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PREFACE

This issue of the *Review* is dedicated to Greg Coleman and his family.

John Scharbach
Editor in Chief

Austin, Texas
June 2011

IN MEMORY OF GREG COLEMAN: PLANTING SEEDS

R. PAUL YETTER*

Since my partner Greg Coleman's untimely death last year, much has been written about his impressive accomplishments as one of the top appellate attorneys in the country. Such remembrances are fitting, as Greg's skill, intellect, and judgment produced some of the most significant appellate decisions in recent years. Indeed, how can one pay him tribute without recalling that in the span of a week, he argued two of the most watched cases in the 2009 Supreme Court term, and won both? How can one think of Greg and not picture him at the podium, presenting with his typical eloquence a complex legal argument?

These countless achievements recalled by his colleagues and friends might lead some to ask, "What was his legacy?" But Greg did not leave a legacy. Legacy is a high-sounding, even prideful concept. People who leave legacies too often seem to have led lives where every good work was done for a reason, to build a perfect resume, to leave a perfect legacy. That was not Greg.

He was a man—just like all of us, a human being. Nothing was handed to him. Born in San Francisco in 1963, Greg came from a great family, stable and loving, but not from privilege. He had a great education, but not at fancy private schools. After graduating from high school in Massachusetts, Greg attended Texas A&M University and, after completing a two-year church mission in Japan, received a B.S. in Applied Mathematical Sciences and a Masters of Business Administration, each with high honors. He received his J.D.

* Mr. Yetter is a founding partner of Yetter Coleman in Austin. After graduating from Columbia University (J.D., 1983), he served as a law clerk for Judge John R. Brown of the Fifth Circuit Court of Appeals. Before founding Yetter Coleman, he was a partner at the law firm of Baker Botts.

with high honors from The University of Texas Law School in 1992, where he served as Managing Editor of the Texas Law Review and was a member of the Chancellors Honor Society. He achieved great success, but not because he joined all the right country clubs. Greg served as a judicial law clerk to Chief Judge Edith Hollan Jones on the United States Court of Appeals for the Fifth Circuit, and to Justice Clarence Thomas on the United States Supreme Court. After his clerkships, Greg entered private practice, but interrupted his career in the private sector to serve as Texas's first Solicitor General. None of his success came easy. He faced the same work stresses, time pressures, career hurdles, and tough choices that we all do.

Yet at every step, Greg chose the high, hard road, a path that he led all his family, friends, and colleagues along with him. He earned every success, every honor, through hard work, patience, humility, loyalty, good humor, and above all an abiding dedication to his Creator. He showed us that we can lead extraordinary lives by just *choosing* to do so.

So, if Greg Coleman did not leave a legacy—that's too pretentious a concept for such a humble man—what did he leave?

Not long ago, Justice Thomas, one of Greg's longtime mentors, insightfully compared Greg to a farmer:

> The guy is just off-the-charts in character. Character is the glue . . . . [H]ere is someone who shows up every day and does his tasks, even if they aren't earth-shattering. He may have a Porsche mind, but he'll get out in the field with a tractor. He's that kind of guy.[1]

That analogy, "getting out in the field with a tractor," is so fitting, because Greg *was* a farmer. He left his mark by planting seeds.

Greg planted seeds among his profession. He did this in ways big and small. By now, we all know about his remarkable successes—the most U.S. Supreme Court arguments (nine) of any Texas lawyer; a string of wins in courts from Delaware to California, Virginia to Texas; a

1. Paul Sweeney, *The Minimalist*, TEXAS SUPER LAWYERS 2010 (Oct. 2010), http://www.superlawyers.com/texas/article/The-Minimalist/138f6360-ab30-494d-95dd-c4fb2e024bcb.html.

place among the very best appellate lawyers in the country, at an age decades younger than his peers. At each stage of his career—tutored by Chief Judge Jones, by Justice Thomas, by then-Attorney General John Cornyn, by exceptional attorneys in private practice—Greg set ever higher bars of excellence and skill. His last four years were perhaps his best. In fact, Yetter Coleman lawyers would marvel when Greg would work what they called "Greg magic" on our toughest cases.

But Greg was not about accolades. He wanted to improve our legal system. In 2010, he spoke at an appellate bar conference in Houston. Naturally, he was asked to regale the audience with his most recent victories—something that every litigator loves to do. Instead, he spent much of his time complimenting the attendees for the civility of their special part of the bar and emphasizing the need for more of it in our justice system.

Greg did not just preach civility and professionalism; he practiced it every day, even in small issues. He always treated opposing counsel and parties with the highest civility and respect, refusing to engage in personal attacks, though he and his clients often were the target of such attacks. He simply would laugh and urge our team to focus on the law and the facts. If a draft brief Greg received for review pointed out obvious, but non-substantive mistakes by the opposing side, he would remove it from the brief. As a matter of course, he never opposed a request from an opposing party for an extension of time, no matter how contentious the litigation, even if the opponent had opposed our similar requests. In short, Greg practiced law the way he lived his life—with simple decency for others.

Each day of his career, Greg was planting a seed—the value of professionalism. Those fortunate enough to work with Greg honor him by following his example.

Greg also planted seeds among his world. For example, he recently travelled alone to Iraq at the request of the United States Government. For eleven long, gritty, and exhausting days, he crisscrossed the country, from Baghdad to Tikrit to Nasiriyah, speaking with local judges, lawyers, and law professors about the American "rule of law" and how it works here and could be instituted in their country. It was

tough duty, but he loved it. In Greg's words, from a long internal trip report that he wrote,

"I came home less skeptical and more hopeful that [the Iraqis] will achieve [a successful transition to a new constitutional structure] and that our countries and peoples may share strong bonds of friendship in the future."

Nor did Greg take this tour for fame or fortune—there was no press coverage or compensation involved. Rather, he simply hoped to make a contribution to the healing of a war-torn society. It was more of Greg's planting.

And, of course, Greg planted seeds among his friends and family. Greg touched those he knew in his unique way. He showed us how to treat others with respect and sincere attention, even in the frantic moments of life. Like when, after making one of his eloquent, seamless Supreme Court arguments, Greg took the memento Supreme Court quill—a treasured keepsake only for the very top appellate lawyers—and he quietly gave it to his longtime paralegal. It was a seed of generosity. Or when, a young summer associate had a flat tire, Greg went out to her house to fix it. A seed of service. He did lots of planting in his life.

The most important of Greg's many plantings is his wonderful family, which remains a clear reflection of his special character: Stephanie, who devotes herself to her boys, friends, church, and community; and his three sons, who each embody different traits of their dad, from having his head for math and economics and commitment to public service, to following in his choice in colleges, to having his scholastic skills and athletic interests.

Greg was a farmer, and he left his mark by planting seeds. God knew that Greg's time was far too short for him to get all those seeds to flower himself. That is where we come in; that is our job. We can take that hard road that God set out for us and that Greg followed so faithfully. We can make Greg Coleman proud by nurturing the many, many good seeds he planted.

IN MEMORY OF GREG COLEMAN: SPEECH BY THE HONORABLE JUDGE JONES*

AUSTIN STAKE CENTER AUSTIN, TEXAS

It is an honor to be asked to talk today about Greg Coleman, and I thank Stephanie for having invited me to do so.

The relationship between judges and law clerks can be very special. Not only is it our privilege to receive assistance from the best and brightest young law students, but, through their success and achievements in their professional lives, we have an opportunity to influence the future. Good law clerks become our friends, our companions and our comrades in shared belief. They are part of our family. Greg was one of the best clerks I have worked with and one of the most distinguished lawyers following his clerkship. He was one of the best in every way.

On this type of sad occasion, the question always arises why God chose to take Greg home so soon? I have pondered this today and at other times. We, of course, will never know the full answer in this world, but a friend pointed me to a passage in the Book of Genesis that may provide a clue to God's design, especially for someone like Greg. In Genesis 5:24, it is said that Enoch, who lived in the generations following Adam, "was walking with God, and he was not, for God took him."[1] The same language is used of the prophet Elijah, who the Bible says was translated directly to Heaven without first undergoing death.[2] These men loved God and were favored by Him accordingly. And so one may conclude

---

* Judge Edith H. Jones is the Chief Judge of the United States Court of Appeals for the Fifth Circuit. She served as a member of the National Bankruptcy Review Commission from 1995 to 1997.

1. *Genesis* 5:24.
2. 2 *Kings* 2:11.

that God takes us when He is ready—and when He knows in His wisdom that we are ready to be in His company. Greg was ready to go home to the Lord, but he will remain vivid in our memories as long as we live.

While remembering an 18-year long friendship with Greg, I thought of life as a book in which the pages turn and, as events unfold, we create bookmarks in our memory for people, places and actions that are of great significance. To pay tribute to Greg, I have turned to some of these bookmarks that reveal his extraordinary qualities of intellect, modesty, diligence and love of his family and his fellow man.

The bookmarks start with his clerkship in my chambers in 1992–93. He came to his clerkship with a record of high academic accomplishment as an honors graduate of the University of Texas School of Law and Texas A&M undergraduate and MBA programs. More than that, however, was represented on his résumé, which was quite long for a law school graduate. He listed numerous community service activities, including a two-year mission for the Mormon Church in Japan, volunteering at a local food bank, and volunteering as a high school track coach. From his early years, Greg had sought to serve others. He linked personal accomplishment with community service. Greg was deeply involved in his church and youth and charitable activities for the rest of his life.

During the clerkship, he was an unusually hard worker. I remember his helping me out with extra, non-glamorous projects while I was on a family vacation. He did this although not asked by me just to assist in the disposition of our very heavy caseload. He arrived at the office early, a practice uncommon among the clerks who are often young, unmarried and less disciplined in their habits. Most clerks also find the demands of a clerkship fully consuming professionally, but not Greg. Greg exceeded the confines of the clerkship when he took a position as an adjunct professor at South Texas College of Law to better support Stephanie and their young family. His class was so popular that seventy students signed up for his teaching the following semester. Characteristically, during his clerkship

he volunteered regularly with a teenage youth group and even subsidized their scuba diving trip with his own money.

Despite these commitments, Greg left work in time to be with his family. When Greg and Stephanie came to our house for a clerks' dinner, the boys were always invited. Chase and Austin were then toddlers, and they loved playing with guns and Star Wars toys that we had stored in a cabinet after our boys outgrew them.

A final anecdote from this period shows Greg's thoughtfulness. I had hired Brad Smith from Michigan to serve in chambers a year after Greg. Brad and his wife Diane, with three children and a fourth on the way,[3] visited Houston in search of a house for rent. Greg and Stephanie were well acquainted with the challenge of managing family finances during a clerkship, but they did not know the Smiths. Yet they drove Brad and Diane around Houston for hours to help them find a nice, affordable neighborhood. Later, the families often got together, and Greg and Stephanie babysat Brad's children while Diane was giving birth to baby George.

In memory of their friendship, and Greg's repeated kindnesses, Brad Smith has flown to Austin for this occasion.

Early in our acquaintance, I wrote two letters about Greg's unusual talents. To Bryan Garner, the well-known writer of legal dictionaries, who had generously corresponded with Greg, I wrote in 1993: "I predict Greg will have an enormously successful career. He is one of the most enthusiastic, dedicated and multifaceted young graduates I have had the privilege to know."[4] And to Justice Thomas, I wrote recommending Greg for a clerkship at the U.S. Supreme Court in 1994 that he "is one of the hardest workers I have ever had," he is "far and away one of the most productive clerks," and the secrets of Greg's success are concentration, organizational ability and a wonderful wife.[5] I guess I was prescient.

3. Brad and Diane now have seven children, but they are neither Mormon nor Roman Catholic!

4. Letter from author to Bryan Garner (1993) (on file with author).

5. Letter from author to Justice Clarence Thomas (1994) (on file with author).

Justice Thomas, who is here today, will have more to say about Greg's clerkship with him, but I have bookmarked a couple of memories from my occasional conversations with Greg during that exciting year. The wages at the Supreme Court are low, and the cost of living in the Washington, D.C., area is high. To save money, the Colemans had only one car while they were there, which Stephanie drove. Greg bicycled to work, even during rain and snow, for that entire year. He adhered to a disciplined schedule—again, uncommon among law clerks in general and especially those at the Supreme Court—of leaving the office in order to be home for the family dinner. After putting the boys to bed, however, Greg routinely worked at home for several hours. In fact, he only slept about four hours each night while he clerked for Justice Thomas. But he loved the work, and he loved this Justice. Later on, Justice Thomas told me, "Send me more Greg Colemans!"

Greg had returned to Texas and embarked on a lucrative career in appellate advocacy when then-Texas Attorney General John Cornyn, now a United States Senator and with us today, asked him again to make a personal financial sacrifice by becoming the state's first Solicitor General. Senator Cornyn had the vision to create this office. The Solicitor General's office represents the state in federal and state appellate courts utilizing talented young lawyers who will agree to serve the state for just a few years. It is fair to say, I think, that Greg Coleman implemented the vision and made the office tremendously successful in promoting the state's interests in court. Greg attracted a bevy of bright lawyers who learned from him, acquired valuable professional experience and then launched successful careers after serving with Greg. Many members of the Texas Solicitor General's office are at this service in tribute to Greg's influence on their lives. Jim Ho and Ted Cruz, who have followed Greg as Solicitor General, are both here, and both consider Greg a mentor and professional model.

Since Greg re-entered private practice nearly a decade ago, he and I have not seen each other often, because he has been so busy. But we talked by phone and sometimes, while on business trips to Houston, he would stop by my office for a visit. He loved practicing appellate law. He was eventually

admitted to practice in all but two federal circuits in addition to the Supreme Court, and he filed briefs and argued cases all over the country. He appeared in the Fifth Circuit at least two dozen times, several times in the Texas Supreme Court, and nine times in the U.S. Supreme Court. He enjoyed discussing the nuances of practice before various courts, regaling me with his experiences, and informing me about hot topics in the law. He was especially happy when the opportunity arose to form his own appellate practice at Yetter Coleman. The firm enabled him to create his own environment for law practice, and it encouraged his pro bono publico representation of clients in causes he believed in.

The zenith of his pro bono work occurred in the spring of 2009 when he argued two important cases in successive weeks at the U.S. Supreme Court. I was so proud of his achievement. One of these cases sought to allow small municipalities and government bodies to "bail out" of onerous preclearance procedures required by the federal Voting Rights Act.[6] The other suit was on behalf of firefighters in New Haven, Connecticut, who had been denied promotions for which they had otherwise fully qualified solely because of their race.[7] It is virtually unheard of for a lawyer to argue two cases in two weeks at the Supreme Court. The required preparation for one argument includes becoming intimately familiar with the lower court records, participating in advance moot court arguments, and managing a team of lawyers. The stress of these responsibilities normally prevents a lawyer from attempting back-to-back arguments. Greg was no ordinary appellate lawyer.

Not long before the arguments were to take place, a news article reported on this unusual event. Greg was described by an admirer as understated and soft-spoken. The writer had also interviewed Greg about the impending challenge. With characteristic modesty, Greg said, "I'm not sure what to say about that. Both cases are very important to the clients, and we're going to do everything we can to give them adequate representation." Greg placed the focus on his

6. Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504 (2009).
7. Ricci v. DeStefano, 129 S. Ct. 2658 (2009).

clients rather than himself. By all accounts, his arguments in each case were brilliant, and he won both of them. His clients, two New Haven firefighters, and his co-counsel in that case have come here today, as have Greg's clients in the Voting Rights case.

In March of this year, I visited Baghdad, Iraq and met the top Iraqi judges under the auspices of our government's important rule of law program there. My visit was generated by Greg, who also went to Iraq in late May. It was our shared privilege to represent the United States and encourage the development of the legal system in a country where judges routinely risk their lives to establish the rule of law. Greg received the initial invitation to visit because he had so impressed a U.S. Department of Justice lawyer who was his *opponent* in the Voting Rights Act case. After she transferred to Iraq for a tour with the rule of law program, this lawyer solicited Greg to participate and, at Greg's urging, then invited me.

Greg deeply impressed the Iraqis he met. The Chief Justice of Iraq, Justice Medhat, is sending a letter of condolence. As an aside, Greg generously gave Justice Medhat a pair of Tony Lama boots. Greg wrote in a report that at each of the several law schools he visited, the faculty, students and attorneys in attendance routinely kept him answering questions for several hours. One such extended meeting occurred on an Iraqi weekend day. He had evidently struck a responsive chord with the audiences in his remarks about our federal system and the division of duties between our national and state governments. Greg had prepared with his usual diligence to inform the Iraqis on a subject of vital importance to them. For a side trip, Greg was allowed to visit the excavations of the ancient city of Ur, where a guide showed him the reputed home of the patriarch Abraham. Abraham was a wealthy man in Ur, then one of the richest cities of the Fertile Crescent, the cradle of Western civilization, before he was called by God and took up his pilgrimage ultimately leading to the promised land. This must have been a spiritually significant occasion to Greg.

When I had to report the plane accident to my former law clerks, most of whom knew or knew of Greg, dozens of them

immediately responded with expressions of shock and sympathy. They called him gracious, talented, wonderful, "one of the best advocates I've worked with." One of my clerks summed up his career well: "He proved it is possible to succeed in private practice while still continuing to fight for things you believe in."

The final bookmark I note is the gratitude my husband Woody and I both feel for Greg and Stephanie's generous support of the David R. Jones scholarship at Pepperdine University. The scholarship was established in honor of our son who tragically perished in a car accident. This was a tangible expression of the mutual affection we have shared.

To conclude, I would say that all the superlatives that have been said about Greg are true. He demonstrated that nice guys can finish first. He lived a full, noble life. He put his family first while also leaving an indelible imprint on his fellow church members, his law firms and clients, law students, young people, the state of Texas and the United States. He served tirelessly while walking humbly with God.

As we mourn Greg's passing from our presence, please recall Christ's promise in John 14:15–18: "If ye love me, keep my commandments, and I will pray the Father, and He will give you another Comforter . . . that he may abide with you forever."[8] I know that as time goes on, the Spirit will offer comfort to Greg's family and friends in many and unexpected ways, not least in these treasured memories of the life Greg lived and the excellent man he was.

In the name of Jesus Christ, Amen.

8. *John* 14:15–18.

IN MEMORY OF GREG COLEMAN: SPEECH BY THE HONORABLE TED CRUZ*

TEXAS REVIEW OF LAW & POLITICS, 2011 ANNUAL BANQUET AUSTIN, TEXAS

It is great to be here with so many friends on a sad and exciting occasion. We are here both to mourn and celebrate a friend to everyone in this room. We are here to present an award that is truly fitting and truly owed to Greg Coleman.

You know if you look in your program brochures at the prior recipients of the Jurist of the Year, it is a remarkable collection of men and women who have made a difference to this Nation, of men and women who have stood for principle, have defended the Constitution, and have transformed the State of Texas and our Nation.

I'll begin with a short story that concerns two of the prior recipients, and this goes back to the mid 1980s. In the mid 1980s the two most prominent, respected, conservative judges on the D.C. circuit were Robert Bork and Antonin Scalia. Everybody knew at the time that when President Reagan had a U.S. Supreme Court nominee, it was likely to be either Bork or Scalia, and nobody knew who would get the first nod. One day, Judge Scalia was walking through the parking garage and he was stopped at the elevator by

---

* Mr. Cruz graduated from Harvard Law School (magna cum laude) in 1995, where he was primary editor of the HARVARD LAW REVIEW and an executive editor of THE HARVARD JOURNAL OF LAW & PUBLIC POLICY and founding editor off the HARVARD LATINO LAW REVIEW. He served as a law clerk to Chief Justice William H. Rehnquist of the U.S. Supreme Court and Judge J. Michael Luttig of the U.S. Court of Appeals for the Fourth Circuit. Mr. Cruz has served as the Solicitor General of Texas, parter at the law firm of Morgan Lewis, and adjunct professor at The University of Texas School of Law. He is currently running for the U.S. Senate.

two U.S. Marshalls who said, "I am sorry Sir, we are holding this elevator for the Attorney General of the United States." Well, when Judge Scalia heard that, he pushed passed the U.S. Marshalls, he stepped into the elevator, he jammed the button and as the door was closing he said, "You tell Ed Meese that Bob Bork doesn't wait for anyone!" And in 1986, President Reagan nominated Antonin Scalia to the U.S. Supreme Court . . . .

We are here today recognizing someone like Justice Scalia, someone like Judge Bork, someone like Ed Meese, who devoted his life to standing for principles beyond the everyday, who devoted his life to standing and fighting to make a difference. Every one of us in this room could stand up and tell stories about Greg Coleman. He touched lives profoundly. Don Willett, Patrick O'Daniel, and Greg and I had a lunch club, where we would go out to lunch, about once a month. For years the four of us would go out to lunch. It was actually a great deal for Don and me because we were public employees, so we would stick either Greg or Patrick with a lunch tab on a regular basis—which was a very good arrangement. When I left the Attorney General's office and moved down to Houston, Greg, Patrick, and Don promptly replaced me with Jim Ho. So they traded up in a big, big way and they got yet another lunch companion who would never pick up the lunch tab.

What I would like to talk about are the three characteristics of Greg that I think are particularly extraordinary. You could talk for hours about characteristics of Greg that are extraordinary. We have a number of law students here today who have not started their career, we have a number of people who are at the middle of their career, or at later stages in their career. I would suggest that all three of these characteristics are models for how every one of us might live our lives.

The first characteristic was excellence. And Greg Coleman believed profoundly in excellence. He began his legal career after coming out of The University of Texas Law School clerking for Chief Judge Jones and then clerking for Justice Clarence Thomas. After a time in private practice, Greg

became the very first Solicitor General of Texas. Now, Greg was on the cutting edge of a transformation that was occurring all across this country. State Attorneys General were creating Solicitor General offices, which had not previously existed. And being the first Solicitor General of Texas was not an easy task. The Attorney General's office has roughly over 4,000 employees and has over 900 lawyers. It is the largest law firm in the State of Texas. There are more than a few lawyers in the Attorney General's office who I think would qualify as old bulls. They are trial lawyers who have been trying cases for 40 years who would ask, "What is some pipsqueak, snot-nosed Supreme Court smarty-pants appellant lawyer know about my case?" And I think that is a verbatim quote I once heard.

Greg was given the task of coming in and creating this office out of whole cloth, creating it within an institution of professionals that had been there for decades. When he showed up, they were not thrilled to find someone coming in to take charge of every appeal for the State of Texas. I will tell you the job Greg did in creating the Office of the Solicitor General made a lasting difference for this State, and it was a legacy that—years later when I had the opportunity to succeed Greg—made it an incredibly easy job because Greg had established in the office an ethos of excellence that was extraordinary. Every lawyer in the office, everyday, took upon themselves a deep and solemn obligation that if a lawyer in the Solicitor General's office made a representation in a brief or at an oral argument to a court, that every judge before whom we practiced would be certain we were speaking fairly and credibly and could be trusted. All of you all are familiar with the Blue Book, that annoying citation manual that has every imaginable nonsense in it. And you are familiar with the Green Book. Well, in the Office of the Solicitor General, there was then the Red Book, which was as bad as the Blue Book was. It was even worse in terms of the most precise citation italicization, exact precise standards that every brief filed by the office would have 100% of the time. And Greg understood how critical it was establishing a credibility with the courts

before whom the office practiced. And I will say that if we had had a first Solicitor General with a lesser commitment to excellence, that office may well have not succeeded.

Greg formed that office and he astonished people by being such an extraordinarily excellent lawyer. He did his job with humility, perseverance, and diligence. To this day, more than a decade later, the Office of the Solicitor General is still the office that Greg built. That is a very real legacy. In my opinion, based on Greg's legacy, Texas has the finest Office of the Solicitor General of any State in the union. It survived occasional miscreants in the office (such as myself), and Jim and Jonathan are now doing a spectacular job carrying on Greg's legacy. So that is the first characteristic I would lift up to all of you is that Greg embodied a level of excellence everyday that was extraordinary.

The second characteristic was service. Greg very easily could have pursued filthy lucre. You know, it is kind of fun when you get paid in wheel barrels. And it would have been very easy for a man of his talents to do nothing but make money in life. And yet, Greg was a principled conservative who devoted his life to standing for the principles he believed in.

In 2009, Greg had a Term at the U.S. Supreme Court that was truly remarkable. For most lawyers, the chance to argue a case at the Court would be the pinnacle of their career. It is an extraordinary, terrifying, exhilarating experience to stand before those nine Justices. Greg did it over and over again, and in 2009 he did something utterly jaw dropping. He didn't argue one blockbuster case of the Term, he argued two, back-to-back. On April 22, 2009, he argued the Ricci v. DeStefano case, representing firefighters in Connecticut who had been denied promotions because of the city's affirmative action policies. It was the blockbuster case of the Term and Greg was their lawyer. For many of us that were here at the services remembering Greg, it was remarkable to see those firefighters down there with tears in their eyes for their lawyer who fought by their side and won a spectacular national victory. That was April 22.

Seven days later, on April 29, 2009, Greg argued a second blockbuster case, the Northwest Austin Municipal Utility District v. Holder case, challenging Section 5 of the Voting Rights Act. There are but a handful of lawyers in the universe who could even contemplate arguing two blockbuster Supreme Court cases back-to-back. Greg not only did that, he did an extraordinary job at them both. And he won them both. In the annals of lawyering it is difficult to overstate the magnitude of an accomplishment that was.

Greg was an extraordinary advocate. Many times, Greg and I would help moot each other, to get ready for oral arguments. Greg's style as an advocate reminded me very much of now Chief Justice John Roberts. John Roberts, when he was a Supreme Court litigator, was widely described as the finest Supreme Court litigator of his generation. And Roberts's style was very interesting. He said "I don't use emotion, I don't use oratory, because emotion and oratory don't work." And what Roberts would do as an advocate is stand at the podium and matter-of-fact answer every single question right down the middle. And it earned an enormous credibility with the Justices. Greg's advocacy style was remarkably similar. He was not a flashy advocate. I'm quite certain not one of his Supreme Court arguments began with "four score and seven years ago." But what he did extraordinarily well was answer right up the middle every question asked by nine brilliant, aggressive Justices. And it is difficult to overstate how hard that is. To do that you have to spend hundreds of hours thinking about the case, thinking about the hardest questions that would vex anyone, and coming up with the answer that is fair, that is credible, that the Justices will trust, and that advances the interests of your client and your case. Greg was extraordinary with that.

The third and final characteristic I want to point to is integrity. You know, there are a lot of people in public life that will take bold stands on things with no risk whatsoever. It is like the classic job interview question:

"What's your greatest weakness?"

> "I work too hard. I'm just too disciplined, too focused on producing the best result."

There are a lot of folks in public life who want to go out and take a stand, and those are the sorts of stands they take—the stand that everyone in polite company will applaud at their doing and there's no risk whatsoever. Greg was not like that. He stood for his principles and I'll tell you two stories. Number one: the Senate was considering reauthorizing Section 5 of the Voting Rights Act, a provision that requires most States in the South to submit to the arbitrary discretion of unelected bureaucrats in the Department of Justice before implementing any change whatsoever in the law concerning voting. Greg went to D.C. and testified against that. Now, Greg knew full well that the headlines on that are really lousy. The headlines of going and saying you're testifying "against the Voting Rights Act" can easily be used to beat you into oblivion. And I'll tell you, as a consequence, it was not a stance he made without price.

When President Bush was President, I had multiple calls from the Department of Justice and from the White House. There were several vacancies on the Fifth Circuit. And over and over again people in the Administration would ask, "Whom should the President put on the 5th Circuit?" I probably had a dozen phone calls where I said, "Listen, if you want to put someone good on the Fifth Circuit, there is no human being in the State of Texas who would make a finer Fifth Circuit judge than Greg Coleman. He is a man of extraordinary principle, intellect, and you want a judge who will do the right thing no matter what, Greg's your man." Sadly, the response that was given, was, "You know, he's taken hard public stands on things like the Voting Rights Act." That Greg was passed over for his principles is a sad reality of our political life. Greg knew full well what he was doing when he stood for his principles, and he was willing to stand for them despite paying a price. That is the definition of integrity. It is easy to stand strong when there is no price to be paid. It means a great deal more when you know you will pay a personal price.

Another example of Greg's integrity comes from his law firm. Greg spent many years at a large law firm. When he took on Section 5 of the Voting Rights Act, it was at a time that there was a fellow in the Department of Defense who had gone on a radio show and said that he thought it was really questionable that large law firms had lawyers out there representing all these terrorists in Guantanamo. And their clients, the big corporate clients, ought to be asking why their fancy lawyers are giving their time away and their clients' money to representing terrorists. What followed was eminently predictable. The organized bar puffed up its chest in outrage at this notion and there proceeded to be editorial after editorial from leaders of the ABA and from various prominent lawyers, all condemning this poor hapless fellow who had said this. One of the folks doing so was the head of Greg's large law firm, who was sending at the time long, hectoring e-mails about how it is the most noble thing any lawyer can do to represent the unpopular, to represent the despised. That is truly when lawyers are rising to the height of integrity.

Simultaneously, Greg was challenging Section 5 to the Voting Rights Act, and his partners at his law firm say, "Oh my goodness! You're doing what?!" And there proceeded to be a host of lawyers on the left who had a tizzy fit. That's the technical term for it. In response, Greg simply cut and pasted from the e-mails the head of the firm had just sent and said, "I thought it was the height of nobility to represent the unpopular, the downtrodden?"

Now, that didn't go over terribly well, because the unpopular and downtrodden only counted on one side of the ideological isle. And Greg very simply said, "that's fine," and he packed up and left. He went and joined Paul Yetter and the excellent lawyers at what became Yetter Coleman. And in time he took much of his team with him. It is an extraordinary example. All of us aspire to care about our principles. And yet, you know principles matter when you are willing to pay a price for them—when you are willing to endure vilification and criticism from others.

Greg was an extraordinary human being. He was passionate, he was compassionate, he was generous. And he was a man who embodied excellence, who embodied service, and who embodied integrity. As you look at the list of the Texas Review of Law & Politics Jurists of the Year, all of us should be proud that Greg Coleman is rightly in that pantheon of conservative greats that has served the Nation, served the State of Texas, and left an incredible legacy for us all. We are all honored to be here remembering our friend Greg.

Thank you.

IN MEMORY OF GREG COLEMAN: ON CIVILITY

PATRICK O'DANIEL*

"Everything we stand for should be in favor of civility; everything—your livelihood, your country, your institutions."

—Justice Clarence Thomas[1]

Greg Coleman embodied civility. He was a kind and humble man; one who represented to many the epitome of the true gentleman. Although his deeds might loom large, he himself would always seek to diminish his role in accomplishing them. In particular, Greg will probably be best remembered for *Ricci v. DeStefano*[2] and *Northwest Austin Municipal Utility District No. One v. Holder*[3], two important cases he argued in the same week before the United States Supreme Court. *Ricci* was a Title VII case concerning statistical racial disparities with respect to a test taken by New Haven firefighters for purposes of promotion[4] while *Northwest Austin* concerned the ability of covered political subdivisions to opt out of the preclearance requirements of Section 5 of the Voting Rights Act.[5] And it is with respect to the latter of those cases where Greg's conduct provides a lesson on the importance of civility. Specifically, in oral argument at the district court level for

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1. Clarence Thomas, *Civility*, 4 RACE & ETHNIC ANC. L.J. 1, 4 (1998).
2. Ricci v. DeStefano, 129 S. Ct. 2658 (2009).
3. Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504 (2009).
4. *Supra* note 2.
5. *Supra* note 3.

Northwest Austin, Greg was confronted with a potentially difficult situation as he made his argument before the three-judge panel.

In the oral argument before the district court, Greg was trying to explain why recent history no longer justified the requirement for a covered political jurisdiction to seek preclearance from the Department of Justice for every change in its voting procedures pursuant to Section 5 of the Voting Rights Act. In effect, keeping preclearance meant that certain political subdivisions were still being treated as bad actors and that there was no end date for removing this taint. Greg explained that when such a requirement was passed it was amply justified by the bad faith of certain election officials who would creatively develop novel methods for denying racial groups the vote in spite of new federal laws prohibiting known, past discriminatory practices.[6] Obviously, Congress could not specifically outlaw every dirty trick that such officials might dream up and so, as Greg put it, to stop such "gamesmanship," Congress required preclearance for certain covered jurisdictions for every proposed change in voting procedures.[7] When it was originally enacted, as Greg explained, this remedy was clearly "important, necessary, congruent and proportional" to the problem of discrimination being addressed.[8] However, in the last several decades, there was no credible evidence that such intentional gamesmanship continued to occur.[9]

At this point, one of the judges provided the following commentary: "It's not gamesmanship. It's discrimination. The Supreme Court's never used that term 'gamesmanship.' It's discrimination. It's new forms of discrimination on top of 40 years of discrimination. It's the same old discrimination . . . . It hurts; it's painful."[10] This was a highly-charged statement and understandable given the long and wretched history of discrimination in this country. Greg, however, did not retreat from his argument nor change the tenor of his

6. *See* Transcript of Oral Argument at 19, 29–30, *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008) (No. 06-1384).

7. *See id.* at 20–21, 33–34.

8. *Id.* at 19.

9. *Id.* at 31.

10. *Id.* at 19.

remarks. He merely reemphasized his point that, "[t]he evidence does not support that type of iterative, what I will call gamesmanship, or iterative strategies, where you simply move from one discriminatory practice to another to avoid enforcement of the law."[11]

Now, try to put yourself in Greg's shoes and imagine what your response might have been in that circumstance. I suspect that it would have been difficult for many of us to have answered with the same grace and goodwill that Greg demonstrated.[12] Others might have become overheated by emotion and rhetoric. But not Greg. He was genuinely curious about other people and their view points—that is he respected them *as* people. And, indeed, that is the core message of both *Ricci* and *Northwest Austin*: People are individuals—not numbers. Everyone was a unique person to Greg equally worthy of attention and, yes, civility.

I first knew Greg at law school when we both served on the editorial board of the Texas Law Review, he as Managing Editor (though, truth be told, he shouldered much more of the duties of the review than indicated by that title) and I as an Articles Editor. He was a new father and his duties to his family came first before his duties to the review—but that just meant he went home to see his family in the early evening and then came slouching back towards the review offices to put in some more time line-editing the esoteric and recondite thoughts of the latest theory-driven scholar.[13] He never complained about the extra work he took

11. *Id.* at 31.

12. In this respect, Greg's behavior is similar to that of Judge Rubin's as described in Chief Judge Edith Jones's memorial to Judge Rubin. *See* Edith Hollan Jones, *In Memoriam: A Farewell to Judge Alvin B. Rubin*, 70 TEX. L. REV. 1 (1991). There, in discussing Judge Rubin's civility, Chief Judge Jones noted: "Another aspect of his civility appeared in his ability to disagree without being disagreeable, especially in highly charged cases. Neither acerbity nor ad hominem attacks on colleagues will be found in his opinions on such subjects." *Id.* at 5.

13. *See, e.g.*, Linda R. Hirshman, *The Book of "A"*, 70 TEX. L. REV. 971 (1992) (addressing the overlooked legal issue of whether Aristotle was a feminist); its responses, Richard A. Posner, *Ms. Aristotle*, 70 TEX. L. REV. 1013, 1017 (1992) (blithely denying that Aristotle was a feminist because one cannot "throw away huge chunks of [his] belief system[] without undermining the remainder"), and Martha C. Nussbaum, *Aristotle, Feminism, and Needs for Functioning*, 70 TEX. L. REV. 1019 (1992) (embracing the notion that Aristotle does have something to offer feminism "despite the evident misogyny and inaccuracy of his hierarchical biology") and reply, Linda R. Hirshman, *Big Breasts and Bengali Beggars: A Reply to Richard Posner and Martha Nussbaum*, 70 TEX. L. REV. 1029, 1032 (1992) (discussing how bigger breasts "serve to collapse the matters of science into issues

on during that year—he just saw it through to completion in the same thoughtful and meticulous manner that people came to admire when, many years later, he just as methodically prepared for oral argument before the United States Supreme Court.

Later, we both clerked for judges on the Fifth Circuit, he for Judge Edith Jones, now Chief Judge of the Fifth Circuit, and I for Judge Will Garwood. Subsequently, we both had the privilege and honor of clerking for Justice Clarence Thomas on the United States Supreme Court. I have Greg to thank for that experience although, again, in his self-effacing way, he would claim that he had no material role to play in such matters. Greg knew that great things could be achieved if one did not worry about credit or publicity but merely worked as hard as one could for what one believed was right. He had those old-fashioned beliefs that justice could be done and the good would win out. He and Justice Thomas shared the faith that each day is a new one and no matter how many cases one might lose there is always hope. Of course, for Greg, he seemed to be more on the winning side, particularly in what turned out to be his last years. He was that happy warrior who truly did travel in the land of hope.

I end this brief memorial as I began it, with a quotation from Justice Thomas, who, more than anyone else, knew the kind of path that Greg had chosen and the character he embodied:

"Be true to your faith and to your beliefs, hold onto your hope. Don't let others take your joy. Treat others as you would like to be treated. Help others along the way."[14]

In words that might have been fashioned with Greg in mind—although Justice Thomas did not know Greg at the time they were written—they highlight what made Greg so special and why so many will proudly keep Greg alive in their hearts and minds for many, many years to come. Greg

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of market desires"). As noted by Justice Thomas, "[t]oday, the law reviews are filled with interdisciplinary studies, critical studies, oppressed group studies, anything but legal studies .... Now, I am sure there is something of value in these articles, at least for the person who writes them, if not for the person who reads them." Clarence Thomas, *Speech*, 25 CUMB. L. REV. 611, 615 (1995). And, Greg might add, let us not forget the value to the one who must edit them.

14. Clarence Thomas, *Commencement Speech*, 74 N.D. L. REV. 435, 438 (1998).

left us all too soon but what he left to us is a gift more precious than gold: civility.

WHY THE DEBATE OVER THE CONSTITUTIONALITY OF THE FEDERAL HEALTH CARE LAW IS ABOUT MUCH MORE THAN HEALTH CARE

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E. DUNCAN GETCHELL, JR.**
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I. INTRODUCTION

"In the tension between federal and state power lies the promise of liberty."[1] But that can remain true in any practical sense only if courts give effect to the familiar proposition that "'[t]he Constitution created a Federal Government of limited powers'"[2] under which "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[3]

The police power is the antithesis of limited, enumerated powers. According to Sir William Blackstone, parliament "can, in short, do everything that is not naturally impossible."[4] One traditional view of the state police power defines it to include all the plenary power of parliament not forbidden to a State by its own constitution or by that of the United States.[5] Given the breadth of that power, it cannot be exercised by the federal government without overwhelming the limitations intended by the Constitution's scheme of enumerated powers. That is why it is logically necessary for the Supreme Court to say – and to continue to say: "We *always* have rejected readings of the Commerce Clause and the scope of Federal power that would permit Congress to exercise a police power."[6]

For those such as Professor Tribe who contend that upholding the federal healthcare mandate is an easy case to

1. Gregory v. Ashcroft, 501 U.S. 452, 459 (1991). The Constitution transcends the merely utilitarian by declaring that a fundamental purpose of the document is "to . . . secure the Blessings of Liberty to ourselves and our Posterity . . ." U.S. CONST. Preamble. *See also*, United States v. Lopez, 514 U.S. 549, 578 (1995) ("[T]he federal balance is too essential a part of our constitutional structure, and plays too vital a role in securing freedom for us to admit inability to intervene when one of the other levels of Government has tipped the scales too far.") (Kennedy, J., concurring).

2. New York v. United States, 505 U.S. 144, 155 (1995).

3. US CONST. amend. X.

4. 2 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA, ch. 2 (St. George Tucker ed., 1803).

5. Thorpe v. The Rutland & Burlington Railroad Co., 27 Vt. 149 (1855).

6. United States v. Morrison, 529 U.S. 598, 618–19 (2000).

decide,[7] the undeveloped subtext is that Virginia and other challengers either do not understand the Progressive/Roosevelt constitutional settlement or are quixotically trying to overturn it. Nothing could be farther from the truth in the case of Virginia's suit. Virginia has modestly framed its case within the scope of present authority. No existing case needs to be overruled and no existing doctrine needs to be curtailed or expanded for Virginia to prevail on the merits. Nor does Virginia remotely suggest that the United States lacks the power to erect a system of national healthcare. Virginia expressly pled that Congress has the authority to act under the taxing and spending powers as it did with respect to social security and Medicare, but that Congress in this instance lacked the political capital and will to do so.[8] No challenge has been mounted by Virginia to the vast sweep and scope of the Patient Protection and Affordable Care Act (PPACA).[9] Instead, only the mandate and penalty were challenged because the claimed power is tantamount to a national police power inasmuch as it lacks principled limits.

The conclusion reached in this article is that Congress lacks the power to enact the mandate and penalty[10] for that reason. But it is also a purpose of this article to demonstrate how maintaining an activity/inactivity distinction vindicates the insights of *Gregory*[11] and of Justice Kennedy's concurrence in *Lopez*,[12] that there is a practical sense in which our liberties are preserved by federalism. This is so because, after the Roosevelt Court settlement, very little individual economic activity remained free from potential federal regulation. However, inactivity until now has been permitted to remain as an opt-out from regulation. Because this domain of inactivity is not protected by any of the other checks and balances, permitting regulation of inactivity under the Commerce Clause would subject the entire person to federal control in a way that would be deemed intolerable

7. Lawrence H. Tribe, *On Health Care, Justice Will Prevail*, N.Y. TIMES, Feb. 7, 2011.

8. Pacer E.D. Va. Case 3:10-cv-00188-HEH Doc. 1 ¶11. See Helvering v. Davis, 301 U.S. 619 (1937).

9. Pub. L. No. 111–148, 124 Stat. 119 (2010).

10. PPACA § 1501.

11. 501 U.S. at 452.

12. 505 U.S. at 155.

by citizens who value individualism above the meliorist programs of government.

In Part II, we describe the old jurisprudential regime which at least supposed itself to be a guardian of economic liberty founded upon the reasonableness principle of the natural law held to be implicit in the Due Process Clauses of the Fifth and Fourteenth Amendments. In Part III, we review the Progressive critique of that regime. In Part IV, we describe the New Deal settlement. And in Part V, we suggest why overleaping the activity/inactivity divide would be destructive of liberty interests now shielded by federalism.

II. THE NATURAL LAW OF REASONABLENESS

The Commonwealth of Virginia is the only American State to have officially published its colonial statutes.[13] In the second third of the seventeenth century, laws began to reflect a practice of stating the occasion and premises of an enactment in a preamble composed of "whereas" clauses. It can hardly be doubted that in doing so the Assembly acted under the influence of "the Chief English prose work of the sixteenth century," Richard Hooker's *Of The Laws Of Ecclesiastical Polity*.[14] What the Assembly wished to demonstrate was that its laws were reasonable. Book I of Hooker's work, entitled *Concerning Laws, and their several kinds in general*, was published in 1593 together with a preface and three other books. In that first book, Hooker appears as "one of the first writers to use the term 'law of nature' in the modern sense of a physical law, in contrast with the stoic and medieval sense (which he also employs) of universally valid moral principles." Hooker also insists upon "some form of consent of the governed as a basis for legitimate political power: 'without which consent there were no reason that one man should take it upon him to be lord or judge over another.'" And he judges harshly those who would try: "Again, 'for any prince or potentate of what

13. WILLIAM WALLER HENING, THE STATUTES AT LARGE, BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619 (University Press of Virginia Charlottesville 1969) (Facsimile edition in XIII Volumes).

14. ARTHUR STEPHEN, HOOKER OF THE LAW OF ECCLESIASTICAL POLITY at xiv (McGrade ed., Cambridge Univ. Press 1989) (2004 reprint).

kind so ever upon earth to exercise the same [i.e., legislative power] of himself, and not either by express commission immediately and personally received from God, or else by authority derived at the first from their consent upon whose persons they impose laws, it is no better than mere tyranny."[15]

For Hooker, to be legitimate, a law must be consistent with right reason derived from an intelligible cosmos created by a rational God. The argument is "that the precepts of the law of reason derive from a series of intuitively self-evident propositions which human beings are capable of discovering for themselves through the natural light of reason."[16]

Although scholars can debate how original, or derivative of Hooker, John Locke's thought may be,[17] there can be no question that Locke's views on the role of reason in defining rights and his demand for the consent of the governed rest upon Hooker as a foundation. Thus, "Locke was correct in principle when he cited the 'judicious Hooker' near the beginning of the *Second Treatise of Government* to support his own conception of morality as based on a natural human equality without political subordination of one person to another."[18]

Although the Declaration of Independence is the most perfect summary of Locke's political thought ever penned, that document does not explain why natural law thinking dominated the American bench and bar for the next hundred years and more. The reason is found in the work of Blackstone. Despite his high regard for the powers of parliament, William Blackstone was a natural law thinker and his *Commentaries on the Laws of England* dominated American legal training in the late eighteenth and for most of the nineteenth century. "In the first century of American independence, the *Commentaries* were not merely an approach to the study of law; for most lawyers they constituted all there was of the law." So prominent a legal voice as that of Chancellor Kent was largely repeating

15. *Id.* at xxiii.

16. RICHARD HOOKER, THE FOLGER LIBRARY EDITION OF THE WORKS OF RICHARD HOOKER, Vol VI, Part One at 107 (W. Speed Hill, ed., Medieval & Renaissance Texts & Studies, Binghampton, N.Y. 1993).

17. *Id.* at 112 n.48.

18. Stephen, *supra* note 14 at xxiii.

Blackstone. Something Kent willingly acknowledged when he said "that 'he owed his reputation to the fact that, when studying law . . . he had but one book, Blackstone's *Commentaries*, but that one book he mastered.'"[19] As commented upon "by numerous American editors" like St. George Tucker, the *Commentaries* "became the bible of American legal institutions."[20]

Of course, when we read Blackstone, we hear Locke. Here is the heart of the matter for Blackstone: "'For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion, so, when he created man and endued him with freewill to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of these laws.'" This law is superior in obligation to all other. "'It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.'"[21]

So it was in no way surprising that American courts began to review laws in light of their reasonableness. A celebrated example is *Commonwealth v. Alger*[22] in which the Court balanced the public interest in the police power against the rights of private property. At common law, the law of nuisance adhered to the principle *sic utere tuo ut alienum non laedas*.[23] Regulation beyond the law of nuisance might in some cases be "necessary and expedient" but it must be at the same time "reasonable."[24]

The adoption of the Fourteenth Amendment's prohibition against any State "mak[ing] or enforce[ing] any law which shall abridge the privileges or immunities of citizens of the United States," or "deprive any person of life, liberty, or

19. DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW at 3 (University of Chicago Press 1941) (1996 ed.).
20. *Id.* at xv.
21. *Id.* at 49.
22. 7 Cush. 53 (1851).
23. To use your own in such a manner as to not injure another's.
24. Holden v. Hardy, 169 U.S. 366, 392 (1898) (quoting *Alger* with approval).

property, without due process of law" or "deny to any person within its jurisdiction the equal protection of the laws," would in time lead to an almost complete reversal of the holding in *Barron v. Baltimore*[25] that the Bill of Rights restrained only federal and not State power.

The Court's first encounter with the Fourteenth Amendment was in the *Slaughter-House Cases*.[26] John A. Campbell, who had resigned from the Supreme Court when Alabama seceded, argued for The Butcher's Benevolent Association of New Orleans against a monopoly secured by widespread bribery that benefitted seventeen men. "[F]ormer Senator Matthew H. Carpenter (who had helped draft the Fourteenth Amendment)" appeared "for the monopoly."[27] Campbell advanced constitutional arguments under the Thirteenth Amendment as well as the Privileges and Immunities, Equal Protection, and Due Process clauses of the Fourteenth Amendment.[28] The argument from the Thirteenth Amendment was rejected with the observation that any effort to turn the meaning of the amendment from the abolition of the institution of slavery as it actually existed, "and with a microscopic search endeavor to find in it a reference to servitudes, which may have been attached to property in certain localities, requires an effort, to say the least of it."[29] Because the Fourteenth Amendment distinguishes between national and state citizenship, while guaranteeing only the privileges and immunities of the former, the scope of the clause was restricted to purely national matters, such as the right to be protected abroad and on the high seas.[30] The Court then brushed aside the remaining arguments saying, "The argument has not been much pressed in these cases that the defendant's charter deprives the plaintiff's of their property without due process of law, or that it denies to them the equal protection of the law." With respect to due process, both the Fifth Amendment and most state constitutions guaranteed it, and

25. 32 U.S. (7 Pet.) 243, 249 (1833).
26. 83 U.S. (16 Wall.) 36 (1873).
27. BERNARD SWARTZ, A HISTORY OF THE SUPREME COURT at 159 (Oxford University Press Paperback 1995).
28. 83 U.S. (16 Wall.) at 66.
29. *Id.* at 69.
30. *Id.* at 74, 79.

the meaning of that guarantee had been frequently litigated. This permitted the Court "to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision."[31] And if the Louisiana law is viewed as a good faith regulation of a noxious trade for the protection of public health, as the majority said, then this conclusion was compelled under existing doctrine because the enactment then became merely a reasonable exercise of the police power.[32]

In dissent, Justice Field recognized that the state police "power undoubtedly extends to all regulations affecting the health, good order, morals, peace, and safety of society, and is exercised on a great variety of subjects, and in almost numberless ways." But he noted that the restrictions on where animals could be kept and slaughtered were the only health measures in the law and that "[w]hen these requirements are complied with, the sanitary purposes of the act are accomplished." Because nothing required the exclusion of other butchers from this area, he thought the appeal to the police power pretextual, saying, "The pretense of sanitary regulations for the grant of the exclusive privileges is a shallow one, which merits only this passing notice."[33]

Justice Field was prepared to say that the individual "right to pursue one of the ordinary trades or callings of life" was protected by the Fourteenth Amendment "and was so intended by the Congress which framed and the States which adopted it." Field located that protection in the privileges and immunities guarantee of the amendment and it is difficult to read the debate on the amendment in the *Congressional Globe* without concluding that as a matter of history he was probably correct.[34]

31. *Id.* at 80–81.

32. *See* DAVID E. BERNSTEIN, REHABILITATING LOCHNER at 13 (University of Chicago Press) ("Miller may have meant only that the Due Process Clause does not reach *valid* police power measures . . . .").

33. *Id.* at 87–88.

34. *Id.* at 96–97. *See also,* McDonald v. City of Chicago, 130 S. Ct. 3020, 3058 (2010) (Thomas, J., concurring in part and concurring in the judgment).

When Field stated that the purpose of the Fourteenth Amendment was to incorporate the inalienable rights declared in the Declaration of Independence into the Constitution,[35] he was adhering to what became a central tenet of the Republican Party worked out by James G. Birney and Salmon P. Chase twenty years before the war.[36] "Chase's interpretation of the Constitution was summed up in the First Liberty Party address he composed, in December, 1841: 'The Constitution found slavery and left it a State institution – the creature and dependent of State law – wholly local in its existence and character.'" All men were persons in contemplation of the Constitution. "The Fifth Amendment, which barred Congress from depriving any 'person' of 'life, liberty, or property' without due process of law, was intended in Chase's view, to prevent the National government from sanctioning slavery anywhere within its exclusive jurisdiction." The national "government 'cannot create or continue the relationship of master and slave,' he insisted, and therefore whenever a slave came into an area of Federal authority, he automatically became free."[37]

Dred Scott claimed to be free because he had been taken to the Illinois and the Wisconsin Territory.[38] He lost of course. "Southern politicians had been instrumental in the repeal of the Missouri Compromise, and their Constitutional position was accepted by the Supreme Court in the Dred Scott decision."[39] But no one doubted that a purpose of the Fourteenth Amendment was to overturn *Dred Scott.* As Justice Bradley put it in his dissent in the *Slaughter-House Cases*, "it was the intention of the people of this country in adopting that amendment to provide National security

35. 83 U.S. (16 Wall.) at 115–16, 121–22.

36. ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN at 76 (Oxford University Press 1974 reprint). Field was a Democrat when appointed to the Court by Abraham Lincoln. BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT at 151 (Oxford University Press) (paperback edition 1995).

37. Foner, *supra* note 36 at 76. "Chase did not take the extreme position of some anti-slavery men that the fugitive slave clause was a violation of natural law and therefore void . . ." He pointed out instead that that it differed from other clauses in neglecting to delegate to Congress power to enforce it by appropriate legislation. This left each free State as the only judge of its obligations under it. "During the secession crisis he suggested that the North might agree to pay compensation for fugitive slaves instead of returning them." *Id.* at 77.

38. Schwartz, *supra* note 36 at 111.

39. Foner, *supra* note 36 at 100.

against violation by the States of the fundamental rights of the citizen."[40] Both Bradley and Swayne, another Lincoln appointee, writing in dissent were prepared, as an alternative to the Privileges and Immunities Clause, to lodge the guarantee of those fundamental rights in the Due Process Clause of the Fourteenth Amendment.[41] Presumably they remembered that "John A. Bingham of Ohio, who almost alone was responsible for the choice of phraseology in Section 1" of the Fourteenth Amendment, had "in the slavery controversy . . . invoked due process in a substantive sense."[42]

It has been said that "[b]efore his retirement, Field was to see the elevation of his earlier dissents on the matter into the law of the land." Or, "as Justice Frankfurter put it, the Justices 'wrote Mr. Justice's Field's dissents into the opinions of the Court."[43]

"Three weeks after the *Slaughter-House* decisions, Chief Justice Chase suddenly died."[44] And when *Munn v. Illinois*[45] was written by the new Chief Justice Morrison R. Waite in 1877, Field was still in dissent, joined by Justice Strong. Although the majority upheld state regulation of the price charged by certain grain elevators, everyone now agreed that the enactment had to pass muster under the Due Process Clause of the Fourteenth Amendment.

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40. 83 U.S. (16 Wall.) at 122.

41. *Id.* at 122, 128. Justice Swayne expressed his natural law thinking thusly: "it is necessary to enable the government of the nation to secure to everyone within its jurisdiction the rights and privileges enumerated, which, according to the plainest considerations of reason and justice and the fundamental principles of the social compact, all are entitled to enjoy." *Id.* at 129. Justice Bradley averted to another component of Natural Law thinking by limiting the police power "to uniform regulations equally applicable to all." *Id.* at 119. The notion that enactments for the benefit of special interests are illegitimate in the natural law tradition is reflected in the oath for Burgesses adopted by the Virginia Assembly in March 1657/58:

> You and every of you shall swear upon the holy Evangelist and in the sight of God to deliver your opinions faithfully, justly and honestly according to your best understanding and conscience for the general good and prosperity of this country and every particular member thereof, And to do your utmost endeavor to prosecute that without mingling with it any particular interest of any person or persons whatsoever, So helpe you God and the contents of this booke.

1 Hening at 508.

42. Willard Hurst, *Book Review*, 52 HARV. L. REV. 851, 857 (1939).

43. Schwartz, *supra* note 36 at 151.

44. *Id.* at 161.

45. 94 U.S. at 113 (1877).

"Soon after Waite succeeded to his position, Bradley struck up a close relationship with him and the new Chief Justice relied on Bradley in his work."[46] Indeed, Waite relied upon an outline prepared by Bradley to such a degree in *Munn* "that he has been characterized as a virtual co-author of the famous opinion there." As "the Court's leading legal scholar, Justice Bradley" found the exercise of police power at issue reasonable based upon the common law, "especially Lord Hale's seventeenth-century statement that when private property is 'affected with a public interest, it ceases to be *juris private* only.'"[47]

Under the influence of Justice Bradley's natural law thinking, the majority began with first principles.

> When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the preamble of the Constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private, *Thorpe v. R. & B. Railroad Co.*, 27 Vt. 143; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non laedas*. From this source come the police powers . . . Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum charge to be made for services rendered, accommodations furnished, and articles sold.[48]

46. Schwartz, *supra* note 36 at 162, 165.
47. *Id.* at 165. *Juris privati* – private of right.
48. *Id.* at 124–25.

In distinguishing between property which is truly private and beyond the reach of regulation under the Due Process Clause, and property being used to affect the common interest, the Court made an observation that bears on the activity/inactivity distinction that has arisen in the health care litigation.

> Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. *He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.*[49]

Field in dissent distinguished the common law arguments by noting that "[w]hen Sir Matthew Hale, and the sages of the law in his day, spoke of property as affected with a public interest . . . , they referred to property dedicated by the owner to public uses," as when a street is opened on private land, "or to property the use of which was granted by the government, or in which special privileges were conferred."[50] According to Field, the Due Process Clause grants power over private property in four circumstances only. First, it may be taken for public purposes upon adequate compensation. Second, it may be taxed. Third, government may regulate under the police power within the limits of the maxim *sic utere tuo ut alienum non laedas*, and finally property "may be destroyed to arrest a conflagration or the ravages of pestilence, or be taken under the pressure of an immediate and overwhelming necessity to prevent public calamity . . ."[51]

Melville Weston Fuller was elevated to the Supreme Court as Chief Justice in 1888 and held that office until he died in 1910. "Even before Chief Justice Fuller took his seat," state courts "had used substantive due process to strike down regulatory laws on the ground that such a law 'arbitrarily

49. *Id.* at 126 (emphasis added).
50. *Id.* at 139.
51. *Id.* at 145.

deprives him of his property and some portion of his personal liberty."[52] It was not until 1897 that the Supreme Court followed suit in *Allgeyer v. Louisiana*.[53] In an opinion written by Rufus Wheeler Peckham, the court struck down a prohibition of purchasing out-of-state insurance as violative of the Fourteenth Amendment. "The liberty mentioned in that amendment, Peckham wrote, 'means not only the right of the citizen to be free from the mere physical restraint on his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to purchase any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to the carrying out to a successful conclusion the purposes above mentioned.'"[54] While still on the New York Court of Appeals, Peckham had identified liberty with freedom of contract and freedom of contract with personality: "'the faculties with which [man] has been endowed by his Creator."[55] According to one contemporary observer, in *Allgeyer*, "'all that happened was that the Supreme Court joined hands with most of the appellate tribunals of the older States.'"[56]

Justice Field resigned in 1897[57] and died in 1899 so he never saw the apotheiosis of his judicial philosophy set out in *Lochner v. New York*.[58] However, his nephew, Justice David J. Brewer was in the majority in that case.

The statute under review in *Lochner* was a law of New York limiting employment to a sixty hour week. Justice Peckham declared, with no evident doubt, that "[t]he statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer" in

52. *Id.* at 181 quoting Matter of Application of Jacobs, 98 N.Y. 98, 105 (1885).
53. 165 U.S. 578 (1897).
54. *Id.* at 589.
55. Schwartz, *supra* note 36 at 180 quoting People v. Gillson, 109 N.Y. 389, 398 (1888).
56. *Id.* at 181 quoting Hough, *Due Process of Law-Today*, 32 HARV. L. REV. 218, 228 (1919).
57. Schwartz, *supra* note 36 at 178.
58. 198 U.S. at 45 (1905).

violation of the Fourteenth Amendment.[59] He acknowledged that "[b]oth property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in exercise of" its police "powers, and with such conditions the Fourteenth Amendment was not designed to interfere." New York, "therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection." The majority noted that the Court had "recognized the existence and upheld the exercise of the police powers of the States in many cases which might fairly be considered as border ones, and it has, in the course of its determination of questions regarding the asserted invalidity of such statutes, on the ground of their violation of the rights secured by the Federal Constitution, been guided by rules of a very liberal nature, the application of which has resulted, in numerous instances, in upholding the validity of state statutes thus assailed," including a Utah statute limiting employment in mines and shelters to an eight hour day.[60] But the police power must have justiciable limits. "Otherwise the Fourteenth Amendment would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be." So, whenever the right of contract was limited this question had to be judicially determined: "Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?"[61]

"In *Lochner*, it has been suggested, Justice McKenna, whose father had owned a bakery, may have persuaded Fuller and others in the majority that bakery work and that the health rationale was a sham."[62] Be that as it may, the

59. 198 U.S. at 53 (citing Allgeyer, 165 U.S. 578).
60. *Id.* at 53–54.
61. *Id.* at 56.
62. Schwartz, *supra* note 36 at 194.

majority did consider the health concerns advanced in support of the law pretextual: "It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives."[63]

White and Day joined Harlan in dissent. Accepting that the Fourteenth Amendment protects liberty of contract, they were unable to "say that the State has acted without reasons nor ought we proceed upon the theory that its action is a mere sham."[64] They also found it significant that the law "applies only to work in bakery and confectionary establishments, in which, as all know, the air constantly breathed by workmen is not as pure and healthful as that to be found in some other establishments or out of doors."[65]

Holmes's dissent is rightly regarded as a rhetorical tour de force.[66] It initially declares, "This case is decided upon an economic theory which a large part of the country does entertain." And whose theory might that be? Why Herbert Spencer's of course.

Spencer undertook in his *Social Statics, Abridged and Revised*[67] to demonstrate philosophically that a society organized on *laissez faire* principles come closer than any other to realizing the Benthamite calculus of the greatest happiness of the greatest number. His argument proceeded from this first principle: "Every man has freedom to do all that he wills, provided he infringes not the equal freedom of any other man."[68] This permits Holmes to observe, "The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not." Furthermore,

63. 198 U.S. at 64.
64. *Id.* at 73.
65. *Id.* at 70.
66. Judge Posner regards it as "a rhetorical masterpiece." Schwartz, *supra* note 36 at 197.
67. HERBERT SPENCER, SOCIAL STATICS, ABRIDGED AND REVISED (New York: D. Appleton and Company 1896).
68. *Id.* at 55.

Holmes famously declares, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's social statics." And so, we should recognize that "a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*."[69]

What is not often remarked upon is that the rhetorical force of Holmes's dissent depends on a strawman argument. Spencer's First Principle is simply *sic utere tu ut alienum non laedas*. And he expressly notes that this principle has been asserted through time by Locke, by the American Founders in the Declaration of Independence, as well as "Judge Blackstone and 'the judicious Hooker.'"[70] It is one thing to maintain that "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." That powerfully advances the thought that the recent musings of an English social philosopher are not in the Constitution. It would have been quite another thing for Holmes to have said "The Fourteenth Amendment does not enact the principles of John Locke." This would have been regarded as puzzling at best and at worst demonstrably false.

Holmes's overarching concern was that majority political opinion be given effect. "Every opinion tends to become a law," he wrote, and "I think that the word liberty in the Fourteenth Amendment is preverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." Not only could a reasonable man think the law in *Lochner* was "a proper measure on the score of health," Holmes said he knew "[m]en whom I certainly could not pronounce unreasonable [who] would uphold it as a first installment of a general regulation of the hours of work."[71]

Because so many applications of the police power were upheld before and after *Lochner*, that case was something of an outlier as a practical matter. After acknowledging that

69. Lochner, 198 U.S. at 75 (Holmes, J., dissenting).
70. Spencer, *supra* note 67 at 47.
71. Lochner, 198 U.S. at 76.

fact, Francis J. Swayze still found it provocative. Writing in the November 1912 number of the Harvard Law Review he said of *Lochner*: "The result cannot be called satisfactory."[72]

In 1930 the Harvard University Press published *The Revival of Natural Law Concepts*, by Charles Grove Haines. A review of that book in the Harvard Law Review noticed that "the author has included a polemic on the usurpation of legislative powers by the judiciary of the United States and especially by the Supreme Court." According to this view, "the courts have made natural law theories a part of current constitutional law" defining this natural law in terms of "'the eighteenth-century notion of fundamental rights beyond the realm of governmental interference and the concept of inalienable rights as formulated in the Declaration of Independence.'" Then, "[t]o his history of the restoration, or rather the continuance of natural law thinking in our constitutional law the author gives an economic interpretation." What Haines thought had happened was that "under the guise of the phrases 'due process of law,' 'equal protection of the laws,' 'public purpose' for taxation, 'public use' for eminent domain, and 'reasonableness,'" the courts had assumed the power "to pass upon the wisdom or unwisdom of legislation, although ostensibly applying the words of a written constitution in a mechanical manner; and in passing upon the legislation in this way they ha[d] judged it from the point of view of eighteenth-century individualism." As a consequence "the forces of economic *laissez faire* and conservatism ha[d] been able to block legislation to deal with economic and social needs." Haines was sufficiently upset with this turn of events to foresee amending the Fourteenth Amendment or if that were not possible, changing the type of person populating the Federal bench."[73] What was going on?

III. THE PROGRESSIVE CRITIQUE

If it is true that there was a homegrown, American natural law jurisprudence founded on Locke and Blackstone, and transmitted through the non-academic training of

72. Francis J. Swayze, *Judicial Construction of the Fourteenth Amendment*, 26 HARV. L. REV. 1 (1912).

73. William C. VanVleck, *Book Review*, 44 HARV. L. REV. 317, 318 (1930).

lawyers, that system would become vulnerable whenever it encountered a declining belief in the claims of reason.[74] Following its formation in 1878, the American Bar Association successfully pursued a policy of largely limiting the practice of law to graduates of ABA accredited law schools. When brought into the academy, the American legal tradition was exposed to various criticisms.

Prior to the New Deal, there was a "general constitutional ideology of leading Progressive jurists, especially a highly influential group of Progressive judges and law professors associated with Harvard Law School, including Louis Brandeis, Felix Frankfurter, Learned Hand, and Roscoe Pound." Adopting "Justice Oliver Wendell Holmes, and later Brandeis, as its-standard-bearers on the Supreme Court," this group pursued "a political agenda that favored a significant increase in government involvement in American economic and social life."[75] The fact that the regulatory welfare state grew remarkably during the New Deal and afterwards gives rise to vague expectations that the preparatory thought and writings of the Progressive critics of the old jurisprudence is somehow co-extensive with what was accomplished in the Supreme Court when *Lochner* was overturned. A comparison of Section II with Section III dispels those expectations. Like most men and movements, the reach of the Progressive legal elite exceeded its grasp in large measure because the Progressive constitutional

74. *See* Boorstin, *supra* note 19 at 5. ("In the course of the last hundred years, and under the influence of the ideas of Compte, Darwin, Marx, Freud, and Veblen, we have come to minimize the importance of 'reason' in determining the course of history. According to these ideas, 'reason' ceases to be the power holding in check the dark forces of superstition, self-interest, and unreason, and instead rational systems become themselves the expression of dark and uncontrollable forces."). Although Compte still counted for something to Boorstin in 1941, by 1957 the Harvard Law Review would publish a book review of Irving Berlin's inaugural lecture in a memorial series in honor of Compte. Berlin's efforts were described in these terms:

> [A]fter a very tepid tribute to the memory of the great man, which suggests he was not quite such a *big* fool as he seems in spite of 'his grotesque pedantry, the unreadable dullness of his writing, his vanity, his eccentricity, his solemnity, the pathos of his private life, his insane dogmatism, his authoritarianism, his philosophical fallacies' . . . , Mr. Berlin denotes the rest of his lecture to a devastating and merciless attack not merely on Compte's philosophy of history but on the very foundation of his lifework – the concept of sociology as a true science.

Christopher Dawson, *Book Review*, 70 HARV. L. REV. 584 (1957).

75. Bernstein, *supra* note 32 at 41.

ideology was too radically different from what had gone before. As a consequence, the Natural Law tradition continued to operate through substantive due process for fundamental rights. And the augmentation of federal power under the taxing power and Commerce Clause left sufficient limits on federal power to make the PPACA mandate and penalty unconstitutional.

A. *Academics and Judges*

In 1880, Oliver Wendell Holmes was a private practitioner and part time lecturer at Harvard Law School. Asked to give a series of lectures "[h]e chose as his topic *The Common Law* and the lectures were published in a book of that name in 1881." In its opening sentence Holmes repudiates any jurisprudence of reason: "The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." On the strength of this book, he was made a Professor in 1882, but at the end of that year, he was elevated to the Supreme Judicial Court of Massachusetts, where he remained until his elevation to the Supreme Court in 1902.[76]

As a judge, Holmes continued, on and off the bench, to speak out as a philosopher of the law, having identified that as his life's goal when he wrote Ralph Waldo Emerson in 1876.[77] On January 8, 1897, Holmes delivered a speech, on the occasion of the dedication of the new hall of the Boston University School of Law, entitled *The Path of the Law*, which he copyrighted. In it, Holmes declared that "Nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law." Natural law might be used to justify revolution, but that is the end of it. "No doubt

76. Schwartz, *supra* note 36 at 191–92.

77. Mark DeWolfe Howe, *Oliver Wendell Holmes at Harvard Law School*, 70 HARV. L. REV. 401, 417 n. 45 (1957) (Letter of April 16, 1876: "It seems to me that I have learned, after a laborious and somewhat painful period of probation, that the law opens a way to philosophy as well as anything else, if pursued far enough, and I hope to prove it before I die.").

simple and extreme cases can be put of imaginable laws which the statute-making power would not dare to enact, even in the absence of written constitutional prohibitions, because the community would rise in rebellion and fight; and this gives some plausibility to the proposition that the law, if not a part of morality, is limited by it."[78] In these remarks he gave "vast encouragement ... to legal positivism."[79]

On January 17, 1899, Holmes delivered an address entitled *Law in Science and Science in Law* to the New York State Bar Association. In it, he deprecated equating the science of the law, as it was then called, with an historical understanding of it.

> I trust that I have shown that I appreciate what I thus far have spoken of as if it were the only form of the scientific study of law, but of course I think, as other people do, that the main ends of the subject are practical, and from a practical point of view, history with which I have been dealing thus far, is only a means, and one of the least of the means, of mastering a tool. From a practical point of view, as I have illustrated upon another occasion, its use is mainly negative and skeptical. It may help us to know the true limit of a doctrine, but its chief good is to burst inflated explanations.[80]

Holmes supposed that "[e]very one instinctively recognizes in these days the justification of a law for us cannot be found in the fact that our fathers always have followed it." Instead, "[i]t must be found in some help which the law brings toward reaching a social end which the governing power of the community has made up its mind that it wants." All in all, Holmes thought that "the practical study of the law ought also to be scientific" in this sense: "The true science of law does not consist mainly in a theological working out of dogma or a logical development as in mathematics, or only in a study of it as an anthropological document from the outside; an even more important part consists in the

78. Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991, 993 (1997).

79. Henry M. Hart, Jr., *Holmes' Positivism—An Addendum*, 64 HARV. L. REV. 929, 935 (1950–51).

80. Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 452 (1899).

establishment of its postulants from within upon accurately measured social desires instead of tradition."[81]

Lest we see some form of what became known as legal realism lurking between the lines, Holmes reassured his audience with these words:

> I do not expect or think it desirable that the judges should undertake to renovate the law. That is not their province. Indeed precisely because I believe that the world would be just as well off if it lived under laws that differed from ours in many ways, and because I believe that the claim of our especial code to respect is simply that it exists, that it is the one to which we have become accustomed and not that it represents an eternal principle, I am slow to consent to overruling a precedent, and think that our most important duty is to see that the judicial duel shall be fought out in the accustomed way.[82]

Still, close and doubtful cases do arise, and in those cases Holmes says "the simple tool of logic does not suffice and even if it is disguised and unconscious the judges are called on to exercise the sovereign prerogative of choice."[83] That choice should be exercised with "an ultimate dependence upon science because it is finally for science to determine, so far as it can, the relative worth of our social ends, and, as I have tried to hint, it is our estimate of the proportion between these, now often blind and unconscious, that leads us to insist upon and to enlarge the sphere of one principle and to allow another gradually to dwindle into atrophy."[84] How far this differs from a prescription that a good judge will intuit the better future and then help bring it about we cannot say. What is clear is that Holmes's concept of legal science at a minimum includes sociology.[85]

Perhaps no dismissal of the role of reason in the law has ever been written with a greater show of brutality than in Holmes's *Natural Law*, published in the *Harvard Law*

81. *Id.*
82. *Id.* at 460.
83. *Id.* at 461.
84. *Id.* at 462.
85. *Id.* "Very likely it may be that with all the help that statistics and every modern appliance can bring us there never will be a Commonwealth in which science is everywhere supreme. But it is an ideal, and without ideals what is life worth?"

Review in the closing months of World War I. He begins by dismissing the traditionalists as hopeless romantics.

> It is not enough for the knight of romance that you agree that his lady is a very nice girl – if you do not admit that she is the very best that God ever made or will make, you must fight.
>
> . . .
>
> It seems to me that this demand is at the bottom of the philospher's effort to prove that truth is absolute and of the jurist's search for criteria of universal validity which he collects under the head of natural law.[86]

Holmes next equates truth with might and numbers: "I used to say, when I was young, that truth was the majority vote of that nation that could lick all others . . . and I think that the statement was correct in so far as it implied that our test of truth is a reference to either a present or an imagined majority in favor of our view."[87]

There is also a suggestion that a code of laws that abolished all existing fundamental rights would have equal legitimacy with the existing code of laws and that we prefer what we now have out of naive familiarity.

> The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere. No doubt it is true that, so far as we can see ahead, some arrangements and the rudiments of familiar institutions seem to be necessary elements in any society that may spring from our own and that would seem to us to be civilized – some form of permanent association between the sexes – some residue of property individually owned – some mode of binding oneself to specified future conduct – at the bottom of all, some protection for the person. But without speculating whether a group is imaginable in which all but the last of these might disappear and the last be subject to qualifications that most of us would abhor, the question remains as to the *Ought* of natural law.[88]

86. Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918).
87. *Id.*
88. *Id.* at 41.

As always for Holmes, after publication of *The Common Law,* duties and rights are simply predictions about what the state will do in any particular circumstance and rights rest on "the fighting will of the subject to maintain them"; on the proposition: "A dog will fight for his bone."[89]

"On the occasion of the ninetieth birthday of Mr. Justice Holmes, his" soon to be "successor on the Supreme Court of the United States said Holmes was 'for all students of the law and for all students of human society the philosopher and the seer, the greatest of our age in the domain of jurisprudence, and one of the greatest of the ages."[90] This reputation celebrated by Cardozo largely rested on dissents. The dissent in *Lochner* was followed by others of note, particularly that in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), as the Court continued to protect the right of contract against what it deemed to be unreasonable regulation. "'Since 1920, 'Professor Frankfurter noted in 1930,' the Court had invalidated more legislation than in fifty years preceding.'"[91] Holmes, like Cardozo after him, had other views.

In 1949, eighteen years after Cardozo was elevated to the Supreme Court, and eleven after he died, Louis Jaffe wrote of a friend who said that a "judge wherever choice is possible should bring about the result most in accord with progressive policy. That is the test of a good judge, a liberal judge."[92] Cardozo was perfectly willing to share his view of judging, writing a book in 1921 entitled *The Nature of the Judicial Process.*[93] When Learned Hand reviewed it in the *Harvard Law Review*, he summarized Cardozo's judicial vision in these terms: "He must be faithful to the past, of which he is the inheritor, but not too faithful; he must

89. *Id.* at 42.

90. Mark DeWolfe Howe, *The Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 529 (1951), citing Cardozo, *Mr. Justice Holmes*, 44 HARV. L. REV. 683, 684 (1931). In point of fact because Holmes practiced sociological jurisprudence he was particularly susceptible to conventional wisdom such as eugenics. *See* Buck v. Bell, 274 U.S. 200, 207 (1927) ("Three generations of imbeciles is enough."). "Roscoe Pound launched the sociological jurisprudence movement with a series of influential attacks on the Supreme Court's nascent liberty of contract jurisprudence." Bernstein, *supra* note 32 at 42.

91. Schwartz, *supra* note 36 at 218.

92. Louis L. Jaffe, *The Judicial Universe of Mr. Justice Frankfurter*, 62 HARV. L. REV. 357, 358 (1949).

93. Learned Hand, *Book Review*, 35 HARV. L. REV. 479 (1921–22).

remember that he lays down a rule of general application, - consistency for him is a jewel; but beyond all he must remember that he is a priest of his time, the interpreter of an inarticulate will, which accepts the past only in part, - no more of it than the present has not yet awakened to repudiate."[94] Not only does Hand approve, but he is more than a little elitist in his approval as he wonders what the people will think of such candor.

> That a judge of Judge Cardozo's standing should so frankly own the way in which he works is itself a portent, though in fact he probably disposes of his cases by no saliently different methods from the judges who have preceeded him. Indeed he is analyzing, not his own mind alone, but the ways in which all judges decide their cases. But the self-scrutiny which can learn how it works and the candor which will avow it, are rare in such high places. The masters assure us that ours is a time of change in the law, when it is to be recast; one of those periods when the bud is bursting its sheath and the flower unfolding. If they are right – and who are we to question them? – the development will be self-conscious as never before. How Demos will accept it is another matter. Hitherto he has been lulled to rest by unctious protests of docility from his judges. Will he awaken in a rage when they admit that they are not all "mind," but entertain a will as well? Perhaps not; most judges are more pious than Judge Cardozo – and less sincere.[95]

In 1915, Hand wrote an unsigned editorial for *The New Republic* calling for the repeal of the Fifth and Fourteenth Amendments' due process clauses. In 1924, Frankfurter did the same thing. More "[p]rivately, Justice Brandeis supported repeal of the entire Fourteenth Amendment."[96]

In 1931, Felix Frankfurter published in the Harvard Law Review a review of *The American Leviathan: The Republic In the Machine Age*, by Charles A. and William Beard. The review includes this assertion:

> The machine age, however, leads more and more to governmental permeation in matters which to some

94. *Id.*
95. *Id.* at 480.
96. Bernstein, *supra* note 32 at 44.

> lawyers and judges still seem peculiarly reserved for exclusively private arrangement, immune against state interference. But the *laissaz faire* of law is as doomed as the *laissaz faire* of economics. Even to the most gallant survivor of economic individualism, the 'economic man' is now seen in the context of society; the issues center upon the nature of the context and how the individual fits into it. Also law will more and more heed these realities, and cease to concern itself with abstract individuals of an obsolete age.[97]

This is obviously a philosophic reference. To what does it refer?

B. *The Progressive Philosophic Critique of Individualism*

In 1924, John C.H. Wu described Roscoe Pound "as a pragmatist, and among the pragmatists he is most akin to John Dewey."[98] Pound, in 1934, associated himself with Dewey's philosophic critique.[99] In February and March 1919, John Dewey delivered lectures at the Imperial University of Japan, which he published later that year under the title *Reconstruction in Philosophy*.[100] Dewey's first premise was that all prior rationalistic philosophy falsely claimed to "demonstrate[e] the existence of a transcendent, absolute or inner reality and of revealing to man the nature and features of this ultimate and higher reality." To Dewey, this tradition had no true explanatory power because it was "originally dictated by man's imagination working under the influence of love and hate and in the interest of emotional excitement and satisfaction." Indeed the goal of the first lecture was to present the "reasonable hypothesis . . . that philosophy originated not out of intellectual, but out of social and emotional material" leading to "a changed attitude toward traditional philosophies."[101]

97. Felix Frankfurter, *Book Review*, 44 HARV. L. REV. 661 (1931).

98. John C.H. Wu, *The Justice Philosophy of Roscoe Pound*, 18 ILL. L. REV. 285 (1924). Wu also noted that Pound "resorts to what he calls 'a social engineering' . . . ."

99. Roscoe Pound, *Law and The Science of Law In Recent Theories*, 43 YALE L.J., 525, 526 (1934).

100. JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY (First Beacon Paperback ed. 1957).

101. *Id.* at 23–25.

For Dewey, reason was a chimera and what a reconstructed philosophy should value is intelligence. "It will regard intelligence not as the original shaper and final causes of things, but as a purposeful energetic re-shaper of those phases of nature and life that obstruct social well being."[102] That is, the future human project should be to use the scientific method of trial and error, of hypothesis and experimentation, to endlessly improve the social sphere.

In his fourth chapter, Dewey promised "to show how and why it is now possible to make claims for experience as a guide in science and moral life which the older empiricists did not and could not make for it."[103] As we consider this point, we are told that "[r]eason, as a Kantian faculty that introduces generality and regularity into experience, strikes us more and more as superfluous – the unnecessary creation of men addicted to traditional formalism and to elaborate terminology." Reason is supplanted by or merged into intelligence "conceived after the pattern of science, and used in the creation of the social arts."[104]

According to Dewey, the old philosophy sought the ultimate unchanging absolute.[105] In the reconstructed philosophy, change "becomes prophetic of a better future."[106] And once "the belief that knowledge is active and operative takes hold of men, the ideal realm is no longer something aloof and separate; it is rather that collection of imagined possibilities that stimulate men to new efforts and realizations."[107] If we are to embark upon a program of experimental utilitarianism based upon the recognition that there is no truth other than whatever is verified by the scientific method, what will keep the effort from becoming exploitive? "The only guarantee of impartial, disinterested inquiry is the social sensitiveness of the inquirer to the needs and problems of those with whom he is associated."[108] When this system is operative it "places upon men the responsibility for surrendering political and moral dogmas,

102. *Id.* at 51.
103. *Id.* at 78.
104. *Id.* at 95–96.
105. *Id.* at 106–07.
106. *Id.* at 116.
107. *Id.* at 118.
108. *Id.* at 147–48.

and subjecting to the test of consequences their most cherished prejudices."[109]

In his seventh, and next to last chapter, Dewey presents morality as situational, relative, and collective. "*Moral* goods and ends exist only when something has to be done."[110] And with change lies the opportunity of "doing away once [and] for all with the traditional distinction between moral goods, like the virtues, and natural goods like health, economic security, art, science and the like."[111]

"Inquiry, discovery take the same place in morals that they have come to occupy in sciences of nature" which in turn become "the technique of social and moral engineering."[112] The morality of an action is to be judged only by its consequences and "[n]o past decision nor old principle can ever be relied upon to justify a course of action."[113] When growth becomes the end, "[m]istakes are no longer either mere unavoidable accidents to be mourned or moral sins to be expiated and forgiven." They are simply lessons. As a consequence "[n]o individual or group will be judged by whether they come up to or fall short of some fixed result, but by the direction in which they are moving."[114]

In his final chapter Dewey continued the thought that morality is exclusively social.

> When the self is regarded as something complete within itself, then it is readily argued that only internal moralistic changes are of importance in general reform.
>
> . . .
>
> But when self-hood is perceived to be an active process it is also seen that social modifications are the only means of changed personalities.[115]

It is here that Dewey fixes the relationship between the individual and society. There are only "three alternatives: Society must exist for the sake of individuals; or individuals must have their ends and ways of living set for them by society; or else society and individuals are correlative,

109. *Id.* at 160.
110. *Id.* at 169.
111. *Id.* at 172.
112. *Id.* at 173–74.
113. *Id.* at 174–75.
114. *Id.* at 175–76.
115. *Id.* at 156.

organic, to one another, society requiring the service and subordination of individuals, and at the same time existing to serve them."[116] In selecting the third alternative, Dewey makes the individual very much the junior partner: "Now it is true that social arrangements, laws, institutions are made for man, rather that man is made for them; that they are means and agencies of human welfare and progress. But they are not means for obtaining something for individuals, not even happiness. They are means of *creating* individuals."[117]

Although Dewey was a prominent purveyor of these ideas, they were, in a sense, in the air. As Roscoe Pound had written in 1911, "Hence we find American jurists working out the applications of common individualism after the individualist philosophy and economics have lost their momentum, and we find our courts and lawyers insisting upon views of liberty of contract, of risk of employment, and of the fellow-servant rule which are out of all relation to actual life."[118] For those entertaining similar thoughts, the work of affording constitutional protection against regulation of the private rights of contract would seem philosophically illicit.

C. *Critique of the Historians*

The Progressives argued that the burden of proof was never on reformers until the experiment had been undertaken and the consequences known. In this spirit Charles A. Beard declared in 1913, "'The theory of economic determinism has not been tried out in American History, and until it is tried out, it cannot be found wanting.'"[119]

In 1944, Charles A. and Mary R. Beard published their final major work, *A Basic History of the United States*.[120] In a Prefatory Note, they declared that "the book is no mere

116. *Id.* at 187.
117. *Id.* at 194.
118. Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591, 611 (1911).
119. Cecelia M. Kenyon, *Book Review*, 70 HARV. L. REV. 1497 (1957), quoting C.A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 7 (1913).
120. CHARLES A. AND MARY R. BEARD, A BASIC HISTORY OF THE UNITED STATES (Doubleday, Doran & Company New York).

summary or digest of our previous works." Neither was "it a collection of excerpts from any or all of them." Instead, it was "newly written to express the historical judgment which" the Beards had "reached after more than forty years devoted to the study of" American history.[121] We notice Charles Beard in particular because he was immensely influential and his professional life spanned the Progressive movement and the New Deal in a way that make his description of the motives of the contending parties revealing of the polemics of the time. Following a chapter entitled "Revolts Against Plutocracy Grow," the Beards offered another entitled "Realizations in Social Improvement." In it, the motives of reformers are presented as entirely disinterested, while those of their opponents have no visible public policy component but instead rest on financial interest.

First, consider the reformers:

> Other than the political insurgency that went by the name Progressive, related to it, and yet in many respects fundamentally independent of political partisanship, were efforts of humanitarians to realize ideals social in nature that transcended personal desires for self-perfection, wealth, prestige, and power
>
> . . .
>
> They sought to apply the theories of social meliorism developed by the economists, sociologists, and political scientists who analyzed and pointed out inadequacies in the doctrines of individualism. The humanitarians were more than students, theorists, and writers, though some of them were all those persons; they were primarily activists anxious to get reforms established. They made minute surveys of blighted areas in national life and searched for ways and means of integrating social theory and social practice.[122]

Operating through many organizations they broke down resistence. "They also compelled a reconstruction or re-education of the United States Supreme Court which for more than forty years had been reading into the Federal Constitution, as Justice Oliver Wendell Holmes remarked,

121. *Id.* at Prefatory Note.
122. *Id.* at 393.

the laissez-faire doctrines of Mr. Herbert Spencer, English individualist."[123] The American people, "who observed poverty at first hand or suffered from it personally protested against it and demanded amelioration by concerted efforts, private and public; and leaders in the labor movement, who had direct contact with social condition in industrial cities, promoted what was frequently called the war on poverty."[124]

What of their opponents? "In the run-of-the-mill opinion social conservatism signified the support of measures and practices which protected concentrated wealth, and methods of acquiring wealth, against interference on the part of government." Individualists might believe that "[i]t is individuals struggling to make a living and acquire property who set productive activities in motion and create the wealth which makes the country great and prosperious." As a consequence, they might think that they held their wealth on just terms. But the Progressives knew better. "They accepted the contention of the sociologists such as Lester Ward and Anna Garlin Spencer to the effect that the individual, no matter how enterprising, derives the knowledge, the inventions he makes and uses, and the security he enjoys from the common life of society and the government that holds it together." The ills of society that held others back they attributed to impersonal causes which could be eliminated or mitigated by social change. This change, "they argued, can be brought about peacefully, by group and public action, and this dire poverty can be abolished, misfortunes mitigated, special privileges inimical to the interests of society destroyed, and the quality of the common life improved."[125]

Writing in the midst of World War II, Charles Beard had moderated some of his earlier rhetoric on the class interests underlying the Constitution. But strong rhetoric had been the norm in the historical critique of individualism. "Princeton University President (and later U.S. President) Woodrow Wilson . . . dismissed talk of 'the inalienable rights of the individual' as 'nonsense.'" For Wilson, "'[t]he object of constitutional government' was not to protect liberty, but 'to

123. *Id.* at 394.
124. *Id.* at 399.
125. *Id.* at 394–96.

bring the active, planning will of each part of the government into accord with the prevailing popular thought and need.'"[126]

D. *Distinguishing the Critique from the New Deal Settlement*

Positivism, Sociological Jurisprudence, Legal Realism, Law as Science, Dewey's Utilitarian Philosophy, and the claims of the Humanitarians to the moral high ground were all rhetorical auxiliaries or handmaidens in the run up to the New Deal constitutional settlement but they do not define it. These schools provided motive force to some of the actors and gave rise to an intellectual/emotional aura for the period. But they have no more been grafted into the Constitution than the *Social Statics* of Mr. Herbert Spencer. The constitutional substance of the Roosevelt shift resides in the Supreme Court caselaw from 1937 onward. The powers that are most capable of collapsing federalism unless restrained are the taxing power and the Commerce Clause; and in Part IV, we will look at how much and how little they were augmented in and after 1937, on our way to demonstrating that they are inadequate to support the healthcare mandate and penalty. But first we should notice how broadly Substantive Due Process, and its protections of individual rights, survived. Economic Substantive Due Process, to be sure, died as a practical matter, although review for reasonableness survives in a formal and vestigial way in the rational basis test.[127]

The use of natural law concepts, together with the Due Process Clauses of the Fifth and Fourteenth Amendments to authorize judicial restraint of legislative power is uniquely American. When Hooker declares divine law superior to positive law he merely licenses the subject to disobey positive law in good conscience while suffering the consequences. Locke allows a subject to revolt against seriously unjust laws if he has the power, or if not, to give such laws only grudging, outward and passive obedience. Blackstone accords natural law superior status, but he does

126. Bernstein, *supra* note 32 at 92.
127. See United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

so in the context of claiming that the English common law is uniquely admirable because it does agree with natural law. Only in America did natural law become a significant tool of judicial review where it continues to operate in the guise of fundamental rights.

"Ironically, despite the calumny heaped on the due process liberty of contract decisions and the Supreme Court justices who wrote them, modern constitutional jurisprudence implicitly (and sometimes explicitly) draws a great deal from pre-New Deal due process decisions rejecting novel assertions of governmental power." Hence it can be said that "[m]odern 'liberal' constitutional jurisprudence, rather than being directly descended solely from the ideas of early-twentieth century Progressive jurists, is a synthesis of Progressive fondness for government economic regulation, and the classical liberal ('conservative') support for individual rights and skepticism of government power reflected in the liberty of contract cases."[128]

"With Roosevelt appointees joining a growing Progressive liberal majority on the Court the New Dealers had the opportunity to fulfill the old Progressive dream of emasculating the Due Process Clause and limiting its scope to purely procedural rights. Professor Bernstein has analyzed the reasons why they did not. They include the fact that the Court's protection of non-economic fundamental rights was popular, "especially . . . among the ethnic and religious groups that formed the core of the New Deal coalition." After the loss of the court-packing fight, New Dealers presented themselves as guarantors of civil rights. According to this narrative, "[n]ot only was a large and active federal government not a constitutional problem, but Americans needed such a government to protect them from abuses of state and corporate power."[129]

That leaves us with this familiar legal playing field. Infringement by government of rights deemed historically fundamental triggers strict scrutiny review. Under this outcome-determinative standard of review, the government is expected to lose, but a court escapes the subjectivity associated with direct reasonableness review because the

128. *Id.* at 55.
129. Bernstein, *supra* note 32 at 104–06.

standard of review decides the case and not any *ad hoc* judgment of a court. Questions arising from structural limitations of the Constitution are decided directly without resort to an outcome-determinative standard of review. Economic regulation is reviewed under the outcome-determinative rational basis test. The government is expected to win, but a fig leaf of reasonableness review is preserved while avoiding subjectivity, because the standard of review decides the case and not any *ad hoc* decision of a court concerning the objective reasonableness of an enactment.

What this means for the healthcare lawsuits is that the reviewing courts will be presented with a binary choice. Either Congress has the power to command a citizen to purchase a good or a service from another citizen or it does not. If we the people did not grant that power, we should expect the courts to strike down the mandate and penalty. If we do not want to see the principle that such purchases can be mandated across the full range of our national life, then we should not want the mandate and penalty upheld simply as an expedient to address the exigencies supposedly addressed by the healthcare law. This is so because once a power is allowed, Congress has plenary power to fully exercise it within its utmost scope and reach subject only to political restraints.[130]

IV. THE MANDATE AND PENALTY ARE BEYOND THE MODERN LIMITS ON THE TAXING POWER AND OF THE COMMERCE CLAUSE, NOTWITHSTANDING NEW DEAL JURISPRUDENCE

"Wilson appointee James McReynolds, Taft appointee Willis Van De Vanter, and Harding appointees George Sutherland and Pierce Butler" were caricatured in the 1920's by Progressives "as the 'Four Horsemen' – as in 'of the apocalypse.'" Although they had controlled the court "through alliances with various other justices, especially Harding appointees William Howard Taft and Edward Sanford,"[131] in 1930, with the country sunk in depression, Chief Justice Taft resigned and Sanford died. This left the

130. Morrison, 529 U.S. at 616, n.7.
131. Bernstein, *supra* note 32 at 49.

Four Horsemen—now reduced to three—balanced by Holmes, Brandeis and Stone—whom Taft had labeled "'the Bolsheviki.'"[132] In 1930, former Associate Justice and Republican Presidential candidate Charles Evans Hughes replaced Taft as Chief Justice and Owen J. Roberts replaced Sanford. Of course, as we have seen, Cardozo replaced Holmes in 1932.

As governor of New York between 1906–10, Hughes helped erect the modern bureaucratic regulatory state,[133] so it was not especially surprising that, in company with Roberts, he joined Brandeis, Stone and Cardozo in 1934 in upholding a New York law regulating the price of milk. This decision, *Nebbia v. New York*,[134] is notable because, "[i]n his opinion of the Court, Justice Roberts transformed the Court's attitude toward the legality of price fixing by doing away with the limited category of 'business affected with a public interest' upon which the price-fixing power had until then been based."[135]

Although the Court engaged in perhaps the most obvious disregard of original intent ever when the same five justices upheld a state moratorium on debts in *Home Building & Loan Association v. Blaisdell*,[136] because this too was an exercise in State police power, it was not necessarily diagnostic of the view of the Hughes Court with respect to attempts to expand national power. The next year, however, that view was clarified when the Court struck down a section of the National Industrial Recovery Act of 1933 (NIRA) in *A.L.A. Schechter Poultry Corp. v. United States*.[137] Although commentators include this case in the *Lochner* narrative,[138] it is an underremarked fact that all nine justices voted to declare the NIRA unconstitutional.

The most radical feature of the NIRA was that it permitted voluntary trade groups to issue codes of fair competition having the force of law. Petitioners had been

132. James A. Henretta, *Charles Evans Hughes and the Strange Death of Liberal America*, (*available at* http://www.historycooperative.org/journals/1hr./24.1/henretta.html p. 3 of 51).

133. *Id.*, at p. 10 of 51.

134. 291 U.S. 502 (1938).

135. Schwartz, *supra* note 36 at 231.

136. 290 U.S. 398 (1934).

137. 295 U.S. 495 (1935).

138. *See, e.g.*, Schwartz, *supra* note 36 at 232–33.

indicted and convicted of violations of, and conspiracy to violate, the "'Live Poultry Code.'"[139] At the beginning of the year, the Court in *Panama Refining Co. v. Ryan*[140] had voted eight to one (Cardozo dissenting) to strike down a grant of administrative authority to the executive branch on the grounds of improper delegation of legislative power. The Court concluded that the situation in *Schechter* was even worse. Here private associations were allowed to make law without limitation or restriction.[141] Not only did the Court strike the Poultry Code down on improper delegation grounds, Cardozo, the lone dissenter in *Panama Refining,* agreed, calling the delegation in *Schechter* "unconfirmed and vagrant" as well as "delegation run riot."[142]

The Court also found the Poultry Code unconstitutional under the Commerce Clause because the effects on commerce were insufficiently direct. Cardozo agreed. After noticing and rejecting Learned Hand's analysis in the Second Circuit, he wrote: "Activities local in their immediacy do not become interstate and national because of distant repercussions. What is near and what is distant may at times be uncertain. There is no penumbra of uncertainty obscuring judgment here. To find immediacy or directness here is to find it almost everywhere."[143]

Publicly, the Court was conciliatory or firm depending on how its statements are parsed. Before reaching the merits, the majority opinion noted that the United States had argued "that the provision of the statute authorizing the adoption of codes must be viewed in light of the grave national crisis with which Congress was confronted." The answer to that was this: "The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants." The United States had also "urged

139. 295 U.S. at 521.
140. 293 U.S. 388 (1935).
141. 295 U.S. at 541–42.
142. 295 U.S. at 551, 553.
143. *Id.* at 554 (citation omitted). Hand in upholding most of the convictions below had urged the proposition that "[a] society such as ours 'is an elastic medium which transmits all tremors throughout its territory; the only question is of its size."

that the national crisis demanded a broad and intensive cooperative effort by those engaged in trade and industry, and that this necessary cooperation was sought to be fostered by permitting them to initiate the adoption of codes." The problem with that for the Court was that those codes "place all persons within their reach under the obligation of positive law, binding equally those who assent and those who do not assent." To make matters more dire, violations were "punishable as crimes."[144]

In addition to this public message, there is a story of a private one.

> No sooner had the decision been read from the bench than Brandeis spelled out its meaning in blunt terms to New Deal lawyer Tom Corcosan. Brandeis had known him since Corcosan clerked at the Court for Justice Holmes. Summoning him to the justices' robing room, Brandeis told Corcosan: This is the end of this business of centralization, and I want you to go back and tell the president that we're not going to let this government centralize everything. It's come to an end.[145]

Early in January 1936, the Court struck down the Agricultural Adjustment Act (AAA) in *United States v. Butler*.[146] Under the AAA, Congress sought to regulate agricultural supply and demand by requiring payments from processors and making payments to producers.[147] The United States did not seek to uphold the AAA under the Commerce Clause, so *Butler* broke down into two issues.

First, the Court held that the exaction from the processors could not be sustained under the taxing power because it was not a tax. The Court had decided in the *Child Labor Tax Case*[148] in 1922 that the definition of a tax was justiciable and that a penalty to enforce a regulation had to be supported by an enumerated power other than the taxing power.

144. *Id.* at 528-29.

145. ROBERT SHOGAN, PRECLUDE TO CATASTROPHE at 82 (Chicago *Ivan R. Dee* 2010) (citing ARTHUR M. SCHLESINGER, THE AGE OF ROOSEVELT: THE POLITICS OF UPHEAVAL at 280 (Boston, Houghton Mifflin, 1960)).

146. 297 U.S. 1 (1936).

147. *Id.* at 52–57.

148. 259 U.S. 20 (1922).

With respect to payments to producers, the Court held that the spending power was limited by other constitutional provisions, specifically, in the case of the AAA, the Tenth Amendment. The Court also stated that payments to encourage conduct where the payments were not made to execute an enumerated power intruded upon the reserved powers of the States. Stone, Brandeis and Cardozo dissented.

Although Franklin Roosevelt did not campaign against the Supreme Court in the election of 1936, his defeat of the "Old Bull Mooser", Governor Alf Landon of Kansas, with 60.7 percent of the popular vote, and with the electoral votes of every State except Maine and Vermont, was stunning.[149] Flush with victory, Roosevelt devised his court packing plan. "Given advance warning by Corcosan, Brandeis told his young friend plainly that he was dead set against the plan and warned that the president was making a serious mistake." Then, "working behind the scenes he engineered the release of a letter from Chief Justice Hughes forcefully disputing FDR's claim that the Court was overworked (the rationale for the president's proposal), which many viewed as the decisive blow in killing the idea."[150] Announced in February 1937, the plan did prove to be a mistake and Congress refused to pass it.[151]

Even before the Court packing plan was publicly announced, the Court had voted in conference to uphold the National Labor Relations Act (NLRA). Although *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,[152] was immediately recognized as revolutionary in effect, no new doctrine had yet been worked out. It instead preserved the old indirect and remote test,[153] simply finding that the activities at issue were not too indirect and remote.

The NLRA prohibited "unfair labor practices affecting commerce."[154] Commerce was statutorily defined as "trade, traffic, commerce, transportation or communication" among

149. SAMUEL ELIOT MORRISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE, at 975–76 (New York Oxford University Press 1965).
150. Shogan, *supra* note 145 at 82.
151. Morrison, *supra* note 149 at 970.
152. 301 U.S. 1 (1937).
153. *Id.* at 37.
154. *Id.* at 22.

States, foreign states, territories or the District of Columbia.[155] The statutory definition of "affecting commerce" spoke in terms of "in commerce, or burdening or obstructing commerce or the free flow of commerce or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." Because Congress traditionally had the power to regulate things in commerce, as well as the channels of commerce, the NLRA was carefully drafted to make it possible to present arguments in its favor in the best light possible under existing doctrine.

Perhaps the most significant decision of the 1937 term was *Helvering v. Davis*,[156] which conservative or libertarian commentators have labeled "the most harmful" case ever decided by the Supreme Court.[157] There the Court in a seven to two decision held that the spending power is not limited by the enumeration of powers in Article I, Section 8.

Davis is of no help to the United States in the health care litigation because the social security tax upheld in that case is a constitutionally authorized excise tax on employment as judged by historic standards. Thus, there was no occasion to revisit the first prong of *Butler* or the *Child Labor Tax Case*, which remain good law.[158] Indeed, the proposition that there is a judicially ascertainable difference between a penalty and a tax was restated in *United States v. LaFranca*,[159] which observed: "A tax is an enforced contribution to provide for the support of government; a penalty . . . is an exaction imposed by statute as punishment for an unlawful act." This definition was affirmed and quoted as recently as 1996 in *United States v. Reorganized CF&I Fabricators of Utah, Inc.*[160] The health care penalty under this definition is clearly just that, a penalty. It is a penalty in aid of the

155. *Id.* at 31.

156. 301 U.S. 619 (1937).

157. ROBERT A. LEVY & WILLIAM MELLOR *DIRTY DOZEN* at xiii, 19 (forward by Richard A. Epstein, Sentinel 2008).

158. Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477, 484 (1989) (The Supreme Court reserves to itself the prerogative of overruling its cases.). *See also* Pacer E.D. Va. Case 3:10-cv-00188-HEH Doc. 70 Amicus Curiae Brief of Constitutional Law Professors [Jack M. Balkin, Gillian E. Metzger, Trevor W. Morrison] In Support of Motion to Dismiss at 18 (recognizing that these cases "have not been explicitly overruled.").

159. 282 U.S. 568, 572 (1931).

160. 518 U.S. 568, 572 (1996).

health care mandate so it is not even a "tax penalty." There are, of course, tax penalties in the tax laws generally, but the term in the Virginia case is a meaningless neologism. Furthermore, as stated in *Dep't of Revenue of Montana v. Kurth Ranch*,[161] even if the penalty had been denominated a tax in the PPACA, "there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty . . . ." The fact that the Supreme Court reaffirmed this central principle of the *Child Labor Tax Case* and the first prong of *Butler* as recently as 1994, necessitates that the heath care penalty be supported by an enumerated power other than the taxing power. Thus, the claim that the penalty can be sustained as a tax collapses back into the Commerce Clause argument. In the face of these difficulties "every court which has considered whether § 1501 operates as a tax has concluded that it does not."[162]

Things are no better for the United States under the Commerce Clause. The case described by the Supreme Court as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity,"[163] *Wickard v. Filburn*,[164] was not decided until 1942, when the Horsemen were long gone and six of the justices were Roosevelt appointees. In *Gibbons v. Ogden*,[165] the Supreme Court had found that the terms "regulate" and "commerce" had justiciable meanings and limits. "For nearly a century" after *Gibbons v. Ogden*, the Court's decisions "under the Commerce Clause dealt rarely with questions of what Congress might do in the exercise of its granted power under the Clause, and almost entirely with the permissibility of state activity which it was claimed discriminated against or burdened interstate commerce."[166] Writing near the end of his life, Madison told a friend that the principles underlying this negative view of the Commerce Clause had been the

161. 511 U.S. 767, 779 (1994).
162. Mead v. Holder, No. 10-950 (GK), 2011 U.S. Dist. LEXIS 18592, at 69–70 (D.D.C. Feb. 22, 2011).
163. United States v. Lopez, 514 U.S. 549, 560 (1995).
164. 317 U.S. 111 (1942).
165. 22 U.S. (9 Wheat.) 1 (1824).
166. Wickard, 317 U.S. at 121.

true purpose of it. It was intended to permit the commerce of inland states to escape taxation by the coastal states.[167]

Be that as it may, beginning with the Interstate Commerce Act in 1887, the Sherman Antitrust Act in 1890, and other enactments after 1903, Congress began asserting its positive power under the Commerce Clause. As we have seen, it was first met with significant checks from the Supreme Court.[168] "In general," the Court protected state authority over intrastate commerce by excluding from the concept of interstate commerce "activities such as 'production,' 'manufacturing,' and 'mining,'" and by removing from its definition activities that merely affected interstate commerce, unless the effect was "direct" rather than indirect.[169] When the Supreme Court in *Wickard* upheld the Agricultural Adjustment Act of 1938 it held that "even if [an] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time be defined as 'direct' or 'indirect.'"[170] Although this was very broad compared with what had been permitted before, there were still palpable connections with economic activity as traditionally understood. Nothing in the Court's formulation provides authority for the regulation under the Commerce Clause of the passive status of being uninsured.

The marketing order that was employed against Mr. Filburn and against his home-grown wheat had defined marketing wheat "in addition to its conventional meaning" as "including" feeding (in any form) to poultry or livestock which, or the products of which, are sold, bartered, or exchanged." It had been Filburn's practice to sell milk, poultry and eggs from animals fed with his home-grown wheat.[171] The parties stipulated that the use of home-grown

167. *The Founders' Constitution*, vol. 2, Article 1, Section 8, Clause 3 (Commerce), Document 19 (*available at* http://press-pubs.vchicago.edu/Founders/al_8_3commerce19.html).

168. Wickard, 317 U.S. at 121-22 and 122, n.20 (collecting cases striking down congressional enactments).

169. *Id.* at 119–20.

170. *Id.* at 125.

171. *Id.* at 114.

wheat was the largest variable in the domestic consumption of wheat.[172] *Wickard* involved the voluntary activity of raising a commodity which, in the aggregate, was capable of affecting the common stock of wheat. What *Wickard* did was to establish the principle that, when an economic activity in the aggregate has a substantial impact on interstate commerce, there is no as-applied, *de minimus* constitutional defense to regulation under the Commerce Clause.

Despite its clear nexus with economic activity, for a long time it was thought that *Wickard* lacked a limiting principle. Writing in the mid-1980's, David Currie maintained that *Wickard* "expand[s] the commerce power to cover virtually everything."[173] In the mid 1990's, Judge Kozinski suggested that the Commerce Clause could just as easily be called the "Hey, you-can-do-whatever-you-feel-like Clause."[174] However, in the 1990's it became apparent that there is a limiting principle and that this limiting principle is to be found in the "proper" prong of the Necessary and Proper Clause.

In striking down a part of the Gun-Free School Zones Act of 1990 as violative of the Commerce Clause, the Supreme Court in *United States v. Lopez,*[175] observed that since *Wickard* it had progressed no further than to hold that Congress can regulate (1) channels of interstate commerce, (2) instrumentalities of and persons and things in interstate commerce, and (3) "activities that substantially affect interstate commerce."[176] The third area of regulation, however, is not regulation under the Commerce Clause alone but depends on the operation of the Necessary and Proper Clause because intrastate commerce is being regulated on account of its effect on interstate commerce.[177]

It has been known since *M'Culloch v. Maryland*[178] that the Necessary and Proper Clause may only be used consistent

172. *Id.* at 125, 127.

173. DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT THE FIRST HUNDRED YEARS, 1789–1888 at 170 and n. 89 (University of Chicago Press 1985).

174. Levy, *supra* note 157 at 37. They view *Wickard* as the second most harmful decision of the Supreme Court.

175. 514 U.S. 549 (1995).

176. *Id.* at 558-59.

177 *See* Gonzales v. Raich, 545 U.S. 1, 34 (2006) (Scalia, J., concurring in judgment).

178. 17 U.S. (4 Wheat.) 159, 206 (1819).

with the letter and spirit of the Constitution and cannot be employed contrary to any other provision in it.[179] What became apparent beginning in the 1990's is that acts are "prohibited" and fail to "consist with the letter and spirit of the constitution" if they transgress against the principles of structural federalism. As the Court said in *Printz v. United States,*[180]

> When a "Law . . . for carrying into Execution" the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier, *supra* at 919 [including enumerated powers and the Tenth Amendment], it is not a "Law . . . *proper* for carrying into Execution the Commerce Clause," and is thus, in the words of The Federalist, "merely [an] act of usurpation" which "deserves to be treated as such."

This language was repeated in 1999 in *Alden v. Maine.*[181] This is the principle that undergirds the statement of the Court in *Morrison* in 2000: "We *always* have rejected readings of the Commerce Clause and the scope of Federal power that would permit Congress to exercise a police power."[182] That, in turn, is why the mandate and penalty are unconstitutional: A command to a citizen to purchase a good or service from another citizen has no principled limits.[183]

V. CONCLUSION: WHY THIS NEW CLAIM OF POWER SHOULD BE REJECTED

This is an odd moment in American history for Congress to claim the power to require one citizen to purchase a good or service from another. It has been asserted only recently

179. "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.*

180. 521 U.S. 898, 923–24 (1997) (emphasis in original).

181. 527 U.S. 706 (1999).

182. 529 U.S. at 618-19.

183. Raich, 545 U.S. 1 is no broader than *Wickard.* Indeed, because Angel Raich conceded that the statute at issue was facially valid, 545 U.S. at 15, she was trying to set up the as-applied, *de minimus* defense disallowed in *Wickard. See* Raich, 545 U.S. at 47-48 (O'Connor, J., dissenting) ("The task is to identify a mode of analysis that allows Congress to regulate more than nothing (by declining to reduce each case to its litigants) and less than everything (by declining to let Congress get the terms of analysis.")).

without judicial foreshadowing or doctrinal preparation. Because of its sheer novelty, it arrives in the courts with a presumption of invalidity.[184] Nor does Congress require it in order to create, maintain, or enlarge the regulatory welfare state. Congress has been found to have plenary power to do that under the taxing and spending powers, and Virginia in its suit has challenged none of what has gone before. In short, the federal government may tax, spend and borrow to the extent of its political will. Therein lies the problem. The public perception is growing that the United States is dangerously in debt and that its social programs – like those in the rest of the economically advanced world – are unsustainable. The votes were not there to finance national health care in the usual way, i.e., <u>via</u> a new or higher tax, so the mandate and penalty were brought in.

This violates a foundational bargain of the New Deal era. The Progressive meliorists had argued that they should be accorded constitutional space in which to make a social experiment, agreeing in turn to be judged by the results. The New Dealers carried the experiment forward. Seventy years later, results are in suggesting that the experiment is living beyond its means. The statist heirs to the experiment say that it cannot and must not be curtailed, so now they claim this new power.

Acknowledging the legitimacy of that newly claimed power would fundamentally alter the relationship between government and the American citizen. For the first time in American history, government would become Hobbes' Leviathan. And the national government that would acquire this character would not be the level of government that lies closest to hand, but would be the one most susceptible to the effects of public choice theory; a government whose

184. Free Enterprise Fund v. Public Company Accounting Oversight Bd., 130 S. Ct. 3138, 3159 (2010)

> (Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity. Neither the majority opinion [in the Court of Appeals] nor the PCAOB nor the United States as intervenor has located any historical analogues for this novel structure. They have not identified any independent agency other than the PCAOB that is appointed by and removable only for cause by another independent agency.)

Printz, 521 U.S. at 918. (The Failure of Congress to assert a particular power for 200 years "tends to negate the existence of that power.").

enactments depend on entrenched career politicians who are more accessible to representatives of special interests than they are to their distant constituents.

Who does not believe that if the power is granted it will not be employed to its fullest extent? Who can claim to foresee the unintended consequences that will ensue? Who can say what the effect would be on the very notion of private capital, already so lightly protected under the heading of regulatory takings? For example, nothing in principle would prevent a mandate to purchase a government retirement annuity.

What we do know for sure is that economic rights and non-economic rights are mutually reinforcing. There is a sense in which, as F.A. Hayek said, economic rights are the "prerequisite of all other Freedoms."[185] Can we recognize a right to commandeer and regiment citizens who are in a state of repose without unacceptable damage to liberty?

The United States has argued that the analysis of the scope of Congressional power "cannot be driven by hypothetical statutes that no legislature would ever adopt."[186] But the corollary is also true: "the [Constitution] protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."[187]

Questions of the scope of congressional power are ultimately constitutional and judicial. Nor is the impulse to relegate the question solely to the ballot box particularly satisfying when the usual and ordinary forms have not been observed by Congress. PPACA was drafted in secret and passed the Senate without a committee hearing or report on Christmas Eve amid scenes of parliamentary brutality. Measured by polls, PPACA stands in the statute books contrary to the will of the American people. And, at the next election following its enactment, the Republican Party gained the largest number of seats in the House of Representatives since President Roosevelt was rebuked in

185. F.A. HAYEK, THE ROAD TO SERFDOM, 110 (5th Anniv. Ed. 1994).
186. Pacer, Nos. 11-1057 & 11-1058 (Doc. 21 at 69).
187. United States v. Stevens, 130 S. Ct. 1577, 1591 (2010).

the 1938 elections after his court packing plan had failed. So this is not 1937 and PPACA is not the AAA.

The issues, in any event, stand on a higher plain than electoral politics or health care policy. Questions of the scope of congressional power implicate the liberty interest of every citizen in a long term way. The Supreme Court has been quite clear on this point. It said in *Morrison*: the "assertion that, from *Gibbons* on, public opinion has been the only restraint on the congressional exercise of the commerce power is true only insofar as it contends that political accountability is and has been the only limit on Congress' exercise of the commerce power *within that power's outer bounds* . . . . *Gibbons* did not remove from this Court the authority to define that boundary."[188] And Justice Kennedy clearly identified in his *Lopez* concurrence the interests implicated in the health care argument when he said: "Although it is the obligation of all officers of the Government to respect the constitutional design, the Federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far."[189]

Interest group politics have carried this country significantly away from the old natural law concept of governance exclusively for the general good. But subordinating the Constitution to the perceived exigencies of the day would be against the common interest no matter how ardently the proponents of the mandate and penalty might desire them for utilitarian reasons. As the Supreme Court recently reiterated: "Calls to abandon [constitutional] protections in light of 'the era's perceived necessity,' *New York*, 505 U.S. at 187, are not unusual . . . . [something] may be a 'pressing national problem,' but 'a judiciary that licensed extra constitutional government with each issue of comparable gravity would, in the long run, be far worse.' *Id.* at 187-188.[190]

188. 529 U.S. at 616, n.7.
189. 514 U.S. at 578.
190. *Free Enterprise Fund*, 130 S. Ct. at 3157.

The battle for liberty is never over. The challenges to the health care law are our generation's battle field in that ceaseless struggle.

THE INTERNATIONAL CRIMINAL COURT REVISITED: AN AMERICAN PERSPECTIVE

JUDGE DAVID ADMIRE, RET.*

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I. INTRODUCTION

The participation by the United States in the International Criminal Court (ICC) has been the subject of much discussion and disagreement. Many have argued that the goals of the ICC are goals that America should embrace.[1] The Preamble to the Rome Statute (Statute) recognizes the serious nature of crimes that threaten world peace and clearly defines the need to bring perpetrators to justice. Most Americans understand and agree with those goals.

However, opposition to the ICC coalesces around two distinct concerns. First, there exists an understandable fear that United States' leaders and soldiers could be charged and tried for crimes brought for political reasons given the United States' position and influence in the world. The second concern is that by submitting to the ICC's jurisdiction, U.S. citizens would be subject to trial without the protections contained in the United States' Constitution.[2] When authorizing the United States signing the Rome Statute, President Bill Clinton stated:

> The United States should have the chance to observe and assess the functioning of the court, over time, before choosing to become subject to its jurisdiction. Given these concerns, I will not, and do not recommend that my successor, submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied.[3]

The Obama Administration seems to have adopted a policy of principled engagement with international

1. *See* Stephen Kaufman, *New U.S. Cooperation for International Criminal Court*, America.gov (June 2, 2010), http://www.america.gov/st/peacesec-english/2010/june/20100602160754esnamfuak0.7448694.html (arguing the U.S. should become a party to the ICC).

2. Jennifer K. Elsea, CONG. RESEARCH SERV., RL 31495, U.S. POLICY REGARDING THE INTERNATIONAL CRIMINAL COURT 6, 7, 9 (2006).

3. William Jefferson Clinton, President of the United States, Statement on the Signature of the International Criminal Court Treaty, Washington, D.C., at 1 (Dec. 31, 2000), 37 Weekly Comp. Pres. Doc. 4 (Jan. 8, 2001), available at http://usinfo.state.gov/topical/pol/usandun/00123101.htm.

institutions and recently participated in the ICC conference in Kampala, Uganda.[4]

This paper argues that the ICC, as it is currently established, operated and by the interpretation given to the Statute, falls short of the basic protections and expectations that have been ingrained in all Americans. These shortcomings include the selection and education of competent trial judges and protection of the rights of the accused.

II. JUDGES

The success or failure of the ICC depends largely on the judges who hear and decide the cases involving genocide, war crimes, and crimes against humanity. The abilities they bring to the bench must assure that justice will be dispensed impartially and efficiently. Without a competent bench, the ICC cannot achieve the hopes envisioned for it by the signatories to the Statute.

A. *Selection of Judges*

The selection of judges to sit at the ICC is a complicated procedure. First, they are elected by the Assembly of States Parties[5] after being nominated by their individual country.[6] This requires an interested party to potentially run two campaigns for election. More importantly, the Statute requires certain minimum qualification for judges. The first general qualification requires candidates to have "high moral character, impartiality and integrity."[7] Furthermore, the same article requires that a candidate possess the qualifications to be appointed to the highest court in their country. [8]

4. For an interesting discussion of this policy, *see* Harold H. Koh, Legal Advisor, U.S. Dep't of State and Stephen J. Rapp, Ambassador-at-Large for War Crimes Issues, U.S. Engagement With the International Criminal Court and the Outcome of the Recently Concluded Review Conference (June 15, 2010), http://www.state.gov/s/wci/us_releases/remarks/143178.htm (discussing events and impressions of the State department officials that participated in discussion on the ICC).

5. Rome Statute of the International Criminal Court art. 36(6)(a), July 17, 1998, 2187 U.N.T.S 90 [hereinafter Rome Statute].

6. *Id.* at art. 36(4)(a).

7. *Id.* at art. 36(3)(a).

8. *Id.*

In the United States, most judges have extensive practical experience in trying cases in the courtroom.[9] The reason for this seems to be self-evident. How can one manage a court, appropriately receive and weigh evidence, rule on motions or competently do what is routinely required of a judge if they have no prior experience in trying cases. Moving from the role of an experienced advocate to the role of a judge is difficult enough. Making that transition without prior experience would be exceptionally difficult. Understanding this concept is important when considering the additional qualifications required of an ICC judge. Article 36 (3) (b) of the Statute provides:

> Every candidate for election to the Court shall:
> (i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or
> (ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court. [10]

Subsection (i) contains the important requirements for a trial judge. However, the Statute does not leave well enough alone. It adds subsection (ii) not with the conjunctive 'and' but with the conjunctive 'or.' Using 'and' would arguably bring to the court as judges individuals with appropriate trial experience but also those with expertise in international law. However, by using the conjunctive 'or,' the Statute allows election of judges who have no trial or courtroom management experience. While one might argue that subsection (ii) would allow the selection of qualified individuals, it does not require it. The Statute contains the definition of crimes,[11] the elements of crimes,[12] the general principles of criminal law[13] and the applicable law to be

9. Colin B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 Vand. J. Transnat'l L. 1083, 1113–14 (2008).
10. *Id.* at art. 36(3)(b).
11. *Id.* at arts. 6–8.
12. *Id.* at art. 9.
13. *Id.* at Part III.

applied.[14] Given this comprehensive statutory framework of the Statute, there appears to be a limited need for experience in international law alone.

How in reality has the selection process worked? Most judges at the ICC have impressive credentials in their own fields. The question remains whether that is sufficient for a trial or appellate judge hearing some of the most important criminal trials in the world. The Court is divided into three divisions: Pre-Trial, Trial and Appeals.[15] The following table indicates the current assignment of judges at the ICC.

Table 1

Pre-Trial Division[16]	Trial Division[17]	Appeals Division[19]
Fernández de Gurmendi (Argentina)	Joyce Aluoch (Kenya)	Erkki Kourula (Finland)
Hans-Peter Kaul (Germany)	Bruno Cotte (France)	Akua Kuenyehia (Ghana)
Sanji Monageng (Botswana)	Fatoumata Diarra (Mali)	Daniel Nsereko (Uganda)
Sylvia Steiner (Brazil)	Sir Adrian Fulford (United Kingdom)	Sang-Hyun Song (Republic of Korea)
Cuno Tarfusser (Italy)	Elizabeth Odio Benito (Costa Rica)	Anita Ušacka (Latvia)
Ekaterina Trendafilova (Bulgaria)	Kuniko Ozaki (Japan)	
	Christine Van den Wyngaert (Belgium)	
	[René Blattman (Bolivia)[18]]	

14. *Id.* at art. 21.

15. *Id.* at art. 34(b).

16. *Pre-Trial Division*, INT'L CRIM. CT., http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Chambers/Pre+Trial+Division/.

17. *Trial Division*, INT'L CRIM. CT., http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/chambers/trial%20division/trial%20division?lan=en-GB.

The Pre-Trial Chamber of the Court operates essentially as a protection against an overzealous prosecutor through the confirmation of charges process.[20] That Chamber must confirm or deny the prosecutor's request for charges.[21] In essence, it acts like a United States court in determining whether there is sufficient evidence to proceed to trial through a preliminary hearing.[22] Of these judges, only Judges Steiner and Monogeng have previous judicial experience.[23] Judges Trendafilova and Tarfusser have previous experience as prosecutors.[24] Judge de Gurmendi has no judicial experience and Judge Kaul was a diplomat.[25]

The Trial Division has eight judges, which are divided as needed into three judge panels.[26] Of these judges, six have some degree of judicial experience at either the domestic level or at another international criminal tribunal.[27] Judges Ozaki and Blattman have no judicial experience and little if any trial experience.[28]

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18. Judge Blattman's term ended in 2009, but he will remain in office until the completion of the *Lubanga* trial, as permitted in Rome Statute, *supra* note 5, at art. 36(10).

19. *Appeals Division*, INT'L CRIM. CT., http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Chambers/Appeals+Division/.

20. Rome Statute, *supra* note 5, at art. 61(7) (identifying the rulings the Pre-Trial Chamber may make on the evidence).

21. *Id.*

22. *See*, FED. R. CRIM. P. 5.1(e) (rule on hearing and finding at the preliminary trial).

23. Judge Steiner served on the Brazilian Federal Court of Appeal. Judge Monogeng served on the High Court of the Republic of the Gambia. *Pre-Trial Division*, INT'L CRIM. CT, *supra* note 16.

24. Judge Trendafilova was a deputy district attorney at the Sofia District Court. Judge Tarfusser was Chief Public Prosecutor of the Bolzano District Court. *Pre-Trial Division*, INT'L CRIM. CT, *supra* note 16.

25. Judge de Gurmendi was Director General for Human Rights at the Argentinean Ministry of Foreign Affairs. Judge Kaul was Ambassador and Commissioner of the Federal Foreign Office for the International Criminal Court. *Pre-Trial Division*, INT'L CRIM. CT, *supra* note 16.

26. Rome Statute, *supra* note 5, at art. 39.

27. Judge Aluoch served on the Kenyan Court of Appeals. Judge Cotte served as President of the Criminal Chamber of the *Cour de Cassation*. Judge Fulford is a High Court Judge of England and Wales on secondment. Judges Diarra, Odio Benito, and Van den Wyngaert all served as judges on the International Criminal Tribunal for the former Yugoslavia. *Trial Division*, INT'L CRIM. CT., *supra* note 17.

28. Judge Blattman served as Bolivian Minister of Justice and Human Rights. Judge Ozaki worked as Director for Treaty Affairs for the United Nations Office on Drugs and Crime. *Trial Division*, INT'L CRIM. CT., *supra* note 17.

The Appeals Division is composed of five judges.[29] Judges Song and Kuenyehia are academics with no previous judicial experience before being elected to the ICC.[30] Judges Kourula, Ušacka and Nsereko have either judicial or trial experience.[31]

B. *Judicial Experience*

It is apparent that six of the nineteen[32] judges sitting on the ICC, or almost 33% of the bench, have little if any experience in a courtroom either as a judge or an advocate. This appears to be an intended result of the Statute.[33] The Statute requires judges to choose to be listed either on the A list (experience in criminal trials or procedure) or the B list (experience in international law).[34] The first election required that there be nine judges from the A list and five from the B list.[35] Furthermore, subsequent elections should maintain that proportion.[36] There may be a justification for including international law experts on the ICC bench, but only if they were assigned to the Appeals Division. It has been suggested that this may have been the unwritten intent of the statute.[37] However, it is important that appellate judges understand the difficulties and issues presented to a trial court. The skill set necessary to be a competent trial judge is significantly different than those required of an academic or an appeals judge. Trial judges do

29. Rome Statute, *supra* note 5, at art. 39.

30. Judge Song was a Professor of Law at Seoul National University Law School, but started his career as a judge-advocate in the Korean army. Judge Kuenyehia served as the Dean of the University of Ghana, but does have some experience as a solicitor of the Supreme Court of Ghana. *Appeals Division*, INT'L CRIM. CT., *supra* note 19.

31. Judge Kourula was a district judge in Finland. Judge Ušacka served as a judge on the Latvian Constitutional Court. Judge Nsereko worked as a civil and criminal defense attorney in Uganda and was on the List of Counsel eligible to appear before the ICC. *Appeals Division*, INT'L CRIM. CT., *supra* note 19.

32. Including Judge Blattman.

33. Rome Statute, *supra* note 5, at art. 36(3)(b).

34. *Id.* at art. 35(5).

35. *Id.*

36. *Id.*

37. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, 346 (3rd ed. 2007) ("Reading between the lines, the Statute seems to be saying that the more practically oriented criminal law specialists should focus on trials, while their more cerebral brethren in the international law field should focus on appeals.").

not have the luxury of time to ponder at great length the issues that come before them. If they did, trials would become lengthy academic debates rather than an efficient administration of justice. Trial judges who lack trial experience will have to learn the art of being a trial judge at the expense of those whose cases are being heard. Similarly, in the Pre-Trial Division, two of the seven judges lack the legal experience necessary for the efficient operation of that division.[38]

A central concern to the United States before agreeing to the jurisdiction of the Statute should be that any American coming before the ICC will face experienced and capable jurists. While it is true that many American judges must learn their craft, they typically will never have assigned to them a complicated or highly controversial case prior to gaining the necessary experience. But at the ICC, all cases entail complicated facts, controversial situations and defendants whose status is unlike the typical street criminal. For example, the *Katanga* and *Ngudjolo* cases involve multiple counts of crimes against humanity and war crimes.[39] In *Lubanga*, the defendant was charged with enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities.[40] Unless they have served on another international criminal tribunal, most judges will have no experience trying these types of cases. America cannot allow its high-ranking civilian or military officials to be brought to trial before judges who simply lack the critical skills required of a trial judge in complicated and controversial cases. To do so would place them in jeopardy simply due to the inexperience of judges who hold the fate of those individuals in their hands.

C. *Judicial Systems*

A further complication that must be carefully reviewed is the systems from which these judges are selected. The drafters of the Statute attempted to craft a system that

38. Specifically Judges de Gurmendi and Kaul, *supra* note 25.

39. Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges (Sept. 30, 2008).

40. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-803, Decision on the Confirmation of Charges (Jan. 29, 2007).

embodies parts of both the civil law and common law systems.[41] This almost impossible task has created additional problems for the ICC judges.

For example, at the ICC, the Pre-Trial Chamber hears evidence and confirms charges against defendants.[42] This system comes from the civil law countries. This procedure is designed to protect defendants from defending charges that are not supported by "sufficient evidence to establish substantial grounds to believe that the person committed the crime charged."[43] The Chamber does not simply decide whether the charges requested by the prosecutor are legally sufficient, it may change or alter the prosecutor's theory of the case.[44] In this role, the judges seem more like prosecutors than neutral judges. In most American jurisdictions, the prosecutor files charges and their evidentiary sufficiency can be challenged in probable cause proceedings. In the federal courts, the prosecutors must present evidence to support their request for felony charges to a grand jury.[45] The grand jury can then issue an indictment or not. In the U.S. system, the decision as to which charges to bring and the theory of criminal responsibility rests solely with the prosecutor. At the ICC, the Pre-Trial Chamber inserts itself into this role.

Another example that causes difficulty is the type of legal system to which each judge is accustomed. Twelve judges are from civil law countries,[46] four judges from common law countries[47] and three from arguably mixed systems.[48] The

41. Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 27 (2001) (discussing the development of the Rome Statute).

42. Rome Statute, *supra* note 5, at art. 61.

43. *Id.* at art. 61(5).

44. *See, e.g.*, Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, para. 469–71 (Sept. 30, 2008) (holding that because the defendants were tried together as principals in the offense, there was no value in an accessory charge).

45. FED. R. CRIM. P. 7.

46. Judges Blattman (Bolivia), Cotte (France), Diarra (Mali), de Gurmendi (Argentina), Kaul (Germany), Kourula (Finland), Odio Benito (Costa Rica), Steiner (Brazil), Tarfusser (Italy), Trendafilova (Bulgaria), Ušacka (Latvia) and Van den Wyngaert (Belgium). *Legal Systems*, THE CIA WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html.

47. Judges Aluoch (Kenya), Fulford (United Kingdom), Kuenyehia (Ghana), and Nserko (Uganda). *Id.*

ICC has characteristics from both systems. For example, the office of the prosecutor investigates crimes and sets forth the charges it wishes to bring before the Pre-Trial Division.[49] This function is similar to common law countries. However, in civil law countries, the power to investigate is controlled by the judge.[50] In civil laws countries, judges typically have all of the evidence before them before the trial begins.[51] Since they have already determined the relevance of that evidence, objections on admissibility of evidence are rarely heard.[52] By contrast, in common law jurisdictions, judges typically do not see the evidence before pre-trial motions or trial and are required to rule on the admissibility of evidence regularly.[53] In the ICC, only two of eight trial judges, Aluoch and Fulford, come from common law countries.

At the ICC, any trial judge from a civil law system has been thrust into an adversarial trial system in which the judge has no expertise, necessitating on the job learning. This necessarily requires exercising more caution to avoid errors. While some may argue that the ICC is not an adversarial system, a close examination of the trials occurring at the ICC today would indicate the contrary. The Trial Chamber has issued written decisions on questions of admissibility that could easily be decided in the courtroom. For example, a decision was issued on 15 July 2010 on a request to admit prior recorded testimony. This decision was ten pages in length.[54] The record is replete with written decisions on various motions that common law judges would have handled orally from the bench.[55] These written

48. Judges Monageng (Botswana), Ozaki (Japan), and Song (Republic of Korea). *Id.*

49. Rome Statute, *supra* note 5, at arts. 42, 53, and 54.

50. *See* Maximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 AM. J. COMP. L. 835, 840 ("Civil law jurisdictions predominantly conceive the judge as a public official whose role is to investigate the truth . . . [The judge is] able to pursue lines of investigation and produce evidence . . . .").

51. *Id.*

52. *Id.*

53. *Id.* at 843.

54. Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07-2233, Decision on Request to Admit Prior Recorded Testimony of P-30 as well as Related Video Excerpts (June 30, 2009).

55. Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07-2233-Corr, Corrigendum to the Decision on Request to Admit Prior Recorded Testimony of P-30 as well as Related Video Excerpts (June 30, 2009); Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07-1728, Decision on the Communication of P-

decisions cause delay in the proceedings since the decisions have to be drafted and circulated for review and approval among the judges.[56] This process is more akin to an appellate court than a trial court. It would be more efficient and eliminate delay if the presiding judge of each trial chamber made all rulings concerning admissibility. These delays are inherent in a system where experienced jurists in one system are required to operate within the boundaries of another system that is foreign to them. With delays come increased costs for defense counsel and their staff. The court's 2008 legal defense budget for Katanga totaled €472,459 of which €128,103 were for three months of trial.[57] Similar costs for Ngudjolo totaled €442,309 with €128,103 for trial.[58]

D. *Education of Judges*

This experiment of utilizing parts of the common law and civil law systems has certain inherent problems. However, these problems can be reduced if certain actions are undertaken. First, each judge should have to complete a training program in the theory and operation of the other system. This will assist them in understanding the actions of other judges from that system. Furthermore, civil law judges and non-common law trial judges need to be educated in the decision-making processes and issues that are normal for adversarial proceedings. Also, judges need to be educated in effective trial management in such a system. Second, if the Assembly of States Parties is going to continue electing judges without criminal trial experience, there must be a training course on the skill sets necessary for a trial judge. Third, there should be a program of study to educate judges on the differences in international criminal law and procedure and domestic, national criminal law and procedure. Finally, a yearly educational program should be

316's Statement (Dec. 17, 2009); Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07-1817, Order in Relation to the Disclosure of the Identity of P-143 (Feb. 1, 2010).

56. ICC R. PROC. & EVID. 64.

57. International Criminal Court, Assembly of States Parties, 7th Sess., Report on Different Legal Aid Mechanisms before International Criminal Jurisdictions, 29, ICC-ASP/7/23 (Oct. 31, 2008), http://www.icc-cpi.int/iccdocs/asp_docs/ASP7/ICC-ASP-7-23%20English.pdf.

58. *Id.*

established on current issues of importance to the ICC. Each of the judges elected to the ICC bench have very strong and impressive curriculum vitae. Should an education program be established and required of newly elected judges, but not current judges, the now existing inefficiencies will merely continue. For the ICC to operate efficiently as a trial court, its judges must better understand the processes and operations of a criminal trial.

Simple election to the ICC bench does not make an individual an effective judicial officer. If judges of the ICC believe that mere election bestows upon them the traits of an effective trial judge, the result is a state of ignorance that the United States best avoid. If the judges of the ICC do not implement an effective training program for themselves, regardless of their background, the United States should not become a signatory to the Rome Statute. While one can understand that the ICC is still developing as an institution, the fact remains that the court has faltered as a judicial body in failing to resolve its cases in a timely and efficient manner.

Finally, there must be recognition from the court itself that the sole purpose of the court is to try defendants charged with the most serious criminal charges. The Court is not a body designed to provide a stage for new and novel theories of law much discussed by academics. Furthermore, it is not an institution to be glorified by diplomats as an international effort to bring the worst among us to justice. Until the Assembly of States assures the election of trial and appellate judges appropriately trained and experienced, the ICC will merely remain a hope of what could be encased in the reality of what it has become.

III. INDIVIDUAL RIGHTS

During the course of the debate on whether the United States should ratify the Statute, arguments were made that the Statute was consistent with the rights guaranteed by the U.S. Constitution.[59] While these comparisons of the

59. *See, e.g.*, Monroe Lee *The U.S. Constitution and the ICC*, CITIZENS FOR GLOBAL SOLUTIONS, http://globalsolutions.org/files/public/documents/ICC_constitution.pdf (comparing language used in the United States Constitution and the Rome Statute of the ICC describing a criminal defendant's rights).

language of the Statute and the U.S. Constitution may be accurate, the interpretation given to the language of the Statute by the ICC differs substantially.

A. *Reasonable Doubt*

In the United States, every criminal case has to be proven beyond a reasonable doubt.[60] With few exceptions, all members of a jury must agree that there is no reasonable doubt before a defendant can be found guilty.[61] Leaving aside the fact the Statute does not provide for jury trials, it does provide that a three-judge panel will decide the question of whether the prosecutor has met the necessary burden of proof.[62] If two of the three judges believe the charges have been proven beyond a reasonable doubt, the defendant will be convicted regardless of whether the third judge has a reasonable doubt.[63] Obviously, the statutory requirement of proof beyond a reasonable doubt at the ICC has a significantly different meaning than it does in U.S. courts.

B. *Speedy Trial*

The U.S. Constitution guarantees citizens a speedy trial.[64] Some states require trials to begin within a certain period of time from the defendant's first appearance.[65] In Washington

60. *In re* Winship, 397 U.S. 358, 361–64 (1970) (noting the long history of the requirement in American jurisprudence and holding "explicitly" that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

61. Apodaca v. Oregon, 406 U.S. 404, 406, 410–14 (holding explicitly that unanimity is not required for state criminal juries because the jury's role of providing "between the accused and his accuser . . . the commonsense judgment of a group of laymen" is "equally well served" by unanimous and non-unanimous verdicts; because the Sixth Amendment does not require unanimity; because the Fourteenth Amendment forbids only "systematic exclusion of identifiable segments of the community from [juries];" and because the Court could not assume in the absence of proof that jury verdicts decided by a mere majority vote would necessarily ignore the arguments for acquittal of the minority jurors). Federal criminal jury verdicts must be unanimous. FED. R. CRIM. P. 31(a).

62. Rome Statute, *supra* note 5, at art. 39(2)(b)(ii).

63. *Id.* at art. 74(3) (providing merely that "[t]he judges shall *attempt* to achieve unanimity in their decision," but requiring only a majority vote) (emphasis added).

64. U.S. CONST. amend. VI.

65. *E.g.*, State v. Naveira, 873 So.2d 300 (Fla. 2004) (discussing the requirements of the Florida statute, which requires trial within 175 days of arrest and holding that the statute had not been violated where trial had been scheduled

State, a defendant in custody has the right to be brought to trial within sixty days if in custody and ninety days if not in custody.[66] While these deadlines are frequently waived by the defendant or, under certain circumstances, increased by the judges, courts normally require exactly what the state rule or constitution demands.[67]

The Statute also requires a defendant to be brought to trial without undue delay.[68] At the ICC, the reality of a speedy trial is quite different. In the *Lubanga* case, the defendant was taken into custody on 17 March 2006.[69] Charges were confirmed on 29 January 2007.[70] His trial began on 26 January 2009.[71] Germain Katanga was taken into custody on 17 October 2007, charges were confirmed on 30 September 2008[72], and trial began on 24 November

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within that time period and the defendant had filed a continuance claiming to be unprepared to proceed to trial); State v. Broughton, 581 N.E.2d 541 (Ohio 1991) (discussing a similar rule); People v. Bagato, 188 N.E.2d 716 (Ill. 1963) (holding that a statutory right to trial within a certain time of arrest was not violated where defendant's actions had caused delay); State v. Stimson, 704 P.2d 1220 (Wash. Ct. App. Div. 3 1985) (holding that the defendant's constitutional right to a speedy trial was not violated where defendant established no prejudice and had remained silent when the statutory period expired).

66. WASH. REV. CODE ANN. § 10.3.3 (West 2002).

67. *See, e.g.*, *Naveira*, 873 So.2d at 307–08 (holding that "the trial court erred in granting the motion for discharge" because "Naveira was not ready for trial on the date trial was scheduled and . . . requested a continuance; thus, he was unavailable for trial under subdivision (k) and was not entitled to be discharged" and that "mere fact that Naveira had to elect between a speedy trial under the rule and adequate preparation, however, did not violate his constitutional rights"); *Broughton*, 581 N.E.2d at 544–47 (discussing the legal effect of the Sixth Amendment's guarantee of the right to a speedy trial and its relevance in analyzing the state statute at issue in the case); *Bagato*, 188 N.E.2d at 719–20 (holding that a grant of continuance on defendant's motion did not cause a delay sufficient to trigger operation of a statute mandating trial within a four-month time frame and noting that because constitutional concerns would be raised in a case in which prosecutors hypothetically claim defendant filed a continuance in order to obtain more time to prepare for trial, in the obverse, defendant could not raise constitutional issues where any delay was self-inflicted); *Stimson*, 704 P.2d at 387–90 (acknowledging that "while founded upon the constitutional right to a speedy trial, the 60-day trial rule for a defendant in custody prescribed by [state statute] is not of constitutional magnitude" and holding that defendant's constitutional right to a speedy trial was not adversely affected where counsel failed to alert the court that defendant's trial was scheduled for a date beyond the sixty day window).

68. Rome Statute, *supra* note 5, at art. 67(1)(c).

69. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (Jan. 29, 2007).

70. *Id.*

71. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Transcript of the Trial Court (Jan. 26, 2009).

72. Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges (Sept. 30, 2008).

2009.[73] Mathieu Ngudjolo Chui entered custody on 6 February 2008.[74] Since he is being tried with Katanga[75], the dates of his confirmation of charges and trial are the same as Katanga's.

Of particular concern are the actions of the Pre-Trial Chambers. They have been given a relatively simple task of determining the sufficiency of the evidence. However, they have taken this simple statutory mandate and transformed it into a time consuming and cumbersome task. The charging documents, the Confirmation of Charges cited above, is 226 pages in length in the *Katanga* and *Ngudjolo* case and 157 in *Lubanga.*[76] This procedure, which allowed the defendants to be held in custody from seven months to nearly a year prior to charges being confirmed, is unjust at best.

As of August of 2010, none of the three trials has concluded. Prior to the start of trial, Mr. Lubanga was in custody nearly three years.[77] Mr. Katanga was in custody more than two years and Mr. Ngudjolo 21 months prior to commencement of trial.[78] Clearly, this is not acceptable under American jurisprudence. Furthermore, there is no justification to allow an American citizen to be held in confinement for years prior to the commencement of trial. One can only wonder whether there exists an unconscious pressure to convict in order to justify the lengthy confinement of the defendants.

C. *Hearsay*

In the United States, hearsay is not admissible unless it falls within an exception to the hearsay rule.[79] However, at

73. Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07, Transcript of the Trial Court (Nov. 24, 2009).

74. Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges (Sept. 30, 2008).

75. Prosecutor v Katanga, Case No. ICC-01/04-01/07, Decision on the Joinder of the Cases against Katanga and Ngudjolo (Mar. 10, 2008).

76. Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges (Sept. 30, 2008); Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (Jan. 29, 2007).

77. Mr. Lubanga was held Mar. 17, 2006–Jan. 26, 2009. *Supra* notes 70–72.

78. Mr. Katanga was held Oct. 17, 2007–Nov. 24, 2009. *Supra* note 73. Mr. Chui was held Feb. 6, 2008–Nov. 24, 2009. *Supra* notes 73–75.

79. FED. R. EVID. 802.

the ICC, hearsay evidence is allowed and the only protection for the defendant is that the court must consider the probative value of the hearsay evidence.[80] The United States considers hearsay evidence to be inherently unreliable since the maker of the statement is not before the court, under oath, and subject to cross-examination.[81] Without cross-examination, the four risks of a witness's testimony for truthfulness, the perception, memory, narration, and sincerity, cannot be tested.[82] At the ICC, however, a defendant must rely on the judges to appropriately decide if there is reliability to a hearsay statement. These two approaches are significantly different. The decisions of the ICC allowing hearsay evidence to be introduced place potential American defendants at risk in a manner that U.S. courts simply would not allow.

D. *Confrontation*

Closely aligned with the hearsay rule is the right to confront ones accusers as guaranteed by the Sixth Amendment to the U.S. Constitution. If an out of court statement does not fall within the exceptions to the hearsay rules, it is not admissible. Furthermore, if the statement is testimonial in nature, it would not be allowed as a violation of the confrontation clause.[83] The Statute seems to provide defendants with the right to confront witnesses against them by cross-examination.[84] However, in the ICC, a hearsay statement would be admissible and would result in the denial of a defendant's right to cross-examine. At the ICC, the right to confront is only one factor in determining the probative value of the statement.[85] A defendant's right to confront the witnesses against them is so fundamental to the American concept of justice that the approach adopted by the ICC is not an option.

80. Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges ¶ 118 (Sept. 30, 2008).

81. *See* FED. R. EVID. art. VIII advisory committee's note.

82. *See id.*

83. Crawford v. Washington, 541 U.S. 36, 54–57 (2004).

84. Rome Statute, *supra* note 5, at art. 67(1)(e).

85. Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶ 109 (Sept. 30, 2008).

E. *Double Jeopardy*

The concept that one cannot be placed in jeopardy of a criminal conviction after being found not guilty of the crime runs deep in the American experience. For good reason, this protection against double jeopardy was embodied in the Fifth Amendment to the U.S. Constitution.[86] The Statute seems to address this issue in Article 20 (1) which states: "Except as provided in this statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court."[87] However, when one examines the section on Appeal and Revision, a different result emerges.[88] When the Trial Chamber decides the guilt or innocence of a defendant, it must issue a written judgment that contains a full and reasoned statement as to its findings on the evidence and its conclusions.[89] It is at that point that the Trial Chamber, much like a jury in the United States, weighs the probative value of the evidence and the credibility of the witnesses. In the United States, if the jury reaches a verdict of not guilty, the defendant is free from further criminal liability for those actions on which the charges are based.

At the ICC, however, the prosecutor may appeal a factual determination made by the Trial Chamber.[90] If the Appeal Chamber determines that a verdict of not guilty was materially affected by an error of fact, it may reverse or amend the decision[91] or order a new trial before a different Trial Chamber.[92] Because of this statutory framework, a defendant can be found guilty by the Appeals Chamber without ever having heard the live testimony of a witness. The question must be asked: how can one judge the credibility of witness without having the opportunity to observe their testimony in person?

86. U.S. CONSTT. amend. V.
87. Rome Statute, *supra* note 5, at art. 20(1).
88. *Id.* at Part VIII.
89. *Id.* at art. 74(5).
90. *Id.* at art. 81(1)(a)(ii).
91. *Id.* at art. 83(2)(a).
92. *Id.* at art. 83(2)(b).

This issue is addressed in United States' courts by a jury instruction setting forth how this judgment on credibility should be made. A typical instruction reads:

> In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe everything a witness says or only part of it or none of it.
>
> In deciding what to believe, you may consider a number of factors, including the following: (1) the witness's ability to see or hear or know the things the witness testifies to; (2) the quality of the witness's memory; (3) the witness's manner while testifying; (4) whether the witness has an interest in the outcome of the case or any motive, bias or prejudice; (5) whether the witness is contradicted by anything the witness said or wrote before trial or by other evidence; and (6) how reasonable the witness's testimony is when considered in the light of other evidence which you believe.[93]

As indicated in the instruction, an important component in determining a witness's credibility is the individual's manner while testifying. A witness's manner, body language and expressions often say more than the words they employ. Yet, in the ICC, the Appeals Chamber may make value judgments on testimony without seeing the person actually testify. More importantly for this discussion, the Appeals Chamber has the authority to convict a defendant after the defendant has been found not guilty by the judges who have observed all the witnesses. While the Statute appears to protect an individual from double jeopardy, one can readily observe that this protection is illusory.

F. *Exclusionary Rule*

In the United States, the exclusionary rule prohibits the admission of evidence obtained in violation of the Fourth, Fifth, and Sixth Amendments.[94] This issue is covered in the ICC founding documents:

93. Pattern Criminal Jury Instructions for the District Courts of the First Circuit § 1.06, available at http://www.med.uscourts.gov/practices/crpji.97nov.pdf.

94. *See, e.g.*, Weeks v. United States, 232 U.S. 383 (1914); Mapp v. Ohio, 367 U.S. 643 (1961).

> Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:
>
> a) The violation casts substantial doubt on the reliability of the evidence; or
>
> b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.[95]

Whereas in the United States the purpose of the exclusionary rule is to prohibit police misconduct, the Rome Statute has different purposes. In Article 69(7)(a), the concern is "the reliability of the evidence" rather than the problems arising from the violation. [96] In subsection (b), the concern is "the integrity of the proceedings."[97] This is more in line with previous justification for the exclusionary rule. However, the Statute requires that the integrity be seriously damaged. Evidently, damage to the court's integrity not rising to the level of "serious" is acceptable. Article 69(7) simply does not provide the protections against illegally obtained evidence to which Americans are accustomed. Recently, the Appeals Chamber denied an appeal challenging the lawfulness of an arrest on procedural grounds of timely filing.[98] Typically, in the United States, one can raise a constitutional violation at any time.[99] These constitutional protections are so important that procedural limitations to raising them are very limited. Furthermore, the existence of these constitutional protections would not be considered at the ICC in determining admissibility.[100] Also, the ICC has the authority to request the submission of evidence for the determination of the truth.[101] In essence, at the ICC, like many civil law jurisdictions, the search for the truth is more important than the protection of individual

95. Rome Statute, *supra* note 5, at art. 69(7).

96. *Id.*

97. *Id.*

98. Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07-2259, Judgment on the Appeal of Mr. Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings" (July 19, 2010).

99. *See, e.g.*, WASH. R. APP. P. 2.5, TEX. R. APP. P. 44.2.

100. Rome Statute, *supra* note 5, at art. 69(8); ICC R. PROC. & EVID. 63(5).

101. *Id.* at art. 69(3).

rights. While this may be a worthy goal, it comes at a price—the lessening of individual protections against government intrusions.

IV. CONCLUSION

The selection of judges who have a strong background and experience in the effective and efficient operation of a trial court is a crucial requirement before the United States becomes a signatory to the Rome Statute. While some individuals may not possess that background, a comprehensive education and training program for judges can be developed to overcome that deficiency. The need for appropriate case management skills is apparent at the ICC, but can be easily addressed if the judges embark on an appropriate educational program and thorough and systematic review of court procedures.

The language contained in the Rome Statute seems to offer the same protections contained in the U.S. Constitution. However, it is clear that the constitutional rights enjoyed by citizens of the United States are not similarly protected by the Statute as interpreted by the judges of the International Criminal Court. It is not being argued here that these interpretations are legally wrong or even inappropriate. They are, however, unacceptable from an American perspective. These interpretations simply run counter to the expectations of liberty that we as a people have.

While the hopes and dreams embodied by the Rome Statute are worthy goals, they must be viewed carefully before the United States submits to the jurisdiction of the court. President Clinton warned us correctly that we should observe the court before adopting the Rome Statute. Time has shown us that the court has not met the minimal requirements that citizens of the United States demand. Until those changes have been demonstrated, the United States should continue to observe the court from afar.

STRAIGHT IS BETTER: WHY LAW AND SOCIETY MAY JUSTLY PREFER HETEROSEXUALITY

GEORGE W. DENT, JR.*

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I. INTRODUCTION

America (like many other countries) is embroiled in a culture war over homosexuality. The homosexual movement demands the end of "heteronormativity"—the social and legal preference for heterosexuality.[1] It insists that "Gay Is Good"—just as good as heterosexuality.[2] This article presents a defense of heteronormativity; it argues that straight is better. Part II summarizes the debate over the legal treatment of homosexuality. Part III discusses the legitimacy of value judgments in the law. Part IV discusses the "new natural law" philosophy of sexuality propounded by several Catholic philosophers. Part V advances the argument for a social and legal preference for heterosexuality and traditional marriage. Part VI addresses the relevance of gender relations to the debate over marriage and heteronormativity. Part VII considers the implications of an appropriate social and legal preference for heterosexuality.

II. THE CONFLICT OVER HOMOSEXUALITY

America, like every other society in history throughout the world, has always preferred heterosexuality over homosexuality. Homosexual acts were once a capital offense in many states, and only recently did the Supreme Court overturn the few remaining state laws making homosexual acts a crime.[3] Many people now insist on the removal of not just all other legal disabilities of homosexuality, but of all legal preferences for heterosexuality, an attitude dubbed "heteronormativity."

1. The term "heteronormativity" was apparently coined in Michael Warner, *Introduction: Fear of a Queer Planet*, 29 SOCIAL TEXT 3 (1991). It does not entail suppression of alternative sexualities.

2. *See* Chai Feldblum, *Gay Is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139 (2005).

3. Lawrence v. Texas, 539 U.S. 558 (2003).

This demand covers many issues, two of which are particularly controversial. First, it insists on equal treatment of same-sex and opposite-sex couples in the law of marriage. Second, it wants a broad prohibition of discrimination against homosexuals by either government or private entities in employment, housing, services, and many other fields. Businesses, individuals, and even religious organizations would face legal pressures not to act upon, or even to express belief in, a preference for heterosexuality.[4] These demands are based in part on the Constitution, but to a greater extent they are simply normative. That is, the gay movement insists that, even if the Constitution does not mandate its program, justice does.

Demands for "marriage equality" provoke a reply that children fare best (and thus society benefits) when raised by their biological parents who are married to each other.[5] Evidence of this is so strong that the traditional family has gained support from many liberals who once considered such support discriminatory.[6] To encourage men and women who will have children to marry and stay married, the law extends both material benefits and an expressive (or

4. *See infra* notes 28–92 and accompanying text.

5. See Marsha Garrison, Marriage Matters: What's Wrong with the ALI's Domestic Partnership Proposal, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 305, 324–26 (Robin Fretwell Wilson ed., 2006) [hereinafter RECONCEIVING THE FAMILY] (citing dozens of studies and concluding that "[m]arriage is also associated with important advantages to children"); Wendy D. Manning & Kathleen A. Lamb, Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families, 65 J. MARRIAGE & FAM. 876, 885 (2003) (adolescents living with their two biological married parents "generally fare better than teenagers living in any other family type"); Kristin Anderson Moore et al., Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do about It?, CHILD TRENDS RESEARCH BRIEF 6 (June 2002) ("the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage"); Blaine Hardin, 2-Parent Families Rise After Change in Welfare Laws, N.Y. TIMES, Aug. 12, 2001, at A1 ("a powerful consensus has emerged in recent years among social scientists . . . . From a child's point of view, according to a growing body of social research, the most supportive household is one with two biological parents in a low-conflict marriage").

6. Isabel V. Sawhill, *The Behavioral Aspects of Poverty*, THE PUB. INTEREST, Fall, 2003, at 79, 87–88 ("As evidence of the benefits to children of growing up in a two-parent family has strengthened, liberals have become less likely to question the value of marriage."). *See also* THE OBSERVER (London), Nov. 19, 2000, at 1 (reporting that "the pro-marriage movement is gaining strength on both sides of the Atlantic").

symbolic) preference to marriage. Recognition of same-sex marriage ("SSM") would impair the benefits of marriage in various ways, including crippling its social prestige.[7] However, some claim that recognizing SSM would inflict no serious harm but would actually raise the prestige of marriage.[8]

In sum, many Americans are conflicted about the legal status of homosexuality. They believe homosexuals should not be treated as criminals or moral reprobates and should not generally suffer discrimination. However, they also value traditional marriage and religious freedom and are loath for the law to declare, in effect, that mainstream religious attitudes toward homosexuality are themselves immoral. Thus many Americans struggle to find a proper balance between these competing considerations.

III. THE LEGITIMACY OF VALUE JUDGMENTS IN THE LAW

Many political thinkers argue for governmental neutrality about matters of lifestyle and the meaning of "the good life,"[9] a policy called "moral bracketing."[10] This policy is not merely debatable but unachievable. The very Preamble to the Constitution states that its purpose is partly to "promote the general Welfare."[11] This is hardly surprising. The Declaration of Independence proclaims that "all Men . . . are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness [and] That to secure these Rights, Governments are instituted among Men[.]"[12] Government can hardly

7. *See infra* notes Part VII-A-1.

8. *See* J ONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA 86 (2004); ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 111–12, 179 (1995) (stating that recognition of SSM would "buttress the ethic of heterosexual marriage").

9. *See* BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 349–78 (1980); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 90-100 (1977); JOHN RAWLS, POLITICAL LIBERALISM 173–211 (1971); Feldblum, *supra* note 2, at 147–49; Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233 (2004).

10. CARLOS A. BALL, THE MORALITY OF GAY RIGHTS: AN EXPLORATION IN POLITICAL PHILOSOPHY 1(2003).

11. U.S. CONST., Preamble.

12. THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

"promote the general Welfare" or secure the right to pursue happiness without having some idea of what is "the good life."

Making moral judgments is what law is all about. The Constitution's purpose to "promote the general Welfare" entails a moral judgment. Most governments have functioned for the benefit of a small elite, but the Framers chose a different moral principle. Criminal laws, such as bans on homicide, theft, and perjury, rest on a judgment that these acts are immoral. Likewise government makes moral judgments about what behavior deserves to be subsidized or taxed, to receive expressive (or symbolic) support or disapproval, and what values shall be promoted or discouraged in public education.

Sensible scholars acknowledge that moral neutrality is not only undesirable but impossible. As William Galston says, "Like every other political community" the liberal state "embraces a view of the human good that favors certain ways of life and tilts against others."[13] Kent Greenawalt says that "government promotes all sorts of points of view over others."[14] Michael Sandeland others express similar views.[15] Natural law theorists, of course, agree.[16] Some gay advocates claim that the law not merely *may* but *should* make moral judgments about sexuality. Carlos Ball argues "in favor of the proposition that the state has positive obligations to recognize and support good and valuable intimate relationships and concomitantly against the idea that the state *only* has obligations of non-interference vis-à-vis those

13. WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERALSTATE3 (1991).

14. KENT GREENAWALT, 2 RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 9 (2008).

15. *See* Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521 (1989); *see also* BALL, *supra* note 10, at 34 (referring to the ubiquity of evaluations of the good engaged in by even the most liberal of states"); PATRICK NEAL, LIBERALISM AND ITS DISCONTENTS, ch. 2 (1997); MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW 67-69 (1988).

16. *See* Gerard V. Bradley, *Law and the Culture of Marriage*, 18 NOTRE DAME J.L. ETHICS &PUB. POL'Y 189, 194 (2004) ("Law supports certain institutions of civil society for the sake of the common good . . . . Law supports these institutions for the sake of genuine human flourishing.").

relationships."[17] He acknowledges that these obligations "raise . . . issues that are moral at their core."[18]

The inevitability of moral judgments in law-making requires resort to metaphysics, to some source of norms. Fact and reason alone cannot generate norms.[19] Fact and reason cannot tell that people are "created equal" and "endowed . . . with certain unalienable Rights[.]"[20] Indeed, they would tell us that people are *unequal* in every way in which science can measure them. Fact and reason cannot tell us what social distribution of wealth to strive for or how to weigh the interests of future generations.[21]

Inter alia, the law must decide what is intrinsically good for human beings. This is the "happiness" cited in the Declaration of Independence and called human "flourishing" by many natural law theorists. The components of flourishing are called intrinsic or basic goods.[22] Goods that are intrinsic are good in themselves, as opposed to instrumental goods, which are good only in that they are conducive to some other good. Medicine, for example, is instrumentally good because it promotes health, which is a good in itself. The nature—or even existence—of intrinsic goods cannot be proved by fact and logic, nor deduced or inferred from other truths. Rather, "the practical intellect

17. BALL, *supra* note 10, at 17 (emphasis in original).

18. *Id.* at 29.*See also* Feldblum, *supra* note 2.

19. *See* ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND 194 (1987) ("Reason cannot establish values, and its belief that it can is the stupidest and most pernicious illusion."); KARL R. POPPER, THE OPEN SOCIETY AND ITS ENEMIES 53 (1947) ("It is impossible to derive norms or decisions from facts."); Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381, 421–22 n.60 (1992) (stating that government must make decisions concerning many controversial issues that cannot be decided on empirical grounds).

20. THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

21. For a good, brief explanation of the inability of fact and reason to answer policy questions, see Stanley Fish, *Are There Secular Reasons?*, THE N.Y. TIMES OPINIONATOR(Feb. 22, 2010, 6:00 PM), http://opinionator.blogs.nytimes.com/2010/02/22/are-there-secular-reasons/.

22. Robert George refers to "'basic human goods'—that are our most fundamental reasons for choice and action."ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 3 (1999). S*ee also* BALL, *supra* note 10, at 7 (referring to "basic needs and capabilities that are indispensable for the leading of full human lives").

may grasp them, and practical judgment can affirm them without the need for a derivation."[23]

Of course, people disagree about the nature of intrinsic goods, and about the existence of human rights. Bentham scorned the idea of natural rights as "nonsense upon stilts."[24] Many cultures have notions of human goods very different from those now accepted in America. Warrior cultures, for example, consider the honor and glory accorded valiant soldiers to be the highest goods.[25] And, of course, Americans disagree about the morality of homosexuality. Rather than trying to bracket the moral issue, some gay activists now argue that homosexuality is morally equivalent to heterosexuality.[26]

In free societies, government does not promote human flourishing by ordering people exactly how to live. It is an axiom for us that broad freedom to shape one's life is a necessary condition to flourishing. That is why the Declaration of Independence lists "Liberty, and the pursuit of Happiness" among our "unalienable Rights."[27] It is, however, entirely appropriate for government to encourage people to behave so as to achieve true happiness, to promote their well-being "as judged by themselves,"[28] because "people left to their own devices will not be in a position to lead the most valuable life available to them."[29] And "[o]ften people's preferences are unclear and ill-informed, and their choices will inevitably be influenced by default rules, framing

23. George, *supra* note 22, at 45.

24. Jeremy Bentham, *Anarchical Fallacies, in* 2 JEREMY BENTHAM, WORKS 501 (J. Bowring, ed. 1843) ("Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense—nonsense upon stilts.").

25. *See* WILLIAM J. GOODE, THE CELEBRATION OF HEROES: PRESTIGE AS A CONTROL SYSTEM (1978).

26. *See* BALL, *supra* note 10; Feldblum, *supra* note 2; Vincent J. Samar, *The Case for Treating Same-Sex Marriage as a Human Right and the Harm of Denying Human Dignity, in* WHAT'S THE HARM?: DOES LEGALIZING SAME-SEX MARRIAGE REALLY HARM INDIVIDUALS, FAMILIES OR SOCIETY? 239, 239 (Lynn D. Wardle, ed. 2008) [hereinafter WHAT'S THE HARM?] (arguing that "same-sex marriage should be seen as a human right . . . under universal morality").

27. THE DECLARATION OF INDEPENDENCE, para. 2 (1776).

28. CASS R. SUNSTEIN & RICHARD H. THALER, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 80 (2008).

29. Stephen A. Gardbaum, *Why the Liberal State Can Promote Moral Ideals After All*, 104 HARV. L. REV. 1350, 1365 (1991).

effects, and starting points."[30] Family law is one area where government so behaves, performing what has been called a "channeling function."[31]

Law can influence people's conduct when public opinion is ambivalent or uncertain, but it invites trouble when it opposes established norms. The classic American example of this truth is Prohibition. Most Americans did not consider consumption of alcohol immoral. As a result, in much of America Prohibition was openly flouted. Moreover, if law disdains public morality, public respect for the law in general suffers. Respect for the law waxes when citizens believe that the law in general is so reasonable that they can assume, without explanation, that each law is reasonable and should be obeyed.[32] If many laws offend public morality, however, people grow more skeptical and unwilling to obey the law, especially when it is against their interest to do so. Again, Prohibition offers an illustration. Not only was Prohibition itself ignored, but crime in general proliferated because more people ceased to feel a duty to abide by the law, and the general public became more tolerant of those who broke the law.

Morality can exist without religion, but most people throughout history, and most Americans today seek moral guidance in religion. Nothing in American law makes this illegal or improper so long as any resulting law or government act does not create an establishment of religion[33] or violate any other constitutional demand.

30. Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1159 (2003).

31. *See* Carl Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992).

32. Seana Sugrue, *The Erosion of Marriage: A Pyrrhic Victory?*, *in* WHAT'S THE HARM?, *supra* note 26, at 297, 299 ("A society whose citizens are law-abiding tend to judge right and wrong conduct as being closely aligned with legal or illegal conduct. Moreover, . . . [a]s the state increasingly claims the power to define rights, it tends to set the terms of inter-institutional mediation.").

33. *See* U.S. CONST., amend. I ("Congress shall make no law respecting an establishment of religion . . . ."). As President [then Senator] Obama has said: "[S]ecularists are wrong when they ask believers to leave their religion at the door before entering into the public square . . . . [T]o say that men and women should not inject their 'personal morality' into policy debates is a practical absurdity. Our law is by definition a codification of morality . . . ." Barack Obama, United States Senator, Keynote Address at Call to Renewal Conference on Building a Covenant

Indeed, from America's beginnings our concept of human rights has been based on religion. The Declaration of Independence proclaims that "all men . . . are endowed by their Creator with certain unalienable Rights[.]" The founders considered virtue and religion essential to a free society because they preserve "the moral conditions of freedom."[34] Religion propelled the abolition and civil rights movements.[35] Individuals can be moral without being theists, but it is not clear that a society can agree on an effective moral framework not based on religion.[36] Debate over the legal treatment of homosexuality and marriage cannot be resolved without resort to morality. For many people moral norms are found in religion, and that is not unconstitutional or inappropriate.

Value judgments in the law may not deny equal protection.[37] Just as the law cannot avoid normative judgments, so it cannot treat everyone the same; every law discriminates in some way. In many American jurisdictions, for instance, possession of an unregistered gun is a crime even though many people do not consider it immoral. The norm of equality demands that likes be treated alike, but what circumstances or acts do we consider alike? Because possession of an unregistered gun is deemed an undesirable act in some places, punishment for that act does not violate the norm of equal protection.

Thus "equality" is more a label attached to a conclusion than an analytical tool.[38] The history of the Fourteenth Amendment gives some idea what kinds of status or behavior should be treated equally. The paradigm

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for a New America, June 28, 2006, *available at* http://www.nytimes.com/2006/06/28/us/politics/2006obamaspeech.html.

34. Thomas G. West, *Religious Liberty*, CLAREMONT INST., Jan. 1997, *available at* http:www.claremont.org/writings/970101west.html.

35. *See* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 227-29 (1993).

36. *See* MICHAEL J. PERRY, TOWARD A THEORY OF HUMAN RIGHTS: RELIGION, LAW, AND COURTS 114-29 (2006) (arguing that efforts to establish a secular ground for human rights have not succeeded).

37. U.S. CONST. amend. XIV, § 1 ("nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws").

38. For this reason, the idea of equality has been called "empty." *See* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

example—the issue that the Equal Protection Clause was specifically designed to address—is race, but other distinctions in the law—including distinctions based on conduct rather than status—have been held to violate that clause.[39] For present purposes, then, the question is whether homosexuality and SSM should be deemed just as desirable or valuable as heterosexuality and traditional marriage. Equal treatment cannot be assumed; it must be justified.

A law's value judgments need not be binary. The law avails of infinite gradations, with consequences ranging from severe criminal penalties to important material and symbolic support. So also the law might treat different kinds of intimate relationships and conduct not just as good or bad, but it can make shaded determinations of better and worse.

Americans enjoy many rights. Some are bolstered by a plethora of ancillary laws. The paradigm is racial discrimination which is prohibited in both government and private activity by innumerable federal, state, and local laws. However, even this right is not absolute. The Supreme Court has condoned some kinds of race discrimination.[40]And most rights receive little or no secondary support. Although the Constitution confers a right to bear arms,[41] for example, no law forbids discrimination by individuals or private organizations (including businesses) against people who own or bear arms.

IV. THE CATHOLIC NATURAL LAW PHILOSOPHY OF SEXUALITY

Several philosophers propound a natural law theory of the intrinsic good of marriage as "a two-in-one flesh communion of persons that is consummated and actualized by acts of the reproductive type"[42]—i.e., uncontracepted coitus.

39. *See*J OHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.3 (7th ed. 2004) (discussing application of the Equal Protection Clause to racial and other classifications).

40. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding some racial preferences in law school admissions).

41. U.S. CONST., amend II.

42. Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301, 305 (1995).

In choosing to perform nonmarital orgasmic acts, including sodomitical acts—irrespective of whether the persons performing such acts are of the same or opposite sexes (and even if those persons are validly married to each other)—persons necessarily treat their bodies as *means* or *instruments* in ways that damage their personal (and interpersonal) integrity; thus, regard for the basic human good of integrity provides a conclusive moral reason not to engage in sodomitical and other nonmarital acts.[43]

Although this doctrine is not overtly religious, most of its leading proponents in America are Roman Catholics, and it contains elements that most Protestants and Jews reject, such as treating sex with contraception or any sexual act other than vaginal intercourse within marriage as immoral. Most Americans agree about the intrinsic good of a man and a woman conceiving, bearing, and raising a child within marriage, and to that extent they presumably agree on the special status of marital intercourse. However, it does not necessarily follow—and most Americans would not agree—that all other sexual acts "damage [people's] personal (and interpersonal) integrity" and are immoral.

Like any value system, the Catholic natural law doctrine of human sexuality can be neither confirmed nor refuted as can a mathematical computation.[44] However, it seems to fail a requirement of any theory of natural law, a requirement accepted by Catholic natural lawyers themselves,[45] that it be based on human nature and, therefore, comprehensible to people of all faiths.[46] The Catholic rejection of all sex not of

43. *Id.* at 302 (emphasis in original) (footnotes omitted).*See also* John Finnis, *Law, Morality, and "Sexual Orientation"*, 69 NOTRE DAME L. REV. 1049, 1064-69 (1994); Germain G. Grisez et al., *Practical Principles, Moral Truth, and Ultimate Ends*, 32 AM. J. JURIS.99 (1987).

44. Thus Robert George, following Germain Grisez, states that the "new" natural law posits "first principles" that "direct human action toward more-than-merely-instrumental ends or purposes—'basic human goods'—that are our most fundamental reasons for choice and action." GEORGE, *supra* note 22, at 3.

45. Thus Thomas Aquinas said: "[L]aw . . . is nothing other than a certain dictate of reason for the Common Good, made by him who has the care of the community and promulgated." THOMAS AQUINAS, SUMMA THEOLOGIAE I-II, at 145 (R. J. Henle, S.J. ed., 1993). He did not tie it to any particular religion.

46. *See*THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 599 (Robert Audi ed., 2d ed. 1995) (referring to claims that natural law is "a doctrine of law that all civilized

the "reproductive type" has attracted very little support except among traditional Catholics. This fact alone may not invalidate their doctrine, but it raises grave doubt about it and prompts the question why non-Catholics widely disapprove it.

The doctrine seems arbitrary in allowing contraception by abstinence but not contraceptive devices or sex other than vaginal intercourse. If there is a duty to reproduce as often as possible, then abstinence or use of the rhythm method of contraception would be immoral, but that is not the Catholic position. If these are permissible, why may a couple not use contraceptive devices or engage in non-reproductive sex? In non-reproductive sex can a couple can still express their love for each other and thus solidify their marriage, which can benefit not only themselves but their children, born and as yet unborn. The Catholic natural law doctrine offers a reason for law and society to favor heterosexuality, but it is not a doctrine most Americans accept.

V. SOCIETY MAY LEGITIMATELY PREFER HETEROSEXUALITY AND TRADITIONAL MARRIAGE

A. *The Intrinsic Good of Human Life, the Creation of Human Life, and the Family*

1. Human Life and the Biological Family

Most people believe that human life is intrinsically good—life is generally considered a blessing, not a curse. Correlatively, the creation of human life is intrinsically good for the children created. The creation of human life is also universally regarded as an intrinsic good for parents. Birth of a child is almost always celebrated, and it is a tragedy when a child is stillborn. As Stephen Carter says, "Most people would see the value of children or the horror of murder without the need for explanation. It is not merely an

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peoples would recognize" and can "be known by reason alone, without revelation, so that the whole human race could know how to live properly").

instinct but a part of their vision of the good."[47] Sterility of a married couple is typically bewailed as a misfortune. Many couples that have difficulty in conceiving a child make heroic efforts to do so, often at great expense and enduring humiliating and painful procedures. When life is created, "most parents are intrinsically motivated to care for their children."[48]

The bond with biological parents is also intrinsically good for children. Love of children for their parents is universal and is considered as natural as the love of parents for their children. Children separated from their parents often strain to find them, even if they have never known them.[49] Loss of a parent is universally regarded a tragedy and is typically traumatic. Through the bond with their parents children also have a bond with other members of their biological family—siblings, aunts, uncles, grandparents, cousins, etcetera—that are also universally considered important. As one scholar put it:

> [C]hildren and their descendants who don't know their genetic origin cannot sense themselves as embedded in a web of people past, present, and in the future through whom they can trace the thread of life's passage down the generations to them . . . . Same-sex marriage puts in jeopardy the rights of children to know and experience their genetic heritage in their lives and withdraws society's recognition of its importance to them, their wider family, and society itself . . . . There are obligations

47. Stephen L. Carter, *Liberal Hegemony and Religious Resistance: An Essay on Legal Theory*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 25, 47 (Michael W. McConnell, et al. eds., 2001). Empirical evidence supports Carter. Asked, "If you had it to do over again, would you or would you not have children?," 91% of American parents polled said yes; only 7% said no. Moreover, when asked, "If you had to do it over again, how many children would you have, or would you not have any at all?," only 24% of childless adults over 40 wanted no children, and only 5% were undecided. *See* Bryan Caplan, *The Breeders' Cup*, WALL ST. J., June 19-20, 2010, at W1.

48. Clare Huntington, *Familial Norms and Normality*, 59 EMORY L.J. 1103, 1142 (2010).

49. See *infra* notes 81–82 and accompanying text (discussing adopted children's desire to contact their biological parents).

> on society not to create genetic orphans, which is what we would be doing.[50]

Like any intrinsic human good (such as friendship or music), bearing and raising children do not appeal to some people. These people are not immoral or demented. For reasons we don't understand very well, some people are different. If they do not harm others, we should generally tolerate their differences. In some cases we may even honor their behavior. Some who eschewed friendship and became hermits have been canonized. That does not invalidate the norm of friendship. Schools, for instance, encourage children to develop friends, and they inquire whether something is wrong with a child who has no friends. However, if after inquiry it seems that a child is a natural loner who will never value friendship, we should accept that. Similarly, we can encourage people to have children (responsibly), but accept their refusal to do so.

In many species males mate with females but play no role in raising the offspring. Humans have evolved differently. Because human infants are helpless for an unusually long time, they need more care than other infant animals. Human infants are more likely to survive if the father stays with the mother and helps raise the children. For this reason, humans have evolved a tendency to mate for long periods of time, often for life. There is also synergy between the bonding of male and female and the bearing of children: the presence of children helps to keep a male and female together.[51]

Adoption is recognized as valuable to the adopted children, to their adoptive parents, and to society. However, adoption is regarded as a tragic necessity when the biological parents are unable or unwilling to provide their children with adequate care, not as equal to the biological family.

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50. Margaret Somerville, Testimony to Legislative Committee on Bill C-38, 38th Parliament, Canada, June 2, 2005, *quoted in* Louis DeSerres, *Preserve Marriage—Protect Children's Rights*, *in* WHAT'S THE HARM?, *supra* note 26,at 103, 108–09. *See also* MARGARET SOMERVILLE, THE ETHICAL IMAGINATION: JOURNEYS OF THE HUMAN SPIRIT 154 (2006).

51. *See* RICHARD A. POSNER, SEX AND REASON 312 (1992).

Preference for the biological family is manifested in laws and practices so uncontroversial that we hardly think about them. Imagine a couple petitions a court for custody of a newborn child because, although the biological parents seem adequate, the petitioners are wealthier, better educated, cleaner, neater, more committed to parenting, and therefore likely to do a better job raising the child than the biological parents. No court in the country would entertain this petition, and Americans would be shocked if it were granted. Biological parents are strongly presumed to be entitled to custody of their children. This presumption is overcome only by clear proof of actual abuse or neglect.

Law and custom go even further: suppose in the preceding hypothetical the biological parents agree to hand the child to the other couple in exchange for money. The agreement would be unenforceable and quite possibly a basis for a criminal action against all four adults. The child might be seized from the biological parents, but custody would certainly not be granted to the would-be baby buyers. Again, Americans would be horrified if the law upheld such an agreement.

There is an instructive real-life experiment in severing parents from the raising of their biological children. In some Israeli kibbutzim, children were cared for in group homes. Parents and children met only at occasional visits. Conditions for the experiment were ideal; the community was sociologically and politically homogeneous; there were no ethnic, religious, or class conflicts. Nonetheless, as soon as this practice ceased to be an economic necessity parents renounced it—they wanted their children to live with them, not in a group home.[52] The biological family was stronger than communal ideology.

By recognizing marriage society can also acknowledge the nuclear family as an economic unit. Only the mother can become pregnant, bear children, and nurse them. For the benefit of the family and of society there must be a division

52. *See* Karl Zinmeister, *Actually, Villages Are Lousy at Raising Pre-School Children*, AMERICAN ENTERPRISE, May/June 1996, at 53, 54 (stating that in nearly all kibbutzim "[i]nfant care has been shifted back to parents").

of labor, with the father performing other functions. Society recognizes this fact by, *inter alia*, treating the family as a single taxable entity.[53] Homosexual couples are not an economic unit in the same way. They may *choose* a division of labor, but it is not forced on them by biology.

2. Homosexuals and the Rights of Children Concerning Their Biological Parents

A same-sex couple can adopt a child, but that possibility hardly compels validation of SSM. The creation of human life is a scientific fact. Marriage is tied to it. Adoption—whether by a same-sex couple or anyone else—is not. A homosexual couple can obtain children in many ways, but they cannot create children by their sexual union. Thus a same-sex union is in this sense the opposite of a reproductive unit—the parties choose a relationship that intrinsically rejects the creation of human life.

Adoption is a legal act. A child may be adopted by, or given to the legal custody or guardianship of, any person or group whom the law allows; there is no good reason to tie this process to marriage. For example, a widowed parent might want another adult (possibly a close relative, friend, or business associate) to share legal custody and care for a child while the parent travels for work, but the two adults may have no desire to marry. Also, while adoption can be a great blessing for children whose parents are unable or unwilling to care for them, even adoption by a traditional married couple is not equal to the biological family.[54]

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53. *See* JOSHUA D. ROSENBERG & DOMINIC L. DAHER, THE LAW OF FEDERAL INCOME TAXATION §§ 1.04, 3.07, 7.04[5], 9.04[5] (2008) (discussing provisions of tax code dealing with marriage and divorce).

54. *See* David M. Brodzinsky, *Long-Term Outcomes in Adoption,* 3 THE FUTURE OF CHILDREN 153, 153 (Spring, 1993) ("A selective review of the literature indicates that, although most adoptees are well within the normal range of functioning, as a group they are more vulnerable to various emotional, behavioral, and academic problems than their nonadopted peers living in intact homes with their biological parents."); Gail Slap et al., *Adoption as a Risk Factor for Attempted Suicide During Adolescence,* 108 PEDIATRICS330 (Aug. 2001) ("Attem3pted suicide is more common among adolescents who live with adoptive parents than among adolescents who live with biological parents."); Michael Wierzbicki, *Psychological Adjustment of Adoptees: A Meta-Analysis,* 22 J. CLINICAL CHILD PSYCH. 447 (1993) (meta-analysis of 66 published studies finding that adoptees had significantly higher levels of

Further, adoption by a same-sex couple may not be equal to adoption by a traditional married couple. It is claimed that empirical studies show children raised by same-sex couples fare just as well as other children,[55] but these claims are dubious. No study has compared children raised by same-sex couples to children raised by their married, biological parents.[56] The children in these studies are often compared with children raised by single mothers.[57] Clearly the latter do not do as well as children raised by their married, biological parents, so on its face the claim carries little weight. Many children in homosexual homes are the

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maladjustment, externalizing disorders, and academic problems that nonadoptees); Matthew D. Bramlett et al., *The Health and Well-Being of Adopted Children*, 119 PEDIATRICS, Supp. 2007, at S54 ("Adopted children are more likely than biological children to have special health care needs, current moderate or severe health problems, learning disability, developmental delay or physical impairment, and other mental health difficulties."). *See also* SHARON VANDIVERE ET AL., ADOPTION USA: A CHARTBOOK BASED ON THE 2007 NATIONAL SURVEY OF ADOPTIVE PARENTS 5 (2007), which found *inter alia*:

> [C]ompared to the general population of children, adopted children are more likely to have ever been diagnosed with—and to have moderate or severe symptoms of—depression, ADD/ADHD, or behavior/conduct disorder . . . . [P]arental aggravation (for example, feeling the child was difficult to care for, or feeling angry with the child) . . . is more common among parents of adopted children than among parents in the general U.S. population (11 compared with 6 percent).

55. *See* Gregory N. Hayek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, 61 AM. PSYCH. 607, 611 (2006) (stating that "[e]mpirical studies comparing children raised by sexual minority parents with those raised by otherwise comparable heterosexual parents have not found reliable disparities in mental health or social adjustment"); BALL, *supra* note 10, at 168 ("The social science literature indicates that lesbians and gay men as a group meet their responsibilities toward their children as well and as completely as do heterosexual parents.") (footnote omitted).

56. This was admitted by the Plaintiff's expert witness in *Perry v. Schwarzenegger*, *See* Brief of Defendant-Intervenors-Appellants at 89, Perry v. Schwarzenegger, 704 F.Supp. 2d 921 (N.D. Cal. 2010).

57. *See* ELIZABETH MARQUARDT, INST. FOR AM. VALUES, THE REVOLUTION IN PARENTHOOD: THE EMERGING GLOBAL CLASH BETWEEN ADULT RIGHTS AND CHILDREN'S NEEDS 22 (2006) ("[T]he biggest problem by far is that the vast majority of these studies compare single lesbian mothers to single heterosexual mothers—in other words, they compare children in one kind of fatherless family with children in another kind of fatherless family.") [hereinafter THE REVOLUTION IN PARENTHOOD]. *See also* A. Dean Byrd, *Conjugal Marriage Fosters Healthy Human and Societal Development, in* WHAT'S THE HARM?, *supra* note 26, at 16 ("The studies on same-sex parenting . . . are basically restricted to children who were conceived in a heterosexual relationship whose mothers later divorced and self-identified as lesbians. It is these children who were compared to divorced, heterosexual, mother-headed families.").

biological offspring of one parent, with the other adult as a step-parent. In fables, step-parents are typically hostile to their step-children.[58] Whether step-parents are less salubrious than other parents is unclear, but the possibility that they are is another reason for caution about gay parenting. Homosexual couples with children often experience competition or jealousy over parenting, and the children often exhibit a preference for or "primary bond" with one parent.[59] If one is the child's biological parent, it would be natural for the child to identify that adult as the real parent.[60]

Most studies of same-sex parenting have small, self-selected samples of children who have not been in the household very long, and who have been evaluated at one time (rather than followed for a substantial period).[61] This is not a result of any impropriety by the investigators. Until

58. *See* BRUNO BETTELHEIM, THE USES OF ENCHANTMENT: THE MEANING AND IMPORTANCE OF FAIRY TALES 66–73 (1975) (discussing "The Fantasy of the Wicked Stepmother").

59. *See* Claudia Ciano-Boyce & Lynn Shelley-Sireci, Who Is Mommy Tonight? Lesbian Parenting Issues, 43 J. HOMOSEXUALITY No. 2, at 1, 10-11 (2002) (discussing how children raised by lesbian adoptive couples typically chose one parent as the primary caregiver, causing "pain and conflict for and between the lesbian partners"); Susanne Bennett, Is There a Primary Mom? Parental Perceptions of Attachment Bond Hierarchies Within Lesbian Adoptive Families, 20 CHILD & ADOLESCENT SOC. WORK J. No. 3, at 159, 166-69 (2003) (discussing adoptive children's preference for one parent in adoptive lesbian couples).

60. *See* DeSerres, supra note 48, at106 ("This biological imbalance can also be the source of numerous tensions and conflicts that are not likely to benefit the child . . . .").

61. A group of 70 prominent scholars from all relevant academic fields recently concluded: "The current research on children raised by [same-sex couples] is inconclusive and underdeveloped—we do not yet have any large, long term studies that can tell us much about how children are affected by being raised in a same-sex household." WITHERSPOON INST., MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES 18 (2006) [hereinafter MARRIAGE AND THE PUBLIC GOOD]. *See* Lynn D. Wardle, *Considering the Impacts on Children and Society of "Lesbigay" Parenting*, 23 QUINNIPIAC L. REV. 541 (2004) [hereinafter Wardle, *Considering the Impacts*] (listing methodological flaws of these studies, especially use of small, self-selected samples). *See also* Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 897 [hereinafter Wardle, *Potential Impact*]. The most recent study to claim to prove the success of same-sex parenting is Laura Langbein & Mark A. Yost, Jr., *Same-Sex Marriage and Negative Externalities*, 90 Soc. Sci. Q. 292 (2009). It has the same methodological shortcomings as the prior studies. *See* Douglas W. Allen, Let's Slow Down: Comments on Same-Sex Marriage and Negative Externalities 3 (Dec., 2010) *available at* http://ssrn.com/abstracts=1722764.

recently few examples existed (especially for gay male homes),[62] so a large, longitudinal study is not yet possible. Children cannot be examined without the consent of their guardians, so a self-selected sample is inevitable.

Further, the couples in these studies are intrepid pioneers, keenly aware of the difficulties they face and determined to overcome them. In many social experiments such pioneers succeed, but less impressive people who later try the same thing are less successful.[63] If indeed the pioneers of same-sex parenting have been successful, that success may not be matched by later efforts. In sum, the studies invoked by the gay movement cannot support any confident conclusions.

Moreover, other studies and evidence suggest less happy results. The claim that living with a same-sex couple does not affect a child's sexuality is improbable. Experts recognize that parents' sexuality can hardly *help* but affect their children.[64] Even young children may sense, or be told by others, that their guardians are unusual—queer—thereby beginning their awareness of sexuality at an unusually early age. There is even some evidence that children raised by homosexuals are more likely to become

62. *See* Charlotte Patterson, *Lesbian and Gay Parenting and Their Children: Summary of Research Findings* 15, *available at* http://www.apa.org/pi/lgbt/resources/parenting-full.pdf (reporting only two longitudinal studies of lesbian parenting and none of gay male parenting). *See also* Byrd, *supra* note 57, at 16 ("Studies of children raised by male couples are virtually non-existent."). The lack of large-scale studies stems largely from the small number of children living in homosexual households, a condition likely to persist, especially with respect to gay male couples. *See infra* notes 168-69 and accompanying text.

63. *See* DIANE RAVITCH, THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION (2010).

64. *See* A. Dean Byrd, *Gender Complementarity and Child-Rearing: Where Tradition and Science Agree*, 6 J. L. & FAMILY STUD. 213, (2004) ("Children learn about male-female relationships through the modeling of their parents."); Bruce Ellis, *Of Fathers and Pheromones: Implications of Cohabitation for Daughters' Pubertal Timing, in* JUST LIVING TOGETHER: IMPLICATIONS OF COHABITATION ON FAMILIES, CHILDREN, AND SOCIAL POLICY 161 (A. Booth & A. Crouter eds., 2002); J. Stacey & T.J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter*, 66 AM. SOCIO. REV. 159 (2001) (study finding homosexually parented children are more likely to experience sexual confusion and to engage in homosexual and bisexual behavior); D. Baumrind, *Commentary on Sexual Orientation: Research and Social Policy Implications*, 31 DEVELOPMENTAL PSYCH. 130 (1995) (*semble*); S. Golombok & F. Tasker, *Do Parents Influence the Sexual Orientation of Their Children? Findings from a Longitudinal Study of Lesbian Couples*, 32 DEVELOPMENTAL PSYCH. No. 1, at 3–11 (1996) (noting that children "from lesbian families were more likely to explore same-sex relationships").

homosexual, and they may experience greater confusion and anxiety about sex.[65]

Given the fragility of many homosexual relationships,[66] children in these homes are more likely to suffer the stresses of divorce and to learn that marriage is temporary, not a lasting relationship of trust. Every child raised by a homosexual couple has already lost at least one biological parent, so a divorce may cause heightened trauma. Given the apparently higher levels of infidelity in homosexual couples,[67] children in these homes are more likely to witness conflict over infidelity and to see it as a normal part of marriage. Given the apparently higher levels of violence in homosexual couples,[68] it is more likely that children in these homes will themselves be violent to others in intimate relationships. Given the high rates of child sex abuse among homosexuals and bisexuals,[69] children in these homes may be more likely to suffer sex abuse. More generally, children in these homes are less likely to learn the values of commitment to others and more likely to be exposed to certain unhealthy behaviors. At the least, given the uncertain effects of homosexual parenting, the children raised by homosexual couples are being treated as guinea pigs, which is troubling.

65. *See* Walter R. Schumm, *Children of Homosexuals More Apt To Be Homosexuals? A Reply to Morrison and to Cameron Based on an Examination of Multiple Sources of* Data, 42 BIOSOCIAL SCI. 721 (2010) (meta-analysis finding that children raised by gay couples are much more likely than others to be gay); Traycee Hansen, A Review and Analysis of Research Studies Which Assessed Sexual Preference of Children Raised by Homosexuals (2009), *available at* http://www.drtaycehansen.com/Pages/writings_sexprefprt.html (concluding that studies by pro-homosexual researchers "can't be used to make definitive statements, [but] are suggestive that homosexual parents are rearing disproportionate numbers of non-heterosexual children").

66. *See infra* notes 161-62 and accompanying text.

67. *See infra* notes 166-69 and accompanying text.

68. *See infra* note 174 and accompanying text.

69. *See* R. Blanchard et al., *Pedophiles: Mental Retardation, Maternal Age, and Sexual Orientation*, 28 ARCHIVES OF SEXUAL BEHAVIOR 111 (1999); Kurt Freund & Robin J. Watson, *The Proportions of Heterosexual and Homosexual Pedophilia: An Explanatory Study*, 18 J. SEX & MARITAL THERAPY 34 (1992).

In America, public space is saturated with sex.[70] Despite disturbing levels of divorce and adultery, for most children in a traditional family, home and family are havens from this tawdry atmosphere. Homosexual households are less likely to give children that shelter. Given the promiscuity of many gay men and their obsession with the physical appearance of themselves and potential sexual partners,[71] their children are more likely to believe that these attitudes are normal and proper.

Advocates of same-sex parenting claim there is no difference between having a mother and a father and having two guardians of the same sex. This, too, is implausible. Men and women differ in significant ways.[72] A growing body of studies confirms: "Mothers and fathers contribute in gender specific and in gender-complementary ways to the healthy development of children."[73] "Fathers tend to do things

70. *See* American Psychological Association, Report of the APA Task Force on the Sexualization of Girls 19 (2007) ("Many studies have suggested that the culture delivers abundant messages about the objectification and sexualization of adult women . . . ."); *id.* at 34 ("The research summarized in this section offers evidence of negative consequences for girls when they are sexualized or exposed to sexualized images[.]").

71. *See infra* notes 164-69 and accompanying text.

72. *See generally* STEVEN PINKER, THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE 343-50 (2002); DAVID C. GEARY, MALE, FEMALE: THE EVOLUTION OF HUMAN SEX DIFFERENCES (1998); Dorion Sagan, *Gender Specifics: Why Women Aren't Men*, N.Y. TIMES, June 21, 1998, § 15, at 1 (stating that hormonal differences affect all organs of the body, abilities, behaviors, and effects of medication).

73. Byrd, *supra* note 57, at 5; Ilanit Gordon *et al.*, *Oxytocin and the Development of Parenting in* Humans, 68 BIO. PYSCH. 377 (Aug. 15, 2010) (finding that hormonal differences between men and women are associated with differing parenting behavior). Sara S. McLanahan, professor of sociology and public affairs at Princeton University, *quoted in* Laurie Tarkan, *Fathers Gain Respect from Expert (and Mothers)*, N.Y. TIMES, Nov. 3, 2009, at D5 ("In the last 20 years, everyone's been talking about how important it is for fathers to be involved"); *See also* MARRIAGE AND THE PUBLIC GOOD, *supra* note 61, at 18;WADEHORN &TOM SYLVESTER, FATHER FACTS 153 (2002); ELEANOR E. MACCOBY, TWO SEXES: GROWING UP APART, COMING TOGETHER (1998);Thomas G. Powers et al., *Compliance and Self-Assertion: Young Children's Responses to Mothers Versus Fathers*, 30 DEVELOPMENTAL PSYCH. 980 (1994); A. Sarkadi et al., *Father's Involvement and Children's Developmental Outcomes: A Systematic Review of Longitudinal Studies*, 97 ACTA PAEDIATRICA 153 (2008) (review spanning 20 years of studies including over 22,000 children found that fathers reduce behavioral problems in boys and psychological problems in girls, enhance cognitive development, and decrease delinquency); Robin Fretwell Wilson, *Undeserved Trust: Reflections on the ALI's Treatment of De Facto Parents, in* RECONCEIVING THE FAMILY, *supra* note 5, at 90, 106-10.

differently but not in ways that are worse for the children. Fathers do not mother, they father."[74] Fidelity of the mother to one man also revelaed paternity--the identity of the father--which is hidden by promiscuity in some other species, including close relatives of humans like chimpanzees.[75]

For lack of evidence, especially about male couples and long-term effects, uncertainty about gay parenting will persist for years. Liberalization of divorce was touted on the seemingly humane premise that some marriages are irreparably broken and that it is better to let the parties end these marriages rather than perpetuate their misery by forcing them either to stay married or to endure a long, bitter, damaging legal battle over questions of fault.[76] It was argued that children would not be harmed by divorce because they are "infinitely malleable."[77] "[I]t was fashionable among intellectuals to contend that the best interest of adults also serve the best interests of children. This formerly conventional wisdom has proven to be gravely mistaken . . . ."[78]

The damage done to children by divorce became evident only many years after divorce laws were liberalized and

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In a recent study, fathers who were counseled in parenting spent more time with their children, "and the children were much less aggressive, hyperactive, depressed or socially withdrawn than children of fathers in the control group." *See* Tarkan, *supra* note 72. Studies with animals have found behavioral and even neurological deficiencies in mammals raised without fathers. *See* Shirley S. Wang, *This Is Your Brain Without Dad*, WALL ST. J., Oct. 27, 2009, at B7.

74. Child psychologist Dr. Kyle Pruett, *quoted in* Tarkan, *supra* note 72, at D5.

75 *See* Nicholas Wade, *Supremacy of a Social Network*, N.Y. TIMES, Mar. 15, 2011, at D4, citing the work of primatologist Bernard Chapais ("the presence of both parents revealed the genealogical structure of the family, which is at least half hidden in chimp societies").

76. *See* JANE LEWIS, THE END OF MARRIAGE? INDIVIDUALISM AND INTIMATE RELATIONS 5 (2001).

77. Sugrue, *supra* note 32, at 302.

78. Seana Sugrue, *Canadian Marriage Policy: A Tragedy for Children*, REPORT, INST. FOR MARRIAGE & FAMILY CANADA 2 (May 31, 2006), *quoted in* Lynne Marie Kohm, *What's the Harm to Women and Children?: A Prospective Analysis, in* WHAT'S THE HARM?, *supra* note 26, at 86.

divorce became more common.[79] The experience with liberalized divorce follows the law of unintended consequences. It should caution us against assuming that an unprecedented change in the law and meaning of marriage will have only the beneficial consequences that some people hope for.

Not surprisingly, some homosexuals are using artificial means of reproduction.[80] Recognition of SSM arguably requires that artificial reproduction (including cloning) be legalized. Since homosexuals cannot create children sexually, the principle of equality arguably entitles them to other means of reproducing.[81] This argument has already been accepted in countries that have validated SSM.[82]

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79. *See* MARGARET F. BRINIG, FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY 174–77 (2000); ELIZABETH MARQUARDT, BETWEEN TWO WORLDS: THE INNER LIVES OF CHILDREN OF DIVORCE (2005);JUDITH S. WALLERSTEIN, JULIA M. LEWIS & SANDRA BLAKESLEE, THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY (2000);BARBARA DAFOE WHITEHEAD, THE DIVORCE CULTURE: RETHINKING OUR COMMITMENTS TO MARRIAGE AND THE FAMILY (1998).Liberalized divorce also harms women. *See* LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985).It took almost forty years before rigorous studies were possible, and they showed the great damage wrought by liberalized divorce. Allen, *supra* note 61, at 2.

80. *See* BALL, *supra* note 10, at 166 (stating that "changes in reproductive technology have made it possible for lesbians and gay men to have biological children").

81. Anthony C. Infanti, Dismembering Families 13 (Univ. Pittsburgh Legal Studies Research Working Paper Series, Paper No. 11, 2009), *available at* http://www.ssrn.com/abstract=1374492 (arguing that denial of a federal tax deduction for the medical costs of artificial reproduction "contributes to the subordination of lesbian and gay families as well as many other nontraditional American families"). *See also* DeSerres, *supra* note 48, at 104-05. Under the Universal Declaration of Human Rights, the right to marry includes the right to found a family. UNITED NATIONS, UNIVERSAL DECLARATION OF HUMAN RIGHTS, Art. 16.1. To complete a bootstrap line of reasoning, the possibility of artificial reproduction has also been cited to justify SSM. *See* Karen Struening, *Looking for Liberty and Defining Marriage in Three Same-Sex Marriage Cases, in* MORAL ARGUMENT, RELIGION, AND SAME-SEX MARRIAGE: ADVANCING THE PUBLIC GOOD 19, 38 (Gordon A. Babst et al. eds., 2009).

82. *See* DeSerres, *supra* note 48, at 104 (citing a French parliamentary report); Elizabeth Marquardt, *How Redefining Marriage Redefines Parenthood*, FAMILYSCHOLARS.ORG, Dec. 1, 2010, *available at*, http://familyscholars.org/2010/12/01/how-redefining-marriage-redefines-parenthood/ (stating facts indicating that use of third party sperm and egg donors to conceive children "does appears to be increasing in jurisdictions that have recognized same-sex marriage or similar arrangements"). The likelihood that recognition of SSM would "normalize" artificial reproduction also casts doubt on Dale Carpenter's claim that recognition would reduce "the number of scenarios in

This threatens children. Artificial reproduction (such as artificial insemination of the mother) entails the separation of the resulting child from one or both of its biological parents. Children artificially conceived and raised apart from their biological fathers "hunger for an abiding paternal presence."[83] Adopted children often crave knowledge of and contact with their biological parents and are challenging laws that prevent them from doing so.[84]

Artificial reproduction is more problematic than adoption because the former is harder for the law to monitor. Each adoption must be approved by a court charged to protect the child. Artificial reproduction gets little legal oversight. The children created are subject to the whims of adults. Artificial reproduction is also different in that it is irreversible. If an adoption goes awry it can be rescinded, but the artificial creation of a human being cannot be undone. Neither artificially created children nor adoptees have an adequate natural family to which they can return. The difference

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which you have multiple adults vying for children." Dale Carpenter, *The Unconservative Consequences of Conservative Opposition to Gay Marriage, in* WHAT'S THE HARM?, *supra* note 26, at 319, 323.

83. KYLE PRUETT, FATHERNEED 207 (2000); *see also* DAVID POPENOE, LIFE WITHOUT FATHER (1996). *See also* Barbara Dafoe Whitehead, *Answered Prayers: Where Is Technological Reproduction Taking Us?*, COMMONWEAL, Oct. 20, 2006, at 133 (citing study finding widespread identity problems among such children resulting from artificial insemination); THE REVOLUTION IN PARENTHOOD. *supra* note 54, at17(footnotes omitted) (stating that damage to children raised by same-sex couples may be greater when "[a]dults purposefully conceive a child with the clear intention of separating that child from a biological parent.").*See also* ELIZABETH MARQUARDT, NORVAL D. GLENN & KAREN CLARK, MY DADDY'S NAME IS DONOR: A NEW STUDY OF YOUNG ADULTS CONCEIVED THROUGH SPERM DONATION 5 stating that "on average, young adults conceived through sperm donation are hurting more, are more confused, and feel more isolated from their families. They fare worse than their peers raised by biological parents on important outcomes such as depression, delinquency and substance abuse.") (Inst. for American Values 2010).

84. *See* Patrick F. Fagan, *Adoption Works Well: A Synthesis of the Literature*, FAMILY RESEARCH COUNCIL, Nov. 2010, at 12 ("At some stage, adopted children commonly desire to get to know their birth mother."). "It is now being widely recognized that adopted children have the right to know who their biological parents are whenever possible, and legislation establishing that right has become the norm." SOMERVILLE, *supra* note 50, at 147. *See also* David Crary, *Sperm-Donors' Lids Seek More Rights, Want to End Anonymous Sperm Donation, available at*http://www.app.com/apps/pbcs.dll/article?AID-2010100812064; Vardit Ravitsky& Joanna E. Scheib, *Donor-Conceived Individuals' Right to Know*, THE HASTINGS CENTER, BIOETHICS FORUM, July 20, 2010, *available at* http://www.thehastingscenter.org/Bioethicsforum/Post.aspx?id=4811&blogid=140.

between the two is that for the artificially created child this happens by the design of the custodial parents.

The law has paid little attention to the rights of children regarding their biological parents because in the past there was no threat to these rights. Children lived with their natural parents unless the parents died, voluntarily surrendered them or were found unfit by a court. Through artificial reproduction children may be separated from their biological parents without any of these conditions being present.

Allied to support for artificial reproduction is a movement to reduce or eliminate the social and legal significance of the biological nexus between parents and children. It is argued that "parents" should be those who really perform normal parenting functions.[85] This would deny biological parents of any rights in their children and deprive children of any right in their biological parents, which is even more disturbing. To plan deliberately to separate a child from one or both parents seems to be child abuse.[86] At least in theory, biological parents can act in their own interests; infant or unborn children cannot. Although baby selling is illegal, adults can take pay for being egg or sperm donors and take steps to prevent their biological children from having any legal rights against, or contact with, or even knowledge of the identity of their parents. In this way some men have sired hundreds of children.[87]

Gay activists disparage blood ties. William Eskridge says that recognizing SSM "involves the reconfiguration of the family, de-emphasizing blood, gender, and kinship ties . . . . Gay experience with 'families we choose' delinks family from

85. *See* Susan Frelich Appleton, Gender and Parentage: Family Law's Equality Project in Our Empirical Age 6-7 (June 21, 2010), *available at* http://ssrn.com/abstract=1628232.

86. *See* Camille W. Williams, *Planned Parent-Deprivation: Not in the Best Interests of the Child*, 4 WHITTIER J. CHILD & FAM. ADVOC. 375 (2005); SOMERVILLE, *supra* note 50, at 147 (drawing ethical distinction between accidental and deliberate destruction of "children's links to their biological parents, and especially for society to be complicit in this destruction").

87. *See* Rachel Lehmann-Haupt, *Mapping the God of Sperm*, NEWSWEEK, Dec. 16, 2009, *available at* http://www.newsweek.com/id/227104 (discussing man who is the father of nearly 400 children by sperm donation).

gender, blood, and kinship. Gay families . . . often form no more than a shadowy connection between the larger kinship groups."[88] As David Blankenhorn says, children in a homosexual household will not be treated as the victims of a tragedy; rather "it will be explained to everyone, including the children, that something wonderful has happened!"[89] Homosexuals may tell children conceived by artificial insemination that they do not have a mother or a father.[90]

As Eskridge suggests, validating SSM would affect not only children in homosexual households. By changing the meaning of parenthood it would affect all children. Traditionally biological parents have inalienable duties to their children. As the adages say, you can choose your friends but not your relatives, and home is where they can't turn you away. "De-emphasizing blood" and validating "families we choose" imply that biological parents may choose to eschew those duties. If biology is irrelevant, parents have no more rights in or responsibility to their biological children than any other adults. The law could abandon consistency and continue to impose duties on biological parents despite "de-emphasizing blood" in favor of "families we choose," but the new social meaning of parenthood will make it harder to enforce those duties.

In opposition some argue for a "birthright of children to be connected to their mothers and fathers."[91] As a French parliamentary commission put it, "The interests of the child must outweigh the exercise the freedom by adults."[92] The

88. WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING APARTHEID IN THE CLOSET 11 (1999).

89. David Blankenhorn, Editorial, Protecting Marriage to Protect Children, L.A. TIMES, Sept. 19, 2008, at A27.

90. *See* Jerry Mahoney, *Mom/Not Mom/Aunt*, N.Y. Times, July 16, 2010, at ST6 (reporting that the author and his homosexual partner were told by their surrogacy agency "not to use the 'm-word.' 'This child will have two fathers,' the staff member scolded, 'He or she will have an egg donor and a surrogate, but no mother." *See also supra* note 53.

91. Daniel Cere, *War of the Ring, in* DIVORCING MARRIAGE: UNVEILING THE DANGERS IN CANADA'S NEW SOCIAL EXPERIMENT 9, 11 (Daniel Cere & Douglas Farrow eds., 2004). *See also* Margaret Somerville, *What About the Children?, in id.* at 67.

92. Report to Parliament on the Family and the Rights of Children 48, National Assembly, France (Jan. 25, 2006) (Eng. translation), *quoted in* DeSerres, *supra* note 48, at 112.

United Nations Convention on the Rights of the Child states that each child "shall have . . . as far as possible, the right to know and be cared for by his or her parents."[93] David Blankenhorn argues that "children have the right, insofar as society can make it possible, to know and to be cared for by the two parents who brought them into this world."[94]

The law has begun to recognize a right of offspring of artificial insemination to know who their fathers are,[95] but does that go far enough? They have already been denied the right to grow up with their real parents. If that happened because their guardians had bought or stolen the child from the parents, we would consider the child gravely wronged and injured. How does the voluntary consent of the biological parents render the child any less wronged or injured by artificial reproduction?

Some argue that children live in homosexual homes already and will continue to do so even if we do not recognize SSM, so we may as well recognize it and give those children the resulting benefits.[96] This argument assumes, however, that recognizing SSM will affect only homosexuals who marry and will not diminish the existing benefits of marriage. This article shows, however, that recognizing SSM would be the next step in profoundly changing the meaning of and respect for marriage and severely impairing its benefits.

Moreover, recognizing SSM may generate little or no benefit for children in homosexual households. The benefits of marriage to children arise mainly from binding biological parents. With SSM, this is impossible. Many gay couples have children because one of the child's biological parents

93. UNITED NATIONS, CONVENTION ON THE RIGHTS OF THE CHILD, Art. VII (1989).

94. *See also* Daniel Cere, *Toward an Integrative Account of Parenthood ,in* WHAT IS PARENTHOOD? (Daniel Cere & Linda McClain, eds. forthcoming) (referring to children's rights "to a maternal bond" and to "be connected to their genetically-related parents").

95. *See* Neal Hall, *Daughter of Sperm Donor Seeks to Know Identity of Biological Father*, VANCOUVER SUN, Oct. 27, 2008, *available at* http:// http://www.canada.com/vancouversun/news/story.html?id=3146c8d6-d2a6-4d3b-a911-6eaaa3732558.

96. *See* Carpenter, *supra* note 81, at 320.

left the other and now lives with another adult. I know of no evidence that children benefit if those two people are married, even if they are of different genders. It is speculative that children in a gay household will benefit if the adults are in a recognized marriage. As for artificial reproduction, we should hesitate to allow this regardless of the genders of the adults in the home.[97] The number of children in gay households is also small, so that any benefits to those children would likely be outweighed by damage to the much larger number of other children.[98]

B. *Heterosexual Bonding*

Again, a strong bond between mother and father is instrumentally good for their children (and thus also for society) because it increases the likelihood that they will be good parents.[99] Enduring love is also intrinsically good for a woman and a man; all cultures have celebrated it. It unites the two halves of humanity. None of us, male or female, can live the life of the other half. The union between a woman and a man brings them as close as possible to experiencing the full range of human experience.[100] It affords a unique integration of intrinsic human goods—*eros*, bearing and raising children, companionship, and incorporation of the

97. *See* George W. Dent, Jr. *Visions of a World Without Blood Ties*, 2 INT'L J. JURISP. FAM. __ (forthcoming 2011)..

98. Dale Carpenter gives some numbers that are hard to reconcile. At one point he estimates the number of such children as "at least a million." Carpenter, *supra* note 81, at 320. However, he also recites an estimate of 777,000 same-sex couple households and says that "about 20% or all male couple households in the United States and one-third of all female couple households in the United States are raising children." *Id.* That would mean 200,000-250,000 such households, which would have to have an average of four to five children each to bring the total of children to 1,000,000. That seems unlikely.

99. *See supra* note 49 and accompanying text.

100. Roger Scruton puts it somewhat differently: "In the heterosexual act, it might be said, I move out *from* my body towards the other, whose flesh is unknown to me; while in the homosexual act I remain locked within my body, narcissistically contemplating in the other an excitement that mirrors my own." ROGER SCRUTON, SEXUAL DESIRE: A MORAL PHILOSOPHY OF THE EROTIC 310 (1986). Carlos Ball legitimately objects that people vary in more than just their gender, so that another person of the same sex is not an exact duplicate of one's self. BALL, *supra* note 10, at 124. However, homosexual relationships lack the otherness, the differentness inherent in normal love. The benefits of this "otherness" are relevant to gender, not to race or religion. *See infra* note 201.

full range of humanity and of human life.[101] Society may fairly consider this unique holistic capacity an intrinsic good of heterosexual love that is lacking in homosexual relationships, which are necessarily more fragmented.

Romantic love need not be for life, but a permanent commitment is generally considered the highest form of love between a woman and a man. A wealth of neuroscientific evidence shows that "humans are the healthiest and the happiest when they engage in sex only with the one who is their mate for a lifetime."[102] "The majority of sexually active young people say they wish they had postponed having sex . . . ."[103]

When a woman and a man reproduce, an exclusive, lifetime commitment between them benefits their children.[104] If the union is not exclusive, conflicts are likely—over the attentions of the other (as for sex, affection, or help with chores); and over attentions to their mutual children (as opposed to children that they have borne with others). Love between a woman and a man is more likely to endure and be exclusive if they are married,[105] so the benefits of enduring, exclusive love to them are another reason for society to encourage marriage. By contrast, it is unclear whether enduring, exclusive love between homosexuals confers the same benefits on society.[106]

C. *Heteronormativity Is Not Just Socially Constructed*

Some call gender a "cultural invention, a social construction, and a self-presentation we enact in certain

101. *See generally* Cere, *supra* note 96.

102. JOE S. MCILHANEY & FREDA MCKISSIC BUSH, HOOKED: NEW SCIENCE ON HOW CASUAL SEX IS AFFECTING OUR CHILDREN 136 (2008).

103. Wendy Shalit, *Hookup Ink*, ACAD. QUESTIONS, Winter 2008-09, at 91–92.

104. *See supra* note 49 and accompanying text.

105. *See Marriage More Stable Than Cohabitation, Research Finds*, CHRISTIAN TODAY (Feb. 22, 2010), http://www.christiantoday.com/article/marriage.more.stable.than.cohabitation.research.finds/25351.htm (reporting a study in Britain finding, e.g., that fewer than a quarter of first cohabitations last five years).

106. *See infra* Part V-E.

settings."[107] Were that true, it might be unjust to deny people equal treatment for what is "socially bestowed,"[108] for being what society made them. However, under that theory society must tolerate all consensual sexual conduct, including adultery or even bigamy. Also, if sexuality is whatever society dictates, arguably it is valid for society to favor heterosexuality. And if we have no free will—if all human conduct is predetermined—then the whole debate about sexuality (including its outcome) is already determined and we shouldn't worry about it (although it is already determined that some of us will).

Of course, society does influence sexual behavior. Pederasty is more common in societies that condone it than in societies that severely punish it. However, there is considerable doubt about the strong constructionist view of sexuality, even to its meaning.[109] One problem is its "inherent vicious circularity" in that any statements it makes would themselves presumably be socially constructed.[110] Moreover, a strict constructionist explanation of sexuality seems implausible. In evolutionary theory, "mating is the single most important act of any individual of any sexually reproducing species."[111] Genes must to some extent incline most people to heterosexuality.

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107. RICHARD A. LIPPA, GENDER, NATURE, AND NURTURE 115 (2d ed. 2005).*See also* BALL, *supra* note 10, at 8-10 (discussing various forms of the claim); Janis S. Bohan, *Regarding Gender: Essentialism, Social Contructionism, and Feminist Psychology, in* TOWARD A NEW PSYCHOLOGY OF GENDER 33 (Mary M. Gergen & Sara N. Davis eds., 1997); J.D. Delameter& J.S. Hyde, *Essentialism Vs. Social Constructionism in the Study of Human Sexuality*, 35 J. SEX RESEARCH 10, 14, 16 (1998) (explaining that "sexuality is created by culture" and that "phenomena such as homosexuality are social constructions, the product of a particular culture, its language, and institutions"); EDWARD STEIN, THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY, AND ETHICS OF SEXUAL ORIENTATION 97 (1999).

108. VIVIEN BURR, AN INTRODUCTION TO SOCIAL CONSTRUCTIONISM 21 (1995).

109. "[T]here is as yet no genuine agreement as to the conceptual coherence or empirical viability of the entire social constructionist enterprise." Edwin E. Gantt & Emily Reynolds, *Meaning, Morality, and Sexual Attraction: Questioning the Reductive and Deterministic Assumptions of Biologism and Social Constructionism, in* WHAT'S THE HARM?, *supra* note 26, at 169. *See also* E.J. CAPALDI & R.W. PROCTOR, CONTEXTUALISM IN PSYCHOLOGICAL RESEARCH: A CRITICAL REVIEW (1999); I. HACKING, THE SOCIAL CONSTRUCTION OF WHAT? (1999).

110. Gantt & Reynolds, *supra* note 110, at 169-70.

111. H. Fisher, *The Nature of Romantic Love, in* TAKING SIDES: CLASHING VIEWS ON CONTROVERSIAL PSYCHOLOGICAL ISSUES 86 (12th ed., Brent D. Slife ed., 2002).

The social constructionist explanation of sexuality also clashes with the homosexuality movement's opposition to purported "psychotherapy" to enable homosexuals to function heterosexually. That opposition is predicated on the argument that sexual orientation is firmly fixed early in life, if not at birth, and that efforts to change sexual behavior often inflict serious emotional damage.[112] If sexual orientation is as socially constructed as, say, our tastes in clothing, then that orientation should not be so difficult and traumatic to change.

D. *Marriage*

Love between a woman and a man and the creation of human life are both intrinsically good,[113] but love and reproduction can occur without marriage. The special legal and social treatment of marriage has been attacked on several grounds[114] and alternatives have been proposed. Some would "abolish marriage as a legal category."[115] Instead, the law would apply "the same rules that regulate other interactions in our society—specifically those of contract and property, as well as tort and criminal law."[116] Similarly, Martha Ertman advocates commercializing

112. *See* American Psychiatric Association, *Position Statement on Therapies Focused on Attempts to Change Sexual Orientation (Reparative or Conversion Therapies)*, 157 AM. J. PSYCH. 1719 (2000) (advising against such efforts).

113. *See supra* notes 46, 102-03 and accompanying text.

114. For example, many feminists consider marriage sexist, patriarchal, oppressive to women. *See infra* note 197 and accompanying text.

115. MARTHA A. FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 228 (1995). *See also* Martha C. Nussbaum, *A Right to Marry?*, 98 CALIF. L. REV. 667, 672 (2010) (proposing that government "withdr[a]w from the marrying business" and instead "offer . . . civil unions to both same- and opposite-sex couples"); Dianne Post, *Why Marriage Should Be Abolished*, 18 WOMEN'S RTS. L. REP. 283 (1997); Claudia Card, *Against Marriage and Motherhood*, 1 HYPATIA 1, 11 (Summer 1996) (suggesting that it is impossible for any woman to achieve true mutuality in a heterosexual marriage); Paula Ettelbrick, *Since When is Marriage a Path to Liberation?*, *in* SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 164 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997); Michael Warner, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE, ch. 3 (1999); Anemona Hartcollis, *For Some Gays, a Right They Can Forsake*, N.Y. TIMES, July 30, 2008, at 12.

116. *Id.* at 229. *See also* Tamar Lewin, *Untying the Knot, For Better or Worse: Marriage's Stormy Future*, N.Y. TIMES, Nov. 23, 2003, at WK1 ("The most radical structural change being discussed these days in taking the state out of the marriage business.").

marriage and contractualizing intimate affiliation.[117] Others would extend the legal status of marriage to a variety of personal relationships so that people could choose their form of family from several options, which could include separating sex, residence, emotional intimacy, financial partnership, child-bearing and child-raising.[118] Should traditional marriage continue to enjoy special treatment?

Marriage binds children to their parents, which is both intrinsically and instrumentally good for them all. "[T]he institution of marriage is designed to help heterosexual couples remain together and connected to their children in a loving relationship . . . ."[119] Children generally fare best when they both live with their biological parents and the parents are married. Indeed, to bear and nurture children is usually a major (or the dominant) reason to marry.[120] "The marital alliance is fundamentally a reproductive alliance."[121] Children get not only health and educational benefits from marriage; they also learn important norms and crucial habits in the family, including the norms and practices of kinship, including "love, sacrifice, and altruism."[122] In the

117. Martha M. Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C.L. REV. 1 (2003).

118. *See* Feldblum, *supra* note 2, at 179-82 (advocating state support for two other forms of personal relationships as well as marriage); Nancy D. Polikoff, *Equality and Justice for Lesbian and Gay Families and Relationships*, 61 RUTGERS L. REV. 101 (2009) (arguing that the law should not favor marriage); Robert Epstein, *Same-Sex Marriage Is Too Limiting*, L.A. TIMES, Dec. 4, 2008 ("The real challenge is to have the state begin to recognize the full range of healthy, non-exploitative, romantic partnerships that actually exist among human beings."); Laura Rosenbury, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809 (2010) (arguing that sex should be decoupled in the legal sphere from both domestic relations and other traditional forms of emotional intimacy, thus rejecting the dominant understanding that the most important relationships between adults should always be both sexually and emotionally intimate).

119. Douglas W. Allen, *Who Should Be Allowed Into the Marriage?*, 58 DRAKE L. REV. 1043, 1071 (2010).

120. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, chap. VII, § 78, at 43 (referring to marriage's "chief end, procreation").

121. Margo Wilson & Martin Daly, *Marital Cooperation and Conflict, in* EVOLUTIONARY PSYCHOLOGY, PUBLIC POLICY AND PERSONAL DECISIONS 197, 203 (Charles Crawford & Catherine Salmon, eds., 2004).

122. Lynn D. Wardle, *The Morality of Marriage and the Transformative Power of Inclusion, in* WHAT'S THE HARM?, *supra* note 26, at 209, 212. *See also* Sugrue, *supra* note 32, at 300 ("primary socialization . . . typically occurs within the family").

family children also learn the values of democracy and of citizenship.[123]

Children are society's future, so we all share the benefits of marriage. "[A]ll societies that survive are built on marriage. Marriage is a society's cultural infrastructure . . . . The history of human society shows that when people stop marrying, their continuity as a culture is in jeopardy."[124] In a recent science fiction film, *Children of Men*, people can no longer reproduce so that extinction of humanity looms. Most people would consider that a disaster, not a neutral or welcome event. The natural or "nuclear" family is not a recent mutation; it has been dominant for centuries, at least in Western cultures.[125] Some refer (disparagingly) to "the state's interest in encouraging procreation."[126] This is misleading. "Marriage is not a factory for childbearing. Marriage exist[s] to encourage men and women to create the next generation in the right contexts and simultaneously to discourage the creation of children in other context—out of

123. *See* George W. Dent, Jr., *"How Does Same-Sex-Marriage Threaten You?,"* 59 RUTGERS L. REV. 233, 240 (2007); Lynn D. Wardle, *The Bonds of Matrimony and the Bonds of Constitutional Democracy*, 32 HOFSTRA L. REV. 349 (2003). The founders recognized that the (traditional) family nurtured the virtues of citizenship necessary to a republic. *See* David F. Forte, *The Framers' Idea of Marriage and the Family, in* THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, & MORALS 103 (Robert P. George & Jean Bethke Elshtain eds., 2006). *See generally* SEEDBEDS OF VIRTUE: SOURCES OF COMPETENCE, CHARACTER, & CITIZENSHIP (Mary Ann Glendon & David Blankenhorn eds., 1995).

124. David W. Murray, *Poor Suffering Bastards: An Anthropologist Looks at Illegitimacy*, POLICY REV., Spring 1994, at 9.

125. Joan Acocella, *Little People*, NEW YORKER, Aug. 18 & 25, 2003, at 138, 139.

126. Gary J. Simson, *Beyond Interstate Recognition in the Same-Sex Marriage Debate*, 40 U.C. DAVIS L. REV. 313, 367 (2006) (*citing* Adams v. Howerton, 486 F. Supp. 1119, 1123-25 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir. 1982)).

wedlock in fatherless homes."[127] At any rate, prolonged low reproductive rates threaten social and political stability.[128]

Is traditional marriage obsolete, "an archaic institution"?[129] Not at all. Children's need for the careful nurturing that a traditional family does best is greater now than ever before and is likely to grow in the future. Not long ago it sufficed for children to learn the basic skills of farming and not to avoid causing too much trouble. To flourish in a modern economy, however, children need bourgeois habits and higher education.[130] As a result, raising children now is much more expensive,[131] and children have greater need for the higher income that a traditional marriage is more likely to generate.[132] Moreover, "our nation's contemporary political and economic institutions depend even more than before on citizens who embrace the values and virtues fostered by the nuclear family."[133]

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127. Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 U. ST. THOMAS L.J. 33, 44 (2004). *See also* INST. FOR AMERICAN VALUES, CAN GOVERNMENT STRENGTHEN MARRIAGE?: EVIDENCE FROM THE SOCIAL SCIENCES 9 (2004) [hereinafter CAN GOVERNMENT STRENGTHEN MARRIAGE?] ("The goal of marriage law . . . is *to increase the proportion of children who are raised by their own two married parents in low-conflict marriages.*"); *id.* at 7 (referring to marriage as society's "way of linking the rights and responsibilities of mothers and fathers to each other and to the children they share . . . ."); Allen, *supra* note 123, at 1048–49("the essential purpose of marriage has been to encourage successful procreation and child-rearing.").

128. *See, e.g.*, Ilan Berman, *Russia's Real Threat? Failure: Decline Breeds New and Perplexing Dangers*, WASH. TIMES, Feb. 1, 2010, at B01 (explaining the economic, political, and geopolitical consequences of Russia's so-called "demographic death spiral").

129. Michaelangelo Signorile, *Bridal Wave*, OUT, Dec.-Jan., 1994, at 68, 161.

130. *See* James Surowiecki, *Leave No Parent Behind*, THE NEW YORKER, Aug. 18, 2003, at 48 (asserting that 30 years ago a high school diploma was sufficient for middle class children and "decent jobs for unskilled and semi-skilled labor were readily available. Today, such jobs are much harder to find, and college is considered a necessity.").

131. *Id.* ("[T]he cost of having children has risen much faster than the cost of being childless.").

132. *See infra* note 146 and accompanying text (showing that married men make more money than unmarried men).

133. W. Bradford Wilcox, *Family Ties*, PUB. INTEREST, Fall 2003, at 115, 118 (summarizing a theme from BRIGITTE BERGER, THE FAMILY IN THE MODERN AGE: MORE THAN A LIFESTYLE CHOICE (2002)).*See also* Sugrue, *supra* note 32, at 306-08 (arguing that habits acquired in the family are essential to the successful functioning of a market economy); *Id.* at 308 (speculating that China may be managing the transition to a market economy better than Russia and most of post-

Many industrialized nations are now losing population.[134] This is not yet so in America, but we should not be complacent about the possibility. There are two main reasons why we have so far avoided depopulation. One is that we absorb many more immigrants than do other countries. However, the high number of immigrants with low education and job skills creates economic problems, and the need to assimilate many people from cultures very different from our own also creates social problems. A high rate of immigration may not be the best way to maintain our population. A second reason for our growing population is that Americans still value the family, so the fertility rate is higher here than in many other countries. However, various trends, including the campaign for SSM, are eroding respect for the family. "As marriage becomes a matter of putting adult[s] . . . . first, fewer and fewer children are had."[135]

Even if our population is not falling, the percentage of Americans who are older and receive Social Security, Medicare, and other benefits for the elderly, is rising in proportion to the working age population who must pay for these benefits. One way to mitigate this problem is to encourage fertility by supporting the family.

On the other hand, marriage is the most intimate human relationship and, therefore, arguably is uniquely *inappropriate* for regulation by uniform, state-dictated rules. Why not let adults make their own rules?[136] The answer is that marriage is more than an arrangement between two people. It also involves children the couple may create. Typically these children do not even exist when the marriage is created and, even if they do exist then, they cannot negotiate contract to protect their interests; society must protect them. Bertrand Russell, no fan of bourgeois morality, said that "it is through children alone that sexual

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colonial Africa because respect for the family has remained stronger in China than in those other nations).

134. *See generally* BEN J. WATTENBERG, FEWER: HOW THE NEW DEMOGRAPHY OF DEPOPULATION WILL SHAPE OUR FUTURE (2004).

135. Sugrue, *supra* note 32, at 310.

136. This is exactly what some feminists propose. *See supra* notes 116-18 and accompanying text.

relations become of importance to society, and worthy to be taken cognizance of by a legal institution."[137] "Societies have found marriage necessary because husbands and wives often have private interests that are not compatible with the interests of their spouses, children, other family members, or communities in general."[138] Renown anthropologist Bronislaw Malinowski said that "the institution of marriage is primarily determined by the needs of the offspring, by the dependence of the children upon their parents."[139] And sociologist James Q. Wilson: "Marriage is socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve."[140]

Marriage is also a collective event. In a sense, it makes the whole community and all of civilization parties to the couple's commitment to each other and to their children.[141] By a public wedding, a couple joins others as celebrants of one of humanity's most cherished and ancient rituals and thereby confirms society's norms.[142] In turn, the community supports the marriage. As Joseph Raz says, marriage "requires a culture which recognizes it, and which supports it through the public's attitude and through its formal institutions."[143]

Many people refer to the "sanctity of marriage." This persuades others that marriage is a religious institution and should be deprived of legal significance. Marriage does have religious significance in America, but that alone hardly justifies abolishing marriage as a legal status. Murder, theft,

137. BERTRAND RUSSELL, MARRIAGE AND MORALS 156 (Liveright ed. 1970).

138. Allen, *supra* note 123, at 1048.

139. BRONISLAW MALINOWSKI, SEX, CULTURE AND MYTH 11 (1962).

140. JAMES Q. WILSON, THE MARRIAGE PROBLEM 41 (2002).

141. *See* John Witte, Jr. & Joel A. Nichols, *Marriage, Religion, and the Role of the Civil State: More Than a Mere Contract: Marriage as Contract and Covenant in Law and Theology*, 5 U. ST. THOMAS L.J. 595, 600 (2008) ("Marriage is an institution that is both private and public, individual and social, and temporal and transcendent in quality. Its origin, nature, and purpose lie beyond and beneath the terms of the marriage contract itself.").

142. *See* SCRUTON, *supra* note 102, at 357-58.

143. JOSEPH RAZ, THE MORALITY OF FREEDOM 162 (1986).

and perjury also have religious significance,[144] but we do not ignore them in law and relegate them to religion.

The religious concern with marriage, unlike many other matters, is common and nonsectarian. "Among the founders of religions over the last two thousand years, many opposed property and the family. *But the only religions that have survived are those which support property and the family.*"[145] In other words, marriage is valued by all surviving religions because it is essential to the survival of any sect and of the society of which it is a part. For the same reason, marriage is also a matter of legitimate and, indeed, vital concern to the law.

Marriage is instrumentally good for the parties. Married people live longer, make more money, enjoy better health (both physical and mental), and report greater satisfaction with sex and with life generally than do unmarried people.[146] Some of these advantages may exist simply because healthier, more industrious and more law-abiding people are more likely to marry, but "some . . . . fraction of the marital 'premium' stems from marriage itself."[147]

A striking effect of marriage is that it civilizes men. Married men work longer hours, make more money, commit less crime, and abuse drugs less than do single men.[148] They

144. The Ten Commandments state, *inter alia*, "Thou shalt not kill . . . . Thou shalt not steal. Thou shalt not bear false witness against thy neighbor." *Exodus*20:13, 15-16.

145. 1 THE COLLECTED WORKS OF F.A. HAYEK: THE FATAL CONCEIT: THE ERRORS OF SOCIALISM 137 (W.W. Bartley III, ed. 1988) (emphasis in original).

146. *See generally* LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER-OFF FINANCIALLY (2000); Byrd, *supra* note 54, at 3-7; W. Bradford Wilcox, Linda Waite & Alex Roberts, Marriage and Mental Health in Adults and Children 1, Inst. For American Values, Center for Marriage and Families, Research Brief No. 4, Feb. 1, 2007), *available at* http://heartland.org/custom/semod_policybot/pdf/21121.pdf ("Married Americans were more than twice as likely as divorced or separated Americans to say they were very happy with life in general.").

147. Garrison, *supra* note 5, at 324; *see also* W. BRADFORD WILCOX ET AL., WHY MARRIAGE MATTERS: TWENTY-SIX CONCLUSIONS FROM THE SOCIAL SCIENCES 19-22 (2d ed. 2005).

148. "Communities of unmarried young men are prone to engage in violence and predatory sex. Compared with the married, young unmarried men tend to be lazy and unfocused . . . . Marriage compels men to grow up." STEVEN RHOADS, TAKING SEX DIFFERENCES SERIOUSLY 252-53 (1994). The rate of imprisonment for single young men is six times that for married young men. *See* George A. Akerlof,

also stabilize the neighborhoods where they live, including deterring crime by others. The social value of having men marry is especially obvious from the collapse of order when marriage ceases to be normative, as has happened in many American inner city neighborhoods.[149] The civilizing effects of marriage seem to benefit men more than women, probably because unmarried men are less civilized to begin with and more inclined to be destructive and self-destructive than are unmarried women.[150]

E. *Are Homosexuality and Same-Sex "Marriage" Equally Valuable?*

Gay activists proclaim the equal goodness of homosexuality and of SSM.[151] They say, it would benefit some and harm no one.[152] This claim is dubious.

Men Without Children, 108 ECON. J. 287, 296 (1998). Married men engage in less aggressive and illegal behavior than single men. S. Alexandra Burt et al., *Does Marriage Inhibit Antisocial Behavior?: An Examination of Selection v. Causation via a Longitudinal Twin* Study, 67 ARCHIVES GEN. PYSCH. 1309 (2010).Married men are less likely to be sexually promiscuous, to be unfaithful to a longtime partner, or to abuse alcohol. *See id.* at 287; Steven L. Nock, *The Consequences of Premarital Fatherhood*, 63 AM. SOC. REV. 250 (1998). Married men work longer hours and make more money. *See* WILCOX ET AL., *supra* note 145, at 19-22.

149. *See* Akerlof, *supra* note 146; Nock, *supra* note 146.

150. "[M]en are less attracted to and less well equipped for marriage than women." RHOADS, *supra* note 146, at 252. *See also* Terrence O. Moore, *Heather's Compromise: How Young Women Make Their Way in a World of Wimps and Barbarians*, CLAREMONT REV. BKS., Spring 2004 *available at*http://www.claremont.org/publications/crb/id.947/article_detail.asp. ("Clearly men will not be properly civilized in our day unless the traditional standards for courtship and marriage return in some form.").

151. *See* BALL, *supra* note 10, at 4 ("lesbians and gay men by the thousands are . . . stepping forward and insisting that their relationships and families merit social recognition and support."). Some actually seem to claim moral *superiority* for homosexuality. ***See*** BALL, *supra* note 10, at 112 (claiming that homosexual relationships are superior because they "are more egalitarian and less role driven than heterosexual relationships"); Feldblum *supra* note 2, at 178 (referring to "lessons about the normative good of marriage that will be easier to perceive in" SSM); & 181 (stating that "the gay community has pioneered in developing ["intimate forms of *nonsexual* partnership"] and non-gay individuals could learn and benefit from developing similar relationships") (emphasis in original).

152. *See* Samar, *supra* note 26, at 248: "Does anybody really expect that their opposite-sex spouse will leave him or her if the same-sex couple down the street gets married?" *See also* Linda McClain, *Deliberative Democracy, Overlapping Consensus, and Same-Sex Marriage*, 66 FORDHAM L. REV. 1241, 1251 (1998) ("The requirements of public reason would . . . require the delineation of precisely how same-sex marriages threaten the institution of marriage in terms of public reasons and political values implicit in our public culture."); Lynn D. Wardle, *"What's the*

First, homosexuality cannot create human life or the biological family. This point can be stated algebraically. Designate a committed, loving relationship between any two adults as "A." Assume for the moment that homosexuals are just as likely to create such a relationship as are heterosexuals.[153] Now designate the ability of two people to create human life—an ability possessed only by a male-female couple—as "B." If we say that the homosexual "married" couple is just as good as the traditional married couple, then

A = A + B

If this statement is true, then "B"—the capacity to create human life—is worth zero; it is worthless, of no value. No gay activists deny the intrinsic value of human life—they hardly could do so without disparaging their own lives. Some gay activists acknowledge that the capacity of a woman and a man to create human life is a good that homosexual couples to not have.[154] They nonetheless argue for equal treatment of homosexuality, but their reasoning is hazy.[155] As we have noted, all known societies have valued and celebrated the ability of a woman and a man to create human life.

Harm?" and Why It Matters, in WHAT'S THE HARM?, *supra* note 26, at vii, vii ("Perhaps the most decisive question in the debate about whether same-sex marriage should be legalized is—'what's the harm?'"). *See* LEE BADGETT, WHEN GAY PEOPLE GET MARRIED: WHAT HAPPENS WHEN SOCIETIES LEGALIZE SAME-SEX MARRIAGE (2009) (arguing that there have been no negative effects where SSM has been recognized).

154. *See* SULLIVAN, *supra* note 8, at 196 ("The timeless, necessary, procreative unity of a man and a woman is inherently denied to homosexuals, and the way in which ... parenthood transforms their relationship, is far less common among homosexuals than among heterosexuals.").

154. *See* SULLIVAN, *supra* note 8, at 196 ("The timeless, necessary, procreative unity of a man and a woman is inherently denied to homosexuals, and the way in which ... parenthood transforms their relationship, is far less common among homosexuals than among heterosexuals.").

155. Carlos Ball, for example, does not expressly deny the value of human life, but seems to argue that the ability of a woman and a man to create human life is morally irrelevant. BALL, *supra* note 10, at 121-23. Ball does this while disagreeing with the "new natural lawyers," but rejecting their position does not mean that homosexual relationships are equally valuable. Ball also seems to belittle the reproductive capacity of a woman and a man on the ground that homosexuals can conceive artificially. *See id.* at 121. First, most people do not consider this possibility equal to natural conception, and there are dangers in artificial reproduction. *See* Dent, *supra* note 97.

Although some homosexuals favor recognition of SSM,[156] others fear it would bring unwelcome pressure on them to marry.[157] Still others consider marriage unsuited for gays. Nancy Polikoff, for example, says, "the desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism."[158] Some lesbians and feminists oppose legal recognition of marriage altogether.[159]

Non-recognition of SSM because homosexuality is sterile has been called hypocritical because many different-sex couples cannot or choose not to bear children.[160] The argument is flimsy. Couples who choose to be childless may change their minds or accidentally conceive. As for infertile couples, unless they are very old their infertility could be determined only by a physical examination that would grossly intrude on human privacy and dignity.[161]

Barring legal marriage to older couples would be irrational because couples already married can stay married in old age. There would also be gender equality issues. Older

156. *See* WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE (1996).

157. *See* BALL, *supra* note 10, at 112 (referring to those who believe that "attempts to privilege distinct forms of intimate relationships . . . inevitably lead . . . to the coercion and stigmatization of those who remain outside the socially privileged relationships"). Some believe pressure to marry would occur, and would be a good thing for gay people. *See* KATHLEEN E. HULL, SAME-SEX MARRIAGE: THE CULTURAL POLITICS OF LOVE AND LAW 78 (2006); RAUCH, *supra* note 8; Claudia Card, *Against Marriage, in* SAME-SEX MARRIAGE: DEBATING THE ETHICS, SCIENCE, AND CULTURE OF HOMOSEXUALITY 317, 321 (John Corvino ed., 1997).

158. Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not 'Dismantle the Legal Structure of Marriage in Every Marriage*, 79 VA. L. REV. 1535, 1536 (1993). *See also* Nitya Duclos, *Some Complicating Thoughts on Same-Sex Marriage*, 1 LAW & SEXUALITY 31 (1991); Karen Knop & Christine Chinkin, *Remembering Chrystal MacMillan: Women's Equality and Nationality in International Law*, 22 MICH. J. INT'L L. 523, 555 (2001) (claiming that "not all lesbian women would favor legal changes that require them to identify their relationships as family").

159. *See supra* notes 119-22 and accompanying text.

160. *See* Hernandez v. Robles, 855 N.E.2d 1, 30 (N.Y. 2006) (Kaye, C.J., dissenting) ("the ability or desire to procreate is not a prerequisite for marriage. The elderly are permitted to marry . . . .").

161. *See* Hernandez v. Robles, 855 N.E.2d 1, 11–12 ("limiting marriage to opposite-sex couples likely to have children would require grossly intrusive inquiries, and arbitrary unreliable line-drawing").

men can still father children, so they could marry young women but not old women, and older women (who cannot bear children) could not marry at all. It is hard to imagine any benefit from such rules. Most important, infertile couples do not reproduce because they are physically unable to do so. Homosexual couples, however, have chosen a sterile relationship. Most people perceive the former as trying to uphold the norm of marriage, whereas a homosexual couple obviously flouts that norm.

Except for reproduction, are homosexual relationships equally valuable? Heterosexual relationships have at least one inherently durable element. Again, the bond between woman and man is rooted in the biological need to nurture human infants for a long time.[162] For either the mother or the father to have sex outside the marriage could disrupt their bond by creating competing demands from other children and the other parent(s).

It would be astonishing if this natural bond, a billion years of evolution, were just coincidentally equaled by the bond between same-sex couples, which has no biological basis. The animal kingdom is instructive. In some species male and female mate for life; in many they do not. But in no species do members of the same sex mate for life. Homosexuals have less reason to bond as couples and, when they do, less reason for the bond to be enduring and exclusive. Not surprisingly, then, many homosexuals are less inclined than heterosexuals to marry[163] or to have enduring relationships.[164]

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162. *See supra* note 49 and accompanying text.

163. *See* Harry R. Jackson, Jr., *What's the Vex of Same-Sex*, TownHall.com, Oct. 12, 2009, *available at* Harry R. Jackson, Jr., *What's the Vex of Same Sex*, TownHall.com, Oct. 12, 2009, *available at*http://townhall.com?Common/PrintPage.aspx?g=c9bc9aad-468e-49e2-9e1c-03225fd7ba2 (reporting that in the Netherlands, where SSM is recognized, only 12% of gay people have chosen to marry). Paul Ames, *Dutch Gays Don't Take Advantage of Opportunity to Marry* (Apr. 20, 2011), *available at* http://www.globalpost.com (report that since Neetherlands recognized SSM in 2001, "just 20 percent of gay Dutch couples are married, compared to 80 percent of heterosexual coules). *See also* Maggie Gallagher & Joshua K. Baker, *Demand for Same-Sex Marriage: Evidence from the United States, Canada, and Europe*, 3 IMAPP POLICY BRIEF No. 1, 1, 6 (Apr. 26, 2006), *available at* http://www.marriagedebate.com/pdf/imapp.demandforssm.pdf. In 2006 the New Jersey Supreme Court found that there were "16,000 same-sex couples living in committed relationships" among a state population of 8,500,000. Lewis v.

Where homosexuals (especially gay men) do marry or otherwise enter into a committed relationship, it generally seems to happen later in life than it generally does for traditional couples.[165] This is not surprising. A usual motive for a traditional marriage is to start a family, so it generally

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Harris. 908 A.2d 196, 218 (N.J. 2006). Those 32,000 people are less than 0.4% of the population.

In Oregon 2,600 same-sex couples [thus 5,200 people], comprising about 20% of the of Oregon's same-sex couples, registered in the first year after Oregon instituted domestic partnerships, even though this offered most of the legal protections and benefits of marriage. Bill Graves, *Only One-Fifth of Oregon's Same-Sex Couples Opt for Union*, THE OREGONIAN, Feb. 2, 2009, *available at* http://blog.oregonlive.com/news_impact/2009/02/domestic_partnerships.html. 70% were female. Oregon's population was estimated at 3,790,060 in 2008. *See* http://quickfacts.census.gov/gfd/states/41000.html. Thus those 5,200 people are less than 0.0014% of the population.

In three years only 6,500 couples registered under Vermont's civil union law. *See* Pam Belluck, *Gays Respond: 'I do,' 'I Might' and 'I Won't,'* N.Y. TIMES, Nov. 26, 2003, at A1. One reason for the low number is that "couples who came of age in the 1960's and 1970's [tended] to see marriage as a heterosexual institution symbolizing a system that they could not, or would not, want to be part of." *Id.* Only 166 of General Motors' 1,300,000 employees claimed the same-sex benefits it offered. *See* Maggie Gallagher, *What Is Marriage For?*, WKLY. STANDARD, Aug. 4/Aug. 11, 2003. In short, very few same-sex couples have sought legal recognition when it is available, and most (especially the males couples) had no interest in establishing legal recognition.

164. *See* Gunnar Andersson et al., *The Demographics of Same-Sex Marriages in Norway and Sweden*, 43 DEMOGRAPHY 79 (2006) ("divorce-risk levels are considerably higher in same-sex marriages");DENNIS ALTMAN, THE HOMOSEXUALIZATION OF AMERICA, THE AMERICANIZATION OF THE HOMOSEXUAL 187 (1982) ("[A]mong gay men a long-lasting *monogamous* relationship is almost unknown."); Maria Xiridou et al., *The Contribution of Steady and Casual Partnerships to the Incidence of HIV Infection in America*, 17 AIDS 1029, 1031 (2003) (finding that among a sample of Amsterdam men that gay male partnerships lasted on average 1.5 years and that men in these partnerships had an average of eight casual partners per year); Maggie Gallagher & Joshua K. Baker, *Same-Sex Unions and Divorce Risk: Data from Sweden*, IMAPP POLICY BRIEF, May 3, 2004 (study of registered partnerships in Sweden finding that gay male couples were 50% more likely to divorce, and lesbian couples were over 167% more likely to divorce than heterosexual couples); C.C. Hoff et al., *Serostatus Differences and Agreements About Outside Sex Partners Among Gay Couples*, 21 AIDS EDUC. & PREVENTION x (2009) (study finding that half of gay couples in committed relationships had explicit agreements allowing sex with others); Walter Schumm, *Comparative Relationship Stability of Lesbian Mother and Heterosexual Mother Families: A Review of the Evidence*, 46 MARRIAGE & FAM. REV. 499, 504 (2010) (finding that after about ten years in a couple relationship "37.8% of lesbian couples separated compared with 15.7% of heterosexual couples")..

165. *See* Gary J. Gates, M.V. Lee Badgett & Deborah Ho, Marriage, Registration and Dissolution by Same-Sex Couples in the U.S. 9 (July 2008), *available at* http://www.ssrn.com/abstract=1264106 (study finding that same-sex couples who married in Massachusetts were considerably older than opposite-sex couples who married).

occurs when the couple is young enough to bear children and handle the physical rigors of raising them. Gay couples do not bear children.

Some gay men are promiscuous to an extent incompatible with marriage.[166] Some gay men disdain monogamy as proper only for heterosexuals because they bear children, not a model gays should emulate.[167] One says: "Gay liberation was founded ... on a sexual brotherhood of promiscuity and any abandonment of that promiscuity would amount to a communal betrayal of gargantuan proportions."[168]

Due in part to promiscuity, homosexuals have high rates of disease and mental illness. Gay men became more cautious about sex after the onset of AIDs, but infection rates soon rebounded to their former levels.[169] Gay men also

166. In one study 43% of white male homosexuals reported having sex with 500 or more partners, with 28% having 1,000 or more sex partners. MARTIN S. BELL &ALAN P. WEINBERG, HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN 308-09 (1978). *See* also Paul Van den Ven et al., *A Comparative Demographic and Sexual Profile of Older Homosexually Active Men*, 34 J. SEX RESEARCH 354 (1997) (finding similar figures). Homosexual promiscuity is acknowledged by many homosexuals. *See* MARSHALL KIRK & HUNTER MADSEN, AFTER THE BALL 280–347 (1990). Even gay men with a "steady partner" tend to be promiscuous. *See* Jackson, *supra* note 166 (reporting that "in the Netherlands ... homosexual men who have a steady partner have had an average of eight other sexual partners per year; lesbians were found to have more male partners over their lifetime than heterosexual women.").

167. *See* DAVID A.J. RICHARDS, SEX, DRUGS, DEATH, AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION 53 (1982); Michael Bronski, *Behind the SexPanic! Debate*, HARV. GAY & LESBIAN REV. 29 (Spring 1998); Caleb Crain, *Pleasure Principles: Queer Theorists and Gay Journalists Wrestle Over the Politics of Sex*, LINGUA FRANCA 27 (Oct. 1997); Sheryl Gay Stolberg, *Gay Culture Weighs Sense and Sexuality*, N.Y. TIMES, Nov. 23, 1997, § 4, at 1.

168. GABRIEL ROTELLO, SEXUAL ECOLOGY: AIDS AND THE DESTINY OF GAY MEN 112 (1997).

169. *See* Centers for Disease Control and Prevention, *CDC Analysis Provides New Look at Disproportionate Impact of HIV and Syphilis Among U.S. Gay and Bisexual Men* (Mar. 10, 2010), *available at* http://www/cdc/gov/nchstp/Newsroom/msmpressrelease.html (report finding that "the rate of new HIV diagnoses among men who have sex with men (MSM) is more than 44 times that of other men and more than 40 times that of women," and even greater discrepancies for syphilis) [hereafter CDC Analysis]. This report stated that one reason for the high rate of HIV infection among gay men is "complacency about HIV risk." *See also* Centers for Disease Control, *Resurgent Bacterial Sexually Transmitted Disease Among Men Who Have Sex with Men—King County, Washington, 1997-99*, MORBIDITY & MORTALITY WKLY. REPT., Sept. 10, 1999, at 773; *see also* Byrd, *supra* note 57, at 14 (summarizing several studies).

suffer disproportionately from many other diseases.[170] Homosexuals also have higher rates of suicide and mental illness and drug and substance abuse.[171] And, although many homosexuals brag about the absence of gender discrimination in their relationships, high levels of relationship violence exist.[172]

Some gays blame the pathology of promiscuity and disease on their social oppression. William Eskridge argues that

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170. *See* Byrd, *supra* note 57, at 13-14 (summarizing several studies); Anne Tompalo& H. Hunter Handsfield, *Overview of Sexually Transmitted Diseases in Homosexual Men, in* AIDS AND INFECTIONS OF HOMOSEXUAL MEN 3 (Pearl M. & Donald Armstrong eds., 2d ed. 1989) ("homosexual men were known to be at high risk of acquiring sexually transmitted diseases"); Centers for Disease Control, Sexually Transmitted Disease Surveillance 2009, at 33 (Nov. 2010) (finding high and growing rates of syphilis infection among homosexual men).

171. *See* D.M. Ferguson et al., *Is Sexual Orientation Related to Mental Health Problems and Suicidality in Young People?*, 56 ARCHIVES GEN. PSYCH. 876 (1999) (study concluding: "Gay, lesbian and bisexual young people were at increased risks of major depression . . . generalized anxiety disorder . . . conduct disorder . . . [and] suicide attempts."); Richard-Herrel*et al*, *Sexual Orientation and Suicidality*, 56 ARCHIVES OF GEN. PSYCH. 867 (1999) (study finding that "same gender sexual orientation is significantly associated with each of the suicidality measures"); Christine E. Grella et al., *Influence of Gender, Sexual Orientation, and Need on Treatment Utilization for Substance Use and Mental Disorders: Findings from the California Quality of Life Survey*,19 BMC PSYCH. 52 (2009), *available at* http://www.biomedcentral.com/1471-244X/9/52 (empirical study finding that homosexuals were twice as likely to seek mental health, and substance abuse treatment); Yue Zhao et al., *Suicidal Ideation and Attempt Among Adolescents Reporting "Unsure" Sexual Identity or Heterosexual Identity Plus Same-Sex Attraction or Behavior: Forgotten Groups?*, 49 J. AM. ACAD. OF CHILD & ADOLESCENT PSYCH. 89 (2010) (study finding homosexual and bisexual youths have higher suicide risk than others). Many gay men also suffer from eating disorders. Stacey, *supra* note 169.

172. *See* Byrd, *supra* note 57, at 12-13 (summarizing several studies); Lisa K. Waldner-Haugrud et al., *Victimization and Perpetration Rates of Violence in Gay and Lesbian Relationships: Gender Issues Explored*, 12 VIOLENCE & VICTIMS 173 (1997) (reporting that "47.5% of lesbians and 29.7% of gay people have been victimized by a same sex partner); P.A. Brand & A.H. Kidd, *Frequency of Physical Aggression in Heterosexual and Female Homosexual Dyads*, 59 PSYCH. REPTS. 1307 (1986) (finding reports of abuse in 30% of lesbian relationships); C.K. Waterman et al., *Sexual Coercion in Gay Male and Lesbian Relationships: Predictors and Implications and Support Services*, 26 J. SEX RESEARCH 118 (1989); S. Owen & T.W. Burke, *An Exploration of the Prevalence of Domestic Violence in Same-Sex Relationships*, 95 PSYCH. REPTS. 129 (2004); U.S. Dep't of Justice, Office of Justice Programs, Extent, Nature, and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey 30 (July, 2000), *available at* http://www.ncjrs.gov/txtfiles1/nij/181867.txt ("Same-sex cohabitants reported significantly more intimate partner violence than did opposite-sex cohabitants—39% of lesbians reported being raped, physically assaulted, and/or stalked by a cohabiting partner at some time in their lifetimes, compared to 21% of heterosexual women. Among men, the comparable figures are 23.1% and 7.4%.").

validating SSM would "civilize gay men by making them more like lesbians."[173] Both claims are weak. Society condemns promiscuity in homosexuals more than their fidelity or abstinence. One study found HIV infection of gay men in American cities to be highest in San Francisco, a famously gay friendly city. Its rate was 150% higher than in Pittsburgh, not a particularly gay-friendly city, which had the lowest rate.[174] Similarly, high levels of mental illness among gays are also found in the Netherlands, perhaps the most gay-friendly country in the world.[175]

As for marriage civilizing gay men,[176] probably few gay men (especially the young) will marry,[177] and marriages that are entered into are likely to be short-lived.[178] Further, if the threat of deadly diseases posed by promiscuity, including AIDS, did not reduced gay men's promiscuity in the long term, it is unclear that a wedding ring will. Men are not domesticated by a wedding ceremony and a ring, but by a wife and children.

Gay couples are also more prone to adultery.[179] This is hardly surprising since, unlike traditional couples, adultery

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173. ESKRIDGE, *supra* note 159, at 84. *See also* RAUCH, *supra* note 8, at 19-21.

174. "The estimated level of [HIV] infection among homosexual men ranges from 20% in a Pittsburgh study to 50% in a San Francisco study."THOMAS E. SCHMIDT, STRAIGHT & NARROW 27 (1995) (citing many studies).

175. T.G. Sandfort et al., *Same-Sex Behavior and Psychiatric Disorder*, 58 ARCHIVES GEN. PSYCH. 87 (2001).

176. *See* GEORGE GILDER, MEN AND MARRIAGE 12-18 (5th ed. 1993); POSNER, *supra* note 51, at 312 (stating that the presence of children helps to keep married couples together).

177. *See* Gates et al. *supra* note 169, at 8 (finding that two-thirds of same-sex couples that entered into a legally recognized relationship were female).

178. *See supra* note 167 and accompanying text (finding gay male partnerships in Amsterdam last an average of 1.5 years).

179. One study of 156 male couples found that for them "fidelity is not defined in terms of sexual behavior, but rather by their emotional commitment to one another." All the couples who had been together over five years made allowance for outside sexual activity. DAVID P. MCWHIRTER& ANDREW M. MATTISON, THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP 252-53 (1984). Andrew Sullivan exhorts heterosexuals to develop a greater "understanding of the need for extramarital outlets between two men than between a man and a woman . . . . The truth is, homosexuals are not entirely normal; and to flatten their varied and complicated lives into a single, moralistic model is to miss what is essential and exhilarating about their otherness." SULLIVAN, *supra* note 8, at 202-204. *See also* KIRK & MADSEN, *supra* note 171, at 330 (study finding that "the cheating ratio of 'married' gay males, given enough time, approaches 100%").

in gays does not threaten to create new children who would compete for resources and care with the couple's own biological children. Gay couples who marry have a high divorce rate.[180] They may have different expectations or preferences than do traditional married couples about adultery[181] as well as other matters, like the sharing of finances.[182]

Because of problems like these, "the American College of Pediatricians believes it is inappropriate, potentially hazardous to children, and dangerously irresponsible to change the age-old prohibition on homosexual parenting, whether by adoption, foster care, or by reproductive manipulation."[183]

The law could handle these different attitudes of homosexuals about marriage in one of three ways. First, it could apply the standards for traditional couples to SSM. Second, it could apply the standards appropriate for SSMs to traditional couples as well. However, both of these approaches would entail applying standards appropriate for one group to another group with very different needs.[184] The wiser choice, then, would be to apply to each group the distinct standards appropriate for it.[185] To do that, however,

180. *See* Andersson et al., *supra* note 167;*see also* Lawrence Kurdek, *Are Gay and Lesbian Cohabiting Couples* Really *Different from Heterosexual Married Couples?*, 66 J. FAMILY & MARRIAGE 880, 893 (2004) (finding that the dissolution rate of homosexual couples was more than three times that of heterosexual married couples, and the dissolution rate of lesbian couples was more than four times that of heterosexual married couples).

181. *See* Craig Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage,"* 66 FORDHAM L. REV. 1699, 1726 (1998) (questioning if marriage may not have "the same meaning—entailing commitment to the same values—for gay people as for their heterosexual counterparts"). *See also supra* notes 171, 181 (discussing understandings and practices concerning fidelity among gay couples).

182. *See* Dent, *supra* note 127, at 250 & n.94.

183. American College of Pediatricians, Homosexual Parenting: Is It Time for Change? (rev'd Mar. 26, 2009), *available at* http://www.acpeds.org/?CONTEXT=art&cat=22&art=50&BISKIT=2920801063.

184. *See* Allen, *supra* note 123, at 1051 (stating that "[t]here is no escaping this dilemma.").

185. Some gay advocates agree. *See* Jeffrey A. Redding, *Dignity, Legal Pluralism, and Same-Sex Marriage*, 75 BROOK. L. REV. 791, 832-62 (2010) (arguing for a separate legal system for same-sex unions).

would show the error in having placed them under the same regime to begin with.

The problems of homosexuality do not mean that society should condemn it. However, they do strongly suggest that SSM is not as valuable as traditional marriage.

F. *Influencing Behavior and the Immutability Debate*

Some claim that sexual orientation is innate and immutable.[186] Therefore, heteronormativity serves no purpose but to gratuitously disadvantage and stigmatize homosexuals. There are several problems with this argument. First, not all agree that homosexuality is immutable.[187] Some people are bisexual, and others change their behavior.[188] Many same-sex households with children were created when the mother in a traditional marriage left it and entered into a lesbian relationship.[189] On the other hand, some women have abandoned long-term lesbian relationships and entered into heterosexual relationships.[190]

Further, the main purpose of privileging traditional marriage is to influence heterosexuals, not homosexuals. By celebrating traditional marriage society encourages couples who create children to do so within marriage.[191] Celebrating heterosexual marriage also encourages heterosexuals who

186. *See* Dean Hamer & Michael Rosbash, *Genetics and Proposition 8: Human Sexual Orientation Has Deep Biological Roots*, L.A. TIMES, Feb. 23, 2010, at 13 (stating that "the empirical evidence for the role of genetics in human sexual orientation has been quietly but steadily mounting over the last 15 years.").

187. *See* EDWARD O. LAUMAN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES 308-09 (1994) (finding evidence implying that one plausible interpretation of the pattern is that "the environment in which people grow up affects their sexuality in very basic ways" and homosexuality is more common where it is tolerated or condoned); Lisa M. Diamond, *Female Bisexuality from Adolescence to Adulthood: Results from a 10-Year Longitudinal Study*, 44 DEVELOPMENTAL PSYCH. 5 (2008) (finding the link between sexual preferences and self-identification somewhat fluid).

188. *See* LAUMAN ET AL., *supra* note 194; K.K. Kinnish *et al.*, *Sexual Differences in the Flexibility of Sexual Orientation: A Multidimensional Retrospective Assessment*, 34 ARCHIVES OF SEXUAL BEHAV. 173 (2005).

189. *See supra* note 57.

190. *See* E. Schechter, *Labels May Oversimplify Women's Sexual Identity, Experiences*, 35 MONITOR ON PSYCH. 28 (2004).

191. This is especially important for the less well-off, who most need the stability that marriage provides. *See* KAY HYMOWITZ, MARRIAGE AND CASTE IN AMERICA85-86 (2006).

might otherwise not marry *or* procreate to do both. This is appropriate because of the benefits of marriage and of bearing and raising children to the couple, as well as to society.

Moreover, society can influence sexuality. Homosexual activity is more common in societies that condone it than in societies that condemn it.[192] Even if sexual *orientation* is immutable, sexual *conduct* is "an issue of choice."[193] Children subjected to homosexual experiences may be more likely in adulthood to identify as homosexual.[194] There has been some success in altering homosexual behavior in adults.[195] Though by no means conclusive, and still the subject of heated debate, these findings suggest that sexual preference and conduct are not strictly immutable or purely genetic.

Admittedly, any change may be tenuous. Although a former homosexual may be heterosexually active, s/he may still have homosexual urges. That does not mean the there was not a change. The individual's behavior has changed. We all have temptations we resist because we believe that succumbing to them is wrong or would have undesirable consequences.

Carlos Ball considers the immutability debate irrelevant, though: "If same-gender sexual conduct, relationships, and families, however, are good . . . then whether one 'chooses' to be a lesbian or a gay man would become as irrelevant a question as whether one chooses to be a heterosexual."[196] As this article shows, however, society has many good reasons to prefer heterosexuality.

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192. *See* LAUMAN ET AL., *supra* note 194, at 308-09.

193. BALL, *supra* note 10, at 101.

194. *See* William R. Lenderking, et al., *Childhood Sexual Abuse Among Homosexual Men: Prevalence and Association with Unsafe Sex*, 12 J. GEN. INTERNAL MED. 250 (1997); Elisa Romano & Rayleen V. De Luca, *Male Sexual Abuse: A Review of Effects, Abuse Characteristics, and Links with Later Psychological Functioning*, 6 AGGRESSION AND VIOLENT BEHAVIOR 64, 65; M.E. Tomeo et al., *Comparative Data of Childhood and Adolescence Molestation in Heterosexual and Homosexual Persons*, 30 ARCHIVES OF SEXUAL BEHAV. 535 (2001).

195. *See* Robert L. Spitzer, *Can Some Gay Men and Lesbians Change Their Sexual Orientation? 200 Participants Reporting a Change from Homosexual to Heterosexual Orientation*, 32 ARCHIVES OF SEXUAL BEHAV. 403 (2003).

196. BALL, *supra* note 10, at 101.

In a group conversation, a former academic colleague of mine once referred to "gay rabbis." When another in the group voiced surprise at "gay rabbis," my colleague replied: "Sure. Lots of rabbis are gay—they just don't know it." I later wondered whether this condition should be accounted a misfortune, or a blessing. Imagine a rabbi at his 90th birthday party, surrounded by his wife and loving children, grandchildren, and great-grandchildren, and admiring colleagues and congregants. A supernatural stranger takes the rabbi aside and says: "You are a homosexual but didn't know it. Had you known and acted on that fact, you could have had a much lustier sex life."

The rabbi might admit the stranger's claim. He might agree he was less attracted to women (including his wife) than most men seemed to be, and that he felt an attraction to men that most men did not seem to share. He might nonetheless say that his wife's love and their marriage, the joys of raising their children and of having grandchildren and great-grandchildren, and the respect of his colleagues and congregation far outweighed any drawbacks of a mediocre sex life. And might we not agree?

VII. RAMIFICATIONS

A. *The Expressive Function of Marriage*

The law affects marriage primarily through its expressive function; i.e., "in expressing social values and in encouraging social norms to move in particular directions."[197] "Because societies care about family obligations they make them part of their systems of honor[.]"[198] The law bolsters the honor society confers on marriage by giving it official recognition.[199] Advocates of SSM acknowledge that this

197. Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 953 (1996).

198. Scott FitzGibbon, *A City without Duty, Fault, or Shame, in* RECONCEIVING THE FAMILY, *supra* note 5, at 28, 42.

199. *See generally* Carol Weisbrod, *On the Expressive Functions of Family Law*, 22 U.C. DAVIS L. REV. 991 (1989). *See also* MARRIAGE AND THE PUBLIC GOOD, *supra* note 61, at 2 ("Creating a marriage culture is not a job for the government . . . . *But*

expressive function of legal recognition of marriage—the honor and symbolic approval it confers—is the main reason for seeking legal validation of SSM.[200]

1. SSM and Respect for Marriage

In general, traditional marriage is good for the married couple, their children and society.[201] Not all marriages prove beneficial to the couple or their children, and some people may not be suited for marriage, but most things society promotes are not beneficial or suitable for everyone. Society promotes college attendance, for example, even though some students will drop out and not graduate and college is simply unsuitable for some people.

Many people seize the benefits of marriage on their own but, as with all goods, some do not.[202] So it is wise for society to promote traditional marriage by making it seem normal and attractive, especially to those who may not see its benefits on their own. Would legal recognition of SSM aid this effort? Some argue that the sight of homosexual couples marrying despite their inability to reproduce would inspire greater social respect for marriage.[203] At the least, it is argued, recognition of SSM would be a "free lunch"—it would benefit homosexuals by giving them the legal benefits of marriage and the social benefits of greater respect, without diminishing respect for the institution of marriage.[204]

The claim is implausible. Economists have taught us to doubt claims of a free lunch. "Law cannot by itself create or

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law and public policy will either reinforce and support these goals, or undermine them.") (emphasis in original).

200. *See* Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 580 (1994-95) (referring to "marriage's central symbolic importance in our society and culture" and the "transformative potential of [homosexuals'] right to marry"); E.J. Graff, *Retying the Knot*, The Nation, Jun. 24, 1996, at 12 ("Marriage is an institution that towers on our social horizon, defining how we think about one another.").

201. *See supra* notes 5, 47-50, 123-33 and accompanying text.

202. *See supra* notes 29-30 and accompanying text.

203. *See* RAUCH, *supra* note 8, at 94-95.

204. *See supra* notes 8 & 155 and accompanying text.

define social institutions; they arise out of and are sustained by social attitudes and practices. Law can only operate at the margin . . . to affirm, to assist, to adjust institutions."[205] The law's definition of marriage has always coincided with the mainstream religious definition so that the two reinforced each other with the respect that society affords to the law and religion.[206] Recognition of SSM would reverse this relationship and provoke a war between the two.

SSM would not win this war quickly, or perhaps ever. Many Americans consider homosexual marriage a "mocking burlesque"[207] or "mere parody"[208] of the real thing. Thirty-one states have voted on initiatives to recognize traditional marriage only, and in all thirty-one the initiative prevailed. These states include some of the most liberal (California, Oregon, Washington, New Jersey, Hawaii, and Maine), and in most states the vote was not even close. Moreover, some who voted against these initiatives surely did so because they thought SSM deserves recognition even though they themselves do not approve of it.[209] Given the widespread opposition to SSM and the 31 state constitutions barring its recognition, only a Supreme Court decision could impose SSM nationwide. Such a decision would certainly provoke a

205. Carl E. Schneider, *Afterword: Elite Principle: The ALI Proposals and the Politics of Law Reform, in* RECONCEIVING THE FAMILY, *supra* note 5, at 489, 502.

206. *See* W. Bradford Wilcox & Steven L. Nock, *What's Love Got To Do With It? Equality, Equity, Gender, and Women's Marital Happiness*, 84 SOC. FORCES 1321 (2006); Vaughn R.A. Call & Tim B. Heaton, *Religious Influences on Marital Stability*, 36 J. SCIENTIFIC STUDY OF RELIGION 382 (1997). [AE: Does this cite support the statement? If not, how to rephrase?]

207. Hadley Arkes, *The Closet Straight*, NAT'L REV., July 5, 1993, at 43, 35.

208. James Q. Wilson, *Against Homosexual Marriage*, COMMENTARY, Mar. 1996, at 34, 36 (*quoting* Kenneth Minogue, Book Review, *A Politics of Homosexuality*, NAT'L REV., Nov. 27, 1995, at 62, 64.

209. *See, e.g.*, Tamara Audi, Tustin Scheck & Christopher Lawton, *California Votes for Prop 8*, Wall Street J., Nov. 5, 2008, available at http://online.wsj.com/article/SB122586056759900673.html (mentioning a voter opposing the measure because it would not affect his marriage).In addition, Iowa voters ousted the three state Supreme Court justices who had found traditional marriage unconstitutional and had to stand for confirmation elections. *See* A.G. Sulzberger, *In Iowa, Voters Oust Judges Over Marriage Issue*, N.Y TIMES, Nov. 3, 2010.

movement to amend the Constitution, an effort that would either succeed or persist for many years.[210]

Dislike of homosexual marriage seems especially strong in groups in which rates of marriage have fallen the farthest, notably blacks and lower-income whites. Indeed, America is dividing into two societies, separate but unequal—the married and the unmarried.[211] Marriage remains strong, and divorce rates have actually fallen among the well-to-do, and their children have benefitted.[212] Among the less well-off, however, marriage has declined and divorce has increased—and their children suffer the consequences.[213] Jonathan Rauch evidently thinks these people will be inspired by the pitch: "Wouldn't you like to get married and be just like a couple of homosexuals?"[214] I find that hard to believe.

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210. *See generally* William C. Duncan, *The Case for a Federal Marriage Amendment to the Constitution, Civil Rights, Religion & Same-Sex Marriage: Where Are We Going?*, 30 T. MARSHALL L. REV. 145 (2005).

211. "[T]he United States is devolving into a separate-and-unequal family regime, where the highly educated and affluent enjoy strong and stable households and everyone else is consigned to increasingly unstable, unhappy, and unworkable ones." Inst. for American Values, When Marriage Disappears: The Retreat from Marriage in Middle America 53 (Dec., 2010), *available at* http://www.stateofour unions.org/2010/SOOU2010.pdf.

212. *See id.* at 19 (finding falling divorce rate for the highly educated).

213. *See* HYMOWITZ, *supra* note 198, at 105-106 (arguing that it is the less well-off who most need the stability that successful marriages provide). In 2008 the poverty rate for single parents with children was 36.5%; for married couples with children it was 6.4%. Robert Rector, Marriage: America's Greatest Weapon Against Child Poverty 1 (Sept. 16, 2010), *available at* http://www,heritage.org/Research/Reports/2010/09/Marriage-America-s-Greatest-Weapon-Against-Child-Poverty. One study concludes that the decline in two-parent families accounted for "almost half the increase in child income inequality and more than the entire rise in child poverty rates" between 1971 and 1989. Robert I. Lerman, *The Impact of the Changing US Family Structure on Child Poverty and Income Inequality*, 63 ECONOMICA119, 137 (1996). *See also* Richard Fry & D'Vera Cohn, Women, Men and the Economics of Marriage 3 (Pew Research Center, Jan. 19, 2010), *available at* http://pewsocialtrends.org/2010/01/19/women-men-and-the-new-economics-of-marriage/ (finding that "[o]verall, married adults have made greater economic gains over the past four decades than unmarried adults"); *id.* at 5-6 (finding that marriage rates have fallen for those without a college degree). In 2008, "more than two-thirds of births to women who were high school dropouts occurred outside of marriage." Rector, *supra*, at 4.

214. *See* RAUCH, *supra* note 8.

For many Americans, validating SSM would distort the meaning of marriage.[215] "When the state does not uphold marriage's constitutive norms, it does serious damage to marriage's vitality and long-term viability."[216] At the least, validating SSM would shift the child-centered social meaning of marriage toward an understanding of marriage as intended primarily to gratify adults.[217] It would be another major step in what one scholar has called "the turn toward the self in the law of marriage and family."[218] And this is happening as debate is "focused almost entirely on adults and their right not to be discriminated against on the basis of their sexual orientation. The conflicting claims, rights, and needs of children were barely mentioned."[219] In that case, "marital norms, especially the norms of permanence, monogamy, and fidelity, will make less sense."[220] Of course, if the primary purpose of marriage is to gratify adults, it is hard to see why the law should favor marriage over other arrangements that people choose.[221]

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215. *See* Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 DUKE J. CONST. L. & PUB. POL'Y 1, 26 (2006) ("The very act of legal redefinition will radically transform the old institution and make it into a profoundly different institution, one whose meanings, value, and vitality are speculative.").

216. *See* Sugrue, *supra* note 32, at 299.

217. Seana Sugrue calls this effect "antinomian hedonism," which reflects "the belief that unions exist to fulfill the desires and emotional needs of those who wish to enter into them." Sugrue, *supra* note 32, at 300.*See also* Amy Wax, *Traditionalism, Pluralism, and Same-Sex Marriage*, 59 RUTGERS L. REV. 377, 400-01 (2007) (arguing that with recognition of SSM "procreation might become less central to marriage" and that "homosexual couples might place less emphasis on sexual fidelity" which "might affect how heterosexuals view their own commitments"). *See also* WHITEHEAD, *supra* note 78 at 54 (presenting the traditionalist argument that the liberalization of divorce had this effect). E.J. Graff says (approvingly) that recognizing SSM would make marriage "ever after stand for sexual choice, for cutting the link between sex and diapers." Graff, *supra* note 261, at 12.

218. Helen M. Alvare, *The Turn Toward the Self in the Law of Marriage and Family: Same-Sex Marriage and Its Predecessors*, 16 STAN. L. & POL'Y REV. 135 (2005).

219. SOMERVILLE, *supra* note 50, at 150.

220. Sherif Girgis, Robert P. George & Ryan T. Anderson, *What Is Marriage?*, 34 HARV. J.L. & PUB. POL'Y245, 276 (2010). "Public institutions shape our ideas, and ideas have consequences; so removing the rational basis for a norm will erode adherence to that norm—if not immediately, then over time." *Id.*

221. *See supra* note 141 and accompanying text.

Some gay people admit that recognizing SSM would erode respect for marriage—and they welcome that prospect. Nan Hunter says that validating same-sex marriages could "destabilize the gendered definition of marriage."[222] Michael Warner sees the fight for recognition of SSM as an interim tactic, "a transitional moment toward the eventual abolition of marriage." [223] Janet Halley predicts similar consequences:

> [R]ecognition of same-sex marriage might lend momentum to the long-running erosion of the specialness of marriage. No longer privileged by restriction to *some* unions and deprived of its power to send the message that those unions are particularly good, marriage might become less, not more, meaningful. Cross-sex couples could lose interest in marriage as a result, opting to co-habit rather than to marry. Pro-marriage voting strength could erode; the social consensus that it is worthwhile to devote public and private resources to "support marriage" could break up. If this happens, rather than a convergence of same-sex with cross-sex couples in maintaining the centrality and thus the normalizing power of marriage, "mere" recognition will have contributed to the end of marriage's centrality as a mode of social ordering.[224]

Such an effect seems to be occurring in the Netherlands, which began recognizing SSM in 2001. Since then, more

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222. Nan D. Hunter, *Marriage, Law and Gender: A Feminist Inquiry*, 1TUL. J. L. & SEXUALITY 9, 12 (1991). *See also* SULLIVAN, *supra* note 8, at 179 ("Even those tolerant of homosexuals may find this institution [marriage] so wedded to the notion of heterosexual commitment that to extend it would be to undo its very essence."). "[C]onferring the legitimacy of marriage on homosexual relations will introduce an implicit revolt against the institution into its heart." Ellen Willis, *Can Marriage Be Saved? A Forum*, THE NATION, July 5, 2004, at 16, 16.

223. WARNER, *supra* note 119, at 88-89. Michelangelo Signorile urges homosexuals to "demand the right to marry not as a way of adhering to society's moral codes but rather to debunk a myth and radically alter an archaic institution." They should "fight for same-sex marriage and its benefits and then, once granted, redefine the institution of marriage completely. " Signorile, *supra* note 132, at 161.

224. Janet Halley, *Recognition, Rights, Regulation, Normalization: Rhetorics of Justification in the Same-Sex Marriage Debate, in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 97, 101 (Robert Wintemute & Mads Andenaes, eds., 2001). "[Former President George W.] Bush is correct . . . when he states that allowing same-sex couples to marry will weaken the institution of marriage. It most certainly will do so, and that will make marriage a far better concept than it previously has been." Victoria A. Brownworth, *Something Borrowed, Something Blue: Is Marriage Right for Queers? In* I DO/I DON'T: QUEERS ON MARRIAGE 53, 58-59 (Greg Wharton & Ian Philips eds., 2004).

heterosexual couples have opted for domestic partnerships and cohabitation and fewer have married.[225] Some have even suggested that disparagement of the biological family might facilitate a government takeover of the traditional functions of the family.[226]

Some liken homosexuality to bestiality. Homosexuals understandably take great umbrage at this comparison. But in so doing they tacitly answer the question: What's the harm in recognizing SSM?[227] The comparative societal framework does matter in the context of engendering respect. To equate homosexuality with bestiality is reasonably seen by homosexuals as an insult.[228] Similarly, to equate heterosexuality and traditional marriage with homosexuality and SSM is reasonably perceived by heterosexuals as an insult to them.

Recognizing SSM and forcing Americans to honor SSM and homosexuality as "just as good as" traditional marriage and heterosexuality will diminish respect for government and the law in general and accelerate social disintegration. "[A] social order based on laws can be maintained without massive coercion only if most people most of the time abide, as a result of supportive social norms, by the social tenets embedded in the law . . . ."[229] People are more likely to cooperate if encouraged to do so by respected authority.[230] "[M]arriage's constitutive norms also serve to uphold other

225. *See* M. Trandafir, The Effect of Same-Sex Marriage Laws on Different-Sex Marriage: Evidence from the Netherlands(working paper, Univ. of Sherbrokee) (2009).

226. *See generally* Allan Carlson, *Equality Or Ideology? Same-Sex Unions in Scandinavia, in* WHAT'S THE HARM?, *supra* note 26, at 263.

227. *See* McClain, *supra* note 155 at 1251; *see also supra* note 8 and accompanying text.

228. However, before long it may be possible to gestate a human being inside an animal. *See* SOMERVILLE, *supra* note 50, at 128. If an animal is to some extent the biological parent of a child, does marriage with animals become defensible?

229. AMITAI ETZIONI, THE MONOCHROME SOCIETY 171 (2001).*See also* PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965); *see also* HARRY M. CLOR, PUBLIC MORALITY AND LIBERAL SOCIETY: ESSAYS ON DECENCY, LAW AND PORNOGRAPHY (1996); ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY (1995).

230. *See* Lynn Stout, *On the Proper Motives of Corporate Directors (Or, Why You Don't Want to Invite Homo Economicus to Join Your Board)*, 28 DEL. J. CORP. L. 1 (2003).

forms of social order, including state order, especially republican order. Hence, the demise of marriage can be expected to weaken the norms of other institutions, including the state."[231] Recognizing SSM and normalizing homosexuality will also weaken our commitment to others. Traditional marriage is a model for that commitment, and the family is the school in which children learn to care about others. Homosexual relationships are less enduring and faithful than traditional marriages and thus less a model for commitment to others, and homosexual households are less likely to teach that value.[232]

In liberal societies like America, social solidarity, or communitarianism, competes with individual freedom, or autonomy. Our Constitution is intended to "secure the Blessings of Liberty," but also to "form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, [and] promote the general Welfare."[233] Solidarity has waned in America in recent decades.[234] The reasons for the decline are complex and hazy, but surely one reason is the belief of many that our traditional values have been not merely abandoned but dishonored by our government.

Again, our commitment to rights in America stems from religion.[235] So also does our sense of duty to people outside our families and circle of friends. For most Americans, the norm of doing unto others as we would have done unto us and of helping those in need even if they are strangers, come from Christianity and Judaism. As our government and law have deprecated the faith of most Americans, these tenets too have suffered, and may decline further in the future. Many parents who dislike the contempt for religion and traditional values that is common in public schools remove

231. Sugrue, *supra* note 32, at 299.

232. *See supra* notes 165-88 and accompanying text.

233. U.S. CONST. pmbl.

234. *See* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000).

235. *See supra* note 34 and accompanying text.

their children to private schooling.[236] They may also withdraw their support for public schools, thereby further eroding social solidarity.

A further effect of this conflict will be increasing geographic segregation of America into areas that honor traditional values and areas that do not. This has already occurred as a few states have recognized SSM, domestic partnerships, or civil unions while most prefer traditional marriage. Some jurisdictions outlaw discrimination against homosexuals; others do not. Some public schools teach approval of homosexuality;[237] others do not. Many traditional families flee left-leaning, pro-homosexual urban areas for areas with more conventional values. America has always had social differences between regions and between urban, suburban, and rural areas, but these differences seem to be deepening, and attitudes toward the family are an important part of the division. This trend will further erode the social unity needed to address problems that are best handled at the national level.

The alienation of traditional religionists is aggravated by the further insistence that private service providers aid and abet such homosexual practices as same-sex weddings[238] and artificial insemination of women in lesbian partnerships.[239] The law sometimes silences those who oppose the homosexual movement[240] and has denounced passages from the Bible as "hate speech."[241] Some in the homosexual

236. Enrollment in Christian schools has been growing and is expected to continue to grow. *See* National Center for Education Statistics, The Condition of Education 2006, Indicator 3, Trends in Private School Enrollment (2006), *available at*http://nces.ed.gov/pubs2006/2006072.pdf; National Center for Education Statistics, Projections of Education Statistics to 2014, Appendix A: A Projection Methodology: Enrollment (2006).

237. *See infra* Part VI-B.

238. *See Wilkock v. Clane Photography, L.L.C.*, HRD No. 06-12-20-0685, Human Rights Comm'n of New Mexico, available at http://volokh.com/files/willockopinion.pdf (visited May 18, 2009).

239. *See* N. Coast Women's Care Med. Group, Inc. v. San Diego Superior Court, 189 P.3d 959 (Cal. 2008).

240. *See* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006) (upholding punishment of public school student who wore at school a t-shirt expressing opposition to the school's official program condoning homosexuality).

241. *See* Peterson v. Hewlett-Packard Co., 358 F.3d 599, 605 (9th Cir. 2004) (referring to passages from the Bible posted by Peterson in his work cubicle as

movement make no secret of their desire to drive their opponents out of the public square.[242] The effort is succeeding.[243] They try to deny the Boy Scouts use of public facilities[244] and to exclude traditionalist religious organizations from college campuses.[245] They have forced the closure of Catholic welfare agencies because they would not extend spousal benefits to SSMs[246] or offer adoption services to homosexual couples.[247] They demand that public schools teach young children that homosexuality is normal and acceptable.[248]

Protection of unborn children is another traditional value with strong connections to religion, so the legal war over abortion offers an instructive comparison. Many Americans

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"hurtful," "hostile and intolerant," and "demeaning and degrading"). [AE: This cite doesn't support "hate speech." At a minimum, "hate speech" needs to be taken out of quotes above the line. That phrase is never used.]

242. *See* MARSHALL K. KIRK & HUNTER MADSEN, AFTER THE BALL: HOW AMERICA WILL CONQUER ITS FEAR AND HATRED OF GAYS IN THE '90S, at 189 (1989) (advocating depicting traditionalists as "[h]ysterical backwoods preachers, drooling with hate to a degree that looks both comical and deranged," thereby rendering them "so discreditable that even Intransigents will eventually be silenced in public . . . .").

243. *See* Matthew J. Franck, *In the Gay Marriage Debate, Stop Playing the Hate Card*, WASH. POST, Dec. 17, 2010 *available at*http://www.washingtonpost.com/wp-dyn/content/article/2010/12/17/AR201012170528.html (reporting incidents of intimidation of supporters of traditional marriage); Michael Foust, *Pollster: Most "Gay Marriage" Polls Skewed*(Aug. 16, 2010), *available at* http://www.bpnews.net/bpnews.asp?id=33524 (reporting that most Americans responding to automated polls oppose recognition of SSM, but that, when contacted by a live caller, most favored it).

244. The effort has succeeded in some cases and not in others. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (holding that the Boy Scouts is an expressive association that has a First Amendment right to exclude as officers those who do not conform to its standards of conduct); Barnes-Wallace v. Boy Scouts of Am., 275 F. Supp. 2d 1259 (S.D. Cal. 2003) (holding that city could not favor Boy Scouts in leasing public park land because it is a religious organization); Evans v. City of Berkeley, 129 P.3d 394 (Cal. 2006) (holding that city could bar Sea Scouts from use of municipal marina).

245. *See* Christian Legal Soc'y v. Martinez, 130 S.Ct. 2971 (June 28, 2010) (upholding public law school's refusal to accredit Christian organization that did not accept committed homosexuals as officers).

246. *See* Michelle Boorstein, *Citing Same-Sex Marriage Bill, Washington Archdiocese Ends Foster-Care Program*, WASH. POST, Feb. 17, 2010, at B1.

247. *See* Patricia Wen, *They Cared for the Children: Amid Shifting Social Winds, Catholic Charities Prepares to End Its 103 Year of Finding Homes for Foster Children and Evolving Families*, BOSTON GLOBE, June 25, 2006, at A1.

248. *See infra* notes 380-82 and accompanying text.

(perhaps a majority)[249] still resist the Supreme Court's invention of a constitutional right to abortion.[250] In nearly forty years public opinion about abortion has changed very little. The reason for the differences is clear. Desegregation eradicated a local religious heresy and brought American law back into line with traditional Judeo-Christian principles and with the attitudes of the rest of the world.[251] The Supreme Court's abortion decisions flouted most mainstream American religion and the beliefs of most of the rest of the world.

The homosexual movement faces much greater opposition than the pro-abortion movement. It violates Jewish and Christian tenets that until recently were unquestioned for nearly 3,000 years. It also offends most of the rest of the world. Clearly this opposition will not vanish in this century. Further, legal abortion rarely poses dilemmas of individual conscience. With a few exceptions (such as a nurse ordered to participate in an abortion), citizens are not expected to aid, abet, or condone abortions; they simply may not disrupt them. As noted, the demands of the homosexual movement for active cooperation from private parties have already caused many disputes, and these will proliferate if the movement continues to advance. Sometimes innocent bystanders are injured in these clashes. The cases where Catholic agencies terminated valuable social services are just two examples.[252]

Marital customs have varied greatly from place to place and from time to time. However, one constant is that marriage has always served to attach mothers and fathers to

249. Gauging public opinion about abortion is tricky. Obviously many Americans are conflicted about it, and their responses to poll questions often vary considerably depending on the phrasing of questions. *See* Dalia Sussman, *A Question of What to Ask*, N.Y. TIMES, Feb. 28, 2010, Week in Review, at 5 (stating that "in evaluating results [of public opinion polls], the way a question is worded can be significant[,]" and discussing abortion as one issue on which this is true).

250. *See* Roe v. Wade, 410 U.S. 113 (1973).

251. *See infra* Part VI-A-4.

252. *See infra* notes 307-8- and accompanying text.

their children and to each other.[253] "Marriage (and only marriage) unites the three core dimensions of parenthood—biological, social and legal—into one pro-child form: the married couple."[254] Correlatively, marriage has always been exclusively heterosexual.[255] Marriage, in other words, has always served as regulation of breeders. As David Blankenhorn puts it: "marriage is not primarily a license to have sex. Nor is it primarily a license to receive benefits or social recognition. It is primarily a license to have children."[256]

The universality of this norm suggests that there is a good reason for it: if a practice helps human communities to survive and flourish, it "will be routinely rediscovered by every culture, without need of either genetic descent or cultural transmission of the particulars."[257] Perhaps, then, it would be unwise to transmogrify the social nature and function of marriage. As Seana Sugrue puts it, "the erosion of marriage has a tendency to erode other institutions."[258]

2. A Hypothetical: The Martin Luther King and Jefferson Davis Holiday

A hypothetical may help. Imagine a proposal to change the Martin Luther King holiday to the Martin Luther King **and Jefferson Davis** holiday. How could anyone oppose this change? Its material cost would be virtually zero, and it would extend equality to fans of the Confederacy who now

253. "In all societies, marriage shapes the rights and obligations of parenthood." Blankenhorn, *supra* note 93. *See also supra* notes 140, 142-43 and accompanying text.

254. Blankenhorn, *supra* note 93, at 23.

255. "Recognized marriage has invariably been restricted to heterosexual couples . . . ." Wilson & Daly, *supra* note 125, at 203. "Culture and religions throughout history have recognized various forms of marriage. Same-sex marriage has not been one of them." STEVEN F. NOLL, TWO SEXES, ONE FLESH: WHY THE CHURCH CANNOT BLESS SAME-SEX MARRIAGE 41 (1997). *See also* George W. Dent, Jr., *The Defense of Traditional Marriage*, 4 VA. J.L. & POL. 581, 584 n.9 (1999).

256. Blankenhorn, *supra* note 93. "People wed primarily to reproduce." *Id.* (quoting anthropologist Helen Fisher).

257. DANIEL C. DENNETT, DARWIN'S DANGEROUS IDEA: EVOLUTION AND THE MEANINGS OF LIFE 487 (1995).*See also* Allen, *supra* note 123, at 1048 ("several features [of marriage] are remarkably constant across times, cultures, and religions and must therefore reflect a universal human condition").

258. Sugrue, *supra* note 32, at 310.

feel like second class citizens because of their affectional preference. More generally, it would promote equality by affording equal legal and social respect to all choices rather than privileging one preference simply because it is held by the majority.

However, I suspect (and hope) that most Americans would reject this change because of its expressive effect. It would, in the view of most Americans, change the meaning of the holiday from one that honors racial equality to one that equally expresses indifference between racial harmony and racism. Some might contest this characterization, claiming that the change would only honor the courage and solidarity of the Confederates. However, the majority would be justified in attaching the meaning they see. If this makes fans of the Confederacy feel bad, that is unfortunate—the purpose of the Martin Luther King holiday is not to harm anyone. But it can't be helped—society has a right (within the limits of the Constitution) to champion some values and not others. Society is just as warranted in preferring heterosexuality and traditional marriage as it is in preferring civil rights and racial equality. No valid moral principle dictates otherwise.

3. The Precedent of Illegitimacy

An instructive precedent is the destruction of the law's ancient preference for legitimate children.[259] This preference, it was argued, unfairly punished and stigmatized bastards for the sins of their parents. The Supreme Court overturned most legal discrimination against illegitimates as a violation of Equal Protection.[260] The sentiment underlying the Court's rulings was not controversial. No one favored the stigmatizing of bastards for its own sake. The legal and social stigmas were intended to deter adults from conceiving children outside of marriage

259. The legal and social ostracism of illegitimate children dates at least to the Old Testament. *See Deuteronomy* 23:2 ("A bastard shall not enter into the congregation of the LORD; even to his tenth generation shall he not enter into the congregation of the LORD.") (KJV).

260. *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) (disapproving of laws "imposing disabilities on the illegitimate child").

because children do best when raised by their biological parents who are married and because illegitimacy threatens social disruption from conflicting claims of children with different parents.

However appealing the motives for acceptance of illegitimate children, it was followed by a sharp drop in the normativity of marriage and a steep rise in the rate of illegitimacy.[261] Despite the legal acceptance of illegitimacy, it is still generally damaging to children.[262] In some areas illegitimacy reached levels so high as to damage entire communities. Marriage is a social as well as a legal institution. If illegitimate children are few, even they perceive marriage as the norm that everyone (themselves included) is expected to follow. The behavioral problems (like crime, drug abuse and poor academic performance) to which illegitimate children are prone are also confined by the influence of the vast majority of children who are legitimate. When illegitimacy spreads, though, these behavioral problems are no longer seen as pathological aberrations but as normal—an example of "defining deviancy down."[263] Schools cease to function effectively. Crime and drug abuse thrive, driving out community residents who can leave and victimizing residents who cannot leave.

The Supreme Court mandated formal legal equality for illegitimate children. Unfortunately, illegitimate children

261. Between 1960 and 2004 the percentage of children born out of wedlock rose from 5.3 to 35.7 percent. BARBARA DAFOE WHITEHEAD & DAVID POPENOE, THE STATE OF OUR UNIONS: THE SOCIAL HEALTH OF MARRIAGE IN AMERICA 37 (2006). The rate reached 37 percent in 2005. *Babies Born to Singles Are at Record: Nearly 4 in 10*, N.Y. TIMES, Nov. 22, 2006, at A19. Of course, the legal acceptance of illegitimacy was not the only factor causing this epidemic. Many other changes that wracked American society in this period may have contributed to it. The liberalization of divorce law, for example, and the ensuing explosion of divorce rates, sullied the prestige of marriage.

262. *See* AMY L. WAX, RACE, WRONGS, AND REMEDIES 58 (2009), stating:

> A growing body of research shows that children who grow up with single or unmarried parents are less well-off on many measures. In addition to having lower educational achievement and completing fewer years of schooling, they experience more behavioral and psychological problems throughout life and have less stable adult relationships.

See also WHITEHEAD &POPENOE, *supra* note 322, at 33-34.

263. This term was coined by Daniel Patrick Moynihan. *See* Daniel Patrick Moynihan, *Defining Deviancy Down*, AM. SCHOLAR, Winter 1993, at 17.

were not hurt primarily by their legal status, but by the absence of a mother or father in their lives. Children in general probably suffered more injury from the epidemic of illegitimacy than they benefitted from its legal acceptance. Moreover, the change is difficult to reverse. When a social institution is suddenly stripped of the respect it accumulated over many centuries, how can it be quickly restored? We have no quick fixes, and even long-term solutions are elusive.[264]

Recognition of SSM would probably produce similar effects. It would make the minority of the small minority of homosexuals who wed feel better about themselves and enhance their respect somewhat. However, it would also further diminish respect for and the normativity of marriage, with concomitant detriment for individual adults, society as a whole, and, especially, for children.

4. The Desegregation Analogy

Although Americans have rejected SSM every time they could vote on it, gay activists argue that public attitudes would soon change dramatically if gay rights and SSM were foisted onto the public. They invoke the precedent of racial integration and, in particular, the eradication of anti-miscegenation laws by the Supreme Court in *Loving v. Virginia*.[265] As America accepted desegregation and interracial marriage, it is said, so it will quickly and calmly accept SSM.

The analogy is most instructive—but it argues strongly against recognizing SSM. First, the relationship of religion to racial oppression is completely different from its relationship to the homosexual movement. Christianity triumphed in the Roman Empire due in part to its ethnic universality. As St. Paul said, in Christianity "there is neither Greek nor Jew . . . Barbarian, Scythian, bond nor

264. *See* WAX, *supra* note 234, at 84 (stating that "no social program has yet been devised that can arrest these trends").

265. 388 U.S. 1 (1967). *See* R.A. Lenhardt, *Beyond Analogy:* Perez v. Sharp, *Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 CALIF. L. REV. 839 (2008) (comparing interracial and same-sex marriage).

free: but Christ is all, and in all."[266] There is no history of racial caste systems or of anti-miscegenation laws in Western culture.

In the American South the religious justification for racial oppression and segregation did not gel until the early 19th Century.[267] Until then slavery needed no justification; it was an ancient and widespread institution.[268] Only when the charge that slavery offended Christianity gained wide acceptance was it necessary to contrive a religious justification for slavery. This doctrine never took hold outside the American South, however. Thus, when the Supreme Court held segregation unconstitutional, it was simply rejecting a local heresy[269] and returning America to orthodox Christian views.

Race holds a unique place in American history—it was the principal issue over which America fought its only civil war. Race also holds a unique place in American law. It was the basis for three amendments to the Constitution,[270] and is the subject of innumerable anti-discrimination laws.[271]

Western legal tradition and Judeo-Christian theology on SSM and homosexuality are almost exactly the opposite of what they were (and are) on slavery and racism. In Judaism and Christianity homosexual acts have long been denounced as a grave sin, and Western law has generally treated homosexual acts as crimes, often as capital offenses.[272] For the Supreme Court to mandate equality for SSM and

266. *Colossians* 3:11 (KJV).

267. *See* GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815 539 (2009) (describing the beginning of racist ideology and its inconsistency with traditional Christianity and the Christian beliefs of the founders).

268. The Popes condemned slavery at least from 1435. *See* Loel S. Panzer, *The Popes and Slavery*, HOMILETIC & PASTORAL REV., Dec. 1996, at 1, *available at* www.churchinhistory.org/pages/booklets/slavery.htm. However, slavery long continued to be tolerated in many areas of Christianity.

269. At the time of the decision in *Loving* only sixteen states had anti-miscegenation laws. *See* Loving v. Virginia, 388 U.S. 1, 6 (1967).

270. U.S. CONST. amends. XIII-XV.

271. *See, e.g.*, Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e (2010) (federal law barring racial and other forms of discrimination in many contexts).

272. *See* Bowers v. Hardwick, 478 U.S. 186, 196-97 (1986) (Burger, C.J., concurring), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003) ("Homosexual sodomy was a capital crime under Roman law.").

homosexuality, then, would not snuff out a local heresy and return the law to Western and Judeo-Christian orthodoxy, but would trample on Western and Judeo-Christian norms and enshrine heresy.

The religious differences between the two cases are reflected in the ecclesiastic and international responses they provoked. Desegregation and the eradication of anti-miscegenation laws provoked some religious opposition in the American South, but not in most of the nation or anywhere else in the world. Indeed, it has been argued that the national push for desegregation was motivated in part by concern that the subordination of blacks had become an embarrassment for America in the Cold War with the Soviet Union.[273] Desegregation brought us into line with the beliefs of the rest of the world.

By contrast, homosexual activity is widely disapproved by the world's major religions and by most other nations. The experience of the Anglican Communion is instructive. The Episcopal Church, the American arm of the Anglican Communion, condoned the ordination of a homosexual bishop. The international hierarchy, led by the Archbishop of Canterbury, showed signs of accepting this action. However, members of the Communion in Africa, where the most Anglicans now live, made clear that they opposed ordination of homosexuals and would, if necessary, split from the mother church over the issue. The Catholic Church continues to condemn homosexual activity and is unlikely to change its attitude in this century, if ever. Among Muslims, Western approval of homosexuality is often cited as a prime example of the West's immorality.[274] Even the European

273. *See* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000); *see also* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 182-84 (2004).

274 Muslim nations have consistently blocked efforts to adopt, or even discuss, an international accord condemning discrimination against homosexuality. *See* James Tillman, *UN General Assembly Eliminates Reference to "Sexual Orientation," Gender Identity,* LIFESITENEWS (Dec. 21, 2009, 12:15 PM), *available at* http://www.lifesitenews.com/ldn/2009/dec/09122102.html; Andrew Osborn, *Muslim Alliance Derails UN's Gay Rights Resolution*, GUARDIAN, Apr. 25, 2003, at 17, *available at*http://www.guardian.co.uk/world/2003/apr/25/gayrights.andrewosborn.

Court of Human Rights and the French Constitutional Council have denied there is a right to recognition of SSM.[275]

America's political reaction to the abolition of anti-miscegenation laws is also instructive. Before the Supreme Court's ruling in *Loving* many state anti-miscegenation laws had already been rescinded by legislative or judicial action. In no state was a referendum passed to restore the old law. By contrast, the push for SSM provoked broad opposition, and referenda to restore traditional marriage succeeded in all 31 states where the issue reached the ballot.[276] Further, most African-Americans reject the comparison; most oppose recognition of SSM.[277] Thus in every salient respect the circumstances of the homosexual movement are almost the exact opposite of the desegregation movement.

5. Polygamy, Incest, and Equality

Granting normative equality to SSM will make it logically difficult or impossible to deny like treatment to some other marital practices currently disapproved, like polygamy and incest,[278] and some other sexual activities that are now illegal in many places, like prostitution and pornography. Carlos Ball characterizes such claims as "the typical essay

275. *See European Court Rules Gay Marriage Not Universal Human Right, Says Countries Can Make Own Rules, available at*http://www.foxnews.com/world/2010/06/25/european-court-rules-gay-marriage-universial-human-right/. The French Constitutional Council—the highest French court on constitutional issues—recently rejected a constitutional demand for recognition of SSM. *See* Lauren Funk, *French High Court Affirms Traditional Marriage* (Feb. 3, 2011), *available at* http://www.c-fam.org/publications/id.1782/pub_detail.asp.

276. *See supra* note 270 and accompanying text. *See also* Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153 (2009) (discussing the radically different political responses to the two judicial phenomena).

277. *See* Cara Mia DiMassa & Jessica Garrison, *Why Gays, Blacks are Divided on Prop. 8*, L.A. TIMES, Nov. 8, 2008, at A1 (reporting that nearly two-thirds of black voters voted for Prop. 8).

278. *See, e.g.*, David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 491 (1996). Marriage between close relatives is now forbidden in all states. *See* Lynn D. Wardle, *"Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771, 778-86 (2001).

that discusses the parade of horribles."[279] Significantly, he does not refute that vision and he seems to condone it for homosexual relationships.[280]. As recognition of SSM has gained credence, polygamy has also ceased to be unthinkable in America. A recent manifesto signed by hundreds of scholars and political activists called for legal validation of "committed, loving households in which there is more than one conjugal partner."[281]

Incest is also garnering more respect.[282] If two persons of the same-sex can marry, it is hard to see why two brothers or three sisters cannot marry. Even for heterosexual couples who bear children, the scientific argument against incest based on the threat of birth defects is weak.[283] Moreover, the ban on incest discriminates against close relatives who want to marry without having a sexual relationship.[284]

This is not surprising because the primary argument for recognizing SSM is the principle of autonomy; the idea that people should be free to do as they wish so long as they do not cause some fairly clear, direct harm to others. [285] The Supreme Court invoked autonomy in nullifying criminal sodomy laws.[286] The same principle argues for polygamy.[287]

279. *See* BALL, *supra* note 10, at 243 n.131; Raphael Lewis, *Opponents Warn Lawmakers that Polygamy Will Be Next*, BOSTON GLOBE, Feb. 10, 2004 ("Advocates of same-sex marriage . . . dismissed the argument by their opponents [that SSM leads to polygamy] as 'an old myth' that has little to do with fundamental rights of people.").

280. Ball says that "polygamous *heterosexual* relationships . . . , at least in this country, have been built around traditional gender roles and a pronounced disparity of power between the partners . . . ."BALL, *supra* note 10, at 114 (emphasis added).

281. BEYOND SAME-SEX MARRIAGE: A NEW STRATEGIC VISION FOR ALL OUR FAMILIES & RELATIONSHIPS 2 (July 26, 2006).

282. *See* Brett McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. 337, 359 (2004) ("I find something unseemly about the efforts of many gay advocates to deny the analogy [between anti-sodomy and anti-incest laws]. They are a group of people who have gained their own liberty paying scant heed to the liberty of others.").

283. *See* Denise Grady, *Few Risks Seen to the Children of 1st Cousins*, N.Y. TIMES, April 4, 2002. Most incest and endogamy laws are also overly broad in that they forbid many relationships with no close blood tie. *See id.*

284. *See* MARTHA A. FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004); Byrd, *supra* note 57, at 9.

285. *See* Lewis v. Harris, 908 A.2d 196, 228 (N.J. 2006) (Poritz, C.J., concurring and dissenting) (stating that the relevant principle is the "liberty to choose, as a matter of personal autonomy," whom to marry); BALL, *supra* note 10, at 34-35.

286. *See* Lawrence v. Texas, 539 U.S. 558, 574 (2003).

Indeed, the autonomy argument seems more powerful for polygamy and incest than for SSM because the former have been and still are common to many societies,[288] while the latter has almost never been tolerated anywhere.

Arguments for SSM, polygamy, and incest also inevitably raise the question whether government should prefer *any* sort of marriage over non-marital living relationships. Chai Feldblum describes her own arrangement with four other women who share expenses and chores (including child care), but whose relationships are not sexual and who do not considered themselves married.[289]

6. The Burden of Proof and the Dubious Benefits of SSM

Gay activists claim there is little empirical evidence that condoning homosexuality and SSM would harm society. True, but the reason is that these steps have never been tried except in a few experiments too new to produce clear results. It also follows, of course, that gay advocates cannot prove that they will *not* harm society. Given this uncertainty, who should bear the burden of proof? Some believe it rests with the defenders of traditional norms. As one gay activist put it: "We ought to pull the pin and see what happens."[290]

It is astonishing that so many educated people are willing (even eager) to take this approach. In other areas, such as climate change, most educated people more prudently advocate the precautionary principle, which advises: "Avoid

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287. *See* Andrew F. March, *Is there a Right to Polygamy? Marriage, Equality and Subsidizing Families in Liberal Public Justification*, J. MORAL PHIL. (forthcoming),*available at*http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1346900 (arguing that "the four most plausible arguments compatible with public reason for an outright ban on all forms of polygamy are unvictorious").

288. In non-Western societies polygamy is the norm. *See* POSNER, *supra* note 51, at 69. In Europe endogamy was only slowly suppressed after Christianity was established. *See* JACK GOODY, THE DEVELOPMENT OF THE FAMILY AND MARRIAGE IN EUROPE 31-33 (1983).

289. *See also* Elizabeth Brake, *Minimal Marriage: What Political Liberalism Implies for Marriage Law*, 120 ETHICS 302 (2010) (referring to "care networks").

290. Christine Pierce, *Gay Marriage*, 26 J. SOC. PHIL. 2, 10 (1995).

steps that will create a risk of harm . . . . In a catchphrase: Better safe than sorry."[291]

Compared with the risks of recognizing SSM, the potential benefits are meager.[292] The material benefits of legally valid marriage are small,[293] the number of homosexuals is small,[294] and not all of them would marry anyway. Thus, as many fans of SSM concede, the main benefit would be symbolic.[295]

Much of the argument for validating SSM focuses on the supposed benefits to children living with same-sex couples.[296] The claim is dubious. The number of children affected is now small and likely to remain so.[297] Giving same-sex relationships the label "marriage" will not change the underlying reality or many people's opinion of the arrangement. Many people already have shared custody of children without feeling a need to have the arrangements

291. Cass R. Sunstein, *Beyond the Precautionary Principle* 2 (John M. Olin Law & Economics Working Paper No. 149, 2003), *available at* http:/ssrn.com/abstract=307098. *See also* SOMERVILLE, *supra* note 50, at 96, 106-07 (highlighting the dangers of rejecting the concept of the natural).

292. *See generally* Allen, *supra* note 123.

293. For many married couples the most significant legal consequence of marriage is the "marriage penalty" in the federal income tax. *See* George W. Dent, Jr., *Traditional Marriage: Still Worth Defending*, 18 BYU. J. PUB. L. 419, 423 n.21 (2004).

294. A recent report by the Centers for Disease Control found that "the proportion of men who reported engaging in same-sex behavior within the past five years" was 2% of the overall U.S. population, or 4% of the U.S. male population. CDC Analysis, *supra* note 175. Since these figures include some men who who rarely (perhaps only once in their lives) engaged in gay sex, the number of men who are predominantly homosexual is presumably substantially smaller. One extensive study estimated the number of exclusively homosexual males as 2.5%. D. Black et al., *Demographics of the Gay and Lesbian Population in the United States: Evidence from Available Systematic Data Resources*, 37 DEMOGRAPHY 139, 144 (2000).

295. *See supra* note 261 and accompanying text.

296. *See supra* note 100 and accompanying text.

297. Quite a few gay men have never lived with a same-sex partner. *See* Dan Black et al., *Demographics of the Gay and Lesbian Population in the United States: Evidence from Available Systematic Data Sources*, 37 DEMOGRAPHY 139, 143 (2000) (about 32 percent of gay men have never lived with a same-sex partner). The number of lesbian couples that have children in the home is low, and for gay male couples the number is even lower. *See id.* at 150 (about 21.7 percent of lesbian couples and 5.2 percent of gay male couples have children in the home). The figures jibe with the low rates of registration of same-sex marriages and homosexual domestic partnerships where such arrangements are legally recognized. *See infra* note 166.

labeled "marriage."[298] There's no reason why children raised by same-sex couples should need it. The possible benefits of legal recognition of SSM are so paltry that many gays do not consider legal recognition of SSM and important or even a desirable goal.[299]

A few countries now recognize SSM. In 20 years or so we will have some idea of its social effects. If, contrary to my expectations, SSM is shown to cause no harm, we can then follow suit. If, however, we recognize SSM now and it then causes harm, it will be difficult to stop further damage, much less to repair the damage already done. California briefly recognized SSM between the time when the state supreme court imposed it on the state and the re-establishment of traditional marriage by Proposition 8. A major issue then was the status of SSMs that had been recognized in the interim period. Would these marriages remain valid; or as having once been valid but now invalid; or as having never been valid? Whatever the decision, it would precipitate a host of legal difficulties. Any broader, more sustained recognition of SSM would be much harder to undo.

7. Legal Alternatives to Marriage

Some propose a compromise by creating a new legal status—often called domestic partnership or civil union—that would offer the legal features of marriage to homosexuals while preserving the traditional, heterosexual definition of the term "marriage." The usual argument for this compromise is that the word "marriage" has powerful religious and historical significance independent of its legal

298. For example, some single mothers have their own mothers help raise their children. It may be desirable for the grandmother to be given legal authority in order to handle the child's affairs. However, there would seem to be no benefit in labeling the relationship between the mother and the grandmother "marriage."

299. *See* ANDREW J. CHERLIN, THE MARRIAGE GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY 122 (2009) (stating that only in America are gay people campaigning so determinedly for recognition of SSM, and that most gay men and lesbians in Europe view marriage as an oppressive heterosexual institution).

incidents.[300] Thus, offering homosexual couples the legal incidents without the name "marriage" would make everyone happy.

There are several problems with this proposal. First, it might not satisfy anyone. If the legal incidents of the new status are the same as for marriage, those who consider same-sex relationships less valuable than traditional marriage would be upset despite the use of a different word. Most who favor SSM would also be unhappy because they realize that the primary benefit of marriage is precisely the expressive effect of having SSM treated identically to conventional marriage.[301] Using a different name would forfeit much of that effect.[302] In sum, creating a new category with the same legal features as marriage but without the name might do the damage that defenders of traditional marriage fear from SSM without giving proponents of SSM the benefits they seek.

A further problem is that some courts have held the compromise position unconstitutional because they saw no rational basis for offering homosexuals the legal incidents of marriage but not the name.[303] Another is whether the new category would also be available to different-sex couples who want to avoid the term "marriage."[304] It would be hard to justify denying them that option, but giving them the option

300. *See* Lewis v. Harris, 908 A.2d 196, 221 (N.J. 2006) (stating that "the word marriage itself—independent of the rights and benefits of marriage—has an evocative and important meaning to both parties").

301. *See supra* notes165-88 and accompanying text. *See also* CAN GOVERNMENT STRENGTHEN MARRIAGE?, *supra* note 131, at 9 (arguing against the creation of new categories that would "blur the distinction between marriage and non-marriage.").

302. *See* Michael Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 VA. J. SOC. POL'Y & L. 291, 338 (2001) (stating that a separate structure for homosexuals would convey "a message that these unions were in some way second class units unworthy of the term 'marriage' . . . that these are less important family relationships"); *see also* Lewis v. Harris, 908 A.2d 196, 227 (N.J. 2006) (Poritz, C.J., concurring and dissenting) (quoting the foregoing passage).

303. *See, e.g.*, Perry v. Schwarzenegger, 704 F.Supp.2d 921 (N.D. Cal. 2010).

304. *See* Haldeman v. Dep't of Revenue, TC-MD070773C (Or. Tax Ct. Sept. 24, 2008), *available at*http://www.ojd.state.or.us/tax/TaxDocs.nsf/%28$All%29/1C672AA03BF8EB22882574EF00821974/$File/070773CDECHaldeman.pdf) (rejecting constitutional challenge to state law limiting domestic partnerships to same-sex couples).

would end the unique status of marriage for different-sex couples.

Some argue for a panoply of legal choices, including (but not limited to) domestic partnerships and civil unions. Even some homosexuals criticize this idea as "marriage-lite" and argue that it would "represent a challenge to the primacy of marriage itself."[305] It would certainly facilitate the argument that the law should ignore such status altogether and look solely to the actual relationships between people:[306] once marriage ceases to be unique, it's hard to see why the law should pay much attention to the label people choose.

Homosexuals point to some legal problems they face because they cannot legally marry. In this regard homosexual relationships are not unique. There are many situations where people want to share some legal capacity (such as custody of a child) or expenses. These problems can be handled case-by-case. For example, if hospital visitation by homosexual partners is a problem, a law can be passed to address that problem. However, there may be enough issues warranting legal attention to merit a new legal category (perhaps called "personal associations") with a list of legal features. However, this category would not be intended for the bearing of children so its legal features would be quite different from those of marriage. It would probably not be perceived as "marriage-lite" and therefore would not diminish the prestige of the real thing.

B. *Education*

Public schools are one vehicle by which society transmits its norms to the young. A goal of the homosexual movement is to mandate that children in public schools be taught that homosexuality is normal and just as good as heterosexuality. This goal has been attained in many places.[307] In one case in

305. Carpenter, *supra* note 81, at 321.

306. *See supra* note 118-21 and accompanying text.

307. The federal Department of Health and Human Services now calls for applicants for federal funding for sex education programs "to consider the needs of lesbian, gay, bisexual, transgender, and questioning youth and how their programs will be inclusive of and non-stigmatizing toward such participants." DEPARTMENT OF HEALTH & HUMAN SERVICES, HHS-2010-ACF-ACYF-AEGP-0123,TITLE V STATE

Massachusetts, an eighth grade teacher described and discussed with her class the uses of dildoes.[308] In another the AIDS Action Committee of Massachusetts, with the help of the Massachusetts Department of Public Health, produced and distributed a booklet entitled *The Little Black Book: Queer in the 21st Century*.[309] *Inter alia*, the booklet gave tips to boys on how to perform oral sex on and masturbate other males, and how to safely have someone urinate on you for sexual pleasure, and included a directory of bars in Boston where young men meet for anonymous sex.[310] The booklet was offered to students attending a conference on gay and lesbian issues held at a public high school.[311]

Although the Committee later apologized for giving the booklet to high school students,[312] it did not apologize for its content. Thus it seems that, but for a few extreme details, such pedagogy could become routine. Homosexuals are on average more promiscuous than heterosexuals,[313] and education and publicity will at least reflect that fact, as did this booklet. Obviously the message will not be the importance of marriage to responsible procreation. Once SSM is validated, it may be dangerous for a public school teacher to suggest that heterosexuality or traditional marriage may in any way be superior to homosexuality or

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ABSTINENCE EDUCATION GRANT PROGRAM9 (July 30, 2010), *available at* http://www.acf.hhs.gov/grants/open/foa/view/HHS-2010-ACF-ACYF-AEGP-0123/0/pdf; DEPARTMENT OF HEALTH & HUMAN SERVICES, HHS-2010-ACF-ACYF-PREP-0125,STATE PERSONAL RESPONSIBILITY EDUCATION PROGRAM 5 (Aug. 2, 2010), *available at* http://www.acf.hhs.gov/grants/open/foa/view/HHS-2010-ACF-ACYF-PREP-0125/0/pdf.

308. National Public Radio, *All Things Considered*, Sept. 13, 2004, *quoted in* Scott FitzGibbon, *The Principles of Justice in Procreative Affiliations*, *in* WHAT'S THE HARM?, *supra* note 26, at 125, 139. *See generally* VALERIE RICHES, SEX EDUCATION OR INDOCTRINATION: HOW IDEOLOGY HAS TRIUMPHED OVER FACT (2004).

309. *See* Joanna Weiss, *Explicit Pamphlets Displayed at School*, BOSTON GLOBE, May 19, 2005. [AE: Looks like this is available online, but is behind a pay wall. How to note that?].

310. *See* Brian Camenker, *What Same-Sex "Marriage" Has Done to Massachusetts* (Oct. 20, 2008), *available at* http://www.massresistance.org/docs/marriage/effects_of_ssm.html.

311. *See* Weiss, *supra* note 372.

312. *See id.*

313. *See supra* notes 171-174 and accompanying text.

SSM.[314] Any student making such a suggestion, including a statement of belief in traditional Jewish or Christian morality, could also be punished.[315]

Parents have been denied the right to remove their children from classes condoning homosexuality, or even to be notified when such classes will be taught.[316] These classes won't turn heterosexual children into homosexual children, but they may heighten children's confusion and anxiety about sex, which is already a fraught issue for young people. The American College of Pediatricians has recommended that schools not encourage non-heterosexual attractions among students who may merely be experimenting or experiencing temporary sexual confusion.[317] Teaching approval of homosexuality will also create a religious conflict for many children who will be told, in effect, that a religion

314. For example, after SSM was imposed by the Supreme Judicial Court in Massachusetts, the Boston Superintendent of Schools issued a memorandum forbidding, *inter alia*, discrimination or any act "that may create a climate of intolerance" on the basis of sexual orientation. Memorandum (May 13, 2004), *quoted in* FitzGibbon, *supra* note 371, at 138. Any statement suggesting the superiority of traditional marriage or of heterosexuality might be deemed to violate this policy.

315. *See* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006) (upholding dismissal of public high school student on two days when he wore tee-shirts reciting the Biblical condemnation of homosexual acts). In another case a college instructor called a student a "fascist bastard" and refused to give him a grade for saying in class that, according to his Christian beliefs, marriage is between a man and a woman. *See* Gail Holland, *Student Sues L.A. College District Over Gay-Marriage Speech*, L.A. TIMES, Feb. 16, 2009. A federal district court held unconstitutional the school speech code with which the instructor sought to justify his actions. Lopez v. Candaele, 630 F.3d 775 (S.D. Cal. July 13, 2009). In a third case a federal court enjoined use of a public school curriculum that taught children that "[r]eligion has often been used to justify hatred and oppression . . . . Early Christians were not hostile to homosexuals. Intolerance became the dominant attitude only after the Twelfth Century." Citizens for a Responsible Curriculum v. Montgomery County Pub. Schs., No. Civ. A. AW-05-1194, 2005 WL 1075634 (D. Md. May 5, 2005). The passage from the school policy statement is quoted in David French, *Expelling God from the University*, ACAD. QUESTIONS, Summer 2006, at 75, 82.

316. *See* Parker v. Hurley, 514 F.3d 87 (1st Cir. Jan. 31, 2008), *cert. denied*, 129 S.Ct. 56 (2008). *See also* Tracy Jan, *Parents Rip School over Gay Storybook: Lesson Reignites Clash in Lexington*, BOSTON GLOBE, Apr. 20, 2006, *available at* http://www.boston.com/news/local/articles/2006/04/20/parents_rip_school-over_gay_storybook/.

317. *See* Letter to School Officials (March 31, 2010), *available at* http://www.factsaboutyouth.com/posts/letter-to-school-officials/.

that preaches that homosexual acts are wrongful is itself wrong.

Courts often uphold suppression of religious expression in public schools on the ground that being exposed to, or even offered the choice to hear such expression, could do children great damage. It seems anomalous that playing an instrumental version of *Ave Maria*[318] at a voluntary public high school ceremony is so offensive that it can be forbidden, but that positive descriptions and demonstrations of homosexual acts are considered so benign that parents may not withdraw their children from or even demand advance notice of these sessions so that they can advise their children about them.[319]

Instruction condoning homosexuality will also create tensions and divisions within families and religious congregations.[320] Children will be taught that anyone (including their parents and their church) who calls homosexual acts undesirable is wrong. More generally, if schools preach that parents and the church are wrong about homosexuality, children will reasonably infer that they may be wrong on other matters as well. The lesson for children will be to doubt all authority except that of the omniscient, omnipotent, and infallible state.

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318. An ensemble was forbidden to play an instrumental version of *Ave Maria* at a high school graduation ceremony. School officials said it was sufficient that the title alone would offend some attendees, even though no one had to attend this part or any of the ceremony. Lower courts upheld the prohibition against a First Amendment challenge, and the Supreme Court denied certiorari. Nurre v. Whitehead, 580 F.3d 1087 (9th Cir. 2009), *cert. denied*, 130 S.Ct. 1937 (2010). For other cases upholding the banishment of references to religion from public schools see Charles J. Russo, *Same-Sex Marriage and Public School Curricula: Reflections on Preserving the Rights of Parents to Direct the Education of Their Children, in* WHAT'S THE HARM?, *supra* note 26, at 355, 359, 362.

319. *See generally* Russo, *supra* note 26, at 359:

> If courts are truly concerned about the potential for unduly influencing children [by references to religion], then one can only wonder why school officials should be regarded as any less capable of shaping the attitudes of students when providing unchallenged gay-friendly instruction on same-sex marriage to impressionable young minds which may not even grasp the import, or impact, of what they are being taught.

320. *See* Russo, *supra* note 26, at 361 (stating that such instruction "may tear at the fabric of society by causing inter-generational rifts as children are indoctrinated on points-of-view that are not consonant with the values of their parents").

It is appropriate—indeed wise—for government to use education to promote traditional marriage because it produces great benefits for husbands, wives, their children and all society.[321] These facts can be taught as part of sex education in public schools.[322] Unfortunately, even college textbooks on the family tend to play down or deny these facts.[323] They also tend to be "adult-centered" and to give "insufficient attention to child-related topics."[324]

In sum, many in the gay movement want public schools to teach that homosexuality is just as normal and desirable as heterosexuality, and many public schools already do so. This instruction may mislead or deceive students about what behavior is conducive to their own happiness and beneficial to the family and society; increase their confusion and anxiety about sex; interfere with relations between parents and children; and serve as a government declaration of the falsity of our mainstream religions. Public schools should instead provide sex education that gives students accurate, helpful information without impairing parental control establishing religious orthodoxy.

VIII. CONCLUSION

Society has valid reasons to prefer heterosexuality and traditional marriage over other options, including homosexuality and "same-sex marriage." Heterosexuality is a normal part of human nature. It is conducive to the happiness of most people to treat it as such. Traditional marriage and the biological family are not inherently sexist and are now beneficial to both sexes. They also benefit society by making adults better and more productive citizens and by providing the best upbringing for children. When a husband and wife bear and raise children they are not

321. *See supra* Part IV-D.

322. *See* CAN GOVERNMENT STRENGTHEN MARRIAGE?, *supra* note 131, at 13 (proposing to "[a]dd a marriage message to teen-pregnancy prevention").

323. *See* Norval D. Glenn, *Family Textbooks Twelve Years Later*, ACAD. QUESTIONS, Winter 2008-09, at 79, 82 (reporting that most textbooks devote little or no attention to how marriage affects adults).

324. *Id.* at 80-81.

merely effecting their personal lifestyle preference; they are helping to ensure the future of our society.

Homosexuals—and all people—should be treated with decency and civility, but not all behavior merits equal respect. Societies make innumerable value judgments about what is good for individuals and for the community, as when they promote education or favor certain kinds of art over others. The benefits of heterosexuality and traditional marriage easily justify a social and legal preference for them.

Society's preference for heterosexuality and traditional marriage is manifested mostly through education and the expressive function of law, and secondarily through material benefits. These efforts would be substantially hindered if homosexuality and "same-sex marriage" were treated as equal. The message then would not be that traditional marriage and the biological family are particularly desirable, but that they are just one lifestyle choice, no better than many others. Society need not choose this message. It may choose the message that promotes the wellbeing of most people and of society as a whole.

DIVISIVE DIVERSITY AT THE UNIVERSITY OF TEXAS: AN OPPORTUNITY FOR THE SUPREME COURT TO OVERTURN ITS FLAWED DECISION IN *GRUTTER*

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I. INTRODUCTION

In *Grutter v. Bollinger*,[1] the Supreme Court identified a compelling interest in diversity in higher education. By so doing, the Court sanctioned a new vehicle for universities endeavoring to use race as a (determinative) criterion in university admissions.[2] Recently, the Fifth Circuit Court of Appeals heard a challenge to the University of Texas at Austin's (University) admission policy challenging that University's use of race in selecting its students.[3] In *Fisher v. University of Texas at Austin*, the Fifth Circuit held that the University's use of race in selecting its students, which closely mirrored the system held constitutional in *Grutter*, was also constitutional.[4]

Fisher has piqued the interest of the legal community. The University, the largest and (arguably) most prestigious public school in Texas,[5] has vigorously defended its decision to use racial classifications for selecting its students.[6] The plaintiffs, two white female applicants who were denied admission,[7] have been represented by nationally-recognized attorneys out of Washington, D.C.[8] Moreover, at this intermediate appellate stage, numerous amicus briefs were filed supporting both sides from national sources, including

1. 539 U.S. 306, 343 (2003).

2. However, at the same time the Court decided *Grutter*, it also decided a companion case, which dealt with the University of Michigan's undergraduate admissions program. *Gratz v. Bollinger*, 539 U.S. 244 (2003). *Gratz* is important to keep in mind as we lay the framework for the Supreme Court's decision in *Grutter*, as a majority of the *Gratz* Court found the undergraduate admissions policy unconstitutional. Because *Gratz* was decided solely on narrow tailoring grounds, the opinion did not endorse a compelling interest in diversity in undergraduate education. *Id.* at 275. This point is explored more fully in Part III.B.

3. Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 247 (5th Cir. 2011).

4. *Id.* at 247.

5. *See National University Rankings*, U.S. NEWS & WORLD REPORT, http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities/spp+50 (2011) (ranking the University of Texas at Austin forty-fifth among all universities in the country and the best public university in Texas).

6. Brief of Appellees, *Fisher*, 631 F.3d 213 (No. 09-50822).

7. *Fisher*, 631 F.3d at 217.

8. *Id.* at 215.

the Asian American Legal Foundation,[9] National Association of Scholars,[10] Center for Equal Opportunity,[11] and Pacific Legal Foundation[12] in support of the plaintiffs, and the NAACP,[13] Black Student Alliance,[14] American Association of State Colleges and Universities,[15] and the Asian American Institute[16] in support of the University (to name a few). Further, in a highly unusual move at the circuit stage, even the Obama Administration filed an amicus brief supporting the University.[17]

The implication of such a wide interest in the case is self-evident. Both proponents of racial classifications in university admissions, as well as opponents, view *Fisher* as having the potential seriously to affect the ability of universities to use race in admissions. While the plaintiffs are seeking review from an *en banc* panel of the Fifth Circuit at present,[18] a petition for writ of certiorari to the Supreme Court is likely to follow.

Given the national interest in *Fisher*, this article will lay forth the constitutional issues at stake. Part I provides a history of Supreme Court precedent on racial classifications, focusing on the birth of diversity in constitutional law in *Bakke*,[19] and culminating with the elevation of diversity's status to a compelling governmental interest in *Grutter*.

9. Brief of Amicus Curiae the Asian American Legal Foundation in Support of Reversal, *Fisher*, 631 F.3d 213 (No. 09-50822).

10. Brief Amicus Curiae of Pacific Legal Foundation et al. in Support of Plaintiffs and Appellants and Reversal, *Fisher*, 631 F.3d 213 (No. 09-50822).

11. *Id.*

12. *Id.*

13. Amicus Brief of the Black Student Alliance at the University of Texas at Austin and the NAACP Legal Defense & Educational Fund, Inc. in Support of Appellees, *Fisher*, 631 F.3d 213 (No. 09-50822).

14. *Id.*

15. Brief Amicus Curiae of American Council of Education et al., *Fisher*, 631 F.3d 213 (No. 09-50822).

16. Brief of Amici Curiae Asian Pacific American Legal Center et al. in Support of Appellees and in Affirmance of the District Court Judgment, *Fisher*, 631 F.3d 213 (No. 09-50822).

17. Brief for the United States as Amicus Curiae Supporting Appellees, *Fisher*, 631 F.3d 213 (No. 09-50822).

18. Petition for Rehearing En Banc Filed by Appellants Ms. Abigail Noel Fisher and Ms. Rachel Multer-Michalewicz, *Fisher*, 631 F.3d 213 (No. 09-50822).

19. Regents of Cal. v. Bakke, 438 U.S. 265 (1978).

Part II explains *Fisher* in detail, including the three separate opinions this highly contentious case produced. Part III shows the various ways *Fisher* can be constitutionally distinguished from *Grutter*, thereby demonstrating how the Supreme Court can overrule the *Fisher* Court without overturning *Grutter*. Part IV, however, advocates for a summary reversal of *Grutter* based on two serious constitutional implications of the *Grutter* Court's holding.

II. THE RISE OF DIVERSITY AS A COMPELLING INTEREST

Diversity as a compelling interest has a brief, singular appearance in the holdings of the Supreme Court.[20] A proper understanding of the *Grutter* Court's compelling interest holding begins by looking at what did and did not amount to a compelling interest before *Grutter*. Before a court can begin to apply *Grutter* prospectively, it must first take a retrospective look at how *Grutter* arrived at its conclusion and what that conclusion means.

A. *Regarding National Security and Past Discrimination*

Amidst anti-Japanese sentiment, a World War Two Supreme Court was confronted with an extreme case of governmental discrimination in *Korematsu v. United States*.[21] In *Korematsu*, the Supreme Court held that national security was a compelling government interest that allowed the United States government to exclude all persons of Japanese ancestry from military zones on the West Coast.[22] While *Korematsu* today is rightly ridiculed for justifying internment of Japanese-Americans based on hysteria and xenophobia, the case remains noteworthy as the first Supreme Court decision to apply strict scrutiny under the Equal Protection Clause to racial classifications.[23] At the outset the Court noted that "all legal restrictions which curtail the civil rights of a single racial group are

20. Grutter v. Bollinger, 539 U.S. 306 (2003).
21. 323 U.S. 214 (1944).
22. *Id.* at 223.
23. *Id.* at 216.

immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."[24] Despite the rigid scrutiny, the Supreme Court found the national security interests to be sufficiently compelling to uphold the program.[25]

Although *Korematsu* laid the foundation for strict scrutiny analysis of racial classifications, the Supreme Court did not apply it to all race-implicated Equal Protection cases immediately.[26] By the 1960s, however, the Supreme Court began routinely striking down racially discriminatory statutes under strict scrutiny analysis.[27] Around this time the Supreme Court also upheld racial classifications designed for remedial purposes. These remedial cases are the first to find a governmental interest sufficiently compelling to permit race-based classifications with reasoning that today's Court might accept.[28] In a number of school desegregation cases following *Brown v. Board of Education*, the Supreme Court consistently found racial classifications to be constitutional when employed to remedy

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24. *Id.*

25. The Court stated,

> Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

Id. at 219–20.

26. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (holding that segregated schools violate the Equal Protection Clause because of the social and psychological harms caused by segregation in education); Rachel C. Grunberger, Note, Johnson v. California*: Setting a Constitutional Trap for Prison Officials*, 65 MD. L. REV. 271, 276 (2006) (discussing *Korematsu* and the application of strict scrutiny to racial classifications).

27. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 8–9 (1967) (striking down law banning interracial marriage); Grunberger, *supra* note 26, at 276–77 (discussing the 60s Court's application of strict scrutiny to racial classifications).

28. Technically, *Korematsu* is the first case to find an interest sufficiently compelling to justify race-based classifications—namely, national security. However, as will be discussed shortly, the *Adarand* Court's statements on *Korematsu* bring into strong question whether that reasoning could command a majority of the Court today. *See infra* Part II.C (discussing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995)).

past intentional discrimination.[29] In *Swann v. Charlotte-Mecklenburg Board of Education*, the Court distilled its reasoning behind the school desegregation cases that authorized race-based remedies in order to remedy past discrimination:

> Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools.[30]

By the 1970s, overt discriminatory race-based policies became less common, and soon the Supreme Court's attention turned to affirmative action, or race-preference policies. In *DeFunis v. Odegaard*, the Supreme Court was presented with a challenge to the University of Washington School of Law's race-based affirmative action policy.[31] Although ultimately decided on mootness grounds, *DeFunis* is interesting in that the University of Washington never argued that its program could withstand strict scrutiny under the rationale of "diversity."[32] Indeed, "the term 'diversity' does not appear at all in the record of the case."[33]

Not until *Bakke* did the Supreme Court determine whether the government had a compelling interest in racial classifications outside of remedying past discrimination.[34] Before *Bakke*, only state policies designed to remedy the effects of past discrimination were sufficiently compelling to deny an individual's right to equal protection. Indeed, many governmental entities that began race preference programs

29. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. County Sch. Bd., 391 U.S. 430 (1968); Brown v. Bd. of Educ., 349 U.S. 294 (1955) (*Brown II*).

30. *Swann*, 402 U.S. at 28. *See generally Green*, 391 U.S. 430. *But see* Elizabeth S. Anderson, *Constitutionalizing and Defining Racial Equality: Racial Integration as a Compelling Interest*, 21 CONST. COMMENT. 15, 15 (2004) (arguing that "[t]he ideal of the school desegregation cases is that racial integration is a positive good").

31. DeFunis v. Odegaard, 416 U.S. 312 (1974).

32. *Id.*

33. PETER W. WOOD, DIVERSITY: THE INVENTION OF A CONCEPT 111 (2003).

34. Regents of Cal. v. Bakke, 438 U.S. 265, 265 (1978).

could not justify those programs under a theory that they were remedying the effects of past intentional discrimination.

B. Bakke *and the Invention of Diversity*

Books and articles have been written analyzing *Regents of the University of California v. Bakke*, and it remains one of the most highly debated Supreme Court decisions.[35] For good reason too, as the Court's decision produced six separate opinions that often go in complete opposite directions.[36] Interesting for our purposes is that the *Bakke* opinion sparked the diversity fire, for before *Bakke*, the notion that diversity could be a compelling governmental interest was never suggested.

In short, *Bakke* presented the Court with a then-typical race-preferences program, whereby the Medical School of the University of California at Davis guaranteed admission to students from certain minority groups.[37] Allan Bakke was a white male (a disfavored race) who was twice denied admission to the Medical School.[38] Because the Medical School was only opened in 1968, the preferential program could not be justified on the grounds that it was needed to remedy past discrimination.[39] Thus, if the program were to survive strict scrutiny, a new rationale would have to be developed.[40]

35. *See* HOWARD BALL, THE *BAKKE* CASE: RACE, EDUCATION, AND AFFIRMATIVE ACTION (2000); SUSAN BANFIELD, THE *BAKKE* CASE: QUOTAS IN COLLEGE ADMISSIONS (1998); TIM MCNEESE, *REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE*: AMERICAN EDUCATION AND AFFIRMATIVE ACTION (2006); Leslie Yalof Garfield, *Back to Bakke: Defining the Strict Scrutiny Test for Affirmative Action Policies Aimed at Achieving Diversity in the Classroom*, 83 NEB. L. REV. 631 (2005); Marcia G. Synnott, *The Evolving Diversity Rationale in University Admissions:* From Regents v. Bakke *to the* University of Michigan *Cases*, 90 CORNELL L. REV. 463 (2005).

36. *Bakke*, 438 U.S. 265.

37. *Id.* at 369.

38. *Id.* at 276.

39. *Id.* at 371 (Brennan, J., concurring in part and dissenting in part).

40. The standard of review to apply to the Medical School's use of racial classification did not command a majority of the court. Although Justices Powell and White argued that strict scrutiny applied, *id.* at 287 (plurality opinion), Justices Brennan, Marshall, and Blackmun argued that "racial classifications designed to further remedial purposes must serve important governmental

Interestingly, the University did not rely on diversity to uphold its race-conscious program. The University's petition for certiorari "frame[d] the university's racial preferences as primarily an effort to realize 'the goal of educational opportunity unimpaired by the effects of racial discrimination.'"[41] The issues raised in the briefing by both sides were more concerned with test scores and other statistical disputes. "The *diversity* argument does not appear in the section of the UC petition giving reasons why the Supreme Court should hear the case."[42]

Nevertheless, it was the University's passing references to diversity that convinced Justice Powell, and only Justice Powell, that racial classification may be permitted when narrowly tailored to further the compelling interest of diversity. "Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body."[43] None of the other justices agreed. However, the four Justices that would have upheld the University's quota agreed with statements in Justice Powell's opinion that "some use[] of race in university admissions are permissible."[44] Therefore, those four justices argued that they had five votes sufficient to "revers[e] the judgment below insofar as it prohibits the University from establishing race-conscious programs in the future."[45]

Justice Powell's *Bakke* opinion is unquestionably the starting point for examining diversity as a compelling state interest:

> Without *Bakke*, the *diversity* argument—the conceit that ethnic and racial diversity are *educationally* constructive—might have languished along with the labor theory of value

objectives and must be substantially related to achievement of those objectives." *Id.* at 359 (Brennan, J., concurring in part and dissenting in part) (citations omitted). Chief Justice Burger and Justices Stevens, Rehnquist, and Stewart argued that Title VI could resolve the case, so ruling on the standard of review was inappropriate. *Id.* at 411 (Stevens, J., concurring in part and dissenting in part).

41. WOOD, *supra* note 33, at 104.

42. *Id.* at 106.

43. *Bakke*, 438 U.S. at 314.

44. *Id.* at 326 (Brennan, J., concurring in part and dissenting in part).

45. *Id.*

> and a thousand other bits of leftist rhetoric that never caught on. Powell's *Bakke* opinion, however, lifted *diversity* out of obscurity and gave it the respectability of seeming law . . . The happenstance that none of his Supreme Court colleagues joined Powell in extolling *diversity* tends to be overlooked, and those who are now committed to promoting the idea are perhaps reluctant to remember that the widely cited legal foundation for pursuing diversity in schools and colleges rests on one man's unsupported opinion.[46]

Although Justice Powell certainly wrote that "diversity is compelling," he was the only one who subscribed to that position.[47] Only two points commanded a majority of the Court: (1) Alan Bakke was entitled to admission and (2) some amorphous consideration of race is allowable under the Constitution.[48] Most notably, as a result of the severely split court, Justice Powell's arguments in support of using diversity as a compelling state interest were his alone.

C. *The* Bakke *Aftermath—Diversity Lays Low*

In the years following *Bakke* but before *Grutter*, the Supreme Court heard a number of Equal Protection cases where those suing were not members of a preferred class.[49] In that 25-year span, the Supreme Court had many opportunities to introduce diversity as a compelling state interest, but never did.

Soon after *Bakke*, the Court took up *Fullilove v. Klutznick*, which involved a 10% minority set-aside program for certain federal contracts.[50] The Court recognized that "[t]he history of governmental tolerance of practices using racial or ethnic criteria ... must alert us to the deleterious effects of even benign racial or ethnic classifications when they stray from narrow remedial justifications."[51] While the *Fullilove* Court

46. WOOD, *supra* note 33, at 113.

47. *Bakke*, 438 U.S. at 315.

48. *Id.* at 271–72.

49. *See, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

50. 448 U.S. 448 (1980).

51. *Id.* at 486–87.

was once again deeply divided, it held that race-conscious measures could be used to remedy past discrimination.[52] Interestingly, Justice Powell, although joining the majority opinion, wrote separately in *Fullilove* to note that the racial classifications, despite being permissible in this narrow instance, nevertheless, like all racial classifications, must be subjected to the most rigorous judicial scrutiny to survive.[53]

This point would eventually be adopted by a clear majority of the Supreme Court in *Adarand*.[54] Following Justice Powell's lead, the *Adarand* Court "ma[de] explicit what Justice Powell thought implicit in the *Fullilove* lead opinion: Federal racial classifications, like those of a State, must serve a compelling governmental interest."[55] *Adarand* is also noteworthy to our discussion because of its harsh criticism of *Korematsu*.[56] National security might appear to be the most compelling of governmental interests, but the *Adarand* Court did not think it justified governmental racial classifications.[57] It therefore concluded that "[a]ny retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future."[58] As one commentator notes, "[t]he fact that such an important and vital interest, national security, was retroactively determined to be insufficient to justify the use of racial classifications in the *Korematsu* situation demonstrates just how stringent judicial review under strict scrutiny was meant to be."[59]

Thus, pre-*Grutter*, remedying past discrimination was the lone constitutionally recognizable rationale for the

52. *See id.* at 481 (upholding a statute that remedially addressed past racial discrimination).

53. *Id.* at 496 (Powell, J., concurring).

54. *Adarand*, 515 U.S. 200.

55. *Id.* at 235.

56. *Id.* at 236.

57. *See id.* (finding that security is an inadequate motivation for Japanese internment camps).

58. *Id.*

59. Brandon M. Carey, Note, *Diversity in Higher Education: Diversity's Lack of a "Compelling" Nature, and how the Supreme Court has Avoided Applying True Strict Scrutiny to Racial Classifications in College Admissions*, 30 OKLA. CITY U. L. REV. 329, 345 (2005).

government's use of a racial classification.[60] Not surprisingly, then, race-preference programs almost universally failed strict scrutiny analysis. "Only once between its 1945 inception in *Korematsu* and its application in *Grutter* has an affirmative-action program survived both prongs of the strict scrutiny analysis."[61]

In 1989, a plurality of the Supreme Court went further, holding that remedying past discrimination remains the *only* means by which the government can use racial classifications. Justice O'Connor (who would write the *Grutter* opinion), joined by Chief Justice Rehnquist and Justices White and Kennedy, argued that "[c]lassifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."[62] Further still, Justice Scalia concurring in the judgment, argued that racial classifications must be restricted even more narrowly:

> At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates—can justify an exception to the principle embodied in the Fourteenth Amendment that "[o]ur Constitution is colorblind, and neither knows nor tolerates classes among citizens . . . ."[63]

Whereas remedying past discrimination remains a compelling governmental interest, two post-*Bakke* / pre-*Grutter* cases help clarify what is not a compelling

60. In *Korematsu*, the Supreme Court found national security to be a compelling government interest. However, as noted above, the *Adarand* Court's statements on *Korematsu*, bring into strong question whether that reasoning could command a majority of the Court today.

61. Libby Huskey, Case Note, *Constitutional Law—Affirmative Action in Higher Education—Strict in Theory, Intermediate in Fact?* Grutter v. Bollinger, *123 S. Ct. 2325 (2003)*, 4 WYO. L. REV. 439, 470 (2004); *see also* United States v. Paradise, 480 U.S. 149, 165–66 (1987) (upholding a race-conscious remedy designed to "remedy the present effect of past discrimination"); Robert J. Donahue, Note, *Racial Diversity as a Compelling Governmental Interest*, 30 IND. L. REV. 523, 540–41 (1997) (discussing cases upholding race-conscious policies under the compelling interest of remedying the effects of past discrimination).

62. City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 493 (1989).

63. *Id.* at 521 (Scalia, J., concurring) (citations omitted).

governmental interest. In *Palmore v. Sidoti*, the Supreme Court was faced with a Florida decision that allowed the state to remove a child from the custody of its mother because she was married to a man of a different race.[64] The father argued that the bi-racial household would subject the child to social stigmatization, and therefore it was in the best interest of the child to be with him.[65] The Court recognized that while "granting custody based on the best interests of the child is indisputably a *substantial* governmental interest[,]" that "cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody."[66]

Perhaps most informative on the pre-*Grutter* Court's understanding of what constitutes a compelling interest justifying race-based classifications is the decision in *Wygant*.[67] That case dealt with a school board program that prevented members of certain minority groups from being laid off.[68] As there was no history of past discrimination, the school board defended its policies on the grounds that its procedures were "an attempt to remedy societal discrimination by providing 'role models' for minority schoolchildren."[69] The *Wygant* Court rejected this asserted non-remedial interest as an unconstitutional "attempt to alleviate the effects of societal discrimination."[70] Further, the Court held that it was "too amorphous a basis for imposing a racia[l] classifi[cation]."[71] Additionally, because the role model theory was not tied to remedying past discrimination, it "ha[d] no logical stopping point"[72] such that racial classifications based on it would be "ageless in

64. 466 U.S. 429 (1984).
65. *Id.* at 431.
66. *Id.* at 433–34 (emphasis added).
67. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1980).
68. *Id.*
69. *Id.* at 272.
70. *Id.* at 274.
71. *Id.* at 276.
72. *Id.* at 275.

their reach into the past, and timeless in their ability to affect the future."[73]

Interestingly, the dissent in *Wygant* recognized the similarities between the "role model" theory and diversity. "[O]ne of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous 'melting pot' do not identify essential differences among the human beings that inhabit our land."[74] Justice Stevens' dissent is noteworthy because he dissented from an opinion that rejected the diversity rationale (albeit in *secondary* education).

Before *Grutter*, therefore, remedying past discrimination was the sole basis on which government could create a racial classification. As this case history demonstrates, the Constitution countenances racial classifications only in the most limited circumstances. A "role model theory," societal discrimination, child custody, or even (arguably) national security is an insufficient reason to use racial classifications. "The decision in *Grutter* to classify diversity in higher education as a compelling state interest seems quite weak when one considers all of the state interests that have not been classified as compelling."[75] *Grutter* is undeniably a unique case in that the Supreme Court found a second compelling interest that allows the government to employ racial classifications.

D. *Diversity Obtains Constitutional Sanction*—Grutter v. Bollinger

Grutter concerned a challenge to the race-conscious admissions program[76] of the University of Michigan Law

73. *Id.* at 276.

74. *Id.* at 315 (Stevens J., dissenting).

75. Carey, *supra* note 59, at 350.

76. *Id.* at 311. The Supreme Court considered this case in conjunction with a parallel challenge to the University's race-conscious admissions program for its undergraduate schools in *Gratz v. Bollinger*, 539 U.S. 244 (2003).

School, a top-rated institution.[77] Although the law school's admissions plan focused generally on an applicant's GPA and LSAT scores, exceedingly high scores on those markers would not guarantee admission. Conversely, exceedingly low scores would not necessarily preclude admission, because the law school employed a number of so-called "soft variables" to achieve a "diverse" student body.[78] The law school's understanding of diversity included more factors than just race, although its plan made clear that the law school had made a special commitment to racial diversity, which would be obtained by admitting "critical masses" of historically underrepresented minorities.[79]

In 1996, Barbara Grutter, a nonminority Michigan resident with fairly good GPA and LSAT scores,[80] unsuccessfully applied for admission to the law school and thereafter brought suit to challenge the constitutionality of the law school's race-conscious admissions plan. The district court conducted a bench trial during which several experts and law school officials testified.[81] Ultimately, the district court enjoined the plan on the grounds that diversity is not a compelling interest and that, even if it were, it could be achieved through a race-neutral admissions policy.[82] The Court of Appeals for the Sixth Circuit, sitting *en banc*,

77. Grutter v. Bollinger, 539 U.S. 306, 312 (2003) (noting the school's status as an elite institution, which plays an important role in the majority's narrow-tailoring analysis).

78. *See id.* at 315.

79. *See id.* at 316.

80. *See id.* (noting that Ms. Grutter had a 3.8 GPA and an LSAT score of 161).

81. Among those who testified was the former director of admissions, who testified that the admissions staff was not told to admit a certain percentage of minorities, although the director would be given daily reports to keep a running total on the numbers of minorities offered admission. *Id.* at 318. The then-current director of admissions also testified, stating her view that critical mass meant "meaningful representation" of minority students—*i.e.*, enough minority students such that minorities would not feel reluctant to participate in class discussion and would not feel isolated. *Id.* The law school dean testified, however, that in at least some cases the race of an applicant determined whether the applicant was admitted. *Id.* at 319. A law school professor testified that achieving a "critical mass" of minority students was important because it would teach nonminority students that minorities have a variety of viewpoints. *Id.* at 319–20. A statistical expert for the plaintiff testified that the law school's "plus-factor" for race could at times be significant. *See id.* at 320.

82. Grutter v. Bollinger, 137 F. Supp. 2d 821, 872 (E.D. Mich. 2001).

reversed, holding that diversity is a compelling interest and that the law school had no other workable race-neutral alternatives.[83]

1. Adopting the Powell *Bakke* Framework

The *Grutter* majority opinion, authored by Justice O'Connor, begins with an analysis of *Bakke*.[84] Justice O'Connor adopted Justice Powell's opinion for guidance in resolving *Grutter*.[85] She noted that Justice Powell had approved of using race in admissions only for the attainment of a diverse student body, but that a university's belief in the value of diversity was entitled to First Amendment solicitude and deference from the Court.[86] Again drawing on Justice Powell's opinion, Justice O'Connor emphasized that racial diversity *per se* cannot be the goal; rather, diversity as a legitimate compelling interest must be broader than merely racial or ethnic diversity.[87]

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83. *See* Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002) (en banc).

84. *Grutter*, 539 U.S. 306, 312–14 (2003).

85. *Id.* at 325. Justice O'Connor observed that the lower courts have long been confused as to which *Bakke* opinion controls. She avoided that issue by simply declaring that the holding of *Bakke* is that race and ethnicity can play some role in the admissions process. The debate on *Bakke* has revolved around how to apply the test articulated in *Marks v. United States*. *Cf.* Damien M. Schiff, *When* Marks *Misses the Mark: A Proposed Filler for the "Logical Subset" Vacuum*, ENGAGE, 119–24 (Feb. 2008) (discussing application of the *Marks* test to *Rapanos v. United States*, a split decision concerning the scope of the Clean Water Act).

86. *Grutter*, 539 U.S. at 324, 329. It is more than a little curious that the Court would afford deference to a University's determination that a given interest is compelling. After all, strict scrutiny by its nature implies a searching review that is opposed to deference. *See id.* at 394 (Kennedy, J., dissenting) (arguing that "[d]eference is antithetical to strict scrutiny, not consistent with it"). Moreover, it is not clear what the First Amendment would have to do with such deference. The Court has afforded First Amendment protection to state university professors to protect their free speech rights, but it makes little sense to afford such deference when (1) speech is not at issue and (2) affording deference might result in the violation of someone else's constitutional liberties (e.g., Ms. Grutter's equal protection rights) rather than merely a limitation on governmental power. Lackland H. Bloom, Jr., Grutter *and* Gratz*: A Critical Analysis*, 41 HOUS. L. REV. 459, 469, 479 (2004).

87. *Grutter*, 539 U.S. at 324–25. *But see* Bloom, *supra* note 86, at 472. Bloom writes:

> [T]he Court's failure to reiterate why broad-based diversity is important leaves the impression that it viewed it as nothing more than a fig leaf to cover an aggressive use of racial preferences. As far as the reader can tell from the Court's opinion, the educational benefits that result in a

2. The Compelling Interest

Having set forth the newly adopted Powell framework, Justice O'Connor then articulated the majority's guiding principle: "not every decision influenced by race is equally objectionable."[88] She then acknowledged the law school's purported compelling interest: "the educational benefits that flow from a diverse student body."[89] To achieve that end, outright racial balancing such as is entailed with quotas would not be allowed, but a university could use race to achieve "critical masses" of underrepresented minorities.[90]

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compelling state interest flow all but exclusively from racial as opposed to viewpoint-oriented diversity.

Bloom, *supra* note 86, at 472; *see also* Larry Alexander & Maimon Schwarzschild, Grutter *or Otherwise: Racial Preferences and Higher Education*, 21 CONST. COMMENT. 3, 11 (2004) ("In recent years, universities have sought to justify racial preferences by the alleged contribution of racial diversity to the education of those admitted under the normal standards. Those arguments are insincere: the universities are interested in race, not diversity of views or backgrounds.").

88. *Grutter*, 539 U.S. at 327. Justice O'Connor's statement is remarkable given that many commentators believed that, after Justice O'Connor's majority opinion in *Adarand*, *all* racial classifications—even so-called "benign" classifications—would be subject to the most exacting of judicial scrutiny. *See, e.g.*, Stephen C. Minnich, Comment, 46 CASE W. RES. L. REV. 279, 286 (1995); L. Darnell Weeden, *Yo, Hopwood, Saying No to Race-Based Affirmative Action Is the Right Thing to Do from an Afrocentric Perspective*, 27 CUMB. L. REV. 533, 553 (1996–1997); Russell N. Watterson, Jr., Note, Adarand Constructors v. Peña: *Madisonian Theory as a Justification for Lesser Constitutional Scrutiny of Federal Race-Conscious Legislation*, 1996 B.Y.U. L. REV. 301, 301 n.3 (observing that *Adarand* requires strict scrutiny even for benign racial classifications); *cf.* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) ("We hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."). Evidently, with *Grutter*, the Court rejected that absolutist position for one in which the "strictness" of the scrutiny is based on contextual factors. *See* Paul Brest, *Some Comments on* Grutter v. Bollinger, 51 DRAKE L. REV. 683, 690–91 (2003).

89. *Grutter*, 539 U.S. at 328. Justice Thomas, in dissent, observed that the real compelling interest was not those educational benefits attributable to having a diverse student body but rather obtaining those benefits in an *elite* institution, or simply achieving a diverse student body—an "aesthetic"—regardless of its benefits. *See id.* at 354–56 (Thomas, J., concurring in part and dissenting in part); *cf.* Bloom, *supra* note 86, at 483 ("[F]or a Court made up of nine Justices, not to mention the law clerks who are all graduates of elite, selective law schools, requiring a law school to sacrifice any of its hard-earned status is all but unthinkable.").

90. *Grutter*, 539 U.S. at 329–30. It unclear how the use of race to achieve "critical mass" is different from the use of race in quota systems, at least in those quota systems where slots are provisionally set aside for minorities. *See* Brian N. Lizotte, Note, *The Diversity Rationale: Unprovable, Uncompelling*, 11 MICH. J. RACE & L. 625, 650 (2006) ("Unfortunately, 'critical mass' seems impossible to define concretely without resort to any poisonous 'quota.'"). A critical mass must

Justice O'Connor then embarked on an extended discussion of various educational benefits alleged to flow from a diverse student body, relying heavily on a number of amicus briefs to show that such benefits extend beyond the classroom to the workplace, politics, and the military.[91]

3. Narrow Tailoring

Justice O'Connor next reemphasized from her *Bakke* discussion that race cannot be used as a blunt instrument, such that *Bakke*-style quotas, as well as *Gratz*-style point systems, are impermissible.[92] She also underscored that applicants must be understood as individuals and that race may only be used as one among many factors in a "holistic" review.[93] Race may be used as part of a "good faith" effort to

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function as either an absolute number or a percentage. In practice it is probably both. For example, if a critical mass of black students is five percent of the total student population, but the population is only 10 students, then necessarily critical mass will be based on absolute numbers, for one cannot have half of a student. In either case, critical mass is not achieved until a certain number is reached. That is essentially the same process as with a quota. To be sure, the process by which a minority is admitted as part of a quota or as part of a critical mass may differ (i.e., a minority need not be otherwise qualified for admission under a quota system but may have to make such a showing in a system using critical mass), but the end result is the same: numbers drive the use of race in admissions. *See id.* at 650–51.

91. *Grutter*, 539 U.S. at 330–33. Justice O'Connor's reliance on diversity benefits outside campus complicates her analysis. It is one thing to hold that diversity is important to the learning environment, or to dispelling stereotypes among students. On these issues, a school's assessment of the importance of those benefits would make a plausible claim to deference. But the analysis changes considerably when looking at *post-graduation* benefits; after all, nothing that happens to minorities after graduation will directly help the learning experience of any student still in school. Moreover, there is no reason to defer to a school's assessment of the *non-pedagogical* benefits of diversity. *Cf.* Lizotte, *supra* note 90 ("Minority representation in the military is not an educational benefit."); Bloom, *supra* note 86, at 508 ("Perhaps the greatest constitutional drawback to the recognition of creating an educated group of potential minority leaders as a compelling interest is that it does not seem to require the same individualized and competitive evaluation process as the Powell diversity process does."). At the same time, to defer, as the *Grutter* majority does, to the empirical views of amici on what constitutes a compelling interest may be fraught with error. *See* Alexander & Schwarzschild, *supra* note 87, at 5 n.9 (suggesting that the "endorsement of racial affirmative action by corporate America should carry little or no weight").

92. *Grutter*, 539 U.S. at 334. Forbidding point systems may have the unintended consequence of encouraging arbitrariness, *see* Brest, *supra* note 88, at 691, or of making the cost of "race as a plus factor" admissions programs prohibitive, *see* Bloom, *supra* note 86, at 498–99. As noted at the outset, *Gratz* was decided solely on narrow tailoring grounds and is tangentially relevant to the discussion of diversity as a compelling interest. *See supra* note 2; *infra* Part III.B.

93. *Grutter*, 539 U.S. at 334.

achieve a permissible goal, and "some attention to numbers" is not the equivalent of a quota system.[94] Hence, the law school's keeping track of the race of admittees was permissible because the value given to race remained constant throughout the admissions process.[95] Justice O'Connor warned that race cannot become the defining feature of an application, and that no bonus points can be awarded because of race.[96] But she emphasized that, under the law school's program, all students admitted have been found to be qualified to succeed.[97] Justice O'Connor also observed that the law school's program gave serious consideration to other non-race factors when determining educational diversity.[98]

Justice O'Connor admitted that whenever race is used in admissions plans, it will result in some students who, but for race, would (or would not) have been admitted.[99] But she rejected the contention that the law school had other race-neutral means available to it to achieve critical masses of minority students. Specifically, Justice O'Connor rejected the contention that the law school could have achieved critical masses by lowering its academic admissions standards. She noted that doing so would prevent the law

94. *Id.* at 335.

95. *Id.* at 336. It is true that paying attention to numbers is not the same as a rigid quota system, but the results are largely the same: the race of an applicant becomes significant not just because of whom the person is, but also because of *how many* of that person's race are in the admissions pool and are accepted. Both systems promote racialism, "which is not the same thing as racism . . . but has a built-in tendency to promote racism" by promoting the "message . . . that the races are different from one another," and once "differences are magnified, antagonisms tend to magnify as well." Alexander & Schwarzschild, *supra* note 87, at 7.

96. *Grutter*, 539 U.S. at 337. The law school's program, unlike the undergraduate school's program, did not allocate points to an applicant based on race. But that distinction seems immaterial to the Court's stated concern that race not become a defining feature of an application. Even when race is used as a "plus" factor, that necessarily means that, at least for some students, the "plus" will make the difference between admission and rejection in the same way that racial "bonus points" would.

97. *Id.* at 337–38; *cf.* Alexander & Schwarzschild, *supra* note 87, at 9 ("The fact is that those admitted to college or graduate school through racial preferences are in general less qualified—not necessarily unqualified (whatever that means), but less qualified—to do college and postgraduate work than those admitted without preferences.").

98. *Grutter*, 539 U.S. at 337–38.

99. *Id.* at 339.

school from maintaining its elite status, and that the narrow tailoring component of strict scrutiny only required the law school to investigate alternatives that worked "about as well."[100] Justice O'Connor also declined the invitation from the United States as amicus to require the law school to use a percentage plan (like Texas's Top Ten Percent Law), reasoning that such plans would not be a good fit for graduate (as opposed to undergraduate) institutions.[101]

4. Endpoint

Justice O'Connor concluded her opinion with a discussion of when the law school's race-conscious admissions policy would end. She noted that all such race-based programs must have an endpoint, but that it would be unfair to require the law school to articulate a hard-and-fast deadline

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100. *Id.* The majority does not explain how the law school can have a compelling interest in a diverse *elite* student body, as opposed to merely a diverse student body. *See* Bloom, *supra* note 86, at 483. Bloom criticizes the majority opinion:

> [T]his fails to explain why Michigan's elite status is treated as part of the landscape immune from alteration, especially given that Michigan clearly made a deliberate choice in designing its admissions program to preserve its elite admissions policy—knowing full well that this would make it harder, if not impossible, to achieve a racially diverse student body without employing significant racial preferences.

Id. None of the on-campus benefits articulated by the law school as purportedly flowing from a diverse student body depends upon that body's aggregate academic qualifications. The lack of an analytic bridge between preserving the benefits of a race-influenced diversity and the need to maintain an "elite" school status is important because the "about as well" narrow tailoring standard refers to result, not to unwanted side-effects. That standard, articulated in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1980), comes from a law review article in which the author interprets strict scrutiny's narrow tailoring requirement as mandating that a court determine whether race-neutral means are available that would advance the same compelling interest "about as well *and at tolerable administrative expense.*" Kent Greenwalt, *Judicial Scrutiny of "Benign" Racial Preference in Law school Admissions*, 75 COLUM. L. REV. 559, 579 (1975). The full context of the "about as well" quote is revealing because it makes clear that the externalities of race-neutral options only factor into the strict scrutiny analysis in terms of the budgetary wherewithal of the governmental actor. Thus, in the context of *Grutter*, it should not have mattered that the law school would have had to sacrifice its elite status to achieve its diversity goal race-neutrally because there was no showing that a race-neutral policy would have been cost-prohibitive. Using a race-neutral and academic-lite admissions policy probably does produce about as good a result as the law school's race-conscious policy. *Cf.* Brest, *supra* note 88, at 691 n.27 ("It is worth noting that many law schools can achieve considerable diversity in respects other than race just by admitting by the numbers.").

101. *Grutter*, 539 U.S. at 340.

given the vagaries of critical mass and diversity.[102] Justice O'Connor observed that it had been about twenty-five years since Justice Powell's authorization of the use of diversity and race in university admissions, that minority test scores and admission rates had improved, thus, it would be reasonable to expect that the law school's race-conscious program would become unnecessary in the next twenty-five years.[103]

III. *FISHER V. UNIVERSITY OF TEXAS AT AUSTIN*

Having set forth the new rules of the game in race-conscious admission practices enunciated in *Grutter*, a discussion of the University of Texas's experimentation with race and diversity in admissions is warranted. These decisions by the University would lead ultimately to the Fifth Circuit's decision in *Fisher*.

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102. *Id.* at 342.

103. *Id.* at 343. Justice Ginsburg, joined by Justice Breyer, concurred largely to note that the majority opinion's 25-year sunset provision was more a hope or aspiration than a legally significant due date. *See id.* at 345–36 (Ginsburg, J., concurring). The majority opinion also drew four dissenting opinions. The Chief Justice dissented largely on the grounds that, in his view, the law school's admissions policy in practice operated as a crude quota. *See id.* at 385 (Rehnquist, C.J., dissenting). Specifically, the Chief Justice drew attention to the fact that what constituted a critical mass for one minority group never approximated what constituted a critical mass for other minority groups. *See id.* at 380–82; *see also* Bloom, *supra* note 86, at 481. Bloom states,

> If the point of critical mass was to admit a sufficient number of underrepresented minorities to encourage uninhibited expression, it is unclear why the critical mass for African-American students was so much larger than that for Hispanic or Native American students, or why as few as three Native American students constituted a critical mass.

Bloom, *supra* note 86, at 481. Justice Kennedy dissented largely on the grounds that the Court was not applying a sufficiently exacting standard of review and that the law school's use of race was constitutionally too heavy-handed. *Grutter*, 539 U.S. at 392–393 (Kennedy, J., dissenting). Justice Scalia and Justice Thomas dissented to contest the notion that diversity can be a compelling interest, *see id.* at 347–48 (Scalia, J., dissenting); *id.* at 356–61 (Thomas, J., dissenting), and that the law school had available race-neutral alternatives, *see id.* at 361–67 (Thomas, J., dissenting).

A. *From Racial Classification to Race-Neutrality to Racial Classifications*

Prior to 1996, the University of Texas at Austin employed two criteria for student admission. The first, used to this day, is called the Academic Index. The Index rates a student's academic achievement according to her grade point average, SAT scores, and similar data.[104] The University's use of the second criterion—race—ended in 1996 when the Fifth Circuit ruled in *Hopwood v. Texas* that race-conscious admission policies are unconstitutional.[105] In response to *Hopwood*, the University developed a new race-neutral admission criterion termed the Personal Achievement Index, to be used in conjunction with the Academic Index.[106] The clear purpose of the Personal Achievement Index was to increase minority enrollment without using explicitly race-conscious means; indeed, "many of the [Personal Achievement Index] factors disproportionately affected minority applicants."[107]

In 1997, the Texas Legislature responded to *Hopwood* by enacting the Top Ten Percent Law, which mandates that the top 10% of students graduating from each public high school be guaranteed admission to the University.[108] (In 2010, the Texas Legislature amended the law to cap the number of guaranteed admissions to the University of Texas at Austin to 75% of the spots reserved to Texas residents).[109] Although the Law is facially race-neutral, "underrepresented minorities were its announced target and their admission a large, if not primary, purpose."[110]

The admissions process changed again following the Supreme Court's decision in *Grutter*. *Grutter* effectively overruled *Hopwood* and spurred the University to reexamine its admission process. In response, the University

104. Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 222 (5th Cir. 2011).
105. Hopwood v. Texas, 78 F.3d 932, 934–35 (5th Cir. 1996).
106. *Fisher*, 631 F.3d at 223.
107. *Id.*
108. TEX. EDUC. CODE ANN. § 51.803 (1997).
109. *Id.* § 51.803(a-1) (2010).
110. *Fisher*, 631 F.3d at 224.

commissioned two studies to determine whether, consistent with *Grutter*, the University had obtained a "critical mass" of minority students through the Top Ten Percent Law.[111] The first study reviewed minority presence in classes of a "participatory size"—*i.e.*, between 5 and 24 students—and concluded that 90% of these classes had 1 or 0 African-American students, 46% had 1 or 0 Asian-American students, and 43% had 1 or 0 Mexican-American students.[112]

The University's second study was based on students' impressions of diversity on campus. "Minority students reported feeling isolated, and a majority of all students felt there was insufficient minority representation in classrooms for the full benefits of diversity to occur."[113] Relying on these studies, the University concluded that it "had not yet achieved the critical mass of underrepresented minority students needed to obtain the full educational benefits of diversity."[114] The University accordingly adopted a new admissions policy under which race would be one factor to be considered in admissions.[115] In the years after the University's adoption of the new policy, minority representation has increased markedly, although "it can be difficult to attribute increases in minority enrollment to any one initiative," particularly given that "demographics have shifted in Texas," such that "increases in minority enrollment likely in part reflect the increased presence of minorities statewide."[116]

B. *Pursuing Diversity at the University of Texas at Austin*

The University contended that the interest it sought to advance through its post-*Grutter* admissions policy is the same interest that the Supreme Court approved in *Grutter*

111. *Id.* at 224–25.

112. *Id.* "A later retabulation, which excluded the very smallest of these classes and considered only classes with 10 to 24 students, found that 89% of those classes had either one or zero African-American students, 41% had one or zero Asian-American students, and 37% had either one or zero Hispanic students." *Id.* at 225.

113. *Id.* at 225 (internal quotation marks omitted).

114. *Id.* at 226.

115. *Id.*

116. *Id.*

itself—namely, the purported "compelling interest in obtaining the educational benefits of diversity."[117] Specifically, that interest would encompass the "attempt to promote cross-racial understanding, break down racial stereotypes, enable students to better understand persons of other races, better prepare students to function in a multicultural workforce, cultivate the next set of national leaders, and prevent minority students from serving as spokespersons for their race."[118] Moreover, that interest, per the University, could only be achieved through a "critical mass of underrepresented minorities . . . to further its compelling interest in securing the educational benefits of a diverse student body."[119]

In order to achieve this asserted interest, the application process divides applicants into three pools: Texas residents, domestic non-Texas residents, and international students. Applicants compete for admission only among other applicants in the same pool. Admission decisions for the latter two categories are based solely on a combination of the Academic and Personal Achievement Indices.[120] In contrast, for the first category, applicants are subjected to the Top Ten Percent Law. Those applicants who do not gain admission under the Law are then reviewed according to the two Indices.[121] A few applicants' Academic Index scores are high enough by themselves to justify admission, and a few are low enough to be presumptively denied.[122]

The Personal Achievement Index is based on scores from two essays and a third score, called the "personal achievement score," based on the applicant's entire file.[123] Each set of scores is graded from 1 to 6, although the personal achievement score is weighted slightly higher than the essay scores.[124] That weighted score takes into account a

117. *Id.* at 230.
118. *Id.* at 230 (internal quotation marks omitted).
119. *Id.* at 230–31 (internal quotation marks omitted).
120. *Id.* at 227.
121. *Id.*
122. *Id.*
123. *Id.* at 227–28.
124. *Id.* at 228.

"special circumstances" component "that may reflect the socioeconomic status of the applicant and his or her high school, the applicant's family status and family responsibilities, the applicant's standardized test score compared to the average of her high school, and—beginning in 2004—the applicant's race."[125]

C. *The* Fisher *Litigation*

Texas residents Abigail Fisher and Rachel Michalewicz brought suit to challenge the University's denial of their admission to the Fall 2008 class at the University of Texas at Austin.[126] They alleged that the University's denial violated their rights against racial discrimination under the Equal Protection Clause of the Fourteenth Amendment,[127] and sought equitable relief as well as damages.[128] The district court ruled in the University's favor, and the plaintiffs appealed.

The Fifth Circuit panel affirmed the district court in three opinions. Judge Higginbotham wrote for all three members of the panel. His opinion's analysis is divided into four main parts; the first concerning the standard of review and the level of deference (if any) the University merited;[129] the second concerning whether the University's admissions policy standing alone is unconstitutional;[130] the third concerning whether the University's policy, in combination with the Top Ten Percent Law, is unconstitutional;[131] and the fourth whether the University's policy was necessary to achieve a "critical mass" (properly understood) of minority students.[132] Judge King concurred to note that she did not join in the lead opinion to the extent that it called into question the constitutionality of the Top Ten Percent Law.[133]

125. *Id.*
126. *Id.*
127. U.S. CONST. amend. XIV, § 1.
128. *Fisher*, 631 F.3d at 217.
129. *See id.* at 231–34.
130. *See id.* at 234–39.
131. *See id.* at 238–42.
132. *See id.* at 242–46.
133. *Id.* at 247 (King, J., concurring specially).

Judge Garza wrote an extensive concurrence expressing the view that *Grutter* was wrongly decided.[134]

1. The Higginbotham Opinion

a. *Deference*

All sides agreed that the University's admissions policy was to be reviewed under strict scrutiny and would require a showing of narrow tailoring.[135] But the parties disagreed over whether and to what extent the University's determinations regarding the lack of a critical mass and how to achieve that critical mass were entitled to judicial deference.[136] Judge Higginbotham looked to *Grutter* for the answer. He noted that deference to the University was justified on two grounds: that its admissions policy was the result of expert educational decision-making; and that the policy emerged from an academic environment entitled to First Amendment solicitude.[137] Judge Higginbotham specifically rejected the plaintiffs' argument that deference was only merited for the University's determination that educational diversity is a compelling interest.[138] He also concluded that *Grutter* requires that a court's "narrow-tailoring inquiry . . . [be] undertaken with a degree of deference to the University's constitutionally protected, presumably expert academic judgment."[139]

Judge Higginbotham rejected the plaintiffs' reliance on a series of Supreme Court cases dealing with race and public employment, culminating in *Ricci v. DeStefano*.[140] The plaintiffs had argued that these cases instituted a new

134. *Id.* at 247–66 (Garza, J., concurring specially).

135. *Id.* at 231 (lead opinion); Brief of Plaintiffs-Appellants Abigail Noel Fisher and Rachel Multer-Michalewicz at 20–21, *Fischer*, 631 F.3d 213 (No. 09-50822); Brief of Appellees at 23–27, *Fisher*, 631 F.3d 213, (No. 09-50822).

136. Brief of Plaintiffs-Appellants Abigail Noel Fisher and Rachel Multer-Michalewicz at 20–21, *Fischer*, 631 F.3d 213 (No. 09-50822); Brief of Appellees at 23–26, *Fisher*, 631 F.3d 213, (No. 09-50822).

137. *Fisher*, 631 F.3d at 231.

138. *Id.* at 232.

139. *Id.*

140. *Id.* (citing Ricci v. DeStefano, 129 S. Ct. 2658 (2009)).

standard of narrow tailoring to the effect that the government must establish a "strong basis in evidence" for the need for racial classifications.[141] Judge Higginbotham found the analogy to *Ricci* and its predecessors unconvincing, because those cases' "high standard for justifying the use of race in public employment decisions responds to the reality that race used in a backward-looking attempt to remedy past wrongs, without focus on individual victims, does not treat race as part of a holistic consideration."[142] The University's system, however, approaches race differently, for it looks to race as just one non-determinative factor, and analyzes individuals as individuals; these differences from the public employment cases "steer[] university admissions away from a quota system."[143] Thus, "courts must afford a measure of deference to the university's good faith determination that certain race-conscious measures are necessary to achieve the educational benefits of diversity, including attaining critical mass in minority enrollment."[144]

b. *Racial Balancing*

Judge Higginbotham began his analysis of the racial balancing issue by noting that the University, in designing its new policy, clearly wanted to avoid a quota system.[145] He emphasized that, whereas a quota presupposes some fixed goal, a *Grutter*-style diversity goal demands just a good-faith effort to reach a range established by the goal.[146] Moreover, the University's admission policies do not produce a result that is demographically consistent with Texas's general racial make-up, which, per Judge Higginbotham, supported

141. *Id.* (internal quotation marks omitted).

142. *Id.* at 233.

143. *Id.*

144. *Id.* Judge Higginbotham also rejected the plaintiffs' reliance on *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), because there the school district "pursued racial balancing and defined students based on racial group classifications, not on individual circumstances" as the University purportedly does. *Fisher*, 631 F.3d at 234.

145. *Fisher*, 631 F.3d at 234–35.

146. *Id.* at 235.

the conclusion that the University's admission policy is not a quota system.[147]

The plaintiffs also contended that the University's motive was race-based because the University had relied on demographic data to establish the ranges of its diversity goals.[148] Judge Higginbotham rejected that argument as well, reasoning that reference to demographic data is appropriate to establish some connection between the community at large and the diversity goals that are to be aimed at with the admissions process.[149] After all, the surest way to determine which minorities are underrepresented (and thus which are needed to reach a critical mass) is to consult demographics.[150] Thus, if the University's mission is to produce people who can fulfill "the future leadership needs of Texas," then it is appropriate for the University's diversity goals to correspond, to some reasonable degree, to Texas's racial diversity.[151]

The plaintiffs also contended that, regardless of the plan's design or how it arrived at the specific diversity goals, the admissions policy was still unconstitutional because it strove for a critical mass more than "encompassing only that level of minority enrollment necessary to ensure that minority students participate in the classroom and do not feel isolated."[152] Relying on *Grutter*, Judge Higginbotham acknowledged that critical mass must be understood with reference to a university's particular diversity goals and that those goals may appropriately extend beyond the "narrow 'pedagogical concept'" of critical mass advanced by the plaintiffs.[153] He therefore found no problem with the University's focus on certain minority groups who were the "most significantly underrepresented on its campus."[154]

147. *Id.*
148. *Id.* at 236.
149. *Id.* at 236–37.
150. *See id.*
151. *Fisher*, 631 F.3d at 237.
152. *Id.* at 238.
153. *Id.* at 238.
154. *Id.* at 238.

c. *Top Ten Percent Law*

The plaintiffs contended that the Top Ten Percent Law was an adequate and racially neutral way for the University to achieve its diversity goals.[155] Consequently, the plaintiffs argued that the University's race-based admissions policy was necessarily *not* narrowly tailored.[156] Judge Higginbotham rejected the argument, reasoning that the Law and other "percentage plans" are not a constitutionally required alternative to race-based plans.[157] He relied on *Grutter*'s conclusion that such percentage plans do not afford the individualized flexibility that universities need to achieve a diversity that begins, but does not end, with race.[158] And he reemphasized that "the Top Ten Percent Law alone does not perform well in pursuit of the diversity *Grutter* endorsed and is in many ways at war with it."[159]

The court's discussion of the Top Ten Percent Law, however, must be taken in context. Judge Higginbotham did not say that the constitutionality of the Top Ten Percent Law is doubtful.[160] Rather, Judge Higginbotham stated that a university would have a difficult time achieving *Grutter*-style diversity (which is *not* constitutionally mandated) using a percentage plan like the Law, largely because it does not operate at an individual level and therefore cannot produce the supposedly fine-tuned, multi-faceted diversity that *Grutter* endorsed and the University wants to achieve.[161] In that vein, Judge Higginbotham underscored that the Law focuses on geographic diversity, which in his view "crowds out other types of diversity that would be considered under a *Grutter*-like plan."[162]

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155. *Id.* at 239.

156. Brief for Appellants at 23, *Fisher*, 631 F.3d 213 (No. 09-50822).

157. *Fisher*, 631 F.3d at 239.

158. *Id.*

159. *Id.* at 240.

160. Judge King (and perhaps Judge Garza) specifically declined to join in addressing the law's constitutionality because no party had briefed the issue. *Id.* at 247.

161. *Id.* at 240.

162. *Id.*

Judge Higginbotham noted two additional policy-based criticisms of the Law. First, following Justice Ginsberg's dissent in *Gratz v. Bollinger*,[163] he observed that percentage plans give parents an incentive to keep their children in underperforming schools, and students a reason to take easy classes to protect their GPAs.[164] Second, Judge Higginbotham noted that the Law creates very intense competition for the 10% of slots left after the Law's operation, such that on average those students admitted by virtue of their Academic and Personal Achievement Indices have higher average SAT scores than those admitted under the Law. That result purportedly hurts "minority students (who nationally have lower standardized test scores) in the second decile of their classes at competitive high schools."[165] Thus, Judge Higginbotham concluded that the Top Ten Percent Law was "a blunt tool for securing the educational benefits that diversity is intended to achieve," and hence the University was not constitutionally mandated to use it instead of a race-conscious program to achieve such *Grutter*-style diversity.[166]

d. *Critical Mass*

The plaintiffs argued that, because the Top Ten Percent Law already substantially increased the number of minorities at the University, it placed the University's race-conscious program beyond *Grutter*'s protective ambit.[167] Judge Higginbotham agreed to a point, conceding that the Law's "substantial effect on aggregate minority enrollment at the University . . . places at risk [the University's] race-conscious admissions policies."[168] Nevertheless, Judge Higginbotham rejected the plaintiffs' proposed percentage-based levels of minority participation that would establish a critical mass, reasoning that they were grounded in the

163. Gratz v. Bollinger, 539 U.S. 244, 298 (2003) (Ginsburg, J., dissenting).
164. *Fisher*, 631 F.3d at 241.
165. *Id.*
166. *Id.* at 242.
167. Brief for Appellants, *supra* note 156, at 23–26.
168. *Fisher*, 632 F.3d at 243.

incorrect notion of critical mass as being just that number of students necessary to achieve representation in class discussions and to avoid feelings of isolation.[169] He also rejected the plaintiffs' contention that the Law achieves critical mass because minority enrollment now exceeds minority enrollment before *Hopwood*, when the University last used race-conscious admission policies.[170] Judge Higginbotham found that argument unconvincing, both because it assumed without proof that pre-*Hopwood* minority numbers were at critical mass levels, and because pre-*Hopwood* numbers would not reflect demographic changes in Texas since that time.[171] Judge Higginbotham again underscored that, because *Grutter*-style diversity is not simply a function of racial diversity, *Grutter*-style diversity cannot be achieved by "any fixed numerical guideposts."[172]

Finally, the plaintiffs advanced a "good enough" argument: although the Top Ten Percent Law may not have achieved a perfect "critical mass," the University's race-conscious addition to that Law made only marginal improvements to minority enrollment and could not justify the use of race in light of the Law's "good enough" results.[173] Judge Higginbotham rejected that argument too, relying on Justice Kennedy's concurring opinion in *Parents Involved in Community Schools v. Seattle School District No. 1* for the proposition that a race-conscious plan aimed at achieving *Grutter*-style diversity would be justified "even for the small gains" sought by the University.[174]

2. The King Special Concurrence

Judge King concurred specially to note that no party had challenged the Top Ten Percent Law; therefore, she would

169. *Id.*

170. *Id.* at 244.

171. *Id.* He also observed that the University enrolled fewer minorities in 2004 than in pre-*Hopwood* 1989. *Id.*

172. *Id.* at 244–45.

173. *Fisher*, 632 F.3d at 239.

174. *Id.* at 246 (citing *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 790 (2007) (Kennedy, J., concurring)).

not join in the lead opinion "insofar as it addresses . . . the validity or the wisdom of the Top Ten Percent Law."[175] Judge King apparently was laboring under a misapprehension as to the nature of the lead opinion's discussion of the Top Ten Percent Law. As noted above, that discussion was not intended to cast doubt on the constitutionality of using race-neutral means to achieving a race-conscious goal.[176] Rather, the discussion's criticisms of the Top Ten Percent Law were intended to establish that the Top Ten Percent Law, and percentage plans generally, are not capable of achieving a *Grutter*-style diversity.[177] As a consequence, the narrow tailoring requirement of strict scrutiny does not demand that the University use such a percentage plan in lieu of a race-conscious plan. To be sure, the lead opinion does discuss whether the Top Ten Percent Law, *in combination with* the University's race conscious plan, is unconstitutional, but that discussion does not imply that the Top Ten Percent Law, standing alone, raises constitutional concerns.[178]

3. The Garza Special Concurrence

Judge Garza also authored a special concurrence, agreeing fully with the lead opinion to the extent that it faithfully applied *Grutter* to the University's admission policy, but also arguing that *Grutter* was wrongly decided and that the Supreme Court should revisit the use of race in university admissions.[179] Judge Garza advanced several criticisms of *Grutter*. First, he chastised the Court for replacing the traditional "least restrictive means" interpretation of narrow tailoring with "a regime that encourages opacity and is incapable of meaningful judicial review [because] [c]ourts now simply assume . . . that university administrators have acted in good faith in pursuing racial diversity."[180] Relatedly,

175. *Id.* at 247 (King, J., concurring specially).
176. *See supra* Part III.C.1.
177. *Fisher*, 631 F.3d at 241–42.
178. *See id.* at 242.
179. *Id.* at 247–48 (Garza, J., concurring specially).
180. *Id.* at 249.

Judge Garza criticized *Grutter* for relieving universities of the "require[ment] to use the *most effective* race-neutral means," such that, assuming good faith, universities "are free to pursue less effective alternatives that serve the [diversity] interest 'about as well.'"[181]

Judge Garza also took aim at *Grutter*'s conclusion that incorporating race into a holistic analysis cured any concerns about the use of quotas.

> If two applicants, one a preferred minority and one nonminority, with application packets *identical* in all respects save race would be assigned the same score under a holistic scoring system, but one gets a higher score when race is factored in, how is that different from the mechanical group-based boost prohibited in *Gratz*? Although one system quantifies the preference and the other does not, the result is the same: a determinative benefit based on race.[182]

In Judge Garza's view, the use of catch phrases like "individualized consideration" and "holistic review" simply obscure the unchanging fact that race is used in essentially the same way as it is in more blunt quota systems.[183] Even worse, *Grutter*'s prohibition against the quantification of race or ethnicity prevents courts from providing any meaningful review, because courts cannot determine whether race or ethnicity functions as just a plus factor or instead as a but-for cause of admission.[184]

Judge Garza also took issue with *Grutter*'s malleable concept of diversity, which would allow universities to continue to claim a need for race in admissions even if aggregate minority enrollment could be increased substantially through race-neutral means, so long as "these minority students were disproportionately bunched in a small number of classes or majors."[185] Indeed, such a standardless understanding of critical mass would allow

181. *Id.* at 250–51 (citing Grutter v. Bollinger, 539 U.S. 306, 339 (2003)).
182. *Id.* at 252.
183. *Id.*
184. *Id.* at 252–53.
185. *Id.* at 253.

educators to use race until "the elusive critical mass had finally been attained . . . [by] major-by-major and classroom-by-classroom."[186]

Judge Garza also criticized *Grutter*'s conclusion that educational diversity, in which race plays some ill-defined role, constitutes a compelling state interest. He noted that there is no sound way to measure any of the purported benefits flowing from educational diversity. "*Grutter* permits race-based preferences on nothing more than intuition—the type that strict scrutiny is designed to protect against."[187] Moreover, *Grutter* erroneously assumes that increasing racial diversity will increase viewpoint diversity.[188] But that assumption runs right up against the ultimate remedial purpose of the Equal Protection Clause: to prevent government from treating people according to race on account of outmoded or unsubstantiated stereotypes about what members of certain races think or believe.

> *Grutter* sought to have it both ways. The Court held that racial diversity was necessary to eradicate the notion that minority students think and behave, not as individuals, but as a race. At the same time, the Court approved a policy granting race-based preferences on the assumption that racial status correlates with greater diversity of viewpoints.[189]

Judge Garza lambasted *Grutter* for its shift from "emphasis on diversity in educational *inputs* with a new emphasis on diversity in educational *outputs*"; in other words, from focusing just on the supposed value of diversity in the classroom to the supposed value of diversity in the workplace and in civic life, as well.[190]

Judge Garza concluded his critique of *Grutter* with a review of the decision's effectiveness criterion. Just how successful must a race-based program be at increasing diversity to be constitutionally justified? In Judge Garza's

186. *Id.* at 254.
187. *Id.* at 255–56.
188. *Id.* at 256.
189. *Id.*
190. *Id.* at 258.

view, the standard should be whether the race-based program "meaningfully furthers its intended goal of increasing racial diversity on the road to critical mass."[191] After an exhaustive review of the data in the record, Judge Garza concluded that "the University of Texas's use of race has had an infinitesimal impact on critical mass in the student body as a whole" and thus "the University's use of race can be neither compelling nor narrowly tailored."[192] That conclusion follows because, if the impact on racial balance is minimal, then necessarily the University's race-based admissions program will have "no discernable educational impact."[193] Judge Garza ended his concurrence with reaffirmation of the principle that "the Constitution prohibits all forms of government-sponsored racial discrimination," such that the University's race-based program could never be justified if "the Court[] [was to] return to constitutional first principles."[194]

IV. REGARDING *FISHER*'S PURPORTED STRICT ADHERENCE TO *GRUTTER*

Quoting the Texas Solicitor General, the district court in *Fisher* argued that "[i]f the Plaintiffs are right, *Grutter* is wrong."[195] The court of appeals agreed. While the *Fisher* decision produced three separate opinions, all judges were in agreement that the University of Texas had remained faithful to the diversity interest sanctioned by the Supreme Court in *Grutter*.[196] However, *Grutter*'s expansion of what is allowable as a compelling governmental interest remains the lone Supreme Court opinion sanctioning diversity's unique status. Given that the Supreme Court remains hesitant to expand the diversity compelling interest into secondary education, it is prudent to review two obvious

191. *Id.* at 260.
192. *Id.* at 263.
193. *Id.*
194. *Id.* at 266.
195. Fisher v. Univ. of Texas at Austin, 645 F. Supp. 2d 587, 612 (W.D. Tex. 2009).
196. *See supra* Part II.C.

avenues where the Supreme Court can distinguish *Grutter* from *Fisher*.

A. *Race-Neutral Measures are Sufficient*

As noted above, in the intervening years between *Hopwood* and *Grutter*, the University of Texas at Austin had adopted a wholly race-neutral means of achieving its purported compelling interest in diversity.[197] To this end, "[w]hen the decision was made to reintroduce race-conscious admissions in 2004, underrepresented minorities made up 21.4% of the incoming class[.]"[198] This percentage was appreciably higher than the percentage of minority enrollment required in *Grutter* and was achieved wholly through race-neutral means.[199] Moreover, this number was higher than the race-conscious means secured for the University before *Hopwood*.[200]

To survive a constitutional challenge to a race-conscious admissions policy, the University has to demonstrate that its program is narrowly-tailored. "The essence of the 'narrowly tailored' inquiry is the notion that explicit racial preferences . . . must be only a 'last resort' option."[201] In the context of preferential treatment towards high school students, Justice Kennedy recently observed that "measures other than differential treatment based on racial typing of individuals first must be exhausted."[202] Interestingly, it was Justice Powell, the father of diversity, who first introduced the requirement that race-neutral means be exhausted

197. *See supra* Part II.C.1.c (discussing the Top Ten Percent Law).

198. *Fisher*, 631 F.3d at 243.

199. *Id.* at 243–44 ("African-Americans and Hispanics never represented more than a combined 14.8% of the Michigan Law school's applicant pool during the examined time period.").

200. *Id.* at 244.

201. Hayes v. N. St. L. Enforce. Officers Ass'n, 10 F.3d 207, 217 (4th Cir. 1993).

202. Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 798 (2007) (Kennedy, J., concurring); *see also* Rothe Dev. Corp. v. U.S. Dep't of Def., 545 F.3d 1023, 1036 (Fed. Cir. 2008) (stating that "[e]ven where there is a compelling interest supported by a strong basis in evidence," the court must consider "the efficacy of alternative, race-neutral remedies"); Western States Paving Co., Inc. v. Wash. State Dep't of Transp., 407 F.3d 983 (9th Cir. 2005) (noting that narrow tailoring under the Equal Protection Clause requires "serious, good faith consideration of workable race-neutral alternatives") (citations omitted).

before resorting to race-conscious means.[203] In *Wygant*, Justice Powell observed that narrow tailoring requires "intense scrutiny to whether a nonracial approach or a more narrowly-tailored racial classification could promote the substantial interest about as well and at tolerable administrative expense."[204]

Seen in this light, the University's history with race-neutral alternatives provides a constitutionally significant contrast to the law school in *Grutter*. Not only has the University adopted a "race-first" policy towards admissions since *Grutter*, but it also has a very successful history of increasing the raw numbers of minorities through race-neutral means since *Hopwood*.[205] To the extent that the compelling interest in diversity can be achieved through increased minority enrollment, the University's race-neutral plan has been a demonstrable success.[206]

More to the point, however, is that the University has failed to demonstrate its race-conscious measures are any more successful in attaining the "educational benefits that flow from a diverse student body."[207] Accordingly, the measure of success of the University's race-conscious means "should be its ability to achieve those educational benefits."[208] Yet, the dispute in *Fisher* concerned whether a "critical mass" was achieved, not whether the race-conscious measures resulted in educational benefits.[209] But this approach is backwards and ignores the actual compelling

203. Kenneth L. Marcus, *Diversity and Race-Neutrality*, 103 NW. U. L. REV. COLLOQUY 163, 164 (2008).

204. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6 (1986) (quoting Kent Greenwalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 578–579 (1975)); *see also* Marcus, *supra* note 203, at n.6.

205. *See generally,* U.S. DEPT. OF EDUC., OFFICE FOR CIVIL RIGHTS, ACHIEVING DIVERSITY: RACE-NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION (2004).

206. *Compare* Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2333–34 (2000) (discussing university efforts to increase the minority representation on campus), *with* Marcus, *supra* note 203, at 167 ("[I]ncreasing racial or ethnic representation is not a sufficiently compelling interest to justify the use of racial preferences.").

207. Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

208. Marcus, *supra* note 203, at 168.

209. Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 242–46 (5th Cir. 2011).

interest identified by the Supreme Court in *Grutter*. "In other words, to pass court scrutiny, institutions must seriously consider whether the same level of educational attainment believed to be available through the inclusion of racial and ethnic criteria in a multi-factored diversity approach can also be achieved through nonracial means."[210]

Admittedly, it is highly questionable to what extent a public institution could actually demonstrate educational benefits flowing from race-conscious admissions policies.[211] But the failure of the University in *Fisher* even to attempt to justify its race-conscious policies on "educationally beneficial" grounds, could lead the Supreme Court to distinguish *Fisher* from *Grutter*. Whereas *Grutter* laid the compelling interest framework, the Supreme Court left it for the lower courts to hammer out the details. Resorting to race-conscious means without any evidence that race-neutral means are any *less* effective in achieving the educational benefits from a diverse student body should be constitutionally significant.

B. *Undergraduate Admissions at the University of Texas*

As the *Grutter* Court rightly observed, "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause."[212] The circumstances that led the *Grutter* Court to find a compelling interest in "attaining a diverse student body" are unique.[213] Central to the finding of diversity as a compelling interest in *Grutter* was the fact that a law school was asserting the interest.[214] Furthermore, "that the *law school* has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the *law school's* proper institutional mission."[215] Thus, the deference the

210. *Marcus*, *supra* note 203, at 168.

211. *See id.* at 168–70 (discussing problems with quantifying diversity's educational benefits).

212. *Grutter*, 539 U.S. at 327.

213. *Id.* at 328.

214. *Id.* ("Today, we hold that the *Law school* has a compelling interest in attaining a diverse student body." (emphasis added)).

215. *Id.* at 329 (emphasis added).

Supreme Court afforded in *Grutter* was unique to the law school environment. In contrast, the University in *Fisher* argued that its interest is compelling "[b]ecause the University's educational mission includes the goal of producing future educational, cultural, business, and sociopolitical leaders."[216]

But such a justification is no different from any public institution's, and iteration of goals that amount to nothing more than a desire to "produce . . . leaders" is no different from those of a kindergarten. Law schools, the *Grutter* Court reasoned, are extraordinary institutions "represent[ing] the training ground for a large number of our Nation's leaders."[217] In fact, the Court went further noting that "highly selective law schools" (including the University of Michigan) are unique in that they account for "25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges."[218]

This emphasis placed on highly selective law schools was not dicta; it was central to the *Grutter* Court's finding of a compelling interest. "Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America."[219] Thus, while the *Grutter* Court found a compelling interest, it was a very narrow one indeed. When viewed in context, as the *Grutter* Court repeatedly cautions, the compelling interest in diversity, under the *Grutter* rationale, is only compelling for highly selective law schools.

Insofar as there is a compelling interest in diversity, in any form, *Grutter* remains the lone Supreme Court decision to which proponents of diversity can cite. In *Parents*

216. Fisher v. Univ. of Tex. at Austin, 645 F. Supp. 2d 587, 602 (W.D. Tex. 2009).

217. *Grutter*, 539 U.S. at 332.

218. *Id.*

219. *Id.* at 332–33.

Involved in Community Schools, a plurality of the Court flatly rejected extending the compelling interest in *Grutter* to K-12 education.[220] Furthermore, a majority of the Court recognized that the facts in *Grutter* gave rise to a unique compelling interest, and that outside of that context, government would be restrained from finding diversity, in any form, a compelling state interest.[221] Thus, the *Parents Involved* Court provides a clear warning to lower courts that extend *Grutter*: the *Grutter* holding was narrow, and all race-based classifications in support of diversity must be put in their proper context.

The unique compelling interest found by the *Grutter* court is unlikely to be found by the Supreme Court again. Of the top-12 ranked law schools, only three are public institutions that must heed the requirements of the Equal Protection Clause.[222] Moreover, two of those three public institutions, the University of California at Berkeley and the University of Michigan, now are prohibited from considering race in admissions under their respective state constitutions.[223] Thus, not only are the requirements for the compelling interest in *Grutter* unlikely ever to be met again, but even the institution at issue in *Grutter*, the University of Michigan Law School, no longer uses race in its admissions process.

220. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 723–24 (2007).

221. *Id.* at 725 ("The Court in *Grutter* expressly articulated key limitations . . . noting the unique context of higher education—but these limitations were largely disregarded by the lower courts in extending *Grutter* to uphold race-based assignments in elementary and secondary schools.").

222. The three public institutions ranked in the top 12 are the University of California at Berkeley, the University of Michigan, and the University of Virginia. *See Best Law schools, Rankings*, U.S. NEWS & WORLD REPORT (2009), *available at* http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/rankings (last visited Dec. 20, 2009). It should be noted, however, that even private universities must follow Title VI of the Civil Rights Act. 42 U.S.C. §2000(d) (2006) (stating that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in any program receiving Federal financial assistance" and thereby extending Title VI to private universities that receive any federal benefits, such as offering students federal loans or grants); *see also Title VI, Title IX and the Private University*, 78 MICH. L. REV. 608 (1980).

223. CAL. CONST. art. I, § 31; MICH. CONST. art. I, § 26.

Put simply: context matters. "[S]trict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context."[224] The unique blend of facts and circumstances in *Grutter* gave rise to a limited compelling interest. Out of context, that compelling interest can appear broad, as the Fifth Circuit found in *Fisher*, but in context, as the Supreme Court placed it in *Parents Involved*, it is clear that *Grutter* provides a narrow compelling interest unlikely to reappear.

V. REVISITING *GRUTTER*—TWO ADDITIONAL REASONS THE SUPREME COURT SHOULD OVERTURN *FISHER* BY OVERTURNING *GRUTTER*

Since the day it was decided, Justice O'Connor's *Grutter* opinion has been under attack.[225] Indeed, Chief Justice Rehnquist,[226] along with Justices Kennedy,[227] Scalia,[228] and Thomas[229] all filed dissenting opinions in *Grutter*. Moreover, in *Fisher*, Judge Garza laid forth numerous reasons why *Grutter* was wrongly decided,[230] going so far as to write that *Grutter*, "strays from fundamental principles of constitutional law" as well as that "*Grutter* represents a digression in the course of constitutional law," and to disparage the Supreme Court for choosing an "erroneous path . . . [that] detour[s] from constitutional first principles."[231] If the Supreme Court is to take up *Fisher* the words from these learned justices and judges are sure to be revisited, and readers interested in *Fisher* would be wise to look first to them to understand the serious constitutional

224. Grutter v. Bollinger, 539 U.S. 306, 327 (2003).

225. *See* Roger Clegg, *Grutter @ 1*, THE NATIONAL REVIEW (June 23, 2004), http://www.nationalreview.com/articles/211246/i-grutter-i-1/roger-clegg.

226. *Grutter*, 539 U.S. at 378–87 (Rehnquist, C.J., dissenting).

227. *Id.* at 387–95 (Kennedy, J., dissenting).

228. *Id.* at 346–49 (Scalia, J., dissenting).

229. *Id.* at 349–78 (Thomas, J., dissenting).

230. *See supra* Part II.C.3.

231. Fisher v. The Univ. of Tex. at Austin, 631 F.3d at 213, 247 (5th Cir. 2011) (Garza, J., concurring specially).

concerns raised by the Court's *Grutter* holding. However, it is important to emphasize two particularly pernicious problems that are caused by the Court's holding in *Grutter*: (1) the extraordinary deference the Court afforded despite strict scrutiny review; and (2) the sanctioning of racial stereotyping.

A. *Affording Deference under Strict Scrutiny*

Strict scrutiny review for race-based classifications has been around since *Korematsu*. There, the Court noted that, "all legal restrictions which curtail the civil rights of a single racial group ... must [be] subject[ed] ... to the most rigid scrutiny."[232] And, for the past 75 years, the Court has steadfastly applied strict scrutiny to racial classifications, because "[a]ny retreat from the most searching judicial inquiry can only increase the risk of another [*Korematsu*] occurring in the future."[233] But *Grutter*'s sanctioning of deference under strict scrutiny lessens the burden for a state actor attempting to justify racial preferences, thus leaving open the possibility of many constitutional mistakes in the future.

Prior to *Grutter*, decisions of the Supreme Court made clear that distinctions between persons based solely upon their ancestry "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[234] All racial classifications by government are "inherently suspect"[235] and "presumptively invalid."[236] Accordingly, the core purpose of the Equal Protection Clause is to eliminate governmentally sanctioned racial distinctions.[237]

> [Where the government proposes to ensure participation of some specified percentage of] a particular group merely because of its race or ethnic origin, such a preferential

232. Korematsu v. United States, 323 U.S. 214, 216 (1944).
233. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 236 (1995).
234. *Id.* at 214 (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).
235. *Id.* at 223 (citation omitted).
236. Shaw v. Reno, 509 U.S. 630, 643 (1993).
237. City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 495 (1989).

> purpose must be rejected . . . as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.[238]

All governmental action based on explicit racial classifications is subject to strict scrutiny to ensure that the personal right to equal protection has not been infringed.[239] Thus, before resorting to a race-conscious measure, the government must "identify [the] discrimination [to be remedied], public or private, with some specificity," and must have a "strong basis in evidence" upon which to "conclu[de] that remedial action [is] necessary."[240]

Strict scrutiny applies regardless of whether a law is "benign" or "remedial,"[241] regardless of the race of those burdened or benefited by a particular classification,[242] and regardless of whether the law may be said to benefit and burden the races equally.[243] Simply put, it makes no difference whether the governmental program has hard quotas, soft quotas, goals, or timetables. It will result in "individuals being granted a preference because of their race."[244] A constitutional injury occurs whenever the government treats a person differently because of his or her race.[245]

When a governmental scheme uses a racial classification, the action is not entitled to the presumption of constitutionality which normally accompanies governmental acts.[246] "A governmental actor cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists," and "blind judicial deference to legislative or executive pronouncements of

238. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978).
239. *Adarand*, 515 U.S. at 227.
240. *Croson*, 488 U.S. at 500, 504 (citation omitted).
241. *Adarand*, 515 U.S. at 226 (citation omitted).
242. *Croson*, 488 U.S. at 494.
243. Shaw v. Reno, 509 U.S. 630, 651 (1993).
244. Lutheran Church—Missouri Synod v. FCC, 141 F.3d 344, 354 (D.C. Cir. 1998).
245. *Adarand*, 515 U.S. at 211, 229–30.
246. *Croson*, 488 U.S. at 500.

necessity has no place in equal protection analysis."[247] A racial classification is presumptively invalid, and the burden is on the government to demonstrate extraordinary justification.[248] In order to justify a racial classification, the government "'must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary . . . to the accomplishment" of its purpose or the safeguarding of its interest.'"[249] It requires governmental specificity and precision,[250] and demands a strong basis in evidence that race-based remedial action is necessary.[251] Absent a prior determination of necessity, supported by convincing evidence, the governmental entity will be unable narrowly to tailor the remedy, and a reviewing court will be unable to determine whether the race-based action is justified.[252]

Grutter upends this hornbook constitutional law by according extraordinary deference to the determination by officials of the University of Michigan Law School that genuine diversity is essential to its educational mission.[253] In other words, the creation of a compelling interest in diversity is based on the *ipse dixit* of the University that it is a compelling interest.

Further, political bodies, like the Board of Regents of the University of Texas System are not insulated from the temptation of racial politics. Racial politics is not only helping one's own race, it uses race to curry votes.[254] In *Croson*, the Supreme Court invalidated an elected city council's voluntary race-based preference program, fearing that it was adopted for the purpose of "racial politics," a concept that applies similarly to local school boards.[255] The Supreme Court demanded that any government entity

247. *Id.* at 500–01.
248. *Reno*, 509 U.S. at 643–44.
249. Regents of Cal. v. Bakke, 438 U.S. 265, 305 (1978) (citations omitted).
250. *Croson*, 488 U.S. at 504.
251. Shaw v. Hunt, 517 U.S. 899, 909 (1996).
252. *Croson*, 488 U.S. at 510.
253. Grutter v. Bollinger, 539 U.S. 306, 328–29 (2003).
254. TOM CAMPBELL, SEPARATION OF POWERS IN PRACTICE 122 (2004).
255. *Grutter*, 539 U.S. at 492, 510.

seeking to classify by race must point to specific identified instances of past or present discrimination.

> [I]f there is no duty to attempt either to measure the recovery by the wrong or to distribute that recovery within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate "a piece of the action" for its members.[256]

Accordingly, race-based decisions made by political groups in the political process are suspect. The Supreme Court held:

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.[257]

The *Grutter* Court's deference to the law school is also explicitly contrary to *Wygant*. In *Wygant*, the Supreme Court did not defer to a local school board's judgment with respect to the purported benefits of a racially mixed teaching staff. There, the Court found unconstitutional a collective bargaining agreement between a school board and a teacher's union that favored certain minority races. The school board defended the agreement on the grounds that minority teachers provided "role models" for minority students and that a racially diverse faculty would improve the education of all students.[258] The Supreme Court held that the use of race violated the Equal Protection Clause

256. City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 510–11 (1989).
257. *Id.* at 493.
258. Wygant v. Jackson Bd. of Educ., 476 U.S. 274–76 (1986).

and rejected an asserted interest in "providing minority role models for [a public school system's] minority students, as an attempt to alleviate the effects of societal discrimination."[259] That interest was found to be "too amorphous a basis for imposing a racia[l] classifi[cation]."[260]

Similarly to *Wygant*, courts should not defer to a political body with respect to an educational policy that uses race to discriminate against students in admissions. Indeed, in *Wessmann v. Gittens*, the First Circuit explicitly rejected the argument that courts should "defer[] to school officials' determinations anent the racial and ethnic composition of the student body."[261] The *Wessmann* Court said that "the School Committee's citation to *Brown* is self-defeating, for the *Brown* Court made it abundantly clear that constitutional principles cannot take a back seat to the discretion of local school officials in respect to matters such as the racial composition of student bodies."[262]

Deference to a political body is inconsistent with the holdings of the Supreme Court in *Adarand*, *Croson*, and *Wygant*. Because public universities are political bodies, they may "be greatly tempted to use race for political advantage if permitted to do so."[263] Any watering down of equal protection review will effectively assure that race will always be relevant in American life, and that the "'ultimate goal of eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being's race' will never be achieved."[264]

B. *Sanctioning Racial Stereotyping*

An axiom of equal protection jurisprudence is that the Equal Protection Clause protects "persons, not groups."[265] "It follows from that principle that all governmental action

259. *Id.* at 274.

260. *Id.* at 276.

261. 160 F.3d 790, 797 n.3 (1st Cir. 1998).

262. *Id.*

263. CAMPBELL, *supra* note 254, at 125.

264. City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 495 (1989) (citations omitted).

265. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995).

based on race—a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed."[266] The Fourteenth Amendment's intent is to ensure that all persons will be treated as individuals, not "simply components of a racial . . . class."[267] "Race-based assignments 'embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.'"[268]

In *Grutter*, the law school's admissions policy classified students according to broad racial categories of "African-American" or "Hispanic" or "Asian."[269] The law school, therefore, falls prey to the criticism of the *Miller* and *Adarand* Courts by treating individuals as a product of their race. Under the *Grutter* Court's concept of diversity, individuals within these groups are treated as the embodiment of their group identities. But these broad categories are unjustifiable, insofar as there is nothing intrinsic in these categories that assures a commonality of experience.[270]

In light of these broad racial categories, it is clear that the law school is acting contrary to its stated purpose to "break down racial stereotypes."[271] Accordingly, the law school's true interest is achieving *racial* diversity. It employs race classifications, but attempts to justify them through the *nonsequitur* of lessening racial stereotypes.

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266. *Id.*

267. Miller v. Johnson, 515 U.S. 900, 911 (1995).

268. *Id.* at 912.

269. Grutter v. Bollinger, 539 U.S. 306, 316 (2003).

270. *See* WOOD, *supra* note 33, at 25 ("The term 'Hispanic' clearly doesn't describe common social background; it doesn't designate a common language; and it doesn't, for that matter, describe gross physical appearance."). The same can be said of the term "Asian," which, to name a few examples, includes individuals of Japanese, Vietnamese, or Chinese descent.

271. *Grutter*, 539 U.S. at 330.

> The point is to smooth over the introduction of [race preferences] to college admissions by rhetorically assimilating them to a more wholesome tradition of seeking out students with many different talents and backgrounds. Being of a certain race, however, is not a talent and not clearly a background either, as it indicates nothing definite about a person's character or experience.[272]

By glossing over this important distinction, the *Grutter* Court ignores the true intent of the law school. Its interest is solely in achieving a diversity of race—a racial balance—something both the *Grutter* and *Parents Involved* Courts decried as "patently unconstitutional."[273]

Moreover, by sanctioning a lumping of individuals into these broad racial categories, the *Grutter* Court permits universities to dehumanize the individual students. It perpetuates group-based stereotypes, doubling back on one of the greatest achievements of the Civil Rights Movement—laying bare the perniciousness of stereotyping.[274] This is the greatest failure of the argument in *Grutter*: "it validates and reinforces the dehumanizing habit of judging people by stereotypes."[275] The *Croson* Court warned lower courts against this very problem;"[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth."[276]

Nevertheless, it is a group-right concept of diversity; a concept that lumps together widely different cultures and individuals under one banner; a concept that perpetuates stereotyping; a concept that dehumanizes the very individuals it is designed to aid; and, a concept that the law school used to substantiate its infringement of Barbara Grutter's *individual* right of equal protection. But this

272. WOOD, *supra* note 33, at 119 n.

273. *See Grutter*, 539 U.S. at 330; *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723 (2007).

274. WOOD, *supra* note 33, at 43.

275. *Id.* at 135.

276. City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 493–94 (1989) (quoting Regents of Cal. v. Bakke, 438 U.S. 265, 298 (1978)).

group-right diversity concept contravenes the very premise of the Constitution:

> Diversity might well be understood as an attempt to reverse the founders' efforts to check the growth and powers of factions in American society. Diversity, in effect, enshrines certain kinds of factionalism as a universal good . . . . Diversity raised to the level of counterconstitutional [sic] principle promises to free people from the pseudo-liberty of individualism and to restore to them the primacy of their *group* identities . . . . Real equality, according to [diversity proponents], consists of parity among groups, and to achieve it, social goods must be measured out in ethnic quotas, purveyed by group preferences, or otherwise filtered according to the will of social factions.[277]

By labeling students as either "Hispanic" or "African-American" and according preferences in relation to these broad group identities, the law school in *Grutter* rejects the individuality of its students. "Once we allocate political rights by group identity, the assignment of group identity becomes the crucial determinant of everything else for the individual . . . ."[278] Such a result cannot be countenanced under the United States Constitution designed to thwart precisely the dangers the law school promoted as its goals.

To put it bluntly, the diversity policy endorsed by *Grutter* is unconstitutional. It adopts the counter-constitutional principle of promoting group rights over individual rights. Following *Grutter*, universities must lump students together with little or no common background and then expect them to abide by their group identities so that universities can achieve "diversity." But these schools have no interest in achieving "intellectual diversity"; rather, they just want "racial diversity." In promoting racial diversity, the universities dehumanize and stereotype the very students they attempt to protect. Because racial balancing clearly has been prohibited by the Supreme Court, the government actors call racial balancing, "diversity." But their actions lay their true intent bare. It is racial balancing by a different

277. WOOD, *supra* note 33, at 14 (emphasis omitted).
278. *Id.* at 43.

name. Racial balancing should not be countenanced under the constitutional demands of strict scrutiny and the Constitution's promise of a legally colorblind society.

VI. CONCLUSION

The sad truth is that the United States has a sordid history when it comes to dealing with issues involving race. From *Dred Scott v. Sandford*, to *Plessy v. Ferguson*, to *Korematsu v. United States*, the Supreme Court has all too often been at the forefront of this ugly history.[279] Yet, the Supreme Court has also righted each one of those wrongs. In the *Slaughterhouse Cases*, the Supreme Court recognized that the Fourteenth Amendment overturned *Dred Scott* by making all persons born in the United States citizens (and *not* chattels).[280] In *Brown v. Board of Education*, the Supreme Court overturned *Plessy* by holding that separate is inherently unequal.[281] And in *Adarand Constructors v. Peña*, the Supreme Court affirmed that strict scrutiny must be rigorously applied so mistakes like *Korematsu* do not happen again.[282]

Grutter v. Bollinger should also be recognized as one of the Supreme Court's mistakes. By deferring to the law school's diversity interest, *Grutter* sanctioned a lesser standard of review than strict scrutiny, thereby allowing universities to employ pernicious racial classifications that treat individuals as a by-product of their race. The wrong embodied by governmental racial classifications cannot be underemphasized. Instead of treating individuals as *individuals*, which the Equal Protection Clause requires, racial classifications demean, dehumanize, and stereotype individuals into meaningless skin-color-only groups.

279. *See* Korematsu v. United States, 323 U.S. 214 (1944) (holding that internment of Japanese Americans during World War II was constitutional under the Equal Protection Clause); Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding governmental laws requiring racial segregation because they are separate but equal); Dred Scott v. Sandford, 60 U.S. 393 (1856) (holding that Congress had no authority to prohibit slavery in the federal territories and holding that slaves were not citizens of the United States).

280. 83 U.S. 36, 73 (1873).

281. 347 U.S. 483, 495 (1954).

282. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 236 (1995).

Fortunately, the Supreme Court may soon have the opportunity to right the wrong created by *Grutter*. When *Fisher v. University of Texas at Austin* comes before the Court on a petition for certiorari, the Supreme Court should accept it. Granted, *Fisher* can be constitutionally distinguished from *Grutter*, thereby allowing the Court to reaffirm principles of strict scrutiny without explicitly overturning a decision rendered less than ten years ago. But, *Grutter* should be overturned. *Fisher* provides the Court with an opportunity to right this constitutional wrong.

ACCOUNTING FOR FASB: WHY ADMINISTRATIVE LAW SHOULD APPLY TO THE FINANCIAL ACCOUNTING STANDARDS BOARD

OMAR OCHOA*

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I. INTRODUCTION

Who knew accounting could be so contentious? For all the jokes about the boring lives and personalities housed within the accounting profession,[1] the work product and the promulgation of accounting standards has had a long history of brutal infighting just as entertaining, if not more so, than any professional wrestling event.[2] But this should not be such a surprise. Accounting standards are housed under a complex regulatory system[3] and compliance with these standards is by way of an intense enforcement apparatus.[4] Such a governance system would not be built around an area of low stakes. Indeed, accounting standards have strong behavioral effects on business managers and broad economic consequences.[5] Because public companies are required to use Generally Accepted Accounting Principles (GAAP) when compiling financial statements,[6] accounting standards have become more important with a steady increase in worldwide ownership interest in public companies.[7]

1. "When does a person decide to become an accountant? When he realizes he doesn't have the charisma to succeed as an undertaker." *Reading Room: Humor*, GREENSTEIN, ROGOFF, OLSEN & CO., LLP, CPA'S, http://www.groco.com/readingroom/humor.aspx (last visited April 15, 2011).

2. The assumption that professional wrestling is entertaining is based on the steady increase in net revenues of World Wrestling Entertainment, Inc. Net revenue of close to $500 million in 2009 is almost double the $260 million net revenue of 2006. WORLD WRESTLING ENTERTAINMENT, 2009 ANNUAL REPORT: STRENGTH IN NUMBERS 23 (2010), *available at* http://corporate.wwe.com/documents/annual_report_2009/HTML2/wwe-ar2009_0025.htm.

3. *See,* Richard H. Pildes, *Separation of Powers, Independent Agencies, and Financial Regulation: The Case of the Sarbanes-Oxley Act*, 5 N.Y.U. J. L. & BUS. 485, 493 (2009) (describing the array of institutional arrangements—including self-regulatory bodies, mixed public–private governance structures, and direct SEC regulation—relied on to ensure investor confidence in the integrity of U.S. markets).

4. *See* Lawrence A. Cunningham, *The SEC's Global Accounting Vision: A Realistic Appraisal of a Quixotic Quest*, 87 N.C. L. REV. 1, 43 (2008) (listing accounting enforcement as including "the SEC, private litigation, and various other state and federal authorities").

5. *See* David I. Walker, *Financial Accounting and Corporate Behavior*, 64 WASH. & LEE L. REV 927, 945 (2007) (stating that positive accounting theory posits that managers of firms with earnings-based bonuses favor accounting standards that tend to increase earnings).

6. Securities Exchange Act of 1934, 15 U.S.C. § 78m(b) (2006).

7. *See* Paul Volcker, Remarks to the World Congress of Accountants: Accounting, Accountants, and Accountability in an Integrated World Economy 1

Consider the array of areas touched by GAAP. Private contracts will often include covenants based on financial performance or financial ratios that are produced in compliance with GAAP.[8] Some important parts of tax policy are linked to GAAP.[9] Further, enforcement of some securities laws are intertwined with GAAP.[10] In fact, empirical studies have shown that changes in GAAP have the potential to impact share prices broadly.[11] Such a broad impact should leave no question that there a variety of interests at stake when we talk about control over the promulgation and enforcement of accounting standards.

Enter in the Sarbanes-Oxley Act of 2002 (SOX).[12] SOX was passed by Congress in reaction to the wave of accounting scandals that surfaced in the early part of the decade.[13] Accounting shenanigans discovered at companies such as Enron, Worldcom, and Tyco led Congress to decide it was time to make changes to the structure of accounting standard enforcement and promulgation.[14] The passage of SOX led to increased oversight of internal control procedures and increased financial statement mandates on business managers of public companies.[15] Not long after its passage, a survey conducted showed that the majority of CEOs of the largest companies in the United States wanted to repeal the

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(Nov. 19, 2002), *available at* http://www.iasplus.com/resource/volcker0211.pdf (stating that accounting standards must be strengthened in the global economy).

8. *See* Walker, *supra* note 5, at 941 (noting the impact of GAAP accounting when tied into corporate debt covenants).

9. Cunningham, *supra* note 4, at 34.

10. *Id.*

11. *See, e.g.*, Hassan Espahbodi et al., *Impact on Equity Prices of Pronouncements Related to Nonpension Postretirement Benefits*, 14 J. ACCT. & ECON. 323, 340–41 (1991) (finding that the release of a proposal to change accounting standards regarding postretirement health benefits from pay as you go to accrual accounting resulted in a 3% share price reduction for firms in a sample group).

12. Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

13. *See* Michael A. Thomason, *Auditing the PCAOB: A Test to the Accountability of the Uniquely Structured Regulator of Accountants*, 62 VAND. L. REV. 1953, 1954–55 (2009) (describing how after several highly publicized corporate accounting scandals, Congress passed SOX which represented "a radical departure from the previously self-regulated accounting profession").

14. *Id.*

15. Michael A. Carvin et al., *Massive, Unchecked Power by Design: The Unconstitutional Exercise of Executive Authority by the Public Company Accounting Oversight Board*, 4 N.Y.U. J. L. & BUS. 199, 210 (2007).

Act.[16] Many criticize Congress for acting hastily in the wake of accounting scandals[17] and claim that the alleged benefits of SOX do not outweigh its costs.[18] The SOX backlash has resulted in a broad movement against changes to accounting standards that has been brooding for almost a decade.[19]

The intense dislike for SOX bubbled over into the first major attack—a challenge to one of the centerpieces of the act, the Public Company Accounting Oversight Board (PCAOB).[20] The PCAOB was given vast power to create and enforce auditing standards for public accounting firms.[21] The PCAOB can initiate investigations of accounting firms, report whether the firm is in compliance with provisions of SOX, and grant sanctions for firms that are not in compliance.[22] These powers have caused consternation among public accounting firms who previously were self policed and accountable only to General Auditing Standards (GAS). After receiving a negative report, one accounting firm finally filed suit to test the legality of the PCAOB.[23] The challenge in *Free Enterprise Fund v. Public Company Accounting Oversight Board*[24] focused on the constitutionality of the appointment process for board

16. *See* HENRY N. BUTLER & LARRY E. RIBSTEIN, THE SARBANES-OXLEY DEBACLE: WHAT WE'VE LEARNED; HOW TO FIX IT 86 (2006) (reporting that 58% of corporate directors in the United States surveyed favor repealing or overhauling SOX).

17. Andrew A. Lundgren, *Sarbanes-Oxley, Then Disney: The Post-Scandal Corporate-Governance Plot Thickens*, 8 DEL. L. REV. 195, 199–200 (2006).

18. *See* Kate O'Sullivan, *The Case for Clarity*, CFO Magazine (Sep. 1, 2006), http://www.cfo.com/article.cfm/7851741/c_7873404?f=magazine_featured (last visited March 22, 2011) ("As a result, more than 8 in 10 say the benefit of [SOX] does not outweigh the cost.").

19. *See* Caroline Harrington, Note, *Attorney Gatekeeper Duties in an Increasingly Complex World: Revisiting the "Noisy Withdrawal" Proposal of SEC Rule 205*, 22 GEO. J. LEGAL ETHICS 893, 896–900 (describing reactions by business to enforcement of SOX requirements by the SEC).

20. *See generally*, Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667 (D.C. Cir. 2008) (regarding an attack on the constitutionality of the PCAOB).

21. *Id.* at 205.

22. *Id.* at 205–06.

23. *See* Michael R. Keefe, Case Note, *The Constitutionality of the Double For-Cause Removal Restriction*: Free Enterprise Fund v. Public Company Accounting Oversight Board, *537 F.3d 667 (D.C. Cir. 2008)*, 77 U. CIN. L. REV. 1653, 1653–54 (2009) (explaining that, after a routine inspection of the Nevada accounting firm Beckstead & Watts LLP, the PCAOB identified numerous discrepancies in the firm's accounting practices which prompted Beckstead to sue in federal district court rather than appeal to the SEC).

24. 130 S. Ct. 3138 (2010).

members; the challengers claimed that in Congress's zeal to create an independent board, it gave the PCAOB vast power with no accountability to an elected official.[25] To strike down the PCAOB and the rules it enforced, the accounting firm argued that separation of powers was violated because neither the President nor a proper subordinate had adequate control over the operations of the PCAOB.[26] Because PCAOB members can only be removed for cause by SEC directors, and SEC directors can only be removed for cause by the President, the "double for-cause removal" procedure limits the President's ability to control the operations of the PCAOB.[27] Both the district court and circuit court that heard the case agreed that separation of powers was not violated by the double for-cause removal setup.[28] The Supreme Court disagreed, yet did not go as far as ruling all of SOX unconstitutional or imposing an injunction on the PCAOB.[29]

The challenge to the legality of the PCAOB is likely the first of many assaults on the provisions of SOX. The basis of this Note is to examine potential challenges to the Financial Accounting Standards Board (FASB). Unlike the PCAOB, FASB was not created by SOX. Rather, it has been in existence since the mid-70s. FASB is the organization that promulgates accounting standards known as GAAP.[30] Before SOX, FASB's role as standard setter was based entirely off of recognition by the SEC as the authoritative body on GAAP.[31] SOX solidified this role in legislation.[32] In doing so, FASB now more than ever is open to legal challenges based on its status as a quasi-agency.

FASB has not been without its share of controversy in the past. This can be understood because as the body that maintains GAAP, where FASB intervenes, it does so in high

25. Attorneys for the plaintiff in *Free Enterprise Fund* describe this lack of supervision as the chief concern in the challenge against the PCAOB. *See generally* Carvin, *supra* note 15.

26. *See* Keefe, *supra* note 23, at 1664–67.

27. *Free Enterprise Fund*, 130 S. Ct. at 3147.

28. *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 685 (D.C. Cir. 2008).

29. *Free Enterprise Fund*, 130 S. Ct. at 3161–62.

30. *See infra* Part II.

31. *Id.*

32. *Id.*

stakes territory.[33] In fact, FASB standards often provoke much controversy.[34] At the start of its operations in the 1970s, FASB immediately found itself in the middle of controversy when it proposed a trio of accounting changes designed to limit corporate managers' ability to smooth earnings across accounting periods.[35] In the 1980s, FASB did little to endear itself to managers when it proposed that obligations to retired employees under a defined benefit pension plan should be booked liabilities.[36] Most recently, FASB found itself again in the middle of controversy with proposed changes to stock option expensing.[37]

Today, FASB continues to stir up controversy. Recently, FASB has begun the process to revise lease accounting and do away with the distinction of capital and operating leases.[38] This change would on average result in higher debt levels on a company's balance sheet because companies would no longer be able to avoid recognizing the long term impact of lease payments. Corporate directors have already balked at this proposal and insist that such a change would have a major negative impact on financial statements. Additionally, FASB has trended to move accounting standards toward fair value accounting as opposed to historic cost accounting.[39] This switch would result in companies having to revalue assets and liabilities on a regular basis and adjust balance sheet accounts to conform to market values. The impact of this switch is that firm's financials will be exposed to risk of increase liability amounts and decreased asset values. Corporate directors looking to keep financial statement results consistent are

33. William W. Bratton, *Private Standards, Public Governance: A New Look at the Financial Accounting Standards Board*, 48 B.C. L REV. 5, 7 (2007).

34. Often this controversy is a result of corporate managers campaigning against FASB standards. Cunningham, *supra* note 4, 64.

35. *See* Bratton, *supra* note 33 (describing that FASB made changes to recognition of loss contingencies, forced more write-downs of trouble loans, and limited asset capitalization in the oil and gas industry).

36. Resistance to this proposed change was successful as FASB rescinded the proposal after receiving comments. *Id.* at 33.

37. This particular controversy is discussed in much more detail in Part III.

38. *See* FINANCIAL ACCOUNTING STANDARDS BOARD, FINANCIAL ACCOUNTING SERIES DISCUSSION PAPER, NO. 1690–100, LEASES: PRELIMINARY VIEWS (2009).

39. *See* Stanley Siegel, *The Coming Revolution in Accounting: The Emergence of Fair Value as the Fundamental Principle of GAAP*, 42 WAYNE L. REV. 1839, 1840–41 (1996) (describing the trend towards fair value accounting over the latter part of the twentieth century).

opposed to the change.[40] In all, FASB has provided corporate directors across the country with the motivation to challenge the legality of its accounting standards, and SOX has given more ammo to these directors on which to attack FASB.

To those wishing to challenge FASB, there are a variety of tools available. Lobbying Congress to pass legislation revising GAAP, applying pressure to the SEC to issue regulations revising FASB pronouncements, and direct suits to accounting standards have always been available methods.[41] However, what is not often discussed is the use of administrative law doctrines to challenge both the status of FASB as well as the standards it promulgates. Whether the Administrative Procedure Act (APA) and other administrative law tools apply to FASB has received only minimal treatment in legal scholarship.[42] This could be for a variety of reasons, including statements by the SEC itself that FASB is not an agency.[43] Even the language of SOX supports this claim by calling FASB a private organization.[44] What is most surprising is the seemingly wide-spread acceptance this claim has had with minimal push-back. The PCAOB is also said to be a private organization.[45] In *Free Enterprise Fund* both the circuit court and the Supreme Court paid very little attention to this possibility, and even attorneys for the plaintiff seem to accept this notion.[46] Commentators on the subject have also seemed to acquiesce to this idea easily.[47] In fact, there has only been a single

40. *See* Bratton, *supra* note 33, at 32 (describing fair value accounting as anathema to corporate managers).

41. *See infra* Part III.

42. *See, e.g.* HOMER KRIPKE, THE SEC AND CORPORATE DISCLOSURE: REGULATION IN SEARCH OF A PURPOSE 153 (1979) (maintaining that "[t]he determination of what accounting should mean" is too important to be left to a nonagency entity).

43. Speaking at an investor's rights conference, former SEC chair David Ruder stated, "The FASB is a private organization, not an independent government agency, and is not subject to the Administrative Procedure Act and other legislation applicable to government agencies." David S. Ruder, *Balancing Investor Protection with Capital Formation Needs After the SEC Chamber of Commerce Case*, 26 PACE L. REV 39, 64 (2005).

44. *See infra* note 86 and accompanying text.

45. *See* Carvin, *supra* note 15, at 204 (noting that Congress made the PCAOB a private, nonprofit corporation).

46. *See id.* (accepting that the PCAOB is not "treated as a governmental entity under a wide range of federal statutes, such as the Administrative Procedure Act").

47. *See, e.g.*, Kimberly N. Brown, *Presidential Control of the Elite "Non-Agency"*, 88 N.C. L. REV. 71, 74 (2009) ("The [PCAOB] sets its own budget and is exempt

challenge to FASB on the basis that it is subject to federal agency requirements.[48] However, rather than resolve the case on its merits, the court dismissed the suit because the plaintiff lacked standing.[49]

However, the new wrinkle in this claim is SOX itself. Prior to SOX, the accounting industry was not subject to coordinated government regulation.[50] Indeed, SOX is the first instance of explicit authorization to the SEC to subdelegate authority for creating accounting standards.[51] Additionally, FASB has set itself up as an independent agency in order to gain credibility.[52] The actions taken by FASB combined with Congress's formal recognition of the SEC's subdelegation combine to provide the basis for administrative law challenges on FASB.

This Note will proceed in parts. In part II, I offer an overview of the history of accounting standard promulgation starting from the Securities Act of 1933 to today. In part III, I list the mechanisms available to corporate directors to challenge FASB promulgations and explain why administrative law challenges are the most likely to succeed. In part IV, I detail why FASB should be considered an agency based on how it is treated by the branches of government, the subdelegation of authority, its own internal operations, and the effect of SOX. In part V, I discuss the ramifications of recognizing FASB as a federal agency subject to the APA and other administrative law doctrine. Finally, I conclude with a short discussion on the implications for the financial sector of such recognition.

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from the procedural and judicial review strictures of the [APA]").

48. Arthur Andersen & Co. v. Sec. & Exch. Comm'n, Fed. Sec. L. Rep. ¶ 95,720 (N.D. Ill. 1976).

49. *Id.*

50. Prior to the creation of the PCAOB, firms were regulated by "'a bewildering array of monitoring groups' under the auspices of the accounting profession." S. REP. NO. 10-205, at 4 (2002).

51. Jacob L. Barney, *Beyond Economics: The U.S. Recognition of International Financial Reporting Standards as an International Subdelegation of the SEC's Rulemaking Authority*, 42 VAND. J. TRANSNAT'L L. 579, 586 (2009).

52. *See* Bratton, *supra* note 33, at 9 (describing FASB as lacking credibility until adopting procedures resembling agency directives).

II. DEVELOPMENT OF INSTITUTIONALIZED ACCOUNTING STANDARDS

A. History

The development of accounting standards setting is an interesting one, mired in trial and error. The idea that standard setting can be institutionalized is relatively new. Throughout most of history, accounting standards have been a product of self-regulation.[53] This tradition of self-regulation was born out of common law countries, which mostly left business standards to the profession.[54] Thus, the self-regulation model for accountants was more a product of history than an actual policy determination.

In the United States, institutionalized standard setting first came into existence after passage of federal securities laws in the 1930s that directed the SEC to determine the form and content of financial statements.[55] For several years, the SEC opined on the best course of action until deciding to completely delegate the job of developing accounting standards to the accountants' professional organization, the American Institute of Accountants (AIA) (currently known as the American Institute of Certified Public Accountants, or AICPA).[56] The AIA created the Committee on Accounting Procedure (CAP) to serve as the standard-setting arm of the organization.[57] However, CAP had a muddled mission: rather than set new standards, the group was to draw from the profession's prevailing practices and recommend appropriate standards.[58] This ad hoc approach was not well received by the profession, and in 1959, the AICPA created a new committee, the Accounting Principles Board (APB).[59] However, the APB did not last long either. The APB would come to be seen by the profession as unable to keep up with the increased technical

53. Cunningham, *supra* note 4, at 41.

54. *Id.*

55. *E.g.*, Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74.

56. Stephen A. Zeff, *A Perspective on the U.S. Public/Private-Sector Approach to the Regulation of Financial Reporting*, ACCT. HORIZONS, Mar. 1995, at 52, 54–57.

57. Barney, *supra* note 51, at 586.

58. ROBERT VAN RIPER, SETTING STANDARDS FOR FINANCIAL REPORTING: FASB AND THE STRUGGLE FOR CONTROL OF A CRITICAL PROCESS 7 (1994).

59. *Id.*

issues facing the industry.[60] Additionally, controversy surrounded the APB both because of standards promulgated[61] and because of the perception that the APB was dominated by large accounting firms.[62] In time, the APB's inability to promulgate standards governing merger activities frustrated even the large accounting firms.[63]

A conference of auditors, preparers, and financial statement users was convened in 1971 by the AICPA to discuss the next steps in accounting standard development.[64] A study group was appointed that recommended a new standard setter be created with a focus on independence but also better constituent representation.[65] In 1973, these private negotiations by the accounting profession resulted in the creation of the third iteration of institutionalized standard setting—FASB.[66] The SEC quickly recognized FASB as the new authorized accounting standard setter.[67]

B. Structure of FASB

To further the independence goal, FASB was organized under the direction of the Financial Accounting Foundation (FAF).[68] The FAF was the original body designated as the successor to the APB; the FAF in turn delegated authority to promulgate accounting standards to FASB.[69] The FAF was organized as an independent not-for-profit entity and comprised nine trustees who were representatives of accounting standard stakeholders—auditors, preparers,

60. *Id.*

61. *Id.* at 57–59.

62. Bratton, *supra* note 33, at 12–13.

63. Ronald King & Gregory Waymire, *Accounting Standard-Setting Institutions and the Governance on Incomplete Contracts*, 9 J. ACCT. AUDITING & FIN. 579, 585–86 (1994).

64. *Id.*

65. *Id.*

66. Dennis K. Beresford, *How Should the FASB be Judged?*, ACCT. HORIZONS, June 1995, at 56, 58.

67. Statement of Policy on the Establishment and Improvement of Accounting Principles and Standards, Accounting Series Release No. 150, [1937–1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 72,172 (Dec. 20, 1973).

68. *Overview*, FIN. ACCOUNTING FOUND., http://www.accountingfoundation.org/cs/ContentServer?site=Foundation&c=Page&pagename=Foundation%2FPage%2FFAFSectionPage&cid=1176158231339 (last visited April 15, 2011).

69. Bratton, *supra* note 33, at 14.

financial statement users, and academics.[70] The FAF was made responsible for appointing the full-time seven member FASB, a number that enabled FASB to work more quickly than the part-time, twenty-one member APB.[71]

FASB members were expected to cut connections with employers, divest investments, and go on salary for a five-year term.[72] Four of the seven members were required to be CPAs, with the others required to be "well versed in problems of financial reporting."[73] The premise of the entire operation was to promote independence in the hopes that this would ground decisions in objective data.[74] This was taken so far as to set up FASB offices in Connecticut as opposed to New York or Washington, D.C.[75] FASB continues to operate under this structure with the biggest change being an expansion of the FAF to nineteen members appointed by eight constituent organizations: 1) the American Accounting Association; 2) the AICPA; 3) the Chartered Financial Analysts Institute; 4) Financial Executives International; 5) the Government Finance Officers Association; 6) the Institute of Management Accountants; 7) the National Association of State Auditors, Comptrollers, and Treasurers; and 8) the Securities Industry and Financial Markets Association.[76]

C. SOX Reform

In the wake of shaken public confidence in the financial sector due to massive accounting scandals, Congress quickly reacted by passing SOX.[77] The Act did many things, but the overarching theme was to create independence for

70. Van Riper, *supra* note 58, at 9.

71. Bratton, *supra* note 33, at 15.

72. Van Riper, *supra* note 58, at 17.

73. ROBERT CHATOV, CORPORATE FINANCIAL REPORTING: PUBLIC OR PRIVATE CONTROL?, 234 (1975).

74. *See* Brown, *supra* note 47, at 80 (describing that the belief behind structuring agencies in an independent form "facilitates logical decision making grounded in objective data and science").

75. Van Riper, *supra* note 58, at 13.

76. Andreas M. Fleckner, *FASB and IASB: Dependence Despite Independence*, 3 VA. L. & BUS. REV. 275, 280 (2008).

77. Michael A. Thomason, Jr., *Auditing the PCAOB: A Test to the Accountability of the Uniquely Structured Regulator of Accountants*, 62 VAND. L. REV. 1953, 1955 (2009).

accounting standard setters.[78] When first introduced in the House by Representative Oxley, the bill was extremely vague and left the structure of a new accounting standard-setting model to SEC discretion.[79] This initial version was not well received, but Senator Sarbanes would soon after introduce a bill closer to the final SOX product.[80] Throughout the hearings, legislators would repeatedly hear testimony about the inadequacies of the self-regulation model in place at the time of the accounting scandals. Many legislators commented that such a model was unsustainable and advocated for a stronger authority with power to promulgate accounting standards and police the accounting profession. Though the idea for more authoritative control of accounting standards had both supporters and critics, most agreed that whatever body was produced should be independent from pressure by the accounting profession as well as Congress.[81]

By any standards, the speed with which SOX was passed was overwhelming.[82] Yet the Act enjoyed overwhelming support from members of Congress as well as the President.[83] With the signing of SOX, Congress had for the first time explicitly granted statutory authorization for the SEC to subdelegate accounting rulemaking authority despite the tradition of doing so since 1938.[84] It did so by amending Section 19 of the Securities Exchange of 1933 to allow the SEC to subdelegate rulemaking authority by "recognize[ing], as 'generally accepted' for purposes of the securities laws, any accounting principles established by a standard setting body" that meets certain criteria.[85] The Act requires that the standard-setting body:

i. is organized as a private entity;

78. *See* Keefe, *supra* note 23, at 1669–71 (describing the variety of provisions within SOX designed to make the PCAOB an independent entity).

79. Pildes, *supra* note 3, at 498–99.

80. *Id.* at 499.

81. *Id.* at 504.

82. The House passed its initial version in April 2002; the Senate passed its in June 2002. The two were reconciled within two weeks, and President George W. Bush signed SOX into law in July 2002. Carvin, *supra* note 15, at 202.

83. *Id.*

84. Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 NOTRE DAME L. REV. 975, 987 (2005).

85. Sarbanes-Oxley Act of 2002 § 108, 15 U.S.C. § 7218 (2006).

ii. has, for administrative and operational purposes, a board of trustees (or equivalent body) serving in the public interest, the majority of whom are not, concurrent with their service on such board, and have not been during the 2-year period preceding such service, associated persons of any registered public accounting firm;

iii. is funded as provided in section 109 of the Sarbanes-Oxley Act of 2002;

iv. has adopted procedures to ensure prompt consideration, by majority vote of its members, of changes to accounting principles necessary to reflect emerging accounting issues and changing business practices; and

v. considers, in adopting accounting principles, the need to keep standards current in order to reflect changes in the business environment, the extent to which international convergence on high quality accounting standards is necessary or appropriate in the public interest and for the protection of investors; and

B. that the Commission determines has the capacity to assist the Commission in fulfilling the requirements of subsection (a) and section 13(b) of the Securities Exchange Act of 1934, because, at a minimum, the standard setting body is capable of improving the accuracy and effectiveness of financial reporting and the protection of investors under the securities laws.[86]

Included in this language is a cross reference to the funding mechanism established for the PCAOB: public companies are required to pay "annual accounting support fees" to fund operations of the recognized boards.[87] After passage of SOX, FASB applied for recognition by the SEC, which was promptly granted.[88]

86. 15 U.S.C. § 77s(b)(1)(A)(i)-(v), (b)(1)(B) (2006).

87. 15 U.S.C.A. § 7219(c)(1) (West 2011).

88. Commission Statement of Policy Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter, Securities Act Release No. 8221, Exchange Act Release No. 47743, Investment Company Act Release No. 26028, 68 Fed. Reg. 23,333, 23,333 (May 1, 2003).

III. AVAILABLE TOOLS TO CHALLENGE FASB STANDARDS

Those wishing to challenge FASB standards are not without tools currently. A variety of mechanisms are available to potentially trump or revise accounting standards promulgated by FASB. However, for reasons detailed below, these available mechanisms are either substantively ineffective or unrealistic. This reality is what warrants a detailed analysis of how administrative law can apply to FASB; otherwise, no meaningful oversight of accounting standard promulgation exists.

A. Override FASB Standards by Statute

Perhaps the most powerful way to defeat any FASB standard is to go to Congress, which has the power to override any accounting standard promulgated by FASB by passing legislation and has been pressed to use this weapon in the past.[89] At times in FASB's history, Congress itself threatened to use legislation in order to stop a controversial accounting standard. Amid the energy crisis of the 1970s, Congress balked at attempts to change accounting rules for the oil and gas industry.[90] In the 1990s, Congress threatened to shut FASB down if it changed accounting rules for stock options.[91]

However, even though Congressional intervention is the most powerful tool, Congress is rarely persuaded by business lobbyists to carry out these threats.[92] Only two clear examples are available. In one instance, Congress passed an investment tax credit aimed at providing immediate benefits for asset purchases.[93] Rather than allow FASB to determine whether the benefit should be recognized in financial statements over the life of the asset or all at once, Congress, due to heavy lobbying by business leaders, specified in legislation that either approach would be

89. *See* Walker, *supra* note 5, at 1000–03 (describing instances of involvement by Congress in the accounting standards setting process).

90. *See* Cunningham, *supra* note 4, at 64 (describing accounting for exploration costs and reserves in the oil and gas industry as a "life-threatening" debate for FASB).

91. *Id.*

92. Walker, *supra* note 5, at 1002.

93. *Id.*

acceptable.[94] In the second, FASB proposals to change stock option expensing in the 1990s was met by a Senate bill that would have conditioned effectiveness of any new standard on an SEC majority vote.[95] As a result, FASB tabled the proposal.[96]

Other than these two examples, Congress's successful intervention into accounting standards is limited to reactions to financial crises. The first example was the collapse of the stock market in the late 1920s that resulted in creating the SEC to, in part, promulgate accounting standards. The second was the passage of SOX in the wake of accounting scandals in 2001.[97] There are a number of reasons for this. First, Congress, itself, recognized the importance of having an independent organization promulgating accounting standards. In fact, one of the main goals of SOX was to create a regulatory model with fewer opportunities for congressional interference.[98] Second, advocates for FASB will often remind Congress of the importance of independence when Congress does attempt to intervene. In the latest fight regarding stock option expensing, the FAF responded swiftly and harshly to attempts by Congress to block FASB proposals.[99] This was a huge difference from the 1990s when Congress essentially bullied FASB into tabling its proposal. The result of the FAF's advocacy on behalf of FASB was a successful change to accounting standards regarding stock options, a fight that took nearly twenty years.[100]

B. SEC Intervention

Similar to Congress, the SEC also has the power to override FASB actions. Because the SEC is the organization with direct responsibility to promulgate accounting

94. *Id.*

95. Beresford, *supra* note 66, at 57.

96. Michael H. Granof & Stephen A. Zeff, *Unaccountable in Washington*, N.Y. TIMES, Jan. 23, 2002, at A19.

97. Thomason, *supra* note 77.

98. Pildes, *supra* note 3, at 488.

99. *See* 2005 FIN. ACCT. FOUND. ANN. REP. 3 (2004) (describing the FAF's response to legislative interference regarding stock option expensing standards).

100. *See* Pildes, *supra* note 3, at 494–495 (describing the history of accounting regulation since the 1960s); Walker, *supra* note 5, at 6 (recounting the passage of SOX).

standards,[101] it can undergo its own rulemaking process in order to establish accounting standards. Even easier, all the SEC has to do in order to block FASB promulgations is not recognize a specific FASB standard as authoritative.[102] But the SEC's intervention into FASB work has been rare.[103] The isolated incident was a result of proposed changes to stock option expensing, the same issue that caused Congress' rare intervention into accounting rules. While the FAF was successful in deflecting Congress's intervention in 2004, the SEC did in fact interfere by changing the date of compliance originally proscribed by FASB.[104] Other than this occurrence, intervention by the SEC into the work of FASB is not readily found.

C. Judicial Decisions

Another option for FASB challengers is to show in court that a particular accounting treatment that they have elected is either a valid selection or that a particular accounting standard does not apply to them. This usually appears in the context of securities violation cases brought by the SEC.[105] Increasingly, courts have relied on nonlegal materials—such as accounting standards—in judicial decisions.[106] Similar to agency regulations, courts have shown a strong deference to GAAP produced by FASB.[107] An example is the Supreme Court's reference of several sources to understand accounting treatment and siding with materials published by FASB.[108] Additionally, high burdens

101. *See supra* note 55.

102. Matthew J. Barrett, *The SEC and Accounting, in Part Through the Eyes of Pacioli*, 80 NOTRE DAME L. REV. 837, 868 (2005).

103. *Id.*

104. *See* Amendment to Rule 4-01(a) of Regulation S-X Regarding the Compliance Date for Statement of Financial Accounting Standards No. 123 (Revised 2004), Share-Based Payment, 70 Fed. Reg. 20,717 (Apr. 21, 1990).

105. Thomas C. Pearson, *Creating Accountability: Increased Legal Status of Accounting and Auditing Authorities in the Global Capital Markets (U.S. and E.U.)*, 31 N.C. J. INT'L L. & COM. REG. 65, 89 (2005) (describing the frequency of securities violations cases).

106. *See* John J. Hasko, *Persuasion in the Court: Nonlegal Materials in U.S. Supreme Court Opinions*, 94 LAW LIBR. J. 427, 431 tbl.1 (2002).

107. *See* Pearson, *supra* note 105, at 98 (noting that courts have shown strong deference to particular FASB statements).

108. *See* United States v. Winstar Corp., 518 U.S. 839 (1996) (referring to accounting textbooks and treatises as well as FASB pronouncements).

of proof exist when it comes to challenging auditor opinions seemingly in line with GAAP. A plaintiff under Section 10(b)(5) of the 1934 Securities Exchange Act must show that the auditing process used to produce the opinion was so deficient as to amount to no audit at all.[109] Related, a plaintiff may deflect charges by showing that the accounting judgments made were not reasonable.[110] The Private Securities Litigation Reform Act of 1995 raised this burden of proof and effectively requires that plaintiffs reference appropriate GAAP authorities.[111]

Under most scenarios, it is not likely that a FASB challenger will be able to prevail against an accounting standard unless he can show a deficiency on the part of the specific accountant performing the work. It should also be noted that these cases involve defenses against criminal charges brought by the SEC.

D. Agency Challenge

Due to the difficulties outlined above, the work of FASB has been mostly insulated from challenges. This is in contrast to several other standard setters, like the EPA, the FTC, and the FCC who constantly undergo court challenges by those who are burdened by their respective regulations.[112] The difference is that administrative law tools clearly apply to these federal agencies[113] while administrative law application is currently ambiguous when it comes to FASB.

One example of this litigation process is *Flight Int'l Group, Inc. v. Fed. Reserve Bank of Chicago*,[114] in which the court determined that the Federal Reserve Bank of Chicago (the Fed.) was subject to the APA.[115] In *Flight International*, an air-transport-services company challenged contracts

109. Pearson, *supra* note 105, at 89.

110. *Id.* at 90.

111. 15 U.S.C. § 78u-4(b)(1)–(2) (2006).

112. *See* Pearson, *supra* note 105, at 76 (describing litigation that was required to establish that many regulatory agencies are considered agencies for purposes of APA).

113. *Id.*; *see* Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 515–551 (2011) (analyzing agency-specific administrative law precedents with case studies focusing on, among others, the EPA and FCC).

114. 583 F. Supp. 674 (N.D. Ga. 1984).

115. *Id.* at 678.

awarded by the Fed. for overnight transportation of bank checks as part of the nationwide check clearing function of the Fed.[116] The court stated that it first needed to decide whether the Fed. qualified as an "agency" under the APA before it could review its actions.[117] In looking to the definition of agency under the APA,[118] the court determined that because the Fed performs "important governmental functions"—such as serving as the fiscal arm of the government—and has powers "entrusted to it" by the government, there could be "no doubt that [the Fed.] is an 'authority' of the government."[119] Additionally, the court noted that the Fed. did not fall under the exclusions listed within the APA.[120]

A similar analysis could also apply to FASB, but the issue is not certain. The initial hurdle is the widely accepted perception of FASB as a private entity.[121] Additionally, because of FASB's structure, it could qualify as an agency "composed of representatives of the parties or of representatives of organizations of the parties" and be excluded under the APA.[122] However, in the continuing discussion, I will point out why administrative law doctrines should apply to FASB.

IV. DETERMINING THAT FASB IS AN AGENCY

There are at least four reasons to believe that FASB is an agency for purposes of administrative law doctrines. First, the self-imposed agency-like operations and benefits that flow from them effectively estopp FASB from claiming it is not subject to all administrative law requirements. FASB should not be allowed to cherry pick aspects of administrative law to its benefit without also being accountable to the democratic ideals embodied in agency requirements. Second, treatment by each branch of

116. *Id.* at 676.

117. *Id.* at 677.

118. *See* 5 U.S.C. § 551(1) (2006) ("'[A]gency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency . . . .").

119. *Flight International*, 583 F. Supp. at 678.

120. *Id.*

121. *See supra* notes 42–49 and accompanying text.

122. 5 U.S.C. § 551(1)(E).

government is consistent with agency treatment. If all branches of the federal government recognize FASB to operate as an agency, FASB may fit into the broad agency definition under the APA. Third, the subdelegation setup between the SEC and FASB demands that FASB be subject to the same requirements that would constrain the SEC if it chose to promulgate accounting standards itself. The SEC may not get around the requirements of administrative law by simply delegating authority. Finally, the passage of SOX has solidified FASB's role as an agency. Whereas before there was no official charge given to FASB, it is now fully recognized by law as an agency and should thus also fall under the requirements of administrative law.

A. How FASB Operates

One reason is that FASB has for so long operated as a federal agency that it should fall under administrative law doctrines naturally in order to enforce proper oversight of the organization as it enjoys the benefits of acting like an agency. Ever since its founding, FASB has taken on characteristics of an agency.[123] In response to criticism that FASB favored regulated parties, FASB implemented formal separation from the accounting profession.[124] Part of this included creating a board that had members who were non-CPAs yet still familiar with accounting standards.[125] This allowed FASB to change its voting requirement from a five to two super majority to a simple majority.[126] FASB's response also resulted in a change to open proceedings, with dissents and other records being made public.[127] FASB also began publishing its reports periodically.[128]

Additionally, FASB created the Conceptual Framework as a way of declaring its guiding principles. The Conceptual Framework contains a series of statements that provide a unified theoretical basis from which to articulate

123. *See* Cunningham, *supra* note 4, at 60.

124. *See* Van Riper, *supra* note 58, at 14 (detailing the early challenges to FASB's creation).

125. *Id.* at 86–87.

126. *Id.* at 87.

127. *Id.* at 86.

128. *Id.* at 46–47.

standards.[129] Because neither the statute delegating authority to the SEC nor any SEC materials provided these guiding principles, FASB, on its own, created the Conceptual Framework[130] as to mirror the intelligible principle required by the nondelegation doctrine.[131] Related to this, FASB declared its mission to be external transparency for financial statement users which was a break from past APB goals more tilted towards the accounting industry.[132] In doing so, FASB aligned its mission with the SEC in protecting investors and users of financial statements.[133] Today, FASB's understood aim is to provide relevant information to the public through public accounting.[134]

Probably the most agency-mirrored improvement for FASB was the creation of its Rules of Procedure.[135] These rules are referred to as FASB's due process in accounting standard promulgation.[136] Included in these rules are requirements for notice and comment in accounting standard promulgation and an open meetings requirement.[137] FASB has itself claimed that these rules were "modeled on the Federal Administrative Procedure Act."[138] In fact, FASB further states that these rules are

129. *Concepts Statements*, FIN. ACCT. STANDARDS BOARD, http://www.fasb.org/jsp/FASB/Page/SectionPage&cid=1176156317989 (last visited Feb. 13, 2011).

130. *See* Barney, *supra* note 51 at 587–88 (noting the SEC's long history of assuming authority not technically granted by statute); Bratton, *supra* note 33, at 9 (discussing the early history of FASB).

131. *See infra* Part V.C. (discussing the requirements of the nondelegation doctrine and their relevance to FASB).

132. *See* Van Riper, *supra* note 58, at 20 (describing the controversy surrounding FASB's switch to decision usefulness as its guiding principle).

133. See *supra* Part IV.A.iii.

134. *See* Fin. Accounting Standards Bd., SFAC No. 1, *available at* http://www.fasb.org/cs/BlobServer?blobcol=urldata&blobtable=MungoBlobs&blobkey=id&blobwhere=1175820899258&blobheader=application%2Fpdf.

135. Fin. Accounting Standards Bd., FASB Due Process Steps Required by the Rules of Procedure, *available at* http://www.fasb.org/cs/BlobServer?blobcol=urldata&blobtable=MungoBlobs&blobkey=id&blobwhere=1175822153159&blobheader=application%2Fpdf.

136. *Id.*

137. *Id.*

138. *Current Issues Before the Financial Accounting Standards Board: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Prot.*, 107th Cong. (2001) (statement of Edmund J. Jenkins, Chairman, Financial Accounting Standards Board), *available at* http://republicans.energycommerce.house.gov/107/hearings/07312001Hearing344/Jenkins565.htm (last visited Feb. 13, 2011).

"broader and more open."[139] Commentators have agreed that "changes in FASB's procedures have further enshrined many of the norms and practices of administrative law."[140]

Though it may seem logical for an entity creating important national standards to follow such practices, FASB is not required to do so by either Congress or the SEC. So why adopt strict rules? Many would agree that in doing so, FASB has essentially gained widespread credibility as a standard setter.[141] FASB's focus on independence, financial statement user protection, and strict procedural standards has contributed to the success it has experienced with all branches of government.[142] As a result, FASB has repeatedly avowed to stick to the agency model.[143] Rather than be seen as a body captured by the industry,[144] or as accounting experts operating in secrecy, the self-imposed limitations have created a level of comfort with the government and the public that allows FASB to enjoy its high level of regard. Especially when many of the decisions made by FASB are controversial for business managers, the ability to secure such good will with government enforcers has kept FASB in business with minimal intervention. Due to the lack of meaningful oversight by the federal government, FASB has essentially been allowed to thus far cherry pick from agency requirements in its operations; FASB has enjoyed the respect and deference due to an expert agency, but to date it has not been subject to the oversight requirements that attempt to ensure accountability for agency decision making.

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139. *Id.*

140. *See, e.g.*, Walter Mattli & Tim Buthe, *Global Private Governance: Lessons from a National Model of Setting Standards in Accounting*, 68 L. & CONTEMP. PROBS. 225, 239 (2005).

141. *See* Claire A. Hill, *Why Financial Appearances Might Matter: An Explanation for "Dirty Pooling" and Some Other Types of Financial Cosmetics*, 22 DEL. J. CORP. L. 141, 152 (1997) (recognizing FASB as the "standard-setting body of the accounting profession").

142. *See* Walker, *supra* note 5, at 1000–02 (describing how FASB has received little interference from government actors because of its neutral standard setting process).

143. Cunningham, *supra* note 4, at 62.

144. *See generally* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010) (analyzing theories of agency capture).

B. Treatment by All Branches of the Federal Government Is Consistent with Agency Status

When deciding whether a governmental entity is an agency for APA purposes, courts will refer to the definition of agency provided by the Act.[145] This definition provides that an agency is "each authority of the Government of the United States, whether or not it is within or subject to review by another agency."[146] This broad definition gives us a baseline to begin analogizing FASB to recognized agencies in order to determine whether it is an "authority of the Government of the United States."[147] We can do so by cataloguing how each branch of government treats FASB and the potential reasons for this.

1. Congressional Treatment

As noted above, Congress has delegated power to the SEC to create accounting standards but also has explicitly authorized the subdelegation of this power.[148] The reasons for this delegation are consistent with reasons for any other agency. Accounting standards are highly technical and complex;[149] rather than leave the work of standard setting to legislators with busy agendas, entrusting the expertise of the accounting profession leads to efficiency from specialization.[150] Congress is also able to conserve its own resources.[151] Not only does Congressional staff not have to

145. *See, e.g.*, New York v. Atl. States Marine Fisheries Comm'n, 609 F.3d 524, 527 (2d Cir. 2010) (referring to the definition of agency contained in the APA to determine whether the ASMFC was a federal agency within the meaning of the APA).

146. 5 U.S.C. § 551(1) (2006).

147. *Id.*

148. *See supra* notes 90–92 and accompanying text.

149. Cunningham, *supra* note 4, at 54.

150. *See id.* (describing efficiencies from delegation of accounting standard promulgation). That accounting standards are highly complex potentially supports the opposite determination; proponents of FASB independence argue that oversight by other entities would be fruitless. However, expertise on its own does not guarantee good decision making and standards by FASB have a real impact on the public. *See* Rebecca M. Bratspies, *Regulatory Trust*, 51 ARIZ. L. REV. 575, 610 (2009) (arguing that while agency work involves highly technical subject matter, agency work is "deeply embedded in a normative context" and that decisions are often between alternative social paths which are not wholly technical).

151. This is also largely dependent on how Congress chooses to set up oversight of the agency. Congress could potentially set up "police patrol" mechanisms where centralized, recurring investigation takes place. Alternatively, Congress could set

wade into the highly technical world of accounting standards, the passage of SOX ensures that funding of FASB does not come from the Congressional budget.[152] Finally, by passing off the power to create accounting standards, Congress is deflecting blame for inevitable accounting scandals.[153] As evidence by its history, Congress would much rather swoop into the accounting world only when absolutely necessary.[154] No matter what regulations are set in place, it is inevitable that some managers will attempt to get around these rules for their personal benefit. Congress is able to play the role of savior by actively delegating responsibility for this field. Additionally, because accounting rules are usually controversial,[155] Congress is able to avoid upsetting constituency groups by recognizing another entity's authority to promulgate contentious standards.

Such reasons are consistent with delegation of powers to independent regulatory agencies. Technical matters such as environmental standards, food and drug standards, radio and television licensing, securities regulations, etc. have all been recognized by Congress as areas of regulation better left to those with more expertise. In many ways, this is the bedrock reason for having agencies in the first place. Additionally, though most regulatory agencies have budgets that are set by Congress and funded by taxpayers, Congress is still able to conserve its own resources by delegating responsibility. Finally, in many of these areas, Congress also has an interest in deflecting fallout from controversial decision making. In sum, the setup of delegation to FASB has been a purposeful choice by Congress if not since its inception then at least since the passage of SOX. In light of this treatment by Congress, it is difficult to argue that FASB is not intended to be an authority of the Government of the United States.

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up a "fire alarm" system where investigation is only warranted when some event triggers reactionary behavior. For a discussion of the police patrol-fire alarm dichotomy in the context of international treaties, see Kal Rastiala, *Police Patrols & Fire Alarms in the NAAEC*, 26 LOY. L.A. INT'L & COMP. L. REV. 389 (2004).

152. *See* 15 U.S.C.A. § 7219(c)(1) (West 2011).

153. *See* Cunningham, *supra* note 4, at 54 n.209 (explaining the blame-deflection rationale behind delegating accounting standard promulgation).

154. *See supra* notes 103–104 and accompanying text.

155. *See supra* notes 33–44 and accompanying text.

2. Treatment by Courts

As noted above, courts have shown strong deference to accounting standards promulgated by FASB.[156] This level of deference is similar to *Chevron* deference granted to agencies. Under *Chevron* deference, agency interpretation of its own power in promulgating rules is given wide latitude unless the interpretation is unreasonable or clearly goes against the organic statute.[157]

There could be several reasons for this level of deference. First, a straightforward explanation is that professional standards are usually considered when determining the appropriate standard of care.[158] Often an accountant will testify as an expert witness to explain GAAP requirements and the accountant's testimony is subject to the same *Daubert* analysis required of expert witnesses.[159] Once accepted, the expert's testimony is considered authoritative. However, this probably cannot explain the court's deference completely, especially in light of the fact that there are often dueling experts at trial.[160] What is more likely is that this level of deference arises because of the court's confidence that FASB standards are derived from an authoritative body that follows a process that resembles the APA's requirements of notice and comment.[161] Because FASB has modeled its operations after that of an authoritative federal agency, courts have felt much more comfortable deferring to the expertise of FASB. The result is that courts at least treat FASB as an authority of the United States Government if not outright calling it one.

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156. *See supra* Part III.C.

157. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency").

158. *See* United States v. Simon, 425 F.2d 796, 805–07 (2d Cir. 1969) (using compliance with GAAP as a measurable level of professional care due).

159. *See* Sofia Adrogue & Alan Ratliff, *Kicking the Tires After Kumho: The Bottom Line on Admitting Financial Expert Testimony*, 37 HOUS. L. REV. 431, 451–52 (2000).

160. *See* Rumsfeld v. United Tech. Corp., 315 F.3d 1361, 1367 (Fed. Cir. 2003) (explaining the potential controversy of having dueling financial experts testify to a lay jury).

161. *See* Memorandum of Understanding, FASB and IASB (describing FASB's rulemaking process), *available at* http://www.fasb.org/news/memorandum.pdf.

3. Treatment by the SEC

Because the SEC has explicit authorization from Congress, the SEC has the power to intervene into the processes of FASB. However, it rarely does so.[162] The reason for this is likely threefold. First, as it is currently set up, the SEC appears to grant prospective rulemaking power to FASB as opposed to taking action on each standard created.[163] The implications of this setup are significant for a variety of reasons[164] but especially in this discussion because it has created an institutional impediment to undermining FASB's work. Rather than have the ability to review each standard, the SEC has set up a process whereby the agency must be active in overturning or revising accounting standards created by FASB. In light of this impediment, the SEC has rarely ever taken action to impede standards produced by FASB.[165] Second, just as with Congress, the SEC has an interest in keeping the accounting standard process independent. Third, FASB has successfully deflected interference by emphasizing neutral rules and aligning its mission with the SEC's mission.[166] This situation has produced the highly deferential attitude the SEC has taken with FASB.

The combination of treatment by all three branches of government is significant. Each branch treats FASB as an authority both as a result of the benefit the respective branches receive by doing so but also because of the unique nature of FASB. This treatment should not be ignored. The broad definition of agency under the APA is likely satisfied making FASB subject to administrative law doctrine.

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162. *See supra* Part III.B.

163. *See* Statement of Policy on the Establishment and Improvement of Accounting Principles and Standards, Accounting Series Release No. 150 (Dec. 20, 1973); Policy Statement: Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter, Securities Release Act No. 33-8221, Exchange Act Release No. 3447743, Investment Company Act Release No. 26028, 68 Fed. Reg. 23,333, 23,333 (May 1, 2003).

164. *See infra* Part IV.C.

165. Barrett, *supra* note 102, at 868.

166. *See* Walker, *supra* note 5, at 977 (noting that FASB's neutral rule emphasis has helped keep FASB from interference by the SEC despite business people lobbying the agency).

C. Subdelegation

Congress has explicitly granted authority to the SEC to promulgate accounting standards.[167] Were the SEC to promulgate accounting standards themselves, these regulations would likely be subject to the APA and other constraints of administrative law.[168] It should follow that FASB would be subject to these same constraints, lest any agency be able to circumvent requirements by simply delegating its authority.

It is clear that agencies may subdelegate their authority to "a subordinate federal officer or agency" unless the organic statute requires otherwise.[169] However, delegating authority to a private entity smacks of constitutional problems.[170] In *U.S. Telecom Association v. FCC*,[171] the D.C. Circuit examined whether the FCC could delegate decision making authority under a particular statute to state regulatory commissions and found that this subdelegation was unlawful.[172] The court held that a "general delegation of decision-making authority to a federal administrative agency does *not* . . . include the power to subdelegate that authority beyond federal subordinates."[173] The court was particularly concerned with administrative agencies maintaining the semblance of democracy in the actions taken.[174] Not allowing subdelegation from a federal agency to a state commission seems like a particularly high bar for the limits of subdelegation in comparison to subdelegation to a private entity.

Even if Congress has expressly allowed subdelegation to a

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167. *See supra* notes 90–92 and accompanying text.

168. Note that SOX does not explicitly exempt the SEC from any administrative law requirements.

169. U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 565 (D.C. Cir. 2004).

170. *See* Jim Rossi, *Antitrust Process and Vertical Deference: Judicial Review of State Regulatory Inaction*, 93 IOWA L. REV. 185, 223 (2007) ("Administrative law has long recognized . . . that delegations of authority to private entities also present a unique set of problems—bordering, at some level, on the unconstitutional."). Particularly, some private delegations might run afoul of the nondelegation doctrine, especially if they enable self-dealing, as in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

171. 359 F.3d 554 (D.C. Cir. 2004).

172. *Id.* at 564–68.

173. *Id.* at 566.

174. *Id.*

private entity, this does not mean FASB should be exempt from requirements of federal agencies. In *Lebron v. National R.R. Passenger Corp.*,[175] the Supreme Court was asked to determine whether action by a private entity created by Congress, Amtrak, could be considered action by the government even though Amtrak explicitly denied being a federal agency.[176] The court found that even though Amtrak was a private corporation, its close ties to the Federal Government meant that it "must be regarded as a Government entity" for constitutional purposes.[177] This decision is significant because it offers validation for the idea that even though a label has been placed on an entity by statute and its own volition, the entity's status in relation to the government should be determined functionally.

In the case of FASB, it is clear that a delegation of power has occurred. First, Congress has explicitly granted this power in statute. Prior to the Securities Exchange Act of 1933, the accounting profession policed itself.[178] Congress created this federal authority to oversee accounting standard setting as a result of financial turmoil.[179] By getting involved in the standard-setting process, Congress has effectively taken the private element out of the process and made it official. Second, recognition of accounting standards by the SEC results in legal enforcement by the federal government for violations. Financial statements that do no adhere to GAAP make public companies and their officers subject to federal charges of securities fraud. Though federal enforcement of professional standards is not always dispositive of agency status,[180] that the entire work of FASB is enforced by the federal government should be cause for concern in making sure that the process creating these standards is subject to some federal control. Finally, the set up between the SEC and FASB is not simply recognition of

175. 513 U.S. 374 (1995).

176. *Id.* at 377–78.

177. *Id.* at 383–92.

178. *See* Cunningham, *supra* note 4, at 41.

179. *See supra* Part III.A.

180. *See* Noblecraft Industries, Inc. v. Sec. of Labor, 614 F.2d 199 (9th Cir. 1980) (holding that OSHA's enforcement of safety standards promulgated by the American National Standards Institute was valid because such standards represented a "national consensus standard").

accounting standards as they are created; the SEC grants authoritative status to standards created by FASB *prospectively*.[181] This type of authority presents a particular problem because it shows that any purported oversight by the SEC occurs only after enforcement. This creates a vast amount of power for FASB with only its internal procedures operating as checks. This free reign of prospective decision making is identical to what was found as unlawful in *U.S. Telecom*. Just as found in that case, the SEC should not be able to circumvent the requirements of rulemaking procedures by outsourcing its authority.

D. SOX Significance

Finally, beyond all of the structural features of FASB, the passage of SOX is the final straw needed to argue that FASB should be subject to agency requirements. As noted above, the passage of SOX marked the first time that Congress had explicitly recognized the SEC's ability to subdelegate the power to promulgate accounting standards.[182] SOX provides a detailed list of what constitutes a valid entity that the SEC may subdelegate their authority to and provides a funding mechanism for the operations of the entity.[183] Though FASB is not called out by name in SOX, to date it is the only organization that fulfills the SOX requirements. This arrangement is significant for at least two reasons. First, FASB *must* adhere to these requirements in order to preserve its standard-setter status, and second, the SEC's authority has been limited by the criteria listed. Both facts combine to show that Congress has irrevocably created a governmental entity that goes beyond merely protecting an interest. With the passage of SOX, FASB has been officially authorized to act as a federal agency.

The requirements of SOX mean that in order to validly promulgate accounting standards, FASB must adhere to the statute. Before SOX, FASB was able to change itself and indeed had undergone several changes in structure and

181. Commission Statement of Policy Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter, 68 Fed. Reg. 23,333, 23,333 (May 1, 2003).

182. *See supra* note 90 and accompanying text.

183. *See supra* note 92–93 and accompanying text.

operations.[184] As a private entity, FASB should be free to change its structure as deemed fit by the FAF and its constituency groups. However, any deviation from the requirements of SOX would mean FASB would likely lose its status as a standard-setting body. The effect of this is FASB can now be analogized to an agency created by Congress. Whereas before SOX there was room to argue FASB was purely a private body that the SEC would rely on to develop accounting standards that agreed with a national consensus,[185] now an analogy can be drawn to any federal agency where Congress specifies the structure of the organization. This increase in control by Congress further stretches the notion that FASB is anything but a government-created entity for rulemaking purposes.

Add to this structural impediment the fact that Congress has now empowered FASB to collect a tax from its constituency. Prior to SOX, FASB was funded by private donations from accounting firms and revenues from its publications.[186] FASB's dependence on the companies it was supposed to regulate made observers insistent on the creation of a separate funding mechanism in the interests of promoting FASB's independence.[187] Additionally, the funding model was unsustainable; FASB was operating at a substantial deficit in the early 2000s.[188] SOX mandated that

184. *See supra* Part IV.C.

185. This situation would be similar to that found in *Noblecraft* where the Ninth Circuit found that OSHA's use of safety standards promulgated by the American National Standards Institute was valid because such standards represented a "national consensus standard." 614 F.2d at 199–203. However, it should be noted that this argument is still a stretch because FASB did far more than assess national consensus in developing accounting standards. This is evidenced by the development of the Conceptual Framework as a guiding principle behind accounting standard promulgation.

186. *Subcomm. on Commerce, Trade, and Consumer Protection of the Comm. on Energy and Commerce*, 107th Cong. 2d (Feb. 14, 2002) (testimony of Edmund L. Jenkins, Chairman, FASB), *available at* http://www.fasb.org/testimony/remarks.pdf.

187. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-601T, PROTECTING THE PUBLIC'S INTEREST: CONSIDERATIONS FOR ADDRESSING SELECTED REGULATORY OVERSIGHT, AUDITING, CORPORATE GOVERNANCE, AND FINANCIAL REPORTING ISSUES, STATEMENT OF DAVID WALKER, COMPTROLLER GENERAL OF THE UNITED STATES (2002).

188. *See* J. Richard Williams, *Funding FASB: Public Money, Public Domain*, THE CPA JOURNAL ONLINE (May 2004), http://www.nysscpa.org/cpajournal/2004/504/perspectives/nv2.htm (indicating an operating deficit of $4.3 million in 2002 and $1.1 million in 2001).

FASB raise money the same way directed for the PCAOB.[189] It authorizes FASB to develop "a reasonable annual accounting support fee" to be collected from public accounting firms.[190] Obviously, a private entity would lack any authority to set up any kind of mandatory contribution system, but what is more, FASB's budget is now subject to approval by the SEC.[191] These new limits on FASB's operations should provide further evidence that Congress has legalized accounting standards and has essentially locked FASB into an agency model.

Further evidence of SOX's impact is what it has done to limit the authority of the SEC. The flipside of the limits on FASB's ability to change its structure is that the SEC is now limited in its ability to recognize a standard-setting body. Prior to SOX, the SEC was able to recognize, and had recognized, other entities as authoritative in promulgating accounting standards.[192] The SEC continues to claim it has the power to recognize standard-setting entities outside of the criteria listed in SOX,[193] but this is not likely given a literal reading of the statute. What this means is that the SEC's plenary power to promulgate accounting standards granted in the Securities Act of 1933 has now been curtailed. Congress has specifically chosen FASB as the standard-setting body and has limited the SEC's ability to change this. The practical effect is that it will be nearly impossible for the SEC to recognize any other entity to promulgate accounting standards. Short of the SEC rescinding its recognition of FASB and promulgating rules itself, FASB is, for all purposes, the congressionally chosen entity to regulate accounting standards.

The analogy between Congress creating an agency through legislation and what was done to make FASB official in SOX is striking. From direction of the structure and funding as well as the apparent intent to make the

189. 15 U.S.C. § 77s(b) (2006).

190. *Id.* at § 7219.

191. *See* Alan Rappeport & Marie Leone, *SEC Used Budget to Strong-Arm FASB*, CFO, April 3, 2007, http://www.cfo.com/article.cfm/8959118 (stating that "since Sarbanes-Oxley, it is the SEC's Office of the Chief Accountant that approves the FASB budget").

192. *See supra* Part II.A.

193. Cunningham, *supra* note 4, at 33.

SEC–FASB relationship permanent, it is as if Congress has created a new iteration of FASB. Congress's intent to make FASB the regulator of accounting standards is clear in SOX. As a result, FASB should be subject to the same requirements of any regulatory entity created by Congress.

V. IMPLICATIONS OF FASB'S AGENCY STATUS

If FASB indeed has agency status, it would become subject to administrative law doctrines. As a result, any deficiencies in light of these requirements might result in nullifying many if not all accounting standards. There are at least three potential bases for challenging FASB standards. First, a challenge could be based on the requirements of the APA. Such applicable requirements include notice and comment opportunity, public meetings and public disclosure of FASB documents, and subject to judicial review. Given the self-imposed procedures, though, these challenges are likely moot. Second, just as in *Free Enterprise Fund*, the appointment and removal process for FASB members could be challenged as unconstitutional. The President and SEC have even less authority over FASB membership, and based on the Supreme Court's determination in *Free Enterprise Fund*, the FASB's appointment and removal process is likely unconstitutional. However, the available remedy is uncertain given how limited the remedy was against the PCAOB. Finally, nondelegation principles provide a potential challenge. Though the nondelegation doctrine has been a relatively weak oversight tool, an intelligible principle from Congress that directs agency work is a requirement that may present a successful challenge basis. Though FASB has provided its own governing principles, it is unclear whether Congress has provided the required intelligible principle to FASB.

A. Statutory Requirements

Statutory checks on agency power include judicial review; notice and comment provisions in the APA;[194] access to records mandated by the Freedom of Information Act

194. 5 U.S.C. §§ 551–559, 701–706 (2006).

(FOIA);[195] and the open-meeting requirements of the Government in the Sunshine Act.[196] The APA requires that for rulemaking to be valid the agency must (1) publish general notice of the proposed rule in the Federal Register[197] and (2) give interested persons "an opportunity to participate in the rule making through submission of written data, views, or arguments.[198] It also requires that final rules be published in the Federal Register at least thirty days before becoming effective.[199] FOIA requires disclosure of federal agency records upon request by "any person,"[200] subject to nine enumerated exemptions.[201] The Government in the Sunshine Act requires open meetings for agencies headed by multimember boards.[202]

Given the requirements of the Rules of Procedure instituted by FASB itself,[203] it is not clear how successful a statutory-based challenge would be. To some extent, FASB already provides for many of these statutory requirements. FASB provides for notice and comment in most projects.[204] This includes releasing an exposure draft of the proposed accounting standard and receiving public comment letters.[205] Deliberations by FASB are held as public roundtables in two stages: one after initial release of an exposure draft and a second after public comment letters are collected.[206] FASB defines its public record as "[l]etters of comment and position papers, research reports, and other relevant materials on projects leading to issuance of pronouncements."[207] This public record is available for

195. *Id.* § 552.
196. *Id.* § 552b.
197. *Id.* § 553(b).
198. *Id.* § 553(c).
199. *Id.* § 553(d).
200. *Id.* § 552a.
201. *Id.* § 552b(c)(1)–(9).
202. *Id.* § 552b.
203. *See supra* notes 177–182 and accompanying text.
204. *Facts About FASB, Our Standard Setting Process*, FIN. ACCOUNTING STANDARDS BD., http://www.fasb.org/facts/index.shtml#decision-making (last visited Mar. 4, 2011).
205. *Id.*
206. *Id.*
207. *Facts About FASB, Our Standard Setting Process*, FIN. ACCOUNTING STANDARDS BD., http://www.fasb.org/facts/facts_about_fasb.pdf (last visited Mar. 4, 2011).

inspection in a public reading room at FASB offices as well as online in some instances.[208]

One potential deficiency is the absence of available judicial review. However, it's not likely that this would be enough to invalidate FASB pronouncements. Though there is no avenue for a direct challenge to accounting standard promulgation, those affected by accounting standards, such as defendants in financial fraud cases, are currently allowed to challenge the application of the accounting standard to their particular circumstances.[209] Judicial review is available to ensure compliance with federal statutes, but federal courts will often defer to agency interpretations under the *Chevron* and *Skidmore* doctrines.[210] This level of deference has in fact played out as courts consider the validity of GAAP in specific cases.[211] These facts coupled together make a judicial review challenge weak.

B. Appointment/Removal Challenge

Aside from statutory challenges, potential challengers could take a cue from *Free Enterprise Fund* and challenge the appointment and removal of FASB members.[212] FASB members are selected by its governing organization, the FAF.[213] Removal of FASB members is only permitted by a two-thirds vote of the FAF and only for cause.[214] The FAF board members are elected by the member organizations[215] and can be removed only for cause by a two-thirds vote of the FAF board.[216]

Appointment and removal jurisprudence has seen several landmark cases decided by the Supreme Court in an attempt to define the appropriate power to structure federal

208. *Id.*

209. *See supra* notes 114–117 and accompanying text.

210. Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 445 (2010).

211. *See supra* notes 114–117 and accompanying text.

212. *See supra* notes 24–29 and accompanying text.

213. Bratton, *supra* note 33, at 14.

214. Fin. Accounting Standards Bd., By-Laws of the Financial Accounting Foundation, Chapter A, Article II-A Financial Accounting Standards Board, Section 3: Appointment of Members.

215. *See supra* note 76 and accompanying text.

216. Fin. Accounting Standards Bd., By-Laws of the Financial Accounting Foundation, Section 6: Elections and Removal.

agencies.[217] The Constitution provides that the president shall appoint all principal executive officers with the advice and consent of the Senate.[218] However, Congress can vest power to appoint inferior officers in the President, courts, or heads of department.[219] In terms of removal, Congress cannot limit the President's power to remove principal officers,[220] but may impose conditions on the removal of inferior officers.[221] The limits of Congress's power to impose conditions was at the center of the *Free Enterprise Fund* case.[222]

Often the distinction between principal and inferior officers is important because of the differences in what Congress may do.[223] However, in the case of FASB, we do not need to go that far because it is clear from the structure that the President is not involved in the process at all. Whereas in the PCAOB arrangement, the President appoints members of the SEC who then appoint PCAOB members, that is not the case for members of the FAF. If FASB is a federal agency subject to administrative law doctrines, its current member selection and removal process is unconstitutional. However, the remedy would likely be similar to that proscribed by the Supreme Court in *Free Enterprise Fund.* Even though the removal process was found unconstitutional, rather than order an injunction of all PCAOB work until SOX could be amended (or, as the parties in the case *really* wanted, a declaration of unconstitutionality for SOX in its entirety), the Supreme Court simply held that PCAOB members could be removed at will by the SEC no matter what the prescribed method

217. *See, e.g.*, Edmond v. United States, 520 U.S. 651 (1997) (holding appointment of military courts of appeals judges appointed by the Court to be constitutional); Morrison v. Olson, 487 U.S. 654 (1988) (holding Independent Counsel not appointed by the President with the advice and consent of the Senate to be constitutional); Bowsher v. Synar, 478 U.S. 714 (1986) (holding that removal of the Comptroller General by Congress to be unconstitutional); Buckley v. Valeo, 424 U.S. 1 (1976) (holding Federal Elections Commissioners selected by Congress to be unconstitutional); Myers v. United States, 272 U.S. 52 (1926) (holding removal of a postmaster by Congress to be unconstitutional).

218. U.S. CONST. art. II, § 2, cl. 2.

219. *Id.*

220. *Myers*, 272 U.S. at 117.

221. *Id.* at 161.

222. Keefe, *supra* note 23, at 1664.

223. *Myers*, 272 U.S. at 164.

said.[224] Applying the same remedy to FASB would mean that board members would be removable at will by the SEC, but it would do nothing to stop the work of FASB.

C. Nondelegation Doctrine

Another available constitutional challenge is based on the nondelegation doctrine. The nondelegation doctrine requires that Congress not delegate to another branch its "essential legislative functions."[225] Though a potentially broad restriction, the Supreme Court has only found a violation of this doctrine twice, both over seventy years ago.[226] In reality, Congress is permitted to delegate power under broad general directives.[227] Though technically still in effect, most commentators would agree that the nondelegation doctrine does not stand as an effective tool to constrain Congress.[228]

However, one important aspect of the nondelegation doctrine is a requirement that Congress provide an intelligible principle when delegating authority to an agency.[229] This intelligible principle is to guide agencies when exercising their delegated authority.[230] It also serves the courts in judicial review as a baseline reference to whether the agency is acting within the scope of its authority. In practice, this is also not much of a restriction. Vague directives included in statutes have often been approved as adequate by the court.[231]

In the case of FASB, it may be that an intelligible principle is missing both from SOX and from recognition by the SEC. When FASB was formed, drafting a goal-setting

224 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3161–64 (2010).

225. A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935).

226. *See* Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 474 (2001) (stating that the two cases were *Schecter Poultry*, 295 U.S. at 495, and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430–33 (1935)).

227. Mistretta v. United States, 488 U.S. 361, 372 (1989).

228. *See, e.g.*, GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 366 (4th ed. 2001) (arguing that "statutes authorizing regulation of 'unreasonable risks' or administrative action 'in the public interest' appear immune from attack").

229. *Am. Trucking Ass'n*, 531 U.S. at 472.

230. *Id.*

231. *See* Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?*, 53 FED. COMM. L.J. 427, *passim* (2001) (discussing the history and current implications of the nondelegation doctrine).

standard was left to FASB itself.[232] This freedom was what led to the creation of the Conceptual Framework by FASB.[233] Though FASB adopted the same mission as the SEC, this was not mandated by the FAF, the SEC, or Congress. The fact that the principle adopted by FASB was controversial further evidences that the Conceptual Framework was not mandated or necessarily expected.

The passage of SOX presents a possible counterargument. Part v. of the subdelegation requirements proscribes that the entity "considers, in adopting accounting principles, the need to keep standards current in order to reflect changes in the business environment, the extent to which international convergence on high quality accounting standards is necessary or appropriate in the public interest and for the protection of investors."[234] This requirement may provide a three-part principle: that created accounting standards (1) reflect business changes, (2) consider international accounting standard convergence, and (3) protect investors. Given the broad directives previously allowed, this may be enough to constitute a guiding principle to the entity recognized as the accounting standard setter.

VI. CONCLUSION

The ramifications of administrative law requirements on FASB are far reaching. As discussed at the start of this Note, the financial system of the United States is highly dependent on accounting information and, therefore, on accounting standards.[235] Any disruption to these standards could have wide-ranging, and long-lasting, effects on the financial markets and economic health of the country. Though these affects are beyond the scope of this Note, it is worth noting that even though future challenges to FASB based on agency grounds are likely to be on point theoretically, as a practical matter, instituting any kind of major change into the regulatory model now in place requires careful consideration. Ultimately, the question cuts two ways: the Court must weigh the benefits of

232. Van Riper, *supra* note 58, at 74–78.
233. *See supra* Part IV.C.
234. 15 U.S.C. § 77s(b)(1)(A)(v) (2006).
235. *See supra* notes 7–9 and accompanying text.

implementing administrative law requirements versus keeping the current system for reasons of familiarity and predictability. The goal of this Note is to provide the basis for properly making that decision, whatever it might turn out to be.


TEXAS REVIEW OF
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