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ARTICLES

NOTES

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LETTER FROM THE EDITOR

Dear Reader,

Civil liberties and civil rights issues are at the forefront of our nation's political dialogue. The struggle for marriage equality continues. The right to vote is under assault. Comprehensive immigration reform may soon become a reality, raising important questions that will hopefully receive full attention before legislation is adopted. Over-incarceration continues to plague our country. And women's issues took a front seat in the 2012 election debate after a few choice comments elicited much outrage.

This issue begins with an article by Kristie LaSalle, which explores the expressive conduct as applied to the Occupy Wall Street Movement. LaSalle uses the movement to highlight critical shortcomings of the expressive conduct doctrine. She then proposes an alternative judicial approach where the conduct itself is critical to conveying the speech.

The second article, by Joshua Friedman and Gary Norman, takes a broad look at the legal and practical challenges facing disabled individuals in the Information Age. The authors explore a range of proposals, including affirmative legislation and action by activists, designed to help combat some of these challenges that disabled individuals currently face.

The first note, by Charles Falck, examines issues underscoring reverse-redlining claims through a critical race theory lens. Falck also proposes suggestions to combat the information asymmetry issue faced by many plaintiffs with valid reverse-redlining claims.

The second note, my own work, addresses judicial deference in redistricting. This Note explores how courts should defer in redistricting and examines competing approaches along a spectrum of deference. The deference question may also have implications for the constitutionality of Section 5 of the Voting Rights Act—an issue that may be addressed, to some degree, by the Court this term.

For a varied discussion of civil liberties and civil rights issues, please also visit our legal blog (tjclcr.blogspot.com) or our Facebook page. We invite you to join our dialogue. For more information on the Journal, please visit our main website: www.tjclcr.org.

Thank you,

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ARTICLES

NOTES

Articles

The Other 99% of the Expressive Conduct Doctrine: The Occupy Wall Street Movement and the Importance of Recognizing the Contribution of Conduct to Speech

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> OCCUPY, v.: to gain access to and remain in (a building, etc.) or on (a piece of land), without authority, as a form of protest.[1]

I. INTRODUCTION

On December 17, 1773, dozens of colonists dumped tea from aboard three merchant vessels into the Boston Harbor.[2] Their intent in so doing was not to create a record-breaking batch of iced tea,[3] but to protest the monopoly held by the East India Company and the British Tea Tax imposed upon the colonies without the benefit of parliamentary representation.[4] This expression of defiance was understood throughout the colonies to symbolize discontent with British rule,[5] and was one of the key events credited with sparking the American Revolution. The American Revolution resulted in the creation of a new democratic form

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[1] OXFORD ENGLISH DICTIONARY ONLINE (Dec. 18, 2012), http://www.oed.com (defining "occupy"). Other definitions of "occupy" include the following: "[t]o take possession of (a place), esp. by force; to take possession and hold of (a building)"; "[t]o take up, use up, fill (space, time, etc.)"; "[t]o live in and use (a place) as its tenant or regular inhabitant; to inhabit; to stay or lodge in"; "[t]o hold possession or office; to dwell, reside; to stay, abide"; and "[t]o take possession of, take for one's own use, seize." *Id.*

[2] George Hewes, *Boston Tea Party: An Eyewitness Account by a Participant*, THE HISTORY PLACE (May 17, 2012), http://www.historyplace.com/unitedstates/revolution/teaparty.htm.

[3] *But see* HARLOW G. UNGER, AMERICAN TEMPEST: HOW THE BOSTON TEA PARTY SPARKED A REVOLUTION 5 (2011) (noting that, among the cries rallying the revolutionaries that night, someone yelled, "Boston Harbor a tea-pot tonight!"); *id.* at 6 (noting that a participant in the Tea Party recalled, "We were merry . . . at the idea of making so large a cup of tea for the fishes").

[4] *Id.* at 158, 176.

[5] *Id.* at 172.

of government dedicated to protecting individual rights. Yet today, nearly 250 years later, the United States Constitution, forged on the heels of the Boston Tea Party and other acts of defiance against perceived corporate oligarchy and political tyranny,[6] would not protect the very acts of protest that led to its genesis.[7]

The historic Boston Tea Party began when a three-day long meeting was held at Faneuil Hall in Boston, Massachusetts to seek redress from the British government's representatives in the colony.[8] Government-imposed taxes on tea were astronomically high, owing to a government-created monopoly on its import by the East India Company, which was struggling in business because its prices were undercut by smugglers.[9] To bolster the failing company, British Parliament permitted the company to export tea directly to the colonies, without having to first move the tea through England and pay an export tax to the British government.[10] Colonists resisted the Tea Act: in several ports, ships carrying the taxed tea were refused entry, or were disallowed to unload their cargo.[11] In Massachusetts, however, the loyalist governor refused to embargo the tea and instead ordered the ships blockaded into the harbor until the duty was paid.[12] The crowds meeting at Faneuil Hall defied orders to vacate the public space, held votes on how to proceed, and sought to persuade the governor that his constituents wanted the tea returned to England.[13] Participants railed against the monopolistic power of the East India Company and the government's imposition of taxes on the common man to protect corporate interests. As is, perhaps, obvious from history, discourse and speeches were unsuccessful in persuading the governor of the need for change, so protestors resorted to famously more unconventional means of protest.

If the motivations and grievances underpinning the Boston Tea Party sound familiar, it is not only because they are taught as rote in junior high school classes across the country, but also because references to similar sources of discontent can be found in the political movements

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[6] *See id.* at 159–60 ("In September 1773 the *Boston Gazette* reprinted a series of inflammatory articles against the Tea Act that had appeared in Philadelphia and New York newspapers. The articles argued that the government-backed East India Company monopoly on tea sales would drive small merchants out of business, encourage establishment of other government monopolies, and eventually destroy free enterprise.").

[7] *Cf.* Louis Henkin, *The Supreme Court, 1967 Term—Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 79 (1968) ("The Constitution protects freedom of 'speech,' which commonly connotes words orally communicated. But it would be surprising if those who poured tea into the sea and who refused to buy stamps did not recognize that ideas are communicated, disagreements expressed, protests made other than by words or mouth of pen."). This language was cited favorably by then-Judge Ginsburg in her concurrence in *Cmty. for Creative Non-Violence v. Watt*, 703 F.2d 586, 605 (1983) (Ginsburg, J., concurring), *rev'd sub nom.* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984).

[8] UNGER, *supra* note 3, at 161–62.

[9] *Id.* at 158.

[10] *Id.*; *see also* Tea Act, 1773, 13 Geo. 3, c. 44 (Eng.).

[11] UNGER, *supra* note 3, at 129–30 (discussing such "nonimportation agreements").

[12] *Id.* at 164.

[13] *Id.* at 162–65.

of today.[14] Since the collapse of the American economy, protests have arisen against federal taxation and spending[15] and against the government's continued pro-corporate policies.[16] One such movement, the Tea Party, became a political faction that has created division within the Republican Party. On the opposite side of the political spectrum, Occupy Wall Street (OWS) "is pretty easily characterized as a constitutional movement seeking to take back the Constitution from 'the malefactors of great wealth,' to borrow a phrase from a century ago."[17] OWS protests are laden with speech, signage, and chants, but also with expressive conduct. In lower Manhattan, New York City, for example, protestors established an encampment in Zuccotti Park—mere feet from Wall Street, the symbolic center of the perceived corporate oligarchy—

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[14] *See, e.g.*, Andrew Sullivan, *You Say You Want a Revolution*, DAILY BEAST (Oct. 22, 2011, 11:30 PM), http://www.thedailybeast.com/newsweek/2011/10/23/how-i-learned-to-love-the-goddamned-hippies.html ("The theme that connects [Occupy Wall Street and the Tea Party movements] is disenfranchisement . . . . [A] 'democratic deficit' gets to the nub of it."). Contemporary commentary on the Tea Act echoes eerily of the protests of modern times against government-backed big business. *See, e.g.*, UNGER, *supra* note 3, at 159–60 ("In September 1773 the *Boston Gazette* reprinted a series of inflammatory articles against the Tea Act that had appeared in Philadelphia and New York newspapers. The articles argued that the government-backed East-India Company monopoly on tea sales would drive small merchants out of business, encourage establishment of other government monopolies, and eventually destroy free enterprise.").

[15] *See, e.g.*, JILL LEPORE, THE WHITES OF THEIR EYES: THE TEA PARTY'S REVOLUTION AND THE BATTLE OVER AMERICAN HISTORY (2010) (discussing the modern Tea Party political movement and its historically inaccurate adoption of the Boston Tea Party narrative). The modern Tea Party found its genesis on February 19, 2009, when Rick Santelli appeared on CNBC and called upon viewers to dump derivative securities into Lake Michigan, mimicking the Boston Tea Party. Rick Santelli, *Squawk Box* (CNBC television broadcast Feb. 19, 2009). This "rant heard round the world" quickly spawned the Tea Party Movement, which railed against what it perceived to be taxation without representation. LEPORE, *supra*, at 4 (noting that Tea Party activists have faulted schools for failing to teach students the Boston Tea Party "as about a collection of interested citizens afraid of seeing their economic success determined by the whim of an interventionist governmental body" and characterized the Boston Tea Party participants as "fed up with taxation without representation"). Professor Lepore, however, notes that "the Tea Party's version of American history bore almost no resemblance to the Revolution [she] teach[es]." *Id.* at 7. Regardless of whence the Tea Party's mission arose, however, the Tea Party has come to be associated with anti-tax propaganda: the "Tea" in the modern "Tea Party" political movement purportedly stands for "Taxed Enough Already." Jill Lepore, *Tea and Sympathy*, THE NEW YORKER (May 3, 2010), http://www.newyorker.com /reporting/2010/05/03/100503fa_fact_lepore.

[16] *About Occupy Wall Street*, OCCUPY WALL STREET (Nov. 19, 2012), http://occupywallst.org/about [hereinafter *About OWS*] (defining the movement as "fight[ing] back against the richest 1% of people that are writing the rules of an unfair global economy that is foreclosing on our future"); *Declaration of the Occupation of New York City*, #OCCUPYWALLSTREET: NEW YORK GENERAL ASSEMBLY (Nov. 19, 2012), http://www.nycga.net/resources/declaration [hereinafter *Declaration of OWS*] (listing among the grievances driving the movement that "[corporations] have taken bailouts from taxpayers with impunity, and continue to give Executives exorbitant bonuses"; "influenced the courts to achieve the same rights as people, with none of the culpability or responsibility"; "determined economic policy, despite the catastrophic failures their policies have produced and continue to produce"; and "donated large sums of money to politicians, who are responsible for regulating them"). *See infra* Part III.

[17] Jack Balkin, *Occupy the Constitution*, BALKINIZATION (Oct. 19, 2011), http://balkin.blogspot.com/ 2011/10/occupy-constitution.html. Professor Balkin notes that "OWS advocates argue that the system of government in the United States is broken. The wealthy and powerful have used their wealth and power to buy access to government, and to use that access to twist regulations and programs to make themselves even more wealthy and powerful, thus turning American democracy into a self-perpetuating machine for taking from the have-nots and giving to the haves." *Id.* Balkin says this is, at base, an argument that the current form of government violates the Guarantee Clause of the United States Constitution. *Id.*

for nearly two months before they were evicted, signaling their occupation of Wall Street and the hope to ultimately recapture the government from corporate interests.[18]

From September 17 until November 15, 2011, protesters occupied the Wall Street area of Manhattan—the center of the corporate greed they perceived to be destroying the United States.[19] In the wee hours of November 15, however, the New York City Police Department evicted the protestors from the park.[20] Petitions for a restraining order were quickly filed and initially granted, but the court later lifted the Temporary Restraining Order ("TRO"), assuming, without deciding, that the First Amendment applied to OWS's activities,[21] but finding that the eviction did not abridge the occupiers' First Amendment rights.[22]

Beyond traditional speech—written and oral—the First Amendment protects expressive conduct. At least, as an academic matter, it does. The Supreme Court, in *United States v. O'Brien*, declared that "symbolic speech" in a public forum is protected from restriction or regulation unless (1) that restriction is within the government's constitutional power; (2) the restriction furthers an important or substantial government interest; (3) the restriction is not aimed at restricting speech; and (4) the incidental effect on speech is no greater than necessary.[23] However, the *O'Brien* Court did not define "symbolic speech" or set forth a test for identifying it,[24] thereby rendering what would become the expressive

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[18] *See* Colin Moynihan, *Wall Street Protest Begins, With Demonstrators Blocked*, CITY ROOM, N.Y. TIMES (Sept. 17, 2011), http://cityroom.blogs.nytimes.com/2011/09/17/wall-street-protest-begins-with-demonstrators-blocked (noting, on the first day of protests, that "[f]or months the protesters had planned to descend on Wall Street on a Saturday and occupy parts of it as an expression of anger over a financial system that they say favors the rich and powerful at the expense of ordinary citizens"); *see also* Rich Lamb, *Protestors Continue 'Occupy Wall Street' Demonstration In Zuccotti Park*, CBS NEW YORK (Sept. 29, 2011), http://newyork.cbslocal.com/2011/09/29/protestors-continue-occupy-wall-street-demonstration-in-zuccotti-park.

[19] *See* Esme E. Deprez & Alison Vekshin, *New York Police in Riot Gear Clear "Occupy" Protestors from Zuccotti Park*, BLOOMBERG (Nov. 15, 2011), http://www.bloomberg.com/news/2011-11-15/u-s-mayors-crack-down-on-occupy-wall-street.html (describing how "New York City police in riot gear swept into a Lower Manhattan park . . . to remove Occupy Wall Street demonstrators who had been camping there for more than eight weeks to protest income inequality").

[20] *Id.*

[21] *See* Waller v. City of New York, 933 N.Y.S.2d 541, 545 (Sup. Ct. 2011) (holding that the owner of the park had the right to adopt reasonable time, place, and manner restrictions in order to keep the space clean and safe); *see also id.* at 544 (assuming for purposes of the petition that the First Amendment applies to the owner of Zuccotti Park, thus obviating petitioners' request for a hearing as to whether Zuccotti Park is a traditional public forum, or a limited public forum).

[22] *See id.* at 545 ("The movants have not demonstrated that they have a First Amendment right to remain in Zuccotti Park along with their tents, structures, generators, and other installations to the exclusion of the owner's reasonable rights and duties to maintain Zuccotti Park, or to the rights to public access of others who might with to use the space safely. Neither have the applicants shown a right to a temporary restraining order that would restrict the City's enforcement of law so as to promote public health and safety.").

[23] *See* United States v. O'Brien (*O'Brien II*), 391 U.S. 367, 377 (1968) (outlining the circumstances under which government regulation may restrict "symbolic speech").

[24] *Id.* at 376. The Court assumed, without deciding, that the burning of a draft card in protest of the Vietnam War—the conduct for which O'Brien was convicted—was "speech" within the meaning of the First Amendment. *Id.*

conduct doctrine a vague mess.[25] Although the Court later set forth a tentative test for what constitutes expressive conduct to be subjected to the *O'Brien* test,[26] "it did so with such a generic approach that it has been of only limited help."[27] Perhaps because of this unhelpful guidance, many courts have followed the facilitative shortcut taken by the *O'Brien* Court and assumed, without deciding, that the conduct at issue was indeed speech.[28]

Judge Stallman of the New York County Supreme Court, in hearing the petition in *Waller v. City of New York*, dismissively addressed the First Amendment implications of the *place* of the protests.[29] However, he failed to acknowledge or address the First Amendment implications of his ruling on the *manner* of the protest; the brief decision is notably bereft of reference to the significance of the encampment to the message of "occupation."[30] He simply declared—without citation to precedent or discussion of any form—that, although the protestors had a right to be present in Zuccotti Park, they had no "First Amendment right to remain in Zuccotti Park, along with their tents, structures, generators, and other installations."[31]

Judge Stallman's finding underscores a flaw of the *O'Brien* test: to wit, the current doctrine is under-protective of conduct that embodies both expressive and non-expressive elements. Perhaps the most obvious indication of the doctrine's disregard for the value of speech is the fact that the *O'Brien* test has never been employed by the Supreme Court to

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[25] *See, e.g.*, James M. McGoldrick, United States v. O'Brien *Revisited: Of Burning Things, Weaving Things and G-Strings*, 36 U. MEM. L. REV. 903, 914–15 (2006) ("[T]he failure to limit the kind of expressive conduct that can be treated as speech invites more and more bizarre behavior to be claimed as speech. Conduct claimed to be within the ambit of speech goes beyond the reach of imagination and occupies an untold amount of judicial time and effort. Courts have decided a plethora of cases. Illustrative are the following lower court decisions. Owners of 'swingers club' did not have a free speech right to support public acts of sexual conduct. A three-dollar fee for non-residents to use a city beach did not breach their free-speech right to lie or sit on the beach. A ban on tattooing was only a limitation of self-expression and was not a limitation on free speech, nor was there a free-speech right to a body massage by a partially-nude masseuse. Weeds more than twelve inches high in a front lawn were not free speech. A law preventing the harassing of hunters did not raise free speech concerns. The free speech clause did not protect the right not to wear a motorcycle helmet, even when the helmet had been removed in a funeral procession as a sign of respect for the newly deceased former rider. Failure to get rid of cockfighting chickens was not protected speech. Thankfully, public cunnilingus and masturbation as part of an exotic dance performance was likewise not protected speech. However, the wearing of a ninja mask while attending an open meeting of a city commission was protected speech." (citations omitted)).

[26] Spence v. Washington (*Spence III*), 418 U.S. 405, 408–10 (1974).

[27] McGoldrick, *supra* note 25, at 912.

[28] *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 560 (1991) (ruling that nonobscene nude dancing was a form of protected expression); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293–94 (1984) (assuming that overnight sleeping in connection with the demonstration is expressive conduct protected to some extent but deciding that regulation of that conduct is not prohibited by the Constitution); First Vagabonds Church of God v. City of Orlando, Fla., 638 F.3d 756, 758 (11th Cir. 2011) (assuming, without deciding, that feeding the homeless was expressive conduct, but finding regulations forbidding it reasonable); Pinard v. Clatskanie Sch. Dist. 6J, 467 F.3d 755, 759 (9th Cir. 2006) (assuming, without deciding, that refusal to board a bus was expressive conduct, but refusing to protect it).

[29] Waller v. City of New York, 933 N.Y.S.2d 541, 544–45 (Sup. Ct. 2011).

[30] *See generally id.*

[31] *Id.* at 375.

strike down a content-neutral regulation that affected speech.[32] First, by failing to consider whether conduct embodies communicative elements within the ambit of the First Amendment, the *O'Brien* Court—and the decisions that followed from that case—too often determine that even a mildly important government interest sufficiently outweighs the important protections of the First Amendment.[33]

Furthermore, and of greater concern, the *O'Brien* test itself is flawed. The final element of the test—whether the incidental effect on speech is no greater than necessary[34]—approaches the problem of expressive conduct from the wrong direction. That is, it is overly deferential to the government's interest and dismissive of the value of speech. With respect to traditional methods of speech in a public forum, the Supreme Court has acknowledged that the location in which protected speech is made is sometimes essential to the message;[35] in such instances, if the speech were to be divorced from the relevant location, its value and impact would be diminished.[36] A close analogue exists with respect to conduct. In some instances, were speech to be divorced from the corresponding conduct, its value would be divorced from corresponding conduct, and therefore, its value or impact would be impaired. Yet, indicative of the flaws of the expressive conduct doctrine, the Court has not yet acknowledged that the *manner* of speaking—the conduct by which the message is conveyed—may sometimes be essential to the message.

Rather than asking if the effect is no greater than necessary, a constitutional test aimed at properly protecting the expressive elements of conduct should require a court to determine whether the prohibition of the proposed conduct forecloses an essential element of the message sought to be conveyed.[37] Where speech alone does not completely or effectively convey the message of the speaker, conduct that forms an essential element of the message should be protected for its own sake, not merely as a convenient shorthand for spoken word. Only then can the doctrine properly protect the expressive elements of conduct common in

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[32] *See Barnes*, 501 U.S. at 577 (Scalia, J. concurring) ("We have never invalidated the application of a general law simply because the conduct that it reached was being engaged in for expressive purposes and the government could not demonstrate a sufficiently important state interest.").

[33] *Cf.* R. George Wright, *What Counts as Speech in the First Place?: Determining the Scope of the Free Speech Clause*, 37 PEPP. L. REV. 1217, 1229 (2010) ("A mere assumption that the activity in question is speech may often leave the court with only an abstract, dry, bloodless, unexamined, superficial sense of how speech should be valued in the case at bar.").

[34] *O'Brien II*, 391 U.S. 367, 377 (1968).

[35] *See infra* Part IV.B.

[36] *See infra* Part IV.B.

[37] In contrast to the expressive conduct doctrine, which is more concerned with facilitating the government interest, the public forum doctrine addresses the manner of permissible restriction on speech in those fora traditionally held in trust for the public. In addressing restrictions on speech in the public forum, current doctrine asks whether there are "ample alternative means" of communicating the message. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (discussing the public forum doctrine). Thus, the public forum doctrine is vastly more speech-protective than the expressive conduct doctrine. *See infra* Part IV.

eras punctuated by intense political and economic frustration. *O'Brien* requires revision.

This Article begins in Part II by outlining the history and political message of OWS in New York City and the eventual eviction of protestors from Zuccotti Park. Part III then describes the current expressive conduct doctrine, tracing its origins from a prohibition on draft card burning in *O'Brien*. It goes on to discuss the test for what constitutes expressive speech—seldom used though that test may be—and the deleterious effects on free speech protection of assuming, without deciding, that given conduct constitutes speech. Part IV briefly describes Zuccotti Park's status as a traditional public forum, and then discusses the Supreme Court's treatment of location that is essential to the content of speech.

Because the New York state court decision evicting the protestors from Zuccotti Park failed to perform any constitutional analysis with respect to the protestors' First Amendment rights, Part V of this Article considers an as-of-yet hypothetical application of the current constitutional doctrine to the eviction of OWS from Zuccotti Park. Under the current doctrine, such a challenge would fail: because the OWS protestors expressed their message in part through conduct, rather than merely through words, the message conveyed by the symbolic occupation of Wall Street would be subordinated to merely nominal government interests. Although the encampment symbolizing occupation should properly be construed as speech, the risk is high that a court may employ the facilitative shortcut endorsed in *O'Brien*. However, even if such expressive conduct is properly construed as speech, it is likely that a court would nevertheless find that it is subordinated to a sufficiently important government interest because the *O'Brien* test is overly deferential to the government and therefore under-protective of speech.

Given this unsatisfying result, Part VI concludes that the expressive conduct doctrine is flawed both conceptually and in application, and calls for *O'Brien*'s revision to enhance protection for conduct that constitutes an important element of speech. Where conduct forms an essential element of the intended message—in that it constitutes not merely a convenient shorthand or substitute for speech, but rather stands for an element incapable of being conveyed by verbal or written speech alone—it must receive the same protection as pure speech. *O'Brien* should apply only where conduct does not form an essential element of speech. But where conduct is so speech-like that it is, essentially, speech, the somewhat more deferential "time, place, and manner" test should be applied to recognize the expressive contribution of the conduct.

II. THE OCCUPY WALL STREET MOVEMENT

A. The Message of Occupation

On September 17, 2011, a small group of protestors, poorly organized but nevertheless determined, set out to protest the capture of the government by corporate interests on Wall Street in New York City.[38] Carrying signs that read "End the Oligarchy," "Democracy Not Corporatization," and "Revoke Corporate Personhood," the group instead found their efforts rebuffed. After broadcasting their intentions on social media sites like Twitter, they arrived to find that the NYPD had barred access to the streets and sidewalks of Wall Street where they sought to protest.[39] Instead, they settled in Zuccotti Park, formerly called Liberty Park, half a block from Wall Street.[40] And there they remained.

By the second day of protests, 200 people had joined the cause.[41] As the group swelled to many hundreds of protestors, arrests began.[42] Protestors were arrested for writing with chalk on sidewalks, blocking traffic, allegedly attempting to jump over police barriers, and resisting arrest.[43] The government resistance—which originally may have been intended to quell the protests and disband the protestors—instead fortified the resolve of the group: a week and a half after the protest

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[38] *See generally About OWS*, *supra* note 16 (defining the movement "fight[ing] back against the richest 1% of people that are writing the rules of an unfair global economy that is foreclosing on our future"); Andrew Flemming, *Adbusters Sparks Wall Street Protest: Vancouver-Based Activists Behind Street Actions in the U.S.*, VANCOUVER COURIER (Sept. 27, 2011), http://www.vancourier.com/Adbusters+sparks+Wall+Street+protest/5466332/story.html.

[39] Moynihan, *supra* note 18. The police's actions in barring the protestors from actually reaching their target area and target audience are, themselves, of questionable constitutionality. Streets and sidewalks are fora which "have immemorially been held in trust for the use of the public and, time out of mind, have been used *for purposes of assembly, communicating thoughts between citizens, and discussing public questions.* Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) (emphasis added). *See infra* Part IV.A for a discussion of the doctrine controlling speech in public fora.

[40] Colin Moynihan, *Wall Street Protests Continue, with at Least 6 Arrested*, CITY ROOM, N.Y. TIMES (Sept. 19, 2011), http://cityroom.blogs.nytimes.com/2011/09/19/wall-street-protests-continue-with-at-least-5-arrested.

[41] *Id.*

[42] There is room for debate as to which came first: the police response to OWS, or the popularization and increase in protest size and scope. *See, e.g.*, Clyde Haberman, *A New Generation of Dissenters*, CITY ROOM, N.Y. TIMES (Oct. 10, 2011), http://cityroom.blogs.nytimes.com/2011/10/10/a-new-generation-of-dissenters. Mr. Haberman notes, in his editorial, that OWS was relatively ignored until a high-ranking police officer, Inspector Anthony Bologna, penned in and pepper sprayed four non-violent, non-disorderly female protestors a week after the movement began. *Id.*; *see also* Sarah Maslin Nir, *Video Appears to Show Wall Street Protesters Being Pepper-Sprayed*, CITY ROOM, N.Y. TIMES (Sept. 25, 2011), http://cityroom.blogs.nytimes.com/2011/09/25/video-appears-to-show-protesters-being-pepper-sprayed. "If the Occupy Wall Street protesters ever choose to recognize a person who gave their cause its biggest boost," Mr. Haberman wrote, "they may want to pay tribute to Anthony Bologna. . . . That pepper shot in the face was a vital shot in the arm for the nascent anti-Wall Street movement. . . . Inspector Bologna's improvidence was a game changer." Haberman, *supra*.

[43] Moynihan, *supra* note 40.

began, the group ratified their statement of purpose, the "Declaration of Occupation of New York."[44]

Much as the Boston Tea Party in 1773 was provoked by the sentiment that the government favored corporate interests over those of its citizens, the Declaration of the Occupation of New York decried the capture of democracy by corporate interest:

> [W]e acknowledge the reality . . . that a democratic government derives its just power from the people, but corporations do not seek consent to extract wealth from the people and the Earth; and that no true democracy is attainable when the process is determined by economic power. We come to you at a time when corporations, which place profit over people, self-interest over justice, and oppression over equality, run our governments.[45]

Essentially, the OWS movement protested the perceived denial of a republican form of government[46] and protested what it saw to be the capture of democracy by corporate interests. The protestors, therefore, resolved to "recapture" democracy. The Declaration concluded with a plea "[t]o the people of the world" to peaceably "occupy public space" to create solutions to the flaws the movement saw in the corporate democracy.[47]

And occupy, they did. What began as a few sleeping bags laid out over cardboard on the ground in Zuccotti Park grew to an extensive tent city, with a pantry, kitchen, medical station, and library.[48] As the encampment grew, so too did official resistance to the movement. Initially, reports of a few arrests trickled in—some on questionable bases.[49] At other times, though, the police presence seemed to be tolerant of the movement.[50]

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[44] *Declaration of OWS*, *supra* note 16.

[45] *Id.* In support of the contention that corporate interests have superseded individual interests and liberty, the protesters promulgated a non-exhaustive list of grievances against corporations, including: "[t]hey have influenced the courts to achieve the same rights as people, with none of the culpability or responsibility"; "[t]hey determine economic policy, despite the catastrophic failures their policies have produced and continue to produce"; "[t]hey have donated large sums of money to politicians, who are responsible for regulating them"; "[t]hey have taken bailouts from taxpayers with impunity, and continue to give Executives exorbitant bonuses"; "[t]hey have perpetuated inequality and discrimination in the workplace based on age, the color of one's skin, sex, gender identity and sexual orientation"; "[t]hey have continuously sought to strip employees of the right to negotiate for better pay and safer working conditions"; and "[t]hey have used the military and police force to prevent freedom of the press." *Id.*

[46] *See* Balkin, *supra* note 17 (discussing the role of the Guarantee Clause—the constitutional guarantee of republican government—in OWS's philosophy).

[47] *Declaration of OWS*, *supra* note 16.

[48] Jonathan Massey & Brett Snyder, *Mapping Liberty Plaza*, PLACES, THE DESIGN OBSERVER GROUP (Sept. 17, 2012), http://places.designobserver.com/feature/mapping-liberty-plaza-zuccotti-park/35948/.

[49] *See, e.g.*, Moynihan, *supra* note 40 (noting that a woman was arrested for wearing a plastic mask on the *back* of her head).

[50] *See, e.g.*, Al Baker, *Wall Street Protest Visits Washington Sq.*, CITY ROOM, N.Y. TIMES (Oct. 8, 2011), http://cityroom.blogs.nytimes.com/2011/10/08/wall-street-protest-moves-to-washington-sq

The owners of Zuccotti Park similarly displayed a lukewarm tolerance toward the protestors. Zuccotti Park is not a public park; it is owned and maintained by Brookfield Properties. As such, it was not covered by the New York City ordinance imposing a curfew on parks[51] and forbidding camping.[52] Furthermore, because it is one of the older privately owned parks in New York City, it is not subject to the modern zoning laws imposing a curfew.[53] Per an agreement with the City upon the construction of Zuccotti Park, it was to remain open for public access twenty-four hours per day.[54] However, shortly after the occupation began, Brookfield promulgated new rules "which seem[ed] aimed at the very essence of the occupation: no camping, no tents, no tarps, no sleeping bags, no lying on the ground or on benches, and no storage of personal property on the ground or walkways 'which unreasonably interferes with the use of such areas by others.'"[55] Citing the need to be able to clean the park, Brookfield Properties, with the backing of the NYPD, threatened to evict the protestors.[56] The New York Civil Liberties Union[57] and even City Councilmen spoke up,[58] urging against this plan of action on First Amendment grounds. Even though eviction seemed imminent in mid-October, the police and property owners continued to tolerate OWS's protests for another month.

(noting that "as some police commanders tried to steer the procession along Sixth Avenue, the marchers disagreed and stayed on West Broadway, passing through the central corridor of SoHo and its bookstores, cafes and restaurants," and yet "[t]he police did not resist"); *but see* Natasha Lennard, *Covering the March, on Foot and in Handcuffs*, N.Y. TIMES (Oct. 2, 2011), http://cityroom.blogs.nytimes.com/2011/10/02/covering-the-march-on-foot-and-in-handcuffs (noting that, as protestors were ordered arrested by NYPD officers, the rank-and-file officers assigned to arrestees merely "made some small talk").

[51] *See* Lisa W. Foderaro, *Privately Owned Park, Open to Public, May Make Its Own Rules*, N.Y. TIMES (Oct. 13, 2011), http://www.nytimes.com/2011/10/14/nyregion/zuccotti-park-is-privately-owned-but-open-to-the-public.html. *See infra* Part IV.A for a discussion of Zuccotti Park's status as a public forum for purposes of First Amendment analysis.

[52] *See* NYC DEP'T OF PARKS & RECREATION, RULES & RECOMMENDATIONS § 1.04(p) ("No person shall engage in camping, or erect or maintain a tent, shelter, or camp in any park without a permit."); NYC DEP'T OF PARKS & RECREATION, RULES & RECOMMENDATIONS § 1.01(c) (decreeing that the rules be effective within and upon all areas under the jurisdiction of the Commissioner, as defined in Chapter 21 of the New York City Charter); NEW YORK CITY CHARTER § 533 ("Powers and Duties of the Commissioner") (stating that the commissioner has authority over all "parks, squares and public places").

[53] Anemona Hartocollis, *Facing Eviction, Protesters Begin Park Cleanup*, CITY ROOM, N.Y. TIMES (Oct. 13, 2011), http://cityroom.blogs.nytimes.com/2011/10/13/told-to-leave-protesters-talk-pre-emptive-strategy.

[54] *See* Foderaro, *supra* note 51 (reporting that the park is required to be open 24 hours a day).

[55] Hartocollis, *supra* note 53.

[56] *Id.*

[57] Press Release, N.Y. Civ. Liberties Union, NYCLU to City: Don't Use Wall St Clean Up as a Pretext for Mass Arrests (Oct. 13, 2011), http://www.aclu.org/free-speech/nyclu-city-dont-use-wall-st-clean-pretext-mass-arrests ("The city must not use the clean up as a pretext for mass arrests. To do so would be a violation of the spirit of the First Amendment and the spirit of dissent.").

[58] Hartocollis, *supra* note 53 (noting that 13 members of the Council wrote to Mayor Bloomberg: "The new rules you are enforcing, however — in particular the prohibition on sleeping bags and gear — is an eviction notice and potentially an unconstitutional closing of a forum to silence free speech.").

B. Eviction and Legal Action

The tentative tolerance of the NYPD and Brookfield Properties finally ran out in the wee hours of November 15, 2011. At one o' clock in the morning, hundreds of police officers in riot gear stormed into Zuccotti Park, backed by helicopters, trucks blasting bright lights, and loudspeakers.[59] Approximately 142 protestors were arrested, the campsites and personal property destroyed, and the camp's library ruined.[60] Coverage of the actual events is spotty, owing to the fact that the police removed all reporters from the park and blockaded them many blocks away, out of sight and earshot of the eviction.[61]

Immediately, OWS lawyers sought a TRO from the court, and by 6:30 a.m., an injunction was granted by the New York County Supreme Court.[62] The City responded quickly, filing papers opposing the TRO—a motion which was granted later that same day.[63] The City averred in its papers that the Occupy protest site created a fire hazard, necessitating the eviction;[64] it strongly urged the court

> not [to] extend the TRO and permit Brookfield and the City to go forward with their plan of reopening the park to all members of the general public, including protestors, while taking steps to prohibit the use of the Park in a manner that creates a public safety hazard, allows unhealthy and unsafe conditions to flourish and prevents all members of the general public from using and enjoying the park.[65]

Oral arguments were held the same day, and an order handed down later in the evening that denied the petitioners' request to extend the TRO, effectively abridging the protestors' First Amendment rights.[66]

In ruling on the opposition to the TRO, Judge Stallman apparently relied primarily on the government's papers. He noted that Zuccotti Park was a "privately-owned public-access plaza" required to be "open to the

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[59] Al Baker & Joseph Goldstein, *After an Earlier Misstep, a Minutely Planned Raid*, N.Y. TIMES (Nov. 15, 2011), http://www.nytimes.com/2011/11/16/nyregion/police-clear-zuccotti-park-with-show-of-force-bright-lights-and-loudspeakers.html (writing that pre-raid preparation by police was substantial and seemingly directed at suppressing protestors; police had studied OWS, underwent "major disaster drill" training, and practiced conventional counterterrorism responses before raiding the park).

[60] *Id.*

[61] Brian Stelter & Al Baker, *Reporters Say Police Denied Access to Protest Site*, MEDIA DECODER, N.Y. TIMES (Nov. 15, 2011), http://mediadecoder.blogs.nytimes.com/2011/11/15/reporters-say-police-denied-access-to-protest-site.

[62] Order to Show Cause and Temporary Restraining Order, Waller v. City of New York, 933 N.Y.S.2d 541 (Sup. Ct. 2011) (No. 112957/11).

[63] *Waller*, 933 N.Y.S.2d at 542.

[64] Affirmation of Deputy Mayor Cas Holloway in Opposition to TRO ¶ 5, *Waller*, 933 N.Y.S.2d 541 (No. 112957/2011) [hereinafter Holloway Aff.].

[65] *Id.* ¶ 2.

[66] *Waller*, 933 N.Y.S.2d at 544–45.

public and maintained for public use 365 days per year."[67] He apparently found the 24-hour-per-day occupation of the park to be inimical to "public use." Glossing over important First Amendment concerns,[68] Judge Stallman simply held that:

> [t]he movants have not demonstrated that they have a First Amendment Right to remain in Zuccotti Park, along with their tents, structures, generators, and other installations to the exclusion of the owner's reasonable rights and duties to maintain Zuccotti Park, or to the rights to public access of others who might wish to use the space safely.[69]

With that statement, OWS's eviction became permanent, and a very important aspect of its speech curtailed.[70] Although members of the movement reassembled in Foley Square, across the street from the courthouse, they could no longer speak *at* those to whom they wished to speak: the corporate interests on Wall Street, now some nine blocks away.[71] More fundamentally, however, the Occupy Wall Street movement could no longer occupy Wall Street.[72]

III. THE EXPRESSIVE CONDUCT DOCTRINE

Conduct that conveys a message, such as occupying a space in protest of the conduct of those who typically use the space, poses a peculiar constitutional quandary. Traditionally, it is within a

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[67] *Id.* at 543.

[68] *Id.* at 544 (assuming, without deciding, that the First Amendment applied to Zuccotti Park as a public forum).

[69] *Id.* at 545. As with most other statements in his opinion, Judge Stallman does violence to First Amendment jurisprudence with this proclamation. It is the *government* that bears the burden of showing that its restrictions on speech comport with all elements of the time, place, and manner doctrine; it is not the responsibility of the protestors to demonstrate that they have a First Amendment right to speech. *See* Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011) ("The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." (quoting *Cohen v. California,* 403 U.S. 15, 21 (1971)); Edan Burkett, *Coordination or Mere Registration? Single-Speaker Permits in* Berger v. City of Seattle, 2010 B.Y.U. L. REV. 931, 945–46 (2010) ("The government bears the burden of showing that its regulations on expressive activity meet all three elements of the time, place, and manner test.").

[70] *See infra* Part V. Since the opinion was handed down, the New York City Police have cracked down severely on expressive conduct, taking the court's ruling to bizarre extremes. As one reporter notes: "I have seen one protestor at Union Square arrested, by four officers using considerable force, for sitting on the ground to pet a dog; another, for wrapping a blanket around herself (neither were given warnings; *but both behaviors were considered too close to 'camping'*) . . . ." David Graeber, *New Police Strategy in New York—Sexual Assault Against Peaceful Protestors,* TRUTHOUT (May 4, 2012) (emphasis added), http://truth-out.org/news/item/8912-new-police-strategy-in-new-york-sexual-assault-against-peaceful-protestors.

[71] *See infra* Part IV.B for a discussion of the importance of location to speech and its effect on free speech analysis.

[72] *See infra* Part V for a discussion of the crippling of OWS in the wake of the abridgement of its expressive conduct.

government's police power to regulate conduct; however, expressive conduct that resembles speech is also deserving of some First Amendment protection.[73] The Supreme Court has acknowledged that conduct may have both speech and non-speech elements, and that, "because of this intermingling of protected and unprotected elements, [expressive conduct] can be subjected to controls that would not be constitutionally permissible in the case of pure speech."[74]

Although it had, for some time before, been recognized that symbolic action may constitute speech,[75] the expressive conduct doctrine found its genesis in *United States v. O'Brien*.[76] The flaws attendant in the doctrine as a whole can be traced from the Supreme Court's analysis and decision in that case. Therefore, this discussion of the expressive conduct doctrine and the necessary revisions must begin with *O'Brien*.

A. A Burning Desire to Express Oneself: *United States v. O'Brien*

On March 31, 1966, David Paul O'Brien and his acquaintances burned their draft cards on the steps of the South Boston Courthouse in opposition to the draft.[77] He was indicted, tried, and convicted of the willful destruction of his draft card in violation of 50 U.S.C. § 462(b), which punished anyone who "forces, alters, knowingly destroys, knowingly mutilates, or in any manner changes" their draft card.[78] That particular section of the Code had been amended by act of Congress in 1965 to add the words "knowingly destroys" and "knowingly mutilates" to the list of proscribed activities.[79]

He was convicted at the trial level, and appealed. At trial and on appeal, O'Brien argued that the 1965 amendment was an unconstitutional abridgment of free speech that served no legitimate purpose.[80] On appeal,

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[73] *See* Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 323 (1968) ("[T]he mere fact that speech is accompanied by conduct does not mean that the speech can be suppressed under the guise of prohibiting the conduct."), *overruled by* Hudgens v. Nat'l Labor Relations Bd., 424 U.S. 507 (1976).

[74] *Id.* at 313. In the context of picketing, the Court noted that "no case decided by [the Supreme Court] can be found to support the proposition that the nonspeech aspects of peaceful picketing are so great as to render the provisions of the First Amendment inapplicable to it altogether." *Id.* at 314.

[75] *See, e.g.*, W. Va. State Bd. of Ed. v. Barnette, 319 U.S. 624, 633–34 (1943) (recognizing the salute of the flag as expressive conduct); Stromberg v. California 283 U.S. 359, 369 (1931) (recognizing the political message in displaying a red flag).

[76] *O'Brien II*, 391 U.S. 367, 376 (1968).

[77] *Id.* at 369. In his own defense, O'Brien informed the jury at trial that he publicly burned the certificate "so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider my position." *Id.* at 370.

[78] *Id.*

[79] *Id.*; *see also* Act of Aug. 30, 1965, Pub. L. No. 89-152, 79 Stat. 586 (1965) (amending statute to add quoted language).

[80] *O'Brien II*, 391 U.S. at 370; O'Brien v. United States (*O'Brien I*), 376 F.2d 538, 540 (1st

the First Circuit found that "no proper purpose [was] to be served by the additional provision prohibiting destruction or mutilation."[81] Rather, the First Circuit found, the law was aimed at abridgment of speech because it "singl[ed] out persons engaging in protest for special treatment," a motive that violated the "very core" of the First Amendment.[82] It upheld O'Brien's conviction, however, on the grounds that, by destroying his draft card, he was no longer in possession of the card, as required by the constitutionally valid portions of the law.[83]

Both the government and O'Brien appealed the judgment of the First Circuit. The Supreme Court noted, at the outset, that the statute did not abridge free speech on its face,[84] but continued to consider whether it constituted a violation of the First Amendment as applied.

The *O'Brien* Court refused to address O'Brien's contention that the act of burning his draft card was "symbolic speech," or expressive conduct. Rather, the Court held that, "*even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment*, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity."[85] Supreme Court precedent dictated that, when a course of conduct had both expressive and non-expressive elements, the expressive elements could be abridged, given a sufficiently important governmental interest.[86] Building upon that precedent, the *O'Brien* Court laid down a test for expressive conduct:

> a government regulation is sufficiently justified [(1)] if it is within the constitutional power of the Government; [(2)] if it furthers an important or substantial government interest; [(3)] if the governmental interest is unrelated to the suppression of free expression; and [(4)] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[87]

The Court held that the law at issue in *O'Brien* met all four of these requirements and that, therefore, O'Brien's conviction could be constitutionally upheld.[88] The *O'Brien* Court found that the regulation of the Selective Service System and maintenance of draft cards was within

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Cir. 1967).

[81] *O'Brien I*, 376 F.2d at 540.

[82] *Id.* at 541.

[83] *Id.* at 541–42.

[84] *O'Brien II*, 391 U.S. at 375 ("Amended § 12(b)(3) on its face deals with conduct having no connection with speech. It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct. The Amendment does not distinguish between public and private destruction, and it does not punish only destruction engaged in for the purpose of expressing views.").

[85] *Id.* at 376 (emphasis added).

[86] *Id.* at 377.

[87] *Id.*

[88] *Id.*

Congress's power to raise armies.[89] It further noted that "[t]he many functions performed by Selective Service certificates establish beyond a doubt that Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction."[90] The Court similarly found the third prong of the test satisfied, noting that "[w]e perceive no alternative means [of protecting "this substantial governmental interest"] that would more precisely and narrowly assure the continuing availability of issued [draft cards] than a law which prohibits their willful mutilation or destruction."[91] With respect to the fourth prong of the *O'Brien* test, the Court merely noted that the focus of the statute was "limited to the noncommunicative aspect of O'Brien's conduct."[92] It wholly failed to address the impact of the statute on the communicative aspect of his conduct. Despite laying down a test requiring an analysis of the incidental effect of a statute on speech, the *O'Brien* Court failed to even identify what incidental effect the regulation had on the expressive elements of O'Brien's actions.

The *O'Brien* decision has been the subject of intense criticism, and for good reason. The test that emerged from the *O'Brien* decision is muddled and incomplete, and it unnecessarily creates a test distinct from the test for restrictions on time, place, and manner of speech. It is unclear from *O'Brien*, or any case that followed, why that pre-existing test—which dictates that restrictions on the time, place, or manner of speech must be justified without reference to the content of the regulated speech, narrowly tailored to serve a significant government interest, and leave open ample alternative means of communicating the desired message[93]—could not adequately balance governmental regulation against the First Amendment rights implicated by expressive conduct.

The most obvious flaw in the *O'Brien* Court's reasoning, however, as Professor McGoldrick notes, derives from the majority's assumption

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[89] *Id.*

[90] *Id.* at 380. It seems, however, that the Court needed to stretch to identify these "substantial interests." It noted that the cards proved that the individual was properly registered (*id.* at 378); however, that information is available in the Selective Service Systems files. It also noted that the information on the draft card "facilitates communication between registrants and local boards" (*id.*); yet, so too does publishing the board's number in the phone book. Finally, and most tenuously, the Court noted "[t]he regulatory scheme involving Selective Service certificates includes clearly valid prohibitions against the alteration, forgery, or similar deceptive misuse of certificates. The destruction or mutilation of certificates obviously increases the difficulty of detecting and tracing abuses such as these." *Id.* at 379-80. This argument completely ignores the common sense notion, suggested by the First Circuit, *see O'Brien I*, 376 F.2d 538, 541-42 (1st Cir. 1967), that anyone who destroys their draft card can be found guilty of nonpossession.

[91] *O'Brien II*, 391 U.S. at 381. In reaching this conclusion, however, the Court carefully and semantically parsed the importance of the 1965 amendment from the preexisting language in the statute, which mandated that the card remain in the registrant's possession at all times and that it not be forged or doctored. *Id.* at 381–82. The Court's analysis ignores the fact that someone who destroys their card was necessarily guilty of nonpossession of the card, which was a clearly valid aspect of the challenged law. *See O'Brien I*, 376 F.2d at 541–42 (noting that O'Brien's conviction could be upheld because, after destroying his card, he was no longer in possession of it).

[92] *O'Brien II*, 391 U.S. at 381–82.

[93] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

> that the burning of a draft card was protected symbolic speech . . . . The Court then seemed to treat the expressive action as anything but protected speech. Assuming, without affirmatively deciding, that expressive conduct is speech would seem to invite some disrespect for the free speech claim. . . . [A]ssuming that an act is free speech, without actually deciding so, . . . presents the real danger that the insincerity of the assumption will erode the level of protection given to the supposed free speech.[94]

He furthermore questions the necessity of the creation of a test separate from the time, place, and manner doctrine for First Amendment rights in a public forum.[95] Indeed, the creation of a distinct test for speech conveyed through conduct, rather than spoken or written word, inherently devalues that speech at the outset.

B. What Is Speech, Anyway?

Six years after creating a confused mess with respect to the expressive conduct doctrine in *O'Brien*, the Supreme Court was provided the opportunity to clarify the doctrine in *Spence v. Washington*.[96] Although the *Spence* Court set forth a definition of "expressive conduct," little was accomplished with respect to clarifying and strengthening the expressive conduct doctrine.

Harold Spence was charged with, and convicted of, violating a Washington state law forbidding the adulteration of an American flag. The statute provided, in relevant part, that "[n]o person shall, in any manner, for exhibition or display . . . [p]lace or cause to be placed any word, figure, mark, picture, design, drawing, or advertisement of any nature upon any flag . . . of the United States . . . or [e]xpose to public view any such flag."[97] On May 10, 1970, Spence hung an American flag, with a peace symbol affixed to it with removable tape, upside down from his apartment window.[98] His intended message, in so doing, was to "associate the flag with peace instead of war and violence, and to serve as a protest to the invasion of Cambodia and the killings at Kent State University, both of which events [sic] had occurred a few days before."[99]

On appeal from his conviction, the Washington Court of Appeals agreed with Spence's contention that the law punished protected

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[94] McGoldrick, *supra* note 25, at 910, 913.

[95] *See id.* at 944; *see also infra* Part IV.

[96] *Spence III*, 418 U.S. 405 (1974).

[97] State v. Spence (*Spence I*), 490 P.2d 1321, 1322 (Wash. Ct. App. 1971) (quoting WASH. REV. CODE § 9.86.020 (1970)).

[98] *Id.* at 1323.

[99] *Id.*

speech.[100] Characterizing *O'Brien* as a balancing test,[101] the court determined that the law's overbreadth served no legitimate government interest and overturned Spence's conviction. However, the Washington Supreme Court reversed, noting that the statute at issue "[did] not purport to inhibit speech of any kind whether actual or symbolic, printed or auditory; it merely says that one cannot use the flag of the United States as the material upon which to print his utterance; he cannot lawfully employ the flag as a billboard, poster, or placard upon which to print his message."[102] By divorcing the medium (the flag) from the message (American peace), the Washington Supreme Court convinced itself that Spence's message could easily be conveyed by other means. Therefore, it concluded that "whatever impairment might be said to arise from this state trenching upon the defendant's rights to speak his mind freely and communicate his personal views by sign and symbol is minimal—so miniscule and trifling as to come within the *de minimus non curat lex* rule."[103]

Fortunately, the Supreme Court of the United States corrected the Washington Supreme Court's many errors and overturned Spence's conviction. In *Spence v. United States*, the Court, in a per curiam decision, reversed the Washington Court's holding "on the ground that[,] as applied to appellant's activity[,] the Washington statute impermissibly infringed protected expression."[104] Eschewing the approach used in *O'Brien* of assuming, without deciding, that Spence's actions constituted speech, the Supreme Court began its analysis by determining that the expressive conduct at issue was, indeed, speech because "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[105] The Court assumed for purposes of argument that the government interest advanced by the state—preserving the national flag as a symbol of the country and nothing more—was substantial.[106] It nonetheless found that the statute was unconstitutional as applied to Spence's conduct; the government's purported interest was in no way impaired by Spence's message.[107]

The *Spence* test has since been clarified, somewhat, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*.[108] There, the

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[100] *Id.* at 1322.

[101] *Id.* at 1325 ("The problem of reconciling protection of legitimate governmental interests with the demands of free speech calls for an evaluation of competing interests and the striking of a balance that will mark the boundaries between what is constitutionally permissible and what is constitutionally impermissible. The doctrine of balancing was articulated in *United States v. O'Brien* . . . .").

[102] State v. Spence (*Spence II*), 506 P.2d 293, 299 (Wash. 1973).

[103] *Id.* at 300.

[104] *Spence III*, 418 U.S. 405, 406 (1974).

[105] *Id.* at 410–11.

[106] *Id.* at 413–14.

[107] *Id.* at 414–15.

[108] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557 (1995).

Court held that a Massachusetts ordinance forbidding parade organizers from prohibiting a particular group from marching in the parade violated the organizers' rights of free speech.[109] The Court, largely addressing the issue of freedom of assembly, nevertheless held that First Amendment speech rights also inhered in the case, and noted that parades constitute expressive conduct in a public forum.[110] As the organizer of such a parade, the Court held, Hurley was entitled to exclude a gay, lesbian, and bisexual group from the parade because "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message."[111] Therefore, just as Spence was entitled to protest both the shootings at Kent State and U.S. involvement in Cambodia,[112] speakers may express many viewpoints through a single act.[113] Expressive conduct need not convey a singular, concrete, isolated message to be protected; a combination of many grievances may be aired through a single action.[114]

C. When You Assume . . . : *Community for Creative Non-Violence* and the Protection of Speech

Perhaps surprisingly—given its seeming obscurity from traditional speech—camping in public parks has been the focus of constitutional scrutiny before. In *Clark v. Community for Creative Non-Violence*, the Supreme Court upheld the National Park Service's prohibition on camping on the National Mall in Washington, D.C., and in Lafayette Park, a sprawling lawn across the street from the White House.[115] The difference in the analysis employed, and conclusions reached, by the majority and the dissenters illustrates perfectly the dangers of the habit, instigated by the Supreme Court in *O'Brien*, of assuming, without deciding, that a given course of conduct constitutes speech.

Activists with the Community for Creative Non-Violence ("CCNV"), wanting to draw attention to the plight of the homeless, sought—and were awarded—a permit to erect a tent city on the Mall, but were denied permission to sleep in the tents.[116] CCNV then filed suit alleging, *inter alia*, that the denial of a permit to sleep in the symbolic tent city was an abridgement of speech.[117] On the heels of a contentious split in the D.C. Court of Appeals, sitting *en banc*, the Supreme Court

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[109] *Id.* at 580–81.

[110] *Id.* at 569.

[111] *Id.* at 569–70.

[112] *Spence I*, 490 P.2d 1321, 1323 (1971).

[113] *Hurley*, 515 U.S. at 569–70.

[114] *Cf. Declaration of OWS*, *supra* note 16 (setting forth a non-exhaustive, varied list of grievances, protesting the "corporate forces of the world").

[115] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 289–90, 299 (1984).

[116] *Id.* at 291–92.

[117] *Id.* at 292.

granted certiorari,[118] and reversed the appellate court's finding that the limitation was an abridgement of speech.[119]

Although the Court acknowledged the *Spence* test for expressive conduct,[120] it assumed, without deciding, that the act of sleeping in the symbolic tent city was communicative conduct; the Court also noted, without support, that it had "serious doubts" that the First Amendment required the Park Service to permit the protests at all.[121] The *Clark* Court nevertheless found that the conduct could be prohibited.[122] It applied the *O'Brien* four-factor test to determine that the regulation prohibiting sleeping in the National Parks was a permissible limitation on CCNV's speech rights.[123]

However, by assuming, without deciding, that the act of sleeping in the tent city was expressive conduct, the Court did not adequately consider the value of the expression, "erod[ing] the level of protection given to the supposed free speech interest."[124] The mere assumption that

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[118] The D.C. Circuit, sitting *en banc*, fractured sharply on the issue: four opinions for six judges concurred with the per curiam opinion of the court, while five judges dissented. *See* Cmty. for Creative Non-Violence v. Watt, 703 F.2d 586, 586 (D.C. Cir. 1983) (per curiam), *rev'd sub nom.* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984); *see also id.* at 587 (Mikva, J., concurring); *id.* at 600 (Robinson, C.J., concurring for himself and Wright, J.); *id.* at 600 (Edwards, J. concurring); *id.* at 604 (Ginsburg, J., concurring); *id.* at 608 (Wilkey, J., dissenting for himself and four others); *id.* at 622 (Scalia, J., dissenting for himself and two others).

[119] *Clark*, 468 U.S. at 292.

[120] *Id.* at 294 ("[A] message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative."); *see also Spence III*, 418 U.S. 405, 410–11 (1974) (holding that expressive conduct exists where "[a]n intent to convey a particularized message [is] present, and in the surrounding circumstances the likelihood [is] great that the message [will] be understood by those who view[] it").

[121] *Clark*, 468 U.S. at 293 ("We need not differ with the view of the Court of Appeals that overnight sleeping in connection with the demonstration is expressive conduct protected to some extent by the First Amendment. We assume for present purposes, but do not decide, that such is the case, but this assumption only begins the inquiry." (citing *O'Brien II*, 391 U.S. 367, 376 (1968)); *id.* at 296.

[122] *Id.* at 299.

[123] *Id.* at 294–96. Its application, however, was limited by the Court, which held that "[e]xpression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions." *Id.* at 293. Restrictions on the time, place, or manner of speech must be (1) justified without reference to the content of the regulated speech; (2) narrowly tailored to serve a significant government interest; and (3) leave open ample alternative means of communicating the desired message. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); *see* City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 808 (1984) (holding that a restriction on the time, place, or manner of expression was justified where it was narrowly tailored to serve the city's interest in eliminating visual clutter); *see also infra* Part IV.A. The Court declared, without much ceremony, that the government had a substantial interest in "maintaining the parks in the heart of our Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence." *Clark*, 468 U.S. at 296. The Court similarly declared that the restriction was narrowly tailored to achieve that interest. *Id.* ("To permit camping—using these areas as living accommodations—would be totally inimical to these purposes."). In so doing, however, the Court failed to address how sleeping in the tent city (prohibited by the government) differed in any significant way from maintaining a 24-hour-a-day vigil (which was permitted). *Id.* at 295 ("The regulation otherwise left the demonstration intact, with its symbolic city, signs, and the presence of those who were willing to take their turns in a day-and-night vigil.").

[124] McGoldrick, *supra* note 25, at 913–14 (discussing the failure of the Court in *O'Brien* to adequately consider the speech-like qualities of burning a draft card and noting "[t]he easy assumption in *Clark v. Community for Creative Nonviolence*—that sleeping in a tent city in Lafayette Park across Pennsylvania Avenue from the White House was speech—likely contributed to the Court's failure to weigh the free speech issues at stake carefully"); *see id.* at 910–15.

something is speech impairs a speaker's ability to demonstrate to the Court the value or importance of the speech at issue, and leaves the Court without a sense of how essential the particular conduct is to the desired message.[125] Additionally, this mechanism makes it all too easy to identify a governmental interest that outweighs the speaker's interest in the conduct attempted.[126] This is, perhaps, made most clear by comparison of the majority opinion of Justice White and the dissenting opinion, written by Justice Marshall and joined by Justice Brennan.

Unlike the majority, the dissent wrestled with the question of whether sleeping in the park, in the context presented by the case, constituted speech. Justice Marshall noted that "[t]he proper starting point for analysis of this case is a recognition that the activity in which the respondents seek to engage—sleeping in a highly public place, outside, in the winter for the purpose of protesting homelessness—is symbolic speech protected by the First Amendment."[127] In strong terms, Justice Marshall wrote that, by assuming, without deciding, that sleeping in the symbolic tent city was speech,

> the Court thereby avoid[ed] examining closely the reality of the respondents' planned expression. The majority's approach denatures respondents' asserted right and thus makes all too easy identification of a Government interest sufficient to warrant its abridgement. A realistic appraisal of the competing interests at stake in this case requires a closer look at the nature of the expressive conduct at issue and the context in which that conduct would be displayed.[128]

Justice Marshall called attention to the fact that the majority characterized the act of sleeping in the tent cities as facilitative (*i.e.*, that it offered an inducement to the homeless to join the protest), rather than expressive, and that this characterization "provide[d] a hint of the weight the Court attached to respondents' First Amendment claims."[129] Indeed, by this characterization, the majority at best undervalues the speech at issue, and at worst assumes that there is no speech value to sleeping in the park at all.

Delving into CCNV's purposes behind its proposed sleep-speech, Justice Marshall acknowledged that sleeping in the park was "integral" to

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[125] *See* Wright, *supra* note 33, at 1228–29 (pondering "is there not some risk that we may wind up unintentionally undervaluing, and perhaps in some cases trivializing, freedom of speech through our frequent recourse to the bypass tactic?" and noting that "[a] mere assumption that the activity in question is speech may often leave the court with only an abstract, dry, bloodless, unexamined, superficial sense of how speech should be valued in the case at bar"); *see also* McGoldrick, *supra* note 25, at 913 (noting that "assuming that an act is free speech, without actually deciding so, . . . presents the real danger that the insincerity of the assumption will erode the level of protection given to the supposed free speech interest").

[126] *Clark*, 468 U.S. at 302 (Marshall, J., dissenting).

[127] *Id.* at 301.

[128] *Id.* at 302.

[129] *Id.* at 310.

conveying the realities of homelessness,[130] such as the lack of privacy and the discomfort of sleeping outside in the bitter cold of winter. Applying the *Spence* test, and viewing the proposed speech in the context of the surrounding circumstances, Justice Marshall determined that the act of sleeping in the tent cities was intended to convey the deplorable conditions faced by the homeless, and that those viewing the demonstration would understand its political significance.[131] Maintaining a sleepless vigil, in shifts, as the majority suggested CCNV was free to do,[132] did not carry the same significance as sleeping in the park would: shift changes would diminish the impact of CCNV's message.

Beyond his consideration of whether the act of sleeping in the park constituted expressive conduct worthy of First Amendment protection, Justice Marshall's analysis of the case differed little from that of the majority. He used the same standard in evaluating the restrictions.[133] Justice Marshall, however, reached a different conclusion from the majority.[134] The "significant" government interest identified by the majority and the government, he noted, was the interest in "maintaining the parks in the heart of our Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence."[135] Yet, he concluded, the government had failed to demonstrate that its ban on sleeping advanced that interest: Justice Marshall lamented that "the tailoring requirement is virtually forsaken inasmuch as the Government offers no justification for applying its absolute ban on sleeping yet is willing to allow respondents to engage in activities—such as feigned sleeping—that is no less burdensome."[136]

Given the different conclusions reached by the majority and dissent in *Clark*, when the same standard and doctrine were applied, it appears that the consideration of whether sleeping in the park constitutes speech—an issue assumed away by the majority, but addressed by the dissent—can influence the outcome of a First Amendment analysis. This

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[130] *Id.* at 303–04 (quoting *Brief for Respondents* at 2).

[131] *Id.* at 305; *cf. Spence III*, 418 U.S. 405, 413–14 (1974) (explaining that the national flag is "capable of conveying simultaneously a spectrum of meanings" and that observers would understand the political significance of its being disfigured; also holding that there was "no risk that appellant's acts would mislead viewers into assuming that the government endorsed his viewpoint"); *see also* Cmty. for Creative Non-Violence v. Watt, 703 F.2d 586, 601 (D.C. Cir. 1983) (Edwards, J. concurring) (noting that the protestors "can express with their bodies the poignancy of their plight[; t]hey can physically demonstrate the neglect from which they suffer with an articulateness even Dickens could not match"), *rev'd sub nom.* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984).

[132] *Clark*, 468 U.S. at 295 ("The regulation otherwise left the demonstration intact, with its symbolic city, signs, and the presence of those who were willing to take their turns in a day-and-night vigil.").

[133] *Id.* at 308 (Marshall, J., dissenting). He agreed with the majority's statement that symbolic speech "is nonetheless subject to reasonable time, place, and manner restrictions." *Id.* And he agreed with the majority that "no substantial difference distinguishes the test applicable to time, place, and manner restrictions and the test articulated in *United States v. O'Brien*." *Id.* at 308 n.6.

[134] *Id.* ("I conclude, however, that the regulations at issue in this case, as applied to respondents, fail to satisfy this standard.").

[135] *Id.* at 308; *see also id.* at 296 (majority op.).

[136] *Id.* at 312 (Marshall, J., dissenting).

same distinction explains the split among the D.C. Circuit: those judges that concurred in the per curiam decision and struck down the prohibition on sleeping reached the question of whether sleeping was, in the context presented, expressive;[137] those judges who dissented, and would abridge the rights of CCNV, assumed the issue away.[138] *Clark* does more than address the constitutionality of camping. It underscores a serious flaw in expressive conduct jurisprudence, first perpetrated in *O'Brien*: the jurisprudential mechanism of assuming, without deciding, that a particular act constitutes speech.[139]

IV. LOCATION, LOCATION, LOCATION: THE IMPORTANCE OF THE FORUM AND THE FIRST AMENDMENT

Judge Stallman's opinion in *Waller v. City of New York* only addressed the protestors' First Amendment arguments in a conclusory fashion.[140] Judge Stallman declined to address the question of whether

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[137] *See* Cmty. for Creative Non-Violence v. Watt, 703 F.2d 586, 592 (D.C. Cir. 1983) (Mikva, J., concurring) ("In the present case, our evaluation of the government's ban on sleeping in symbolic structures is underscored by first amendment scrutiny because, as applied to CCNV's proposed demonstration, the government's ban will clearly affect expression: there can be no doubt that the sleeping proposed by CCNV is carefully designed to, and in fact will, express the demonstrators' message that homeless persons have nowhere else to go."), *rev'd sub nom.* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984); *id.* at 600 (Spottswood, J., concurring) ("[S]leeping in tents at the demonstration sites is a vivid and forceful component of the public message the demonstrators seek to convey; it summons First Amendment scrutiny because, *qua* sleeping, it is expressive."); *id.* at 601 (Edwards, J., concurring) ("[I]t is necessary to determine whether sleeping under the circumstances of this case constitutes 'speech' protected by the First Amendment. I believe that it does, and that the Park Service's total ban against sleeping cannot withstand scrutiny under the test set forth by the Supreme Court in *United States v. O'Brien*."); *id.* at 600 ("[I]n this case there is both a 'particularized message' appellants wish to convey by sleeping in the part and a reasonable expectation that the message will be understood by those who view it. Thus *sleeping in this case is symbolic speech within the pale of the First Amendment*." (emphasis added)); *id.* at 608 (Ginsburg, J., concurring) (noting that there is both communicative and noncommunicative value in sleeping in the symbolic tent city).

[138] *See id.* at 613 (Wilkey, J., dissenting) ("Unlike Judge Mikva, we find it unnecessary to solve this dilemma in the present case. Like the Supreme Court in *O'Brien*, we find that *even assuming the applicability of the more demanding First Amendment standard of review*, the regulations here pass muster." (emphasis added)). Interestingly, Judge Wilkey spills much ink castigating Judge Mikva for failing to adequately address whether the conduct at issue was speech, while he, himself, failed to address the issue at all. *Id.* at 611–13; *see also id.* at 622 (Scalia, J., dissenting) ("I concur with the principal dissent in this case because I agree that if traditional First Amendment analysis is applied to this sleeping, *on the assumption that it is a fully protected form of expression*, the appellants would nonetheless lose." (emphasis added)).

[139] *See, e.g.*, McGoldrick, *supra* note 25, at 912–13 (identifying the failure to articulate a standard for speech versus conduct as a failing of the *O'Brien* court).

[140] He dismissed entirely the protestors' argument that, because the Park's rules prohibiting camping were enacted only after the demonstration began, they were aimed at the conduct and message of the protestors, not content-neutral, and therefore, not a reasonable time, place, or manner restriction. Waller v. City of New York, 933 N.Y.S.2d 541, 544–45 (Sup. Ct. 2011); *see* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("[I]n a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are *justified without reference to the content of the regulated speech*, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" (quoting *Clark*, 468 U.S. at 293) (emphasis added)).

Zuccotti Park was a traditional public forum or a limited public forum for purposes of assessing time, place, or manner restrictions on free speech rights.[141] Instead, he simply assumed, without deciding, that the First Amendment applied to the protestors' conduct.[142] He merely admonished that "[e]ven protected speech is not equally permissible in all places and at all times."[143] Nevertheless, he wrote, "the owner has the right to adopt reasonable rules to permit it to maintain a clean, safe, publicly accessible space consonant with the responsibility it assumed to provide public access according to law."[144] This assertion, however, is not supported in the opinion by case law, and for good reason: Judge Stallman grossly misstates the "time, place, and manner" doctrine. Furthermore, his opinion is devoid of any consideration of the importance of the location to the message conveyed by the Occupy protestors.

A. The Public Forum and Free Speech

It appears from Judge Stallman's sparse opinion that the question of whether Zuccotti Park was public or private property for purposes of the First Amendment arose during oral arguments on the TRO.[145] It seems clear that Zuccotti Park is as traditional a forum for assembly and free speech as was Faneuil Hall in Boston, where participants in the Boston Tea Party assembled to air their grievances against the British Parliament and the East India Company.

A public forum is a space, such as a park, which has, since time

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[141] *Waller*, 933 N.Y.S.2d at 544.

[142] *Id.*

[143] *Id.* (quoting Snyder v. Phelps, 131 S. Ct. 1207, 1218 (2011)) (alteration in original). It appears that Judge Stallman's analysis may have been skewed by a bias against OWS's message. Whereas the majority of his legal analysis is completely unsupported by precedent, *Snyder v. Phelps* is the only case cited in his original opinion. *See generally id.* Furthermore, the quotation he chose from that case—"[e]ven protected speech is not equally permissible in all placed and at all times"—is in fact a direct quote, in its entirety, from another Supreme Court case, *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 799 (1985). That he cited only one case—*Snyder v. Phelps*—and that he pulls from that case a quotation more properly attributable to another case, whether conscious or unconscious, can be no mistake. *Snyder v. Phelps* involved particularly distasteful speech: members of the Westboro Baptist Church, a homophobic, cult-like, organization successfully protected their rights to parade around in front of funerals of war heroes toting signs reading "God Hates Fags" and "Thank God for Dead Soldiers." 131 S. Ct. at 1213. By contrast, the *Cornelius* case, to which the quote should have properly been attributed, involved much milder, praise-worthy speech: literature describing a charity's fundraising campaign. *Cornelius*, 473 U.S. at 790–91. Ironically, in his commitment to equating OWS with unfavorable speech, Judge Stallman chose to cite a case upholding speech rights while in the same breath he improperly curtailed protected speech, instead of citing a case where the restrictions on speech were upheld. *Compare generally Snyder*, 131 S. Ct. 1207, *with Cornelius*, 473 U.S. 788. Adding to the curiosity of his choice of cases, Judge Stallman apparently changed the citation to yet another case before publishing it in one of New York's unofficial reporters. *See Waller*, 34 Misc. 3d at 375 (citing Frisby v. Schultz, 487 U.S. 474, 479 (1988) rather than *Snyder*, 131 S. Ct. at 1207).

[144] *Waller*, 933 N.Y.S.2d at 545.

[145] *See id.* at 544 (commenting that petitioners' request for a hearing on whether the park is a limited or traditional public forum is unnecessary).

immemorial, been held in trust for speech.[146] At least academically, in public fora, the government's ability to curtail speech is limited: "in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'"[147] In some cases, a privately owned space may nevertheless constitute a "public forum" or "limited public forum" for purposes of protecting a member of the public's right to speak on the property.[148] The question of whether a public park is a traditional public forum "depends upon whether the property has by law or tradition been given the status of a public forum, or rather has been reserved for specific official uses."[149] While Zuccotti Park was unquestionably privately *owned*, the city itself admits that it was created pursuant to a special zoning permit that required the owners to maintain the park as open for public use year-round.[150]

The government's concession that it "closely resembles a public park in that it must be open to the public and maintained for public use 365 days per year,"[151] should be sufficient to doom any argument that the park is not a traditional public forum. Parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between

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[146] Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for *purposes of assembly, communicating thoughts between citizens, and discussing public questions*. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."). A "limited public forum" is one which, although not among the categories of traditional public fora—streets, sidewalks, parks—was nevertheless opened up to speech. *See, e.g.*, Hefron v. Int'l Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 655 (1981) ("The Minnesota State Fair is a limited public forum in that it exists to provide a means for a great number of exhibitors temporarily to present their products or views, be they commercial, religious, or political, to a large number of people in an efficient fashion."); Widmar v. Vincent, 454 U.S. 263, 273, 276 (1981) (striking down a ban on religious speech because the university "opened its facilities for use by student groups," and therefore, it could not exclude groups because of the content of their speech).

[147] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)). Once a non-public forum is open for speech purposes, creating a limited public forum, the speech receives some First Amendment protection, though less so than in a traditional public forum. In a limited public forum, the government may impose restrictions that are reasonable and viewpoint neutral. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983) ("The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.")

[148] *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 77, 88 (1980) (holding that a state may permit First Amendment activities at a privately-owned shopping center); Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 325 (1968) (holding that protected First Amendment activities could not be abridged in a privately owned shopping center), *overruled by* Hudgens v. Nat'l Labor Relations Bd., 424 U.S. 507 (1976); Marsh v. Alabama, 326 U.S. 501, 502, 509 (1946) (holding that the sidewalks in a company town, though privately owned, were open for First Amendment purposes).

[149] Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995) (citing Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 802–03 (1985)).

[150] Holloway Aff., *supra* note 64, ¶ 9.

[151] *Id.*

citizens, and discussing public questions."[152] Furthermore, because the city required, pursuant to zoning laws, that the developer of the adjacent building create a public space in exchange for concessions on zoning restrictions,[153] Zuccotti Park therefore ought to hold the status of a public forum.[154] Thus, OWS's message, in written words, should have bent only to a content-neutral, narrowly-tailored regulation necessary to serve an important government interest;[155] the government's right to regulate their symbolic speech should likewise have been "sharply circumscribed."[156]

The only interests identified by Judge Stallman in his opinion were the right of Zuccotti Park's owner to maintain the park for public use and the right of the public to that use. Were Judge Stallman's reasoning sound on this matter, the First Amendment protection afforded speech in important public locations would be all but eviscerated. It strains interpretation to hold that the interest of the public in access to the park could qualify as a government interest; were it so, it would be the interest that all but destroyed the time, place, and manner doctrine with respect to public fora.[157] Fortunately, the Supreme Court has rightfully eschewed this rationale; the government may not completely prohibit speech in a public forum, nor may it distinguish speech based on content without the restriction being narrowly tailored and necessary to serve a compelling government interest.[158] It has not, however, yet passed on the issue particular to the eviction of OWS from Zuccotti Park and the closing of the park: when, if ever, the government may close entirely a public

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[152] Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

[153] Foderaro, *supra* note 51.

[154] *See Pinette*, 515 U.S. at 761 (stating that property may "*by law* [be] given the status of a public forum")

[155] *See id.* (expressive content may be regulated on a public forum "only if such a restriction is necessary, and narrowly drawn, to serve a compelling state interest"); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("[T]he government may impose [reasonable time, place, or manner restrictions], provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'"); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (holding that "restrictions of this kind are valid provided that . . . they are narrowly tailored to serve a significant government interest . . . .").

[156] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

[157] Maintaining a park as open for the unimpeded access of the general public would entitle the government to all but exclude speech from public fora. *But see Clark*, 468 U.S. at 298 (noting that the government had an interest in prohibiting camping in national parks because the effects of camping—the digging of holes, the creation of fire pits, etc.—could impede the enjoyment of the park by the general public). Were it an "important government interest" to permit the general public to use the space filled by a protest, any protest could be forbidden; the only way, and thus the narrowly tailored way, to protect this interest is to deny the speech rights of the would-be protestors. So long as a prohibition on protestors was not based on the content of their message, speech could be forever forbidden in places that "have immemorially been held in trust for the use of the public . . . used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague*, 307 U.S. at 515.

[158] *See Perry*, 460 U.S. at 45; *Pinette*, 515 U.S. at 761 (holding that the government may impose "reasonable, content-neutral time, place, and manner restrictions" on speech in a traditional public forum, but that "[the government] may regulate expressive content only if such a restriction is necessary, and narrowly drawn, to serve a compelling state interest").

forum in order to silence a certain viewpoint or form of speech.[159]

Regardless of whether the Supreme Court may one day hold that a public forum may be permanently closed to speech in order to facilitate the public enjoyment of the space, it has not done so yet. Therefore, if there is a government interest to justify ousting the protestors from Zuccotti Park, it lies in "the owner's reasonable rights and duties to maintain Zuccotti Park."[160] Judge Stallman noted that "[t]o the extent that city law prohibits the erection of structures, the use of gas or other combustible materials, and the accumulation of garbage and human waste in public places," it was proper to evict the protestors from the park.[161] Yet, this all but ignores an essential prong of the time, place, and manner doctrine: the requirement that the restriction on speech be "narrowly tailored."[162] It is important to note, however, that a "narrowly tailored" solution to a government interest need not be the *most* narrow of the options. In *Ward v. Rock Against Racism*, the Supreme Court noted that "[t]he requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation, and *the means chosen are not substantially broader than necessary to achieve that interest.*"[163] Therefore, to pass muster under *Rock Against Racism*, a complete eviction of the protest from the park should be considered "substantially broader than necessary."[164] By evicting the protestors, the City essentially foreclosed Zuccotti Park as a forum for speech.

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[159] *See* Kelly L. Monroe, Note, *Purpose and Effects: Viewpoint-Discriminatory Closure of a Designated Public Forum*, 44 U. MICH. J.L. REFORM 985, 991 (2011) ("The Supreme Court has never decided the issue of when the government may close a designated public forum altogether[, and i]n particular, it has never addressed whether a state actor may close a forum to everyone in order to silence a certain viewpoint.").

[160] Waller v. City of New York, 933 N.Y.S.2d 541, 545 (Sup. Ct. 2011).

[161] *Id.*

[162] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (the government may impose reasonable time, place, or manner restrictions on protected speech, "even in a public forum . . . provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information" (internal quotation marks omitted) (citations omitted)). If the concerns were about the construction of structures, those could have been validly placed off-limits, while permitting the protestors to remain; if the concerns were the use of combustibles, flammables could have been validly prohibited while allowing the protest itself to continue; if the concern was about the cleanliness of the park, it could have been cleared out, section by section, on a weekly basis for cleaning while permitting the protestors to stay in the park. Such solutions would be narrowly tailored, so as to survive constitutional scrutiny—total eviction by police force was not. *See infra* Part VI.B.

[163] *Rock Against Racism*, 491 U.S. at 782–83 (emphasis added).

[164] *See, e.g.*, Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 818 (1985) (Blackmun, J., dissenting) ("In a traditional public forum, the government rarely could offer as a compelling interest the need to reserve the property for its normal uses, because expressive activity of all types traditionally has been a normal use of the property."); *but see Clark*, 468 U.S. at 298–99 (suggesting, in dicta, that protests that impede the use of the park by the general public should be banned).

B. The Importance of Location to Speech: Or, How to Occupy Wall Street from a Distance?

In the wake of eviction, some protestors regrouped several blocks away at Foley Square; however, the new location was not as well-suited for the speech: the occupation of Wall Street could not, as a practical matter, be carried out from nine blocks away. The Supreme Court has occasionally, though subtly, suggested that the relationship between the location of speech and the content of the speech may be important to determining what constitutional protections are due.[165] Although it may initially appear that ample alternative means of communication remain available to the OWS protestors—such as marching or planning events at other locations, or milling about Zuccotti Park during the day but not camping there—it is questionable that these alternatives permit the protestors to convey the message intended by the encampment mere steps from Wall Street.[166] In short, the protestors cannot occupy Wall Street from nine blocks away.

The "ample alternative means" prong of the time, place, and manner doctrine serves to restrict speech in favor of the government's agenda, rather than to protect the rights of the speaker. As Professor David Allen argues, "[r]ather than serving as a way to increase expressive opportunities within society, the ample alternatives test became an important tool in the government management of dissent. . . . It allowed government to make decisions about where to locate dissent based on [the] government's interest rather than the interests of the speakers."[167] The ample alternative means prong of the time, place, and manner test has received relatively little clarification from the Supreme Court,[168] which has, as a result, "devalue[d] public interaction with

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[165] *See, e.g.*, Snyder v. Phelps, 131 S. Ct. 1207, 1217 (2011) (considering the fact that "[t]here is no doubt that Westboro chose to stage its picketing at the Naval Academy, the Maryland State House, and Matthew Snyder's funeral . . . *because of the relation between those sites and its views*" in upholding the protestors rights to speak in those locations (emphasis added)); Members of City Council v. Taxpayer for Vincent, 466 U.S. 789, 812 (1984) (noting that "[w]hile the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate" (citations omitted)); Grayned v. City of Rockford, 408 U.S. 104, 123–24 (1972) (Douglass, J. dissenting) (noting that Grayned's protests were located in close proximity to a school because "[t]he school where the present picketing occurred was the center of racial conflict"); Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 322–23 (1968) (noting that a Union protest aimed at a particular store could not be relocated to a position so remote as to defy the message), *overruled by* Hudgens v. Nat'l Labor Relations Bd., 424 U.S. 507 (1976).

[166] *See* David S. Allen, *Spatial Frameworks and the Management of Dissent: From Parks to Free Speech Zones*, 16 COMM. L. & POL'Y 383, 412–14 (2011) (discussing urban planning and zoning rules as means of controlling dissenting speech in order to ensure that the speech was not made in the "wrong place").

[167] *Id.* at 414.

[168] Am. Civ. Liberties Union of Colo. v. City & Cnty. of Denver, 569 F. Supp. 2d 1142, 1163 (2008) (noting the lack of Supreme Court guidance on what constitutes ample alternative means of communication within the context of restriction on the place of protest).

dissent and disempower[ed] individual speakers."[169]

The tension between the values underlying the First Amendment and the ample alternative means arm of the public forum doctrine has come to a head in the context of ironically-termed "free speech zones" at political events and on college campuses. Free speech zones, although routinely found to be constitutional by courts, "contain[], capture[], and zone[] [free speech] away from its intended recipients."[170] College campuses across the country have designated areas in which protests may occur. Likewise, "free speech zones" or "demonstration zones" have been established at the Republican and Democratic National Conventions since 2004. Oftentimes these locations are hidden away from the public,[171] behind buildings,[172] or under a bridge overpass more than a block from the event.[173] Courts have routinely upheld such restrictions on speech as permissible, given the status of a "free speech zone" as a limited public forum;[174] however, to do so devalues the importance of location to speech.

Sometimes speech is without value—or of diminished value—if it is not made in a particular location. Speech that is permitted only in a location so removed from the target audience that the audience cannot

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[169] Allen, *supra* note 166, at 419–20 (discussing the ample alternative means criteria in the context of free speech zones at political conventions).

[170] Joseph D. Herrold, *Capturing the Dialogue: Free Speech Zones and the "Caging" of First Amendment Rights*, 54 DRAKE L. REV. 949, 951 (2006).

[171] *E.g.*, *Your Right to Say It . . . But Over There*, CHI. TRIBUNE (Sept. 28, 2003), http://articles.chicagotribune.com/2003-09-28/news/0309280121_1_protesters-civic-center-secret-service (examples of relegating protestors to hidden areas at presidential or vice-presidential speaking events).

[172] *Id.*

[173] Allen, *supra* note 166, at 383–84. Professor Allen describes the free-speech zone at the 2004 Democratic National Convention as anything but free:

> The site, referred to as a Demonstration Zone (DZ), featured overhead netting, chain-link fence, razor wire and armed guards. For many, the space more resembled a prison than an area to celebrate First Amendment freedoms, something that was not lost on federal Judge Douglas P. Woodlock, who toured the site before the convention began:
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> "I at first thought, before taking a view (of the protest zone), that the characterization of the space being like a concentration camp was litigation hyperbole. Now I believe it's an understatement. One cannot conceive of other elements put in place to create a space that is more of an affront to the idea of expression than the designated demonstration zone."

Id. (quoting Theo Emery, *Judge Upholds "Free Speech Zone" But Permits March on FleetCenter*, ASSOCIATED PRESS (July 22, 2004), *available at* http://www.axisoflogic.com/artman/publish/ Article_10416.shtml).

[174] *See, e.g.*, *Am. Civil Liberties Union of Colorado v. City & County of Denver*, 569 F. Supp. 2d 1142 (D. Colo. 2008). This logic, it seems, is circular and decidedly wrongheaded. A free speech zone is frequently created within a traditional public forum—a park, parking lot, or sidewalk abutting the event. To demote an area of a traditional public forum to the status of a limited public forum, simply because the government wishes to exclude the speech from the rest of the park, parking lot, or sidewalk, threatens to swallow the public forum doctrine whole. Taken to its logical extreme, such a device for caging speech would permit the government to all but exclude speech from the majority of traditional public fora by pushing speech to the furthest corner of, say, Central Park.

hear it should not withstand constitutional scrutiny.[175] Placement of a free speech zone in such a remote location has not yet been subjected to constitutional scrutiny by the Supreme Court. However, previous Supreme Court decisions have acknowledged the importance of location to speech: "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[176]

The juxtaposition of two cases in particular highlights the Court's recognition that regulating the location of speech may impermissibly diminish the value of the speech itself. In *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*[177] and *Lloyd Corporation v. Tanner*,[178] the Court addressed factually analogous situations, yet came to—at first blush—inconsistent results.

In *Logan Valley*, a labor union appealed a state court decision enjoining the union from picketing on the sidewalks of a privately-owned shopping center.[179] The sidewalks, parking lots, and driveways of the shopping center were privately owned. The Union sought to peacefully picket one of the tenants of the shopping center, Weis Markets, Inc., because the grocery store employed only non-union employees who were "not receiving union wages or other union benefits."[180] Initially, the picketing proceeded almost exclusively in the parcel pick-up area of the parking lot—the portion of the lot where customers could drive their cars to the storefront in order to load parcels.[181] Weis and Logan Valley Plaza sought and obtained an injunction banishing the picketers from the property and relegating them to a thin strip of land, referred to by the court as "berms," between the privately-owned parking lot and a busy, high-speed highway.[182]

The Supreme Court reversed the injunction, noting that the union's speech, including the conduct of picketing,[183] was protectable under the First Amendment, and moreover, it was protectable in front of the

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[175] Serv. Emp. Int'l Union, Local 660 v. City of L.A., 114 F. Supp. 2d 966, 972 (C.D. Cal. 2000); *see also* Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 321–24 (1968) (describing ways in which requiring protestors to picket outside the commercial development containing their target would render their speech ineffective), *overruled by* Hudgens v. Nat'l Labor Relations Bd., 424 U.S. 507 (1976).

[176] Schneider v. New Jersey, 308 U.S. 147, 163 (1939).

[177] *Logan Valley*, 391 U.S. 308 (1968).

[178] Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

[179] *Logan Valley*, 391 U.S. at 313. The sidewalks, parking lots, and driveways of the shopping center were privately owned. *Id.* at 311.

[180] *Id.* at 310, 311 (internal quotation marks omitted).

[181] *Id.*

[182] *Id.* at 312.

[183] *Id.* at 313–14 ("[P]icketing involves elements of both speech and conduct, i.e., patrolling, and . . . because of this intermingling of protected and unprotected elements, picketing can be subjected to controls that would not be constitutionally permissible in the case of pure speech. Nevertheless, no case decided by this Court can be found to support the proposition that the nonspeech aspects of peaceful picketing are so great as to render the provisions of the First Amendment inapplicable to it altogether." (citations omitted)).

store.[184] Employing language reminiscent of the public forum doctrine,[185] the Court noted that private ownership of the property, in and of itself, was an insufficient basis to exclude the union's speech because "[t]he shopping center here is clearly the functional equivalent of the business district . . . in [*Marsh v. Alabama*]" and "is freely accessible and open to the people in the area and those passing through."[186] The Court then noted that the union's "picketing was directed solely at one establishment within the shopping center," yet under the injunction, they were banished to public ground 300 to 350 feet away from the subject store.[187] The Court noted

> Thus the placards bearing the message which petitioners seek to communicate to patrons of Weis must be read by those to whom they are directed either at a distance so great as to render them virtually indecipherable—where the Weis customers are already within the mall—or while the prospective reader is moving by car from the roads onto the mall parking areas via the entrance ways cut through the berms.[188]

The Court concluded that the restriction on the picketing location "substantially hinder[ed] the communication of the ideas which petitioners [sought] to express to the patrons of Weis."[189]

The *Logan Valley* opinion played a central role in *Lloyd Corporation* just four years later. *Lloyd Corporation* involved a challenge by pamphleteers to their exclusion from sidewalks within a private shopping center.[190] On its face, the two cases seem very similar: both involved privately owned property that resembled the "functional equivalent of [a] business district";[191] both addressed the question of

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[184] *See id.* at 323–24 ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.").

[185] *See id.* at 315 ("It is clear that if the shopping center premises were not privately owned but instead constituted the business area of a municipality, which they to a large extent resemble, petitioners could not be barred from exercising their First Amendment rights there on the sole ground that title to the property was in the municipality. . . . [S]treets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely.").

[186] *Id.* at 318–19 (internal quotation marks omitted). *Marsh v. Alabama* involved a challenge by a Jehovah's Witness to the prohibition of handbilling in a "company-town." 326 U.S. 501, 503–04 (1946). The court held that, because the sidewalks and roads of the company town were functionally indistinguishable from public sidewalks and roads in municipalities, the private nature of the sidewalks and roads was an insufficient basis upon which to infringe First Amendment rights. *Id.* at 507–08.

[187] *Marsh*, 326 U.S. at 503–04. The court held that, because the sidewalks and roads of the company town were functionally indistinguishable from public sidewalks and roads in municipalities, the private nature of the sidewalks and roads was an insufficient basis upon which to infringe First Amendment rights. *Id.* at 507–08.

[188] *Id.* at 322.

[189] *Id.* at 323.

[190] Lloyd Corp. v. Tanner, 407 U.S. 551, 552 (1972).

[191] *Compare id.* at 553–54 (describing the layout of the shopping center), *with Logan Valley*,

what exclusions of speech were permitted when the shopping center—traditionally a public forum—was privately owned;[192] and both involved traditionally protected modes of speech.[193] Yet, unlike in *Logan Valley*, the *Lloyd Corporation* Court determined that the First Amendment rights bent to private property rights.[194]

Several individuals sought to distribute handbills to customers of the shopping center, advertising meetings of the "Resistance Community," which opposed the draft and the Vietnam War.[195] When they entered the private sidewalks within the shopping center, however, they were made to leave, based on the shopping center's policy against handbilling.[196] They sued, seeking declaratory and injunctive relief.[197]

The Court, in denying the injunctive relief sought, carefully distinguished *Logan Valley*.[198] It noted that First Amendment protection was afforded to the *Logan Valley* protestors' choice of location "only in a context where the First Amendment activity was related to the shopping center's operations."[199] Although the *Logan Valley* decision emphasized the analogy to *Marsh v. Alabama*, and addressed the fact that the private sidewalks of the shopping center were virtually indistinguishable from traditional public fora,[200] the *Lloyd Corporation* Court considered this "language . . . unnecessary to the decision."[201] It noted that, instead, the holding of *Logan Valley* "was carefully phrased to limit its holding to the picketing involved, where the picketing was directly related in its purpose to the use to which the shopping center property was being put, and where the store was located in the center of a large private enclave with the consequence that no other reasonable opportunities for the picket[er]s to convey their message to their intended audience were available."[202] Noting that "[n]either of these elements is present" in *Lloyd Corporation*,[203] the Court declined to extend the rationale of

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391 U.S. at 315 ("It is clear that if the shopping center premises were not privately owned but instead constituted the business area of a municipality, which they to a large extent resemble, petitioners could not be barred from exercising their First Amendment rights . . . .").

[192] *Compare Lloyd Corp.*, 407 U.S. at 552 ("This case presents the question . . . as to the right of a privately owned shopping center to prohibit the distribution of handbills on its property . . . ."), *with Logan Valley*, 391 U.S. at 309 ("This case presents the question whether peaceful picketing of a business enterprise located within a shopping center can be enjoined on the ground that it constitutes an unconsented invasion of the property rights of the owners of the land on which the center is situated.").

[193] *Compare Lloyd Corp.*, 407 U.S. at 552 (handbilling), *with Logan Valley*, 391 U.S. at 309 (picketing).

[194] *Lloyd Corp.*, 407 U.S. at 564–65.

[195] *Id.* at 556.

[196] *Id.* at 555–56.

[197] *Id.* at 556.

[198] *See generally id.*

[199] *Id.* at 562.

[200] Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 315–18 (1968), *overruled by* Hudgens v. Nat'l Labor Relations Bd., 424 U.S. 507 (1976).

[201] *Lloyd Corp.*, 407 U.S. at 562.

[202] *Id.* at 563 (internal quotation marks omitted) (citations omitted).

[203] *Id.* at 564.

Logan Valley to *Lloyd Corporation*.[204] Consideration of these two cases together suggests that the Supreme Court is sensitive to the incremental importance of location to the desired message.

Other cases have hinted at the same consideration. For example, in *Snyder v. Phelps*, the Supreme Court considered whether tort claims for intentional infliction of emotional distress may properly be sustained against the Westboro Baptist Church (WBC) for exercising its First Amendment rights.[205] The Court held that such claims could not lie, because the WBC had the right to protest where they did, and to express their extreme views as they did.[206] In so holding, the Supreme Court noted that

> [t]here is no doubt that [WBC] chose to stage its picketing at the Naval Academy, the Maryland State House, and Matthew Snyder's funeral to increase publicity for its views *and because of the relation between those sites and its views*—in the case of the military funeral, because [WBC] believes that God is killing American soldiers as punishment for the Nation's sinful policies.[207]

Despite acknowledging that the choice of location caused distress to the loved ones of L.C. Snyder, the Court nevertheless held that WBC had a right to picket "on matters of public concern at a public place adjacent to a public street" because "[s]uch space occupies a special position in terms of First Amendment protection."[208] In so holding, the Court, at least implicitly, accepted the idea that the *location* of the protest with relationship to its message contributed something of value to the speech. In balancing the interests of Mr. Snyder's right not to hear WBC's message against WBC's right to speak, the Court seemed to acknowledge that, were the speech to be made elsewhere, its impact would have been diminished.

OWS, like the WBC, chose Zuccotti Park as the location of their protest "because of the relation between [the] site[] and its views," a link which strengthens the impact of its message.[209] In a somewhat bizarre

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[204] *Id.* at 570.

[205] Snyder v. Phelps, 131 S. Ct. 1207 (2011). WBC is a fundamentalist church, comprised primarily of a single family led by its patriarch-preacher Fred Phelps, with a cult-like mentality and extreme political and social views. WBC espouses the "political" belief that their god is punishing the United States for its tolerance of homosexuality by killing soldiers. *Id.* at 1213. Its primary method of conveying that belief to an often outraged public is through protests at the funerals of fallen soldiers. *Id.* After one such protest at the funeral of Marine Lance Corporal Matthew Snyder, the WBC faced several tort claims from L.C. Snyder's father, including intentional infliction of emotional distress and intrusion upon seclusion. *Id.* at 1214.

[206] *Id.* at 1220.

[207] *Id.* at 1217 (emphasis added).

[208] *Id.* at 1218 (quoting United States v. Grace, 461 U.S. 171, 180 (1983)) (internal quotation marks omitted).

[209] *Id.* at 1217. Judge Stallman, in his opinion abridging the speech rights of the protestors, openly concedes this point: "Occupy Wall Street brought attention to the increasing disparity of wealth and power in the United States, *largely because* of the unorthodox tactic of *occupying the subject public space* on a 24-hour basis, and constructing an encampment *there*." Waller v. City of

inverse of the free speech zones cropping up at political conventions, the City of New York appears to have created in Zuccotti Park a speech-free zone,[210] assuming that the protestors could simply relocate their speech with no incident effect on their message. To preclude them from staging their protest in proximity to Wall Street—and instead forcing them to relocate far from the path to work travelled by the corporate executives whose greed they decry—devalues and inhibits their speech.

V. FROM THE BOSTON COURT HOUSE TO LIBERTY PARK: APPLICATION OF *O'BRIEN* TO OCCUPY WALL STREET

More troubling still than the distance from which the OWS protestors must speak[211] is the fact that an essential element[212] of their speech was effectively forbidden when the court sanctioned their eviction from Zuccotti Park. Despite the fact that Stallman's decision was devoid of any constitutional analysis, let alone an analysis of the effects of the eviction on the expressive conduct of the protestors, the eviction would nevertheless remain likely if a court hearing the challenge followed the established *O'Brien* framework, particularly if the court merely assumed, without deciding, that the challenged conduct was speech.[213] The following section considers an as-of-yet hypothetical application of constitutional analysis to OWS's eviction from Zuccotti Park, which highlights the doctrine's flaws in theory and as applied.

A. Assuming, Without Deciding, that the Occupation of Zuccotti Park Constitutes Speech . . .

As set forth in *Spence*, expressive conduct is speech if it carries with it "[a]n intent to convey a particularized message," and if "in the surrounding circumstances the likelihood [is] great that the message would be understood by those who viewed it."[214] Within this framework, the occupation of Wall Street in Zuccotti Park should properly be classified as speech. An "occupation" is defined by the Oxford English Dictionary, *inter alia*, as "[t]he action of occupying a work place, public building, etc., as a form of protest" and "[t]he action or condition of

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New York, 933 N.Y.S.2d 541, 543 (Sup. Ct. 2011) (emphasis added). *See infra* Part V for a discussion of the crippling effect that the relocation has on not only the ability to reach the target audience, but indeed the very content of the speech itself.

[210] *See* Herrold, *supra* note 170, at 960–71 (discussing the speech-free zones—often referred to as "secured zones"—created in tandem with free speech zones at various political conventions).

[211] *See supra* Part IV.B.

[212] *See infra* Part VI.A.

[213] *See infra* Part V.A.

[214] *Spence III*, 418 U.S. 405, 410–11 (1974).

residing in or holding a place or position."[215] The act of "occupying," with people, placards, and tents, is unquestionably the heart of the movement: by occupying the park, the protestors intended to protest the corporate influence on democracy and take back democracy for the people.[216] This is what the protestors *intended* to do and what those observing the protest *understood* them to be doing.[217] Unquestionably, the targets of the message—the financial institutions—understood the point of view of the occupiers. It matters not that OWS did not espouse a single message;[218] all that matters is that the conduct is intended to convey a message and that viewers understand it to convey a message.[219] The occupation of Zuccotti Park is, therefore, properly construed to have a speech element to it, protectable by the First Amendment subject to the *O'Brien* balancing test.

Whether a court would have considered the extent to which the occupation of Zuccotti Park was expressive is another matter entirely. Given the relative ease with which the *O'Brien* Court assumed the issue away,[220] and given the fact that subsequent cases have seen the use of this facilitative shortcut,[221] it is possible that a court properly considering the issue of whether the occupation constitutes speech may have followed suit. Were the court to do so, however, OWS's speech rights almost certainly would have been curtailed because the approach "denatures [a party's] asserted right and thus makes all too easy identification of a Government interest sufficient to warrant its abridgement."[222]

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[215] OXFORD ENGLISH DICTIONARY ONLINE (Dec. 18, 2012), http://www.oed.com (defining "occupation").

[216] Flemming, *supra* note 38.

[217] *Cf. Spence III*, 418 U.S. at 410–11 ("An intent to convey a particularized message was present and . . . the likelihood was great that the message would be understood by those who viewed it.").

[218] *Compare Spence I*, 490 P.2d 1321, 1323 (Wash. App. Ct. 1971) (noting that Spence's conduct was intended to symbolize protest of *both* the invasion of Cambodia *and* the Kent State University killings), *with Declaration of OWS*, *supra* note 16 (listing several messages sought to be conveyed by OWS).

[219] *See* Hurley v. Irish-American Gay, Lesbian, & Bisexual Grp. of Boston, 515 U.S. 557, 569–70 (1995) ("[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech.").

[220] *See O'Brien II*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment.")

[221] *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) ("We need not differ with the view of the Court of Appeals that overnight sleeping in connection with the demonstration is expressive conduct protected to some extent by the First Amendment. We assume for present purposes, but do not decide, that such is the case.").

[222] *Id.* at 302 (Marshall, J., dissenting); *see also* Wright, *supra* note 33, at 1228–29 ("A mere assumption that the activity in question is speech may often leave the court with only an abstract, dry, bloodless, unexamined, superficial sense of how speech should be valued in the case at bar.").

B. . . . There is Nevertheless a Countervailing Government Interest Sufficiently Substantial to Justify Abridgement of OWS's Speech

Even if a court were to take the time and consideration necessary to determine that the act of occupation constituted speech, it is nevertheless likely that the court would uphold the protestors' eviction under the current expressive conduct doctrine. First, although Zuccotti Park should be properly considered a traditional public forum,[223] there may be some question, given the park's status as a "privately owned public park," whether the City could step in, of its own accord, and evict protestors. This does not matter, though, to a consideration of whether the eviction is within the government's constitutional powers. If the park is a public space, it is within the government's police powers to regulate conduct within its borders. If it is private property, it cannot be seriously disputed that the police could clear the park upon request for assistance from the park's owners, Brookfield Properties.[224]

Second, it is also likely that the court hearing a challenge to the eviction would find that the government had an important or substantial interest in freeing the park from the occupation. Some may argue that the Supreme Court's holding in *Clark*, barring protestors from sleeping in a tent city, controls the outcome of the Occupy protest; however, the case is distinguishable from *Clark* in important ways. The National Park Service in *Clark* issued a permit for a "symbolic tent city" to be erected on the National Mall and in the park across from the White House; it was *sleeping* in the tents that was prohibited.[225] In lower Manhattan, by contrast, it is the *tents* that are disallowed; sleeping is conspicuously absent from Brookfield's list of prohibited activities.[226] Thus, the Supreme Court in *Clark*, faced a much more speech-permissive regulation than the one at issue in this case: symbolic structures were permitted for the sake of CCNV's message; they are not for the sake of

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[223] *See supra* Part IV.A.

[224] *See* Foderaro, *supra* note 51 ("Enforcement [of park regulations] would fall to the building's management company, . . . but if park users refuse to comply, the management may call on the Police Department for help, as it has in an effort to clean out the park."); *cf. O'Brien II*, 391 U.S. at 377 (requiring a regulation abridging expressive conduct to be "within the constitutional power of the Government"). It should be noted that, in a previous challenge to the city's ban on sleeping on city sidewalks, a federal court found the plaintiff—a tenants' rights organization—likely to succeed on the merits of a First Amendment challenge, under the time, place, and manner doctrine. Metropol. Council, Inc. v. Safir, 99 F. Supp. 2d. 438, 439, 450 (S.D.N.Y. 2000). The merits were never reached, however, as the proceeding was merely one for a preliminary injunction, and thus is not controlling. *Id.* at 450.

[225] *Clark*, 468 U.S. at 292.

[226] *See* Waller v. City of New York, 933 N.Y.S.2d 541, 543 (Sup. Ct. 2011) (noting that the relevant prohibitions were "[c]amping and/or the erection of tents or other structures[;] [l]ying down on the ground, or lying down on benches . . . [;] [t]he placement of tarps or sleeping bags or other covering on the property[;] [and] [s]torage [or] placement of personal property on the ground, benches, sitting areas or walkways which unreasonably interferes with the use of such areas by others").

OWS's message. Therefore, a court considering a challenge to the eviction should not simply cite to *Clark* to resolve the issue of whether an important government interest exists, but rather should look to the arguments advanced by the City of New York in opposition to the TRO.[227] The City purportedly sought to

> reopen[] the park to all members of the general public, including protestors, while taking steps to prohibit the use of the [p]ark in a manner that creates a public safety hazard, allows unhealthy and unsafe conditions to flourish and prevents all members of the general public from using and enjoying the park.[228]

The Supreme Court has previously held that an abridgement of speech in public fora may be permitted in order to enable others to enjoy the public space;[229] therefore, the City's purported concern for the rights to public access for other members of the public and the safe, hygienic maintenance of the park would likely constitute an important government interest.[230] Third, and relatedly, the eviction of the protests from Zuccotti Park in order to facilitate the access of the general public is likely to be found "unrelated to the suppression of free expression."[231] Once the eviction is found to be related to public enjoyment of the park, it is all too easy to say that the regulation, therefore, is unrelated to speech,[232] and that it is, instead, related to public rights of access.

Finally, because the Supreme Court's application of the final prong of *O'Brien* has been misapplied since its inception, the eviction of the campers in Zuccotti Park would likely be found to be no more speech restrictive than necessary. In *O'Brien* itself, the Court simply considered whether the statute's prohibition of conduct was, nominally, "limited to the noncommunicative aspect of O'Brien's conduct":[233] it never considered what incidental effect the regulation had on speech. Prohibition of sleeping bags, tents, and other camping equipment in Zuccotti Park is aimed at the noncommunicative element of OWS's conduct, at least, inasmuch as the prohibition on draft card burning was aimed only at the noncommunicative elements of O'Brien's conduct. Because the precedential case implied that the incidental restrictions on

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[227] Holloway Aff., *supra* note 64, ¶ 2.

[228] *Id.*

[229] *See* Ward v. Rock Against Racism, 491 U.S. 781, 800 (1989) (describing New York City's "substantial interest" in limiting sound volume during a concert in Central Park); *Clark*, 468 U.S. at 298 (stating that the government was not required to tolerate protests that damaged parks or made them inaccessible to members of the public).

[230] *Cf. O'Brien II*, 391 U.S. 367, 377 (1968) ("[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

[231] *Id.*

[232] *Cf. id.* (requiring that any restriction on expressive conduct be unrelated to speech).

[233] *Id.* at 381–82.

speech need not be considered, so long as the regulation facially strikes at the noncommunicative elements of the act, this prong is essentially toothless to protect OWS's speech rights, regardless of whether the incidental effect of the regulation—prohibiting the "occupation" of Wall Street—is significantly greater than necessary.

Of course, none of this analysis was undertaken by Judge Stallman in deciding *Waller v. City of New York.* He ignored completely his obligation to ensure that the First Amendment rights of the petitioners before him were not abridged by the City's regulations.[234] Yet the OWS protestors were not, ultimately, prejudiced by this outcome. Ultimately, the eviction of OWS from Zuccotti Park and the silencing of its message of occupation are not peculiar to Stallman's failure to apply constitutional law; the same result would likely attend under the current *O'Brien* expressive conduct framework.

This result—the silencing of the speech of the 99%—should not rest easily with constitutional scholars, courts, politicians, or activists. The same application to the conduct of the participants in the Boston Tea Party would similarly leave their expressive conduct unprotected from government intervention.[235] Contemporaneously discussing the *O'Brien* case, Professor Louis Henkin noted

> [t]he Constitution protects freedom of "speech," which commonly connotes words orally communicated. *But it would be surprising if those who poured tea into the sea* and who refused to buy stamps *did not recognize that ideas are communicated, disagreements expressed, protests made other than by word of mouth or pen.*[236]

The milquetoast *O'Brien* test fails to protect what most would presume to be protected First Amendment activity. Yet the activity—conduct essential to the central message of the protest movement—ought to be protected as a legitimate form of government protest. *O'Brien* requires revision.

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[234] *See generally* Waller v. City of New York, 933 N.Y.S.2d 541 (Sup. Ct. 2011) (mentioning the First Amendment in only a conclusory fashion, citing only one First Amendment case directly).

[235] Briefly, the Boston Tea Party was both intended and understood to be a protest against the monopoly of the East India Company and the British Parliament's support thereof. *See* Unger, *supra* note 3, at 158, 176. The government interest at stake—protection of an industry essential to its economy—could certainly be said to be an important one, and one unrelated to speech. *cf. id.* at 158; *O'Brien II*, 391 U.S. 367, 377 (1968) ("[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."). Because any punishment meted out against the participants in the Boston Tea Party would be directed at protecting the tea from destruction, not at punishing the conduct *qua* speech, a modern court applying the *O'Brien* framework would find the final element satisfied. *Cf. O'Brien II*, 391 U.S. at 377. The protestors at the Boston Tea Party would find no protection in the foundational document that flowed from their acts of protest.

[236] Henkin, *supra* note 7, at 79 (emphasis added).

VI. WHEN ACTIONS SPEAK LOUDER THAN WORDS: CREATING A SPEECH-PROTECTIVE TEST FOR EXPRESSIVE CONDUCT

But what revision? Professor McGoldrick, in his article, United States v. O'Brien *Revisited: Of Burning Things, Waving Things, and G-Strings*, identifies no less than eight errors made by the Court in *O'Brien*.[237] Each of the errors he assigned to *O'Brien*, however, strikes at the same fundamental, underlying flaw: the test articulated is under-protective of speech. The unsatisfying outcome discussed in Part V results from a flaw in the expressive conduct doctrine present from its inception: the *O'Brien* test does not adequately consider whether the restriction on conduct eliminates an essential element of the speaker's message.[238] Where the *O'Brien* test does make this consideration, it forecloses not just expressive conduct, but conduct which *is* essentially speech irreplaceable by words. Where conduct forms an essential element of the message sought to be conveyed by the speaker, it should receive the same protection as the spoken word; in public fora, a restriction on an essential element should be subjected to the narrow tailoring requirement and the ample alternative means prong of the time, place, and manner test.

A. "Go Ahead and Occupy, Just Make Sure You Vacate By Nine P.M.": The Silencing of Essential Elements

In some instances, conduct functions as convenient shorthand for written or spoken word. For example, the burning of a draft card may symbolize resolute opposition to the draft.[239] In other instances, however, conduct fulfills a role—and contributes something to speech—that

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[237] McGoldrick, *supra* note 25, at 909–10 ("First, the Court fundamentally failed to distinguish between expressive conduct that would be accorded a high level of protection under the Free Speech Clause of the First Amendment and that conduct which, like the regulation of walking on the grass, would only have to be justified by at most a conceivably-valid governmental interest. . . . Assuming, without affirmatively deciding, that expressive conduct is speech would seem to invite some disrespect for the free-speech claim. . . . Second, instead of focusing on when expressive conduct might qualify as speech, the *O'Brien* court adopted a four-part test which confusingly combined a government enumerated powers issues with a free speech test. Third, the Court badly stated its own version of the intermediate test. Fourth, the Court implied, but failed to define, a strict scrutiny test. Fifth, the Court then mistakenly applied the intermediate test when it should have applied strict scrutiny. Sixth, the Court further complicated matters by misapplying the intermediate test. It overstated the weight of questionable governmental purposes and undervalued the effectiveness of the symbolic aspects of O'Brien's expressive conduct. Seventh, the Court failed to articulate correctly the role of legislative motive, a failure that continues to this day. Finally, the time, place, and manner test, though at the time of the *O'Brien* case not as fully developed as it is now, would have provided a better approach for the Court than its four-part test.").

[238] *See infra* Part V.B.

[239] *Cf. O'Brien II*, 391 U.S. at 370 (noting that O'Brien burned his draft card "so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider [his] position.").

cannot sufficiently be accounted for with words alone.[240] Under current doctrine, and especially in practice, *O'Brien* fails to accord sufficient protection to the latter category of conduct.

Sometimes, words alone are insufficient to convey the message intended by the speaker. Were this not true, colonists would not have resorted to dumping tea into the Boston Harbor; O'Brien would have merely shouted through a bullhorn rather than burning his draft card to demonstrate his opposition to the draft; and members of OWS could have launched a letter-writing campaign. Chief Justice William Rehnquist, dissenting in *Texas v. Johnson*, a case which sanctioned flag burning as protected speech, pejoratively referred to expressive conduct as "the equivalent of an inarticulate grunt or roar."[241] Rehnquist was correct, though not for the reasons he believed: when pure speech alone is insufficient to convey the emotion, conviction, or urgency of the speakers' message, an inarticulate roar must be protected by the First Amendment.[242]

The occupation of Wall Street was the protestors' "inarticulate grunt or roar." Protests, political discourse, and the political system had failed in the eyes of the protestors; just as meetings at Faneuil Hall and petitions to the governor to hear their grievances had failed the participants in the Boston Tea Party, and the occupiers, like the colonists, resorted to famously more unconventional means of protest.

The importance of the encampment and symbolic occupation of Wall Street to the message of OWS suggests a revision to the *O'Brien* test which would promote a more speech-protective doctrine. The fourth prong of the test currently asks whether "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of [the government's] interest."[243] This prong essentially permits conduct—and the speech it conveys—to be prohibited entirely, even if the value to speech lost is substantial, so long as the prohibition is a response "no greater than necessary" to serve the government's needs. Furthermore, since its inception, it has been applied in such a manner as to essentially write it out of the test altogether. In *O'Brien*, the Court determined that this prong was satisfied merely because the restriction was "limited to the noncommunicative aspect of O'Brien's conduct."[244] This element of the *O'Brien* test, so construed, all but folds into the third

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[240] *See, e.g.*, Brown v. Louisiana, 383 U.S. 131, 141–42 (1966) (attaching First Amendment protection to a sit-in in a racially segregated library as a means of civil rights protest).

[241] Texas v. Johnson, 491 U.S. 397, 432 (1989) (Rehnquist, J., dissenting) ("Far from being a case of 'one picture being worth a thousand words,' flag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others.").

[242] Members of the City Council of the City of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984) (noting that "[w]hile the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, *a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate*" (emphasis added) (citations omitted)).

[243] *O'Brien II*, 391 U.S. at 377.

[244] *Id.* at 381–82.

prong of the test: whether the government interest is unrelated to the suppression of expression.[245] The test as a whole—but particularly this final factor—is anything but speech-protective.[246]

A more appropriate, speech-protective inquiry is whether the prohibition on conduct effectively forecloses an essential element of the message sought to be conveyed by the speaker. Just as the Supreme Court implicitly recognized, in *Logan Valley* and *Snyder v. Phelps*, that the *location* of speech may be essential to the desired message,[247] *O'Brien* should similarly be revised to reflect the recognition that, sometimes, the *manner* in which a message is conveyed—the element of conduct itself—may be essential to the message.

Conduct forms an essential element of a speaker's message where it communicates something not conveyed by the speech alone, be it dumping tea into the Boston Harbor,[248] burning a flag,[249] occupying the symbolic center of the corporate oligarchy,[250] or an inarticulate roar.[251] The identification of conduct forming an essential element of speech is necessarily a fact-specific one. Where a message—or a particular aspect of a message—is conveyed only by the conduct, and is not conveyed effectively through speech alone, it essentially *is* speech, and ought to be protected as such. Therefore, the weary *O'Brien* test should be revised, as follows: a government regulation may restrict expressive conduct if (1) "if it is within the constitutional power of the Government";[252] (2) "if it furthers an important or substantial governmental interest";[253] (3) "if the governmental interest is unrelated to the suppression of free expression";[254] *and* (4) *if it does not foreclose an essential element of the speech.*

The occupation of Zuccotti Park played an important role in conveying the protestors' exasperation with the corporate oligarchy and their message of the reclaiming of democracy. Indeed, as Judge Stallman himself acknowledged in *Waller*, "Occupy Wall Street brought attention

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[245] *Cf. id.* at 377.

[246] *Cf.* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 577 (1991) (Scalia, J., concurring) ("We have never invalidated the application of a general law simply because the conduct that it reached was being engaged in for expressive purposes and the government could not demonstrate a sufficiently important state interest."); *see also* McGoldrick, *supra* note 25, at 910 (noting that the *O'Brien* court "seemed to treat the expressive action as anything but protected speech").

[247] Snyder v. Phelps, 131 S. Ct. 1207, 1217 (2011) (noting that the location of the expressive activity affects its publicity and thus its effectiveness); Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 321–22 (1968) (describing the importance of picketing location), *overruled by* Hudgens v. Nat'l Labor Relations Bd., 424 U.S. 507 (1976); *see also* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 302–03 (1984) (Marshall, J., dissenting) (noting the importance of the locations chosen by protestors—the National Mall and Lafayette Park—to their message and intended audience).

[248] Hewes, *supra* note 2.

[249] Texas v. Johnson, 491 U.S. 397, 399 (1989).

[250] *Declaration of OWS*, *supra* note 16.

[251] *Johnson*, 491 U.S. at 432 (Rehnquist, J., dissenting).

[252] *O'Brien II*, 391 U.S. 367, 377 (1968).

[253] *Id.*

[254] *Id.*

to the increasing disparity of wealth and power in the United States, *largely because of the unorthodox tactic of occupying the subject public space on a 24-hour basis, and constructing an encampment there.*"[255] The ability to camp out in the "subject public space"—to "occupy" Wall Street—formed an essential element of the protestors' speech, even in the eyes of a judge who would not protect that speech. Imagine the OWS message without the conduct: one could picture OWS protestors standing in Central Park, Times Square, or along the side of a road carrying signs reading, "We are occupying Wall Street." Such a protest is so ineffectual as to be nearly comical. Yet that is the plight of the OWS movement in the wake of *Waller v. City of New York*, because without the ability to occupy, the movement's message is diminished in scope and impact. That essential element of speech—the physical occupation of the symbolic center of the perceived corporate oligarchy—deserves protection because it does not merely stand in the place of speech, or augment an otherwise effective exercise of First Amendment rights: it *is* speech itself.

B. What to Do: Treating Conduct that Forms an Essential Element as Speech Per Se

Because expressive conduct that forms an essential element of a speaker's message, it deserves the same protection afforded pure speech, and thus, should properly be considered speech per se. In a public forum, the level of protection afforded speech is governed by the public forum doctrine,[256] which requires that a content-neutral regulation be narrowly tailored to achieve an important government interest, and that it leave open ample alternative means for communication.[257]

Professor McGoldrick has suggested that the *O'Brien* test should be replaced entirely by the time, place, and manner test.[258] He argued that this test "would have provided a better approach for the Court than [the *O'Brien*] four-part test," which he described as "badly stated" and "misapplied."[259] Indeed, there are many overlaps between the two doctrines. The Supreme Court in *Clark* suggested that when the conduct takes place in a public forum, the test for expressive conduct is essentially indistinguishable from the time, place, and manner test.[260]

In fact, the *O'Brien* test is less speech-protective than the companion test that applies to the spoken word at each turn. Although both tests are structurally a form of intermediate scrutiny, the *O'Brien*

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[255] Waller v. City of New York, 933 N.Y.S.2d 541, 543 (Sup. Ct. 2011) (emphasis added).

[256] *See supra* Part IV.A.

[257] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

[258] McGoldrick, *supra* note 25, at 944–45.

[259] *Id.* at 910.

[260] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 298–99 (1984).

test looks much more like rational basis than the time, place, and manner test. While there are clear parallels between several elements of both tests,[261] at each point of similarity, the *O'Brien* test departs from the time, place, and manner test in the direction of less speech protection.

First, the time, place, and manner test requires the restriction on speech be content-neutral;[262] the *O'Brien* test requires that it be "unrelated to . . . expression."[263] Thus, where *spoken* word in a public forum may not be restricted on the basis of the content or viewpoint espoused, conduct may be abridged in a manner that affects certain content more than others, so long as the restriction itself is not based on the expression. Second, the time, place, and manner test requires that the restriction leave open ample alternative means of communication;[264] *O'Brien* requires only that the incidental effect on speech be no greater than necessary to achieve the government's interest.[265] Although the "ample alternative means" element of the test has proved to favor government interests by permitting the government to "make decisions about where to locate dissent based on [the] government's interest rather than the interests of the speakers,"[266] a restriction may not entirely foreclose speech.[267] By contrast, under the *O'Brien* framework, speech in the form of conduct may nevertheless be foreclosed entirely if that is the only means of achieving the government's interest. Where conduct forms an essential element of speech—that is, where it is the only means of conveying an aspect of the speaker's message—the *O'Brien* test permits the speech to be foreclosed entirely.

Third, and most significantly, the time, place, and manner test requires that the restriction be narrowly tailored, whereas, there is no analogous prong in the *O'Brien* test.[268] Absent this requirement in *O'Brien*, a regulation may prohibit conduct in furtherance of a government objective, even if it sweeps far too broadly and forecloses much more speech than necessary.

This last flaw is precisely the fate that befell the symbolic speech of the OWS protestors. When the facts of the protestors' eviction from Zuccotti Park are hypothetically subjected to the *O'Brien* test,[269] their First Amendment Rights cave to the government's purported interests because there is no requirement that the restriction fit the interest. Under the time, place, and manner test, however, the constitutional infirmity of

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[261] *See* McGoldrick, *supra* note 25, at 928–34 (noting that the *O'Brien* test, like the time, place, and manner test, is meant to be intermediate scrutiny, but is confusingly worded); *see also id.* at 935–36 (noting that the test was misapplied).

[262] *Rock Against Racism*, 491 U.S. at 791.

[263] *O'Brien II*, 391 U.S. 367, 377 (1968).

[264] *Rock Against Racism*, 491 U.S. at 791.

[265] *O'Brien II*, 391 U.S. at 377.

[266] Allen, *supra* note 166, at 414.

[267] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

[268] *Compare Rock Against Racism*, 491 U.S. at 791, (noting a narrowly tailored requirement), *with O'Brien II*, 391 U.S. at 377 (omitting any mention of a narrowly tailored requirement).

[269] *See supra* Part V.B.

the regulation is clear.[270] In opposition to the TRO, New York City identified two specific reasons[271] why the eviction of the protestors from Zuccotti Park was necessary: first, the fire hazard posed by the presence of generators and wooden pallets elevating tents;[272] and second, occupation was contributing to the unsanitary conditions of the park.[273] Both of these concerns are unquestionably within the state's police powers to address. But while complete eviction of the protestors from the park certainly achieved the government's purported interest in redressing a fire hazard and ensuring sanitary conditions, it did so in an overly broad way that foreclosed more speech than was necessary.[274] Prohibition of generators, gasoline, and combustibles could have mitigated the City's legitimate concern of fire: indeed, the City acknowledged that the fire marshal issued such a prohibition.[275] Likewise, where unsanitary conditions pose a public health concern, they could be redressed by requiring the occupation to temporarily vacate quadrants of the park—or indeed the entire park—periodically for cleaning. Violations of the prohibition on fire hazards or instructions to yield to cleaning crews could and should be addressed via the penal system, not through an absolute and permanent abridgement of speech.[276] While the time, place, and manner test recognizes the importance of the fit between the regulation and the government's interest,[277] the *O'Brien* test does not. And as a result, more speech than necessary may be curtailed when the speech comes in the form of conduct, rather than words.

Comparison of the *O'Brien* test to the time, place, and manner test demonstrates that, at every turn, modern First Amendment jurisprudence subordinates conduct to spoken or written word. Both tests favor words even where the message conveyed is the same and even where the conduct forms an essential element of the message irreplaceable by words alone. Conduct forming an essential element of the message is not just a shorthand or placeholder for speech: it is speech, per se. It conveys

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[270] *See infra* Part IV.A.

[271] The purposes listed do not include New York City's conclusory assertion that the park should be open to all members of the public. Holloway Aff., *supra* note 64, ¶ 5.

[272] *Id.* ¶¶ 20–21.

[273] *Id.* ¶ 19.

[274] *Cf.* Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989) (stating that time, place, or manner regulations must be narrowly tailored).

[275] Holloway Aff., *supra* note 64, ¶ 8.

[276] *See* N.Y. Civ. Liberties Union, Press Release, "NYCLU to City: Don't Use Wall St. Clean Up as a Pretext for Mass Arrests" (Oct. 13, 2011) *available at* http://www.nyclu.org/news/nyclu-city-don't-use-wall-st-clean-pretext-mass-arrests ("The city must not use the clean up as a pretext for mass arrests. To do so would be a violation of the spirit of the First Amendment and the spirit of dissent."); Hartocollis, *supra* note 53 (mentioning protestors' decision to clean the park in response to a directive from City Hall).

[277] *But see Rock Against Racism*, 491 U.S. at 798 (noting that "a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so"). The flaws of the time, place, and manner restriction, while not as severe or detrimental to speech rights as the flaws of *O'Brien*, are beyond the scope of this Article.

a sentiment or message that cannot be conveyed by words alone. It should, therefore, be protected as speech. In a public forum, conduct that constitutes an essential element of speech should be subjected to the time, place, and manner test. Content-neutral restrictions on essential elements of speech should be "narrowly tailored to serve a significant government interest" and should leave open ample alternative means for making the speech.[278]

Although the time, place, and manner test is more speech-protective than the *O'Brien* test, it is still far from perfect in its application to conduct in public fora.[279] A common sense answer to a call for the replacement of the *O'Brien* test with the time, place, and manner test is that, when expressive conduct is involved, there are always "ample alternative means" of making the speech—just *say* it, just *write* it. It may seem that the "ample alternative means" prong of the time, place, and manner test is rendered meaningless when applied to conduct rather than words. In many instances, this may be true: the sentiment conveyed by burning a draft card[280] could effectively be conveyed by wearing a jacket—or carrying a sign—bearing the written words "Fuck the Draft."[281] But where an essential element of the message *cannot* be conveyed by speech alone—as with the Boston Tea Party or the symbolic occupation of Wall Street by the OWS movement—the common sense of "just say it, just write it" loses its persuasive force. Such conduct should be treated as speech precisely because it is not capable of being replaced by words alone: the ability to "just say" or "just write" does not constitute an alternative means of conveying the message embodied within the conduct. Foreclosing conduct constituting an essential element of the message, therefore, would entirely foreclose the speech itself—an unconstitutional result.[282]

VII. CONCLUSION: THE PRO-SPEECH EFFECT OF THE ESSENTIAL ELEMENTS TEST ON THE BROADER EXPRESSIVE CONDUCT DOCTRINE

Revising the *O'Brien* test to include a consideration of whether the conduct forms an essential element of the speech ensures that, if an essential aspect of the message is communicated through conduct rather than written or spoken words, it is afforded the same protection as pure speech. Indeed, this revision strengthens and refines the expressive

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[278] *Id.* at 791 (quoting Clark v. Cmty. For Creative Non-Violence, 468 U.S. 288, 293 (1984)).

[279] *See supra* Part IV.B.

[280] As the plaintiff did in *O'Brien II*, 391 U.S. 367 (1968).

[281] As the plaintiff did in Cohen v. California, 403 U.S. 15 (1971).

[282] *See* Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789 (1984); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (stating that the government cannot ban all communicative activity in public forums).

conduct doctrine with respect to all conduct.

First, it forces a court to consider whether the conduct in question constitutes speech.[283] The requirement would retire the facilitative shortcut employed since *O'Brien* was handed down, of assuming, without deciding, that the conduct at issue constitutes speech.[284] Elimination of the assumption would provide more accurate protection for the communicative elements of conduct, even if the conduct is not ultimately found to be an essential element of the message: no longer could a court inadvertently devalue the communicative element of conduct.[285] By requiring a court to balance a state's police power against a speaker's actual speech rights, rather than balance a state's police power against a hypothetical speech right, the addition of the essential element factor to the *O'Brien* test would enhance the accuracy with which this balancing test is applied.

Second, where conduct is found to constitute an essential element of speech, it will be treated on par with pure speech.[286] Thus, a spectrum is created which tracks the original purpose of the balancing test. On one end, where conduct bears no communicative element, a state's police power may properly regulate it. Where there are both communicative and noncommunicative elements to the speech, or where the conduct forms a convenient shorthand for speech, an intermediate level of scrutiny is applied to ensure that only a sufficiently important exercise of a state's police power curtails the expressive elements of the conduct.[287] And on the other end of the spectrum, where the conduct is so essential to the message conveyed that the message cannot be effectively conveyed absent the conduct, a more stringent level of scrutiny is applied, treating the speech-like conduct as a coequal of spoken or written words.[288] Thus, the more speech that is inherent in conduct, the more protection is afforded by the First Amendment.

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[283] *See supra* Part VI.B.

[284] *See, e.g., Clark*, 468 US. at 293 (assuming, without deciding, that sleeping constitutes speech).

[285] *Cf.* McGoldrick, *supra* note 25, at 914 ("The easy assumption in *Clark v. Community for Creative Nonviolence* [sic]—that sleeping in a tent city in Lafayette Park across Pennsylvania Avenue from the White House was speech—likely contributed to the Court's failure to weigh the free speech issues at stake carefully").

[286] *See supra* Part VI.B.

[287] *See O'Brien*, 391 U.S. at 376–77.

[288] *See supra* Part VI.B.

The Norman/Friedman Principle: Equal Rights to Information and Technology Access

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§ The authors' names are listed alphabetically and each author has contributed equally to this article. The views expressed in this journal article do not represent the views of the Social Security Administration, Centers for Medicare & Medicaid Services, the United States government, or the State of Maryland. They are solely the views of the authors acting in their personal capacities. The authors wish to gratefully thank Ben Yelin, third-year law student at the University of Maryland Francis King Carey School of Law, for his significant research, writing, and editing assistance on this article.

> It was only just words, words,—they meant nothing in the world to him, I might just as well have whistled. Words realize nothing, vivify nothing to you, unless you have suffered in your own person the thing which the words try to describe.
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> ~Mark Twain[1]

I. INTRODUCTION

Developments in science and technology have a direct impact on the habits, practices, and ultimately, the very substance and nature of societal institutions. As such, innovations in science and technology, when accessible to all, may have the effect of serving as an equalizer of the opportunities of people with disabilities for living, learning, and earning. For example, an accessible Internet—a "superhighway" for information, designed for the needs of people with disabilities—can provide the disabled, the world's largest minority population,[2] with enhanced opportunities for inclusion and integration. Many of the features of the global, information-based economy have the potential to

[1] MARK TWAIN, A CONNECTICUT YANKEE IN KING ARTHUR'S COURT (1889), *reprinted in* MARK TWAIN: HISTORICAL ROMANCES 213, 418 (The Library of America ed., 1994)

[2] U.N. Secretariat for the Convention on the Rights of Persons with Disabilities, Factsheet on Persons with Disabilities (Jan. 18, 2013), http://www.un.org/disabilities/documents/toolaction/pwdfs.pdf.

level the playing field between people with disabilities and the temporarily able-bodied.[3] This result, however, may not be positively realized as long as customs, policies, and laws fail to facilitate and promote accessibility for the disabled.[4]

In the Information Age, a society that does not commit itself to a proactive effort respecting information and digital access propagates injustice, denigrating affirmative civil rights already on the books. In this, the era of the Americans with Disabilities Act (ADA), there is a range of legal obligations respecting information access.[5] The public, however, may be uneducated about, or may simply in some circumstances disregard, issues related to accessibility. While there is an array of domestic protections for persons with disabilities that impose affirmative obligations (for example, providing auxiliary aides or services at the office of a medical provider), such provisions require proactive implementation to achieve their intended purposes. A law on the books without more is insufficient. Thus, the question is how to fortify or expand existing protections, so as to ensure that the affirmative rights drafted by legislators are more than just words.

With a goal of contributing to the dialogue about the problem of accessibility, the Article will present the Norman/Friedman Principle and argue that it should inform and influence the creation and implementation of relevant laws. The Norman/Friedman Principle might be stated as follows: imbuing science and technology with principles of universal design and accessibility will increasingly allow individuals with disabilities to benefit society through greater opportunities for socioeconomic commerce. Once again, technology has a direct impact on "the habits, the practices, and ultimately the substance of societal institutions."[6] This Article discusses, in accord with its principle, how science and technology should create opportunities, rather than restrict the potential technological benefits for the disabled.

Each generation has the responsibility to clarify and improve upon the constellation of constitutional and civil rights available to all citizens.[7] The adoption of the Norman/Friedman Principle is important

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[3] Other scholars have developed this point about the irony of the unrealized potential of the Internet to be an equalizer for persons with disabilities. *E.g.*, M. Christine Fotopulos, *Civil Rights Across Borders: Extraterritorial Application of Information Technology Accessibility Requirements Under Section 508 of the Rehabilitation Act*, 36 PUB. CONT. L.J. 95, 97 (2006). This Article is an exploration of differing technological developments and legal developments related to them, but is not intended to constitute a complete catalog of the ongoing legal developments.

[4] *Id.*

[5] *See generally* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2006 & Supp. III 2009).

[6] *See* Ezra Dodd Church, Note, *Technological Conservatism: How Information Technology Prevents the Law from Changing*, 83 TEX. L. REV. 561, 565 (2004) (discussing the view that once new technologies are introduced into human society, they operate until they have effectively permeated every institution in that society).

[7] For an activist perspective on the obligation of citizens in a republic, see the 1961 inaugural remarks of President John F. Kennedy. President John F. Kennedy, 1961 Inaugural Address (Jan. 20, 1961) (calling on American citizens to protect rights of people the world over to be free from tyranny), *available at* http://www.ourdocuments.gov/doc.php?doc=91&page=transcript. *See also*

because issues of technology and information access limit equal opportunities for the disabled to live, learn, and earn.[8] The authors of this Article, both of whom are lawyers with disabilities, will posit a range of arguments, exploring American law, as well as the United Nation's Convention on the Rights of Persons with Disabilities,[9] to discuss innovative development in disability-rights law and the understanding of the public about that body of law. Notably, this Article will put forth a broader understanding of constitutional jurisprudence—that arguably the U.S. Constitution supports an affirmative right to information and technology access. The authors also posit that, regardless of whether the U.S. Supreme Court declares the existence of the right to technology access, positive legislation on the state and local levels will provide much-needed progress towards protecting the civil rights of the disabled. The authors will consequently explore affirmative measures that public officials might advance, and specifically, measures that elected officials in the Maryland General Assembly might pass, to fortify the civil rights of individuals with disabilities.

II. THE DIGITAL DIVIDE AND THE INFORMATION AGE

> We live in a society exquisitely dependent on science and technology, in which hardly anyone knows anything about science and technology.
>
> ~Carl Sagan[10]

A. Disability: The Basic Legal Framework

An individual must meet the legal definition of disability in order to claim the broad protections of affirmative disability legislation, such as the Americans with Disabilities Act. The ADA definition of disability has a multi-part framework. As enacted in 1990, the ADA defined "disability" with respect to an individual as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C)

Justice Anthony Kennedy's majority opinion in *Lawrence v. Texas*. 539 U.S. 558, 578–79 (2003), discussed *infra* note 150.

[8] The Principle is intended to be "holistic" in nature—to inform the understanding and application of the law in society.

[9] United Nations Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3.

[10] *See* Carl Sagan, *Why We Need to Understand Science*, SKEPTICAL INQUIRER (Spring 1990), http://www.csicop.org/si/show/why_we_need_to_understand_science/.

being regarded as having such an impairment."[11] This definition provides an important sense of what constitutes a condition or impairment rising to the level of a legally defined disability.[12]

Legal classifications and the nuances of statutory language substantially affect the rights of disabled citizens. The 2008 Amendments to the ADA (2008 Amendments) retained the basic framework for the definition of disability, but broadened the rules of construction to expand the definition.[13] To fall within the ambit of the ADA, an individual's impairment must still meet the legal definition for disability. The 2008 Amendments allow for more liberal construction of impairments and conditions.[14] The broad coverage of the current ADA enables the inclusion and promotion of the disabled into activities of daily life.[15]

B. Being Disabled in a Functional World

Disability is inescapable and often inevitable; impairments and conditions, especially those which fall under the term "disability," may affect any person at any time.[16] According to the World Report on Disability, "[m]ore than a billion people are estimated to live with some form of disability, or about 15% of the world's population (based on 2010 global population estimates)."[17] The Pan American Health Organization has also estimated that 1 in 10 persons have some form of disability in the Americas.[18] Specifically, there were some 54 million citizens with disabilities in the U.S. in 2000.[19] Because of the prevalence of conflicts and increasing aging of the world, among other factors,

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[11] 42 U.S.C. § 12102(1) (2006).

[12] Given the broad definition of disability, the federal government estimates that, "12.9% of people between 21 and 64 years of age and 30% of those between 64 and 75 . . . have a disability." Leslie Neal-Boylan, Kristopher Fennie & Sara Baldauf-Wagner, *Nurses with Sensory Disabilities: Their Perceptions and Characteristics*, 36 REHABILITATION NURSING 25, 2011 WLNR 1301033 (Jan. 1, 2011) (using Bureau of Labor Statistics data). Disability—whether obvious or whether self-identified—is likely to be prevalent in the twenty-first century.

[13] 42 U.S.C. § 12102(1) (2006 & Supp. III 2009).

[14] *See* MyLinda K. Sims, *When Pigs Fly: Does The ADA Cover Individuals with Communicable Diseases Such as Novel H1N1 Influenza, "Swine Flu"*? 37 N. KY. L. REV. 463, 465–69 (2010) (comparing the definition of disability in the original ADA with the definition after the 2008 Amendments).

[15] *See, e.g.*, Joshua L. Friedman & Gary C. Norman, *The Paralympics: Yet Another Missed Opportunity for Social Integration*, 27 B.U. INT'L. L.J. 345, 351–52 (2009) (discussing the ADA definition after the 2008 Amendments in the context of daily activities).

[16] *See, e.g.*, David Ferleger, *Federal Disabilities and the Law: The Evolution of Independence*, 57 FED. LAW. 26, 27 (Sept. 2010) (discussing the prevalence and occurrence of disability).

[17] WORLD HEALTH ORGANIZATION, WORLD REPORT ON DISABILITY 261 (2011), *available at* http://www.who.int/disabilities/world_report/2011/report.pdf [hereinafter WHO REPORT ON DISABILITY].

[18] PAN AMERICAN HEALTH ORGANIZATION, HUMAN RIGHTS & HEALTH: PERSONS WITH DISABILITIES 1 (2008), *available at* http://www.paho.org/english/dd/pub/10069_Disabilities.pdf.

[19] Dana Whitehead McKee & Deborah D. Fleischaker, *ADA and the Internet: Must Websites Be Accessible*, 33 MD. B.J. 34, 35 (Nov./Dec. 2000), *available at* http://www.msba.org/departments/commpubl/publications/bar_journ/v33/33vn6.asp.

disability is on the rise in the global community.[20] The increasing prevalence of disability can be seen in two subpopulations of persons at the forefront of the expansion in the incidence of disability: women and wounded warriors.

Data illustrates that women with disabilities constitute a significant proportion of overall persons with disabilities.[21] Globally there are 300 million women or girls who have some form of disability.[22] Women also constitute three-fourths of people with disabilities in low- and middle-income countries.[23] Data show that women with disabilities are more likely than not to be unemployed or underemployed, are likely to be poor, and are likely to be excluded from equal access to an array of services, supports, and systems provided by civil society, such as access to the scientific and technological innovation in healthcare goods and services.[24]

Likewise, wounded warriors, who are returning home to the U.S. in record numbers, require our attention.[25] Approximately, one percent of the U.S. population serves in the armed forces.[26] With the advancement of science and technology, wounded warriors are returning home from the battlefront where they might not have in previous wars.[27] Because of the changing nature of urban warfare, including close-quarters combat and the rise of incendiary devices, wounded warriors suffer from a variety of disabilities with differing levels of severity, requiring long-term social support and services for both themselves and their families.[28] The types of disabilities sustained by wounded warriors will have consequential effect on the healthcare system, including the need for

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[20] *See* WHO REPORT ON DISABILITY, *supra* note 17, at 34–35.

[21] *See, e.g., id.* at tbl.2.1.

[22] *Women With Disabilities*, U.S. AGENCY ON INT'L DEV., http://transition.usaid.gov/our_work/cross-cutting_programs/wid/disability/wwd_statistics.html (last visited Jan. 18, 2013).

[23] *Id.*

[24] Stephanie Ortoleva, *Women with Disabilities: The Forgotten Peace Builders*, 33 LOY. L.A. INT'L. & COMP. L. REV. 83, 92–93 (2010).

[25] *See, e.g., Number of Disabled U.S. Veterans Rising*, CBS NEWS, Feb. 11, 2009, http://www.cbsnews.com/2100-201_162-4086442.html?pageNum=1&tag=page [hereinafter *Disabled Vets Rising*].

[26] Thomas J. Ridge, National Organization on Disability, *Standing Up for Veterans: A National Security Imperative*, NAT'L ORG. ON DISABILITY (Nov. 11, 2011), http://www.nod.org/news/harris_interactive_survey_largest_min. *See also* U.S. CENSUS BUREAU, CENSUS ATLAS OF THE US 201 (2000), *available at* http://www.census.gov/population/www/cen 2000/censusatlas/pdf/12_Military-Service.pdf (reporting that, in the 2000 census, taken prior to the 9/11 attacks, about 0.5% of the U.S. population over the age of 18 was active military and that about 12.7 % was veterans).

[27] *Disabled Vets Rising*, *supra* note 25.

[28] *See Legislative Presentation of the Paralyzed Veterans of America, Air Force Sergeants Association, Blinded Veterans Association, AMVETS, Gold Star Wives, Fleet Reserve Association, Military Officers Association of America and the Jewish War Veterans: Joint Hearing on Legislative Priorities of Various Veterans Service Organizations Before the S. Comm. On Veterans' Affairs*, 112th Cong. (2012) (statement of Alan E. Falk, National Commander, Jewish War Veterans of the USA, discussing the needs of veterans and their families), *available at* http://www.veterans.senate.gov/hearings.cfm?action=release.display&release_id=57d7ee60-a871-4636-ac26-5b7d5d1eb15f.

hospice care many years into the future.[29] As such, it is more critical than ever to ensure that disability is fully and actively accommodated within society.

C. Disabilities in an Inaccessible World

An inaccessible Information Age constitutes a barrier for many individuals with disabilities to living, learning, and earning. In an era where bits and bytes are beamed instantly back and forth, and then are translated into readable and useable information, there is no reason why these barriers should exist. Yet, people with disabilities are bereft of equal opportunities to participate in the life of society. In the next part of this Article, the authors argue that such exclusion is purely unnecessary and adherence to the Norman/Friedman Principle will help shift the conversation about information access in an evolving technological context.

With most entertainment and even office functions (such as word processing or meetings) shifting to online platforms, accessibility issues will continue to worsen if society does not adhere to or expand affirmative civil rights obligations.[30] Specifically, people with sensory disabilities have problems accessing the tools of the Information Age. For example, it is obstructive for a blind person when websites are not designed to function properly with a text-to-speech screen-reader.[31] Moreover, blind and deaf individuals will still encounter a ticket clerk at the film theatre or playhouse who might object to a request for audio description or captioning.[32] Similarly, a disabled person might want to enjoy the flotsam of reality television.[33] The ability of disabled persons to view television is sometimes not an easy task, unless there is a strong commitment to audio description and captioning on the part of society.[34] Consider a step further—the disabled, like others, aspire to be in good

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[29] *See, e.g.*, Andrew Taylor, *House Approves More Money for Veterans' Care*, THE VIRGINIAN-PILOT, June 1, 2012, at A5, *available at* http://www.highbeam.com/doc/1G1-291646062.html (discussing increasing funding for veterans' care).

[30] *See generally* Hayley M. Koteen, *Ending the Disconnect for the Deaf Community: How Amendments to the Federal Regulations Can Realign the ADA With Its Purpose*, 29 CARDOZO ARTS & ENT. L.J. 425, 428 (2011) (discussing the origin and scope of the original ADA and the accessibility problems related to information technology).

[31] *See, e.g.*, Thomas R. Burke, *Starting and Managing an Online Business*, *in* 1 INTERNET L. & PRAC. § 5:1 (2012) (discussing allegations in a 1999 lawsuit—later dismissed—that AOL discriminated against the blind by not having software that was compatible with screen-readers).

[32] This experience, and a few other examples within this Article, is based in part on the personal experiences of one or both of the authors. As previously stated, both authors are persons with disabilities—one is blind and the other is deaf.

[33] *See, e.g.*, *Here Comes Honey Boo Boo* (TLC: A Discovery Company 2012-present) (a reality television show about a child beauty pageant participant and her family living in rural Georgia).

[34] *See generally* Joshua S. Robare, Note, *Television for All: Increasing Television Accessibility for the Visually Impaired Through the FCC's Ability to Regulate Video Description Technology*, 63 FED. COMM. L.J. 553 (2011) (discussing the regulation of captioning activities).

health; this may include use of a gymnasium which may have no captioned televisions. Exercise opportunities in an ever-increasing technology-influenced world are notably poor.[35]

Additionally, people with sight disabilities often encounter difficulty accessing the Internet if they utilize a screen-reader.[36] Many commercial-oriented websites utilize HTML features, such as flash or graphics, to present a series of images and other information describing products and services. While this is important information, a screen-reader may not translate this information into speech if these features are not structured to function with assistive technology.[37] If a document has a PDF format without coding for screen-readers it will often be inaccessible to an individual using a screen-reader.[38] Individuals who identify as deaf or hard-of-hearing also have significant obstacles to accessing auditory-based information on the Internet or other forms of modern digital technologies.[39] Unless content from multimedia sources (such as Netflix, Amazon Instant Video, YouTube, or Google Play video content) is closed captioned or subtitled, the content is often rendered inaccessible.[40] This does not mean that all forms of technological innovation are detrimental; in fact, technology can also play a large role in providing access to areas previously inaccessible.[41]

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[35] *See, e.g.*, Janet E. Lord & Michael Ashley Stein, *Social Rights and the Relational Value of the Rights to Participate in Sport, Recreation, and Play*, 27 B.U. INT'L L.J. 249, 265–66, 270 (2009) (discussing the difficulties of disabled individuals participating in recreational activities); *see also* Darren Burton & Lee Huffman, *Exercising Your Right to Fitness: An Overview of the Accessibility of Exercise Equipment*, 8 ACCESSWORLD, no. 6, Nov. 2007, *available at* http://www.afb.org/afbpress/pub.asp?DocID=aw080603.

[36] For instance, "streaming" animation for a website, in the experience of one of the two authors who is blind, is sometimes tricky with a screen-reader. The Internet should be a place of public accommodation subject to affirmative civil rights protections, such as the ADA. *See, e.g.*, Burke, *supra* note 31 (discussing cases involving the issue of whether electronic "spaces" are places of public accommodation within the meaning of civil rights laws); *see also Screen Readers*, AM. FOUND. FOR THE BLIND, http://www.afb.org/prodbrowsecatresults.asp?catid=49 (last visited Dec. 31, 2012) (describing what a screen-reader is and the questions a user should ask to assess accessibility).

[37] Ryan Campbell Richards, Note, *Reconciling the Americans with Disabilities Act and Commercial Websites: A Feasible Solution?* 7 RUTGERS J.L. & PUB. POL'Y. 520, 549 (2010).

[38] RICHARD E. PETTY, INDEP. LIVING RESEARCH UTILIZATION AT THE INST. FOR REHAB. AND RESEARCH, TECHNOLOGY ACCESS IN THE WORKPLACE AND HIGHER EDUCATION FOR PERSONS WITH VISUAL IMPAIRMENTS: AN EXAMINATION OF BARRIERS AND DISCUSSION OF SOLUTIONS app. E, at 4 (2012)

[39] Allison Landwehr, *Amending the Digital Divide*, 23 SYRACUSE SCI. & TECH. L. REP. 90, 92–93 (2010).

[40] *See* Part IV.D.2.

[41] Researching and writing scholarly works would have been difficult in a time before screen-readers, although there are limited examples of successful scholars and authors finding creative solutions to pre-ADA hurdles, such as the blind poet Milton, who purportedly chained his assistants to help him work. *See, e.g.*, David Ferleger, *supra* note 16, at 27–28 (discussing persons with disabilities throughout history). That is not to suggest that leading disabled scholars never existed—they did. *See, e.g.*, Marc Maurer, *Jacobus tenBroek: Scholar and Leader*, 54 BRAILLE MONITOR, no. 7, July 2011, *available at* https://nfb.org/Images/nfb/Publications/bm/bm11/bm1107/bm110702.htm (documenting the life and achievements of Professor tenBroek, a founder of the National Federation of the Blind, and more importantly, a distinguished scholar). However, technological innovation, such as the screen-reader, is a tremendous advancement in the equality of opportunity for the disabled.

In sum, disability is more than an issue about the substantive legal framework that is or should be in place to provide a range of civil and human rights. If full integration is the goal of our republic, disability rights also must be associated with the accessibility of information and technology.

D. The Hastening Pace of Technological Advancements

Literary works, such as *A Connecticut Yankee in King Arthur's Court*, should remind the reader that, what may constitute alchemy or magic for one generation, constitutes the indispensible tools of everyday existence for another.[42] Whether one understands technological developments as magic or as indispensable tools, their impact on society is clear—as technology is often ahead of legal and other institutions, innovation in science and technology may help or hinder the affirmative rights of many individuals, including the disabled.[43] As such, the authors will discuss the development of relevant technology and then explore how such developments have benefited the disabled. When the technological developments discussed below are fully compared with the lack of accessibility experienced by the disabled, the stage will then be set for a discussion of the Norman/Friedman Principle, including recommendations put forward by the authors.

1. A Historical Overview

Innovations in science and technology have a commonality: their pace of rapid development and incorporation into the populace. Some have argued that, since the early 1970s, the world has been experiencing a wave of development "centered on all the technologies and innovations emerging from the computer chip."[44] To this end, innovations in science and technology during this timeframe have been remarkable: the computer, social media advancements (such as Facebook), and so-called "smart phones."[45] Moreover, these innovations are increasing the kinds of technologies incorporated into daily activities; these technologies may

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[42] *Cf.* Twain, *supra* note 1.

[43] Rita M. Lauria & George S. Robinson, *From Cyberspace to Outer Space: Existing Legal Regimes Under Pressure from Meta-Technologies*, 33 U. LA VERNE L. REV. 219, 223 (2012) ("However, legal systems always lag in response to the breaking wave of effect that rushes over society and culture from the "magic" of sufficiently advanced technologies.").

[44] *See, e.g.*, Kenneth B. Taylor, *In the Search of Our "Better Angels" of Our Future*, 46 FUTURIST 23, 25 (2012).

[45] *See, e.g.*, Michal Raz-Chaimovich, *Meir Brand: Man and Machine Will Merge*, GLOBES ONLINE, Oct. 30, 2012, http://www.globes.co.il/serveen/globes/docview.asp?did=1000794175&fid=1724 (discussing technological advancement).

even become part of our very bodies.[46]

Seemingly, scientific and technological change may originate and advance in unexpected ways. For instance, Braille, the indispensable reading tool of the blind, initially developed in the French army, later transferred to the civilian sector.[47] Similarly, a top-secret research agency of the Department of Defense played a major role in the invention of the Internet.[48] The social media platform Facebook is one such example of technological change inspired by developments in the university environment.[49]

The Internet, and other features of the Information Age it embodies, is a primary and indispensable facet of everyday life. In 1995, about 16,000 persons utilized the Internet.[50] In 2001, this usage rate increased to 513 million persons.[51] By 2007, over 1.3 billion people utilized the Internet, a 21 % increase from the previous year.[52] With such increased usage, and the advent of smart phones enabling immediate access to the Internet, corporations are becoming hard-pressed to develop the latest and greatest technologies to appease the masses. The Internet has dramatically changed society and will continue to affect society—it is too important for leaders not to ensure universal access to it.[53]

Regardless of the rate of change and where it originates, technology is globalizing humanity, bringing all of us closer through a network of information about which Gutenberg could have only dreamed. The printing press arguably democratized knowledge by taking the information access that was solely in the hands of the privileged few and spreading it to the masses. An accessible Information Age may serve a similar purpose—namely, it could be an equalizer among the able-bodied and the disabled. As one scholar has noted, "the Internet is at once a world-wide broadcasting capability, a mechanism for information

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[46] *Id.*

[47] *See* RUSSELL FREEDMAN, OUT OF DARKNESS: THE STORY OF LOUIS BRAILLE 34–35, 46, 58 (1997); *see also Braille History*, ENABLING TECH., http://www.brailler.com/braillehx.htm (last visited Oct. 30, 2012).

[48] *See, e.g.*, Susan P. Crawford, *Internet Think*, 5 J. TELECOMM & HIGH TECH. L. 467, 469–71 (2007) (discussing the Advanced Research Projects Agency Network (ARPANET), a predecessor to the Internet.); *see also* Steve Fritzinger, *How Government Sort of Created the Internet*, THE FREEMAN (Oct. 3, 2012), http://www.fee.org/the_freeman/detail/how-government-sort-of-created-the-internet/#axzz2GfRQh9mP (discussing the role of the Department of Defense in creating networking that led to the Internet).

[49] *See, e.g.*, *Facebook Inc.: Overview*, NYTIMES.COM, http://topics.nytimes.com/top/news/business/companies/facebook_inc/index.html (last visited Dec. 12, 2012) ("Created in 2004 by Mark Zuckerberg in his dorm room at Harvard, Facebook grew from being a quirky site for college students into a popular platform that is used to sell cars and movies, [etc.]").

[50] INTERNET WORLD STATS: INTERNET GROWTH STATISTICS, http:// www.internetworldstats.com/emarketing.htm (last visited Jan. 2, 2013).

[51] *Id.*

[52] *Id.*

[53] The Maryland Department of Disabilities is a vocal advocate on ensuring the accessibility of the Internet. *See, e.g.*, Remarks of Andrew D. Levy, Chair, Maryland Commission on Disabilities, Remarks at the Maryland Celebration of the 22nd Anniversary of the ADA (July 26, 2012), *available at* http://www.browngold.com/wbcntntprd1/wp-content/uploads/Levy-ADA-celebration-remarks-2012-2.pdf.

dissemination, and a medium for collaboration and interaction between individuals and their computers without regard for geographic location."[54] As such, this important equalizing function will only be realized if the Internet is fully accessible.

2. *Disabled Access to Information*

There are many hasty generalizations and common stereotypes regarding how disabled people access information. A common misunderstanding is that all blind people utilize Braille or that Braille is the sole accommodation for accessing information.[55] Believing that blind people, or other populations of disabilities, do not utilize the computer including the Internet is unreasonable.[56] Just as one example, one of the authors is blind. He utilizes a program that verbalizes electronic programs such as email and word processing into speech, so that he can research, review materials, and even write this article.[57] Even those who are more aware of these issues may not be completely familiar with the full range of accommodations for reading and accessing information available to individuals with sensory-related disabilities.

There is a broad range of emerging technologies that aid or enhance the daily lives of the disabled. For example, visually impaired individuals may access information by way of synthetic speech or through captioning.[58] For example, blind individuals often utilize what is called a screen-reader, which provide synthetic speech, reading aloud the contents of a computer screen.[59] Several companies, including Freedom Scientific, hold a substantial share of the market for screen-reading technology.[60] The proprietary software of Freedom Scientific, called

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[54] Patricia A. Broussard, *Now You See It Now You Don't: Addressing the Issue of Websites Which Are "Lost in Space"*, 35 OHIO N.U. L. REV. 155, 163–64 (2009).

[55] In the understanding of one of the authors, a leader in the blindness community, it is generally accepted that most people with various levels of severity of vision loss do not know Braille. This phenomenon is troubling in light of the argument of many leaders in the blindness civil rights movement that Braille is condition precedent to personal and professional life success. *See, e.g.*, Mitch Pomerantz, *President's Message: Employment of the Blind Today and Tomorrow, Part II*, THE BRAILLE FORUM (April 2012), *available at* http://www.acb.org/node/828.

[56] *See* Jacquie Brennan, *Is Your Law Firm Website Accessible?*, 71 TEX. B.J. 264, 265 (2008) (discussing the variety of ways that persons with disabilities use computers and access the Internet).

[57] *See, e.g.*, Kenneth Hirsh, Sharon Krevor-Weisbaum, Gary Norman, & Bryan Rapp, Transcript, *Technology: Are You (And Your Vendors) Ahead of, Behind, or on the Curve?* 19 AM. U. J. GENDER SOC. POL'Y & L. 1189 (2011) [hereinafter *Am. U. Technology Discussion*]. One of the present authors delivered remarks as part of a panel at the bi-annual disability law and policy conference hosted by Washington College of Law, American University. The remarks emphasized the importance of an ongoing dialogue with a range of actors in society. The authors have co-founded the Mid-Atlantic Lyceum as a platform for such dialogue.

[58] Brennan, *supra* note 56, at 265.

[59] *Id.*

[60] *See Screen Reader User Survey #2 Results*, WEBAIM.ORG, http://webaim.org/projects/screenreadersurvey2/ (last visited Jan. 2, 2012) (65% of respondents reported using the JAWS software).

JAWS, has a rich and complex set of coding that allows for manipulation of the computer through alternative means.[61] With a screen-reader, a blind person will manually input the information.[62] There is also software for the visually impaired that magnifies the screen's contents.[63] Moreover, for computer users who are both blind and hearing-impaired, refreshable Braille devices can read text from a website and convert it into Braille characters that the user can touch.[64] An array of additional accommodations is available to those with other disabilities.[65]

Hearing impaired individuals may be aided by technologies such as video interpreting services.[66] The Department of Justice (DOJ) defines this technology as "a video phone, video monitors, cameras, a high-speed Internet connection, and an interpreter."[67] The video phone allows a user to view and sign to an interpreter who can see the user and speak with the recipient of the call.[68] The video monitor can display a split screen of two live images, with the interpreter in one image and the individual who is deaf or hard-of-hearing in the other image.[69]

For the blind, even books and newspapers are migrating to the Internet. The National Library Service for the Blind and Physically Handicapped, a Division of the Library of Congress, operates an online book site called Braille and Audio Reading Download (BARD).[70]

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[61] *JAWS for Windows Screen Reading Software*, FREEDOMSCIENTIFIC.COM, http://www.freedomscientific.com/products/fs/jaws-product-page.asp (last visited Jan. 2, 2013).

[62] *See* Brennan, *supra* note 56, at 265 ("[T]here must be a great deal of contrast between the text and the background. For screen readers, it's important to add tags, often called alt-text (for alternative text), which provides verbal information about things on the screen that are provided visually. For example, if there are photographs or graphics on the website, alt-text would provide information about what is in the picture, which the screen reader would then verbalize. Alt-text doesn't show up on the website at all and is 'seen' only by screen readers.").

[63] *Id.*

[64] *See, e.g.*, Darren Murph, *N.C. States' Refreshable Braille Display Could Revolutionize Reading for the Blind*, ENGADGET.COM, Apr. 1, 2010, http://www.engadget.com/2010/04/01/nc-states-refreshable-braille-display-could-revolutionize-readi/.

[65] Brennan, *supra* note 56, at 265

[66] Douglas M. Pravda, *Understanding the Rights of Deaf and Hard of Hearing Individuals to Meaningful Participation in Court Proceedings*, 45 VAL. U. L. REV. 927, 939–40 (2011); *see id.* at 935 ("The ADA defines 'auxiliary aids and services' to include 'qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments.' The DOJ recently amended its regulations implementing Title II of the ADA. The amended regulations, which took effect March 15, 2011, set forth a number of specific examples of 'auxiliary aids and services,' including qualified interpreters on-site or through **video** remote interpreting (VRI) services; note takers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and **video**-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing." (citations omitted)).

[67] 28 C.F.R. § 35.104 (2012).

[68] Pravda, *supra* note 66, at 939–40.

[69] *Deaf Get Chance to 'Talk' on Phone*, CBSNEWS.COM, Feb. 11, 2009, http://www.cbsnews.com/2100-205_162-595942.html.

[70] *Bringing Joys of A Great Book to Blind and Visually Impaired Readers*, RICHMOND TIMES-DISPATCH, Sept. 18, 2012, http://www.timesdispatch.com/online_features/community_cares/

Patrons, many of whom are legally blind or have other related disabilities, are able to download books to a flash drive or to the computer, allowing them to enjoy the content.[71] Patrons may also read books under the auspices of the National Library Service by usage of digitally recorded and stored books on flash cartages that a specialized machine will play for them.[72] Finally, the National Federation of the Blind provides, free-of-charge, a newspaper and magazine service called Newsline, a telephonic-based program with electronic and e-mail functions.[73]

Furthermore, this article would not be complete without a mention of accessible telecommunications devices, or smart phones, such as the iPhone. Our current smart phones provide remarkable information access, storage, and retrieval. These current devices provide an array of functions, many of which are accessible and helpful for people with disabilities because of text-to-speech applications (or "apps") that are downloadable to the phones.[74] Scanning and verbalizing currency to the blind is but one of the myriad functions that these devices facilitate.[75] Smart phones also allow people to monitor their health and transmit this important data to healthcare providers.[76]

At a minimum, technological developments continue to spur inclusiveness in society. However, their utility depends on a society that is committed to narrowing the road to inclusion. For example, a screen-reader program like JAWS can verbalize an Internet site, only when the site is rendered accessible, meaning that it has been constructed to meet accessibility standards, guidelines, and parameters. The initial costs to ensure such accessibility are generally small if the issue is handled during the website's development.[77] Costs can increase if the website must be retrofitted to provide for accessibility.[78] While there is a policy framework providing guidelines for the construction of accessible

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bringing-joys-of-a-great-book-to-blind-and-visually/article_d6d9ffa6-de2d-5c62-987a-276b47b76ce3.html.

[71] *See id.* (describing BARD).

[72] *Id.*

[73] *See* Matthew Bieniek, *Newsline Gives Access to Newspapers*, CUMBERLAND TIMES-NEWS, Aug. 22, 2011, http://times-news.com/local/x531750710/Newsline-gives-blind-access-to-newspapers.

[74] *See, e.g.*, Natasha Baker, *Georgie App for the Blind Helps Visually Impaired Android Users Navigate Everyday Life*, HUFFINGTON POST, July 23, 2012, http://www.huffingtonpost.com/2012/07/23/georgie-app-blind_n_1694056.html?utm_hp_ref=technology.

[75] *E.g.*, Elizabeth Tyler, *No More Missing Money: New App Allows Blind People to "See" Their Dollars*, TIME NEWSFEED, March 11, 2011, http://newsfeed.time.com/2011/03/11/no-more-missing-money-new-app-allows-blind-people-to-see-their-dollars/.

[76] Sherry Boschert, *Star Trek Tricorders Coming to Medicine*, INTERNAL MED. NEWS, Sept. 15, 2012, at 39 (this feature is particularly important in the case of diabetes, which is a leading cause of blindness).

[77] Kel Smith, *The Missing Link: Understanding Web Accessibility*, 53 NO. 3 PRAC. LAW. 31, 32 (2007) ("website accessibility is a fairly exact science and easily accomplished, provided that early in the process, there are time and resources dedicated to compliance").

[78] *Id.* at 34.

websites,[79] many still do not understand the need for accessibility, and therefore, people with disabilities can be effectively shut out from accessing the Internet.[80]

Thus, the need to have an accessible society is seemingly achievable and is also self-evident. Today, the problem is not solely the lack of affirmative legal obligations on actors in society; it is also a lack of an affirmative commitment to creating an accessible world—namely, development of technology that is affordable, accessible, and useable by the disabled to advance compliance with those obligations. Thus, to further this discussion, this Article will shift to discussing the Norman/Friedman Principle, arguments for the Principle, and measures to be advanced in furtherance of the Principle.

III. THE NORMAN/FRIEDMAN PRINCIPLE

A. Federal Law and the Norman/Friedman Principle

As discussed thus far in this Article, technological innovation may advance or inhibit the opportunities of the disabled. Promoting, fostering, and creating a world open to technological innovation, while also safeguarding against negative side effects of that innovation requires a balance.[81] In the past, actors in society utilized some scientific and technological advances in misguided and detrimental ways, such as in the institutionalization and sterilization of those alleged to be insane or

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[79] *See generally id.* at 34 ("Those who published the content, however, wanted more options in terms of colors, fonts, and imagery. They wanted to format the text in various ways, add a picture, and draw lines and shapes. They began to manipulate HTML into presentation styles that weren't intended for primitive browsers. Because Internet software at the time wasn't adaptable to these highly personalized methods, page display varied from one computer to another. Web design as we know it had sprouted, and it was a mostly unpredictable craft with erratic results. . . . The needs of the disabled user were jettisoned in favor of bloated, poorly coded pages that looked nice but lost cohesion when read by speech readers. Multimedia capabilities such as sound and video, with no governing standards to regulate their use, left disabled users further recessed on the scope of priorities. An interesting thing happened in the next decade, however. . . . [T]he 'Web standards' movement[ ]resulted in lighter pages that were easier to manage. A number of free, compliant-standard browsers cropped up: Mozilla Firefox, Apple's Safari, and Opera. The focus was back on content, not presentation, and that resulted in more accessible pages. As of this writing, the Internet is converting back to an all-text model, only this time with the same potential for visual appeal that creators of non-compliant websites enjoy.").

[80] *See generally Am. U. Technology Discussion*, *supra* note 57.

[81] *See, e.g.*, George P. Smith II, *Law, Medicine, and Religion: Toward a Dialogue and a Partnership in Biomedical Technology and Decision-Making*, 21 J. CONTEMP. HEALTH L. & POL'Y. 169, 175–76 (2005) ("[I]t will be seen that, far from being antagonistic to law and medicine, religion and religious principles can stabilize the field of biomedicine and serve additionally as vectors in shaping both ethical and moral constructs for decision making. In turn, each of these three disciplines complements and strengthens what should be the ultimate goal of the state: to secure the happiness, spiritual tranquility, and well-being of its citizens. This purpose is, in turn, advanced and enhanced by safeguarding the genetic well-being and general health of its citizens.").

the medical experimentation on those alleged to be "defective."[82] In light of such practices in American history, imbuing science with both a moral compass and a commitment to affirmative civil and human rights must be a priority both here in the U.S. and on an international level.[83]

The passage of the ADA in 1990 ushered in new affirmative protections for people with disabilities in, among other areas, public accommodation.[84] The statutory scheme preceded the Internet revolution of the 1990s, and thus failed to account for a new public forum: the digital world. As Massachusetts Representative Edward Markey wrote, "two decades ago, the ADA mandated physical ramps into buildings. Today, individuals with disabilities need online ramps to the Internet so they can get to the Web from wherever they happen to be."[85]

Congress passed the ADA, a landmark piece of legislation, as an attempt to further civil rights aspirations for disabled individuals.[86] President George H. W. Bush signed the ADA into law on July 26, 1990.[87] The ADA's five titles encompass an array of public services, venues, and goods of private and governmental actors in an attempt to improve civil rights protections for people with disabilities.[88] Congress

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[82] Demonstrating early 20th Century prejudice, Justice Holmes stated, in the 1927 case of *Buck v. Bell* that "three generations of imbeciles are enough" in justifying the Court's decision to allow sterilization of a woman with cognitive disabilities. *See* 274 U.S. 200, 207 (1927). While compulsory sterilization of women with disabilities is certainly no longer sanctioned as a form of the community's right to defend itself from public health epidemics, as was suggested in *Buck v. Bell*, societal misconceptions about the sexual rights of persons with disabilities persist. *See generally* Holly Anne Wade, *Discrimination, Sexuality, And People With Significant Disabilities: Issues of Access and the Right to Sexual Expression in the United States*, 22 DISABILITY STUD. Q. 9 (2002), *available at* http://www.dsq-sds.org/article/view/369/485 ("At the turn of the [twenty-first] century, many individuals with significant disabilities began to realize their dreams and have their rights recognized. During the past two decades, the quality of life for individuals with significant disabilities has improved. As a result of groundbreaking litigation, disability rights legislation, advocacy on the part of persons with disabilities and their family members, people with disabilities can no longer be subjected to institutionalization, involuntary sterilization, over medication, over restraint, aversive interventions, and denial of health and other care. However, history continues to perpetuate misconceptions about sexuality and disability." (internal citations omitted)).

[83] As delegates convened in Washington, D.C., during July 2010, to commemorate the twentieth anniversary of the ADA, it was clear that more work is needed on a full range of ways in which the disabled may seek to live, learn, and earn equally. *See National Summit on DisABILITY Policy*, NATIONAL COUNCIL ON DISABILITY, http://www.neweditions.net/ncd2010/index.html (last visited Jan. 3, 2013). As one author can recall from the conference, which he attended as an Associate Civil Rights Commissioner, there was a generalized belief that more is needed, either through enforcement or other practice measures, to ensure greater access. The array of approaches discussed informally in a breakout session included dispute resolution, an important tool that can be used to address this issue. *See generally* Debra T. Berube & Gary C. Norman, *Improving Healthcare Access for People with Disabilities: A Call to Maryland's Leaders*, 45 MD. B.J. 2 (Mar./Apr. 2012) (how dispute resolution should be applied within the context of healthcare disparities of the disabled, whether because of a lack of education or outright discrimination).

[84] *See, e.g.*, Sims, *supra* note 14, at 464–65 (discussing the historical significance of the passage and reception of the ADA).

[85] *Markey Celebrates First-Year Milestone for Making 21st Century Tech Accessible to All*, MARKEY.HOUSE.GOV, Oct. 7, 2011, *available at* http://markey.house.gov/press-release/oct-7-2011-markey-celebrates-first-year-milestone-making-21st-century-tech-accessible.

[86] Sims, *supra* note 14, at 464–65.

[87] RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 5 (2005).

[88] *Id.* at 17–21 (giving an overview of the ADA's language and structure); *cf.* 135 Cong. Rec.

intended the ADA to provide a broad mandate for eliminating invidious discrimination, such that persons with disabilities would no longer be excluded from the mainstream of society.[89] However, more than 20 years after the enactment of the ADA, its goals have not been fully realized[90] and new barriers are emerging in the Information Age. In this context, it is imperative that society adopt the Norman/Friedman Principle, which will help to unify existing laws and ensure that actors in society are committed to realizing the mandate of the original ADA and the aspirations it embodied.

Specifically, Congress intended that the ADA, a comprehensive statutory scheme, would eradicate discrimination by employers (Title I), state and local governments (Title II), and private venues or places of public accommodation (Title III).[91] At the time when Congress passed the ADA, the Internet was still a few years from its robust expansion into the American psyche.[92] Naturally, when Congress drafted the ADA, it may not have anticipated today's digital landscape.

In the early 1990s, then-Senator Al Gore had just pushed through legislation effectively forming the "Internet superhighway."[93] At the time, the dot-com bubble had not yet started. Google had not yet been invented by Larry Page and Sergey Brin.[94] Apple had just released its first portable computer model.[95] Prodigy, Compuserve and AOL were the biggest names in the game.[96] Starbucks had just gone public.[97] The Internet boom was just starting; these were heady, new, and unexplored frontiers.

While the ADA did not help achieve Internet accessibility, amendments to the Rehabilitation Act of 1973, a predecessor to the ADA, impose a requirement that websites and other information technology owned, operated, or controlled by the government, be accessible to people with sensory disabilities.[98] Section 508 of the

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19804 (1989) (statement of Sen. Orrin Hatch).

[89] *Id.*

[90] *See generally Americans With Disabilities Act At 20—Celebrating Our Progress, Affirming Out Commitment: Hearing before the S. Comm. on the Constitution, Civil Rights, and Civil Liberties*, 111th Cong. 39-41 (2010) (statement of Dick Thornburgh, Former U.S. Att'y Gen.), *available at* http://judiciary.house.gov/hearings/printers/111th/111-110_57559.pdf.

[91] COLKER, *supra* note 87, at 2–3.

[92] *See* JANET ABBATE, INVENTING THE INTERNET 181, 218 (1999) (the Internet began to be widely available to the public in the 1990s and its popularity grew through the decade).

[93] *See* Ryan Singel, *The Internet Gets a Hall of Fame (Yes Including Al Gore)*, WIRED, Apr. 25, 2012, *available at* http://www.cnn.com/2012/04/24/tech/web/internet-hall-of-fame/index.html.

[94] *Our History in Depth,* GOOGLE, http://www.google.com/about/company/history/ (last visited Jan. 3, 2012).

[95] *Timeline: Apple Milestones and Product Launches*, REUTERS, Mar. 2, 2011, *available at* http://www.reuters.com/article/2011/03/02/us-apple-timeline-idUSTRE72170T20110302.

[96] *See* Dr. Anthony Curtis, *The Brief History of Social Media,* UNC PEMBROKE, http://www.uncp.edu/home/acurtis/NewMedia/SocialMedia/SocialMediaHistory.html (last visited Jan. 4, 2013) (providing a timeline of the development of the Internet).

[97] *Forty Years Young: A History of Starbucks*, THE TELEGRAPH, May 11, 2011, http://www.telegraph.co.uk/finance/newsbysector/retailandconsumer/8505866/Forty-years-young-A-history-of-Starbucks.html.

[98] 29 U.S.C. § 794d(a)(1)(A)(ii) (2006). Section 504 of the Rehabilitation Act of 1973

Rehabilitation Act imposes an affirmative requirement on the federal government to ensure the accessibility of information technology.[99] Specifically, "[§] 508 requires the [federal government] to publish standards setting forth a definition of electronic and information technology and the technical and functional performance criteria necessary for accessibility for such technology."[100] In addition to tasking the federal government with implementing § 508 of the Rehabilitation Act, its amendments

> require[] that when federal agencies develop, procure, maintain, or use electronic and information technology, they shall ensure that the electronic and information technology allows federal employees with disabilities to have access to, and use of, information and data that is comparable to that enjoyed by federal employees who are not individuals with disabilities.[101]

Furthermore, § 508 requires a federal agency to provide comparable "access to, and use of, information and data" for disabled individuals (not just those who are federal employees) who are seeking information and/or services.[102] However, this important addition to the Rehabilitation Act has limited coverage in that it applies only to federal agencies and not to private businesses or the general public.[103] Congress has yet to address this shortcoming and the DOJ has abstained from using rulemaking to nudge federal law toward complete accessibility.[104] This is where the Norman/Friedman Principle is important.

As discussed herein, the ADA, and the Rehabilitation Act that preceded it, are important tools for protecting the disabled. Yet, it is difficult for statutory enactments to keep coterminous with technological developments. To return to the Norman/Friedman Principle, society must proactively implement existing protections and, when said protections are not realizing their intended purposes, create and implement affirmative legal obligations. In today's Information Age, individuals

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contained the first federal prohibition against discrimination on the basis of "handicap." *Id.* §§ 701–797b. The ADA borrowed substantially from the Rehabilitation Act. COLKER, *supra* note 87 at 10–15. Section 508 (electronic equipment accessibility) was added in the Amendments to the Rehabilitation Act in 1986. 29 U.S.C. §§ 701–797b (2006).

[99] *Id.* § 794d(a)(1)(A)(ii).

[100] Jonathan Bick, *Americans with Disabilities Act and the Internet*, 10 ALB. L.J. SCI. & TECH. 205, 210 (2000).

[101] *Id.*

[102] *Id.* at 210–11.

[103] *See* Eve Hill & Peter Blank, *Future of Disability Rights Advocacy and "The Right to Live in the World"*, 15 TEX. J. C.L. & C.R. 1, 18 (2009) (discussing the limited reach of § 508).

[104] *See* Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460, 43465 (proposed July 26, 2010) (codified at 28 C.F.R. pts. 35, 36) ("It is the [Justice] Department's intention to regulate only governmental entities and public accommodations covered by the ADA that provide goods, services, programs, or activities to the public via Web sites on the Internet. Although some litigants have asserted that 'the Internet' itself should be considered a place of public accommodation, the Department does not address this issue here.").

with disabilities who are given the technological tools to succeed (or at least the accommodation that renders them equal to their fellow man) are more likely to do so, and society will be better for it.

B. Current Developments, Ethical Considerations, and Constitutional Considerations

1. An Ethical Note

Some principles of distributive justice weigh in favor of greater access for the disabled. On the whole, principles of distributive justice can be "best thought of as providing moral guidance for the political processes and structures that affect the distribution of economic benefits and burdens in societies."[105] Distributive justice analysis begins by establishing a criterion of distribution and then encouraging policies that allocate resources to persons in accordance with the guiding principle.[106] Some theories of distributive justice emphasize that the equality interests of disadvantaged minority groups should not be outweighed by the preferences of the majority to maintain the status quo.[107] Because persons with disabilities are a significant part of society, institutions should aim toward eliminating the practices that limit the opportunities of those affected by disability.

An antiquated view holds, however, that the disabled constitute the weaker part of the herd; they should be cast off as they provide no value to, but rather, impose financial and other burdens on society. [108] Scholar Andrienne Asch provides a simple but eloquent rebuttal to this argument:

> When commentators talk about the social costs of providing medical care, education, or supportive services for children and adults with disabilities, they neglect to point out that non-disabled children and adults require societal investment; that the costs of creating an accessible society must be borne

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[105] *Distributive Justice*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (last updated Jan. 2, 2013), http://plato.stanford.edu/entries/justice-distributive/.

[106] *See id.*

[107] *See id.* (discussing critiques of utilitarianism, particularly the theories of John Rawls).

[108] *See, e.g.*, Robert L. Burgdorf, Jr., *Restoring the ADA and Beyond: Disability in the 21st Century*, 13 TEX. J. C.L. & C.R. 241, 262–63 (2008) ("All too often, the courts have exhibited long-held, antiquated notions about disability and about the role of government in addressing disability. If courts think of people with disabilities as not capable of working, for example, anyone who is able to work must not be disabled. Similarly, access barriers were historically viewed by many people as being barriers because of an individual's disability, as opposed to the problem being the barrier itself. When a person with a mobility impairment could not cross a street with curbs, the person's disability was considered to be the reason, as opposed to recognizing that the design of the curb was deficient because it was done with only certain types of people in mind, when it could just as easily have been designed to be usable by all.").

> simply to assist the vast majority of people with non-diagnosable, non-genetic conditions that arise during a life; and that people with disabilities can contribute to the economy and to their families by virtue of the characteristics they have in addition to their impairments.[109]

Arguably, a just and modern society should commit itself to equally distributing the tools necessary for pursuing a prosperous life. Technology access is a tool that, as the authors have argued, facilitates equal opportunities for the living, learning, and earning of the disabled. When they are equally given the ability to do so, the disabled can provide, and have provided, a full range of economic value, community benefit, and relational value to society. While current federal law, such as the ADA, has had the positive effect of shifting, even if slowly, the conversation about the full equality of the disabled within society, additional legal protections, including potentially a constitutional right to equal information access, might further eradicate barriers that can have a discriminatory effects.

2. The Convention on the Rights of People with Disabilities

The United Nation's Convention on the Rights of People with Disabilities (the Convention) provides a strong legal framework, on an international scope, for protecting and promoting the inclusion and integration of the disabled in all facets of daily life. Some have said that, "[a]s the first human rights treaty of the twenty-first century, as well as the first legally enforceable United Nations instrument specifically directed at the rights of persons with disabilities, the Convention [has] usher[ed] in a new era of international human rights law and practice."[110] In that the Convention is consistent with the aspirations, and even the broad principles, of the ADA,[111] the United States must be the leader in this new era of disability awareness and adopt the Convention.

By 2001, disability rights emerged as a serious human rights issue on the agenda of the United Nations. The General Assembly established an ad hoc committee to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities, based on the holistic approach in the

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[109] Andrienne Asch, *Disability Equality and Prenatal Testing: Contradictory or Compatible?*, 30 FLA. ST. U. L. REV. 315, 337 (2003) (internal citations omitted).

[110] Janet E. Lord & Michael Ashley Stein, *The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities*, 83 WASH. L. REV. 449, 450 (2008)

[111] John B. Bellinger III, *Obama's Weakness on Treaties*, N.Y. TIMES (Dec. 18, 2012), http://www.nytimes.com/2012/12/19/opinion/obamas-weakness-on-treaties.html ("The disabilities convention was negotiated between 2002 and 2006, and 126 countries have since become full parties to it. Much of it is modeled on the Americans With Disabilities Act.").

work done in the fields of social development, human rights and non-discrimination and taking into account the recommendations of the Commission on Human Rights and the Commission for Social Development.[112]

The United Nations adopted the Convention and an Optional Protocol to implement it on December 13, 2006 in New York; the two documents entered into force on May 3, 2008.[113] For countries that adopt the Convention, it should provide a critical mechanism in contributing to the democratization of society (including with regard to technology access) for the disabled.[114]

The Convention and its Optional Protocol arguably provide "robust mechanisms to promote national compliance with and implementation of the obligations" set forth in the instruments.[115] While this Article cannot hope to catalog the many provisions of the Convention and its Optional Protocol, it is worth noting that these instruments are unique among international human rights instruments in that they have specific and strong provisions and language regarding national level monitoring.[116] The Convention, as noted below, has specific language concerning technology and information access. In short, Article 9 addresses accessibility, Article 21 addresses freedom of expression and opinion and access to information, and Article 24 addresses education.[117] Taken together, these provisions provide a remarkable right to information and technology access.

Specifically, Article 9 of the Convention is important in that its language imposes affirmative accessibility mandates, including development of early universal design standards and, where existing, the removal of physical and communication barriers.[118] In a related vein,

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[112] G.A. Res. 56/168, U.N. Doc. A/RES/56/168 (Feb. 26, 2002).

[113] Lord & Stein, *supra* note 110, at 450. From the perspective of the authors, the Convention and its Optional Protocol are critical. The provisions of these international instruments will, the authors hope, through their affirmative mandates such as equal access to healthcare (Article 25 of the Convention), galvanize the global community to recognize the affirmative human and civil rights of people with disabilities. *See* U.N. Secretariat for the Convention on the Rights of Persons with Disabilities, *Convention on the Rights of Persons with Disabilities*, UNITED NATIONS ENABLE, http://www.un.org/disabilities/default.asp?id=150 (last visited Jan. 7, 2013).

[114] *See* Lord & Stein, *supra* note 110, at 458 (discussing the Convention's mandates regarding technological access and the role of disabled persons in the creation of domestic accessibility legislation).

[115] Janet E. Lord, David Suozzi & Allyn L. Taylor, *Lessons from the Experience of U.N. Convention on the Rights of Persons with Disabilities: Addressing the Democratic Deficit in Global Health Governance*, 38 J.L. MED. & ETHICS 564, 569 (2010).

[116] *See id.* at 570 (listing instances of affirmative mandatory language).

[117] United Nations Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3. The Optional Protocol was adopted at the same time, Optional Protocol to the Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Dec. 13, 2006). The Convention's text, along with its drafting history, resolutions, and updated list of signatories and States Parties is posted on the United Nations Enable website: http://www.un.org/esa/socdev/enable/rights/convtexte.htm.

[118] *See* United Nations Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3. (Article 9 requires participant states to provide access, which implicitly requires accessible design, and expressly says that the mandate "include the identification and elimination of obstacles and barriers to accessibility").

Article 19 of the Convention is no less important in that its language addresses the right of persons with disabilities to reside in the community, rather than in institutions excluded from the public, as has been the historical practice.[119] Arguably, the Convention is stronger in its goals of shifting people with disabilities from the institution to the community than previous international instruments. Under Article 19, supports and services must be furnished first in the furtherance of allowing people with disabilities to live in the community; institutionalization is a last resort.[120] Obviously, the development and robust adaptation of technology in the community must be at the heart of such supports and services.

Additionally, Articles 31 through 40 provide the monitoring and reporting mechanisms of the Convention, imposing affirmative obligations on state parties to actively comply with and implement the affirmative obligations and to involve people with disabilities in the process.[121] The Convention has a state reporting mechanism, and reports are submitted to a Committee on the Rights of Persons with Disabilities at the United Nations.[122] The Optional Protocol to the Convention provides for additional mechanisms to focus attention on human rights violations of state parties and to encourage state parties to address violations: namely, it provides for the transmittal of communications and the convening of investigatory inquiries regarding egregious violations, though the communications are often confidential and any resulting recommendations are not enforceable.[123]

At this stage of international advancement of disability rights, as shown by the work on the Convention, the United States must be a leader at the forefront of promoting technology access. The Convention will only apply to the United States if the Senate ratifies the instruments.[124] While the Senate Foreign Relations Committee favorably reported ratification of the instruments,[125] the full Senate failed to adopt the convention in December of 2012.[126] If the United States eventually

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[119] *See id.* ("States Parties to this Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community").

[120] *See id.* (persons with disabilities would have a basic right to choose where they live but facilities would be available).

[121] *Id.*

[122] *Id.*

[123] Lord, Suozzi & Taylor, *supra* note 115, at 570–71.

[124] *See* Jennifer Steinhauer, *Dole Appears, but G.O.P. Rejects a Disabilities Treaty*, N.Y. TIMES, Dec. 4, 2012, at A23 ("The measure, which required two-thirds support for approval, failed on a vote of 61 to 38."); *see also* U.S. CONST. art. II, § 2, cl. 2 (stating that the President has the power to make treaties with the advice and consent of the Senate).

[125] Melanie Brunson, *Update on the Convention on the Rights of Persons with Disabilities*, BRAILLE FORUM, October-November 2012, http://www.acb.org/node/1024 ("Then, on July 26, 2012, the Senate Foreign Relations Committee passed the Convention on the Rights of Persons with Disabilities (CRPD) by a vote of 13-6. Sen. John Kerry (D-Mass.), chairman of the foreign relations committee, said that he would prefer to get this treaty to the floor as soon as possible.").

[126] Steinhauer, *supra* note 124.

ratifies the Convention, then its broader provisions (consistent with the Norman/Friedman Principle) and its monitoring mechanisms will ensure the United States is held internationally accountable for any failures to abide by its principles.[127]

Should the United States adopt the Convention, its provisions may be a fulcrum for expanding the protection of the U.S. Constitution to include an affirmative right to technology access.[128] Such a right would arguably embody the Norman/Friedman Principle in that it supports utilizing or expanding existing legal instruments, based on reasonable interpretation, to more fully realize equality of opportunity.

3. Constitutional Considerations

This Article will now address possible constitutional bases for a right to information access, like that advanced by the Norman/Friedman Principle. This discussion will begin with a dichotomy note by Maryland State Senator Jamie B. Raskin during a question and answer session at the 2012 TenBroek Disability Law Symposium.[129] Senator Raskin, who is both a constitutional scholar and an elected representative, was asked whether he could point to a constitutional basis supporting a right to information access. In response, he noted that when the U.S. Supreme Court has addressed the right to information, it has found a so-called "negative right."[130] In other words, the Court has found violations of the First Amendment in instances where the government sought to limit or prohibit access to information.[131] As Senator Raskin further noted, however, the Court has never found an affirmative right to information in the Constitution.[132] The authors argue that such a right could potentially

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[127] For a good discussion of the reasons why the United States Senate should ratify the international instrument, *see e.g.*, News Release, U.S. Senate Foreign Relations Committee, Disability Rights Advocates Urge Ratification of Convention on the Rights of Persons with Disabilities (July 12, 2012), 2012 WLNR 14634956.

[128] *But see* Nick Fina & Roberta Golinkoff, Op-Ed, *Treaty Strikes Wrong Tone for Those with Hearing Loss*, NEWS JOURNAL (Wilmington, Delaware) (Aug. 23, 2012), 2012 WLNR 17841362 ("The relationship between treaty law and national constitutions and legal coda is a complex one. It is clear that treaties bind the countries that ratify them and can or must supersede domestic law. CRPD could result in erosion of the rights of many U.S. citizens who have hearing loss.").

[129] Maryland State Senator Jamin B. (Jamie) Raskin presented the "theme keynote address" at the 2012 Jacobus tenBroek Disability Law Symposium. *Disability Identity in the Disability Rights Movement*, NATIONAL FEDERATION OF THE BLIND (2012), https://nfb.org/law-symposium [hereinafter *Raskin Remarks*] (the referenced Q&A begins at 25:28 of Sen. Raskin's remarks). For biographical information of Maryland State Senator Raskin, *see* http://www.msa.md.gov/msa/mdmanual/05sen/html/msa14610.html.

[130] *Raskin Remarks*, *supra* note 129.

[131] *Cf.* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1988) (finding that a licensing law that allowed a mayor to limit the distribution of a newspaper to be an unconstitutional restriction on freedom of expression); City of Cincinnati v. Discovery Network, 507 U.S. 410, 431 (1993) (finding that a city's selective and categorical ban on the distribution, via newsrack, of "commercial handbills" is not consistent with the dictates of the First Amendment)

[132] *Raskin Remarks*, *supra* note 129. The federal government and several states have adopted some statutory form of a right to information access. *See, e.g.*, The Freedom of Information Act

be protected as one of the unenumerated rights guarded by the Ninth Amendment[133] and would be consistent with the practices and beliefs professed by several of the founding fathers.

The Constitution, amended twenty-seven times, has no specific information technology access rights in its text.[134] The Bill of Rights, constitutional amendments ratified by the states between 1789 and 1791, protect a variety of personal liberties.[135] At the time leading statesmen like President Madison drafted the Bill of Rights, several founding fathers fretted that a Bill of Rights would be construed to limit the rights of the people because it would exclude any unenumerated rights. James Wilson of Pennsylvania voiced his concern that rights should not be excluded just because they were not enumerated:

> A bill of rights annexed to a constitution is an enumeration of the powers reserved . . . every thing that is not enumerated is presumed to be given . . . an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete.[136]

To ensure that the rights enumerated in the other amendments would not be interpreted as an exclusive list of the people's rights, the Bill of Rights drafters included the Ninth Amendment: "[t]he enumeration of rights in the Constitution shall not be construed to deny or disparage others retained by the people."[137]

At the center of the Ninth Amendment is the "great residuum of powers"[138] left in the hands of the people. As scholar Kurt T. Lash has argued, President Madison may have interpreted the Ninth Amendment to serve the dual purpose of safeguarding retained rights and protecting against the encroachment of a large federal government.[139] The Ninth Amendment certainly provides a broad basis for finding certain unspecified but inherently existing rights other than those listed in the

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(FOIA), 5 U.S.C. § 552 (2006 & Supp. V 2011).

[133] U.S. CONST. amend. IX. ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people").

[134] *See generally* U.S. CONST. (although the amendments of the Constitution enumerate certain rights which may be inferred to encompass information access rights, no clear language on the matter appears in the text of the Constitution or its amendments).

[135] U.S. CONST. amends. I–X; ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 12 (3d ed. 2006).

[136] James Wilson, Constitutional Convention Delegate, Speech in the Convention of the State of Pennsylvania on the Adoption of the Federal Constitution (Oct. 28, 1787), *available at* http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/newnatn/usconst/debpenn.html (last visited Jan. 11, 2013).

[137] U.S. CONST. amend. IX.

[138] James Madison, Speech Introducing Bill of Rights (June 8, 1789), *available at* http://press-pubs.uchicago.edu/founders/documents/bill_of_rightss11.html (responding to the argument that, because the federal government created by the constitution was to be one of limited powers, the residuum of powers—all those not ennumerated—would automatically be retained by the people even without a Bill of Rights).

[139] Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 IOWA L. REV. 801, 816 (2008).

preceding eight amendments.[140] In fact, while there is no such thing as "Ninth Amendment rights," courts look to the Amendment to justify the protection of nontextual rights.[141] Therefore, the Ninth Amendment may provide constitutional justification for the protection of certain fundamental rights, including arguably, information access.[142]

Though an affirmative right to information access does not exist in the Constitution and the Ninth Amendment would protect it only as part of the residuum retained by the people, the founding generation realized that their fallibility would require future generations of American leaders to redefine the constellation of constitutional rights available to the people.[143] Indeed, Americans have arguably demonstrated themselves as a people capable of including ever-increasing numbers of persons into the socio-economic fabric. The expansion of constitutional liberties[144] and, when that is not possible, the implementation of affirmative laws[145] plays an important role in the development of our republic's inclusiveness.

Furthermore, Justice Kennedy's majority opinion in *Lawrence v. Texas* suggests that the absence of certain affirmative rights in the

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[140] Jeffrey D. Jackson, *The Modalities of the Ninth Amendment: Ways of Thinking About Unenumerated Rights Inspired by Philip Bobbitt's Constitutional Fate*, 75 MISS. L.J. 495, 506 (2006) ("From this history of the passage of the Ninth Amendment, it appears, at the very least, that Madison and the other members of the First Congress had some idea that they possessed some sort of unenumerated rights that could not be infringed upon by the Constitution.").

[141] CHEMERINSKY, *supra* note 135, at 794.

[142] *Contra* Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 COLUM. L. REV. 498, 572 (2011) ("Contrary to the leading modern accounts of the Amendment's original meaning, the plain language of the Amendment neither compels judicial enforcement of unenumerated rights nor prohibits courts from according such rights a lower level of protection than enumerated rights. All that the express language of the Ninth Amendment commands is that the fact that certain rights have been enumerated in the Constitution not be used as a basis for either denying the existence of other 'retained' rights or according such rights a lower level of protection or respect than they would have received if the Constitution lacked an enumeration of rights.").

[143] Thomas Jefferson expressed his perspective on how the Constitution should be viewed in a letter to Samuel Kercheval on July 12, 1816, a quote which was later inscribed in the wall of the Jefferson Memorial in Washington, D.C. The summary in the memorial reads: "I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors." *Quotations on the Jefferson Memorial*, MONTICELLO.ORG, http://www.monticello.org/site/jefferson/quotations-jefferson-memorial#_note-9 (last visited Jan. 8, 2013).

[144] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (finding a right to privacy in the penumbras of the Bill of Rights); Lawrence v. Texas, 539 U.S. 558 (2003) (finding that a state law against homosexual sodomy violated due process); Duncan v Louisiana, 391 U.S. 145 (1968) (finding that the Sixth Amendment right to a jury trial applies to the states via the Fourteenth Amendment Due Process Clause).

[145] *See, e.g.*, The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.); The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)). While women, African Americans, the disabled, and others, had to strive mightily to acquire equal recognition under the law, that all of these populations of citizens could create and, then, advance successes through a coordinated set of civil rights movement is arguably indicative of a more, not less, open society.

Constitution's text is not conclusive with respect to the actual reach of the document's protections.[146] In finding a state law against homosexual sodomy to be unconstitutional, Kennedy wrote:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[147]

Similarly, while the founding fathers surely could not have envisioned a world with Kindles or iPhones, one might argue that they would support protection of the liberties they held sacred in the context of technology they could never have conceived.

Indeed, as one looks at whether a right to information access can be supported by constitutional principles, it helps to look first at the founding fathers' reverence for education and technological innovation.[148] Thomas Jefferson, in particular, placed great importance on the role of education in a democratic republic:

> I know no safe depositary of the ultimate powers of the society, but the people themselves; and if we think them not enlightened enough to exercise their controul [sic] with a wholesome discretion, the remedy is, not to take it from them, but to inform their discretion by education. This is the true corrective of abuses of constitutional power.[149]

Jefferson also created and utilized a number of tools at Monticello that made his reading and writing easier.[150] Furthermore, Benjamin Franklin created the first public library in Philadelphia[151] and one of the prestigious universities still in existence today, the University of Pennsylvania.[152] In describing the effect of the founders' views of

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[146] *See* 539 U.S. 558 (2003).

[147] *Id.* at 578–79.

[148] The authors would like to preface the following argument by recognizing that the founding fathers applied much of what they professed to believe about liberty only to a select portion of the population.

[149] Letter from Thomas Jefferson to William C. Jarvis (Sept. 28,1820), *available at* http://www.monticello.org/site/jefferson/quotations-education#footnoteref12_375iz3m.

[150] *See Design and Gadgets: Gadgets in the Office*, THE MONTICELLO CLASSROOM, http://classroom.monticello.org/kids/resources/profile/241/Design-and-Gadgets/ (last visited Jan. 18, 2013) (describing tools such as the swivel chair and polygraph—which allowed for the copying of documents—that Jefferson employed in his office at Monticello).

[151] *The History of The Library Company of Philadelphia*, LIBR. COMPANY OF PHILADELPHIA, http://www.librarycompany.org/about/history.htm (last visited Jan. 18, 2013).

[152] *Pennsylvania's University*, THE FRANKLIN INST., http://sln.fi.edu/franklin/timeline/univpenn.html (last visited Jan. 18, 2013).

intellectual and technological exploration on their world, a scholar wrote "[l]etters, learned societies and the printed word came together in the creation of a Republic of Letters, an egalitarian world of knowledge open [in principle] to everyone."[153]

Given that the founding fathers professed belief in an educated leadership base within our republic, if not educated voters for the election of such leaders, the next question is whether the Constitution or its amendments can be interpreted as supporting the existence of a right to information access. The Constitution acknowledges the importance of scientific and technological innovation. Specifically, Article I grants Congress the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[154] That power is granted in the context of intellectual property rights rather than in an affirmative right to information or technology access. The founders sought to protect intellectual property rights in part because they perceived that a property right is necessary to incentivize creation and that the proliferation of technology and creative works would benefit society.[155] Arguably, access to information is a necessary predicate to the creation of an educated populace and the sorts of technology that the founders wanted to promote by way of protecting intellectual property rights. Given the necessity of information in the Internet Age, one might argue that the right to access information should be protected as one of the unenumerated rights retained by the people.

Courts are increasingly called on by the challenge of interpreting constitutional and statutory rights in an ever-changing technology landscape. *Authors Guild, Inc., v. HathiTrust is* a recent example of a federal court encountering this conflict and reaching a result that promoted increased information access.[156] On October 10, 2012, U.S. District Court Judge Harold Baer granted summary judgment in favor of the defendants, including the National Federation of the Blind (NFB), in the U.S. District Court for the Southern District of New York.[157] Judge Baer's decision enabled libraries of educational universities to achieve their primary goal to digitize copyrighted print collections by rendering them accessible for the blind and visually impaired. Thus, by granting summary judgment for the NFB, Judge Baer virtually leveled the technological playing field.

The Author's Guild and other plaintiffs sued to preclude digitization of copyrighted text by Google and the HathiTrust

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[153] Robert Darnton, *A Republic of Letters*, N.Y. TIMES, Aug. 22, 2010, at BR15 (reviewing LEWIS HYDE, COMMON AS AIR: REVOLUTION, ART, AND OWNERSHIP (2010)).

[154] U.S. CONST. art. I, § 8, cl. 8.

[155] ROBERT P. MERGES, PETER S. MENELL, & MARK A. LEMLEY, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 11–12 (5th ed. 2010).

[156] Authors Guild, Inc., v. HathiTrust, No. 11 Civ. 6351(HB), 2012 WL 4808939, (S.D.N.Y. Oct 10, 2012).

[157] *Id.* at *1.

partnership, which maintains a digital library of over 10 million books, alleging that digitization would infringe on the rights of the copyright owners and transferees.[158] The NFB intervened to protect the accessibility rights of the blind, alleging that digitization of the copies enabled the blind "to read digital books independently through screen access software that allows text to be conveyed audibly or tactilely to print-disabled readers."[159] In turn, the NFB noted that this permitted blind users "to access text more quickly, reread passages, annotate, and navigate, just as a sighted reader does with text."[160] The pre-digitization process was slow and cumbersome, and digitization speeds up the process dramatically. Prior to the digitization process, blind and visually impaired individuals could access print materials "only if the materials were converted to braille or if they were read by a human reader, either live or recorded."[161]

Focusing on the public benefit created by the use, Judge Baer concluded that copyright law "would be better served by allowing the use than by preventing it."[162] In substantiating his decision, Judge Baer acknowledged that "equal access to copyrighted information for print-disabled individuals is mandated by the ADA and the Rehabilitation Act of 1976."[163] Under the Copyright Act the right to reproduce or distribute copyrighted materials is generally limited to the copyright owner and licensees.[164] There are a number of exceptions, including fair use[165] and the Chafee Amendment, which grants an exception to authorized entities: "to reproduce or distribute copies of a previously published, non-dramatic literary work in specialized formats exclusively for use by the blind or other persons with disabilities."[166] Judge Baer found that both fair use and the Chafee Amendment were available defenses for the Defendants.[167] The court's fair use analysis turns "perhaps most importantly" on the fact that Defendants' intended use of the copyrighted material would result in "the unprecedented ability of print-disabled individuals to have an equal opportunity to compete with their sighted peers in the ways imagined by the ADA."[168]

The preceding discussion illuminates several potential bases for a right to information access. The foregoing historical and constitutional overview may have an effect of supporting the supposition of the authors

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[158] *Id.*

[159] *Id.* at *2.

[160] *Id.*

[161] *Id.*

[162] *Id.* at *14 (citing the standard for the fair use defense to a charge of copyright infringement laid out in Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 608 (2d Cir. 2006))

[163] *Id.* at *15.

[164] 17 U.S.C. § 106 (2006).

[165] 17 U.S.C. § 107 (2006).

[166] *Authors Guild*, 2012 WL 4808939, at *15 (citing 17 U.S.C. § 121 (2006), the Chafee Amendment to the Copyright Act).

[167] *Id.*

[168] *Id.* at *14.

that a generation who voraciously sought information by oil lamp and who wrote by quill might have accepted a fundamental right to access information for the disabled in the context of the Information Age. The Norman/Friedman Principle would support the judiciary and congress acting in ways that, as with accretion of sand on the shore, will expand the reach of the Constitution to include an affirmative right to information access. After all, the ADA, and related protections, embodies a "social model of disability." Consistent with the Norman/Friedman Principle, the social model has the effect of positing that the deficiency in "disability" is not in the individual but, rather, in the application of the law to physical or mental impairments.[169]

The United States, serving as a beacon to the world, must be at the forefront of expanding the inclusion and integration of the disabled. Thus, this Article presents the Norman/Friedman Principle to ensure that both existing and innovative new protections and policy measures foster, fortify, and ensure such inclusion and integration through information access. The robustness of the Constitution should be part of that conversation.[170] The Article will next discuss a set of desirable policy measures, some of which are already being implemented, that may be interpreted as consistent with the Norman/Friedman Principle.

IV. RECOMMENDATIONS ON IMPLEMENTING THE NORMAN/FRIEDMAN PRINCIPLE

"The best way to predict the future is to invent it."

~Alan Kay[171]

A. The Twenty-First Century Communications and Video Accessibility Act of 2010

This portion of the Article will explore the effect of recent federal legislation regarding access of the sensory disabled to television, an important technology often providing both frivolity and life-saving information. Success in the modern economy, in large part, depends on

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[169] *See* Burgdorf, *supra* note 108, at 263.

[170] *See* Gary Thompson & Paul Wilkinson, *Set the Default to Open:* Plessy*'s Meaning in the Twenty-First Century and How Technology Puts the Individual Back at the Center of Life, Liberty, and Government*, 14 TEX. REV. L. & POL. 48, 89 (2009) (concluding that "[r]ather than waiting almost six decades as America did with the error of *Plessy* to be corrected, we can harness the power of individuals to protect our rights and to strengthen the social contract from the inside out[; f]or, in the end, individuals are the state.").

[171] Alan C. Kay, *Predicting the Future*, STAN. ENG'G, 1(1) (1989), *available at* http://www.ecotopia.com/webpress/futures.htm.

types of technologies that have previously not been available to users with disabilities. As the Norman/Friedman Principle dictates, success in this economy requires equal access to technology—from operating menus on televisions, DVRs or DVDs to participating in video chats with clients across the country and overseas.[172] Laws such as the Twenty-First Century Communications and Video Accessibility Act of 2010 (discussed below) may have the effect of ensuring that information will be available not only to the privileged few but to all, regardless of ability or disability.[173]

The Communications Act of 1934 constituted one of the earliest federal statutes to regulate communications technologies.[174] The purpose of this Act was to make a rapid, efficient telecommunication system available to "all of the people of the United States."[175] As laudable as the Act was for society in a broad sense, this promise did not extend to persons with disabilities until the passage of important legislation, such as the Telecommunications Act of 1996, which amended the Communications Act of 1934.[176]

Because the 1934 Act did not contain provisions necessary to ensure access in the Information Age, additional measures were necessary. Such measures include § 255 of the 1996 Act, which requires manufacturers of telecommunications equipment and providers of telecommunications services to ensure that such equipment and services are accessible to and usable by individuals with disabilities, if doing so is readily achievable.[177] To help remedy the remaining gaps in federal law (such as a lack of video description), Congress passed the Twenty-First Century Communications and Video Accessibility Act of 2010 (CCVA),

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[172] President Barack Obama, Remarks by the President at the Signing of the Twenty-First Century Communications and Video Accessibility Act of 2010 (Oct. 8, 2010), *available at* http://www.whitehouse.gov/the-press-office/2010/10/08/remarks-president-signing-21st-century-communications-and-video-accessib.

[173] *Id.*

[174] *See* Christopher H. Sterling, *U.S. Policy: The Communications Act of 1934*, THE MUSEUM OF BROADCAST COMMUNICATIONS, http://www.museum.tv/eotvsection.php?entrycode=uspolicyc (discussing the history of communications regulation).

[175] Act of June 19, 1934, ch. 652, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. §§ 151–621 (2006)).

[176] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of Title 47 of the U.S. Code). Even the blind themselves debated, at least in the first decade of the twenty-first century, what the Telecommunications Act covered—specifically, whether the Federal Communications Commission could promulgate regulations or issue orders requiring video description of television. *See, e.g.*, *Briefly*, 11 No. 12 ADA COMPLIANCE GUIDE NEWSLETTER 12 (Thompson Publishing Group), Dec. 2000 (reporting that a group of broadcasters had challenged the FCC's statutory authority to issue a rule requiring video description of television broadcasts and that the National Federation of the Blind had called for the same rule to be rescinded and redrafted). However, it is clear that provisions of the Telecommunications Act, such as its notable § 255, had a noble and important purpose of equalizing opportunities for the disabled. *See* 47 U.S.C. § 255 (2006) (requiring manufacturers of telecommunications equipment and providers of telecommunications services to ensure that such equipment and services are accessible to and usable by individuals with disabilities, if doing so is readily achievable).

[177] 47 U.S.C. § 255 (2006).

which further amended the Communications Act of 1934.[178]

In a broad sense, the purpose of the CCVA is to seek full equality for persons with disabilities in the Information Age, attempting to ensure that they are "not left behind as technology changes and the United States migrates to the next generation of Internet-based and digital communication technologies."[179] Congress designed this important Act "to ensure that people with disabilities have access to emerging twenty-first century communications and video programming technologies."[180] The Act would appear to be consistent with the Norman/Friedman Principle in that federal protections for the disabled with respect to information technology equipment and services are expanded.

The CCVA requires that manufacturers of internet-based communications technology make their equipment and services accessible to those with disabilities. [181] The Act also expands the range of devices that are required to be compatible with hearing aids,[182] and devices that must contain closed captioning decoders.[183] Video devices that utilize on-screen menus must now include audio output for individuals who are blind or visually impaired.[184]

In addition to expanding accessibility to equipment and devices, the CCVA substantially broadens access to various critical services These include telephone relay service,[185] emergency alerts by text messaging,[186] closed captioning of video descriptions,[187] and television programming

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[178] Pub. L. No. 111-260, 124 Stat. 2751 (codified in scattered sections of 47 U.S.C. (2006 & Supp. V 2011)).

[179] *21st Century Communications and Video Accessibility Act*, NAT'L ASS'N OF THE DEAF, http://www.nad.org/issues/civil-rights/communications-act/21st-century-act [hereinafter *NAD on CCVA*] (discussing the organization's view of the purpose of the 2010 legislation) (last visited Jan. 18, 2013).

[180] Twenty-First Century Communications and Video Programming Accessibility Act; Announcement of Town Hall Meeting, 76 Fed. Reg. 21741, 21742 (April 18, 2011).

[181] If this is an undue burden for manufacturers, they will still have to make their technology compatible with specialized equipment and services used by persons with disabilities. *Id.*

[182] Pub. L. No. 111-260, § 102 (codified at 47 U.S.C. § 610 (2006 & Supp. V 2011)). This provision allows persons with disabilities to use their hearing aids for newer telecommunications tools, including cell phones, Internet voice technology, MP3s and DVDs or Blu-Rays.

[183] Pub. L. No. 111-260, § 203 (codified at 47 U.S.C. § 303 (2006 & Supp. V 2011)). The current closed captioning requirement only applies to video screens over 13 inches. This Act extends the requirement to any device that displays video programming with sound, including Internet-based devices.

[184] Pub. L. No. 111-260, § 204 (codified at 47 U.S.C. § 303 (2006 & Supp. V 2011)). This section mandates that there must be an audio output where on-screen menus are used, and that there must be easily accessible closed captioning and video description buttons. Many cable, satellite, and online sources are only navigable by the use of on-screen menus, which shuts out access to the visually impaired.

[185] Pub. L. No. 111-260, § 103 (codified at 47 U.S.C. § 225 (2006 & Supp. V 2011)).

[186] Pub. L. No. 111-260, § 106 (codified at 47 U.S.C. § 615c (2006 & Supp. V 2011)).

[187] Pub. L. No. 111-260, § 202 (codified at 47 U.S.C. § 613 (2006 & Supp. V 2011)). Video descriptions inform the viewer of on-screen visual elements during pauses in dialogues. As a stylized example, if there was an explosion on-screen, this would not be described in traditional closed captioning because it would not be dialogue. An explosion would, however, be included in video descriptions. This section also expands coverage of programs covered under closed captioning laws to include television broadcasts that are screened over the Internet. For example, a television show that previously aired on network TV, and subsequently uploaded to Hulu, will now also be required

guides.[188] The right of persons with disabilities to obtain universal services will also expand to newer forms of communications technology, such as Internet-based telephone services.[189]

In short, this Act has helped ensure, in the words of its sponsor, that individuals who are blind and deaf can "fully participate in twenty-first century society."[190] The Act focuses on ensuring that content available in the digital world is accessible to disabled users. The CVAA has the effect of building positively on the Telecommunications Act of 1996's requirements to technology essential in a twenty-first century economy, like Voice over Internet Protocol (VoIP) and streaming video.[191] The CCVA is also likely to nudge manufacturers of telecommunications equipment to provide support and access to those with disabilities.[192]

The CCVA does not represent an end-point in ensuring equal access to technology. As demonstrated in the next section, states have taken up the call for equal access for the disabled. While federal efforts have been encouraging, there is still not an affirmative requirement in the ADA for places of public accommodation to provide multimedia and information technology access to the disabled community, including with regard to emergency alert warnings.[193] Thus, it is arguably the obligation

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to comply with these video descriptions and closed captioning requirements.

[188] Pub. L. No. 111-260, § 205 (codified at 47 U.S.C. § 303 (2006 & Supp. V 2011)). Cable and satellite providers must make guides and menus usable for people who cannot read the visual displays. This provision is particularly crucial, because many video programs are not accessible unless the user can read and operate complex menus or guides.

[189] *See NAD on CCVA*, *supra* note 179 ("[C]onsumers with disabilities – as a distinct group – [will be] eligible to receive universal service support through two specific measures. First, it grants the FCC authority to designate broadband services needed for "phone communication" by people with disabilities as services eligible to receive support under the existing Lifeline and Linkup universal service programs. For example, this would include deaf individuals who are otherwise eligible for Lifeline and Linkup support, but who rely on Internet-based video relay service or point-to-point video for their telephone communications. Second, it grants authority to the FCC to designate programs that distribute specialized equipment used to make telecommunications and Internet-enabled communication services accessible to individuals who are deaf-blind, as eligible for universal service support. Such support, however, is capped at $10 million per year.").

[190] Press Release of Rep. Edward Markey, *Markey Celebrates First-Year Milestone for Making 21st Century Tech Accessible to All* (Oct. 7, 2011), *available at* http://markey.house.gov/press-release/oct-7-2011-markey-celebrates-first-year-milestone-making-21st-century-tech-accessible. As a leader on pro-disability legislation, Rep. Markey is to be applauded for working with the disability rights community to enact important pieces of legislation. Because this Act has many provisions concerning the expansion of access to the Digital Age, such as emergency notifications, it will be an important tool in equalizing the opportunities of the disabled for living, learning, and earning. *See, e.g.*, President Obama, Blind Americans Equality Day 2011, Proclamation No. 8739, 76 Fed. Reg. 65,099 (Oct. 20, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/10/14/presidential-proclamation-blind-americans-equality-day-2011 (touting the Act as evidence of the Administration's "dedicat[ion] to ensuring Americans with disabilities have every opportunity to reach their full potential."). Of course, what will be needed moving forward is ensuring that the broad legislation is translated into day-to-day action

[191] Timothy Stephen Springer, *An Overview of the 21st Century Communications and Video Accessibility Act of 2010*, SSB BART GROUP (Mar. 15, 2011), https://www.ssbbartgroup.com/blog/2011/03/15/an-overview-of-the-21st-century-communications-and-video-accessibility-act-of-2010/.

[192] *Id.*

[193] As in other areas, Maryland has often been at the forefront on disability issues. For many years, the Maryland Department of Disabilities had an innovative, highly regarded and influential Emergency Preparedness Program, directed by a leader with a mobility impairment, Joanne Knapp. *See* Ctr. on Health and Homeland Security, Univ. of Md., *Joanne E. Knapp*,

of the several states of the union, the experimental laboratories of democracy, to advance the Norman/Friedman Principle.

B. Maryland Bills Providing for Certain Protections Regarding Information and Technology

Maryland has historically been at the forefront of efforts to improve the quality of life and equal opportunities for persons with disabilities.[194] For instance, the Maryland General Assembly empanelled a quiet vehicle safety taskforce.[195] The State has also established, under the auspices of the Maryland State Library for the Blind and Physically Handicapped, a repository program to provide greater access to electronic textbooks for students with visual disabilities.[196] After discussing some legislative developments, the Article will provide a proposed resolution that the Maryland General Assembly should pass, advancing the call for a renewed commitment to the inclusion and the integration of the disabled, as well as the passage of legal obligations to further these ends.

The authors will now explore proposed technology-friendly legislation for people with disabilities regarding web accessibility. Generally, this legislation (a set of bills introduced in the 2011 session and again in the 2012 session), if passed, would require websites to be accessible to the blind, and by extension, individuals with other sensory disabilities.[197] Accessibility of the Internet, as a place of public accommodation, is required by this legislation.[198] With the support of civic leaders, such as the Maryland Department of Disabilities and the Maryland Commission on Civil Rights, enhanced web accessibility, and in turn expanded rights for the disabled, can be achieved through the

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http://www.mdchhs.com/our-team/joanne-knapp (last visited Jan. 21, 2013).

[194] This is more of an anecdotal observation than a documentable state of affairs. Certainly, the creation of a cabinet level Department of Disabilities in Maryland, one of the first of its kind, is an example in support of this observation.

[195] 2008 Md. Laws ch. 384 (Md. Senate Bill 276; Md. House Bill 1160). The President of the Maryland Senate and the Speaker of the Maryland House of Delegates each chose one member from their respective chambers to serve on this task force. Members of the blind community, representing the Maryland chapter of the American Council of the Blind and the Maryland chapter of the National Federation of the Blind, also served on the taskforce. The taskforce issued a report to the Maryland General Assembly in December, 2008.

[196] *See, e.g.*, Press Release, Nat'l Fed'n of the Blind, Governor O'Malley Signs Landmark Legislation Providing for Electronic Access (May 8, 2007), https://nfb.org/node/1070.

[197] After failing to gain any traction in 2011, the proposed legislation was reintroduced in 2012 in both chambers of the Maryland General Assembly. H.D. B. 183, 2012 Leg. 429th Sess. (Md. 2012), *available at* http://mgaleg.maryland.gov/2012rs/bills/hb/hb0183f.pdf; S. B. 278, 2012 Leg. 429th Sess. (Md. 2012), *available at* http://mgaleg.maryland.gov/2012rs/bills/sb/sb0278f.pdf.

Unfortunately, committees in both the House and the Senate failed to pass the bills and they never reached the floor in either chamber. In the experience of the two authors, who have advocated the passage of affirmative legislation for many years in Maryland, it will require a multi-year effort to secure such reforms and it does not appear to be atypical that the bills have not passed yet.

[198] *Id.*

passage of these bills.[199]

If passed, the bills would require that places of public accommodation with gross revenues of at least $1 million have accessible websites for the blind or the visually impaired.[200] The bills provide for aggrieved individuals to file a complaint before the Maryland Commission on Civil Rights.[201] The bills also provide definitional language, requiring that the term "disability" should be defined consistent with the ADA. A myriad of places of public accommodation are included in the statutory definition, including the Internet.[202] The bills should not be unduly burdensome to small businesses because they provide for delayed implementation and have the aforementioned minimum $1 million revenue requirement.[203] Though the bills would increase the scope of state civil rights, they have not yet passed in the Maryland General Assembly.[204]

If the bills are enacted, persons with disabilities who encounter inaccessible websites will be able to file complaints with the State Civil Rights Commission.[205] Whether realistic or not, one concern is that the Commission on Civil Rights will be inundated with cases. The authors believe this concern may be easily remedied: complainants should only be able to file one complaint per inaccessible website, and companies may merge similar cases against them into one action. Moreover, the authors believe that any such legislation that passes should urge mediation.

Furthermore, the authors recommend that the proposed legislative measures be amended to add an expanded implementation period. Notably, requirements set forth in the bills should not be effective until two years after passage, allowing businesses a reasonable length of time to become compliant with the law and requiring that all new websites formed after this "grace period" be fully accessible. In the interim, a taskforce should be empanelled, facilitating a conference with multi-party stakeholders (such as businesses, the non-profit sector, and the

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[199] The Maryland Department of Disabilities supports classifying the Internet as a place of public accommodation. *See* Levy, *supra* note 53, at 3 ("Another thing that requires our attention is amending Maryland's public accommodations law to . . . make clear that web sites are public accommodations . . . .") To date, the Maryland Commission on Civil Rights has undertaken no position—this being, in no small part to the advocacy of one of the two authors. Otherwise, the state of support for the bills would have likely been worse—a negative vote for opposing the bills. Eager readers may seek to review, perhaps through a request, the recorded meetings of the Commission as verification.

[200] H.D. B. 183 and S. B. 287.

[201] *Id.*

[202] *Id.*

[203] *Id.*

[204] For example, the Attorney General of Maryland, Douglas F. Gansler, initially opined that the bills violated the state constitution but later withdrew that opinion. *Douglas F. Gansler, Attorney General*, Maryland Manual On-line, *available at:* http://www.msa.md.gov/msa/mdmanual/08conoff/attorney/html/msa14107.html (Last visited Nov. 6, 2012). *See also* Memorandum From National Federation of the Blind to Maryland General Assembly (Jan. 19, 2012) (on file with the authors).

[205] H.D. B. 183 and S. B. 287. When an inaccessible website is encountered, then the bill allows individuals to file a complaint with the Maryland Commission on Civil Rights.

disability advocacy community) to study and make general recommendations on web accessibility and compliance with such accessibility.[206] Regardless of whether these bills pass, Maryland should be encouraged to follow the lead of other states in enforcing the accessibility of websites.

In the Mid-Atlantic region, New York State has acted on its own initiative to rectify accessibility issues among private websites.[207] In 2003, the Attorney General of New York achieved settlements with two major websites (Ramada.com and Priceline.com) that expanded accessibility for people with sensory disabilities on the Internet.[208]

Disabled individuals are increasingly visible as civic leaders, hopefully reminding their able-bodied peers about the full scope of disability rights and maintaining a commitment to creating additional affirmative civil rights. Today, the need to provide reasonable accommodations has expanded beyond the physical realm.[209] People with sensory disabilities now reasonably demand equal access to the same online information as their peers. Affirmative protections have not sufficiently embraced the concept that the Internet is now considered a place of public accommodation. The failure to support affirmative obligations for Internet accessibility will obstruct the far-reaching visions of the ADA's drafters and of Maryland's public accommodations statute—namely, equal access to all. Thus, Maryland should be a leader on this issue by enacting affirmative rights broader than the ADA.

C. Transportation Access Issues

Technology is rapidly changing for most of the goods or services of daily life, nowhere more-so that with regard to transportation. For instance, those "muscle cars" of the 1960s are no longer just vehicles. Their successors are virtual computers—thinking, even talking. The laudable developments in vehicles, which will help ensure greater safety of users, have yet to translate into enhanced liberty for the disabled. However, there is positive progress towards translating technological change, which is often beneficial to the able-bodied, into a form that is inclusive of all. Therefore, this Article will now discuss several noteworthy developments and encourage the enactment of affirmative legislative measures to promote their incorporation in Maryland.

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[206] *Id.*

[207] *See* Press Release, Office of New York Attorney General, Spitzer Agreement to Make Web Sites Accessible to the Blind and Visually Impaired (Aug. 19, 2004), *available at* http://www.ag.ny.gov/press-release/spitzer-agreement-make-web-sites-accessible-blind-and-visually-impaired (stating that Ramada and Priceline had agreed to implement online visual accessibility standards).

[208] *Id.*

[209] *See, e.g.*, Levy, *supra* note 53.

1. Developing the Self-Driving Automobile

Transportation has long been a frustrating issue for many blind individuals.[210] Technology innovation has not previously allowed a blind individual to take the wheel and easily travel from one place to another.[211] However, if next generation technologies are encouraged consistent with the Norman/Friedman Principle, this may no longer be true. Autonomous driving or non-visual interface technologies may be the remedy.[212] As previously discussed, the legal framework and policies implemented must be congruent with technological innovation.

This Article will first discuss the evolution in the self-driving automobile. Autonomous driving first entered mainstream consciousness during the 1970s and 1980s, when pioneer Ernst Dickmanns built the world's first real robot cars.[213] Since then, the vehicle industry, with some degree of help from the technology world (such as Google), has steadily moved the technology forward.[214] The automobile industry has sought to incorporate an array of sensory and other technologies into new models of automobiles, allowing them to aid in parallel parking, among other things.[215] The blind, and others with or without disabilities who cannot legally operate an automobile,[216] will constitute incidental, but important, beneficiaries of these developments.[217]

The blindness advocacy community has been at the forefront of advancing this technology access for the disabled. The Jernigan Institute of the National Federation of the Blind (NFB), a research center developed and directed by the blind, proposed a Blind Driver Challenge to highlight this technology and its applicability to improving the opportunity of the disabled.[218] In 2009, Virginia Tech accepted this challenge, offering its Robotics and Mechanisms Laboratory to host the competition.[219] The NFB also intended the competition to catalyze the

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[210] Jerry Hirsch, *Too Young for a License: Self-Driving Autos Can't Quite Pass the Road Test Yet*, WINNIPEG FREE PRESS, Nov. 2, 2012, at A1 ("[Google founder Sergey] Brin believes such cars could provide transportation to blind people who can't drive or other individuals who shouldn't drive.").

[211] *Id.*

[212] *Id.*

[213] PROF. SCHMIDHUBER'S HIGHLIGHTS OF ROBOT CAR HISTORY, http://www.idsia.ch/~juergen/robotcars.html (last visited June 14, 2012).

[214] Hirsch, *supra* note 210.

[215] *Id.*

[216] Namely, older adults.

[217] Hirsch, *supra* note 210; *see also* Marc Scribner, *Driverless Cars Are Coming. Here's How Not to Regulate Them.* WASH. POST, Nov. 4, 2012, at C4 ("autonomous vehicle technology[] allow[s] disabled people to enjoy the personal mobility that most people take for granted. Google highlighted this benefit when one of its driverless cars drove a legally blind man to a Taco Bell."), *available at* http://www.washingtonpost.com/opinions/driverless-cars-are-on-the-way-heres-how-not-to-regulate-them/2012/11/02/a5337880-21f1-11e2-ac85-e669876c6a24_story.html.

[218] *History*, BLIND DRIVER CHALLENGE, http://www.blinddriverchallenge.org/about-the-blind-driver-challenge (last visited Oct. 26, 2012).

[219] *Id.*

creation of a non-visual interface for a car that would "convey real-time information about driving conditions to the blind," thereby enabling them to safely drive a motor vehicle.[220] In sum, the NFB hoped the challenge would help to change public misperceptions of blindness and the related limitations (or lack thereof), as much as it would establish a functional interface that would permit the blind individual to drive "with the same degree of safety and reliability as a sighted person."[221]

Since 2010 Google has been at the forefront of blind access with its innovative self-driving car.[222] Several other automotive companies have also begun the slow and laborious drive towards self-driving cars, including Ford,[223] Audi,[224] Mercedez-Benz,[225] Volkswagen,[226] and General Motors,[227] but none have made the commitment or the progress that Google has.[228] In May 2012, after extensive lobbying from Google, the Nevada State Assembly passed widespread and extensive legislation regulating autonomous cars and granting licenses to autonomous cars for testing.[229]

The first license was assigned to Google for its autonomous Toyota

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[220] *Id.* Specifically, the NFB intended and purposed the Blind Driver Challenge to accomplish four goals: 1. To establish a path of technological advancement for non-visual access technology, and close the gap between access technology and general technology. 2. To increase awareness among the university scientific community about the real problems facing the blind by providing expertise from the perspective of the blind within the context of a difficult engineering challenge. 3. To demonstrate that vision is not a requirement for success and that the application of innovative nonvisual solutions to difficult problems can create new opportunities for hundreds of thousands of people—blind and sighted. 4. To change the public perceptions about the blind by creating opportunities for the public to view blind people as individuals with capacity, ambition, and a drive for greater independence. *Id.*

[221] *Frequently Asked Questions*, BLIND DRIVER CHALLENGE, http://www.blinddriverchallenge.org/frequently-asked-questions (last visited Oct. 26, 2012).

[222] Mark Hachman, *Google Developing a Self-Driving Car, And It Works*, PC MAGAZINE (Oct. 9, 2010, 4:25 PM), http://www.pcmag.com/article2/0,2817,2370518,00.asp.

[223] Mark Hachman, *Ford Taking a Slow Road to Self-Driving Cars*, PC MAGAZINE (March 6, 2012, 9:00 AM), http://www.pcmag.com/article2/0,2817,2401168,00.asp.

[224] Mark Hachman, *Audi's Future: Self-Driving Cars, Dual HUDs, LTE*, PC MAGAZINE (Jan. 11, 2012, 6:14 PM), http://www.pcmag.com/article2/0,2817,2398803,00.asp.

[225] Viknesh Vijayenthiran, *2013 Mercedes-Benz S-Class to Debut Autonomous Driving System*, MOTOR AUTHORITY (Nov. 14, 2011), http://www.motorauthority.com/news/1068584_2013-mercedes-benz-s-class-to-debut-autonomous-driving-system.

[226] *Driving Without a Driver - Volkswagen presents the 'Temporary Auto Pilot'*, VOLVO US MEDIA NEWSROOM (June 23, 2011), http://media.vw.com/pressrelease/746//driving-without-driver-volkswagen-presents-temporary-auto-pilot.

[227] Chuck Squatriglia, *GM Says Driverless Cars Could Be on the Road by 2018*, WIRED (Jan. 7, 2008, 1:49 PM), http://www.wired.com/autopia/2008/01/gm-says-driverl/.

[228] *See* Rebecca J. Rosen, *Google's Self-Driving Cars: 300,000 Miles Logged, Not a Single Accident Under Computer Control*, THE ATLANTIC (Aug. 9, 2012, 12:29 PM), http://www.theatlantic.com/technology/archive/2012/08/googles-self-driving-cars-300-000-miles-logged-not-a-single-accident-under-computer-control/260926/ (describing Google's progress in autonomous driving systems).

[229] Assemb. B. 511, 2011 Leg. 76th Sess. (Nev. 2011), *available at* http://www.leg.state.nv.us/Session/76th2011/Bills/AB/AB511_EN.pdf and, as incorporated into the Nevada DMV Regulations, *available at* http://www.leg.state.nv.us/register/2011Register/R084-11A.pdf. *See* John Markoff, *Google Lobbies Nevada to Allow Self-Driving Cars*, N.Y. TIMES, May 10, 2011, at A14, *available at* http://www.nytimes.com/2011/05/11/science/11drive.html.(discussing Google's involvement with the bill).

Prius.[230] Since then, California has also passed an autonomous driving bill, albeit a more limited one.[231]

In advancement of the technology, public officials on a national scale and in several states are working to create an interconnected information network on the streets and from the streets to signalized intersections.[232] Google's progress will hopefully push other vehicle manufacturers to join in realize revitalizing the autonomous driving industry.

While blind individuals are not the specific target market for autonomous driving, they, and other physically disabled individuals, will be ideal beneficiaries should this technology reach the mainstream.[233] Generally speaking, autonomous driving has several beneficial features, including the prevention of traffic congestion and the ability to aid drivers in avoiding accidents.[234] The autonomous system is intended to analyze the driving environment in a quick and accurate manner, thereby allowing for the safe operation of the vehicle.[235] While this technology will allow the able-bodied driver to repose and drink a cup of coffee, the technology will quite literally allow the blind to operate a vehicle, even if an unique manner. Therefore, the authors encourage Maryland to pass a legal or regulatory framework to encourage this technology in the State.

2. Silent Cars and Their Remedy

Hybrid vehicles may be all the rage nowadays, but technological "improvements" occasionally create additional challenges for the blind. When Toyota introduced its Prius, as one of the first hybrid-electric vehicles, it debuted with a unique feature that has plagued the blind since its introduction—namely, hybrid vehicles barely make any noise. To be more precise, when operating on the electric battery, "hybrid cars are generally quieter than a vacuum cleaner,"[236] and blind individuals may be unable to audibly detect the presence of these vehicles.

Blind pedestrians rely on the variable sounds of traffic and other

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[230] Ben Timmins, *Google's Self-Driving Toyota Prius Gets its Nevada Driver's License*, MOTOR TREND (May 8, 2012), http://wot.motortrend.com/googles-self-driving-toyota-prius-gets-its-nevada-drivers-license-202803.html.

[231] 2012 Cal. Legis. Serv. 570 (West) (to be codified at CAL. VEH. CODE § 38750); Scribner, *supra* note 217.

[232] Steve Johnson, *Silicon Valley Technology Could Be Key to Safer Driving*, DESERT SUN (Palm Springs, Cal.) Nov. 6, 2012, at A5.

[233] The hope of the authors is that this technology will be the mainstream in the future. Affordable and accessible transportation is a key barrier for many, even most disabled individuals, inclusive of the blind author of this article.

[234] Hirsch, *supra* note 210.

[235] Tiffany Kaiser, *California Passes Bill for Autonomous Vehicle Standards*, DAILY TECH (May 22, 2012, 12:29 PM), http://www.dailytech.com/article.aspx?newsid=24737.

[236] Raymund Flandez, *Blind Pedestrians Say Quiet Hybrids Pose Safety Threat*, WALL ST. J., Feb. 13, 2007, at B1.

background noises to safely navigate streets and roads when using guide dogs or canes. Specifically, blind individuals obtain auditory and tactile cues from the environment,[237] and they cannot accurately gather these cues when hybrid vehicles are operating nearby. Cues include traffic sounds at an intersection that help a blind person to understand when it is safe to cross the street.[238] When a noisy vehicle is discerned, a blind pedestrian knows there is a high probability of hearing a vehicle pass within a few seconds and can devote full attention to listening for it.[239] These cues are generated by tire noise at higher speeds, and by internal-combustion engines at lower speeds.[240] However, quiet cars reduce these cues. While a guide dog is far better than a white cane in addressing this issue, even these beloved animals have limitations if their handlers cannot determine traffic flow or cannot know when to cross because of the lack of an accessible pedestrian signal.

In 2008, Lawrence Rosenblum, professor of psychology at the University of California-Riverside, conducted a study, funded by the NFB, on the safety of hybrid cars. Dr. Rosenblum determined that these types of cars could create risks for pedestrians who are blind, small children, the elderly, runners, and cyclists, among others.[241] According to the study, hybrid cars, when operating in electric mode or at low speeds, decreased the timeframe for these individuals to "audibly detect the location of approaching hybrid cars when the vehicles operate at very slow speeds."[242] In contrast, when operating at higher speeds (in excess of 20 miles per hour), or when leaving a stoplight, the tire noise emitted from these vehicles generated audible cues to avoid pedestrian risk.[243] The National Highway Traffic Safety Administration commissioned a subsequent study in 2010 that determined that quiet cars such as hybrid-electric vehicles posed a direct safety risk to blind or low-vision pedestrians.[244]

The study documented "the overall sound levels and general spectral content for a selection of hybrid-electric and internal combustion vehicles in different operating conditions," evaluated "vehicle detectability for two ambient sound levels," and considered "countermeasure concepts that are categorized as vehicle-based, infrastructure-based, and systems requiring vehicle-pedestrian communications."[245] The study reviewed the public safety concerns of

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[237] *Id.*

[238] NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., QUIETER CARS AND THE SAFETY OF BLIND PEDESTRIANS: PHASE 1 18 (2010) [hereinafter NHTSA STUDY], *available at* http://www.nhtsa.gov/search?q=quieter+cars&x=0&y=0.

[239] *Id.*

[240] *Id.* at 75.

[241] *Hybrid Cars Are Harder to Hear*, UC RIVERSIDE NEWSROOM (April 28, 2008), http://newsroom.ucr.edu/1803.

[242] NHTSA STUDY, *supra* note 238, at 75.

[243] *Id.*

[244] *Id.*

[245] *Id.* at 3.

quiet cars on the basis of vehicle type, vehicle operation, and ambient sound levels, and proposed potential countermeasures to mitigate the safety risk of these low-volume vehicles.[246] The study generally found that over 20 million Americans have some degree of vision impairment,[247] about 3.3 million Americans aged 40 and older are blind or have low vision (this number was estimated to increase by 70 %, reaching 5.5 million in the year 2020),[248] while about 100,000 are "independent travelers" who use white canes in coordination with their other senses for orientation and mobility.[249] Prior to the study, the number of those individuals affected by quiet vehicles was unknown.[250]

In detailing the hypotheses, the study analyzed whether human response time was different based on electric or internal combustion engines, and evaluated the sound levels at lower speeds for hybrid-electric cars.[251] In addition, this far-reaching study generally assessed and evaluated factors such as speed limit, lighting and weather, vehicle maneuvers, anecdotal reports, blind mobility needs and acoustic cues, types of intersections, traffic sounds, vehicle operation and detectability, low speed factors, driver reactions, and ambient sound levels.[252] The study also evaluated proposed countermeasures.[253] Ultimately, the study determined that crashes involving pedestrians had higher incident rates for hybrid-electric vehicles than internal combustion engines.

The study also showed that blind pedestrians expressed the preference that quiet vehicles be equipped with a sound generator that, when the vehicle operated less than 20 miles per hour, provided sufficient warning noise to blind pedestrians. The noise would mimic the sound of an internal-combustion engine vehicle. Above that speed limit, tire noise emitted the requisite sound for pedestrian alert information and the audible warning system was unnecessary.

Given the safety concerns regarding hybrid-electric vehicles, President Obama signed the Pedestrian Safety Enhancement Act of 2010 (PSEA) into law.[254] The law mandated that the Department of Transportation create a motor vehicle safety standard alert sound, which would allow blind and other pedestrians to reasonably detect the presence of a hybrid-electric vehicle.[255] This would reduce the hazardous

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[246] *Id.*

[247] *Id.* at 75.

[248] *Id.* at 18.

[249] *Id.* at 75.

[250] *Id.*

[251] *Id.*

[252] *Id.* at 3.

[253] These counter-measures included infrastructure-based signals, detection systems and sound strips, education and enforcement for blind pedestrians and guide dogs, vehicle-based artificial engine sounds, vehicle-pedestrian proximity warning systems and pedestrian-based electronic travel aids; the study also determined the advantages and disadvantages, benefits, shortcomings/challenges, and development status of these varied countermeasures. *Id.* at 22.

[254] Pedestrian Safety Enforcement Act, 49 U.S.C. § 30111 (2006 & Supp. V 2011).

[255] *Id.*; U.S. Dep't. of Transp., *NHTSA Already Working to Fulfill New Pedestrian Safety Enhancement Act*, FASTLANE.DOT.GOV (Jan. 6, 2011), http://fastlane.dot.gov/2011/01/nhtsa-

situation for pedestrians with little or no vision created by silent vehicles.[256] This system has been implemented in the 2012 Toyota Prius V, generating a proximity notification system, which activates at speeds below 15 miles per hour, and is generated by externally mounted speakers on the Prius.[257] In short, the PSEA may be interpreted as another example of how society may positively adopt legislation that conforms to the Norman/Friedman Principle in order to expand upon the inclusion and integration of the disabled into society.

D. Technology Access Cases

The issue of equal access to information content in the entertainment industry poses one of the most contentious issues faced by the disabled. For example, in the last decade, there has been litigation in several different entertainment contexts regarding whether captioning technology must be provided for disabled patrons. This Article will now discuss three examples of captioning litigation, showing, in an illustrative way, how courts are handling equal access to public accommodations in an evolving technological environment. The authors are promoters of dispute resolution, but there are times when litigation may be necessary to promote the broader issues of information access discussed above.

1. Arizona v. Harkins

For a moment, imagine, as a deaf individual, missing key sayings such as the immortal 1939 catchphrase uttered by Clark Gable to Scarlett O'Hara, "Frankly, my dear, I don't give a damn," in *Gone With The Wind*, "I'll be back" in *The Terminator*, James Bond's straight-faced "Bond. James Bond" by Sean Connery, or even "May the Force be with you" by Han Solo to Luke Skywalker as he leaves to destroy the Death Star in *Star Wars*.[258] No matter your favorite genre, these timeless phrases and many others, through the "magic of movies," have made and continue to make an impact on the lives of millions of Americans.

The movie theater industry is a multi-billion dollar business.[259]

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working-to-fulfill-psea-of-2010.html#.UI8R-GI24ec.

[256] *Id.*

[257] Antuan Goodwin, *Prius' Artificial Engine Noise Demonstrated, Explained*, CNET (Sept. 22, 2011), http://reviews.cnet.com/8301-13746_7-20110209-48/prius-artificial-engine-noise-demonstrated-explained.

[258] American Film Inst., *AFI's 100 Years . . . 100 Movie Quotes*, AFI.COM (June 22, 2005), http://www.afi.com/100years/quotes.aspx.

[259] *Domestic Movie Theatrical Market Summary 1995-2013*, The-NUMBERS.COM, http://www.the-numbers.com/market/ (last visited Jan. 18, 2013) (showing over $10 billion in annual

Movie theaters rake in generous profits from box office revenues, concessions sales, and advertising. In short, movies are good business, and movie theaters do all they can to generate traffic and revenue. One would imagine that movie theater chains would have no problem sharing this "magic" with all patrons. This is not the case. The right to movie theater accommodations has a stormy history[260] and movie theater chains have raised many arguments against providing equal access,[261] some in the context of litigation.[262] More recently, with the groundbreaking settlement in *Ball v. AMC Entertainment Corp.*,[263] some theaters have rushed to caption their showings. As of April 2011, both Regal and Cinemark have committed to full captioning access for the deaf and hard-of-hearing.[264] While some litigation has been necessary to reach this step, the provision of this "full access" is a significant first step for movie theater chains on the rocky path to equal access for all. As demonstrated by ongoing litigation, whether conducted privately, with the DOJ, or through the various state attorney generals, the remainder of the large chains—including AMC/Loews, Carmike, and Cineplex, among others—will be "dragged kicking and screaming"[265] into the limelight when they finally agree to do what Regal and Cinemark have already

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ticket sales alone for the movie industry every year since 2009).

[260] Concerning captioning access s*ee, e.g., Cornilles v. Regal Cinemas, Inc.*, No. 00–173, 2002 WL 31469787 (D. Or. Jan. 3, 2002) (holding that "defendants need not install Rear Window Captioning Systems in all of their movie theatres to comply with Title III of the ADA. . . . anticipated costs of $6 million to $36 million per defendant is unreasonable as a matter of law."); *Todd v. American Multi-Cinema, Inc.*, No. 02-1944, 2004 WL 1764686 (S.D. Tex. Aug. 5, 2004) (holding that "Equal access does not mean equal enjoyment."). Both *Cornilles and Todd* were dismissed. Concerning physical handicaps *see, e.g.*, Fiedler v. American Multi-Cinema, Inc., 871 F. Supp. 35 (D. D.C. 1994) (finding that "disabled people are to have equal access to the less desirable—and presumably cheaper—seats at theatrical events, as well as the most coveted" and assessing whether to provide an accommodation that may pose a direct threat to the health and safety of others).

[261] *See* John F. Stanton, *Comments of the Alexander Graham Bell Association for the Deaf and Hard of Hearing in Support of House Bill 1463 ("Rachel's Law – Closed Captioning in Movie Theatres")*, ALEXANDER GRAHAM BELL ASSOCIATION FOR THE DEAF AND HARD OF HEARING (Mar. 23, 2010), http://nc.agbell.org/document.doc?id=422. There have been several arguments against mandatory captioning including, but not limited to: "we don't discriminate" against the disabled, other patrons do not like the services provided to the disabled, future technologies will provide more alternatives; the equipment is too expensive, captioning alters the content or is a different service, and there are not enough manufacturers for captioning equipment.

[262] *See id.* Stanton's detailed brief as Counsel for the Alexander Graham Bell Association in support of Rachel's Law does an excellent job in analyzing the history of movie theater captioning access, addressing the legislative history to the variety of case law struggling to garner equal access accommodations for the disabled. As such, the authors will not discuss the history of captioning access here; readers are encouraged to study this brief for further details.

[263] 315 F. Supp. 2d 120 (D.D.C. 2004).

[264] John Waldo, *Movie Captioning: Now the Rule Rather than the Exception*, HEARING LOSS ASS'N OF CAL. (May 17, 2011), http://hearinglossca.org/movie-captioning-now-the-rule-rather-than-the-exception.

[265] Alex Kozinski, Chief Judge, U.S. Court of Appeals for the Ninth Circuit, noted to counsel for the movie theaters during oral arguments in *Arizona v. Harkins* that "You are going to lose eventually . . . you are going to lose this battle in the end. You can get out in front of it and be the good guys, or you can be dragged kicking and screaming and look like jerks. I don't understand why you are choosing to fight this battle." Oral Argument at 48:35, Arizona v. Harkins, 603 F.3d 666 (9th Cir. 2010) (No. 08-16075), *available at* http://www.ca9.uscourts.gov/media/view.php?pk_id=0000004752.

done.

The U.S. Court of Appeals for the Ninth Circuit considered the issue of equal access to movie theater accommodations in *Arizona v. Harkins Amusement Enterprises, Inc.*[266] The State of Arizona initially filed suit against Harkins Amusement Enterprises (Harkins), a large and well-known movie theater company in Arizona, on behalf of similarly situated blind and hearing impaired individuals. The State of Arizona alleged that Harkins had violated the ADA[267] and the Arizonans with Disabilities Act[268] when it failed to provide equal access to the blind and deaf populace who sought captioning or descriptive audio access at Harkins' movie theaters.

On appeal, the Ninth Circuit found that claimants did establish a prima facie case of discrimination.[269] The claimants showed that they were disabled under the ADA; that Harkins was a private entity that owned, leased, or operated a place of public accommodation; and that the claimants were denied public accommodations by Harkins due to their disability.[270] More specifically, in order to prevail, the claimants had to demonstrate that Harkins' invidious discrimination included:

> [the] failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.[271]

The court reasoned that movie theater captioning and descriptive narration technology fell under the category of "auxiliary aids and services."[272] The sundry provision of these supplementary accommodations allowed for the nondiscriminatory enjoyment of movies at Harkins' movie theaters.[273]

The Ninth Circuit disagreed with the district court's finding that such accommodations were outside the breadth of the ADA;[274] namely, the district court assumed that discrimination was based on equal access to the goods and services actually provided, rather than the provision of

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[266] *Harkins*, 603 F.3d 666.

[267] 42 U.S.C. §§ 12101–12213 (2006 & Supp. III 2009).

[268] ARIZ. REV. STAT. ANN. § 41-1492 (2012).

[269] *Harkins*, 603 F.3d at 671, 675.

[270] *Id.* at 670.

[271] *Id.* (citing 42 U.S.C. § 12182(b)(2)(A)(iii) (2006 & Supp. III 2009)).

[272] *Id.*

[273] *Id.* at 670–72.

[274] *See id.* at 675 ("the district court erred in holding that closed captioning and descriptive narration are not required by the ADA.").

alternative goods and services as defined in 42 U.S.C. § 12103(1).[275] The district court's interpretation would effectively eliminate the ADA's affirmative requirement for a place of public accommodation to provide auxiliary aids and services.[276]

The Ninth Circuit reviewed the various accommodations requested to determine which ones might constitute a necessary but equal accommodation for the disabled.[277] The court noted that descriptive narration technology allows individuals with visual impairments to hear information about key visual aspects of movies.[278] The court also reviewed three commonly used captioning access technologies.[279] The first two were less prevalent forms of "open captioning," which displays captions on the screen for the entire audience to view.[280] One type of open captioning engraves text onto each individual frame of the film, while the other type projects captioning through a projector onto the screen, thereby enabling the theater to turn on or off the captioning based on demand.[281] The third and most popular option captioning access technology option allows for closed captioning to be displayed on portable reflector panels located at the individual's seat.[282] The court determined that captioning access was generally limited to theaters that had the requisite equipment for these advanced technologies.[283] Harkins provided only limited captioning runs at two theaters—out of 21 theaters and 262 auditoriums owned and operated by Harkins throughout Arizona—and did not have descriptive audio at any theater.[284]

The Ninth Circuit did not determine whether particular types of captioning access would be required by movie theaters; indeed, it concurred with the district court's holding that "the ADA does not require Harkins to utilize open captioning as a matter of law."[285] However, it clearly noted that the district court erred in finding that captioning access and descriptive narration were not outright required outright by the ADA.[286] The Ninth Circuit left open the determination as to whether these services or aids would fundamentally alter the nature of Harkins' services or constitute an undue burden.[287]

The Ninth Circuit's affirmation that movie theater

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[275] *Id.* (rejecting the district court's reliance on *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1115 (9th Cir. 2000) and *McNeil v. Time Ins. Co.*, 205 F.3d 179 (5th Cir. 2000)).

[276] *Id.* at 672.

[277] *Id.* at 668–69.

[278] *Id.* at 669.

[279] *Id.* at 668.

[280] *Id.*

[281] *Id.*

[282] Otherwise known as "seat-based captioning." *Id.*

[283] *Id.*

[284] *Id.* at 669.

[285] *Id.* at 675.

[286] *Id.*

[287] *Id.* (citing 42 U.S.C. § 12182(b)(2)(A)(iii) (2006 & Supp. III 2009) and 28 C.F.R. § 36.303(a) (2012)).

accommodations[288] are included within the ambit of the ADA has far-reaching potential. While a number of affirmative defenses remain available to theaters with respect to the provision of these accommodations,[289] time itself poses a hazard to these arguments. As technology continues to develop and adapt to changing trends, the costs for providing widespread movie theater accommodations will likely decrease. This will ultimately reduce the probability of a successful "undue burden" argument. Likewise, as public opinion continues to sway in favor of expanding civil rights protections,[290] movie theaters will likely find the "fundamental alteration" argument to be limited as a matter of law. This reflects the changing nature of our times and the increasing openness of society towards equal access for all.

2. NAD v. Netflix

As highlighted by the CCVA, the difficult issue of ensuring equal access to all is not limited to the movie theaters, but also extends to online captioning of content. On June 16, 2011, the National Association of the Deaf (NAD) filed a civil suit against Netflix in the U.S. District Court for Massachusetts.[291] NAD alleged that Netflix violated the ADA by failing to provide equal access to its "Watch Instantly" streaming content. Specifically, NAD alleged that Netflix violated a regulation promulgated pursuant to 42 U.S.C. § 12181(7),[292] when it failed to provide equal access to millions of deaf and hard-of-hearing individuals who desired nothing more than the "full and equal enjoyment" of the "public accommodation's goods, services, facilities, and privileges, including 'place[s] of exhibition and entertainment,' 'place[s] of recreation,' 'sales or rental establishment[s],' and 'service establishments.'"[293] NAD argued that the ADA was intended to "remove barriers and bring people with disabilities into the mainstream."[294] Netflix, by failing to caption its "Watch Instantly" content, limited access to entertainment for the deaf and hard-of-hearing,[295] which NAD alleged was an "ongoing and continuous violation of the law."[296]

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[288] These include, but are not limited to, captioning access for the deaf and descriptive narration for the blind.

[289] Foremost being the exceptions for "undue burden" and the "fundamental alteration" contained in 28 C.F.R. §§ 36.302(a), 36.303(a).

[290] *Cf.* ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat. 3553 (criticizing the Supreme Court's limitation of the ADA's scope and amending the ADA to rectify those limitations).

[291] Complaint, Nat'l Ass'n of the Deaf v. Netflix, Inc., No. 3:11-cv-30168 (D. Mass. June 6, 2011), *available at* http://www.nad.org/sites/default/files/2011/June/NAD,%20et%20al.%20v.%20Netflix%20Complaint.pdf.

[292] 28 C.F.R. § 36.201(a) (2013).

[293] Complaint, *supra* note 291, at 3.

[294] *Id.* at 15.

[295] *Id.* at 1.

[296] *Id.* at 17.

Netflix has over 20 million subscribers and was the "only major player in the online-only video subscription business."[297] This particular "Watch Instantly" streaming content is the "biggest source of Internet traffic in the U.S.," accounting for nearly 30% of peak time traffic out of the 50% total that was comprised of streaming of video and audio.[298] As of June 14, 2011, Netflix had only captioned approximately 5% to 30% of its content.[299] NAD indicated that it, and other members of the deaf and hard-of-hearing community, had made numerous requests to Netflix to provide captioning access on this content.[300]

NAD substantiated its complaint with a number of customer complaints from deaf and hard-of-hearing individuals from all over the country.[301] While hearing subscribers were able to access the full content of the "Watch Instantly" library, deaf and hard-of-hearing members were unable to do so.[302] This prevented deaf and hard-of-hearing individuals from paying for the least expensive feature offered by Netflix, and instead required them to obtain the more expensive plans that included DVD rentals, in order to obtain accessible content.[303] This, according to NAD, resulted in a "deaf tax" being charged against the deaf and hard-of-hearing populace.[304] This would also unduly limit deaf individuals to a delay in watching the content and would unreasonably tether them to watching content on a physical DVD player rather than "on the go" as the "Watch Instantly" content permitted.[305]

The DOJ submitted a particularly enlightening Statement of Interest.[306] Most important, the DOJ emphasized that the ADA is not limited just to physical structures,[307] and can be applied via physical or electronic spaces—for example, the telephone or Internet.[308] This DOJ proclamation has relevance to other issues discussed in this Article. The DOJ noted that it has historically interpreted Title III of the ADA to apply to web services, thereby supporting NAD's contention that Netflix is a public accommodation subject to Title III.[309] The DOJ indicated that it viewed Netflix under Title III in a variety of ways: 1) as a "service establishment" which allows for "customers to instantly stream a wide variety of programming via its website wherever they have an Internet

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[297] *Id.* at 5.

[298] *Id.* at 2.

[299] *Id.* at 6–7. The NAD based this number on the varied definition of content. *Id.*

[300] *Id.* at 7–8.

[301] *Id.* at 12.

[302] *Id.*

[303] *Id.*

[304] *Id.* at 15.

[305] *Id.*

[306] Statement of Interest of the United States at 1, Nat'l Ass'n of the Deaf v. Netflix, Inc., No. 3:11-cv-30168 (D. Mass. May 15, 2012), 2012 WL 1834803. *The DOJ noted that it filed the motion* because this matter governed the interpretation and application of Title III of the Americans with Disabilities Act, and is the primary agency responsible for enforcing Title III of the Act. *Id.* at 1.

[307] *Id.* at 5.

[308] *Id.* at 7.

[309] *Id.* at 4, 9,10.

connection;"[310] 2) Netflix's content is included within the "exhibition or entertainment" category as its website provides content including movies, television programs, and other related entertainment content; and 3) Netflix constitutes a "rental establishment" because its customers pay for the rental of video programming via its website and receive physical or electronic versions of the rented content.[311] The DOJ also discussed how the CCVA was directly applicable to the case at bar: it requires, among other things, streamed Internet programs already in the video programming distributor's library to be captioned by September 30, 2012, which would require Netflix to caption most, if not all, of its "Watch Instantly" content.

As this article went to press, Netflix entered into a historical settlement with NAD on October 9, 2012.[312] As of the date of settlement, 82% of Netflix's content was captioned, and the company agreed to caption 90% of its content by September 30, 2013. [313] Netflix further agreed to reach 100% captioning of its content by September 30, 2014.[314] Until 100% of the content is captioned, Netflix stated that it will maintain a sortable database on its website listing all captioned or subtitled content.[315] In addition, all newly added content will include captions or subtitles, with a decreasing time-frame for captioning or subtitles to be added to the new content.[316] Netflix also agreed to pay attorney's fees and costs, as well as $40,000 for monitoring the implementation of the consent decree.[317] The parties also settled on a proviso, ensuring for alternative means of accommodating the deaf and hard-of-hearing based on improved technologies.[318]

In short, this is the first and most unique settlement of its kind—a web-based[319] streaming-content provider agreeing to caption all of its content—and may lead to similar widespread implementation by other content providers. As the need for captioning access grows, content providers have begun to take steps to ensure equal access for all, even though these steps may be the results of litigation.

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[310] *Id.* at 7.

[311] *Id.* at 6–7.

[312] Consent Decree, Nat'l Ass'n of the Deaf v. Netflix, Inc., No. 3:11-cv-30168 (D. Mass. Oct. 9, 2012), *available at* http://dredf.org/captioning/netflix-consent-decree-10-10-12.pdf.

[313] *Id.* at 3.

[314] *Id.*

[315] *Id.*

[316] Netflix would have 30 days by 2014 to caption newly launched content, with this number decreasing to 15 days by 2015, and 7 or less days by 2016. *Id.* at 4.

[317] *Id.* at 6.

[318] *Id.* at 7.

[319] Although Netflix provides DVDs as a primary element of its programming, and intends to do so as a long-term business endeavor, streaming media is recognized to be a significant and fast growing aspect of Netflix's repertoire. *See* Jessie Becker, *Netflix Introduces New Plans and Announces Price Changes*, NETFLIX: U.S. & CANADA BLOG (July 12, 2011), http://blog.netflix.com/2011/07/netflix-introduces-new-plans-and.html (describing streaming and DVD-only packages).

3. Feldman v. Pro Football

On March 25, 2011, the U.S. Court of Appeals for the Fourth Circuit issued an unpublished per curiam opinion discussing the issue of captioning access at Redskins Stadium. [320] The case arose from a complaint filed in the U.S. District Court for the District of Maryland Southern Division, wherein the district court granted in part the plaintiffs' motion for summary judgment.[321]

In the underlying case, plaintiffs (deaf and hard-of-hearing fans who attended Washington Redskins football games) alleged that defendants (collectively the owners and operators of FedEx Field, the home of the Redskins) refused to provide auxiliary aids and services—specifically captioning access—to ensure that announcements made over the public address system were effectively communicated to deaf and hard-of-hearing fans.[322] While the Redskins provided assisted listening devices upon request, not all plaintiffs benefitted from the devices.[323] Thus, plaintiffs and NAD requested that captioning be displayed on the JumboTron at FedEx Field.[324] This would enable plaintiffs to "understand referee calls, plays during the game, and emergency announcements."[325] Plaintiffs also requested that certain LED ribbon boards used to caption announcements during the game be relocated to enable a clear "line of sight" for both the JumboTron and the LED ribbon boards.[326] Plaintiffs further alleged that defendants failed to provide equal access to the "aural information broadcast"—music with lyrics.[327]

After suit was filed, defendants began captioning all broadcast content—both on televisions located inside the stadium and on the JumboTron itself—at every Redskins home game and promised to continue doing so indefinitely.[328] Thus, defendants argued that plaintiffs' claim was rendered moot.[329] Plaintiffs argued that defendants could end the feed at any time, a fact with which the district court agreed.[330] The district court also noted that the provision of assistive listening devices was insufficient under the ADA, as this technology was "useless" to plaintiffs and thus, did not provide effective communication.[331]

In sum, the district court concluded that "Title III of the ADA requires Defendants to provide deaf and hard-of-hearing fans equal

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[320] Feldman v. Pro Football, Inc., 419 F. App'x 381 (4th Cir. 2011).
[321] Feldman v. Pro Football, Inc., 579 F. Supp. 2d 697 (D. Md. 2008).
[322] *Id.* at 698–700.
[323] *Id.* at 699.
[324] *Id.* at 699–700.
[325] *Id.* at 699.
[326] *Id.* at 703.
[327] *Id.* at 708.
[328] *Id.* at 700.
[329] *Id.* at 706.
[330] *Id.*
[331] *Id.* at 709.

access to the aural information broadcast over the stadium bowl public address system at FedEx Field, which includes music with lyrics, play information, advertisements, referee calls, safety/emergency information, and other announcements."[332] Defendants appealed to the Fourth Circuit over the mootness issue, and the district court's requirement for defendants to provide auxiliary access to the aural content broadcast over the public access system.[333] The Fourth Circuit affirmed the district court's decision that the defendants had not discharged their burden of showing that they would not repeat their wrongs, finding that defendants could stop providing captioning with "ease."[334] The Fourth Circuit also agreed with the district court that, "music played over the public address system during Redskins home games is part of the football game experience that defendants provide as a good or service, and that the Americans with Disabilities Act requires full and equal access to the music lyrics."[335]

In conclusion, the provision of specific functional auxiliary aids to promote equal access for the disabled does far more than merely enabling the user to understand, follow, or enjoy the content provided; it provides an experience—indeed an essential facet of daily life and a necessary accommodation for the disabled.[336] Cases such as *Netflix* show that while some companies undertake certain affirmative actions to broadcast content with captioning, these actions are often insufficient. The deaf and hard-of-hearing constitute but a small percentage of the overall population, but that does not diminish their need or desire to utilize the universe of media options.

E. Assistive Technology Costs and Repair

As should be readily apparent by this point in the Article, many disabled individuals rely on reasonable accommodations to actively engage in the routines and enjoyment of daily life. As this Article has discussed, there are many forms of assistive technologies—hardware or software—that aid these individuals in communicating, seeing, hearing, or achieving mobility.[337] Because these many technologies may serve as

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[332] *Id.*

[333] Feldman v. Pro Football, Inc., 419 F. App'x 381, 386 (4th Cir. 2011).

[334] *Id.* at 387.

[335] *Id.* at 384.

[336] *Id.*

[337] A screen-reader like JAWS is an example. Moreover, "[a]lthough some [assistive technology devices], such as calculators, wheelchairs, and books on tape, may be familiar to all or most educators, others, such as the reading pen and alternative computer input devices, are more recent advances, and would likely be unfamiliar to many educators.

The range of assistive technology devices that are likely to become widely available in the future will be even more remarkable in their ability to improve the lives of students with disabilities, and even more foreign to educators not trained in their use. One example of such a device, which may become available in the near future, is the Hybrid Assistive Limb or HAL. This Device consists

a way to lessen the physical, mental, or emotional limitations of the disabled, ensuring their inclusion and integration in society, it is critical that such technology be affordable, useable, and in good condition. And if not, disabled users must be able to easily address that state of affairs.

1. Addressing the Price Gap: Ensuring Assistive Technologies are not Lemons

As with all other purchases, assistive technology devices will sometimes fail to operate as designed, and should be covered under expansive warranties intended to suit this purpose. However, as with any other mechanical device, whether a car or a form of assistive technology, warranty coverage may not suffice when a manufacturer is noncompliant with its own warranty, cannot reasonably repair or replace the product, or the customer takes matters into his or her own hands. "Lemon laws" exist to safeguard the rights of both consumers and manufacturers, and to provide a remedy for purchasers of a particular item that repeatedly fails to meet certain performance and quality standards.[338] As such, the authors support a lemon law in Maryland for technology specifically designed for and utilized by the disabled.

Lemon laws were first incorporated into the context of assistive technology when Congress passed the Technology-Related Assistance for Individuals with Disabilities Act in 1988,[339] which was later reauthorized and renamed the Assistive Technology Act in 1998.[340] Some states are attempting, or have attempted to, expand on the federal legislation to ensure that disabled customers do not receive a "lemon" when they make an expensive purchase of assistive technology. Upon review of existing assistive technology lemon laws,[341] the authors have devised a few points that should be addressed within the context of drafting updated model legislation. This list is by no means exhaustive.

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of a backpack, belt, and leg attachments, all of which are worn by the user. The backpack contains a computer that communicates wirelessly with the leg attachments and the belt contains the device's power source. The device assists people with physical disabilities that render them immobile or weak by intercepting the signals from their brains that tell their legs to move prior to them reaching the leg muscles, and then activates motors in the leg attachments that move the user accordingly. The device is, in effect, a powered suit, which is controlled by an individual's own brain signals. The potential applications of this device for special education are many."). Jonathan Stead, Notes and Comments, *Toward True Equality of Educational Opportunity: Unlocking the Potential of Assistive Technology Through Professional Development*, 35 RUTGERS COMPUTER & TECH. L. J. 224, 239–40 (2009).

[338] BLACK'S LAW DICTIONARY 984 (9th ed. 2009) (defining lemon law as "a statute designed to protect a consumer who buys any product of inferior quality").

[339] Technology-Related Assistance for Individuals with Disabilities Act of 1998, Pub. L. No. 100-407, 102 Stat. 1044 (codified in scattered sections of 29 U.S.C.).

[340] Assistive Technology Act of 1998, Pub. L. No. 105-394, 112 Stat. 3627 (codified in scattered sections of 29 U.S.C.).

[341] In the Mid-Atlantic region alone, the authors found statutes in New York, Pennsylvania, and Delaware. *E.g.*, DEL. CODE ANN. tit. 6, §§ 5001b–5007b (2012) (Assistive Technologies Device Warranties and Consumer Protection).

State or federal representatives should certainly not hesitate to seek advice and comments from specialists in the field of assistive technology, to ensure that the proposed legislation truly meets the needs and desires of the disabled populace.

The law should cover any consumer who buys or leases an assistive technology device from the manufacturer or assumes ownership of such device prior to the expiration of the manufacturer warranty. The law should extend to both original and subsequent purchasers and to all means of purchase, such as through an online medium like eBay. The consumer should not be penalized for seeking alternative methods of purchasing the same device for the same purpose.

The law should not require the presence of a disability under the ADA or related state or federal law. Nondisabled consumers should not be penalized if they purchase an assistive technology device, regardless of whether the purpose is to aid an individual with a disability or for personal use. If states choose to narrow coverage to individuals with a disability, any broader protections in that state's civil rights law should apply to purchasers if the protections are broader than the ADA.

The law should not cover devices sold or transferred without a warranty or in "as is" condition. If the consumer purchases a device without a warranty, any protection provided by this law is voided. In other words, the manufacturer is absolved of any fault for problems the assistive technology device may have if there is not a warranty.

The law should allow for a "reconsideration period." States may consider a reconsideration period, which would enable the consumer to return his purchase within a minimal timeframe, such as three days. This coverage should not apply with "as is" assistive technology purchases.

The law should be broadly construed to cover all devices created or utilized for the purpose of assistive technology. This should include, but not be limited to, wheelchairs and lifts, scooters, hearing aids, seating and positional aids, communication devices, and talking or screen-reading software and hardware. The law should also provide for future expansion based on the rapidly developing growth of technology.

Lemon law coverage should extend for a finite period from the longer of the date of purchase or during the warranty period allotted by the manufacturer. If there are any issues with the manufacturer's warranty, the lemon law will apply throughout this period. If the assistive technology is repurchased near the end of the manufacturer's warranty, then the lemon law should extend for the subsequent purchaser beyond this period for a reasonable length of time.

Manufacturers must be required to repair devices within a set time period. Manufacturers should be allowed a reasonable length of time to undertake review and possible repairs of the assistive technology device. Failure to rectify the defect within this time period should result in replacement, or sanctions for a total failure to comply with any requested repairs.

If, on multiple occasions, the repair takes longer than the requisite time period, alternative options should be provided. In the event that multiple repair delays occur, manufacturers must be required to provide similar alternatives to the consumer, such as refunding the cost of the purchase, total replacement, or a reasonable reimbursement of the daily cost of renting an alternative device.

Consumers should be entitled to refund or replacement after a given number of failed attempts at repair or if the needed repair does not occur within a given length of time. If the manufacturer has made a number of failed attempts at repair, and the product continues to operate in a manner inconsistent with its intended operation, the manufacturer must provide refund or replacement to the consumer. Consumers should not be entitled to fees for time or effort expended, although manufacturers should be encouraged to work closely with consumers to satisfy continued consumer needs.

Coverage should not apply to devices that are abused, neglected, or substantially materially altered. Any device that bears signs of post-purchase damage, modification, or harm to the effective operation of the device should not be covered under the lemon law. The law should also limit coverage on this basis regardless of intent on the part of the consumer.

Manufacturer defenses should be limited to those allowed by law. Manufacturers should not be entitled to construct non-statutory defenses. Related complaints should be submitted to the appropriate state agency for review. Complaints should be viewed in the light most favorable to the consumer.

Enforcement and potential sanctions for failure to comply with the law should be included, but failure to exhaust administrative remedies should not be a bar to private suit. The law should dictate which agency is responsible for the enforcement of the lemon law and provide sanctions for a manufacturer's deliberate failure to comply with the law. However, consumers should not be required to file complaints with the appropriate agencies in the event that they desire to proceed privately against a manufacturer.

Finally, *consumers should not engage in self-help.* The law should require consumers to continue making payments towards a purchase or lease of the device, even if the device fails to operate as expected.

The recommendations made in this section should guide drafters of a model lemon law act for assistive technology. States, including Maryland, should undertake efforts to review, draft, and propose updated legislation. Any such outdated laws related to assistive technology or those that are unduly limiting—such as those which omit mention of or limit coverage for wheelchairs or hearing aids—should be updated with newer, more relevant legislation that adequately addresses both current and future needs.

2. Maryland's Need for Affirmative Action

As this Article has described throughout, more often than not, the states must be catalysts for change. As such, this issue constitutes a prime subject for legislative action in the Maryland General Assembly.[342] As residents of the great State of Maryland, the authors encourage the enactment of a lemon law in Maryland. The Motorized Wheelchair Warranty Enforcement Act of 1994 (Wheelchair Act)[343] is the closest the state has to a lemon law for assistive technologies. This Act pertains exclusively to motorized wheelchairs and does not address coverage for assistive technology as a whole.

While Maryland should be commended for enacting legislation that protects the rights of those with motorized wheelchairs, one must wonder why Maryland stopped there—why not go all the way and finish the job that was started in 1994? Historically, Maryland has been at the forefront of disability protection and advocacy.[344] Despite this positive achievement, Maryland lags behind the numerous other states that have enacted broad assistive technology protections for the disabled. Thus, there is a dire need, nearly 20 years after the Assistive Technology Act[345] was first implemented, for Maryland to step up to the plate and swing this one out of the ballpark. The points the authors have provided in this Article will guide policymakers in Maryland to critically review and analyze the Wheelchair Act. Expansion of the existing assistive technology law should be recommended and ultimately implemented. But the buck should not stop there.

Furthermore, Maryland legislators should consider even broader expansion of the rights of the disabled. A comprehensive resolution should be passed in the Maryland General Assembly to further this aim. Having equal opportunities to utilize technology like any other person should be explicitly or implicitly at the core of the joint resolution. The joint resolution should hold that assistive technology guidelines, as well as overall requirements for full accessibility of all technologies, should be established in all domains—whether through housing accommodations, captioning access, or physical accessibility—anywhere that commerce flows through Maryland.[346] The authors hope that such a

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[342] Once again, any such action might be more informed and also more subject to quick passage if a stakeholder engagement process is applied, such as that suggested in the article by Ms. Berube and Mr. Norman above. Berube & Norman, *supra* note 83, at 15–16.

[343] MD. CODE ANN., COM. LAW §§ 14-2701–14-2706 (West 2012).

[344] Among other aspects, Maryland has various civil rights protections which have been enacted to further the quality of life for the disabled, including a Disability Law Center, a Civil Rights of Persons with Disabilities Clinic at the University of Maryland Francis King Carey School of Law, a cabinet-level Secretary of Disabilities who oversees the Maryland Department of Disabilities, and a Maryland Commission on Civil Rights that enforces Maryland's anti-discrimination law. *See* Title 20, MD. CODE ANN., STATE GOV'T (West 2009) (outlining the role of the Commission on Civil Rights and the laws it enforces).

[345] *See supra* Part IV.E.I.

[346] These are the range of efforts that the authors are consistently and regularly advocating

joint resolution would continue the dialogue about technology access, particularly with respect to the media.

V. CONCLUSION

It is not enough to pin the blame on others, to say this is a problem of one section of the country or another, or to deplore the facts that we face. A great change is at hand, and our task—indeed, our obligation—is to make that change peaceful and constructive for all. Those who act boldly are recognizing right as well as reality.[347]

The goal of this Article is to contribute to the growing dialogue about how to advance affirmative civil and constitutional rights, if not in the existing federal legal framework, then at least in individual states such as Maryland. While most of the websites, movie theater accommodations, and various technological devices and programs mentioned in this Article provide a significant degree of accessibility, they still pose some limitations, especially insofar as the Internet and the Information Age are concerned. There are ongoing challenges in safeguarding the civil rights of the disabled. For instance, if an Internet site is not properly coded or tagged for accessibility from the start, then access to the website may be futile for a blind person even with a screen-reader; if captioning content is not properly entered by a stenographer or is not entered at all, a deaf person may misinterpret or be unable to follow the content provided; if an indigent, physically handicapped individual's electric wheelchair fails to operate properly and the manufacturer refuses to repair the product under the warranty, the individual will be unable to ambulate or perform his activities of daily living. A society which does not commit itself to ensuring that information is accessible, in light of technological advances in the Information Age, propagates injustice and denigrates affirmative legislative protections that may be well-crafted and on the books.

In short, no matter what the content, the disabled have a civil, and arguably a constitutional, right to equal access to information available to able-bodied Americans through technology. If the rights of one person are denigrated, then by extension, the rights of all are lessened.[348] Any failure to provide this access, unless such an accommodation is legitimately demonstrated to be "unduly burdensome" or it

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within their membership on the Maryland Commission on Civil Rights and the Technology Loan Assistance Program Board, and also in their personal capacities as leaders with disabilities. To further advance the cause, the authors are attempting to create a new Disability and Human Rights Section within the Maryland State Bar Association.

[347] President John F. Kennedy, Radio and Television Report to the American People on Civil Rights (June 11, 1963), *available at* http://www.jfklibrary.org/Asset-Viewer/Archives/JFKWHA-194-001.aspx.

[348] *Id.* ("It was founded on the principle that all men are created equal, and that the rights of every man are diminished when the rights of one man are threatened.").

"fundamentally alters" the nature of the content provided, is egregious and a detriment to disability rights. In addition, not only are the disabled irreparably harmed by a lack of accessibility—society as a whole suffers from the harm resulting from such injustice. Thus, the law must, in accordance with the Norman/Friedman Principle set forth in this Article, be interpreted holistically, compassionately, and broadly to equalize the opportunity, although not necessarily *per se* the outcome, for the disabled.[349]

[349] *Id.* ("As I have said before, not every child has an equal talent or an equal ability or an equal motivation, but they should have an equal right to develop their talent and their ability and their motivation, to make something of themselves.").

Notes

Equitable Access: Examining Information Asymmetry in Reverse Redlining Claims Through Critical Race Theory

Charles Falck*

I. INTRODUCTION

The economic collapse of 2008 affected an extraordinary number of Americans.[1] The implosion of the mortgage-backed securities market,

* Thank you to the editors of the *Texas Journal on Civil Liberties & Civil Rights* for their extraordinary help in preparing this Note for publication. I especially want to thank Professor Zipporah Wiseman for her guidance in developing this Note.

[1] Michael D. Hurd & Susann Rohwedder, *Effects of the Financial Crisis and the Great Recession on American Households* 21 (Nat'l Bureau of Economic Research, Working Paper No. 16407, 2010), *available at* http://www.nber.org/papers/w16407 (finding that the 2008 recession caused widespread financial distress among American households, with 40 percent of households surveyed affected by unemployment, negative home equity, arrears on mortgage payments, or

which accelerated the recession, was rooted in the American subprime loan market. Lending institutions made high-priced, dangerous loans to individuals whose credit profiles and incomes indicated that they were likely to default. As defaults mounted and housing prices fell, the worth of the complex financial instruments plummeted, as did the Wall Street institutions that used the instruments to leverage themselves with debt many times greater than their operating capital. The financial crisis exposed Wall Street as a house of cards, and much of the regulatory conversation in the years since has focused on preventing Wall Street institutions from so cavalierly mishandling the vast amounts of money the public entrusts to them.[2] Yet while chief executives and financial officers face closer scrutiny in the eyes of the law and public opinion, a graver reality confronts the borrowers who signed mortgages they were unlikely to ever pay off.

Some of these borrowers have turned to courts for redress. As a theoretical matter, these lawsuits straddle a precarious line: though the terms of these mortgages were unfavorable, could the borrowers seek compensation despite willingly accepting these unfavorable terms? Part II of this Note focuses on lawsuits alleging that banks engaged in predatory lending—that is, offering subprime loans to individuals who either could have qualified for a fairly administered loan or who should not have qualified for any loan. Plaintiffs have brought claims of this nature under the Fair Housing Act (FHA), the Truth in Lending Act, and the Equal Credit Opportunity Act. This Note will focus on claims alleged under the FHA.

The author will argue that courts should adopt a test for stating a prima facie claim of reverse redlining that does not penalize plaintiffs disadvantaged by information asymmetry. The tests used by courts have, to an extent, depended upon the plaintiffs showing the unfairness and discrimination in their loan terms by examining the loan terms of non-minority borrowers, even though such terms are quite complex and rarely available. Consequently, plaintiffs have to obtain, interpret, and explain loan terms that lenders have created, organized, and have easier access to.

In order to alleviate the information asymmetry, judges should first utilize a test for stating a reverse-redlining claim that allows plaintiffs, whenever possible, to make out a prima facie case by producing information from their own records or publicly available sources. Second, where statistical analysis of documents not belonging to plaintiffs is required, judges should clearly identify which statistics could be used to make out a prima facie claim.

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foreclosure).

[2] *See, e.g.*, Timothy Geithner & Lawrence Summers, Op.-Ed, *A New Financial Foundation*, Wash. Post, June 15, 2009, at A15, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/06/14/AR2009061402443.html ("This current financial crisis had many causes. . . . But it was also the product of basic failures in financial supervision and regulation.").

In Part III, the Note will explore its thesis from Part II through critical race theory and neoclassical economics. The counter-arguments utilize notions of efficiency and rationality within the housing market, both before and after the 2008 crisis. In response, the Note will criticize several assumptions underlying the neoclassical approach, focusing on the realities disadvantaged minority plaintiffs face and detail attributes that make courts well suited to serve as institutions for reform. The Note will conclude by endorsing a more active role on the part of judges in addressing the information asymmetry faced by plaintiffs who bring reverse-redlining claims.

II. REVERSE-REDLINING CLAIMS

A. Evidence that Minority Borrowers Suffered More, the Fair Housing Act, and Reverse-Redlining Plaintiffs

Overwhelming evidence supports the notion that minority borrowers have suffered more from unfavorable loans than white borrowers. In 1998, during the early stages of the subprime bubble, borrowers in upper-income Black neighborhoods were more than six times as likely as borrowers in upper-income white neighborhoods to have refinanced a mortgage with a subprime loan, and more than twice as likely as borrowers in low-income white neighborhoods to have done so.[3] In 2006, at the height of the subprime bubble, Black borrowers were nearly twice as likely, and Latino borrowers were 50% more likely, than white borrowers to have a subprime loan—even when controlling for some borrowing and lending characteristics.[4] Black homeownership fell from 49% in 2005 to 46% in 2009 after the bubble burst.[5] Racial disparities manifested even in the terms of the subprime loans themselves: Black and Latino borrowers were more likely to have higher-priced subprime loans than similarly situated white borrowers.[6] Consequently, the loss of wealth suffered by Black and Latino communities has been immense, even when compared to the loss felt by white communities. As a result of the crisis, spillover costs from

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[3] Raymond Brescia, *Tainted Loans: The Value of a Mass Torts Approach in Subprime Mortgage Litigation*, 78 U. CIN. L. REV. 1, 30–31 (2009) (citing U.S. DEP'T OF HOUS. & URBAN DEV. & U.S. DEP'T OF TREASURY, CURBING PREDATORY HOME MORTGAGE LENDING: A JOINT REPORT 22–23 (2000), *available at* www.huduser.org/publications/pdf/treasrpt.pdf).

[4] *Id.* at 31 (citing Robert B. Avery et al., *The 2006 HMDA Data*, 93 FED. RES. BULL. A73, A95 (2007), *available at* http:// www.federalreserve.gov/pubs/bulletin/2007/pdf/hmda06final.pdf).

[5] Robert G. Schwemm & Jeffrey L. Taren, *Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act*, 45 HARV. C.R.-C.L L. REV. 375, 381 (2010). White homeownership fell in the same period from 76% to 74.5%. *Id.* at 381 n.43.

[6] Brescia, *supra* note 3, at 31–32 (citing Robert B. Avery et al., *The 2006 HMDA Data*, 93 FED. RES. BULL. A73, A95 (2007), *available at* http:// www.federalreserve.gov/pubs/bulletin/2007/pdf/hmda06final.pdf).

foreclosures in Black and Latino communities were enormous—$194 billion and $177 billion respectively between 2009 and 2012.[7]

Redlining is the practice of refusing to lend because of race or other protected trait.[8] Section 3605 of the FHA prohibits redlining, making it unlawful for any person or entity "whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin." [9] A redlining case traditionally involves a minority plaintiff who has been denied a loan despite having similar qualifications as white borrowers who received similar loans.[10]

By contrast, reverse-redlining claims are brought by plaintiffs who received loans but allege that they were intentionally given unfavorable loans on account of their race—thus, the "reverse" of the redlining cases. Like redlining plaintiffs, reverse-redlining plaintiffs have also sued under FHA § 3605; in addition, reverse-redlining plaintiffs have sued under § 3604(b), which prohibits discrimination "against any person in the terms, conditions, or privileges of sale or rental of a dwelling . . . because of race, color, religion, sex, familial status, or national origin."[11]

The recognition of reverse-redlining claims under the same FHA provisions used to prohibit redlining might seem contradictory, given that the statute broadly aimed to increase access to credit for minorities.[12] However, as this Note will discuss, the tests that courts have used in reverse-redlining cases come from Title VII, which is part of "a coordinated scheme of federal civil rights laws enacted to end discrimination[,] . . . construed expansively to implement that goal."[13]

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[7] Charles L. Nier III & Maureen R. St. Cyr, *A Racial Financial Crisis: Rethinking the Theory of Reverse Redlining to Combat Predatory Lending Under the Fair Housing Act,* 83 TEMP. L. REV. 941, 950 (2011) (citing DEBBIE GRUENSTEIN BOCIAN ET AL., CTR. FOR RESPONSIBLE LENDING, FORECLOSURES BY RACE AND ETHNICITY: THE DEMOGRAPHICS OF A CRISIS 11 (2010), *available at* http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf).

[8] Redlining in the strict sense means refusal to give credit based on geography and without regard to actual creditworthiness. Richard A. Givens, *The "Antiredlining" Issue: Can Banks Be Forced to Lend?*, 95 BANKING L.J. 515, 515 (1978). But there is a "tremendous overlap between redlining and lending discrimination." Anthony D. Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 HARV. L. REV. 1463, 1487 (1994). According to Raymond Brescia, the term comes from "lending practices where bankers would literally draw a red line on maps, identifying the communities—typically communities of color—where the bank would not extend credit." Raymond Brescia, *Subprime Communities: Reverse Redlining, The Fair Housing Act and Emerging Issues In Litigation Regarding the Subprime Mortgage Crisis*, 2 ALB. GOV'T L. REV. 164, 179 (2009).

[9] 42 U.S.C. § 3605(a) (2006).

[10] Nier III and St. Cyr, *supra* note 7, at 942.

[11] 42 U.S.C. § 3604(b) (2006).

[12] Dana Kaersvang, Note, *The Fair Housing Act and Disparate Impact in Homeowners Insurance*, 104 MICH. L. REV. 1993, 2000 (2006) (arguing that FHA sponsors aimed broadly to end discrimination in financial assistance for home ownership).

[13] Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 935 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988) (quotations removed).

Given courts' broad construction of antidiscrimination laws to effectuate their remedial purpose, this apparent tension between the prohibitions against redlining and reverse redlining becomes less problematic.[14]

B. Varying Tests Adopted for Stating a Reverse-Redlining Claim

The 2008 collapse accelerated the rise of reverse-redlining cases in the district courts, where judges have struggled to find an appropriate legal test in the face of motions to dismiss. District courts construing the FHA in reverse-redlining cases have adopted different tests, depending in part on whether the plaintiffs assert a disparate treatment claim (that they were targeted because of their race) or assert a disparate impact claim (that, regardless of intent, reverse redlining disproportionately affected them because of their race). Arguably, none of these tests provide plaintiffs with a just and fair chance to prove their claims. The tests disadvantage plaintiffs by exacerbating their lack of access to, and knowledge of, the terms of other loans administered by defendants—an example of information asymmetry.

The Southern District of Ohio in *Matthews v. New Century Mortgage Corp.* evaluated a claim of disparate treatment.[15] The four *Matthews* plaintiffs, all single elderly women, sued for reverse redlining in violation of § 3605 of the FHA.[16] They alleged that New Century Mortgage Company gave them loans they never could have afforded, with high-priced and deceptive interest rates and terms that were kept from them.[17] They claimed that New Century intentionally targeted them for unfair loans on the basis of their sex and marital status.[18]

The Matthews court used an employment discrimination test from the U.S. Supreme Court's *McDonnell Douglas Corp. v. Green*[19] as its framework. Under *Matthews*, a prima facie case of reverse redlining requires showing "(1) that [the borrower] is a member of a protected class; (2) that [the borrower] applied for and was qualified for loans; (3) that the loans were given on grossly unfavorable terms; and (4) that the lender continues to provide loans to other applicants [outside the protected class] with similar qualifications, but on significantly more

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[14] Benjamin Howell, Comment, *Exploiting Race and Space: Concentrated Subprime Lending as Housing Discrimination*, 94 CALIF. L. REV. 101, 137 (2006) ("Given the FHA's broad purpose and precedent supporting its expansive interpretation to remedy segregation's effects, novel arguments supported by strong empirical data regarding market conditions are important tools in combating the harmful effects of racially concentrated subprime lending.").

[15] 185 F. Supp. 2d 874 (S.D. Ohio 2002).

[16] *Id.* at 881.

[17] *Id.* at 877–82, 885–86.

[18] *Id.* at 887. *Matthews* is not a case of reverse redlining based on race; nonetheless, the framework it establishes applies equally to claims of reverse redlining based on race.

[19] 411 U.S. 792, 802–03 (1973).

favorable terms."[20] The *Matthews* court added that instead of meeting the fourth prong, a plaintiff could alternatively offer evidence that the lender intentionally targeted the plaintiff on the basis of a protected trait in order to state a claim.[21]

In denying the defendants' motion to dismiss, the *Matthews* court found that the plaintiffs satisfied each prong of the prima facie case.[22] However, the court failed to clearly define what types of evidence were needed to meet each prong, an omission that could disadvantage future reverse-redlining plaintiffs. First, the *Matthews* court failed to consider the obstacles facing plaintiffs by leaving ambiguous the definition of "qualified" under the test's second prong, which requires that plaintiffs show they were qualified for loans. In one sense, all reverse-redlining plaintiffs were "qualified" for a loan, in that they all were approved for one. However, only a portion of reverse-redlining plaintiffs were "qualified" in the sense that they could be expected to make their payments for a reasonable amount of time despite the unfavorable loan terms. The difference is crucial. If the test requires a showing that plaintiffs were "qualified" in the sense that they could be expected to make their payments, then plaintiffs who received loans that they could never afford in the first place would have a hard time surviving a motion to dismiss.

This concern is especially grave in cases where the plaintiffs assert that they could never afford any fairly administered loan. For reverse-redlining purposes, there is no practical distinction between plaintiffs who received less favorable loans than they qualified for and plaintiffs who should not have qualified for any fairly administered loan. In either context, the plaintiffs allege that they were targeted because of their protected trait for a loan designed to default. The second prong of the *Matthews* test precludes plaintiffs who should not have qualified for any fairly administered loan from surviving a motion to dismiss.

Second, the fourth prong disadvantages plaintiffs by requiring a showing that the lender "continues to provide loans to other applicants . . . on significantly more favorable terms."[23] Many plaintiffs rely on the theory that loan officers obscured the terms of the loans so that the plaintiffs think they are receiving one set of terms, when really they are receiving less favorable ones.[24] The *Matthews* court failed to define or offer examples of what constitutes "significantly more favorable terms."[25] Furthermore, the court does not explain how to acquire these

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[20] *Matthews*, 185 F. Supp. 2d at 886.

[21] *Id.* at 886–87. The option of using evidence of intentional targeting to meet the fourth prong of the prima facie claim is explained further below.

[22] *Id.* at 887.

[23] *Id.* at 886.

[24] *See, e.g.*, *Barkley v. Olympia Mortgage Co.*, Nos. 04 CV 875(RJD)(KAM), 05 CV 187(RJD)(KAM), 05 CV 4386(RJD)(KAM), 05 CV 5302(RJD)(KAM), 05 CV 5362(RJD)(KAM), 05 CV 5679(RJD)(KAM), 2007 WL 2437810 at *12 (E.D.N.Y. Aug. 22, 2007).

[25] *Id.*

loan terms offered by the same lenders to other borrowers—a significant hindrance, given that the documents are in the possession of the defendants.[26] The court does not consider these information asymmetry issues and leaves the plaintiffs with a lack of clarity as to how to satisfy this "significantly more favorable terms" prong.

The *Matthews* court did recognize an alternative to the fourth prong of the test.[27] Plaintiffs can instead present direct evidence of intentional targeting—that the lenders specifically sought out the plaintiffs on the basis of a protected trait.[28] However, the court again failed to illuminate how plaintiffs are supposed to tackle this information asymmetry problem and acquire this information.

The Eastern District of New York's standard for stating a prima facie reverse-redlining claim in *Barkley v. Olympia Mortgage Co.* more completely addresses the information asymmetry between reverse-redlining plaintiffs and lenders. In *Barkley*, the plaintiffs alleged that the lenders engaged in a property-flipping scheme where they bought houses in foreclosure auctions and artificially enhanced their market value.[29] They further alleged that the originators targeted the minority plaintiffs, as first-time homebuyers with limited financial means and knowledge, with loans that locked in the houses' enhanced value, so that originators could collect more on commission when the plaintiffs defaulted.[30] The court adopted the *Matthews* test for stating a prima facie claim of reverse redlining, but it interpreted the test to more equitably serve plaintiffs. First, the *Barkley* court resolved the ambiguity in the term "qualified" by holding that it requires only showing that the plaintiff qualify for a fairly administered loan.[31] Second, the *Barkley* court clarified how to use the "intentional targeting" alternative to the fourth prong.[32]

The *Barkley* court resolves the first ambiguity by rejecting the defendant's argument that the plaintiffs failed to satisfy the second *Matthews* prong.[33] The claim in *Barkley* specifically alleged that the plaintiffs could not afford the loans the originators coerced them into accepting.[34] The *Barkley* court only required the plaintiffs to show that they qualified for a fairly administered loan, not necessarily the loan terms at issue in the case.[35] Whether or not the plaintiffs could afford the

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[26] Discovery, of course, is not available before one would need to defend against a motion to dismiss.

[27] *Matthews*, 185 F. Supp. 2d at 886–87.

[28] *Id.*

[29] *Barkley*, 2007 WL 2437810 at *2.

[30] *Id.* at *1–2.

[31] *Id.* at *15 (citation omitted).

[32] *Id.* ("The Court joins the other district courts to have considered reverse-redlining claims premised on targeting allegations and holds that plaintiffs may establish the fourth prong of their *prima facie* case with evidence of intentional targeting.").

[33] *Id.*

[34] *Id.* at *2.

[35] *Id.* at *15 (citing *Matthews v. New Century Mortgage Corp.*, 185 F. Supp. 2d 874, 887 (S.D. Ohio 2002)).

specific loan they received was immaterial; as long as they could show that they could afford another "fairly priced" mortgage available in the marketplace, they would satisfy the second prong.[36] This holding addresses the information asymmetry problem by not requiring plaintiffs to gain access to and decipher other loans that the defendant has created and sold. The ability to look at other loans in the marketplace increases the chance that the plaintiffs can find a "fairly administered" loan for which they would have qualified.

The *Barkley* court resolves the second ambiguity by clarifying how to show intentional targeting. The *Barkley* court does not require plaintiffs to present the terms of other loans offered by defendants, but only to show that the defendants targeted the faulty loans in question exclusively to the plaintiffs.[37] Thus, under *Barkley,* not only do plaintiffs not have to study any of the defendant's loans offered to other borrowers, but there need not even exist a comparative group of borrowers. This formulation makes sense within the context of the case because the lenders did not have white customers, and so there was no separate category of loans to evaluate.[38] Therefore, information asymmetry is much less of an issue under the *Barkley* formulation of the *Matthews* test.

Similar information asymmetry problems plague a test adopted for stating a disparate impact reverse-redlining claim.[39] The Northern District of California evaluated a disparate impact claim in *Ramirez v. GreenPoint Mortgage Funding, Inc.*[40] and, like *Matthews*, also drew its prima facie test from employment discrimination law. The plaintiffs in *Ramirez* brought a disparate impact claim alleging that GreenPoint's policy of allowing loan originators to impose subjective, discretionary charges and interest rate mark-ups on the loans resulted in an adverse disparate impact on minority borrowers because they paid higher fees and interest rates than similarly-qualified white borrowers.[41]

For a disparate impact reverse-redlining claim, the *Ramirez* court required the plaintiff to show "a significant disparate impact on a

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[36] *Id.* Interestingly, the *Barkley* court attributed its interpretation to *Matthews*, even though the *Matthews* court merely concluded, without analyzing, that the plaintiffs were qualified for loans even though they could not afford the loans over which they filed suit. *Matthews*, 185 F. Supp 2d at 887.

[37] *Id.* at *14 ("In reverse-redlining cases, courts have justified allowing evidence of intentional targeting in lieu of evidence of disparate treatment or impact because to hold otherwise would allow predatory lending schemes to continue as long as they are exclusively perpetrated upon one racial group.").

[38] The plaintiffs alleged that the defendant "concentrated its business in minority census tracts and targeted minorities for the alleged scam by creating advertisements that featured minority homebuyers and selectively running these ads in minority communities." *Id.* at *2. As Raymond Brescia discusses, lenders can often deal exclusively with minorities, as the Barkley defendants allegedly did, or create affiliates to deal solely in minority communities. Brescia, *supra* note 8, at 200–01.

[39] Like Matthews, Ramirez adopted a standard for stating a prima facie case of reverse redlining in response to a motion to dismiss for failure to state a claim. *Ramirez v. GreenPoint Mortgage Funding*, 633 F. Supp. 2d 922, 927–29 (N.D. Cal. 2008).

[40] 633 F. Supp. 2d 922 (N.D. Cal. 2008).

[41] *Id.* at 924–25.

protected class caused by a specific, identified . . . practice or selection criteria."[42] Like in *Matthews*, the *Ramirez* court declines to explain the reasoning behind its choice of a test other than to say that courts generally use employment discrimination case law to construe the FHA.[43]

Similar to *Matthews*, plaintiffs face an information asymmetry problem under the *Ramirez* test for disparate impact reverse-redlining claims. The *Ramirez* test requires plaintiffs to identify a specific practice or selection criteria that caused the disparate impact, but again, the vast majority of necessary documentation is in the defendant's sole custody. Moreover, proving a significant disparate impact on a protected class can require use of a sophisticated statistical model, which will often require costly expert testimony.[44]

To the *Ramirez* court's credit, it did find that the showing that minority borrowers were almost twice as likely to have high-APR (annual price interest rate) loans as white borrowers was sufficient to show a significant disparate impact on a protected class and allow the claim to survive a motion to dismiss.[45] In adopting this standard, however, the court did not seem to anticipate potential difficulties the plaintiffs might face at trial in explaining loan terms to the jury. Furthermore, most individual plaintiffs will lack the resources of class action plaintiffs, so information asymmetry issues will be difficult to overcome.

C. Recommendations for Judges Deciding Reverse-Redlining Claims

When comparing all three of the aforementioned tests, the *Barkley* test goes the furthest toward limiting the information asymmetry problems discussed. Yet even the *Barkley* test does not address every type of potential reverse-redlining plaintiff. Cases may occur in which plaintiffs are not qualified for any fairly administered loan, but were given a predatory loan anyway. Such plaintiffs are no less damaged by the subprime crisis than those who do qualify for fairly administered loans but were given a subprime loan instead. Indeed, one might imagine that plaintiffs not qualified for loans left even worse off than those with more solid credit histories or income streams. No current legal test

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[42] *Ramirez*, 633 F. Supp. 2d at 927 (quoting Stout v. Potter, 276 F.3d 1118, 1121 (9th Cir. 2002)) (quotations removed).

[43] *Id.* at 927 n.1 ("Although *Stout* was an employment discrimination case, the parties do not dispute that courts look to employment discrimination jurisprudence when interpreting claims under the FHA and ECOA.").

[44] *See* Nier III and St. Cyr, *supra* note 7, at 976 (noting that "a predatory loan is often the result of a combination of different factors that may be attributable to multiple policies or practices. . . . [that] can make it very difficult to trace disparities to a specific policy or practice.").

[45] *Ramirez*, 633 F. Supp. 2d at 928–29.

adequately addresses their plight.

A satisfactory legal test for a prima facie case of reverse redlining should focus less on analysis of the particular defendant's loans and policies, and more on information the individual plaintiff has equal access to. Such a test must be able to adapt to plaintiffs' unique circumstances. Courts should generally accept the *Barkley* treatment of the *Matthews* factors, emphasizing the utility of intentional targeting in proving the fourth prong. Intentional targeting need not necessarily be shown by analyzing the defendant's loans and policies offered to all potential borrowers; instead, a test should allow a showing of intentional targeting by pleading that the methods the defendant used to give access and market loans to a particular person were discriminatory. Such a test would ensure that plaintiffs need not amass specialized knowledge of non-party loans offered by defendant, as the first three prongs of the *Matthews* test can generally be satisfied through the plaintiff's own loan documents.[46]

Where plaintiffs allege that they were not qualified for any fairly administered loan, but that lenders duped them into accepting a subprime loan anyway, the second prong of the *Matthews* test—that the plaintiff applied for and was qualified for loans—should be omitted. In fact, it may be their lack of qualification that attracts predatory lenders to them in the first place. Nothing in the FHA excludes borrowers who should not have qualified for any loan from bringing a reverse-redlining action, and the legal standard for making out a prima facie claim should accommodate them accordingly. If plaintiffs assert that they could never have afforded any loan, even if administered on fair terms, as long as they show that the lenders led them to believe that they were so qualified, the second prong of the *Matthews* test need not apply.

Courts should take a more active role when they decide to use statistics to measure one or more of the *Matthews* prongs. Statistics are an accepted way of proving a reverse-redlining claim,[47] but courts do not always specify which statistics they will accept. The *Ramirez* court accepted one metric: Home Mortgage Disclosure Act data showing minorities who borrowed from GreenPoint between 2004 and 2006 were almost 50% more likely than whites to have received a high-APR loan to purchase or refinance their home.[48] However, there may not be publicly available statistics that are specific to the particular defendant. Under the *Ramirez* test, an originator might argue that there are many different factors that affect whether or not a loan achieves subprime status, making

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[46] Andrew Lichtenstein, *United We Stand, Disparate We Fall: Putting Individual Victims of Reverse Redlining in Touch With Their Class*, 43 LOY. L.A. L. REV. 1339, 1348 (2010).

[47] Brescia, *supra* note 8, at 214 (describing using statistics to establish a prima facie case of reverse redlining).

[48] *Ramirez v. GreenPoint Mortgage Funding*, 633 F. Supp. 2d 922, 928–29 (N.D. Cal. 2008). The court also relied on allegations in the complaint that the individually-named plaintiffs were charged a disproportionately greater amount in non risk-related credit charges than similarly-situated whites. *Id.* at 929. *See* Lichtenstein, *supra* note 46, at 1351 (noting that Home Mortgage Disclosure Act data plays an important role in helping plaintiffs prove reverse redlining claims).

it much more difficult for a plaintiff to find a comparable loan to his own. Therefore, courts should come up with specific criteria for the plaintiffs to present that minimizes as much as possible the abilities of a defendant to distort the data. Whenever possible, courts should encourage plaintiffs to use data that will not require them to look at other loan terms. For example, courts have accepted eviction rates as evidence of the unfairness or disparate impact of the terms of plaintiffs' living arrangements compared to others outside of the plaintiffs' protected class.[49] With these changes, courts can begin to dissolve the informational asymmetry that plagues reverse-redlining litigation in the wake of the subprime crisis and give plaintiffs the day in court they deserve.

III. SUPPORTING THE NEW STANDARD THROUGH CRITICAL RACE THEORY

A. The Subprime Mortgage Collapse, Critical Race Theory, and Neoclassical Economics

Critical race theory is a movement by activists and scholars who study and hope to transform racial and power dynamics.[50] The movement is characterized by certain tenets and methodologies, one major theme being how the law operates to maintain the status quo of racial oppression rather than facilitate change.[51] Critical race theory examines the structures of institutions, including courts, to detect potential areas that unfairly disadvantage entire groups of individuals.[52] While there are many different branches of critical race theorists, it is hard to imagine that they would not embrace this Note's recommendations for addressing

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[49] *See* Betsey v. Turtle Creek Associates, 736 F.2d 983, 988 (4th Cir. 1984) (holding that plaintiffs made out a prima facie case that an all-adult rental policy had a disparate impact on mostly black current tenants where they offered evidence that 54.3% of non-white tenants in the building received eviction notices compared to 14.1% of white tenants).

[50] RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 3 (2d ed. 2012).

[51] *See* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1050 (1978) (arguing that "as surely as the law has outlawed racial discrimination, it has affirmed that Black Americans can be without jobs, have their children in all-black, poorly funded schools, have no opportunities for decent housing, and have very little political power, without any violation of antidiscrimination law.").

[52] *See* Cassandra Jones Havard, *Democratizing Credit: Examining the Structural Inequities of Subprime Lending*, 56 SYRACUSE L. REV. 233, 270 ("The issue of access to credit is an indisputable exemplar of economic subordination as addressed by critical race theory. The search for economic justice for borrowers who are vulnerable in the marketplace raises issues of economic and racial privilege."); *see also* Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 754 (1994) (stating that critical race theory "puts law's supposed objectivity and neutrality on trial, arguing that what looks like race-neutrality on the surface has a deeper structure that reflects White privilege.").

the information asymmetry issue previously discussed.

The subprime mortgage collapse facilitated institutional oppression of minorities. Credit rating agencies gave subprime securities good ratings, regardless of value.[53] These good ratings facilitated even more aggressive lending by lending institutions.[54] This way of lending operated to oppress entire groups of borrowers with limited financial means and know-how, and, as reverse-redlining claims allege, did so based upon the borrower's race (or age or other protected trait). The elimination of such oppression aligns with the goals of both critical race theory and the FHA's explicit ban on discrimination in real estate transactions.

The most direct challenge to critical race theory comes from neoclassical economics, which examines the efficiency of the decisions that individuals make.[55] Neoclassical economics analyzes the viability of market transactions based upon the notion of efficiency. A given transaction is efficient if it serves what Richard Posner, the architect of much law-and-economics theory, terms "wealth maximization," or the net amount of wealth between the parties to the transaction—including non-pecuniary value.[56] Therefore, if the result of a transaction is that one party's wealth increases by more than the other party's wealth decreases, then the transaction is efficient. The central assumption of neoclassical theory is that parties will always act rationally, or to serve their own wealth maximizing self-interest, in any given transaction.[57] Therefore, governments should impose as little regulation as possible on economic markets to ensure that as many people as possible will engage in rational, wealth-maximizing transactions.

Posner argues that judges have promoted, and should continue to promote, efficiency and wealth maximization through their decisions by protecting the common law rights of property and contract.[58] If judges use their expertise to protect the rights of property and contract through their decisions, they can rule efficiently. Neoclassical theory frowns upon any attempt by judges to redistribute wealth because judges lack the nuanced economic expertise to define the contours or appreciate the consequences of any given redistribution.[59]

Under the logic of neoclassical economic theory, reverse redlining

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[53] Brescia, *supra* note 3, at 5.

[54] Eamonn K. Moran, *Wall Street Meets Main Street: Understanding the Financial Crisis*, 13 N.C. BANKING INST. 5, 46–47 (2009).

[55] *See generally* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 353–54 (1990) (stating that the basic assumption of neoclassical economics is that people act rationally to maximize their satisfaction).

[56] *Id.* at 356.

[57] *Id.* at 353.

[58] *Id.* at 360–61.

[59] *Cf.* Jonathan Klick, Francesco Parisi, *Wealth, Utility, and the Human Dimension*, 1 N.Y.U. J.L. & LIBERTY 590, 595 (2005) (advocating a functional school of law and economics because "judges and policymakers in many situations lack the expertise and methods for evaluating the efficiency of alternative legal rules").

should not be a cognizable claim for plaintiffs. Because people are responsible for their own actions, the argument follows that subprime borrowers should bear the consequences of accepting a loan. No one forced them to sign the papers against their will. Their decision to do so could have come from a number of influences: personal desire, advice from officers and rating agencies, pressure from family. But no matter what the terms of the loans were, neoclassical economics would support the idea that these borrowers are ultimately responsible for their own resources, and should be held accountable if they make a business deal that does not work out in their interest. The argument applies both to plaintiffs asserting they never could have afforded their loan and to those who assert that similarly situated borrowers outside of the protected class received better terms. Neoclassicists might argue that both groups should have ensured they were not being defrauded, even if that meant looking at loans of other lenders.

An extreme form of this argument (perhaps even a perversion) has come from the extreme political right. The argument is that judges should not take into account the information asymmetry that many subprime borrowers face because (1) those subprime borrowers are the chief cause of the recession and (2) legislation "forced" lenders to lend to these borrowers.[60] One neoclassical commentator has echoed this theory, noting that the public outcry concerning the banks' "equal opportunity lenient lending to all" was "ironic" considering that banks had recently been investigated for redlining.[61]

B. Efficiency: Discrimination, Informational Asymmetry, and the Neoclassical "Rational Actor"

Critical race theory flatly rejects using notions of efficiency to justify possible discrimination.[62] As Cass Sunstein argues, even in places

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[60] Charles W. Murdock, *Why Not Tell the Truth?: Deceptive Practices And the Economic Meltdown,* 41 LOY. U. CHI. L.J. 801, 854–56 (2010). Murdock collects comments from the right illustrating this view; for example, conservative commentator Ann Coulter blamed the subprime mortgage crisis on "affirmative action lending policies." *Id.* at 854 (quoting Ann Coulter, *They Gave Your Mortgage to a Less Qualified Minority*, ANNCOULTER.COM (Sept. 24, 2008), http://www.anncoulter.com/columns/2008-09-24.html). Michael Aleo and Pablo Svirsky also cite Coulter and others to show how commentators tried to blame borrowers and the Community Reinvestment Act, which was designed to increase lending to minority communities, for the crisis. Michael Aleo & Pablo Svirsky, *Foreclosure Fallout: The Banking Industry's Attack on Disparate Impact Race Discrimination Claims Under the Fair Housing Act and the Equal Credit Opportunity Act,* 18 B.U. PUB. INT. L.J. 1, 10–13 (2008). They note that even more mainstream commentators adopted this view: *Washington Post* columnist Charles Krauthammer, for example, wrote that the CRA "led to tremendous pressure . . . to extend mortgages to people who were borrowing over their heads . . . . Were there some predatory lenders? Of course. But only a fool or a demagogue . . . would suggest that [predatory lending] is a major part of the problem." *Id.* at 12 (quoting Charles Krauthammer, Op.-Ed., *Catharsis, Then Common Sense*, WASH. POST, Sep. 26, 2008, at A23).

[61] Gary Becker, *The Subprime Housing Crisis*, THE BECKER-POSNER BLOG (Dec. 23, 2007), http://www.becker-posner-blog.com/2007/12/the-subprime-housing-crisis--becker.html.

[62] *See* CASS SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE, 151 (1997) (arguing that capital

like the subprime housing market where discrimination could be an efficient, rational, and rewarding choice for lenders, the negative effects it has outweigh its economic virtues.[63] No matter how efficient reverse redlining may be for lenders, discrimination imposes something of a caste system[64] that could keep a minority of subprime borrowers from utilizing the mobility that subprime loans promise. Alleviating information asymmetry in reverse-redlining actions would constitute a rejection of the status quo in which discrimination, though formally outlawed, may operate in the subprime housing market.

Even aside from the extreme view that reverse-redlining claims should not be cognizable, the neoclassical notions of efficiency and the rational actor challenge the proposed recommendation supported by critical race theory. The basic precept underlying the neoclassical perspective on this is that addressing any perceived informational asymmetry would not have protected borrowers during the crisis and would not protect them in the future. Rather, like lenders, the government, Wall Street executives, and everyone else, subprime borrowers "rode the bubble" up, and that was the rational choice given the circumstances.[65] Because of the incentives to continue to borrow and lend, neoclassicists argue it was unlikely that giving borrowers more information "would have been effective in warding off this crisis, or will be effective in preventing future crises."[66] Therefore, neoclassicists would not see a reason for courts to address the information asymmetry problem.

Neoclassical theory also implies that even if informational asymmetry does exist, that does not necessarily prevent efficient outcomes. Any outcome that positively serves wealth maximization is efficient, and if lenders increase their wealth by more than borrowers decrease theirs, the transaction is efficient. In that sense, information is a commodity, and those with better information reap the benefits of what they have invested to acquire that commodity. Even if the borrower accepts a loan while operating under information disadvantage, the lending institution's gain is greater than the borrower's loss—thus, the transaction is efficient and there is no need for courts to address the

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markets will not prevent discrimination without regulation).

[63] *See id.* ("[T]he valuation of the market will be a reflection of prevailing norms and practices, and those norms and practices sometimes are what an antidiscrimination principle is designed to eliminate or reduce. When this is so, reliance on markets will be unsuccessful.").

[64] *Id.* at 163 ("Hence the antidiscrimination principle is best conceived as an anticaste principle . . . . The motivating idea behind an anticaste principle is that without very good reason, legal and social structures should not turn differences that are irrelevant from the moral point of view into social disadvantages. They certainly should not be permitted to do so if the disadvantage is systemic.").

[65] *See* Becker, *supra* note 61 ("Given the low interest rate lending atmosphere of the past few years, it is highly unlikely that borrowers would have turned down the mortgages they received if they had much better information about terms, or that lenders would have been more reluctant to originate or hold these mortgage assets if they had better information about the credit and other circumstances of borrowers.").

[66] *Id.*

information asymmetry.

Critical race theorists could answer these arguments with evidence that lenders' informational advantage was not earned by lenders, but was often a symptom of the "status quo" in a housing market that institutionalized discrimination.[67] Regardless of any net efficiency resulting from the information asymmetry, the societal costs of the discriminatory effect are too great.[68] Courts should alleviate that information asymmetry to help undo the status quo that has disadvantaged minority and subprime borrowers.

Posner argued that borrowers acted rationally during the subprime boom,[69] which would lead to the conclusion that judges need not alter the existing test for a prima facie case of reverse redlining. In the immediate aftermath of the economic crisis, Posner argued against regulation and reform because the subprime bubble was emblematic of the rationality of economic bubbles.[70] He uses the maxim that "if prices are rising, they are expected to continue to rise."[71] No one can truly predict when the bubble is about to burst, and so bubbles will remain inevitable. Therefore, lenders who responded to rising prices and favorable ratings and regulations rightly became more aggressive in their lending practices, and subprime borrowers accepted risky loans because "[t]here is a reluctance to act as if housing prices will not continue rising, for by doing so one is leaving money on the table."[72]

Several years later, Posner modified his view on government regulation of bubbles.[73] He asserted that individuals acting rationally could lead to negative, or irrational collective societal consequences.[74] However, Posner reiterated his position that subprime borrowers acted rationally.[75] He introduced a hypothetical subprime borrower who had been renting and was offered a subprime loan to own a home with no down payment but an adjustable interest rate,[76] one of the mechanisms by which loan originators make money despite initial terms that appear to favor the borrower. Posner argues that the borrower should, in a

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[67] *See generally* Adam Gordon, Note, *The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to Whites and Out of Reach for Blacks*, 155 YALE L.J. 186 (2005).

[68] SUNSTEIN, *supra* note 62, at 163.

[69] Richard Posner, *The Subprime Mortgage Mess*, THE BECKER-POSNER BLOG (Dec. 23, 2007), http://www.becker-posner-blog.com/2007/12/the-subprime-mortgage-mess--posners-comment.html.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Compare id.* (advocating that in response to bubbles the government should do "[i]n my opinion, nothing. There have always been bubbles. There will always be bubbles because of the factors that I have been discussing."), *with* RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION 106–07 (2009) (arguing that government regulation was necessary).

[74] POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION 106–07.

[75] *Id.* ("Risky behavior of the sort I have been describing was individually rational during the bubble. But it was collectively irrational.").

[76] *Id.* at 101.

market of rising housing prices, accept the loan because if prices rise as expected, the borrower's wealth will increase with the equity of the home.[77] If prices fall and the borrower defaults, he has not lost much because he had little capital sunk into the home, and he can always return to the rental market.[78]

As both critical race theory and behavioral economics would suggest, Posner's hypothesis about subprime borrowers fails, because consumers operate according to various cognitive biases—not purely according to rationality. Behavioral economist Oren Bar-Gill argues that certain cognitive phenomena permeate consumer credit markets that lead credit card consumers to misperceive pricing systems and behave irrationally.[79] One such phenomenon is overestimation: if consumers are offered two credit cards, one with a low initial rate that switches to a high rate after six months and one with a flat rate, slightly higher than the low initial rate of the other card, consumers tend to pick the first card and then not switch cards when the rates switch.[80] Consumers tend to believe that they will efficiently take advantage of these and other "deals" but tend not to.[81] Sellers then recognize this misperception and package credit card offers to take advantage of consumers' misperceptions.[82] Consequently, consumers end up paying more.[83] Bar-Gill suggests that consumer misperceptions may well play a role in the subprime housing market as well.[84]

Richard Epstein, offering a neoclassical counterpoint to Bar-Gill's analysis, argues that learning can correct information asymmetry.[85] As consumers experience the negative effects of being on the wrong side of

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[77] *Id.* at 102–03.

[78] *Id.* at 103.

[79] Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749, 764 (2008).

[80] *Id.* at 762–64.

[81] *Id.* at 763. Bar-Gill argues that possible reasons for this mistake are that "consumers are optimistic about their future credit needs; about their future will power; about the likelihood that they will switch to a new card with a new, low introductory rate; or all of the above." *Id.* at 763. He also suggests that it may not be a mistake at all, and that consumers may be attempting to limit their own future borrowing by choosing a credit arrangement that would make it prohibitively expensive. *Id.* at 764.

[82] Bar-Gill argues that in the credit card industry, issuers take advantage of consumers' misperceptions by using multidimensional pricing, which allows them to "minimize the perceived total price by reducing price components that are more salient to consumers, and increasing price components that are less salient to consumers." *Id.* at 772. Introductory teaser rates are another way lenders trade on consumer mistakes. *Id.* at 780 (noting that "consumers are more sensitive to introductory rates than they are to long-term rates, despite the fact that most of the borrowing is done at the high long-term rates.").

[83] *Id.* at 786–87. Bar-Gill suggests that the financial harm to consumers from these mistakes is substantial, even without taking into account the cost of financial distress caused by unsafe financial products. *Id.* at 787.

[84] *Id.* at 768.

[85] Richard Epstein, *The Neoclassical Economics of Consumer Contracts*, 92 MINN. L. REV. 803, 811 (2008) ("[T]he neoclassical case for markets rests on the more qualified assumption that learning actually matters. To the extent that the issues that truly matter to them, people develop, if they do not already have them, good feedback mechanisms that lower the risk of loss, especially in standardized transactions where consumers are repeat players. People do so because they pay the price for their own error.").

information asymmetry, they will gradually gain knowledge and make more efficient decisions until they are in a level position with other actors.[86] Any sort of institutional aid to these actors is a disincentive to them to learn the correct information and gain capability on their own. When discussing the subprime lending crisis, Epstein claims that the negative consequences that lenders experienced was a result of taking huge lending risks and not of manipulating consumer misperceptions.[87]

Epstein's learner, just like Posner's rational borrower, is a construct that does not align with the circumstances that subprime borrowers face and that critical race theory may consider. If a subprime borrower accepts a bad loan and defaults on his home, there is no guarantee that he can easily re-enter the rental market. Rental markets are not impervious to a widespread decline in housing prices, and subprime borrowers often may not be able to seamlessly transition from one market to the other. A consumer's misperceptions of loan terms, misperceptions which Bar-Gill argues are endemic, could easily end up costing him everything in his possession.

The proliferation and variety of reverse-redlining claims that plaintiffs are utilizing indicate the creativity with which alleged predatory lenders may have been acting. In addition to discretionary pricing systems, like the ones alleged by plaintiffs in *Ramirez*, pre-payment penalties, closing penalties, yield spread premiums, and even credit scores are all areas in which lenders potentially discriminated against protected classes.[88] For example, yield spread premiums are additional fees the lenders tack onto loans as compensation for the work of mortgage brokers, who work for the lenders in convincing borrowers that the loan presented is the best loan the borrower could obtain.[89] Mortgage brokers can receive compensation by intentionally misleading borrowers, leaving them less able to make an efficient decision or learn from their mistake.

Even if several of Epstein and Posner's assumptions were true, subprime borrowers would still lack resources to overcome the information asymmetry. If subprime borrowers could instantly discover which terms made their loan a dangerous bet and they have the resources to invest again, there is no guarantee that lenders, with more resources and greater access to information, would not find new ways to capitalize on information asymmetry again. After all, such innovation is

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[86] *Id.* at 813 ("[T]here is little hard evidence that consumers are impervious to knowledge, and studies . . . suggest that even in credit markets, people usually learn both from their own errors, and from the errors of others—bad news travels fast.").

[87] *Id.* at 832 ("[T]he simplest explanation remains the best. [Mortgage lenders] took large risks on their loan portfolio and now have to pay the price when the market turned bad. The reversal does not suggest any irrationality. No one gets something for nothing, and the high failure rate is consistent with the high rates of return earlier on. None of their activity is driven by the ability of these mortgage companies to exploit pricing misperceptions, which could be handled under the current laws.").

[88] Brescia, *supra* note 8, at 211–15.

[89] *Id.* at 212.

presumably how they constructed such loans in the first place.

C. Judges as Actors for Combating Information Asymmetry

Although the problem of reverse redlining should be addressed, there are alternatives to reforming the prima facie test for stating a reverse-redlining claim under the FHA. Some commentators have suggested that the courts are not the proper forum for subprime reform. Oren Bar-Gill and Elizabeth Warren, for example, proposed creating a new regulating entity or division within an existing agency to regulate consumer credit products.[90] The proposal has since been adopted with the establishment of the Consumer Financial Protection Bureau (CFPB).[91]

Despite the establishment of the CFPB, courts remain well suited, according to a critical race perspective, to address individual cases of reverse redlining for three reasons. First, courts can focus on one plaintiff and one claim, while regulation often has to hedge and compromise on the issues it addresses. Regulation also has to generalize in accounting for prospective issues, while courts can focus on facts and circumstances of a past event.[92] Second, litigation can bring public attention to a case or cause that often gets lost in drawn out legislation.[93] Third, the costs of the changes to the test for stating a prima facie claim are much lower than the cost of passing, implementing, and enforcing legislation. Judges need only articulate the proper test, which does not add any costs to the task of alleviating information asymmetry.

IV. CONCLUSION

The 2008 financial crisis devastated the wealth of minorities in record numbers, and one of the contributing factors was the action of

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[90] Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 98 (2008). In their article, Bar-Gill and Warren posit that the ex-post common law approach is not suited to regulating consumer credit markets and that "[c]oncerns about institutional competence, doctrinal limitations and procedural barriers justify the observed judicial restraint." *Id.* at 74.

[91] Jared Elosta, Recent Development, *Dynamic Federalism and Consumer Financial Protection: How the Dodd-Frank Act Changes the Preemption Debate*, 89 N.C. L. REV. 1273, 1273 (2011).

[92] *See* Brescia, *supra* note 3, at 72–73 ("Any new regulatory regime that Congress or state legislatures might put into place would be ill-equipped to engage in ex post facto controls on prior conduct. Thus, judicial responses are likely superior to regulatory controls of actions that took place in the past.").

[93] *See id.* at 73 ("[P]laintiffs' counsel would be in a strong position to make such information [about discriminatory lending practices] public, thereby alerting the general public to the information which, in turn, will both raise public awareness about the issue and likely encourage other potential plaintiffs to come forward.").

predatory lenders who engaged in reverse redlining. Plaintiffs bringing reverse-redlining claims are at a unique disadvantage in gaining access to information needed to state a prima facie claim of reverse redlining. The reading of the *Matthews* test in *Barkley* most completely compensates for information asymmetry. Critical race theory could support an additional effort on judges' part—they are in a unique position to alleviate information asymmetry in reverse-redlining cases by allowing plaintiffs to use a combination of public data and information possessed by the plaintiffs.

Neoclassical economics and conservative political pundits argue that information asymmetry need not be addressed and that subprime borrowers acted rationally on their own volition and deserve no special treatment. However, the realities of the subprime housing crisis revealed, consistent with a critical race perspective, that information asymmetry was institutionalized in that market to such a degree that subprime borrowers were competing in a rigged game that rewarded and encouraged discrimination and manipulation. Thus, information asymmetry must be addressed.

Addressing information asymmetry by reforming the test for stating a prima facie claim of reverse redlining could help rally public opinion to challenge the other areas that institutionalize and encourage information asymmetry, if not outright discrimination. As claims are advanced and more cases are filed, the chances increase that one plaintiff could win a reverse-redlining action against a major lender and garner attention to the plight of other victims.

Finding the Sweet Spot: Deference in Redistricting

Meredith C. Kincaid*

> "Now, I do want to talk about the deer with two antlers, because what that ignores is that in the benchmark plan, the deer had one antler and an antenna."
>
> ~Paul Clement, attorney for the State of Texas, describing the design of a district in El Paso in oral argument for *Perry v. Perez*[1]

I. INTRODUCTION

Redistricting plays a major role in American democracy. Census after census, map drawers (most often legislators) draw districts and courts grapple with what kind of supervisory role they should play in redistricting. Even if the public is interested in the process and wants to hold map-drawing legislators accountable for redistricting decisions, self-interested drawers can redistrict around major anticipated threats. Thus, complaints often have to be channeled through the courts.

When evaluating whether a districting plan contains any constitutional or statutory violations, the U.S. Supreme Court's analysis can be fairly fact-intensive. But with respect to when and how to defer to the map-drawing entity, the Court's approach is often couched in abstract terms about interests and policies. This approach may not be altogether helpful when the practical reality sets in—at the end of the day, lines must be drawn.

The Court recently held in the per curiam opinion, *Perry v. Perez*, that a district court must defer to legislative policies in drawing an interim map, to the extent that those policies do not violate the U.S. Constitution or the Voting Rights Act.[2] This concept is not new, and neither is the Court's presentation of the district court's task as one that sounds almost simple.[3] But in the redistricting context, the practical application of deference is anything but simple.

Redistricting involves a variety of legislative policy choices. Some policies may be required by state constitutional mandate. Others may be

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[1] Transcript of Oral Argument at 20, Perry v. Perez, 132 S. Ct. 934 (2012) (per curiam) (Nos. 11-713, 11-714, 11-715).

[2] *Perez*, 132 S. Ct. at 941.

[3] *See, e.g.*, Upham v. Seamon, 456 U.S. 37, 40–41 (1982) (per curiam) ("[A] court must defer to the legislative judgments the plans reflect, even under circumstances in which a court order is required to effect an interim legislative apportionment plan.").

applied to the map but never recorded as something the legislature intended to do. Some may be chosen for parts of the map but not applied consistently statewide. Others still may be partly motivated by a discriminatory intent or may result in a disparately negative effect on minority communities. And of course, some jurisdictions are covered under Section 5 of the Voting Rights Act—an extraordinary burden-shifting remedy that has become somewhat controversial in recent years. How does a district court defer to legislative policy choices in the midst of these various circumstances, while also adequately accounting for the rights that should be protected by the Constitution and the Voting Rights Act?

Parsing legislative choices from an adopted map and distilling them into a set of policies to which district courts should defer is a difficult task. But rather than discussing deference in redistricting as if it were a binary choice (to defer or not to defer), this Note proposes consideration of various models along a deference spectrum. A concept discussed in a variety of other jurisprudential contexts,[4] the notion of different models of deference along a spectrum is helpful—indeed, necessary—for understanding how courts defer, and how they ought to defer, in various redistricting contexts. On one end of the deference spectrum is complete deference—for example, using a newly adopted map as an interim map without regard to any likely or actual constitutional or statutory infirmities. At the other end is zero deference—the court draws whatever map it chooses without any regard for the policies of an adopted map. The appropriate deference model is likely somewhere in between these two extremes,[5] but there are a number of options in the middle. The key is in finding the sweet spot, and recognizing that perhaps the presence of certain circumstances ought to shift that sweet spot in one direction or the other along the deference spectrum.

First, this Note will briefly explore the normative arguments on each side of the deference debate and discuss some overarching considerations to keep in mind. Given the tenuous foothold of racial gerrymandering claims[6] and partisan gerrymandering claims,[7] this Note

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[4] *See generally, e.g.*, Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675 (2003) (proposal for a deference continuum in international tribunal decisions); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001) (discussion of alternative deference standards with respect to agency interpretations of statutes). *See also* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 319–23 (2002) (discussing how the political question doctrine is "part of a spectrum of deference to political branches' [constitutional interpretations]").

[5] *Perez*, 132 S. Ct. at 941 ("[A] district court should take guidance from the State's recently enacted plan in drafting an interim plan. . . . 'to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act.'") (quoting Abrams v. Johnson, 521 U.S. 74, 79 (1997)).

[6] *See infra* Part II.C.3 for an abbreviated discussion on race-based policy decisions in redistricting.

[7] *See* Vieth v. Jubelirer, 541 U.S. 267, 281 (2004) (plurality op.) (stating that claims of excessive partisanship in redistricting are nonjusticiable); *but see* Cox v. Larios, 542 U.S. 947, 947 (2004) (summarily affirming lower court decision to strike down partisan districting plan on one-person-one-vote grounds).

focuses primarily on statutory claims under the Voting Rights Act and vote dilution claims under the Constitution. This Note also, at times, refers to the map-drawing entity as the legislature—this is merely meant as shorthand for the map-drawing entity, even though there are several states that employ a redistricting commission or hybrid system.[8]

This Note will explore how some of these models are already implicit in courts' existing approaches, and it will evaluate each of the models, highlighting some considerations specific to redistricting that seem to be (or perhaps should be) determinative in evaluating which model to use. Finally, this Note will discuss how the deference question could have an important role in the debate over the constitutionality of Section 5.

II. COMPETING IDEALS

The American democracy that we experience today is a constructed reality—"the outcome of legal rules and institutional frameworks, rather than some entity such as 'We the People' that preexists these structural choices."[9] Two structural mechanisms within American democracy are at the root of the normative arguments for and against deference in the context of redistricting, each one aimed at preventing tyranny for future generations. One is systematic disbursement of power among the three branches of government (with built-in checks and balances), as well as between federal and state government.[10] The other is protection of individual rights—creation of areas that are primarily off-limits to government power, providing protection against tyranny in the traditional sense, as well as protection against the tyranny of the majority.[11]

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[8] For the 2010 redistricting round, Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Missouri, Montana, New Jersey, Ohio, Pennsylvania, and Washington gave redistricting commissions primary responsibility for drawing state legislative maps. Some states (Connecticut, Illinois, Maine, Mississippi, Oklahoma, Texas, and Vermont) instead used commissions on an advisory basis to draw or serve as a backup map drawer of their state legislative maps, while others (Arizona, Connecticut, Hawaii, Idaho, Indiana, Montana, New Jersey, and Washington) used commissions as backup map drawers for congressional redistricting. NAT'L CONFERENCE OF STATE LEGISLATURES, REDISTRICTING LAW 2010 163–71 (Nov. 2009), *available at* http://redistrictingonline.org/uploads/Redistrictinglaw2010.pdf.

[9] SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 1128 (3d ed. 2007) (quoting U.S. CONST. pmbl.).

[10] *See generally* THE FEDERALIST NO. 51 (James Madison) (Clinton Rossiter ed., 2003) (arguing for a government with separate branches controlled by checks and balances).

[11] *See* Letter from Thomas Jefferson to James Madison (March 15, 1789), *in* 2 THOMAS JEFFERSON, MEMOIR, CORRESPONDENCE, AND MISCELLANIES, FROM THE PAPERS OF THOMAS JEFFERSON 442 (Thomas Jefferson Randolph ed., 1829) ("[T]he declaration [Bill] of [R]ights is, like all other human blessings, alloyed with some inconveniences, and not accomplishing fully its object. But the good, in this instance, vastly outweighs the evil."); THE FEDERALIST NO. 10, at 72 (James Madison) ("[M]easures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.").

A. Merits of Deference

The disbursement-of-power mechanism of checks and balances provides a key pro-deference argument. Courts have long been uneasy with entering the "political thicket," as issues in this arena are generally reserved for states (or occasionally Congress).[12] Not only are courts concerned about separation of powers and overstepping the proper role of the judiciary, but federal courts are also more and more concerned about basic federalism principles and states maintaining their primary responsibility over this particular area of law.[13]

In addition, courts are concerned about a lack of institutional competence in redistricting.[14] This is an area in which the judiciary views its own branch as, "at best, ill-suited" to evaluate competing policies and make decisions.[15] This competency concern is a major reason that courts have continually emphasized that redistricting is a power and duty primarily reserved for state legislatures.[16] As such, "[a]bsent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it."[17]

Furthermore, the question of what remedy is appropriate is also a thorny issue for courts. Courts have entertained a wide range of remedial options, from declaring a map invalid without ordering a remedy[18] to ordering cumulative voting,[19] none of which seem entirely satisfactory.

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[12] *See, e.g.*, Colegrove v. Green, 328 U.S. 549, 556 (1946) ("To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket.").

[13] *See, e.g.*, Nw. Austin Mun. Util. Dist. No. One v. Holder (*NAMUDNO*), 557 U.S. 193, 202–04 (2009) (discussing the federalism concerns implicated by enforcing Section 5 of the Voting Rights Act).

[14] Abrams v. Johnson, 521 U.S. 74, 101 (1997) ("The task of redistricting is best left to state legislatures, elected by the people and as capable as the courts, if not more so, in balancing the myriad factors and traditions in legitimate districting policies."); ISSACHAROFF ET AL., *supra* note 9, at 117.

[15] Perry v. Perez, 132 S. Ct. 934, 941 (2012) (per curiam).

[16] Chapman v. Meier, 420 U.S. 1, 27 (1975) ("We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court."); White v. Weiser, 412 U.S. 783, 795 (1973) (holding that a federal district court should "honor state policies in the context of congressional reapportionment"); Whitcomb v. Chavis, 403 U.S. 124, 160 (1971) (opining that the district court should not "intrude upon state policy any more than necessary" in crafting a reapportionment plan). *See* Reynolds v. Sims, 377 U.S. 533, 586 (1964) ("[L]egislative reapportionment is primarily a matter for legislative consideration and determination.").

[17] Growe v. Emison, 507 U.S. 25, 34 (1993).

[18] Colegrove v. Green, 328 U.S. 549, 553 (1946) ("Of course no court can affirmatively re-map [state] districts so as to bring them more in conformity with the standards of fairness for a representative system. At best we could only declare the existing electoral system invalid. The result would be to leave [the state] undistricted and to bring into operation, if the [state] legislature chose not to act, the choice of members for the House of Representatives on a state-wide ticket.").

[19] McCoy v. Chi. Heights, 6 F. Supp. 2d 973, 985 (N.D. Ill. 1998), *rev'd sub nom.* Harper v. City of Chi. Heights, 223 F.3d 593 (7th Cir. 2000). Cumulative voting is an alternative voting system in which a voter casts as many votes as there are seats to fill, but the voter can choose how to allocate those votes among candidates; in other words, the voter is able to "cumulate" votes behind the candidate(s) that voter most prefers. Richard Briffault, *Electing Delegates to a State*

This problem of the appropriate remedy further supports the institutional competence argument as to why courts should defer.

B. Concerns About Deference

Contrast the considerations fueling courts' continued emphasis on deference with the concerns underlying deference and the compelling interests that may receive short shrift if courts were to always defer.

First, let us consider what, exactly, courts are deferring to. Certainly, there are general legislative policy choices underlying redistricting decisions. But courts and the public are very much aware that purely policy-based decisions are not the only motivations behind redistricting. American democracy does not have a non-partisan approach to redistricting, and given our effectively two-party system, combined with the fact that most states leave the task to state legislators, it is no surprise that partisan motivations typically play a major role in redistricting.

But perhaps of even greater concern is the self-interest at stake in the outcome. Even when legislators tasked with redistricting are drawing districts for legislative bodies other than their own, self-interest in the outcome is still very much present. This could be because of a desire to draw a district for a different office that would be easy for a drawer to win, or it could even be due to a desire to garner clout with incumbent and incoming legislators who will benefit from the drafting.

Redistricting, therefore, is a setting in which a self-interested faction has the potential to commandeer the political process.[20] Some scholars argue that courts should therefore not defer in voting rights cases, because the democratic process cannot work in light of the self-interested faction.[21]

Furthermore, voting rights have come to rest on an individual rights premise. This is because courts have come to treat the right to vote as a fundamental right protected by the Equal Protection Clause.[22] There is ample debate over whether voting rights cases should be grounded in a

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Constitutional Convention: Some Legal and Policy Issues, 36 RUTGERS L.J. 1125, 1145 (2005).

[20] ISSACHAROFF ET AL., *supra* note 9, at 133 (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 117 (1980)).

[21] *See, e.g.*, *id. Cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938) (noting that more rigorous judicial scrutiny may be necessary when the challenged legislation restricts "[the] political processes which can ordinarily be expected to bring about the repeal of undesirable legislation").

[22] Reynolds v. Sims, 377 U.S. 533, 561–62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. Almost a century ago, in [*Yick Wo v. Hopkins*], the Court referred to 'the political franchise of voting' as 'a fundamental political right, because preservative of all rights.'" (quoting 118 U.S. 356, 370 (1886)).

rights-based theory or a structural theory[23] (a topic not broached in this Note), but regardless of whether it is the best jurisprudential approach, courts have chosen the rights-based approach.[24]

Given the history and context of voting rights cases, it makes sense that courts would emphasize the rights element. The Fifteenth Amendment directs that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[25] But almost 100 years after the Amendment was ratified, its guarantee was far from reality. Eventually the pressure for courts to apply judicial review to these cases outweighed the reluctance to enter the political thicket.[26]

But in 1965, even after judicial intervention and victories for plaintiffs, certain states were still making rampant use of literacy tests, poll taxes, moral character requirements, and other devices, as part of "a calculated plan to deprive Negroes of their right to vote."[27] Congress could no longer ignore the reality that certain states were taking extreme and overt measures to disenfranchise and dilute the votes of racial minorities.[28] The case-by-case approach to stopping "those determined to circumvent the guarantees of the [Fifteenth A]mendment" proved futile—Congress (and President Johnson) recognized the need to pass legislation with teeth.[29] Thus, "almost a century after the Fifteenth Amendment was ratified, Congress passed the Voting Rights Act of 1965—with Section 5 at its core—in order 'to make the guarantees of the Fifteenth Amendment finally a reality for all citizens.'"[30]

Section 5 of the Voting Rights Act provides an extraordinary remedy designed to address the serious, pervasive problems that the Fifteenth Amendment alone was not able to solve.[31] Shortly after its

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[23] *See, e.g.*, Pamela S. Karlan, *Politics By Other Means*, 85 VA. L. REV. 1697, 1717–19 (1999) (questioning the wisdom of the individual rights-based approach); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 106–07 (2000) (arguing that the individual rights-based approach is incorrect and has produced negative results); Guy Uriel-Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099 (2005) (reviewing RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* (2003)) (exploring the rights versus structure debate).

[24] Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966) ("In a recent searching re-examination of the Equal Protection Clause, we held, as already noted that 'the opportunity for equal participation by all voters in the election of state legislators' is required. We decline to qualify that principle . . . . Our conclusion . . . is founded not on what we think governmental policy should be, but on what the Equal Protection Clause requires." (citations omitted)).

[25] U.S. CONST. amend. XV, § 1.

[26] *See* Baker v. Carr, 369 U.S. 186, 210–11 (1962) (holding that whether a state's reapportionment deprived plaintiffs of equal protection was a justiciable question); Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960) ("When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.")

[27] H.R. REP. NO. 89-439, at 12 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2443.

[28] *See id.* at 11 ("[T]he wrong to our citizens is too serious—the damage to our national conscience is too great not to adopt more effective measures than exist today.").

[29] *Id.* at 4, 11.

[30] Shelby Cnty., Ala. v. Holder, 811 F. Supp. 2d 424, 427 (D.D.C. 2011) (citations omitted), *cert. granted*, 133 S. Ct. 594 (2012).

[31] *Id.* Section 5 shifts the burden to covered jurisdictions to demonstrate that a proposed voting

passage, the Court held that Section 5 was constitutional.[32] This holding was the result of a very deferential standard of review,[33] coupled with the serious realities of blatant disenfranchisement and vote dilution.[34] In order to address the rampant constitutional violations, Congress decided on an extraordinary remedy addressed at only a handful of jurisdictions, and the Court viewed that remedy as a perfectly rational decision in 1966.[35]

In light of this extraordinary remedy and the normative arguments against deference, what kind of deference should courts give jurisdictions covered by a statute intended to take some control away from states that have demonstrated a history of discriminatory voting practices? In discussing the various models of deference, I will address considerations unique to challenges of covered jurisdictions' maps and whether a different model of deference may be better suited for jurisdictions covered under Section 5.

Section 5 has become a subject of much debate today in the wake of the Court's sobering words about its constitutionality in *Northwest Austin Municipal Utility District Number One v. Holder* (*NAMUDNO*)[36] and the Court's recent grant of certiorari in *Shelby County v. Holder*.[37] This Note is in no way intended to summarize or contribute to the debate over Section 5's constitutionality, but it will briefly discuss the interplay between the deference issue and the constitutionality of Section 5.

III. OVERARCHING CONSIDERATIONS

A. When Does the Deference Question Arise?

There are a number of situations in which courts have to consider whether or not to defer in redistricting. First, this question arises when courts are drawing permanent plans. A court may need to draw a permanent plan because it found a violation of some sort, and the map-drawing entity has not fixed the plan. Or a court may need to draw a

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change will not be retrogressive. 42 U.S.C. § 1973c(a) (2006).

[32] South Carolina v. Katzenbach, 383 U.S. 301, 337 (1966).

[33] *Id.* at 324 ("The ground rules for resolving this question are clear. The language and purpose of the Fifteenth Amendment, the prior decisions construing its several provisions, and the general doctrines of constitutional interpretation, all point to one fundamental principle. As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.").

[34] *Id.* at 328 ("After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims.").

[35] *Id.* at 324, 337.

[36] 557 U.S. 193 (2009).

[37] Shelby Cnty., Ala. v. Holder, 811 F. Supp. 2d 424, 427 (D.D.C. 2011) (citations omitted), *cert. granted*, 133 S. Ct. 594 (2012).

permanent plan because the entity tasked with redistricting failed to reach the necessary consensus, and thus, failed to adopt any map. If no new map was adopted, questions of deference then center around the benchmark plan (the map currently in use).

The deference question also arises when a court is tasked with drawing an interim plan. This situation occurs when time constraints necessitate the use of a map, but no legally enforceable map is available. Court-drawn interim plans often tend to become permanent plans. There are a variety of reasons this may occur—the most notable is that the legislators who would be responsible for drafting a new plan are now incumbents elected under the interim plan. The reality of interim plans often becoming permanent makes it all the more important for courts to get the interim map right.

The deference question may be further complicated by a case's procedural posture. As background, Section 5 requires that covered jurisdictions obtain approval for voting procedure changes before implementing them.[38] This approval must be obtained from either the Attorney General[39] or a three-judge panel in the U.S. District Court for the District of Columbia.[40] Meanwhile, Section 2[41] and constitutional challenges can be heard by any district court with jurisdiction.[42] Because the U.S. District Court for the District of Columbia has exclusive jurisdiction over preclearance suits,[43] no other court may prejudge the merits of a Section 5 case.[44] Should the possibility of dual litigation in two courts make the deference question more problematic if circumstances require an interim map to be drawn while preclearance is still pending? This was precisely the situation the Court in *Perez* faced, as the next section details.

Furthermore, questions of deference can arise even prior to the question of what remedy would be appropriate. Courts may discuss deference even in deciding whether to find a violation. While questions of deference in determining whether a violation has occurred are important, this Note focuses on questions of deference when courts are drawing interim or permanent maps.

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[38] 42 U.S.C. § 1973c(a) (2006).

[39] This does not require an affirmative stamp of approval by the Attorney General. It may be obtained implicitly if the covered jurisdiction submits the change to the Attorney General and the Attorney General does not interpose an objection within 60 days after the submission. *Id.*

[40] *Id.*

[41] Section 2 of the Voting Rights Act provides that "no voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." *Id.* §1973.

[42] *Id.* § 1973a(c).

[43] *Id.* § 1973l(b).

[44] Perry v. Perez, 132 S. Ct. 934, 942 (2012) (per curiam).

B. *Upham v. Seamon* and *Perry v. Perez*

One cannot discuss deference in the redistricting context without discussing two important per curiam decisions by the Court—one decades old (*Upham v. Seamon*[45]), one very new (*Perry v. Perez*[46])—both arising out of Texas (a covered jurisdiction[47]).

In *Upham v. Seamon*, the Department of Justice denied preclearance to Texas's newly apportioned congressional map (Senate Bill 1), based on its objection to two contiguous districts in South Texas.[48] The three-judge panel from the Eastern District of Texas then redrew the map in an attempt to rectify the two districts that were the object of the Attorney General's objection.[49] But in addition to revising those two districts, the district court also changed the Dallas districts, while leaving all the map's other districts exactly the same as in Senate Bill 1.[50] The changes to the Dallas districts were made because one judge found the Dallas districts unconstitutional and another judge thought the Dallas districts did not meet the higher standard of population equality and racial fairness required for court-drawn maps.[51]

The Supreme Court held that without either a Department of Justice objection or a finding of a constitutional or statutory violation, the district court must defer to Senate Bill 1.[52] The Court held that the stricter standard that concerned the district court judge only applies to "remedies required by the nature and scope of the violation: 'The remedial powers of an equity court must be adequate to the task, but they are not unlimited.'"[53]

Perry v. Perez turned on what exactly *Upham* stands for today. As background, the 2010 census revealed that Texas's rapid growth resulted in four new congressional districts for the state.[54] The Texas legislature then adopted new maps for the state house, state senate, and U.S. Congress.[55] Rather than seeking preclearance from the Department of Justice, Texas opted for the alternative option of submitting those maps for a declaratory judgment in the U.S. District Court for the District of

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[45] 456 U.S. 37 (1982) (per curiam).

[46] 132 S. Ct. 934.

[47] 28 C.F.R. pt. 51 app. (2012).

[48] *Upham*, 456 U.S. at 38.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 39.

[52] *Id.* at 39–41.

[53] *Id.* at 42 (quoting Whitcomb v. Chavis, 425 U.S. 130, 161 (1976)).

[54] Perry v. Perez, 132 S. Ct. 934, 939 (2012) (per curiam).

[55] *Id.* The Texas legislature also adopted a new map for the Texas Board of Education, but that map was not at issue in *Perry v. Perez*. Texas v. United States, No. 11-1303, 2012 WL 3671924, at *95 n.1 (D.D.C. Aug. 28, 2012) (stating that Texas sought preclearance for its redistricting plan for the State Board of Education, and given that there was no opposition or Section 5 infirmity, preclearance for the plan was granted).

Columbia.[56] Meanwhile, challenges to the map were brought by several plaintiffs under Section 2 and the Constitution in the Western District of Texas.[57] As is customary,[58] the Texas district court withheld judgment pending resolution of the preclearance process;[59] but given the looming primary dates, the district court drew interim maps for the 2012 election.[60] The State of Texas requested and received a stay from the Supreme Court, based on the argument that the interim maps did not properly defer to the legislatively adopted maps.[61]

The State argued that the district court should have used the adopted maps as the interim maps unless the court found that some aspect of the maps were likely to violate the Voting Rights Act or the Constitution.[62] Counsel for the State argued that under *Upham*, "even when preclearance is denied with respect to certain districts, the State's legislatively enacted map remains entitled to deference, and any remedy must be narrowly tailored to correcting the legal defects in the challenged districts."[63]

The appellees argued that the district court acted appropriately, and that *Upham* is distinguishable. For one, the district court in *Perez* conducted a full trial on the Section 2 and constitutional challenges, whereas the district court in *Upham* conducted only a hearing.[64] Furthermore, unlike *Upham*, where the court had a specific objection detailing the two problematic districts, the *Perez* district court had no indication of what the Section 5 preclearance issues might be.[65]

In its per curiam opinion, the Supreme Court clarified the district court's role when an interim plan is necessary for a covered jurisdiction and there are concurrent challenges to the map at issue. *Perez* held that in this somewhat rare situation, the district court considering the Section 2

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[56] *Perez*, 132 S. Ct. at 939–40.

[57] *Id.* at 940.

[58] *See* Branch v. Smith, 538 U.S. 254, 283 (2003) (Kennedy, J., concurring) ("Where state reapportionment enactments have not been precleared in accordance with [Section 5], the district court 'err[s] in deciding the constitutional challenges to these acts.'" (quoting Connor v. Waller, 421 U.S. 656, 656 (1975) (per curiam))).

[59] *Perez*, 132 S. Ct. at 940.

[60] *Id.*

[61] *Id.*

[62] Brief for Appellants at 30, *Perez*, 132 S. Ct. 934 (Nos. 11-713, 11-714, 11-715) ("The process the district court should have followed is straightforward: Texas'[s] legislatively enacted map, which is entitled to a presumption of good faith, must be used as the 'interim' map while preclearance is pending, unless the court makes a finding that some aspect of that plan is likely to violate the [Voting Rights Act] or the Constitution.").

[63] *Id.* at 36.

[64] *E.g.*, Brief for Appellees Texas State Conference of NAACP Branches, et al., and Congresspersons Eddie Bernice Johnson, Sheila Jackson-Lee, and Alexander Green at 15, *Perez*, 132 S. Ct. 934 (Nos. 11-713, 11-714, 11-715).

[65] *E.g.*, *id.* at 15–16. The appellees argued that in *Upham*, because the Attorney General singled out two improperly drawn districts in violation of Section 5, that implied that the other districts were in compliance with Section 5; in contrast, appellees argued that in *Perry v. Perez*, it was unclear which parts of the plan complied with Section 5, and therefore, there was not a remainder of the map to which the district court could defer based on the Department of Justice's lack of objection. They suggested that the controlling precedent in the case was not *Upham* but instead *Lopez v. Monterrey County*, 519 U.S. 9 (1996). *Id.*

and constitutional challenges can satisfy the need to avoid prejudging the merits of preclearance by taking guidance from the state's policy judgments, unless those policy judgments reflect aspects of the state plan that stand a "reasonable probability" of failing to gain preclearance.[66] The Court went on to clarify that "reasonable probability" in this context means that the challenge is "not insubstantial."[67] Determining whether a Section 5 challenge is not insubstantial presents yet another practical challenge for courts in evaluating these challenges.

C. Should All Legislative Policies be Deferred to Equally?

Courts do not always defer to all legislative policies equally. Although courts may not openly say how they are deferring, upon examination, one can see that courts already apply varying degrees of deference. The way courts approach deference implies that there are considerations that already do guide courts in how they defer to adopted maps. Some of these considerations include:

1. whether the source of the legislative policy is the state's constitution,
2. the skepticism that courts have long demonstrated toward multimember districting and alternative voting systems,[68]
3. whether the policy is to create new minority opportunity or coalition districts, and
4. the presence of discriminatory intent (coupled with whether the jurisdiction is covered under Section 5).

This Note will discuss each of these considerations in turn.

In addition, while map drawers may utilize general policies like these, they may well also utilize policies that are more specific in nature—for example, "add this neighborhood because my grandchildren to go school there" or "make sure this city is the majority constituency for a representative." Courts should consider whether a policy that is applied only to a very limited part of the map should be afforded the same level of deference as a policy that is applied throughout the map. This consideration may also depend on how clearly the legislature expressed its intent regarding the specifically applied decision.

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[66] *Perez*, 132 S. Ct. at 942.

[67] *Id.*

[68] Multimember districts have more than one elected representative for the district, as opposed to single-member districts, which elect only one representative. Alternative voting systems include cumulative voting, preference voting or single-transferrable voting (STV), and limited voting. *See generally* ISSACHAROFF ET AL., *supra* note 9, at 1128–1207 (discussing alternative democratic structures).

Otherwise, one might legitimately question whether a narrowly applied decision that is not clearly announced should be considered a "policy" at all for deference purposes.

1. State Constitution as the Legislative Policy Source

If the source of the legislative policy is a state constitutional provision, enshrinement in the state's most authoritative legal document certainly presents stronger reasons to defer to that policy. But even when a state constitutional provision is the source of the policy applied, a deference issue arises when that policy is mutually exclusive with a federal statutory or constitutional requirement as applied to a particular area.[69] While a state constitutional provision should trump a legislative policy in general, it should not be deferred to at the expense of the Constitution or the Voting Rights Act.[70]

Another interesting problem is whose interpretation of the state constitutional provision should govern. For instance, suppose the constitutional provision is that the legislature may not unnecessarily "cut" county lines when districting. But suppose the legislature would like to define what it means to unnecessarily cut county lines differently from how the state's highest court does. In light of the deference arguments previously discussed, which interpretation should govern in federal court?

2. A Skeptical Court: Multimember Districting and Alternative Voting Systems

Courts are less inclined to be deferential toward districting plans that make use of multimember districts. For example, in *Connor v. Finch*,[71] the defendants argued that the district court should have adhered more to the state's policy of respecting county lines, which, the defendants argued, would have required multimember districting for the more populous counties.[72] The Court responded to this argument with

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[69] *See, e.g.*, Voinovich v. Quilter, 507 U.S. 146, 159 (1993) (holding that where the map drafter believed the Voting Rights Act conflicted with the Ohio Constitution, his decision to draft in adherence to the Voting Rights Act "does not raise an inference of intentional discrimination[. Instead,] it demonstrates obedience to the Supremacy Clause of the United States Constitution").

[70] U.S. CONST. art. VI, cl. 2.

[71] 431 U.S. 407 (1977).

[72] The redistricting at issue in *Finch* had been the subject of litigation for over a decade. *Id.* at 410. The original state reapportionment plan used county lines to draw districts, some of which were single-member and some of which were multimember. Connor v. Johnson, 256 F. Supp. 962, 965 (S.D. Miss. 1966). The first two plans the district court promulgated relied extensively on multimember districting. *Finch*, 431 U.S. at 410. However, after the Supreme Court advised the district court that single-member districts were preferable, and the Attorney General objected to the

language that was anything but deferential:

> Because the practice of multimember districting can contribute to voter confusion, make legislative representatives more remote from their constituents, and tend to submerge electoral minorities and overrepresent electoral majorities . . . single-member districts are to be preferred in court-ordered legislative reapportionment plans unless the court can articulate a "singular combination of unique factors" that justifies a different result.[73]

Under this holding, a court has to go to some lengths in order to justify deferring to a policy of multimember districting. This is in stark contrast to the more typical approach in which the court drawing a map will instead try to justify a decision *not* to defer to a particular policy.

Courts are also skeptical of court-ordered remedies that involve other alternative voting systems. Take, for example, in *Harper v. City of Chicago Heights*,[74] where the Seventh Circuit reversed the district court's order implementing an alderman system (incorporating cumulative voting) as a remedy for a Section 2 violation.[75] The remedy was not one proposed by any party to the litigation, but the district court cited Illinois law that provided a process for local governments to utilize cumulative voting in local elections (though Chicago Heights did not utilize that process).[76] The Seventh Circuit held that Chicago Heights demonstrated a clear preference for single-member districts by proposing a remedial plan with single-member districts—a preference to which the district court should have deferred.[77] This holding was in spite of the fact that drawing single-member districts would have required adding several government seats (an entry into the realm of governance, which courts typically try to avoid[78]) and raised serious *Shaw* concerns.[79]

But suppose we take a step back and consider why courts disfavor multimember districting and alternative voting systems generally—is this justified? At the time of *Connor v. Finch*, multimember districting was often a mechanism to effectuate discriminatory intent, a fact that may be the root cause for this shift in the deference conversation with respect to an alternative voting system policy.[80] But if discriminatory intent is the

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1975 legislative reapportionment, the district court ultimately adopted a permanent plan that used only single-member districts. *Id.* at 410–14.

[73] *Finch*, 431 U.S. at 415 (citing Mahan v. Howell, 410 U.S. 315, 333 (1973)).

[74] 223 F.3d 593 (7th Cir. 2000).

[75] *Id.* at 601.

[76] *Id.* at 599.

[77] *Id.*

[78] *Cf.* Presley v. Etowah Cnty. Comm'n, 502 U.S. 491, 507 (1992) (stating that courts should not interfere with routine matters of governance, such as deciding the number of appointive positions, in an effort to comply with Section 5).

[79] McCoy v. Chi. Heights, 6 F. Supp. 2d 973, 981–82 (N.D. Ill. 1998) (stating that drawing single-member districts ran the risk of an Equal Protection challenge), *rev'd sub nom. Harper*, 223 F.3d 593 (7th Cir. 2000). Racial gerrymandering is discussed briefly in Part II.C.3.

[80] *See, e.g.*, White v. Regester, 412 U.S. 755, 769–70 (1973) (affirming the district court's

issue, why not focus on that as the reason not to defer, instead of the mechanism on its own (especially given that several election law scholars have lauded some alternative voting schemes as potential solutions to solve some of our biggest election problems[81])? This question is too involved to discuss at length in this Note, but it is worth mentioning in this context.

Regardless of whether disfavoring multimember districting specifically and alternative voting systems generally is justified, the reality is that this legislative policy is disfavored under current redistricting jurisprudence. Thus, it seems prudent for a district court that attempts to implement a disfavored scheme such as multimember districting or an alternative voting system into its remedy, to be prepared to give extensive justification for doing so—even if adoption of the scheme means the court is deferring to the policy choices of the jurisdiction.

3. Creation of Minority Opportunity Districts

A map-drawing entity could choose to create additional minority or coalition districts in its adopted map for any number of reasons: to comply with the Voting Rights Act, to achieve partisan goals, to see a more diverse group of legislators elected, etc. Whatever the reason, if the map-drawing entity made a conscious decision to create minority opportunity or coalition districts, should a district court defer to that policy decision?

Since *Shaw v. Reno*,[82] in which the Supreme Court first recognized a racial gerrymandering claim, taking race into account to any substantive degree has been a tricky line to walk—even if it is for a benign purpose, such as creating additional minority opportunity or coalition districts in hopes of increasing diversity of representation. But it is unclear how much bite *Shaw* still has in the wake of the holding in *Easley v. Cromartie*[83] that a partisan aim could be a valid defense to a claim of racial gerrymandering.[84] Given that maps are often drawn by legislative staff or experts hired to keep an eye toward partisan goals, the partisan defense could likely always be raised as a defense to racial gerrymandering claims.

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conclusion that certain multimember districts in Texas were drawn in an effort to dilute the minority vote).

[81] *See, e.g.*, Richard Briffault, *Lani Guinier and the Dilemmas of American Democracy*, 95 COLUM. L. REV. 418 (1995) (reviewing LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994)) (advocating single transferrable voting, in which voters rank candidates by preference, which, among other benefits, increases competitiveness of elections).

[82] 509 U.S. 630 (1993).

[83] 532 U.S. 234 (2001).

[84] *Id.* at 243, 257.

Furthermore, *Bartlett v. Strickland* has come to stand for the notion that district courts may not set out on their own to create new minority opportunity or coalition districts—they may only draw districts that simply reflect population growth.[85] But can (or should) a court defer to a legislature that decided to draw a new minority opportunity district in order to achieve a partisan goal? The answer seemed to be a cautious "no" when the Court held in *Abrams v. Johnson* that the district court did not err by refusing to defer to a legislative plan that created an additional minority opportunity district.[86] But *Abrams* pre-dates *Cromartie*'s holding that partisan gerrymandering was only unlawful when the predominant purpose of the redistricting was racial and not partisan.[87] Thus, it is unclear whether the answer is still a tentative "no" when the purpose is to achieve a partisan goal.

So on one hand, courts were extremely unlikely to defer in the 1990s to race-based line-drawing; it is unclear how far that non-deference extends today, given that it is not clear what is left of *Shaw* after *Cromartie*. But on the other hand, the choice of whether to spread a minority community among several districts or concentrate it in a few districts is normally left to the political process.[88] Indeed, courts seem especially likely to embrace legislative efforts to comply with the Voting Rights Act—at least if the court agrees that that is what is going on.[89]

Yet, even where the latter occurs, if courts simply approve of certain types of legislative changes when they are the type that the court would order in an appropriate Voting Rights Act challenge, then it is not clear that this is actually deference. But if courts defer to map drawers' choices about *how* to comply with the Voting Rights Act, then that looks more like deference.

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[85] Perry v. Perez, 132 S. Ct. 934, 944 (2012) (per curiam) ("If the District Court did set out to create a minority coalition district, rather than drawing a district that simply reflected population growth, it had no basis for doing so." (citing Bartlett v. Strickland, 556 U.S. 1, 13–15 (2009) (plurality opinion))).

[86] Abrams v. Johnson, 521 U.S. 74, 90 (1997).

[87] *Cromartie*, 532 U.S. at 257 ("The basic question is whether the legislature drew District 12's boundaries because of race *rather than* because of political behavior (coupled with traditional, nonracial districting considerations)." (emphasis in original)).

[88] *See* Voinovich v. Quilter, 507 U.S. 146, 156 (1993) (stating that courts may not order the creation of majority-minority districts unless necessary to remedy a violation of law, but it does not follow that a state's power is "similarly limited").

[89] *See, e.g.*, Quilter v. Voinovich, 981 F. Supp. 1032, 1051 (1997), *aff'd*, 523 U.S. 1043 (1998) ("[G]iven the demands of the Voting Rights Act, which requires some degree of race consciousness on the part of states engaged in redistricting, consideration of race, in conjunction with (and not in predomination over) other demographic data and traditional districting criteria, clearly is a legitimate state interest."); *but see* Miller v. Johnson, 515 U.S. 900, 921 (1995) ("Whether or not in some cases compliance with the Act, standing alone, can provide a compelling interest independent of any interest in remedying past discrimination, it cannot do so here.")

4. Presence of Discriminatory Purpose & Section 5

Sometimes courts are (and should be) reluctant to defer, because there is some degree of merit to a discriminatory purpose claim. Obviously it does not make sense to require a district court to defer to the discriminatory policies of a legislature. But when considering the variety of legislative policies utilized in a map, should a district court be expected to cull out the non-discriminatory policies from those that are discriminatory?

For jurisdictions covered under Section 5, this is an even more relevant inquiry, as the burden is on the jurisdiction to demonstrate that its plan is non-retrogressive and that there is not a discriminatory purpose behind it.[90] In the 2006 Amendments to Section 5,[91] Congress expressly disapproved of the Court's construction of discriminatory purpose in *Reno v. Bossier Parish School Board* (*Bossier Parish II*).[92] *Bossier Parish II* held that Section 5 only bars changes to an existing map that manifest a purpose to retrogress—thus, changes that merely aim to perpetuate existing levels of unconstitutional or illegal discrimination cannot justify denial of preclearance.[93] The Amendments' findings state that the *Bossier Parish II* majority "misconstrued Congress'[s] original intent in enacting the Voting Rights Act of 1965 and narrowed the protections afforded by [Section 5]."[94] The findings also clarified that under Section 5, "[t]he term 'purpose' . . . shall include any discriminatory purpose."[95]

In other words, if the map drawers intended to continue diluting minority votes through an adopted plan, even if they did not intend to dilute minority votes more than the existing map already did, the 2006 Amendments clarified that this qualifies as a discriminatory purpose under Section 5. This arguably implies that a court should not defer when a discriminatory purpose has been found in a covered jurisdiction's plan.

But while the 2006 Amendments seemed to clarify the deference question in this sense, they complicate the deference question when one also considers the issue of Section 5's constitutionality. This Note explores this issue after examining the models along the deference spectrum.

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[90] 42 U.S.C. § 1973c (2006).

[91] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 557.

[92] 528 U.S. 320 (2000)

[93] *Id.* at 341 (holding that Section 5 "does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose").

[94] § 2(b)(6), 120 Stat. at 558.

[95] § 5(c), 120 Stat. at 581.

IV. MODELS ALONG THE DEFERENCE SPECTRUM

The Court has made it clear that it wants district courts to defer, to some degree, to maps adopted by state legislatures.[96] But in all its emphasis on deference, the Court has been (perhaps intentionally) vague in describing *how* to defer to legislative policies. Sometimes it chides the district court for "drawing a district that does not resemble any legislatively enacted plan"[97]—seemingly emphasizing appearances more than underlying policies. Other times the emphasis is on the "legislative judgments the plans reflect,"[98] perhaps implying that a court's deference should include policy decisions consciously made, as well as common features reflected in the map that were not explicitly incorporated into the map.

There are a variety of models along the deference spectrum that courts could utilize in the redistricting context. Some of these models have been rejected (in some, or perhaps all, circumstances), some only work if certain circumstances are present, and choosing between the rest may simply come down to which normative arguments the Court finds more persuasive. Under each model, this Note attempts to highlight circumstances that appear to be pertinent to whether courts defer in a manner consistent with the model, in addition to some circumstances that perhaps should be more directly considered before implementing the particular model.

A. The Extremes

1. Complete Deference

In an ideal world, an adopted plan has no constitutional or Voting Rights Act violations and it is implemented without a need for court intervention. The complete deference model essentially has the same result—there is a challenge to an adopted map, and either the adopted plan is left to stand regardless of any constitutional or statutory violations, or the adopted plan is adopted as an interim map while the constitutional and statutory claims are pursued.

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[96] *See, e.g.*, Abrams v. Johnson, 521 U.S. 74, 79 (1997) ("[A] court, as a general rule, should be guided by the legislative policies underlying the existing plan . . . ."); Upham v. Seamon, 456 U.S. 37, 39 (1982) (per curiam) ("[A] court must defer to legislative judgments on reapportionment as much as possible . . . .").

[97] Perry v. Perez, 132 S. Ct. 934, 944 (2012) (per curiam).

[98] *Upham*, 456 U.S. at 40–41 ("[A] court must defer to the legislative judgments the plans reflect . . . .").

i. Covered Jurisdictions

Implementing a covered jurisdiction's adopted plan without regard to any potentially meritorious constitutional or statutory claims is the most deferential model a district court can employ. Implementing such an adopted plan as an interim plan until preclearance has been granted or denied is a particularly interesting situation. In *Perez*, this is what the State of Texas argued should have been the standard in such a setting.[99] But this model is problematic for several reasons.

If applied to covered jurisdictions, this model would eviscerate Section 5. A critical piece of Section 5 is that it halts the implementation of a voting change until a covered jurisdiction demonstrates that its plan does not have a discriminatory purpose and is not retrogressive.[100] This model of deference completely undoes the crux of the Section 5 remedy—the burden of proof shift. Use of this model would encourage jurisdictions to delay either adoption of a map or the preclearance process as long as possible, so that even a plan with a blatant discriminatory purpose or retrogressive effect under Section 5 could not be stopped before an election.

Furthermore, challenges to a covered jurisdiction's plan under Section 2 or the Constitution cannot be ruled on until the preclearance question is resolved.[101] Therefore, under this model of deference, there is no mechanism available to plaintiffs or courts to prevent implementation of a discriminatory map in a covered jurisdiction. This cannot be. Thus, it makes sense that courts have rejected this model for jurisdictions covered under Section 5.[102]

ii. Non-Covered Jurisdictions

For non-covered jurisdictions, however, these two important concerns are not present. The burden in Section 2 and constitutional challenges rests with the plaintiff; hence, the concern about a jurisdiction gaming the system in order to avoid the need to satisfy its burden is a

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[99] Brief for Appellants, *supra* note 62, at 54–55, *Perez*, 132 S. Ct. 934 (Nos. 11-713, 11-714, 11-715) ("[T]his Court should vacate the interim orders and remand to the district court with instructions to impose Texas'[s] legislatively enacted plan as the interim plan while preclearance is pending.").

[100] 42 U.S.C. § 1973c(a) (2006).

[101] *See, e.g.*, Branch v. Smith, 538 U.S. 254, 283 (2003) (Kennedy, J., concurring) ("Where state reapportionment enactments have not been precleared in accordance with [Section] 5, the district court 'err[s] in deciding the constitutional challenges' to these acts.'" (quoting Connor v. Waller, 421 U.S. 656, 656 (1975) (per curiam))).

[102] *See Perez*, 132 S. Ct. at 940 ("This Court has been emphatic that a new electoral map cannot be used to conduct an election until it has been precleared."); Clark v. Roemer, 500 U.S. 646, 652 (1991) (finding error where a district court did "not enjoin[] elections held for judgeships to which the Attorney General interposed valid [Section 5] objections").

nonissue. In addition, the district court's hands are not tied with waiting on the preclearance process to resolve itself—if the adopted map presents a Section 2 or constitutional violation, the district court can go ahead and rule on that.

If a court is drawing an interim map for a non-covered jurisdiction, one of two situations has occurred—there has either been a finding of a Section 2 or constitutional violation, or there is not enough time to expedite proceedings and rule on the claims before a map needs to take effect. Where there is a valid Section 2 or constitutional claim, courts cannot justify deferring completely to the infirm map.[103]

But where there is not time to evaluate the claims before an impending election, whether the court should defer completely to the adopted map may depend on a few circumstances. First, why was there not time to rule on the claims before the map needed to take effect? Is it because plaintiffs did not bring suit in a timely fashion? Or is it because the legislature left such a small window of time between adoption of the new plan and the primary date that it would be impossible for any plaintiff to challenge the new map? If the legislature delayed passage with the intention of avoiding any challenges before the map can be used in the next election, then that delay starts to look like discriminatory intent. But because discerning legislative intent is a highly problematic endeavor,[104] it might be not be wise to require a court to make a finding of intent in order to determine which model of deference to use.

Second, what other legislative policies are at play? For instance, it is likely very important to the states with pre-Super Tuesday primaries that those primaries remain before Super Tuesday. In that situation, delaying a primary in order to first make a determination on challenges to the adopted map may result in sacrificing a policy (having an early voice in the primary candidate selection process) that the legislature holds more dear than having its new map adopted in whole.

In fact, there have been times when the Court has authorized elections using constitutionally or statutorily infirm maps.[105] These cases have come up only when necessity is the prevailing factor.

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[103] *See Perez*, 132 S. Ct. at 941 ("A district court making such use of a State's plan must, of course, take care not to incorporate into the interim plan any legal defects in the state plan."); Abrams v. Johnson, 521 U.S. 74, 85 (1997) ("[T]he precleared plan is not owed *Upham* deference to the extent the plan subordinated traditional districting principles to racial considerations."); White v. Weiser, 412 U.S. 783, 797 (1973) ("Of course, the District Court should defer to state policy in fashioning relief only where that policy is consistent with constitutional norms and is not itself vulnerable to legal challenge."). Complete deference despite a constitutional challenge would essentially remove the judiciary's role in evaluating these claims entirely, a proposition contrary to fifty years of jurisprudence. *Cf. Baker v. Carr.* 369 U.S. 186, 237 (1962) (holding that a vote dilution claim under the Equal Protection Clause is justiciable).

[104] *See* Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843, 858–70 (2006) (describing why it is particularly difficult to determine legislative intent behind election law).

[105] *E.g.*, Upham v. Seamon, 456 U.S. 37, 44 (1982) (per curiam) (citing Bullock v. Weiser, 404 U.S. 1065 (1972), and Whitcomb v. Chavis, 396 U.S. 1055 (1970), for the proposition that the Court has authorized the use of legally infirm maps on an interim basis when "[n]ecessity has been the motivating factor").

Given the narrow situations in which this model may be useful and the various considerations at play, this model is only potentially viable for non-covered jurisdictions and only when there is not time to properly evaluate Section 2 and constitutional claims. Even then, utilization of this model should be considered on a case-by-case basis, carefully considering why there is not time for proper evaluation and whether any other potentially more weighty legislative policies are at play.

2. *Zero Deference*

Given the federalism and the judicial competency concerns the Court has continually raised in the redistricting context, it is not surprising that this model has been rejected by the Court on a number of occasions.[106] Most recently, the Court in *Perez* rejected this model while the preclearance process was pending.[107] Even in *Upham*, where preclearance was denied, the Court held that the district court must defer to those parts of the map free of either a Department of Justice objection or a finding of a constitutional or statutory violation.[108]

There may be an exception to the general ban on this model when there is a case of racial gerrymandering. In *Abrams*, the Court indicated that district courts may decline to defer to an adopted map when race was the predominant factor behind the map.[109] In that case, it was unclear whether the Court meant that the district court could only refuse to retain those districts with racial gerrymandering, or whether the district court could refuse to defer to the new map in its entirety.[110] But how this would or should play out today is likely no longer relevant, given *Easley v. Cromartie*'s holding that partisan gerrymandering could be a valid defense to a claim of racial gerrymandering.[111]

3. *An Extreme?: Maintain the Status Quo*

A census will almost certainly render any benchmark plan unconstitutional as a violation of one person, one vote.[112] So after census

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[106] *E.g.*, *Growe v. Emison*, 507 U.S. 25, 42 (1993) (rejecting the zero deference approach).

[107] *Perez*, 132 S. Ct. at 944.

[108] *Upham*, 456 U.S. at 39–41.

[109] Abrams v. Johnson, 521 U.S. 74, 90 (1997) ("Interference by the Justice Department, leading the state legislature to act based on an overriding concern with race, disturbed any sound basis to defer to the 1991 unprecleared plan . . . .").

[110] *Compare id.* ("In these circumstances, the trial court acted well within its discretion in deciding it could not draw *two majority-black districts* without itself engaging in racial gerrymandering.") (emphasis added), *with id.* at 90 ("Interference by the Justice Department . . . disturbed any sound basis to defer to the 1991 unprecleared *plan*.") (emphasis added).

[111] *Infra* Part II.C.3.

[112] The one-person-one-vote principle requires that legislative districts contain roughly equal

data is released, the benchmark plan should not remain in place as is, even as an interim option.[113] Rather, this model of deference, starts with the benchmark plan, and then requires district courts to apply either legislative principles utilized in that map, or neutral districting principles, to repair constitutional or statutory infirmities.

As explained below, this model of deference is either the equivalent of zero deference or almost completely deferential, depending on whether or not the map-drawing entity in fact adopted a map.

i. Interim Maps

When a new map has been adopted, using a benchmark as a starting place for an interim map instead of the new map is arguably not deferring at all. Here, the legislature has spoken and prioritized potentially different legislative policies in different ways than it did previously. In one sense, this approach "defers" to the actions of the previous legislature. But because the new legislature rejected the benchmark plan, the argument for deference to the benchmark plan is arguably no stronger than that for starting from a clean slate and using neutral principles under the zero deference model.

Yet, courts generally are much more at ease with starting from a benchmark for an interim plan, rather than starting from scratch.[114] This stance may be because then the court can at least point to something that has already been in use, and thus, the institutional competency concern is somewhat mitigated. The plaintiffs in *Perez* argued that the district court used this model of deference in drawing its interim map by starting from the benchmark and applying neutral districting principles in order to comply with one person, one vote.[115]

The *Perez* Court rejected this model, at least when there was a shift in the number of districts to be drawn.[116] In that situation, the adjustments necessary to change the number of districts are so large that

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numbers of people. Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 757 (2004); *see also* Reynolds v. Sims, 377 U.S. 533, 557, 562 (1964) (holding that apportionment of state legislative seats that failed to include equal populations in each district diluted the weight of some citizens' votes in violation the Equal Protection Clause).

[113] *But see Upham*, 456 U.S. at 44 (citing Bullock v. Weiser, 404 U.S. 1065 (1972), and Whitcomb v. Chavis, 396 U.S. 1055 (1970), for the proposition that the Court has authorized the use of legally infirm maps on an interim basis when "[n]ecessity has been the motivating factor").

[114] *See* Perry v. Perez, 132 S. Ct. 934, 940–41 (2012) (per curiam) ("[T]he plan already in effect may give sufficient structure to the court's endeavor. Where shifts in a State's population have been relatively small, a court may need to make only minor or obvious adjustments to the State's existing districts in order to devise an interim plan.").

[115] Reply Brief for Appellees Texas Latino Redistricting Task Force, Texas Mexican American Legislative Caucus and Shannon Perez at 15, *Perez*, 132 S. Ct. 934 (Nos. 11-713, 11-714, 11-715).

[116] *See Perez*, 132 S. Ct. at 941 ("The problem is perhaps most obvious in adding new congressional districts: The old plan gives no suggestion as to where those new districts should be placed.").

the benchmark no longer provides helpful guidance.[117] Hence, regardless of whether starting from the benchmark is truly deferential or not, it is not a viable option where the number of districts has changed.

ii. Permanent Maps

Juxtapose the use of this model in drawing an interim map with the use of this model in drawing a permanent map, as might occur if the legislature failed to reach a consensus on a new map. Now, maintaining the status quo is arguably the most deferential option. The benchmark is the most recent legislative guidance available, even where the benchmark is a court-drawn plan (since the legislature either chose not to redraw the map or could not reach a consensus on an alternative before the next census). Thus, when crafting a permanent map where the number of districts to be apportioned has not changed, starting with the benchmark and remedying any constitutional or statutory defects is the most deferential option. This method should work where the legal defects of the benchmark are population deviation (one person, one vote) or a discriminatory effect (vote dilution under Section 2 or retrogression under Section 5).

Yet consider what should happen if the benchmark plan were infected by a discriminatory purpose. It would be impossible to remedy a map with this infirmity by deferring to that very map. For the benchmark plan to be infected with a discriminatory purpose implies that such a claim either lost in court or was never brought the first time around. In this day of ardent voting rights litigation,[118] it is hard to imagine a map not being challenged for its discriminatory purpose if there were even a remote chance one could be proved (there are always potential plaintiffs unhappy with a new map). Therefore, this concern should not be a barrier to utilizing this model where legislatures fail to reach a consensus on a new map.

A further consideration arises under this situation when the number of districts has increased or decreased. While the Voting Rights Act does not address what to do when there is a change in the number of districts, there is a statutory provision that addresses this very issue if a state fails to implement a congressional redistricting after a census. The U.S. Code provides that if there is an increase or decrease in the number of districts, and there is no map in place, either the additional representatives (if an increase) or all the representatives (if a decrease) shall be elected at-large.[119] Despite the presence of this statutory provision, at-large

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[117] *Id.*

[118] *See* Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 90 (2009) (stating that the average number of election law cases handled in federal and state courts between 2000 and 2008 was more than double the pre-2000 number).

[119] 2 U.S.C. § 2a(c) (2006).

districting is so disfavored[120] that courts would rather undergo the unwelcome task of redistricting than use this statutory mechanism. But if courts are truly concerned with institutional competence, perhaps utilization of this statute might be just the incentive necessary to encourage a legislature that has otherwise stalled to reach consensus.

In sum, too much or too little deference is equally problematic, except in very limited circumstances. Let us therefore turn to models that fall somewhere in between the two extremes—what this Note terms "sweet spot contenders."

B. Sweet Spot Contenders

1. Defer Except for Challenged Districts (Leave Unchallenged Districts in the Adopted Map Untouched)

This model seems to be the interpretation of *Upham* that states (including Texas) have pushed for,[121] and the Court has not yet confirmed or denied whether this is the model of deference that should be used.[122] But in all the Court's talk of deference, there has not been much talk of the practical realities and challenges of map drawing except when pointing out what a district court did incorrectly. In order for guidance to be truly useful for lower courts that have to draw these maps, it should be practical and forward-looking. This model, in particular, presents many practical challenges for a map drawer.

i. Treatment of Challenged Districts

This model focuses on the treatment (or lack thereof) of the unchallenged districts, but the question remains: how should a court treat the challenged districts? The most deferential version of this model is to allow changes to challenged districts only where there is a finding of a constitutional or statutory violation—the approach Justice Thomas would have taken in *Perez*.[123] Alternatively, one could utilize a variation that is

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[120] *See, e.g.*, Connor v. Finch, 431 U.S. 407, 415 (1977) (describing the Court's preference for single-member districting of Mississippi courts).

[121] *See supra* text accompanying note 63; *see also* Brief of State-Appellants at 35, *Easley v. Cromartie*, 532 U.S. 234 (2001) (Nos. 99-1864, 99-1865) (arguing that the legislature did what *Upham* commanded—namely, to "retain the core of the prior redistricting plan, while taking those steps necessary to cure the constitutional violation").

[122] *Cf.* Upham v. Seamon, 456 U.S. 37, 40–41 (1982) (per curiam) (holding that "a court must defer to the legislative judgments the plans reflects," but without clarifying exactly what that means, and perhaps implying that district courts do not have to leave every unchallenged line exactly in place).

[123] *Perez*, 132 S. Ct. at 945 (Thomas, J., concurring).

more moderately deferential, such as requiring some showing of probability of success on the merits. Finally, the least deferential variation is to allow changes to any challenged districts regardless of probability of success on the merits.

It is unclear whether the Court in *Perez* was advocating for a version of this model or a version of the principles-over-limits model discussed in the next section. But while it is unclear which model the Court in *Perez* would like to see, the *Perez* Court did make clear that if the defer-except-challenged-districts model applies, it needs to be the medium deferential variation. The Court clarified that district courts do not have to defer to districts with legal challenges that have some probability of success.[124] For constitutional or Section 2 claims, that means the claims have to be likely to succeed;[125] for Section 5 claims, that means there has to be a "reasonable probability" that preclearance will be denied ("reasonable probability" in this context means the Section 5 challenge is "not insubstantial").[126] The Court justifies the Section 5 standard as one that provides a sufficient balancing of the competing ideals:

> That standard ensures that a district court is not deprived of important guidance provided by a state plan due to [Section 5] challenges that have no reasonable probability of success but still respects the jurisdiction and prerogative of those responsible for the preclearance determination. And the reasonable probability standard adequately balances the unique preclearance scheme with the State's sovereignty and a district court's need for policy guidance in constructing an interim map.[127]

ii. Practical Difficulties

The difficulty of redrawing a few districts while leaving all the other districts completely untouched renders this model impractical. This is especially true in congressional redistricting where the equipopulation standard under one person, one vote is so restrictive.[128]

Upham has long been the go-to case in support of the idea that

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[124] *Id.* at 942 (per curiam).

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] The equipopulation requirement has been interpreted to require essentially exact precision in achieving population equality among congressional districts, as opposed to state legislative districts, which are currently afforded some minimal flexibility. Cox, *supra* note 112, at 757; *see also* Karcher v. Daggett, 462 U.S. 725, 727 (1983) (affirming that even minimal population variation between congressional districts in reapportionment plans requires justification and a good-faith effort to obtain population equality).

district courts should be more deferential to adopted plans. But the Court in *Upham* emphasized the practical facts that made it easy to defer to the unchallenged districts in that case: there were only two challenged districts and they were contiguous.[129] From a practical standpoint, it therefore made sense that the interim map could be very similar to the adopted plan—because there was a relatively small infirm area, and there were at least some lines that could be shifted without changing the shape of any surrounding districts. Therefore, it may make sense to only utilize this model after a fact-specific inquiry demonstrates that it is actually a practical option.

2. Principles Over Lines

Instead of deferring strictly to every precise line drawn for every unchallenged district (some of which will also be lines of challenged districts), perhaps lower courts should be allowed greater flexibility through the principles-over-lines model. There are two versions of this model—one significantly less deferential than the other.

i. The Less Deferential Version

The less deferential version of this model does not require a district court to use the adopted map's specific district lines as a starting place. Instead, a district court may draw its own map, so long as it utilizes the non-discriminatory legislative principles from the adopted map.

The Court in *Perez* may have left a door open for this model. The Court's straightforward statement that "the state plan serves as a starting point for the district court"[130] seems pretty clearly to reject the zero deference model in any context. Then specifically, the Court rejected the zero deference model while the preclearance process was pending—but with an important caveat. The opinion states, "[w]ithout . . . a determination [of a reasonable probability that preclearance would be denied or of a likelihood of success for a Section 2 or constitutional claim], the District Court had no basis for drawing a district that does not resemble any legislatively enacted plan."[131] Notice the Court's holding does not preclude the possibility of this less deferential version of the principles-over-lines model in a situation where there is a reasonable probability that preclearance would be denied on the basis of a discriminatory purpose that permeated the entire map.

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[129] Upham v. Seamon, 456 U.S. 37, 38 (1982) (per curiam).
[130] *Perez*, 132 S. Ct. at 941.
[131] *Id.* at 944.

However, this less deferential version is problematic for two reasons. First, despite *Perez* perhaps not precluding use of this model where a discriminatory purpose permeated the entire map, this model may ultimately leave too much room for the district court's discretion in how to implement the state legislature's policies. Given the Court's desire to see lower courts take a more deferential approach, a model that does not begin with any previously drawn lines may simply not be deferential enough to satisfy the Court's concerns.

Second, this model presents an administrability problem in that district courts will potentially have to choose whether to utilize one policy over another. This dilemma would arise when a legislature employed districting policies inconsistently in an adopted map or when two policies are mutually exclusive when applied to a particular area. Inconsistent application of policies could make it difficult for district courts to identify the policies the legislature intended to utilize. But even if the legislature made its intended policies very clear, this situation still forces a district court to choose which policies to apply where and what to do when two policies cannot both be applied to a single district. This added discretion may resonate too deeply with the Court's institutional competence concerns.

So while *Perez* seemingly left the door open to the use of the less deferential version of the principles-over-lines model, the Court's strong language in favor of deference indicates this version of the model would likely be rejected, even in the statewide discrimination scenario.

ii. The More Deferential Version

The more deferential version of this model requires the lower court to generally leave the unchallenged district lines intact. But where those lines would need to be changed to accommodate a change to a challenged district, the lower court would not be forbidden from changing those lines. Instead, changes to the lines would be guided by the legislative principles from the adopted map.

This version shares the less deferential version's administrability problem. It is unclear how pervasive throughout the map the legislative policy should be to merit deference—specifically, it is unclear how a court should address the situation in which a legislature applied policies only in a specific area or if the legislature adhered to a particular policy in one district but not another.

It is equally unclear how a court should treat policy choices the legislature did *not* employ. Such an omission may or may not have been intentional. For instance, in *Perez*, the Court chastised the district court's decision not to cut through precinct lines when the legislature did so

freely in the plan.[132] But suppose it was not a deliberate legislative policy choice to cut precinct lines. Should a district court be bound by an absence of a particular policy, when there may not have even been a conscious decision to omit that policy?

While this model of deference presents problems, it also presents the most promise for the right combination of deference and accommodation of the practical realities of map drawing. Utilization of this model may require the court to give more clear guidance on some circumstances that arguably do not warrant as much deference—namely, inconsistently applied "policies" and the absence of a policy—but ultimately this model is the most appealing candidate for a default sweet spot.

V. DEFERENCE AND THE CONSTITUTIONALITY OF SECTION 5

Keeping in mind the broader definition of discriminatory purpose under Section 5, and the compelling reasons to use a less deferential model where a court finds discriminatory purpose, it is important to consider the flip side of those reasons for less deference: whether utilization of a less deferential model could render Section 5 unconstitutional.

Marbury v. Madison[133] famously announced, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[134] So while it was clear that, at a minimum, the judiciary shared in the role of constitutional review, it remained unclear whether that duty was intended to be shared with the other two branches, or whether it was a duty exclusively reserved for the judiciary. By the mid-twentieth century, the Court quashed any remaining doubt by the time of *Cooper v. Aaron*[135]: the federal judiciary's interpretation of constitutional law trumps that of all other branches.[136]

Still, the Court's standard of review for determining whether a statute was constitutional was very deferential to Congress under *South Carolina v. Katzenbach*—Congress could extend rights protections beyond that which the court recognized, so long as it did not drop below the court's baseline minimum rights protection.[137] The Rehnquist Court then made clear in *City of Boerne v. Flores*,[138] at least with respect to Section 5 of the Fourteenth Amendment, that the Court defined the scope

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[132] *Id.* at 943–44.

[133] 5 U.S. (1 Cranch) 137 (1803).

[134] *Marbury*, 5 U.S. at 177.

[135] 358 U.S. 1 (1958)

[136] *Id.* at 18 ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution . . . .").

[137] 383 U.S. 301, 327–28 (1966).

[138] 521 U.S. 507 (1997).

of the constitutional right and Congress could only protect the right with remedies that were congruent and proportional to violations.[139] The Court made clear in subsequent cases that the *City of Boerne* standard extended beyond the Fourteenth Amendment, but whether it extends to rights and remedies protected under the Fifteenth Amendment has yet to be confirmed.

This brings us to Section 5 of the Voting Rights Act. Passed pursuant to Congress's enforcement power under the Fifteenth Amendment, Section 5 is an extraordinary remedy for voting rights violations that occur in covered jurisdictions. Whether Section 5 is still constitutional post-*City of Boerne* is the topic of much debate—especially after the Court expressed serious concern over its constitutionality in *NAMUDNO*[140] and granted certiorari in *Shelby County v. Holder*.[141]

The *NAMUDNO* Court seemed particularly troubled by the question of whether a covered jurisdiction could take advantage of Section 5's bailout provision.[142] The Court made clear that all covered jurisdictions can bail out,[143] and given that the Attorney General has consented to every bailout action since 1984,[144] it seems unlikely that this will be the issue upon which Section 5's constitutionality will turn.[145]

A different issue, which perhaps could be determinative of Section 5's constitutionality, is which model of deference district courts utilize. Could a less deferential model render Section 5 unconstitutional? One reason this could be the case is the practical reality that many interim plans end up becoming permanent plans. This reality, combined with the importance of a benchmark plan in Section 5's retrogression analysis, means that an interim plan will likely have a long-term effect on a covered jurisdiction's apportionment efforts. If the model employed is not deferential enough, redistricting in covered jurisdictions could effectively become the province of the courts. This seems to reach the heart of the Court's concern about Section 5.[146]

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[139] *Id.* at 529–30.

[140] NAMUDNO, 557 U.S. 193, 201–03, 211 (2009).

[141] Shelby Cnty., Ala. v. Holder, 811 F. Supp. 2d 424, 427 (D.D.C. 2011), *cert. granted*, 133 S. Ct. 594 (2012).

[142] *NAMUDNO*, 557 U.S. at 209–11. Section 5 allows jurisdictions to bail out of their reporting requirements if certain criteria are met. In order to bail out, jurisdictions must request a declaratory judgment by a three-judge panel from the U.S. District Court for the District of Columbia, satisfy a number of measures showing the absence of discriminatory voting practices over a ten-year period, and provide evidence of constructive efforts taken to provide access to voting. 42 U.S.C. § 1973b(a) (2006).

[143] *NAMUDNO*, 557 U.S. at 211.

[144] *Shelby Cnty.*, 811 F. Supp. 2d at 500 (citing Berman Decl. ¶¶ 27, 29.

[145] The petition for writ of certiorari in *Shelby County* was granted for the following question: "Whether Congress'[s] decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution." *Shelby Cnty.*, 133 S. Ct. at 594.

[146] *See NAMUDNO*, 557 U.S. at 202. ("[Section] 5, which authorizes federal intrusion into

The Court in *Perez* said the constitutionality concerns about Section 5 would be "exacerbated if [Section 5] required a district court to wholly ignore the [s]tate's policies in drawing maps . . . without any reason to believe those state policies are unlawful."[147] Instead, "the state plan serves as a starting point for the district court[,] . . . [providing] important guidance that helps ensure that the district court appropriately confines itself to drawing interim maps that comply with the Constitution and the Voting Rights Act, without displacing legitimate state policy judgments with the court's own preferences."[148] The Court clarifies that, in deferring to adopted plans, district courts should still take care not to incorporate any legal defects of the adopted plan into the interim plan.[149]

As previously discussed, this makes clear that basically neither extreme on the deference spectrum is permitted, even when Section 5 applies. But beyond that, it does not help narrow down which other model of deference to use. Though *Perez* did not seem to preclude the less deferential version of the principles-over-lines model, perhaps the Court's own application of its holding provides a little more guidance—particularly in light of the Court's stated link between deference and the constitutionality of Section 5:

> Although Texas'[s] entire State House plan is challenged in the [Section 5] proceedings, there is apparently no serious allegation that the district lines in North and East Texas have a discriminatory intent or effect. The District Court was thus correct to take guidance from the State's plan in drawing the interim map for those regions. But the court then altered those districts to achieve de minimis population variations—even though there was no claim that the population variations in those districts were unlawful. In the absence of any legal flaw in this respect in the State's plan, the District Court had no basis to modify that plan.[150]

"[N]o basis to modify that plan," coupled with the other statements by the Court discussed above, seems to imply that the appropriate deference model in *Perez* has narrowed to either the more deferential version of the principles-over-lines model or the medium deferential version of the defer-except-challenged-districts model—in either case, a district court should begin with the actual lines of the adopted plan. From there, however, it is not clear whether the district court can change lines

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sensitive areas of state and local policymaking, imposes substantial federalism costs. These federalism costs have caused Members of this Court to express serious misgivings about the constitutionality of [Section] 5." (citations omitted) (citing Lopez v. Monterrey County, 519 U.S. 9 (1996))). *See also* Abrams v. Johnson, 521 U.S. 74, 101 (1997) ("The task of redistricting is best left to state legislatures, elected by the people and as capable as the courts, if not more so, in balancing the myriad factors and traditions in legitimate districting policies.").

[147] Perry v. Perez, 132 S. Ct. 934, 942 (2012) (per curiam).

[148] *Id.* at 941.

[149] *Id.* at 941–42.

[150] *Id.* at 943 (citations omitted).

of unchallenged districts in order to accommodate changes to legally infirm districts, if the change applies the adopted map's policies (as opposed to policies imposed on a map by the district court, which is how the *Perez* Court viewed the district court's aim of achieving *de minimis* population variations).

While perhaps the normative arguments for deference generally, and the concerns over Section 5's constitutionality in particular, weigh in favor of the defer-except-challenged-districts model, the normative arguments for voting rights and administrability concerns weigh in favor of the principles-over-lines model. The defer-except-challenged-districts model's administrability problems are in many cases insurmountable—how many infirm districts there are, whether they are contiguous, and the nature of the infirmity will all factor into how usable this model is.

However, the more deferential version of the principles-over-lines model is nicely situated to accommodate competing concerns to some degree in most cases. This model is still quite deferential, in that it requires the lower court to generally leave the unchallenged district lines intact. But this model does a better job of accommodating the practical realities of map drawing—where the unchallenged district lines must be changed in order to address the infirmity, the lower court would not be forbidden from changing those lines, so long as those changes are guided by the legislative principles from the adopted map. Thus, so long as the Court does not view the principles-over-lines model as so undeferential that it renders Section 5 unconstitutional, it remains the strongest contender for the default "sweet spot" along the deference spectrum.

VI. CONCLUSION

Conceptualizing deference in terms of a spectrum, rather than a binary choice, can be a particularly helpful way to look at how courts are implementing this vague concept in redistricting, and perhaps how that implementation should be done differently. Certain circumstances render some models of deference inapplicable and others tend to push the needle in either direction along the spectrum. Some situations still do not fit neatly into one particular model, but the spectrum of deference at least incorporates the flexibility necessary to reflect the practical reality that is map drawing.

The models at the two extremes—complete deference and zero deference—should generally not be used by lower courts, with two possible exceptions. The complete deference model is only potentially viable for non-covered jurisdictions and only when there is insufficient time to properly evaluate Section 2 and constitutional claims. Even then, utilization of the complete deference model should be considered on a case-by-case basis, carefully considering why there is insufficient time

for proper evaluation and whether any other potentially more weighty legislative policies are at play. The zero deference model is only potentially viable when a state has engaged in racial gerrymandering, but even then, it is not clear this is a valid option post-*Cromartie*.

The maintain-the-status-quo model could be either very deferential or not at all deferential, depending on whether the legislature adopted a map. Use of this model is acceptable, but it makes the most sense when the legislature did not adopt a map and the number of districts did not change.

Courts have left room in the middle for sweet spot contenders, and we saw why the strongest candidates are either the medium deferential version of the defer-except-challenged-districts model or the more deferential version of the principles-over-lines model. On one hand, the renewed emphasis on deference would support utilization of the defer-except-challenged-districts model, particularly when considered in the context of Section 5's constitutionality. But on the other hand, the more deferential version of the principles-over-lines model is only marginally less deferential than its sweet spot adversary, and it is a far more practical model to apply in the map-drawing reality that district courts face.

Clearer guidance is helpful when district courts are forced to undertake the unwelcome task of redistricting, but that guidance does not have to mean adoption of one deference model for all situations. While it may be that one of these sweet spot contenders should apply in an wide range of situations, a one-size-fits-all is not the way courts are deferring in practice—nor should it be, given the varied nature and range of sources underlying policies utilized. Some merit greater deference than others. But conceptualizing deference as a spectrum, and pinpointing what circumstances do, and should, shift the needle along the spectrum would be a useful and welcome change to the vague, abstract language used now in reference to deference in redistricting.