# TEXAS REVIEW of LAW & POLITICS

VOL. 20, NO. 2 SPRING 2016 PAGES 169–420

SENATOR TOM COTTON'S SPEECH AT THE 2015 FEDERALIST SOCIETY NATIONAL LAWYERS CONVENTION
*Senator Tom Cotton*

COLOR-BLIND-SPOT: THE INTERSECTION OF FREEDOM OF INFORMATION LAW AND AFFIRMATIVE ACTION IN LAW SCHOOL ADMISSIONS
*Robert Steinbuch*
*Kim Love*

CRIMINAL JUSTICE REFORM AT THE CROSSROADS
*John G. Malcolm*

A TEXT-BASED INTERPRETATION OF TITLE VII'S RELIGIOUS-EMPLOYER EXEMPTION
*Stephanie N. Phillips*

STALEMATE AT THE SUPREME COURT: *FRIEDRICHS V. CALIFORNIA TEACHERS ASSOCIATION*, PUBLIC UNIONS, AND FREE SPEECH
*Andrew Buttaro*

*CHEVRON*'S DOMAIN AND THE RULE OF LAW
*Cory R. Liu*

# SUBSCRIBE TO THE *TEXAS REVIEW OF LAW & POLITICS*

The *Texas Review of Law & Politics* is published twice yearly, fall and spring. To subscribe to the *Texas Review of Law & Politics*, provide the *Review* with your name, billing and mailing addresses.

e-mail: subscriptions@trolp.org
online: www.trolp.org
or standard mail:

*Texas Review of Law & Politics*
University of Texas School of Law
727 East Dean Keeton Street
Austin, TX 78705-3299

Annual subscription rate: $30.00 (domestic); $35.00 (international). ISSN #1098-4577.

## REPRINTS

It's not too late to get a copy of one of your favorite past articles. See the complete list of the *Review*'s past articles at www.trolp.org. Reprint orders should be addressed to:

William S. Hein & Co., Inc.
2350 North Forest Road
Getzville, NY 14068

# TEXAS REVIEW
## of
# LAW & POLITICS

VOL. 20, NO. 2 SPRING 2016 PAGES 169–420


ARTICLES


SENATOR TOM COTTON'S SPEECH AT THE 2015 FEDERALIST SOCIETY NATIONAL LAWYERS CONVENTION
*Senator Tom Cotton* ..... 169

COLOR-BLIND-SPOT: THE INTERSECTION OF FREEDOM OF INFORMATION LAW AND AFFIRMATIVE ACTION IN LAW SCHOOL ADMISSIONS
*Robert Steinbuch & Kim Love* ..... 181

CRIMINAL JUSTICE REFORM AT THE CROSSROADS
*John G. Malcolm* ..... 249

A TEXT-BASED INTERPRETATION OF TITLE VII'S RELIGIOUS-EMPLOYER EXEMPTION
*Stephanie N. Phillips* ..... 295

STALEMATE AT THE SUPREME COURT: *FRIEDRICHS V. CALIFORNIA TEACHERS ASSOCIATION*, PUBLIC UNIONS, AND FREE SPEECH
*Andrew Buttaro* ..... 341

*CHEVRON*'S DOMAIN AND THE RULE OF LAW
*Cory R. Liu* ..... 391

---




The *Texas Review of Law & Politics* is a conservative law review. Its mission is to be the prime forum for the discussion and debate of contemporary social issues such as crime, federalism, racial preferences, constitutional history, and religious liberties. The Review publishes thoughtful and intellectually rigorous conservative articles—articles that traditional law reviews often fail to publish—that can serve as blueprints for constructive legal reform.

The *Texas Review of Law & Politics* is published two times a year—fall and spring. Annual subscription rates: $30.00 (domestic); $35.00 (international). To subscribe, access the *Review*'s website at www.trolp.org. Back issues are available from: William S. Hein & Co., Inc., Hein Building, 2350 North Forest Road, Getzville, NY 14068, USA; (800) 828-7571. ISSN #1098-4577.

The *Review* welcomes the submission of articles, book reviews, and notes via standard or electronic mail. All submissions preferably should be submitted in Microsoft Word format. When submitting a manuscript through standard mail, please include a copy on a compact disk, along with a hard copy, addressed to: *Texas Review of Law & Politics*, 727 East Dean Keeton Street, Austin, TX, 78705-3299. When submitting a manuscript electronically, please attach the manuscript to an e-mail message addressed to submissions@trolp.org.

# TEXAS REVIEW of LAW & POLITICS

VOL. 20, NO. 2 SPRING 2016 PAGES 169–420



Founded by Adam B. Ross & Dennis W. Donley Jr. in MCMXCVI

# SUBMISSIONS

The *Texas Review of Law & Politics* welcomes the submission of articles, book reviews, and notes via standard or electronic mail. All submissions should be single-spaced, printed on one side only, with footnotes rather than endnotes. An electronic copy of any accepted manuscript is required.

Citations should conform to the *Texas Rules of Form* (13th ed. 2015) and *The Bluebook: A Uniform System of Citation* (20th ed. 2015). Except when content suggests otherwise, the *Review* follows the guidelines set forth in the *Texas Law Review Manual on Usage & Style* (12th ed. 2011), *The Chicago Manual of Style* (16th ed. 2010), and *Bryan A. Garner, Garner's Dictionary of Legal Usage* (3d ed. 2011).

Manuscripts submitted electronically should be sent to: submissions@trolp.org. Manuscripts submitted via standard mail should be addressed to:

*Texas Review of Law & Politics*
The University of Texas School of Law
727 East Dean Keeton Street
Austin, Texas 78705-3299

# ADVERTISING

The *Texas Review of Law & Politics* is now accepting advertising. We offer the perfect medium to reach a conservative audience interested in contemporary social issues, including crime, federalism, racial preferences, constitutional history, and religious liberties. For more information, please e-mail us at editors@trolp.org or write our Managing Editor at the above address.

The stakes have been raised and the setting changed for conservatives and libertarians alike since the *Review*'s most recent issue. Justice Scalia's tragic passing leaves a distinct void on the high court and in our hearts. A true public servant, Justice Scalia left us with more than impactful jurisprudence. He left us with a reminder of the importance a single principled person can hold in our lives and our country. As November marches closer, and what continues to be an unprecedented election year unfolds, one thing is clear: conservatives face a critical choice and must soon decide who we *are*, and who we *are not*.

Thankfully, 2016 also brings newfound encouragement for conservatives. The *Review* honored Justice Clarence Thomas as the Jurist of the Year and witnessed firsthand how character and humility can influence the next generation of principled jurists. In a year of unknowns, Justice Thomas inspired us all with his wisdom, good nature, and hopeful heart.

Senator Tom Cotton leads the issue with a tribute to Barbara Olson that he delivered at the 2015 Federalist Society National Lawyers Convention. Senator Cotton argues that to maintain our national character and coveted status as a "City upon a Hill" we must encourage and develop the individual character exemplified by Barbara Olson.

Professor Robert Steinbuch and Kim Love follow with *Color-Blind-Spot: The Intersection of Freedom of Information Law and Affirmative Action in Law School Admissions.* The article traces the difficulties Professor Steinbuch faced in obtaining public data about admissions in higher education and takes a hard look at the depth of affirmative action programs. The data reveals a tragic outcome—the program often harmed the very individuals it was designed to help. The analysis includes the largest contemporary longitudinal case study of race admissions at a law school, which should be of interest as we await the Supreme Court's decision in *Fisher v. Texas.*

In *Criminal Justice Reform at the Crossroads,* John G. Malcolm surveys recent state and federal criminal justice reform efforts. His detailed analysis makes clear that reforms have taken root at the state level, and reveal promising results. Mr. Malcolm's examination of the potential reforms available to legislators shows how we can develop a fairer criminal justice system that incarcerates only those who act with criminal intent and addresses some of the underlying issues offenders face so they are more likely to become law-abiding, productive citizens.

Stephanie N. Phillips explores the constitutional danger of asking secular courts and juries to scrutinize religious doctrines in *A Text-Based Interpretation of Title VII's Religious-Employer Exemption.*

Ms. Phillips calls for courts to mitigate the risk of constitutional entanglement with religion by returning to a text-based interpretation of the religious-employer exemption that respects the First Amendment and best aligns with the statute's meaning.

Next, Andrew Buttaro discusses one of the most highly-anticipated cases of the term in *Stalemate at the Supreme Court: Friedrichs v. California Teachers Association, Public Unions, and Free Speech.* Mr. Buttaro evaluates the central arguments in *Friedrichs* and calls for an overruling of *Abood v. Detroit Board of Education* as contrary to First Amendment precedent and relevant social science research. While *Friedrichs* resulted in a stalemate, the key issues surrounding free speech and union dues remain to confront a future Court.

Finally, in *Chevron's Domain and the Rule of Law,* Cory R. Liu critiques the *Chevron* doctrine based on the rule of law, arguing that courts' unfettered discretion to decide whether to follow *Chevron*'s framework results in arbitrary and unpredictable decisions about *Chevron*'s applicability. Mr. Liu concludes that the only way to ensure a rule-based approach to judicial review of agencies' statutory interpretations is to abandon *Chevron* deference and replace the open-ended standard with a clear rule.

It has been an honor and a privilege to serve the *Review.* I thank each of the editors for the immense amount of work they contributed to make this publication possible. Special thanks to Adam Ross, Brantley Starr, and Amy Davis for their guidance and support throughout the year. I look forward to watching the *Review*'s influence grow as we continue to produce blueprints for constructive legal reform.

Allison Allman
*Editor in Chief*

Austin, Texas
May 2016

# SENATOR TOM COTTON'S SPEECH AT THE 2015 FEDERALIST SOCIETY NATIONAL LAWYERS CONVENTION

BY SENATOR TOM COTTON*

Thank you, Gene, for the very kind introduction, and thank you all for the warm welcome. It is always an honor to speak to The Federalist Society. Back when I was a student and lawyer, as Eugene mentioned, I belonged to The Federalist Society because I believed in individual freedom, constitutional government, the rule of law, and the free enterprise system. I hold those beliefs firmly still today, even as a recovering lawyer.

But I also have a less abstract and more personal affinity for you now. I met my wife at a Federalist Society lunch. Shortly after being sworn into the House of Representatives, I spoke to the local lawyers chapter. My wife, Anna, attended that day, and she's here with us today as well. If she could recount our meeting, it would have a long back story with lots of explanation about mutual interest and mutual friends who encouraged her to attend and meet me and so on and so forth. But since I have the privilege of wielding the microphone today, I will tell my shorter, yet 100 percent truthful version. I gave a speech, and a pretty girl gave me her phone number afterwards.

It's particularly humbling to speak to you again on this occasion, the 15th Annual Barbara K. Olson Memorial Lecture. I am truly grateful for the honor, and Ted, thank you for being here today. I didn't know Barbara personally. Of course, I knew Barbara from her frequent television appearances and her writing in the 1990s. She was a fierce advocate for limited government and individual liberty. Barbara also worked tirelessly to expose the Clinton machine's corruption and abuse of power. It was a target-rich environment back then, as it is today. And Barbara had excellent aim.

I did meet Barbara once at the annual summer barbecue she and

---

* U.S. Senator (R-AR), A.B. Harvard College, 1998, J.D. Harvard Law School 2002. This Essay was adapted from remarks given by Sen. Cotton for the Fifteenth Annual Barbara K. Olson Memorial Lecture at the 2015 Federalist Society National Lawyers Convention in Washington, D.C.

Ted hosted for Federalist Society students at their home. Many of you probably attended a similar party in those days, and you probably recall Barbara's warmth, her passion, her zest for life. However vivacious, thoughtful, and graceful she may have seemed on television, the screen still didn't do her justice. She made a big impression on me, as she did on so many others.

I was, therefore, deeply saddened when she died a few weeks later, one of the nearly 3,000 Americans killed on September 11, 2001. Right away, though, I learned, to no one's surprise, that Barbara didn't sit quietly by as Flight 77 hurdled towards the Pentagon. In those most fearful and chaotic moments, Barbara had the course and the presence of mind to call her husband, Ted, not only as a husband, but as a high-ranking official at the Department of Justice who could alert the authorities. When the call dropped, she called back.

Ted explained back then that Barbara was enormously, remarkably, incredibly calm, but she was calculating. She was wondering, "What can I do to solve this problem?" Barbara wasn't cowered by those terrorists. She refused to meekly surrender. As they say in the Army, she went out with her boots on. That made an even bigger impression on me. To the best of my knowledge, Barbara was the only person whom I knew killed in the 9/11 attacks, though I've known too many killed because of those attacks.

Barbara's actions that day and in all the days prior and the character displayed by her actions set a high example for us all, though she would not live to know it. That's the thing about character. It echoes through the ages, far beyond one's own earshot. It's impossible to know how many lives Barbara touched, but it must have been a lot.

I can share one story I do know, a story about a young woman called Susan Grant. Barbara and Susan had a lot in common. Both grew up in Middle America, Barbara in Texas and Susan in Nebraska. Both were Catholics of German descent. Both loved and lived the arts. Barbara was a ballerina, performing in San Francisco and New York. Susan was also a dancer as well as a singer and an actress. In fact, Susan moved to Hollywood at the tender age of seventeen to perform and study at the Academy of Dramatic Arts. Somewhat surprisingly, for Susan, like Barbara, was a political conservative. Susan joined a union, just as Ronald Reagan had done during his acting career. Barbara made her own unlikely

sojourn to Hollywood hoping to earn the money needed to pursue her dream of going to law school, which she did. And here is where the story moves from coincidence to influence and inspiration. Barbara went to Cardozo Law School at Yeshiva University in New York, something of a peculiar choice for a Catholic girl from Texas. Ted says that people told her she wouldn't fit in and that she would be miserable. Far from it. Barbara thrived, becoming immensely popular, and founding the Cardozo Federalist Society chapter.

Years later, with Hollywood behind her, Susan came to the exact same crossroads looking at law schools in New York. Admitted to Cardozo and intrigued by it, she nonetheless wondered if a Catholic girl from Nebraska could ever fit in there. Then, in the school's promotional material, she read a profile of Barbara who had died just a few months earlier. Susan had never met Barbara but recognized and admired her from television appearances and from her writing. Susan took the plunge and followed Barbara's path to Cardozo.

Like Barbara before her, Susan thrived there. Before her third year, pursuing her interest in constitutional law, she interned in the Solicitor General's office, much as Barbara had interned in the Office of Legal Counsel. Returning for her final year at Cardozo, Susan earned the Barbara Olson Scholarship, which is awarded to female students at Cardozo who exemplify Barbara's ideals and values. What Barbara had founded, Susan took over, becoming the President of the Cardozo Federalist Society Chapter. While there probably weren't many more conservatives in Susan's time than there were in Barbara's, the chapter was equally active.

Neither Barbara nor Susan took the typical path to a big New York law firm. Barbara went to Washington where she moved successfully from private practice to the U.S. Attorney's Office to Capitol Hill. Susan moved to Montana where she clerked for the Supreme Court and then, like Barbara, became a federal prosecutor. Susan left her dream job to move to Wyoming where her parents had retired and her father had fallen ill. She went into private practice as she helped care for her father who thankfully recovered. Then, like Barbara, Susan ultimately made her way to our Nation's Capital going to work for the CIA and devoting herself to keeping our country safe. In matters known and as yet unknown to all but a handful of Americans, Susan is entrusted with our nation's most sensitive secrets.

Today, Susan is also the most trusted confidante of a United

States Senator. Most important of all, she's the new mother to a baby boy, Gabriel, my son—my son, Gabriel Cotton—because Susan Grant was my wife's stage name in Hollywood.

I tell this improbable story to demonstrate my larger point. The character we display and the example it sets extend far beyond our ability to comprehend. Barbara never met my wife, and she could not have known that her example would inspire Anna at critical moments in Anna's life.

How does one develop such character? The word itself comes from a Greek word that means "to etch or engrave."[1] This suggests that a lot of work must be done to develop character, and once done, it will be lasting. Aristotle, the first great teacher of character, wrote a lot about this concept.[2] The only way to develop character is the hard way: the way of making each choice, each day for a thousand days and then for a thousand more, the way of listening to one's conscience when pleasure beckons or pain repels, of developing one's judgment to see good both in the circumstances immediately present and the eternal truths.[3]

Aristotle teaches that true virtue isn't merely knowing the good, but also doing it.[4] He says we are not studying in order to know what virtue is, but to become good,[5] for otherwise there would be no profit in it. The key to character development for Aristotle is practical wisdom: the ability to observe circumstances combined with the knowledge of right principles, to reach sound judgments in moral matters.[6] The habitual exercise of practical wisdom in every situation is what ultimately leads to virtue.[7] But, Aristotle observes, "to do all this to the right person, to the right extent, at the right time, for the right reason, and in the right way is no longer something easy . . . . [wherefore] good conduct is rare, praiseworthy, and noble."[8]

---

1. *Character*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2008).

2. *See generally* ARISTOTLE, NICOMACHEAN ETHICS (Martin Ostwald trans., Prentice Hall 1999).

3. *Id.* at 33–35 (explaining how intellectual and moral virtue is the result of good habits).

4. *Id.* at 38–40.

5. *Id.* at 35 ("[W]e are not conducting this inquiry in order to know what virtue is, but in order to become good, else there would be no advantage in studying it.").

6. *Id.* at 152–54 (defining the virtue of practical wisdom). Some translations call this same virtue "prudence." *See, e.g.*, ARISTOTLE, NICOMACHEAN ETHICS 89–90 (Terence Irwin trans., Hackett Publishing 2d ed. 1999).

7. ARISTOTLE, NICOMACHEAN ETHICS 170–73 (Martin Ostwald trans., Prentice Hall 1999) (showing that the virtue of practical wisdom is tied to "virtue in the full sense").

8. ARISTOTLE, *supra* note 2, at 50.

In the virtuous soul, the desires and the judgment cooperate in this fashion to produce good action reliably and persistently, despite danger, despite wariness, despite temptation. The man or woman of good character can be depended upon. Moreover, this kind of practical wisdom and virtue, this kind of character isn't only a good in itself, though it is that. It also influences and inspires others by its example.

In Aristotle's *Rhetoric*, for instance, he explains that one of the most powerful kinds of argument is the example,[9] which moves from particular case to particular case by induction. Aristotle ties argument- by-example to ethos: the influence of character and credibility on speech and persuasion.[10] The point here is that the development of sound character doesn't end with one's own excellence, but also has a practical effect on how others act and are influenced.[11] Good character not only inspires, it makes a kind of argument that has a persuasive and compelling effect on others, whether individually or as a people. It has an effect on what they believe and how they will act. Put simply, in the words of Aristotle, a soul never thinks without the image of another.[12]

Probably the simplest and most memorable statement about the power of good character and its ability to inspire and influence comes from Jesus, as is often the case. In the Sermon on the Mount, Jesus preached:

> Ye are the light of the world. A city that is set on an hill cannot be hid. Neither do men light a candle, and put it under a bushel, but on a candlestick; and it giveth light unto all that are in the house. Let your light so shine before men, that they may see your good works, and glorify your Father which is in heaven.[13]

Truly, a city upon a hill cannot hide. It is there for all to see, good or bad. The city can be brilliantly lit, a shining beacon of hope, or it can be dark and foreboding. The same is true for each

---

9. ARISTOTLE, THE RHETORIC AND THE POETICS OF ARISTOTLE 26 (W. Rhys Roberts trans., Modern Library 1984).

10. *Id.* at 22 ("Persuasion is clearly a sort of demonstration, since we are most fully persuaded when we consider a thing to have been demonstrated. The orator's demonstration is an enthymeme, and this is, in general, the most effective of the modes of persuasion.").

11. *Id.* at 90–91 ("[The orator] must also make his own character look right . . . . Particularly in political oratory . . . it adds much to an orator's influence that his own character should look right and that he should be thought to entertain the right feelings towards his hearers . . . .").

12. ARISTOTLE, DE ANIMA (ON THE SOUL) 208–09 (Hugh Lawson-Tancred trans., Penguin Books 1986).

13. *Matthew* 5:14–16 (King James).

of us. We cannot hide our character. It is there for all to see. What we can do is build our character, to light our candle, so that others may see our flame and walk in its path.

Not only do individuals have character, though, nations have a character too, and none more so than America. After all, the metaphor of a "City upon a Hill" is used more often in connection with our national character than our personal virtue. Most people associate the metaphor with Ronald Reagan, yet the image of America as the "City upon a Hill" goes all the way back to 1630 when John Winthrop preached to his fellow pilgrims aboard their ship *Arbella* while waiting to disembark in what became New England.[14] Winthrop did not mean this in a prideful or a boastful way. On the contrary, he exhorted his fellow pilgrims to walk in the path of the Lord, and to act honestly by Him and by each other. Winthrop knew America would be an example to the world. He wanted to be sure it was a *good* example.

Reagan resurrected this particular metaphor,[15] but Americans have always seen our country as an example for the world. Not surprisingly, the first paragraph of the Federalist Papers begins with this very point:

> It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force. . . . [A] wrong election of the part we shall act may, in this view, deserve to be considered as the general misfortune of mankind.[16]

Our Founders did not think this important question was settled by any means. The long and sorrowful litany of failed republics (both ancient and modern) cataloged throughout the Federalist Papers demonstrates just how hard it is to establish and preserve

14. Governor John Winthrop, A Model of Christian Charity (1630) (transcript available at http://bit.ly/1Qca9QL [perma.cc/3HE7-WKVW]).

15. *E.g.*, Ronald Reagan, We Will Be a City Upon a Hill (Jan. 25, 1974) (transcript available at http://bit.ly/1Mc2AOK [perma.cc/UU6H-6FZH]); Ronald Reagan, Election Eve Address (Nov. 3, 1980) (transcript available at http://bit.ly/22ouz5f [perma.cc/M4YP-28K6]); Ronald Reagan, Farewell Address to the Nation (Jan. 11, 1989) (transcript available at http://bit.ly/1Oj2GTe [perma.cc/3XKF-6A76]).

16. THE FEDERALIST NO. 1, at 27 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classic 2003).

free government.[17] America was richly blessed from its earliest days: a New World, a free people, plentiful land, abundant natural resources, and the protection of oceans. If the American experiment failed despite all these blessings, how could the people of the Old World—so crowded and cramped, riven with ethnic and religious animosity, burdened with historical injustice—ever expect to live in freedom? While the whole world might not live in freedom if America succeeded, surely no one would if America failed. A failed America would indeed be a great misfortune for all of mankind.

Facing the very real risk of such failure, Abraham Lincoln in his Gettysburg Address cast the Civil War in the same universal terms: "[O]ur fathers brought forth on this continent, a new nation, conceived in liberty and dedicated to the proposition that all men are created equal. Now we are engaged in a great civil war, testing whether that nation or any nation so conceived and so dedicated can long endure."[18] The familiarity of these words can obscure the deep truth they contain about America and our national character. The Civil War in Lincoln's eyes wasn't simply an American war but a war for human freedom for all the ages. Why would that be so? Most civil wars, terrible though they are, merely exchange one set of strong men with another. But America is not like most countries. America was born so that we might rule ourselves.

America had fathers, fathers who brought forth a new nation, and that in itself is remarkable. Most nations aren't new, and they don't have birthdays, at least not old and great nations. The old nations of Europe have existed in one form or another across the centuries, the moment of their beginnings lost in the mists of time. But we Americans know our birthday—July 4th, 1776—and we know our fathers. We also know the circumstances of our conception: in liberty, dedicated to the natural equality of all mankind and self-government based on reflection and choice—the only government worthy of a free people.

This is what Margaret Thatcher meant when she said, "[t]he European nations are not and can never be like [America]. They are the product of history and not of philosophy."[19] Yet we also

17. THE FEDERALIST NO. 6, at 48–54 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classic 2003) (noting the histories of Sparta, Athens, Rome, Carthage, Venice, Holland, and England as illustrative of the difficulties in establishing and preserving a republic).

18. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863) (transcript available at http://bit.ly/1bXCawX [perma.cc/27GC-A4L3]).

19. Margaret Thatcher, Speech at Hoover Institution Lunch (Mar. 8, 1991) (transcript

know the circumstances of our conception were imperfect, and it took a great Civil War to preserve our nation as one dedicated to the proposition that all men are created equal. America had its new birth of freedom. Our nation was born again in the blood of our countrymen in a war whose dead nearly outnumber those killed in all our other wars combined.[20] To quote the fifth stanza of *The Battle Hymn of the Republic*: "As He died to make men holy, let us die to make men free."[21] Without their sacrifice, America would have failed, and it would have suggested that no free nation can long endure.

But we did not fail. We fought for the principle of justice. We showed the world that a free nation such as ours can endure and that it is worth fighting for. That is one reason why our founding and the Civil War are so important, and why they belong not only to us Americans, but to all mankind for all the ages. That is why America has been a beacon of hope and aspiration throughout the world. Look at everything that has resulted from the simple, brilliant light of human equality put upon a hill. From an uncertain birth, our Constitution is now the oldest written governing charter in the world.[22] We govern ourselves as free men and women from the Congress to the school board. Despite all our sharp political differences, we transfer power peacefully between parties and people. America based its politics on the natural rights of mankind. We got our politics right, and many material blessings flowed from that.

In just 170 years, America went from a global backwater to the greatest superpower in history.[23] Not only do we possess the world's largest and most advanced economy, we also provide one of the highest standards of living ever known to the working man, with unlimited opportunity for advancement and success.[24] In America,

available at http://bit.ly/1R6OwCR [https://perma.cc/RV8S-34PH]).

20. Jennie Cohen, *Civil War Deadlier Than Previously Thought?*, HISTORY IN THE HEADLINES (June 6, 2011), http://bit.ly/1VeLTW2 [perma.cc/5G3D-P2U4].

21. *Civil War Music: The Battle Hymn of the Republic*, CIVIL WAR TRUST, http://bit.ly/1R6R1oR [perma.cc/PE6V-BV9F] (last visited Mar. 17, 2016).

22. John H. Killian, *Constitution of the United States*, SENATE.GOV., http://1.usa.gov/1mZ9h9Q [perma.cc/HY9M-4DE2] (last visited Apr. 7, 2016) (stating that "the United States Constitution is the world's longest surviving written charter of government.").

23. Ian Bremmer, *These Are the 5 Reasons Why the U.S. Remains the World's Only Superpower*, TIME (May 28, 2015), http://ti.me/1LN9EN4 [perma.cc/3E9S-R9XL]; GEORGE C. HERRING, FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776 (2008).

24. *Gross Domestic Product 2014*, THE WORLD BANK DATABANK, http://bit.ly/1iz15uj [perma.cc/WM9T-DTP9] (last visited Apr. 7, 2016) (ranking the United States' Gross Domestic Product highest in the world as of 2014); *Human Development Report 2015*, UNDP

equality is not just an abstract ideal. In practice, it means we champion self-reliance and individualism. Anyone who works hard and plays by the rules warrants equal dignity and respect. He is entitled to the fruits of his labor, and rightly chafes against undue infringements and meddling in his affairs.

Success is respected in America. Class envy and resentment have always been much weaker political forces here than abroad. In America, as the saying goes, a father and his son see a Rolls-Royce on the street, and the father says, "One day, son, we'll get you into that car." In too many other countries, the father says, "One day, son, we'll get him out of that car."

America's national character—free, equal, and independent—is attractive to people around the world. As Aristotle said of individual character, it inspires them and it influences them, which is why they emulate it and celebrate it.[25] When the oppressed Chinese rose up against their communist government in Tiananmen Square, they constructed a model of the Statue of Liberty[26]—not Big Ben, not the Eiffel Tower, and certainly not the Kremlin. After the fall of the Berlin Wall, Poland and Romania erected statues to Ronald Reagan.[27] Georgia named a street after George W. Bush, and Albania erected a statue in his honor.[28] Kosovo honored Bill Clinton with both a street and a statue.[29] But it is not only our presidents who the world finds so appealing. Hundreds of millions of people around the world watch our movies, listen to our music, dress in our fashions, use our technology, and travel to our country to study, work, and live.[30] Illegal immigration is a grave problem, to

(2015), http://bit.ly/1lfu5e8 [perma.cc/GTD9-RERG] (ranking the U.S. eighth from among 49 countries worldwide that had achieved "very high human development," a category determined by a combination of variables, including labor statistics, gender development, population trends, health outcomes, education achievements, national income and resources, environmental sustainability, employment, human security, and international integration).

25. ARISTOTLE, *supra* note 12.

26. Noah Rayman, *5 Things You Should Know About the Tiananmen Square Massacre*, TIME.COM (June 4, 2014), http://ti.me/1kEqyT0 [perma.cc/7C3B-QHS3].

27. *Poland Unveils Statue of Ronald Reagan in Warsaw*, FOXNEWS.COM (Nov. 21, 2011), fxn.ws/1QyP4Ax [perma.cc/8Z3L-3Z6Y]; Victor Lupu, *A Statue of Former U.S. President Ronald Reagan Will Be Unveiled in Ploiesti*, THE ROMANIA J. (Feb. 4, 2015), http://bit.ly/1Xq1xvL [perma.cc/54KN-YKS8].

28. Lizol, *Tbilisi Officials Name Street After Bush*, FREE REPUBLIC (Sep. 15, 2005), http://bit.ly/1SNdixm [perma.cc/9NVN-NVJG]; Fatos Bytyci, *Albanian Town Thanks George W. Bush with Statue*, REUTERS (July 6, 2011), reut.rs/1TfcGPy [perma.cc/P73P-NT4S].

29. Scott Allen, *8 U.S. presidents with Statues Abroad*, THE WEEK (Nov. 20, 2012), http://bit.ly/1UKGeoK [perma.cc/HD39-MBG9].

30. *See generally* PETER CONRAD, HOW THE WORLD WAS WON: THE AMERICANIZATION OF EVERYWHERE (2014) (surveying America's influence on the world from an international

be sure, but perhaps we should take pride in the fact that we live in a country that people are willing to die to reach, rather than a country that people are willing to die to escape.

Unfortunately but inevitably, our national character supplies an example not only to our friends, but also to our foes. We were targeted on 9/11 not for what we did, but for who we are: freedom's home and exemplar. As President Bush said just nine days after those attacks, "[t]hey hate our freedoms: our freedom of religion, our freedom of speech, our freedom to vote and assemble and disagree with each other."[31]

In this regard, they weren't much different from the totalitarian ideologies we defeated in the 20th century, Nazism and communism. Whether marching under the banner of the swastika, the sickle, or the sword, these fanatics knew their ambition for world domination could not succeed as long as America lived. That's why Hitler declared war on the U.S., even though it was a terrible strategic mistake. That's why Soviet apparatchiks referred to the U.S. as the main enemy, as Russia's KGB state does again today. That's why Iran's ayatollahs still chant "Death to America."[32]

In their hatred, though, they often miscalculate America's willingness and ability to fight the enemies of freedom, much as Hitler did. Most famously, Osama bin Laden called the United States a "weak horse," saying that people would root instead for the "strong horse" of Islamic radicalism.[33] Indeed, in his 1996 fatwa against the United States, bin Laden taunted us for cowardice, not for aggression and arrogance. He mocked American retreats from Lebanon, Yemen, and Somalia.[34] He believed America would retreat further, or even surrender, if attacked directly and on our own soil.

Ultimately, all of our past enemies, from Hitler to bin Laden, learned about American resolve the hard way. But new enemies

---

perspective); *Chapter 2. Attitudes Toward American Culture and Ideas*, PEW RESEARCH CENTER GLOBAL ATTITUDES & TRENDS (June 13, 2012) http://pewrsr.ch/1ROzTrZ [perma.cc/K2NZ-ZAML] (detailing international attitudes toward America).

31. *Text: President Bush Addresses the Nation*, WASH. POST (Sep. 20, 2001), http://wapo.st/My0Lh0 [perma.cc/GEB9-ZVDN].

32. Sam Wilkin & Babak Dehghanpisheh, *Iran's Top Leader Rejects U.S. 'Bullying' in Nuclear Talks*, REUTERS, (Mar. 21, 2015), http://reut.rs/1QdYLDV [perma.cc/N64P-74PS].

33. *Transcript of Bin Laden Videotape*, NPR (Dec. 31, 2001), http://n.pr/211idfh [perma.cc/8CBB-MPNM].

34. Bin Laden's Fatwa, PBS NEWSHOUR (Aug. 23, 1996), http://to.pbs.org/1EARP3O [perma.cc/9YEV-KQXJ] ("You have been disgraced by Allah and you withdrew; the extent of your impotence and weaknesses became very clear.").

have emerged and still question our commitment. The Islamic State's so-called caliph, Abu Bakr al-Baghdadi, reportedly told Americans when he was released from detention during the Iraq War, "I'll see you guys in New York."[35] Such contempt for American power suggests that, despite the lessons of the past, our enemies remain unconvinced of the righteousness and the sturdiness of our character. In this regard, we may never fully convince them.

Here, then, I want to return to the "City upon a Hill." We must remember that the city is on a *hill*, not on an island or within a fortress. It must interact with the outside world. When they watch the city, some foreigners will grow jealous and resentful, coveting its prime territory and its riches, and they will come to take those things. Furthermore, the citizens must leave the city and descend into the valley to draw their water, and into the fields to grow crops and cultivate their herds. They must traverse the roads and build ports to cross the seas to exchange goods for those they lack. They will travel not only as merchants and traders, but also as tourists. For beautiful though the city may be, its citizens will surely want to discover the world.

In short, the "City upon a Hill" will not live in splendid isolation, nor can it adopt a pacifist creed and hope to survive. Walls will be needed, as will guards to protect those walls. An army and a navy must be raised to defend the borderlands, guard the valleys and the fields, secure the ports and open the sea lanes, and protect its citizens around the world. The city cannot easily do these things alone. It must make alliances with other cities and concern itself with their affairs, security, and conflicts.

None of this is to say that the city must lose its luster. On the contrary, the city can shine even brighter as an example for the world, representing not merely an abstract ideal of justice, but a very real commitment to defend it. The city, if it holds fast to its principles and is willing to fight for them, will inspire the just and terrify the wicked.

And here, I'll come back to Barbara and the union of our national and individual character, for the character of a city depends on the character of its citizens. The moral character esteemed by Aristotle is not spontaneous or natural. It must be taught, and it must be practiced.[36] So it is with our national

35. Kellan Howell, *'I'll See You Guys in New York,' ISIS Terror Leader Told U.S. Troops in 2009*, WASH. TIMES (June 14, 2014), bit.ly/1lHRiSV [perma.cc/3QQN-ZUR3].

36. ARISTOTLE, *supra* note 2, at 33–34 ("Intellectual virtue or excellence owes its origin

character. As Lincoln said:

> Let reverence for the laws, be breathed by every American mother, to the lisping babe, that prattles on her lap—let it be taught in schools, in seminaries, and in colleges; let it be written in Primers, spelling books, and in Almanacs;—let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice. And, in short, let it become the *political religion* of the nation . . . .[37]

Our political religion—the natural equality of mankind and self-government founded upon the natural rights of mankind—is an invaluable yet fragile thing. In each generation we must recommit not only to our faith, but also to our willingness to fight for that faith. In doing so, we inspire and influence each other, and we remain the shining example for the world.

Barbara knew these things. She dedicated her life to them and ultimately gave her life for them. She knew that if there's nothing worth killing for or nothing worth dying for, then there's nothing worth living for. Our memorial today pays tribute to her life, but the best tribute of all is to follow her example every day as individuals and as a country. Thank you. God bless you. God bless America, and God bless the memory of Barbara Olson.

---

and development chiefly to teaching, and for that reason requires experience and time. Moral virtue, on the other hand, is formed by habit . . . . This is corroborated by what happens in states. Lawgivers make the citizens good by inculcating ‹good› habits in them . . . .").

37. Abraham Lincoln, The Perpetuation of Our Political Institutions: Address Before the Young Men's Lyceum of Springfield, Ill. (Jan. 27, 1838) (transcript available at http://bit.ly/1plR1Cd [perma.cc/96HN-KGEG]).

# COLOR-BLIND-SPOT: THE INTERSECTION OF FREEDOM OF INFORMATION LAW AND AFFIRMATIVE ACTION IN LAW SCHOOL ADMISSIONS

BY ROBERT STEINBUCH & KIM LOVE*

I. INTRODUCTION ..... 185
II. DISCUSSION ..... 186
A. Freedom of Information Acts ..... 186
B. Race-Based Admissions ..... 188
III. INITIAL STUDIES ..... 194
A. University of California, Los Angeles School of Law (UCLA) ..... 194
B. George Mason University School of Law (GMU) ..... 200
C. Indiana University School of Law ..... 201
IV. UNIVERSITY AT LITTLE ROCK (UALR) DATA ..... 203
A. At-Risk Student Data From 2003–2007 ..... 204
B. All Student Data From 2005–2011 ..... 208
C. Arkansas Attorney General Opinion ..... 211
D. Data Analysis ..... 215
1. Measures of Law School Success by Ethnicity Alone ..... 215

* Robert Steinbuch is a 2015 Fulbright Scholar and Professor of Law at The University of Arkansas at Little Rock, William H. Bowen School of Law. Professor Steinbuch received his J.D. from Columbia Law School, where he was a John M. Olin Law & Economics Fellow and received his B.A. and M.A. from the University of Pennsylvania. He is a former judicial law clerk on the United States Court of Appeals for the Eleventh Circuit and former attorney with the United States Department of Justice, the United States Department of Treasury's Internal Revenue Service, and the United States Senate Committee on the Judiciary. Kim Love is an Academic Professional and Associate Director of the Statistical Consulting Center at the University of Georgia and received her M.S. and Ph.D. in Statistics from Virginia Tech.

The authors' views are independent of any associations and do not necessarily reflect the positions of their employers or any other affiliations; and the authors have no prior relationship with the *Texas Review of Law & Politics*. The authors do not take a political stance on affirmative action as a whole, nor is that the purpose of the article. The authors wish to thank McKendra Ugartechea, Jonathan Martin, Professor Jaxk Reeves, and Padmanand Madhavan Nambiar for their input and assistance. The authors also wish to thank the excellent staff of the *Texas Review of Law & Politics* for their wonderful mastery of the contents of this article.

2. Detailed Examination of Measures of Law School Success ..... 219
3. Ethnicity and Law School Preparation ..... 226
4. What to Make of the Results ..... 232
E. 2013 UALR Data ..... 233
1. Institutional Review Board (IRB) Déjà Vu ..... 233
2. Measures of Law School Success by Ethnicity Alone ..... 236
3. Complex Examination of Measures of Law School Success Across Data Sets ..... 238
4. Ethnicity and Law School Preparation Across Two Data Sets ..... 243
F. 2015 Unsuccessful Data Request ..... 245
1. Pre-Attorney General Opinion Déjà Vu ..... 245
V. CONCLUSION ..... 248

INDEX OF FIGURES AND TABLES

Table 1. Bar Exam-Takers and Passage Rates by Ethnicity ..... 216
Figure 1. Bar Passage Rate by Ethnicity ..... 217
Table 2. Average Law School GPA by Ethnicity ..... 218
Figure 2. Average Law School GPA by Ethnicity ..... 218
Table 3. Logistic Regression Results for Probability of Passing Bar Exam ..... 219
Table 4. Logistic Regression Results for Probability of Passing Bar Exam, Best Model ..... 221
Table 5. Odds Ratio for Passing Bar Exam ..... 221
Figure 3. Relationship of Law School GPA to Bar Passage Rate ..... 222
Figure 4. Relationship of LSAT Score to Bar Passage Rate ..... 223
Figure 5. Relationship of Undergraduate GPA to Bar Passage Rate ..... 223
Table 6. General Linear Model Results for Law School GPA ... 224
Table 7. General Linear Model Results for Law School GPA ... 224
Figure 6. Relationship of LSAT Score to Law School GPA ..... 225
Figure 7. Relationship of Undergraduate GPA to Law School GPA ..... 225
Table 8. Average LSAT Score by Ethnicity ..... 227
Figure 8. Average LSAT Score by Ethnicity ..... 227
Table 9. Average Undergraduate GPA by Ethnicity ..... 228
Figure 9. Average Undergraduate GPA by Ethnicity ..... 229
Table 10. Bar Exam-Takers and Passage Rates by Ethnicity, 2013 ..... 235
Table 11. Logistic Regression by Ethnicity and Data Set ..... 236
Figure 10. Bar Passage Rate by Ethnicity and Dataset ..... 237
Table 12. Results of Linear Regression Comparing Law School GPA by Ethnicity and Data Set ..... 237
Table 13. Average Law School GPA by Ethnicity and Data Set . 238
Table 14. Logistic Regression Results for Probability of Passing Bar Exam, Two Data Sets ..... 239
Table 15. Logistic Regression Results for Probability of Passing Bar Exam, Two Data Sets, Best Model ..... 239
Table 16. Odds Ratios for Passing Bar Exam ..... 241
Table 17. General Linear Model Results for Law School GPA, Two Data Sets ..... 241

Table 18. General Linear Model Results for Law School GPA, Two Data Sets, Best Model ..... 242
Table 19. Linear Model Results for LSAT Score by Ethnicity and Data Set ..... 243
Table 20. Average LSAT Score by Ethnicity and Data Set ..... 243
Table 21. Linear Model Results for Undergraduate GPA by Ethnicity and Data Set ..... 244
Table 22. Average Undergraduate GPA by Ethnicity and Data Set ..... 245

> *The "academy" is supposed to be a realm in which all ideas can be advanced in free and open discourse, in which data matters and smart people struggle toward understanding. Yet these hallmarks of healthy exchange seem absent in debates on affirmative action.*[1]
>
> * * *
>
> *Because the free flow of information and data in society is truly the lifeblood of academic research, it is more than a little ironic that higher education institutions have been extreme in their secretiveness about admissions and student outcomes. Opacity is evident at every turn—particularly when data touches on race or racial preferences. We saw this . . . when [UCLA] political scientist Tim Groseclose was denied access to even an anonymized version of admissions data . . . even though he was a faculty member of the university's admissions committee. The same thing happened to Robert Steinbuch, a professor at the University of Arkansas, Little Rock [and, at the time, a member of his law school's admissions committee]. When Steinbuch expressed concerns that the university's use of racial preferences might wind up admitting students who would struggle on the bar exam, he found himself unable to get even elementary data linking admissions standards to long-term academic and bar outcomes.*[2]
>
> – *Richard Sander & Stuart Taylor, Jr.*

## I. INTRODUCTION

Tim Groseclose describes in his recent book, *Cheating*, the challenges that he confronted in trying to gather and analyze admissions data showing the immense consideration given to race and the ensuing difficulties encountered by those in whose names the affirmative action programs were invoked.[3] Groseclose's narrative parallels the difficulties faced by numerous researchers (some discussed herein), including co-author of this article, Robert Steinbuch.

---

1. RICHARD SANDER & STUART TAYLOR, JR., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT 175 (2012).

2. SANDER & TAYLOR, *supra* note 1, at 235.

3. TIM GROSECLOSE, CHEATING: AN INSIDER'S REPORT ON THE USE OF RACE IN ADMISSIONS AT UCLA 159–61 (2014). Groseclose wrote about his own experience:

> [b]ecause of my membership on UCLA's faculty oversight committee, and because of the data set that Richard Sander and I obtained, I've had a front-row seat to witness a very egregious case of [] dishonesty. Few people are in a position as good as mine to expose it. . . . [Those at UCLA blocking access] are surrounded almost completely by people, like themselves, who value racial and social justice more than they do other virtues such as honesty, transparency, and the rule of law. . . . This, I believe, is the most significant problem in academia today—the low regard that professors place on honesty relative to other ideals. The narrow problem of race, admissions, and cheating at UCLA is tiny compared to that problem.

Unaware of Groseclose and his actions, and prior to his book, Steinbuch—like several other scholars—sought admissions data from the school at which he served on the admissions committee. He was denied access. Thereafter, a state legislator sought an official governmental opinion from the state's highest-ranked lawyer, the attorney general, something an ordinary citizen cannot compel.[4] After the Arkansas Attorney General issued a favorable opinion, Steinbuch obtained the long sought-after information.

This article—the third in an unexpected trilogy[5] documenting the difficulties that a tenured member of the admissions committee had in obtaining public data from the state school at which he is a faculty member—is the story of both some success in ultimately obtaining public data about affirmative action at the University of Arkansas at Little Rock School of Law and the analysis of the ensuing unique information. The result is two inherently intertwined narratives: (1) how government actors improperly imposed hurdles to the access of public data about admissions in higher education, and (2) the commonly secreted fact that admissions programs aimed at minorities often are dramatic in depth and sometimes tragic in outcome. Indeed, the analysis conducted in this paper is the largest contemporary longitudinal case study of race admissions at a law school. And the results confirmed the informed hypothesis that UALR regularly and systematically admitted minorities with significantly lower academic profiles, resulting in demonstrably poorer outcomes for many of these students when compared to their classmates. The timing of these results coincides with the Supreme Court's forthcoming decision in *Fisher v. Texas*.[6] Likely, the Supreme Court will decide (again) the constitutionality of affirmative action by June 2016.

## II. DISCUSSION

### *A. Freedom of Information Acts*

By now, state and federal freedom of information laws (FOIAs)

4. 83 Op. Ark. Att'y Gen. (2012).

5. Robert Steinbuch, *Looking Through the Class and What Alice Found There: A Frustrated Analysis of Law School Admissions Policies and Practices*, 14 SCHOLAR: ST. MARY'S L. REV. ON MINORITY ISSUES 61 (2011); Robert Steinbuch, *Four Easy Pieces to Balance Privacy and Accountability in Public Higher Education: A Response to Wrongdoing Ranging from Petty Corruption to the Sandusky and Penn State Tragedy*, 46 LOY. L.A. L. REV. 163 (2012).

6. Adam Liptak, *Supreme Court Justice's Comments Don't Bode Well for Affirmative Action*, N.Y. TIMES (Dec. 9, 2015), http://nyti.ms/1U3fb6n [perma.cc/Y796-RR8Z].

are well known for serving the purpose of providing the public, directly or through journalists and researchers, the ability to make informed decisions about government action. "Often the best source of information about waste, fraud, and abuse in the government is an existing government employee committed to public integrity and willing to speak out. Such acts of courage and patriotism, which can sometimes save lives and often save taxpayer dollars, should be encouraged rather than stifled."[7]

Recent examples of the varied benefits of FOIAs are easy to find:

> In February 2004, several D.C. public schools tested as having high lead content in their drinking water; District officials asserted that the cause was isolated drinking fountains.[8] The Freedom of Information Act enabled a motivated academic to uncover the truth: "Marc Edwards, a civil engineering professor at Virginia Tech, said . . . he discovered the problem after studying test data obtained through a Freedom of Information Act request of water samples in the schools. Officials conducting tests for D.C. schools 'did not follow standard protocols [in the tests]. They used methods to make the lead look low when it wasn't,' Edwards said."[9] The researcher described his concern with government opacity in this context: "'It's unconscionable that parents were not told and children were allowed to drink that water and this has gone on for years.'"[10]
>
> "Ibraham Al Qosi . . . a Sudanese accountant apprehended after 9/11 on suspicions of ties to Al Qaeda, charged that he and other detainees at Guantanamo Bay had been subjected to bizarre forms of humiliation and abuse by U.S. military inquisitors. . . . Pentagon officials dismissed Al Qosi's allegations as the fictional rantings of a hard-core terrorist."[11] The FOIA changed this impression.[12]
>
> "Many of the documents come from an unexpected source: the FBI. As part of a Freedom of Information Act lawsuit brought by the American Civil Liberties Union, the bureau has released internal e-mails and correspondence recording what their own agents witnessed at Gitmo[, along] with accounts from other

7. Barack Obama and Joe Biden, *Ethics Agenda*, CHANGE.GOV (Jan. 31, 2016), http://1.usa.gov/1Q40M5Q [perma.cc/YTZ3-79NC].

8. Theola Labbe, *Tests Find Elevated Lead Levels At Five Schools, D.C. Council Told*, WASH. POST (Feb. 15, 2007), http://wapo.st/1QACyTJ [perma.cc/75H9-YCVM].

9. *Id.*

10. *Id.* (quoting Marc Edwards, a civil engineering professor at Virginia Tech).

11. Michael Isikoff, *Unanswered Questions*, NEWSWEEK (Jan. 16, 2005), http://bit.ly/1ZVBL7w [perma.cc/YKL3-YP7B].

12. *Id.*

> agencies such as the Defense Intelligence Agency[—]also released as part of the FOIA lawsuit. . . ."[13]
>
> Details concerning noted athlete Pat Tillman's friendly fire death were disclosed as a result of a Freedom of Information Act request: "Army medical examiners were suspicious about the close proximity of the three bullet holes in Pat Tillman's forehead and tried without success to get authorities to investigate whether the former NFL player's death amounted to a crime, according to documents obtained by The Associated Press."[14] Initially, the official descriptions of Tillman's death were different: "The Pentagon and the Bush administration have been criticized in recent months for lying about the circumstances of Tillman's death. The military initially told the public and the Tillman family that he had been killed by enemy fire. Only weeks later did the Pentagon acknowledge he was gunned down by fellow Rangers."[15]

In addition to the perhaps more obvious use of FOIAs by the press, academics have used access laws to conduct critical scholarly research. For example, "[Luke] Nichter, a history professor with a specialization in Nixon-era politics, has filed about 1,000 Freedom of Information Act requests in the past 10 years, and that's 'low-balling' it, he said. Some of what he obtained was used in 'The Nixon Tapes,' a book he wrote with Douglas Brinkley."[16]

Recently, though, FOIAs have taken on a particularly special role in allowing the investigation of higher-education admissions programs in light of the contemporary legal tumult concerning race-based admissions, which have long been controversial.

### *B. Race-Based Admissions*

> [A]lthough affirmative action efforts can take many forms, including special outreach to underrepresented minorities and special programs designed to help minority students acclimate to college or overcome educational deficiencies, the affirmative action controversy in higher education focuses on only one practice[—]admitting minority applicants to selective colleges, universities and professional schools when their credentials, by which is meant prior grades and admissions test scores, are such

13. *Id.*

14. Martha Mendoza, *New Details on Tillman's Death*, WASH. POST (July 27, 2007), http://wapo.st/20ApEd0 [perma.cc/G2SN-X8XP].

15. *Id.*

16. Courtney Griffin, *Professor Uses Freedom of Information Act to Aid Research*, KILLEEN DAILY HERALD (Mar. 15, 2015), http://bit.ly/1EgWVN5 [perma.cc/2WTP-8AHD].

> that their likelihood of admission would be low, perhaps exceedingly so, if they were [W]hite. . . .
>
> [Post World War II] there developed a consensus that the fairest way to select students was on the basis of their prior academic performance and tests designed to predict future performance. This consensus was in part aimed at reducing discrimination and the advantages that those of high social status had in securing admission to Ivy League and other elite schools. Although this so-called meritocratic focus helped some groups like Jews, it offered little to [B]lacks and tended to harm a subset of the most educationally ambitious [B]lacks; who at an earlier time in small numbers, had been able to secure admission to elite schools [but now weren't so able]. . . . because [W]hite applicants with entering credentials stronger than any [B]lack applicants had increased so substantially in numbers that there were more than enough to fill an entering class.[17]

The recent Supreme Court cases of *Grutter v. Bollinger*[18] and *Gratz v. Bollinger*,[19] in which the University of Michigan's Law School and undergraduate admissions programs were respectively challenged, involved extensive briefing of the issue of affirmative action in academia. The cases provide a good review of the contemporary legal and philosophical literature on race-preference programs in higher education.

*Grutter* considered whether the use of race in admissions by the University of Michigan Law School violated the law. Michigan's law school considered applicant race as "one of many factors" relevant to the admissions program,[20] but the school asserted that race was not the principal consideration; rather it was part of a "holistic review."[21] The school maintained that its "minimal criterion is that no applicant should be admitted unless we expect that applicant to do well enough to graduate with no serious academic problems."[22] The law school sought to achieve a "critical mass" of minority students who were otherwise underrepresented, as a percentage of the school population.[23]

---

17. Richard Lempert, *Affirmative Action in the United States: A Brief Summary of the Law and Social Science* 6–7 (Univ. of Mich. Pub. Law & Legal Theory Research Paper No. 430, Dec. 2014), http://bit.ly/1QQoRlp [perma.cc/324V-VEQ5].

18. Grutter v. Bollinger, 539 U.S. 306 (2003).

19. Gratz v. Bollinger, 539 U.S. 244 (2003).

20. Brief for Respondent, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 402236, at *3.

21. *Id.* at *46.

22. *Id.* at *4.

23. Brief for Petitioner, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL

The law school and its allies asserted that: the unique perspective and experiences of minority students help all of their students;[24] attorneys who come from disadvantaged and underrepresented groups will later help those same groups more than other admittees;[25] students admitted under the race-based admissions will help teach their peers more than other admittees;[26] increased minority student representation will help extinguish socioeconomic and racial stereotypes;[27] the aforementioned benefits cannot be accomplished without a race-based classification system, and the classification is the least restrictive method available to achieve these goals.[28]

A brief by certain former military personnel continued that: diversity is necessary and vital to the health of the country;[29] preferential admissions policies in universities allow employers and recruiters greater choice;[30] and preferential admissions policies allow a greater matching of identifying factors between leaders and those that report thereto.[31] The former military personnel also argued that the ROTC program would be significantly damaged without race-based admissions.[32]

Some educators who support race-based admissions policies for law schools also argued the unreliability of standardized exams, such as the LSAT.[33] They highlighted that, on average, minority students score lower on the LSAT than non-minority students—contending that the differences in scores were not reflective of applicant potential.[34] Over a six-year period, the gap in the average LSAT scores between White students and African-American

---

164185, at *4.

24. Brief for Amicus Curiae National Association of Scholars Supporting Petitioners, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 144938, at *18.

25. *See* Brief of Amicus Curiae the School of Law of the University of North Carolina Supporting Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 359269, at *15–17.

26. *See* Brief for Hillary Browne et al. as Amici Curiae Supporting Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) 2003 WL 359254, at *4–7.

27. *Id.* at *13–15.

28. Amicus Brief, *supra* note 24, at *17.

29. Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae Supporting Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 1787554, at *9–10.

30. *Id.* at *29.

31. *See id.* at *15.

32. *Id.* at *29–30.

33. Brief of the Society of American Law Teachers as Amicus Curiae Supporting Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 399060, at *17–18.

34. *Id.* at *16–18.

students was 9.6 points, the gap between White students and Latino students was 7 points, and the gap between White students and Native-American students was 6.8 points.[35]

However, this variance exists across many standardized exams.[36] For example, in 1995, the ratio of White to African-American students who scored above 700 in the verbal section of the SAT was 49:1, and in math the ratio of those who scored above 750 was 89:1, when the ratio of Whites to African-Americans in the general population is roughly 6:1.[37] Proponents of affirmative action generally point to this as a basis for intervention, while opponents contend that the same evidence supports opposite conclusions.[38]

The disparity for undergraduate grade point averages and class rank between some minority groups and non-minorities is also large.[39] In 1995, out of the 734 students named by the College Board as Advanced Placement Scholars, only two were African-American; 506 were White.[40] Only 12% of African-American college-bound students were at the top of their class, compared to 23% of Whites and 28% of Asian-Americans.[41]

While some proponents of Michigan Law School's policy lauded the school as walking the fine line between impermissible quotas and "constitutionally permissible" racial classification discussed in the seminal affirmative action case, Regents of the University of California v. Bakke,[42] opponents—perhaps needless to say—propounded the contrary.[43] Opponents of the race-considering admissions program highlighted that: from the ninety-one minority applicants with a 3.0–3.24 undergraduate grade point average, thirty-seven were admitted;[44] only eighteen of the 205 White students were admitted with the same numbers;[45] fifteen minority applicants were admitted with LSAT scores of 148–153, while *no* White applicants scoring in that range were admitted.[46]

---

35. *Id.* at *16.
36. Brief of the Center of New Black Leadership as Amicus Curiae Supporting Petitioner, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 144864, at *9–10.
37. *Id.*
38. *See id.* at *16–17.
39. *Id.* at *10.
40. *Id.*
41. *Id.*
42. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311 (1978).
43. *See* Brief for the United States as Amicus Curiae Supporting Petitioner, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 176635, at *9.
44. Brief for Petitioner, *supra* note 23, at *7–9.
45. *See id.* at *7.
46. *See id.*

Out of the fourteen different factors that were statistically analyzed, the criterion that increased an applicant's chances to be admitted to Michigan's Law School the most was being an African-American.[47] As such, opponents to Michigan's policy asserted that this amounted to an impermissible quota system.[48]

Opponents of race-based admissions programs reject the notion that viewpoint diversity necessarily comes from racial diversity,[49] and they posit that this justification for racial diversity can never be a compelling state interest justifying racial categorization.[50] The opportunity for abuse,[51] racism,[52] unintended consequences,[53] and a government-defined viewpoint[54] are real possibilities, they say, that stem from this perspective. And many opponents to race-based admissions policies claim that diversity can be achieved by constitutionally permissible means without using race as a basis for admissions.[55] They highlight that Florida and Texas, for example, implemented programs that increased the numbers of minority students without using a race-based admissions policy.[56]

The Court ruled in favor of the Michigan law school—allowing the "holistic" affirmative action plan to continue.[57] The Court effectively held "that universities have a 'compelling interest' in pursuing 'diversity' if their racial preferences are 'narrowly tailored' to that end."[58] While schools cannot have quotas, they may seek a "critical mass" of minorities through other means.[59]

At the same time that it considered *Grutter*, the Supreme Court faced the companion case of *Gratz v. Bollinger*,[60] in which Michigan's undergraduate admissions program was also

47. *See id.* at *9–10.

48. Brief of the Center for Equal Opportunity et al. as Amici Curiae Supporting Petitioner, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 152365, at *11.

49. Brief for Law Professor Larry Alexander et al. as Amici Curiae Supporting Petitioner, Grutter v. Bollinger, 539 U.S. 306 (2013) (No. 02-241), 2003 WL 164181, at *11–12.

50. Amicus Brief, *supra* note 36, at *4.

51. *See id.* at *5–7.

52. Amicus Brief, *supra* note 49, at *13.

53. Brief for Reason Foundation as Amicus Curiae Supporting Petitioners, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 252513, at *11–20.

54. Amicus Brief, *supra* note 49, at *17–18.

55. Brief of the State of Florida and the Honorable John Ellis "Jeb" Bush, Governor as Amici Curiae Supporting Petitioners, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 182930, at *5.

56. *Id.* at *6–8.

57. SANDER & TAYLOR, *supra* note 1, at 208.

58. *Id.* at 209.

59. *Id.*

60. Gratz v. Bollinger, 539 U.S. 244 (2003).

challenged.[61] At the undergraduate level, the consideration of race was explicitly large and effectively calculated: the school gave more consideration to minority status than it did to a perfect SAT exam.[62] The Court, splitting the baby—some suggested—ruled against the school, holding that the Michigan undergraduate race-based admissions system too rigidly considered race, and therefore, was effectively a quota system.[63] As such, that program was unconstitutional under *Bakke*.[64] It was here that Justice O'Connor made her now somewhat-famous proclamation that affirmative action should end in twenty-five years.[65] That was twelve years ago.

One conclusion from the pair of Michigan cases is that the more ineffable a race-based admissions program is, the more likely it would be upheld. The signal from these conjoined cases was that transparency was not conducive to surviving a judicial challenge.

The next Supreme Court case on affirmative action, *Fisher v. University of Texas*,[66] punted on the issue. Justice Kagan recused because she had worked on the case as Solicitor General.[67] That left only three definite pro-affirmative-action votes. But Justice Kennedy remained, nonetheless, the swing vote, because if he sided with the liberals, a 4–4 vote on the substantive question of the continued constitutionality of affirmative action would default to the decision below permitting the race-based admissions program.[68] The decision however was, surprisingly, near unanimous but not substantive. Kennedy wrote the procedural opinion instructing the trial court to collect more information and make a decision providing less deference to the school in deciding how to administer its race-based admissions program.[69] The result was a 7–1 decision,[70] perhaps driven by competing strategic decisions within both camps of the Court.[71] Two conservative Justices, Scalia and

61. *Id.* at 249–50.

62. Brief for Petitioner, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516), 2003 WL 164186, at *25.

63. *See Gratz*, 539 U.S. at 272–76.

64. *Id.* at 275–76.

65. Grutter v. Bollinger, 539 U.S. 306, 310 (2003).

66. Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013).

67. *Id.* at 2414.

68. Garrett Epps, *Is Affirmative Action Finished?* THE ATLANTIC (Dec. 10, 2015), http://theatln.tc/1XZwoDu [perma.cc/R5MS-XMPW].

69. *Id.*

70. *Id.*

71. *See* Richard Lempert, *What to Make of Fisher v. Texas: An Interesting Punt on Affirmative Action?* THE BROOKINGS INSTITUTE (June 25, 2013), http://brook.gs/1S45M0Q [perma.cc/Y75N-6E4H].

Thomas, wrote concurrences eschewing affirmative action.[72] The arguably most liberal Justice, Ginsburg, dissented.[73]

Since the decision was essentially procedural, the parties again sought certiorari, and the Supreme Court granted the request.[74] As such, the Court will decide *Fisher* for a second time. Some believe that the Supreme Court is poised to alter the status quo and significantly restrict, or prohibit outright, the use of race in admissions programs in higher education and elsewhere. Of course, others disagree. Justice Kennedy undoubtedly will decide. He has generally disfavored racial preferences.[75]

## III. INITIAL STUDIES

Legal research on affirmative action is moving from philosophical debates to statistical analyses. Studies at two universities, and the events from a third, serve as a useful prelude to the analysis provided here of the UALR Law School.

### *A. University of California, Los Angeles School of Law (UCLA)*

Several researchers tried to analyze some of UCLA's affirmative action efforts that came about after California's enactment of Proposition 209—the state's ban on race-based affirmative action in public universities.[76] One was Tim Groseclose, who was a member of the faculty committee at UCLA overseeing the undergraduate admissions process.[77] Groseclose wanted to evaluate how well the school's admissions process was working.[78] After receiving some resistance from the school, Groseclose involved his colleague, UCLA law professor Richard Sander, in his efforts.[79] Groseclose, with Sander's help, asked to see *identity-redacted* admissions files.[80] The school refused, asserting that the federal student-privacy law, the Federal Educational Rights and Privacy Act (FERPA),[81]

72. *Fisher*, 133 S. Ct. at 2414.
73. *Id.*
74. Fisher v. Univ. of Tex. at Austin, 758 F.3d 633 (5th Cir. 2014) *cert. granted*, 135 S. Ct. 2888 (July 29, 2015) (No. 14–981).
75. Adam Liptak, *Supreme Court to Weigh Race in College Admissions*, N.Y. TIMES (June 29, 2015), http://nyti.ms/1VZacUD [perma.cc/3RUN-2PWQ].
76. Peter Berkowitz, *Affirmative Action and the Demotion of Truth*, REAL CLEAR POLITICS (June 24, 2014), http://bit.ly/1QkUVfh [perma.cc/23ER-42AK].
77. Larry Elder, *Foreword* to TIM GROSECLOSE, CHEATING: AN INSIDER'S REPORT ON THE USE OF RACE IN ADMISSIONS AT UCLA, at vii (2014).
78. Berkowitz, *supra* note 76.
79. *Id.*
80. Elder, *supra* note 77.
81. 20 U.S.C. § 1232(g) (2015); 34 C.F.R. § 99 (2016).

prevented such access to those *without an educational interest for non-de-identified records.*[82]

The school was wrong. First, Groseclose had an educational interest—an exception under FERPA. He was on the admissions committee.[83] Moreover, he agreed to take the records *without* identifiers of the students.[84] While the school initially refused Groseclose's request, it nonetheless gave the very same data to its chosen "independent researcher" (who was paid $100,000).[85] When faced with the potential for bad press and a FOIA lawsuit, the school reversed its decision to withhold the data and provided Groseclose and Sander the requested public information.[86]

Groseclose concludes that the school was not merely mistaken as to the law, but was in fact lying when it refused to turn over the public data.[87] Groseclose believes that the university did not want a faculty member skeptical of the use of race by the admissions committee to evaluate the process.[88] "In the pursuit of what they perceive to be racial justice, Groseclose argues, university administrators and professors cultivate duplicity and thwart the free exchange of ideas."[89] Groseclose resigned from the admissions committee after the school refused to turn over the data.[90]

Stanford scholar Peter Berkowitz says "Groseclose actually underestimates the problem."[91] For example, an admissions committee member at Boalt-Berkeley hinted that the admissions committee continues to practice racial preference after Proposition 209: "No one can know what's in my head."[92] Berkowitz continues:

> Administrators' and professors' demotion of truth in one area reverberates throughout campus life in others, warping the curriculum and stifling the spirit of inquiry. It sanctifies conformity to the party line, denigrates impartial scholarship and inhibits liberty of thought and discussion. It sustains speech codes

82. GROSECLOSE, *supra* note 3, at 14.
83. *Id.*
84. SANDER & TAYLOR, *supra* note 1, at 234.
85. GROSECLOSE, *supra* note 3, at 14-15.
86. *Id.* at 87-88. "After fending off university efforts to deny access on the canard that the data would compromise applicants' privacy—Groseclose and Sander had carefully explained in their original letter to UCLA how they would protect students' privacy—the two professors were ultimately given an unusually rich data set." Berkowitz, *supra* note 76.
87. GROSECLOSE, *supra* note 3, at 14.
88. SANDER & TAYLOR, *supra* note 1, at 165.
89. Berkowitz, *supra* note 76.
90. *Id.*
91. *Id.*
92. SANDER & TAYLOR, *supra* note 1, at 159.

> and permits the evisceration of due process in campus disciplinary procedures. It turns liberal education into illiberal education.[93]

After analyzing the UCLA admissions data, Groseclose concluded that the school's holistic admissions operated, in fact, as a racial-preference program—in violation of California's then-new prohibition thereon.[94] African-Americans were admitted with scores on average well below Hispanics, Asians, and Whites.[95] In fact, the biggest indictment of UCLA's system occurred when "Groseclose demonstrate[d] that [school-hired investigator, Professor] Mare's analysis [also] provides 'significant evidence of racial bias in UCLA admissions.' For example, Mare found that but for 'disparities'—a euphemism for racial preferences—in the admissions process, approximately one-third fewer African-Americans would have been admitted in 2008."[96] "Absent the adjusted disparities estimated in [Mare's] analysis [i.e. absent the apparent racial preferences given to African-Americans], 121 fewer Black applicants would have been admitted . . . ."[97] These conclusions support the claims by opponents of "holistic systems" that such programs are in reality a surreptitious means for admissions committees to violate explicit bans on affirmative action or hide from the unaware public the very large effect that race is credited in race-based admissions programs.[98]

Groseclose concluded that "UCLA broke the law in order to increase [B]lack student enrollment."[99] Had UCLA not had a race-based admissions program, he says, UCLA would have admitted 40% fewer African-Americans in the years under investigation.[100] Groseclose and others employ empirical analysis—rather than anecdotal evidence—to demonstrate that racial preferences across universities are strong, not just tie-breakers, and are often not helpful to students long-term.[101] Rather, Groseclose says that students "benefitting" from such programs are often put in sub-optimal learning environments due to the "mismatch" of skills to

93. Berkowitz, *supra* note 76.
94. SANDER & TAYLOR, *supra* note 1, at 166.
95. *Id.*
96. Berkowitz, *supra* note 76.
97. GROSECLOSE, *supra* note 3, at 2.
98. SANDER & TAYLOR, *supra* note 1, at 161.
99. Berkowitz, *supra* note 76.
100. *Id.*
101. *Id.*; SANDER & TAYLOR, *supra* note 1, at 6, 18-19, 166.

learning environment (discussed further below).[102]

Sander and his co-author Stuart Taylor, Jr., who wrote about the challenges in obtaining public admissions data from, inter alia, UCLA's School of Law, aptly posit that universities do not want to disclose public-admissions data and student outcomes largely because such a disclosure would highlight the magnitude of race-based preferences and the meager outcomes for many students admitted because of those preferences.[103]Their data were bleak: "[B]lack law graduates fail bar exams at four times the [W]hite rate."[104] Academic-support programs did not cause dramatic changes in bar passage rates.[105] "But [minorities] aren't told of their significant disadvantage when they enter, and so they're effectively being set up to fail."[106]

By 1997, half of UCLA School of Law's African-American students scored in the lowest 10% of their classes, while about half of the school's Hispanic students did only somewhat better—landing in the bottom 20%.[107] This should be of little surprise after examining these students' incoming academic profiles.[108] The aforementioned disparity translated quite predictably in first-time bar passage rates: African-Americans—50%; Hispanics—70%; Whites—90%.[109] Perhaps obviously, failing the bar is financially and emotionally taxing, and many who fail to pass the bar on their first try simply never pass.[110]

This phenomenon is in no way unique. At the University of Texas School of Law, less than 10% of White graduates failed the bar the first time. However, over 50% of African-American graduates failed on their first try, and half of those failed again on their second attempt.[111]

Sander and Taylor see the victims of large racial preferences—and they are typically large—as those receiving preferences and doing poorly as a result.[112] A "cascade effect" intensifies this

102. Berkowitz, *supra* note 76.
103. SANDER & TAYLOR, *supra* note 1, at 171.
104. *Id.* at 4.
105. *Id.* at 56.
106. *Id.* at 6.
107. *Id.* at 55.
108. *Id.*
109. *Id.*
110. *Id.* at 52.
111. *Id.* at 205.
112. *Id.* at 6, 18-19.

phenomenon as one moves down the tiers of law schools.[113] The lower ranked the school, the deeper it must generally go in cherry-picking applicants to fill its minority ranks—resulting in a greater disparity between minorities and non-minorities and a greater likelihood that the school admits some students not suited to attend any law school whatsoever.[114]

Sander points out that one study showed racial preferences only increase African-American admissions by about 14%—the remainder is reshuffling placement.[115] For this small group of African-Americans who never would have been admitted anywhere without race-based admissions (constituting one-seventh of the African-American students attending law schools), their prospects are grim.[116] Fewer than one-third of them ever become lawyers.[117]

Sander, Taylor, and other scholars see the admissions programs' biggest effect, however, in shifting the level/tier school to which the remaining 86% of African-American law students are admitted (and attend).[118] That is, they say that African-Americans are overwhelmingly likely to be admitted to a school above their academic abilities, and this fish-out-of-water environment harms the very students that the admissions programs are designed to help.[119] Sander employs the term "mismatch" to explain this phenomenon driving low minority outcomes.[120]

By admitting mismatched minority students to schools higher

---

113. *Id.* at 19.

114. *Id.* at 20. This phenomenon might be changing, though. Robert Steinbuch commented:

> [A]s top schools struggle to maintain the quality of their student body, these institutions inevitably drop minority admissions, due to the mismatched average academic profiles of minority cohorts resulting from the unique outcome-driven competition that I' ve described here before. While these high-level schools are strongly concerned about the quality of their admissions, lower-tiered schools generally are forced to focus more on survival. . . . Given the overall drop in applications but the greater relative availability of minority applications to lower-tiered schools caused by top schools eschewing these candidates, lower-level schools quite predictably have increased their admission of these now-available candidates. As I previously discussed in the context of the mismatch phenomenon, the result generally will be quite good for these students, as their profiles will better match their admitting schools. And for the schools that are admitting previously unavailable, well-matched students, they are increasing their likelihood of survival without altering their overall academic profile.

Robert Steinbuch, *Should Law Schools Merge, Dissolve, or Adapt?* NATIONAL JURIST (Mar. 12, 2015), http://bit.ly/1nG8cFI [perma.cc/4XYL-6W6G].

115. SANDER & TAYLOR, *supra* note 1, at 61.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 4.

than their academic profiles justify, say Sander *et al.*, these schools reduced the likelihood of minority graduate bar passage by almost one-third.[121] Although Sander provides compelling evidence, other researchers dispute the mismatch theory.[122]

Putting aside whether or not the fish-out-of-water analysis underlying the mismatch theory is the driving force, the outcomes of race-based admissions in law schools are what count. Leading opponent of the mismatch theory, Richard Lempert, wrote the following in seeking to prevent Richard Sander from obtaining data from the State Bar of California:

> I am a strong supporter of empirical work, and, in particular, a believer in work relevant to policy. Much of my own research has been of this sort. Moreover, I do not think social science research should be hampered or suppressed because some groups, even powerful pressure groups, believe the results of well-conducted research will be uncongenial to their preferred policy preferences. With respect to law school affirmative action, I believe sound empirical work can be a win-win proposition whatever it reveals. *No one gains when students admitted to law school through affirmative action fail to benefit from their education because they do not graduate and pass a bar.* If we can better understand why some students, including members of certain racial groups, have special difficulties in graduating law school and passing the bar, then we might be able to improve the situation, either by better advising students about paths that make sense for them to take or by changing how we admit, educate and test law students.[123]

Indeed, many students admitted to law school through affirmative action fail to benefit from their education because they are unable to graduate and pass a bar.[124] One study showed that over half of the African-American students in the "LSAC data never passed the bar exam and thus failed to become lawyers. By contrast, only 17% of the [W]hite students failed to become lawyers."[125] Sander, and others, conclude that African-American law students who opted to attend schools more in line with their academic abilities failed the bar less than half the time than those who chose to go to a school that Sander and others would characterize as

121. *Id.* at 62.

122. *See* Lempert, *supra* note 17, at 10, 21.

123. Letter from Richard Lempert, Professor, University of Michigan Law School, to Board of Governors, State Bar of California (Nov. 6, 2007) (emphasis added) (on file with author).

124. SANDER & TAYLOR, *supra* note 1, at 226-27.

125. GROSECLOSE, *supra* note 3, at 65.

mismatched.[126]

### *B. George Mason University School of Law (GMU)*

In 2000, George Mason University School of Law, a conservative school—which is unusual—submitted its re-accreditation material to the American Bar Association (ABA), the organization that accredits American law schools.[127] The ABA was dismayed by GMU's lack of diversity.[128] To be clear, the ABA was not concerned with the *efforts* at minority recruitment; it was fixated on the *outcomes*.[129] Re-accreditation was put off; the ABA wanted more minority students enrolled—period.[130]

GMU knew that admitting minority students with low indicators often doomed them to poorer outcomes,[131] but the school wasn't going to risk re-accreditation.[132] Therefore, GMU reinstated race-based admissions, which it had previously rejected.[133] In 2002, African-Americans garnered a six-fold admission bump.[134] GMU threw money at its remarkably few incoming African-American students: approximately 50% of all scholarships went to the 3% of African-Americans enrolled in 2002.[135] This was not enough for the ABA.[136]

The school felt constrained by the facts: "Students with LSAT scores below 150 are more than six times as likely to experience academic difficulty . . . more than thirteen times as likely to be dismissed for academic cause, and almost twice as likely to fail the bar exam on their first attempt."[137] The ABA itself requires that "a law school shall not admit applicants who do not appear capable of satisfactorily completing its educational program and being admitted to the bar."[138]

By the 2004–05 academic year at GMU, African-Americans had a fifteen-fold admissions advantage over similarly skilled Whites.[139]

126. SANDER & TAYLOR, *supra* note 1, at 86.
127. *Id.* at 221.
128. *Id.*
129. *Id.* at 223–24.
130. *Id.* at 224.
131. *Id.* at 225.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 226–27 (quoting pre-report to the ABA).
138. *Id.* at 227.
139. *Id.*

The school also gave even more money to minority candidates than it had previously.[140] In 2006, GMU received its coveted blessing from the ABA.[141]

Shortly thereafter, the U.S. Commission on Civil Rights recommended that the ABA abandon its accreditation condition on diversity.[142] The Commission stated that schools should be free to make their own decisions on whether to consider diversity in admissions.[143] The ABA has neither reconsidered nor changed its policy.[144]

### *C. Indiana University School of Law*

Using a dataset of 309 graduates from the Indiana University Robert H. McKinney School of Law who took the bar exam in one year (2012), Nicholas Georgakopoulos—a professor at the school—presents five regression models with bar passage as the dependent variable in each.[145] Unsurprisingly, Georgakopoulos says that the effect on bar passage is highest for law school GPA, with LSAT second.[146] A student with a law school GPA of 2.83 and a 139 LSAT has a less than 14% probability of first-time bar passage, while a student with that same 2.83 GPA and a 166 LSAT has over a 90% probability of first-time bar passage.[147]

The primacy of law school GPA reflects the fact that both law school exams and the bar examination are designed to emphasize certain skills that both law schools and state bars consider essential to good lawyering.[148] The LSAT measures "natural skill or reasoning," and law school GPA measures "learned legal reasoning and performance."[149]

---

140. *Id.*

141. Gail Heriot, *The ABA's 'Diversity' Diktat*, WALL ST. J. (Apr. 28, 2008), http://on.wsj.com/1VgxyVh [perma.cc/DD33-X6Q5].

142. SANDER & TAYLOR, *supra* note 1, at 232.

143. *Id.*

144. *Id.*

145. *See Generally* Nicholas Georgakopoulos, *Bar Passage: GPA and LSAT, Not Bar Reviews* (Indiana University Robert H. McKinney School of Law Research Paper No. 2013-30 Sept. 19, 2013), http://bit.ly/20Ar8aB [perma.cc/62MU-JRR7].

146. *Id.* at 16.

147. *See id.* This increase in percentage points resulting from increasing LSAT with a constant GPA is even greater than the one that results from increasing GPA with a constant LSAT. Thus, it may seem that LSAT score is just as dramatically predictive as GPA with regard to bar passage. However, Georgakopoulos's regression data indicates that LSAT has a noisier relation to bar passage than does law school GPA.

148. *See* Georgakopoulos, *supra* note 145, at 11.

149. *Id.*

Next, Georgakopoulos explores the "phenomenon that 1L[150] GPA is not statistically significant in explaining bar passage" in his sample, while overall law school GPA is.[151] He notes the difference between 1L class structures and upper-level class structures: students choose their upper-level classes, upper-level courses have smaller class sizes, and upper-level class grades include a greater variety of the types of courses available at law school.[152] Georgakopoulos notes that there is a high correlation (0.9) between 1L GPA and total law school GPA; students who tend to excel during their first year in terms of GPA tend to do the same during their second and third years.[153] The strength of this correlation further tends to militate against the cynical view that upper-level students' GPAs increase because they are taking easy courses or receiving inflated grades, because if that view were true, then 1L grades—which aren't "shopped for"—would not correlate so tightly with upper-level GPA.[154]

Georgakopoulos's regressions show that law school GPA is increased by both undergraduate GPA and LSAT.[155] Thus, low undergraduate GPAs and low LSAT scores reduce the probability of bar passage.[156] Approximately 12% of outcome variation is explained by each single-independent-variable model, and approximately 23% of outcome variation is explained by the combination-independent-variable model.[157] The standard error of the estimated GPA in each model is approximately 0.3.[158] This means that for a student whose undergraduate GPA and LSAT predict a GPA of 3.0, the model gives a 95% confidence interval for a law school GPA anywhere between 2.4 and 3.6.[159] A student with a 2.4 law school GPA will have less than a 10% chance of passing the bar; a student with a 3.6 law school GPA will have a greater than 99% chance of passing the bar.[160] The relation between law school GPA and both LSAT and undergraduate GPA is noisy.[161] Scatter plots of the outcomes show that first-time bar failures "tend to be

150. "1L" is a reference to first-year law students.
151. Georgakopoulos, *supra* note 145, at 15.
152. *Id.* at 12–13.
153. *Id.*
154. *Id.*
155. *Id.* at 13–18.
156. *Id.*
157. *Id.* at 14.
158. *See id.*
159. *Id.*
160. *Id.*
161. *See id.* at 13–18.

more frequent at the bottom," and the "bottom" indicates students who underperformed their law school GPA, considering their LSAT scores and/or undergraduate grades.[162]

For second-time bar examinees, however, there is no relationship between undergraduate GPA and law school GPA, or between LSAT and law school GPA.[163] To explain the absence of relation between undergraduate GPA, LSAT, and law school GPA for second-time bar examinees, Georgakopoulos looks to the fact that these graduates all failed the bar the first time: just as the probit regression showed that this population was less likely to pass the bar than their law school GPA would predict, they have a lower law school GPA than their LSAT scores and undergraduate GPAs predict.[164]

The benefits of bar preparation courses were not statistically significant.[165] It matters less which bar preparation course a student takes, and more how the student performed in law school, when it comes to predicting that student's bar passage.[166] Georgakopoulos explains this difference by noting that bar prep courses emphasize rote memorization—which is minimally helpful to bar passage—and law school GPA measures mastery of legal analysis, which maximizes bar passage.[167]

## IV. UNIVERSITY AT LITTLE ROCK (UALR) DATA

While co-author of this article, Steinbuch, was serving on both the Admissions Committee and the Readmissions Committee of UALR, William H. Bowen School of Law,[168] he became concerned with the school's admissions processes.[169] Although a former Dean of UALR had more recently suggested that the school did not practice affirmative action in its admissions decisions,[170] the limited

162. *Id.* at 16.
163. *Id.* at 17.
164. *Id.* at 13–18.
165. *Id.* at 19–21.
166. *Id.*
167. *Id.* at 21.
168. Steinbuch, *Looking Through the Class*, *supra* note 5 at 62.
169. *Id.*
170. Interim Dean of the University of Arkansas at Little Rock, William H. Bowen School of Law Paula Casey commented:

> We're looking for people we believe can succeed here . . . [r]ace is not necessarily a factor. We ask a question about race, but the answer is optional. We might not know an applicant's race. . . . We like to have a diverse student body, but I don't think we've had preferences based on race.

Doug Smith, *Affirmative Action on Arkansas Campuses May End*, ARKANSAS TIMES (Aug. 22, 2012), http://bit.ly/20AjWHW [perma.cc/3GPG-KWJT].

public data that Steinbuch possessed at the time indicated that UALR Law School had in fact been practicing significant race-based admissions and that this was often harming the students for whom the program was designed to help.[171]

Steinbuch understood that whatever reasons law schools have for admitting students with deficient skill sets, the schools are unlikely to internalize the costs of their risky admissions choices.[172] Indeed, the externalization of the costs is surreptitious. As Groseclose wrote:

> Yet while faculty and administrators grant racial preferences, they can't reveal that once the students are admitted. To do otherwise would hurt the self esteem of minority students and degrade the "campus climate." It also would harm the university's ability to recruit minority students. Recall, for instance, how the dean of the UCLA law school reprimanded Sander after he scheduled the forum on his mismatch research: "Having this issue come up now," he wrote, "is not helpful to our efforts to recruit students."[173]

The dean, no doubt, was correct: informing at-risk students of their increased likelihood of failure would assuredly result in some of the students rationally choosing to pursue more promising alternatives.

### *A. At-Risk Student Data From 2003–2007*

An attempt to analyze race-based admissions at UALR preceded this study. In an article published in the Harvard BlackLetter Law Journal, Professor Richard Peltz (now Peltz-Steele) recounted how a series of letters in 2006 between the President of a local African-American lawyers association, Eric Buchanan, and the then-Dean of the UALR Law School piqued his interest in the effect of admissions preferences at UALR, where he too was a tenured professor of law.[174] In a letter entitled "African-American Representation at [UALR]," Buchanan wrote, "I understand that over the past four years no more than four African[-]American males have graduated from [UALR]."[175] Later in the letter

171. Steinbuch, *Looking Through the Class*, *supra* note 5, at 89–90. *See* Richard J. Peltz, *From the Ivory Tower to the Glass House: Access to "De-Identified" Public University Admission Records to Study Affirmative Action*, 25 HARV. BLACKLETTER L.J. 181, 185, n.23 (2009).

172. Steinbuch, *Four Easy Pieces*, *supra* note 5, at 209.

173. GROSECLOSE, *supra* note 3, at 163.

174. Peltz, *supra* note 171.

175. Steinbuch, *Looking Through the Class*, *supra* note 5, at 87–88 (citing letter from Eric

Buchanan wrote, "[i]t is my understanding that nine full-time African-American students were admitted in 2005, of whom six are female and three are male. Only two of those [six] females advanced to the second year 2L status. Three were readmitted [through the Readmissions Committee process], but, [were] required to repeat the entire first year. One was flatly denied readmission."[176] So aware, Peltz-Steele made a request for data relating to race-correlated admissions standards; however, his request was denied.[177] UALR specifically referenced his lack of membership on the Admissions Committee as a basis for the denial.[178]

Steinbuch, in contrast, was a member of both the Admissions Committee and Readmissions Committee at the time. Steinbuch inquired more about how UALR admissions were decided after the school's administration notified the Readmissions Committee that it had compiled a chart of academic information on students whose first-semester GPAs fell short of the 2.0 good-standing mark during their first year of law school for the years 2003 through 2007 ("At-Risk List").[179] Steinbuch requested the name-redacted Law School Data Assembly Service (LSDAS) forms for each of these students—a seemingly modest request in his view.[180]

LSDAS forms provide normalized GPAs as well as LSAT scores.[181] This allows law school Admissions Committees to compare "apples to apples" notwithstanding that different undergraduate institutions use different GPA scales. The UALR administration denied Steinbuch's request for de-identified records of students who had struggled academically, claiming that the information was protected by the Family Educational Rights and Privacy Act (FERPA).[182] The administration was incorrect.[183]

FERPA places a contingency on federal funding: only schools with privacy policies for the release of students' academic records that maintain student privacy can receive federal funding.[184]

---

Spencer Buchanan, President, W. Harold Flowers Law Society, to Charles Goldner, Dean, University of Arkansas at Little Rock (Oct. 18, 2006).

176. *Id.*
177. Peltz, *supra* note 171, at n.35.
178. *Id.*
179. Steinbuch, *Looking Through the Class*, *supra* note 5, at 63.
180. *Id.*
181. *Id.* at 63, n.8.
182. *Id.* at 64–65.
183. *Id.* at 65–68.
184. Steinbuch, *Four Easy Pieces*, *supra* note 5, at 171 (citing 20 U.S.C. § 1232(g) (2006)).

According to regulations promulgated by the Department of Education, FERPA protects information "linked or linkable to a *specific student* that would allow a reasonable person in the school community . . . to identify the *student* with *reasonable certainty*."[185]

Even if a record contains information that meets the definition of personally identifying information, it can still be released if that information is redacted.[186] And "[b]y construction, practice, or, most often, express statutory mandate, nearly all state FOIAs provide that records containing information that is otherwise exempt from disclosure *must* be disclosed if state officials can, with reasonable effort, first segregate and redact exempt portions of the records."[187] This is the law in Arkansas.[188] The process of redacting personally identifying information from records before providing them pursuant to FOIA is called "de-identifying" the records.[189]

This requirement that personally identifiable information be removed before release of education records to the public is, perhaps obviously, a stricter standard than that for the release of education records to school officials, which merely requires a "legitimate educational interest" for full disclosure to the school official.[190] Though little litigation exists on the definition of "legitimate educational interest," the Kentucky Court of Appeals has defined it.[191] The plaintiff in *Medley* was a teacher who requested tapes of her teaching that the school recorded.[192] The school denied the request pursuant to FERPA, characterizing her request as one from a member of the public—thus, subjecting it to the requirement that personally identifiable information be redacted.[193] In reversing the trial court and the school's characterization of Medley as a member of the public, the Kentucky Court of Appeals reasoned that "Medley's request should be judged in light of her position as a teacher."[194] *Medley* placed the burden on

185. Steinbuch, *Looking Through the Class*, *supra* note 5, at 65. (citing 34 C.F.R. § 99.3 (2009)) (emphasis added).

186. *Id.* (citing Letter from LeRoy S. Rooker, Director, FPCO, to Matthew J. Pepper, Policy Analyst, Tenn. Dep't of Educ. (Nov. 18, 2004), http://1.usa.gov/1WF0RSQ [perma.cc/A5UV-AX2S]).

187. Peltz, *supra* note 171, at 189 (citing Open Government Guide: Access to Public Records and Meetings in Arkansas (John J. Watkins & Richard J. Peltz eds., 5th ed. 2006)) (emphasis added).

188. *See id.*

189. *Id.*

190. Steinbuch, *Looking Through the Class*, *supra* note 5, at 66.

191. *Id.* at 66 (citing Medley v. Bd. of Educ., 168 S.W.3d 398, 401 (Ky. Ct. App. 2004)).

192. *Id.*

193. *Id.*

194. *Id.* (citing Medley, 168 S.W.3d at 404).

the school to prove that the requesting teacher's interest was not legitimate.[195] *Medley* also rejected the school board's claim that the superintendent alone could determine whether a requestor had a legitimate educational interest: "[Determining whether a legitimate educational interest exists] is instead a matter of statutory interpretation, a task clearly within the province of this Court."[196]

In fact, the Department of Justice defines "legitimate educational interest" as a request for information by the requestor "to fulfill his or her professional responsibility."[197] UALR has defined the faculty's professional responsibility as "continuously assess[ing] student progress and alumni success through a variety of formal and informal activities."[198]

The administration, however, denied Steinbuch's request, conceding that though Steinbuch's review of students' non-redacted records as a member of the Admissions Committee did serve an "educational need," Steinbuch's desire to use the identity-redacted LSDAS data of students who had already been admitted "is not relevant" to that same educational need and was thus impermissible under FERPA.[199] As already discussed, when UALR previously denied Peltz-Steele's request for race-correlated admissions data, the stated reason for the denial was that he—unlike Steinbuch—was *not* serving on the Admissions Committee and, therefore, lacked a legitimate educational purpose for reviewing the admissions records.[200] But even if Steinbuch's request somehow fell outside of the "legitimate educational interest," Steinbuch's limited request for only the post-redaction records met the FERPA and FOIA standard for the release of de-identified records to the *public*.[201]

On September 1, 2010, the administration also stated that it would refer the issue arising from Steinbuch's request to its own counsel.[202] Steinbuch received a letter from University of Arkansas's

195. *Id.* at 67 (citing Medley, 168 S.W.3d at 405).

196. *Id.* at 67 (citing Medley, 168 S.W.3d at 405–06).

197. *Id.* at 72 (citing Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, *Sharing Information: A Guide to the Family Educational Rights and Privacy Act and Participation in Juvenile Justice Programs* 4 (1997), http://1.usa.gov/1TgLyQq [perma.cc/3TM7-DW3T]).

198. *Id.* at 72.

199. *Id.* at 68 (citing E-mail from A. Felecia Epps, Associate Dean for Academic Affairs, UALR Law School, to John DiPippa, Dean, UALR Law School, and Robert Steinbuch, Professor, UALR Law School (July 14, 2012)).

200. *Id.* at 88–89 (citing Peltz, *supra* note 171, at n.35).

201. *Id.* at 67.

202. *Id.* at 80 (citing E-mail from A. Felecia Epps, Associate Dean for Academic Affairs,

General Counsel's Office on November 8, 2010.[203] The letter did not address whether Steinbuch's request met the legitimate educational interest standard of FERPA, but only interpreted Steinbuch's rights under FOIA as a public citizen.[204] The letter stated that redaction of the students' names and institutions would not be enough to remove all possibility that some information in the records could identify an individual student, because "there is such a small pool of students at the school in certain ethnic and other subgroups."[205] The letter failed to recognize that because the LSDAS reports Steinbuch requested derived from students within five first-year classes—aggregated from the years 2003–2007—the pools of "ethnic and other subgroups" could never be so small as to ever identify a particular student.[206] The letter from the university's General Counsel's Office concluded that in order to comply with FERPA, the school could only release the information if "race, ethnicity, national origin and similar data" was also redacted,[207] which further suggested that UALR shrouded the information in order to protect an unspoken race-based admissions policy. The data that Steinbuch received was scrubbed of all race information.[208] Therefore, it was useless for evaluating race-based admissions.

### *B. All Student Data From 2005–2011*

The saga did not end there, however. In February 2012, the UALR Law School released a report prepared by a paid private vendor, Hanover Research, under a $15,000 contract, on factors correlating to Arkansas Bar passage rate for former students from the period 2005–2011.[209] The Hanover Report showed a statistically significant correlation between first-time bar passage, LSAT scores, and undergraduate and law school grades.[210] The Hanover Report also showed a large disparity between first-time bar passage rates of the two largest ethnic groups.

---

UALR Law School, to John DiPippa, Dean, UALR Law School, and Robert Steinbuch, Professor, UALR Law School (Sept. 1, 2010)).

203. *Id.* at 81 (citing Letter from Jeffrey Bell, Senior Associate General Counsel, UALR, to John DiPippa, Dean, UALR Law School (Nov. 5, 2010)).

204. *Id.*

205. *Id.*

206. *Id.* at 82, 86–87.

207. *Id.* at 81.

208. *See id.* at 78.

209. Steinbuch, *Four Easy Pieces*, *supra* note 5, at 184 (citing Hanover Research, HANOVER REPORT, BAR PASSAGE CORRELATION STUDY (Feb. 2012)).

210. *Id.*

When schools admit less able students, they predictably perform more poorly. "The reason is simple: Entering academic credentials matter. While some students will outperform their academic credentials, just as some students will underperform theirs, most students perform in the range that their entering credentials suggest. Anyone who claims differently is engaging in wishful thinking at students' expense."[211] Others disagree with this:

> Our narrow conceptions of merit ensure that admissions processes at the most selective law schools will continue to be "social engineering to preserve the elites." . . . Now, exclusion [of people of color] has taken on different forms, namely, a faithful reliance on a limited range of admissions factors that have been shown to severely diminish the prospects of applicants from underrepresented and disadvantaged groups. Looming largest, of course, is the LSAT. . . . The merit-based rationalizations used to preserve traditions of exclusion in legal education are becoming increasingly untenable.[212]

The data analysis in this article indicates that the academic metrics do matter and usually reflect academic potential. As schools at the top struggle to admit a sufficient number of academically-gifted minorities to meet their desired diversity outcomes,[213] lower-ranked schools feel an even greater differential between disparately qualified applicant cohorts due to the race-motivated cherry-picking.[214] "Moreover, contrary to popular belief, the gap in grades did not close as students continued through law school. Instead, by graduation, it became wider."[215]

In order to investigate whether lower admissions standards at UALR could explain this disparity in first-time bar passage, Steinbuch sought the data that UALR had already supplied its chosen and school-paid investigator, Hanover Research.[216] Reminiscent of Groseclose's experiences, UALR again refused Steinbuch's request, claiming that "the cohort of students is so small in some years that the individuals can be identified."[217]

---

211. Gail Heriot, *A "Dubious Expediency": How Race-Preferential Admissions Policies on Campus Hurt Minority Students*, HERITAGE FOUND. SPECIAL REP. 167 (Aug. 31, 2015), www.herit.ag/1LSn5Kx [perma.cc/CP3G-CUH2].

212. Aaron Taylor, *Questioning the Status Quo on Law School Diversity*, NAT'L JURIST (May 12, 2015), www.bit.ly/1NrUU4v [perma.cc/F763-DK4M].

213. Heriot, *supra* note 211, at 2.

214. *Id.*

215. *Id.* at 5.

216. Steinbuch, *Four Easy Pieces*, *supra* note 5, at 187.

217. *Id.* (citing E-mail from John DiPippa, Dean, UALR Law School, to Robert Steinbuch, Professor, UALR Law School (Feb. 17, 2012) (on file with author)).

Steinbuch revised his request to explicitly permit UALR to aggregate small cohorts, an option already available—indeed required—under law.[218] The university's General Counsel's Office responded that the data Steinbuch requested were exempt from disclosure *regardless* of whether redaction would make the data non-personally-identifiable.[219]

Steinbuch, a recognized expert on the Arkansas Freedom of Information Act,[220] found this interpretation inconsistent with Arkansas's FOIA, as revealed by the legislative history and judicial precedents that construe the Arkansas FOIA exemptions narrowly,[221] as well as the plain language of Arkansas FOIA exemptions that provide:[222]

> (f)(1) No request to inspect, copy, or obtain copies of public records shall be denied on the ground that information exempt from disclosure is commingled with nonexempt information.
> (2) Any reasonably segregable portion of a record shall be provided after deletion of the exempt information.[223]

At roughly the same time, Steinbuch's colleague, Professor Joshua Silverstein, made a separate request for certain admissions data, specifically: (1) undergraduate and law school transcripts for every student who began law school at UALR in the fall of 2006 and completed the first semester, with all information redacted except for the actual letter grades; and (2) the law school class roster grading forms for fall 2011 that contained only the aggregate incoming class GPA of the students in each course.[224]

In its responses to Silverstein and Steinbuch, the administration told both professors that their requests required approval by the Institutional Review Board (IRB).[225] Thereafter, the IRB notified

---

218. *Id.* (citing E-mail from Robert Steinbuch, Professor, UALR Law School, to John DiPippa, Dean, UALR Law School, and Jeffrey Bell, Senior Associate General Counsel, UALR (Feb. 20, 2012) (on file with author)).

219. *Id.* (citing E-mail from Jeffrey Bell, Senior Associate General Counsel, UALR, to Robert Steinbuch, Professor, UALR Law School (Feb. 22, 2012) (on file with author)).

220. John Lynch, *Law School's Records-Case Defense: Erred in 2013*, ARKANSAS ONLINE (Dec. 18, 2015), www.bit.ly/1ng1VjL [perma.cc/8WRB-T7X2].

221. Steinbuch, *Four Easy Pieces*, *supra* note 5, at 189 (citing Thomas v. Hall, 399 S.W.3d 387, 390 (Ark. 2012) (stating that the Arkansas Supreme Court "liberally interpret[s] the FOIA to accomplish its broad and laudable purpose that public business be performed in an open and public manner . . . [and] broadly construes the Act in favor of disclosure.")).

222. *Id.* at 188 (citing ARK. CODE ANN. § 25-19-105(b)(2) (2002), which exempts from Arkansas FOIA only records whose "disclosure is consistent with the provisions of [FERPA].").

223. *Id.* (citing ARK. CODE ANN. § 25-19-105(f)(1)-(2) (2002)).

224. *Id.* at 193.

225. *Id.* at 194 (citing E-mail from John DiPippa, Dean, UALR Law School, to Robert

both Silverstein and Steinbuch that no approval was needed.[226] This too is reminiscent of the experiences of other researchers investigating race-based admissions. For example, when Richard Sander and his colleagues sought to (and did) obtain data from the California Bar, a pro-affirmative action academic unsolicitedly wrote the California Bar and argued that Sander needed approval from UCLA's IRB.[227] But, the UCLA Human Subjects Committee indicated that Sander's evaluation of the California Bar data required no IRB review.[228]

The UALR administration also specifically *reminded* Silverstein that he would not receive any summer research funding for work he would undertake on his FOIA project, and *advised* him that his time and effort would be better spent researching other topics.[229]

### *C. Arkansas Attorney General Opinion*

The pre-litigation options might have been exhausted had Representative Nate Bell of Arkansas's District 20 not become interested in the matter. On June 8, 2012, he requested an opinion from then-Attorney General Dustin McDaniel, a Democrat, concerning whether UALR is required to produce the information that Professors Steinbuch and Silverstein requested.[230] Professors Silverstein and Steinbuch sent the Arkansas Attorney General's Office a letter, in which they reiterated, inter alia, that they were requesting only the anonymized set of LSAT, undergraduate GPA, law school GPA, race, gender, and age data that UALR provided to Hanover.[231] They emphasized that even if redaction of personally identifiable information was impossible, the "legitimate educational interest" exception to FERPA would apply to the request.[232]

This was a critical juncture in this process. As Groseclose describes about a similar experience:

---

Steinbuch, Professor, UALR Law School (Feb. 20, 2012) (on file with author)).

226. *Id.* at 194 (citing Mem. from Inst. Review Bd. Chair, Inst. Review Bd., to Robert Steinbuch, Professor, UALR Law School (Mar. 7, 2012) (on file with author)).

227. SANDER & TAYLOR, *supra* note 1, at 240.

228. *Id.* at 240–41.

229. Steinbuch, *Four Easy Pieces*, *supra* note 5, at 194 (citing E-mail from John DiPippa, Dean, UALR Law School, to Joshua Silverstein, Assoc. Professor, UALR Law School (May 14, 2012) (on file with author)).

230. Letter from Joshua Silverstein, Assoc. Professor, UALR Law School, and Robert Steinbuch, Professor, UALR Law School, to Dustin McDaniel, Ark. Att'y Gen. (July 16, 2012) (on file with author).

231. *Id.* at 2.

232. *Id.* at 3.

> Under the Public Records Act [FOIA], when a person asks for records from a . . . government agency, the law is clear: the agencies must hand over such records. However, in practice, the agencies often do not. If they refuse, the only recourse for the requestors is to file a lawsuit. However, most people do not know how to do that. And even if they do, most aren't willing to spend the effort to follow through with the lawsuit.
>
> As a consequence, some state agencies play the following game: If they think that the PRA requestor is willing to take them to court, then they hand over the documents. But if they don't, they politely (yet falsely) respond, "Sorry, we don't think the law requires us to give you those documents."
>
> . . . I believe that UCLA officials planned to play the latter game. Notwithstanding what the law said, I believe they had no desire to give us the data we requested. They would give us the data only if they could foresee that a court would force them to do that.[233]

In Arkansas, success in court would likely occur if the attorney general opined in favor of Silverstein and Steinbuch.

The role of attorneys general to FOIA compliance is complicated. Some states, like Illinois, actually allow citizens to make requests of the attorney general requiring the production of an official opinion.[234] Arkansas generally restricts this option to government officials.[235] Typically, the request comes from an agency head seeking to protect himself when he decides to produce documents. Rarely will an agency head seek attorney general input when the government refuses to produce documents because litigating against an attorney general's opinion is a difficult political, no less legal, position for a state agency. On occasion, as here, a request comes from a legislator concerned about the actions of the government agency in denying a FOIA request.

Even though an attorney general is not a wholly independent arbiter—as he represents state agencies—many view attorneys general as somewhat less partisan actors than the agency from which records are sought. Thus, an opinion from an attorney general in favor of a requestor is a powerful statement in favor of disclosure, and one rightly viewed as alluding to future success in court. A ruling in favor of the agency is obviously less illuminating.

After Representative Bell's request, an Associate General Counsel

---

233. GROSECLOSE, *supra* note 3, at 82–83.
234. Steinbuch, *Looking Through the Class*, *supra* note 5, at 85.
235. *See* Ark. Code Ann. § 25-16-706.

for the University of Arkansas wrote to the then-attorney general on behalf of UALR.[236] The school now claimed that (1) the information Steinbuch requested—that UALR had already provided to a private statistics company under a paid government contract—was prohibited from disclosure by FERPA, and thus wholly exempt from Arkansas FOIA;[237] (2) the documents Silverstein requested were not "public records" under Arkansas FOIA;[238] and (3) the combination of the data requested by Professors Silverstein and Steinbuch requested may enable linking the data to a particular student.[239]

On July 16, 2012, Silverstein and Steinbuch again wrote to Attorney General McDaniel and explained that the information requested by them did not violate FERPA.[240] The aggregation of seven years of data resulted in even the smallest racial cohort having nine members, which is far too large for a reasonable person to derive the personal identity of its members.[241] Further, even if there had been a racial cohort small enough to make a particular student identifiable with "reasonable certainty,"[242] the school was required to group the number of students in that too-small cohort with the number of students in the next-smallest cohort, in a process called "scrambling."[243] Scrambling would eliminate the potential of identifying a particular student from a very small cohort.[244]

Again, Groseclose faced the same claims. UCLA's blanket denial to him said:

> The University is not able to comply with your request as stated because, under the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. Section 1232 g), the information you have requested is "personally identifiable information" maintained in "educational records," and therefore is prohibited from non-consensual disclosure.[245]

Groseclose's sentiment mimicked Steinbuch's: "The sentence really didn't make sense, since Sander and [Groseclose] had asked that

236. Silverstein & Steinbuch, *supra* note 230, at 7.
237. *Id.* at 3.
238. *Id.*
239. *Id.* at 13.
240. *Id.* at 3.
241. *Id.* at 7.
242. *Id.* (citing 34 C.F.R. § 99.3 defining "Personally Identifiable Information").
243. *Id.*
244. *Id.*
245. GROSECLOSE, *supra* note 3, at 84.

names be deleted from the records."[246]

The Silverstein-Steinbuch letter also described, regarding Silverstein's request, that the university's General Counsel's claim, that thoroughly redacting the watermarks would be impossible, was incorrect.[247] And even if there existed some watermarks that would still be visible after redaction—unlike the examples that university's General Counsel actually provided—the school would be required to disclose all transcripts except for those that could not be properly redacted.[248]

Finally, the Silverstein-Steinbuch letter showed that combining the requested information would not make it any easier to identify any particular student.[249] Because Silverstein requested only grades, without any other information, there was no way to link the grades to any of the information that Steinbuch requested.[250] Silverstein requested undergraduate and law school transcripts for students entering in the fall of 2006.[251] The data that Steinbuch requested was regarding students who matriculated between 2000 and 2009.[252] Moreover, Silverstein's request expressed willingness to accept undergraduate transcripts of students who entered in 2010 or 2011.[253] So there was potential for no overlap whatsoever between the two requested data sets.[254]

When Groseclose faced the same hurdle with Sander, he remarked:

> UCLA was referring to what is sometimes called the problem of "publicly knowable" category variables. For instance, suppose UCLA gave us a dataset that contained things like an applicant's race and the quality of his or her high school. If so, then situations could arise where, say, in one year UCLA might have only one applicant who (i) is Native-American and (ii) attends a high school that was ranked in the sixth decile in California's Academic Performance Index (API). If so, and if we could somehow learn the name of that student from another data source, then from the UCLA dataset we'd know other things such as his grade point average, his family's income, and his parents' education level.

246. *Id.*
247. Silverstein & Steinbuch, *supra* note 230, at 7.
248. *Id.* at 2, 10.
249. *Id.*
250. *Id.* at 13–14.
251. *Id.*
252. *Id.* at 14.
253. *Id.*
254. *Id.*

> Sander suspected that UCLA would use the publicly-knowable problem as an excuse. That's why in our original letter he wrote five paragraphs noting how UCLA could steer around the problem. . . . UCLA officials, however, either did not read those paragraphs or decided to pretend they didn't exist.[255]

The attorney general opined in favor of Steinbuch and against Silverstein regarding their public-data requests.[256] As a result of the attorney general's opinion, the university gave Steinbuch his data—in hard copy only. The university indicated that it no longer maintained any of the electronic files that Steinbuch had specifically requested.[257] Silverstein eventually received orally the core of the information that he requested from the current dean, after a change in administration at the law school.

### *D. Data Analysis*

The data set that UALR provided was remarkably rich. It contained information on gender, ethnicity, undergraduate GPA (UGPA), LSAT score, and law school GPA for 899 law students who finished their studies at the University of Arkansas at Little Rock (UALR) between 2005 and 2011. And so started the statistical analysis.[258]

#### 1. Measures of Law School Success by Ethnicity Alone

White students constituted the vast majority of the sample (83.2%), as they do in the general population. Out of 748 eligible White students, 624 took the Arkansas Bar Exam and 498 of these passed (79.8% passage rate). Those who did not take the Arkansas Bar Exam took an out of state bar exam or none at all. Out of 84 eligible African-American students, 56 took the exam, and 33 passed the exam (58.9% passage rate).

A comparison of White students and African-American students, the two largest groups in the study, and the only two large enough to justify a separate statistical comparison—using a chi-square test of independence—indicates a statistically significant difference

255. GROSECLOSE, *supra* note 3, at 85–86.

256. 83 Op. Ark. Att'y Gen. (2012).

257. E-mail from Paula Casey, Interim Dean, UALR Law School, to Robert Steinbuch, Professor, UALR Law School (June 13, 2013) (on file with author).

258. All statistical analyses were performed in SAS 9.3. Statistical significance is evaluated throughout at the $\alpha = 0.05$ level of significance. The analysis of the data demonstrated no significant relationships between gender and success in law school at UALR.

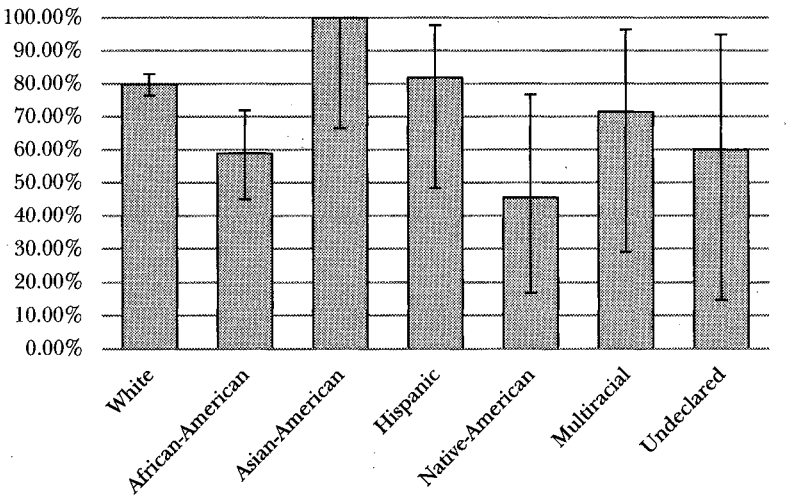
between these two groups in particular ($\chi^2(1) = 13.09$, $p = 0.0003$).

Table 1. Bar Exam-Takers and Passage Rates by Ethnicity

| Ethnicity | No. of Eligible Students | No. of Arkansas Bar Exam-Takers | No. Passed | Passage Rate |
|---|---|---|---|---|
| White | 748 | 624 | 498 | 79.8% |
| African-American | 84 | 56 | 33 | 58.9% |
| Asian-American | 18 | 9 | 9 | 100.0% |
| Hispanic | 15 | 11 | 9 | 81.8% |
| Native-American | 13 | 11 | 5 | 45.5% |
| Multiracial | 11 | 7 | 5 | 71.4% |
| Undeclared | 10 | 5 | 3 | 60.0% |
| Total | 899 | 723 | 562 | 77.7% |

Figure 1 below illustrates passage rates by ethnicity, including standard error bars. Standard error bars take into account both the natural variability in bar passage and the number of students included in the sample. The standard error bars indicate the precision of these passage rates as they might apply to the larger population of individuals similar to the students who actually attended UALR during the time of the study. For example, the bar passage rate for White individuals between 2005 and 2011 was 79.8%. If a similar group of White students made up of different specific individuals had attended, the passage rate would likely have been slightly different because of natural variability among individuals.

Figure 1. Bar Passage Rate by Ethnicity




* Figure includes standard error bars.

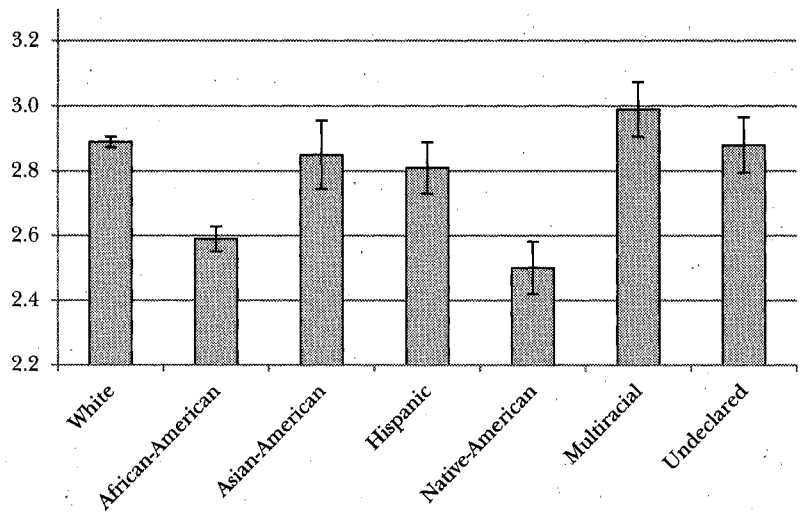
An intermediate measure of a student's success in law school is, of course, law school GPA. Table 2 below provides averages and standard deviations of law school GPAs by the ethnicities of the 873 students in the data set who have a law school GPA record.

For many ethnic groups, the number of students is much lower than the two largest groups (Whites and African-Americans). An analysis of variance (ANOVA) comparing the means of the groups to one another found statistically significant differences among the average law school GPAs of the different ethnic groups. The last column in Table 2 provides an indication of which groups had statistically significant differences; groups with the same letter in this column are not statistically different from one another.

Table 2. Average Law School GPA by Ethnicity

| Ethnicity | No. of Students | Mean | Standard Deviation | Mean[259] Comparisons | |
|---|---|---|---|---|---|
| Multiracial | 11 | 2.99 | 0.28 | A | B |
| White | 725 | 2.89 | 0.44 | A | |
| Undeclared | 10 | 2.88 | 0.27 | A | B |
| Asian-American | 18 | 2.85 | 0.45 | A | B |
| Hispanic | 15 | 2.81 | 0.31 | A | B |
| African-American | 82 | 2.59 | 0.35 | | B |
| Native-American | 12 | 2.50 | 0.28 | | B |

Figure 2. Average Law School GPA by Ethnicity




* Figure includes standard error bars.

259. Comparisons include a correction for multiple comparisons (Tukey adjustment).

Without taking cause into account, Figure 1 and Figure 2 highlight the disparity in bar passage rates and law school GPAs based on student ethnicity. As shown below, these correlations are driven by the underlying differences in the qualifications of the students admitted to UALR—*not* their race.

2. Detailed Examination of Measures of Law School Success

Certainly there are many factors that are related to success in law school. Among these are measures reflecting students' ability and preparedness to succeed in law school, such as undergraduate GPA and LSAT scores. Table 3 provides the general results of a logistic regression model predicting the probability of passing the bar exam based on undergraduate GPA, LSAT scores, law school GPA, ethnicity, and gender (based on the 705 students who had all relevant information recorded).

Logistic regression is appropriate for estimation of probabilities when the measure of interest for each individual has two outcomes. In this case, each individual either passes or fails the bar exam. According to Table 3, once LSAT score, undergraduate GPA, and law school GPA are accounted for, ethnicity—unsurprisingly—is a highly *insignificant* factor with respect to the probability of passing the bar exam ($\chi^2(6) = 3.09$, $p = 0.7979$).

Table 3. Logistic Regression Results for Probability of Passing Bar Exam

| Effect | DF | Wald Chi-Square | P-value |
|---|---|---|---|
| Law School GPA | 1 | 63.11 | <.0001 |
| LSAT Score | 1 | 7.94 | 0.0048 |
| Undergraduate GPA | 1 | 6.54 | 0.0106 |
| Gender | 1 | 1.70 | 0.1923 |
| Ethnicity | 6 | 3.09 | 0.7979 |

After a backward selection process, in which insignificant factors were removed from the model presented in Table 3 one at a time according to significance, the best model for probability of passing the bar exam is based on the factors presented in Table 4. The most significant factor with respect to probability of passing the bar

exam is law school GPA. Unsurprisingly, Sander and Taylor found the same result with their data.[260] For that data, "[i]f you were in the top third of the class, you had more than a 99 percent chance of passing the bar; if you were in the bottom tenth of the class, you had only a one-in-four chance of passing."[261]

Modeling bar passage with law school GPA alone in the current UALR data set gives different but also striking results: those in the top third of the class had at least a 90% chance of passing the bar, but those in the bottom tenth of the class had less than a 33% chance of passing. LSAT score is the next most significant predictor at UALR and elsewhere for all races;[262] undergraduate GPA, while still significant, is the least impactful of the three factors.

To put this in context, in a nationwide study, average LSAT scores explained 45% of the variability in bar passage rates across schools.[263] This provides sound evidence that average LSAT scores are related to passage rates across universities, and it is logical to assume that individual LSAT scores are similarly useful for predicting whether or not an individual will pass the bar. Indeed, the data here show it to be a significant predictor.

Undergraduate GPA—perhaps obviously—is a poorer predictor of bar passage than law school GPA, because law school measures a specific skill set relevant to the bar exam.[264] Also, "[s]tudents who consistently got As or even high Bs in their law school classes were developing a much more powerful and relevant skill set than those who got low Bs or Cs."[265] But, of course, LSAT scores and undergraduate GPA can be used to predict success during the admissions process, which law school GPA cannot.

260. SANDER & TAYLOR, *supra* note 1, at 52.
261. *Id.*
262. *See id.* at 218.
263. Mike Stetz, *Best Schools for Bar Exam Preparation*, THE NAT'L JURIST at 24–26 (Feb. 2015), http://bit.ly/1Dot3Bq [perma.cc/JP6V-WQX5].
264. *See* SANDER & TAYLOR, *supra* note 1, at 54.
265. *Id.*

Table 4. Logistic Regression Results for Probability of Passing Bar Exam, Best Model

| Effect | DF | Wald Chi-Square | P-value |
|---|---|---|---|
| Law School GPA | 1 | 66.05 | <0.0001 |
| LSAT Score | 1 | 9.31 | 0.0023 |
| Undergraduate GPA | 1 | 5.93 | 0.0149 |

Table 5 below provides additional information related to the strength of the factors provided in Table 4 above. Odds ratios indicate the change in the odds of passing the bar exam for each one-point increase in the measure in question. In this case, odds refer to the probability of passing the bar exam relative to the probability of not passing the bar exam. For example, for each one-point increase in LSAT scores, the odds of a student in the UALR sample passing the bar exam increased by a factor of 1.07. The 95% Wald confidence limits indicate that for a student in the population, we can be highly confident that the odds of passing the bar increase by a factor somewhere between 1.03 and 1.12 for each one-point increase in LSAT score.

Table 5. Odds Ratios for Passing Bar Exam

| | | 95% Wald Confidence | |
|---|---|---|---|
| Effect | Odds Ratio | Lower Limit | Upper Limit |
| Law School GPA | 13.41 | 7.17 | 25.07 |
| LSAT Score | 1.07 | 1.03 | 1.12 |
| Undergraduate GPA | 1.77 | 1.12 | 2.79 |

The equation relating each of these factors directly to the probability of passing the bar is:

> Probability of passing = 1/(1+exp(-(-18.0082 + 2.5957 LGPA + 0.0679 LSAT + 0.5681 UGPA).
>
> where LGPA = law school GPA, LSAT = LSAT score, and UGPA = undergraduate GPA.

To better understand the relationships of law school GPA, LSAT score, and undergraduate GPA to the probability of passing the bar exam, Figures 3 through 5 demonstrate each factor respectively, while holding the others at their average value (average law school GPA = 2.86, average LSAT score = 152.52, and average undergraduate GPA = 3.31). Of course, it should be noted that as law school GPA is significantly correlated with both undergraduate GPA (0.2435) and LSAT score (0.42320), the effects of each on bar passage are typically compounded. In each case, it is clear that those with extremely high scores relative to their peers have a much higher chance of passing the bar and vice-versa.

Figure 3. Relationship of Law School GPA to Bar Passage Rate

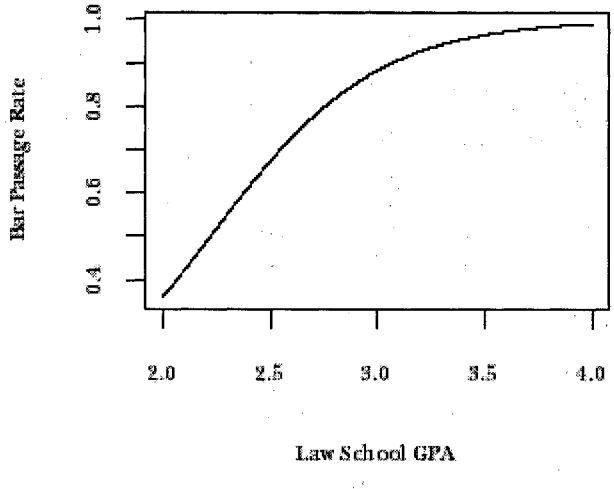


Figure 4. Relationship of LSAT Score to Bar Passage Rate

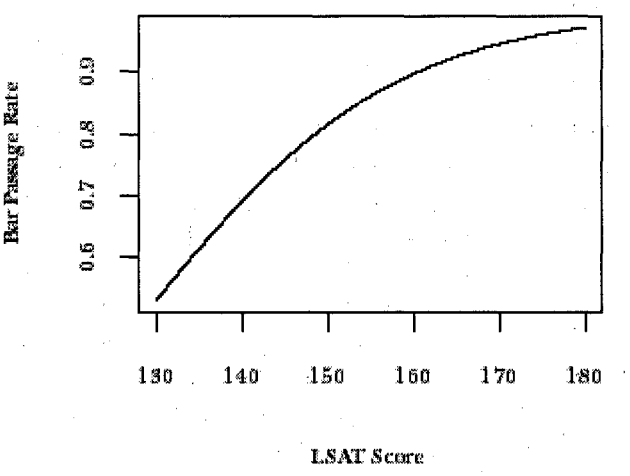
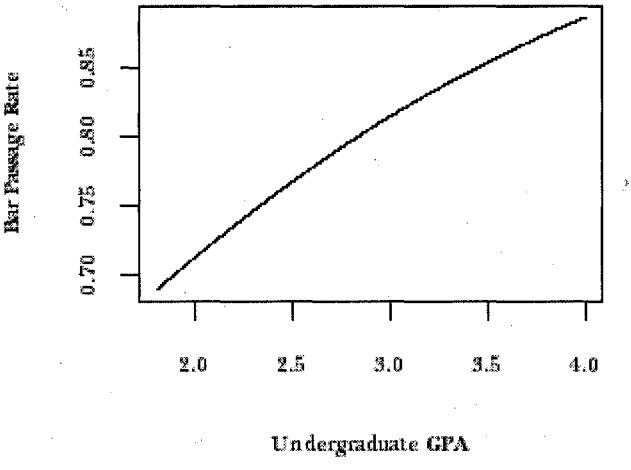



Figure 5. Relationship of Undergraduate GPA to Bar Passage Rate




Law school GPA is not only the most significant of the factors related to bar passage rate, but is itself a measure of success in law school. A general linear model can be used to assess the factors that are significantly related to law school GPA. This model is

appropriate for relating both continuous measures (such as undergraduate GPA and LSAT score) and categorical measures (such as ethnicity) to a continuous measure (such as law school GPA). Table 6 provides general results of a general linear model estimating law school GPA with undergraduate GPA, LSAT score, and ethnicity. Based on these results, ethnicity is not significantly related to law school GPA after LSAT score and undergraduate GPA are accounted for.

Table 6. General Linear Model Results for Law School GPA

| Source | DF | F-value | P-value |
|---|---|---|---|
| LSAT Score | 1 | 166.71 | <.0001 |
| Undergraduate GPA | 1 | 67.23 | <.0001 |
| Ethnicity | 6 | 1.63 | 0.1365 |

Applying a backward selection method once again, the best model for law school GPA is provided in Table 7. Only LSAT score and undergraduate GPA are significantly related to law school GPA. The $R^2$ of this model is 0.2384, indicating that 23.84% of the variability in law school GPA is related to LSAT score and undergraduate GPA.

Table 7. General Linear Model Results for Law School GPA

| Source | DF | F-value | P-value |
|---|---|---|---|
| LSAT Score | 1 | 204.54 | <.0001 |
| Undergraduate GPA | 1 | 67.69 | <.0001 |

The equation relating LSAT score and undergraduate GPA to law school GPA is:

Law School GPA = -3.0886 + 0.0338 LSAT + 0.2375 UGPA

where LSAT = LSAT score, and UGPA = undergraduate GPA.

To better understand the relationships of LSAT score and undergraduate GPA to law school GPA, Figures 6 and 7

demonstrate each factor respectively, while holding the other at its average value (average LSAT score = 152.52, and average undergraduate GPA = 3.31).

Figure 6. Relationship of LSAT Score to Law School GPA

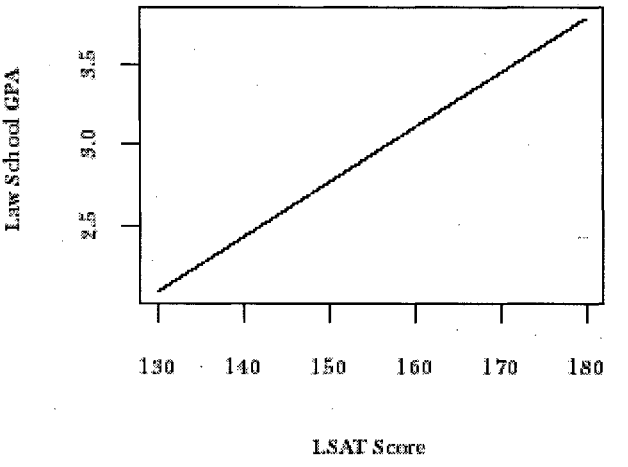
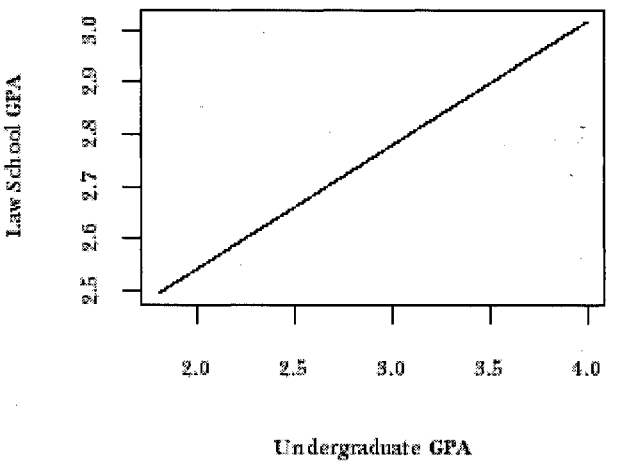



Figure 7. Relationship of Undergraduate GPA to Law School GPA



When factors related to preparation for law school success are accounted for, there is—unsurprisingly—no intrinsic relationship between ethnicity and law school success. This is consistent with results at other schools discussed above.[266] This suggests the appropriateness of an additional analysis relating ethnicity to those factors (LSAT score and undergraduate GPA).

### 3. Ethnicity and Law School Preparation

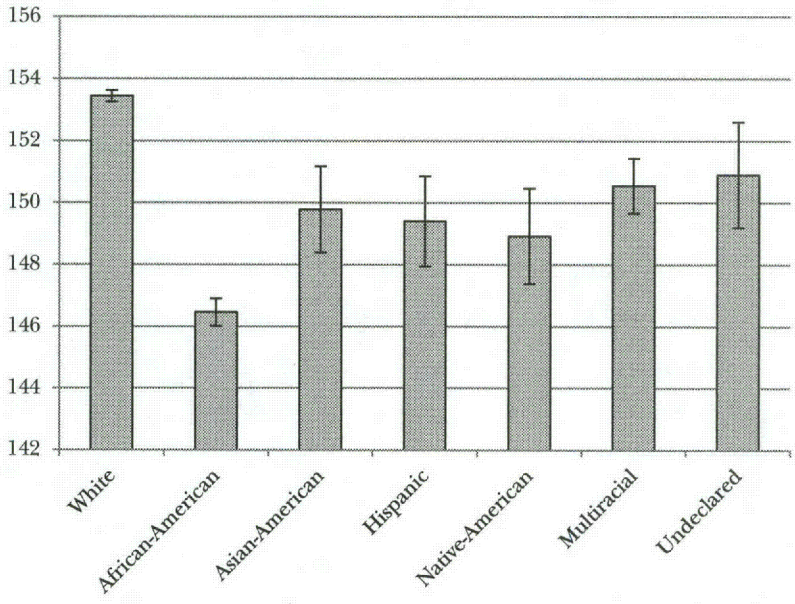
Table 8 provides means and standard deviations of LSAT scores by ethnicity from the UALR data set. The scores are ordered from highest (White, mean = 153.44) to lowest (African-American, mean = 146.46). An ANOVA comparing the means of the groups to one another found statistically significant differences among the average scores of the groups ($F(6, 892) = 27.62$, $p < 0.0001$). The last column in Table 8 provides an indication of which groups had statistically significant differences; groups with the same letter in this column are not different from one another. Given a pooled standard deviation estimate of 5.05 across all ethnicities, the African-American average (lowest) is approximately 1.4 standard deviations below the White average (highest). The $R^2$ associated with this analysis is 0.1567, indicating that 15.67% of the variability in average LSAT scores of analyzed students enrolled at UALR is associated with ethnicity. That is, the LSAT scores of students whom UALR admitted and enrolled varied significantly depending on the ethnicity of the students.

266. SANDER & TAYLOR, *supra* note 1, at 96.

Table 8. Average LSAT Score by Ethnicity

| Ethnicity | No. of Students | Mean | Standard Deviation | Mean Comparisons | |
|---|---|---|---|---|---|
| White | 748 | 153.44 | 5.13 | A | |
| Undeclared | 10 | 150.90 | 5.38 | A | B |
| Multiracial | 11 | 150.55 | 2.94 | A | B |
| Asian | 18 | 149.78 | 5.90 | | B |
| Hispanic | 15 | 149.40 | 5.63 | | B |
| Native-American | 13 | 148.92 | 5.54 | | B |
| African-American | 84 | 146.46 | 4.06 | | B |

Figure 8. Average LSAT Score by Ethnicity



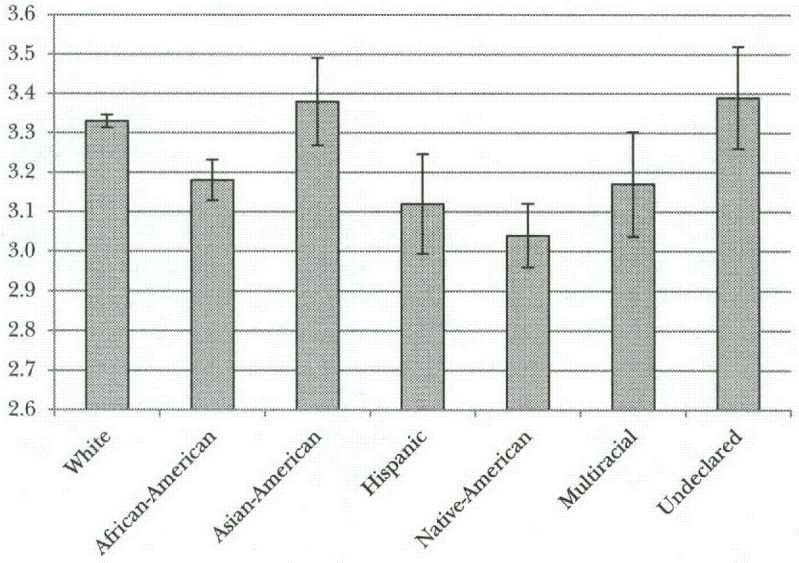

* Figure includes standard error bars.

Table 9 provides means and standard deviations of undergraduate GPAs by ethnicity. An ANOVA comparing the means of the groups to one another found statistically significant differences among the average scores of the groups ($F(6, 892) = 2.90$, $p = 0.0084$). After adjusting for multiple comparisons, none of the pairwise differences in the ethnicities are statistically significant; however, the difference that is the closest to being statistically significant is the one between White and African-American students (Tukey-adjusted $p = 0.0656$). The $R^2$ associated with this analysis is 0.0191, indicating that only 1.91% of the variability in average undergraduate GPAs of analyzed students enrolled at UALR is associated with ethnicity (virtually all of the differences in undergraduate GPA are unrelated to ethnicity). That is, UALR did not apply very different admissions standards based on undergraduate GPA—as it did for LSAT scores—depending on the race of the student. This analysis, however, does not account for any quality adjustment of undergraduate GPAs.

Table 9. Average Undergraduate GPA by Ethnicity

| Ethnicity | No. of Students | Mean | Standard Deviation |
|---|---|---|---|
| Undeclared | 10 | 3.39 | 0.41 |
| Asian-American | 18 | 3.38 | 0.47 |
| White | 748 | 3.33 | 0.45 |
| African-American | 84 | 3.18 | 0.47 |
| Multiracial | 11 | 3.17 | 0.44 |
| Hispanic | 15 | 3.12 | 0.49 |
| Native-American | 13 | 3.04 | 0.29 |

Figure 9. Average Undergraduate GPA by Ethnicity




* Figure includes standard error bars.

Thus, the differences in LSAT scores based on race are large and highly significant; the differences in undergraduate GPAs are less significant. LSAT scores below 150 are viewed by many as warnings that test takers lack the skills necessary to practice law. At least two studies, including one this year that examined LSAT scores from 2000 to 2011, have concluded that scores on the test, administered by the Law School Admission Council, closely track later bar passage rates.[267]

Kyle McEntee of Law School Transparency, a nonprofit watchdog organization, said his group's recent study showed that many schools were admitting students whose lack of legal aptitude made them vulnerable to failing the bar.[268] And, at the same time, they are incurring six-figure student debt that will weigh them down in the future.[269]

267. Elizabeth Olson, *Study Cites Lower Standards in Law School Admissions*, N.Y. TIMES (Oct. 26, 2015), http://nyti.ms/1WHMt2 [perma.cc/6YDA-EGMN].
268. *Id.*
269. *Id.*

Law School Transparency spent nine months reviewing incoming LSAT scores for law schools.[270] The report shows that law schools have been admitting students with lower LSAT scores since applications began to decline in 2011.[271] While the LSAT is designed to predict success in the first year of law school, McEntee said it is also a strong indicator for success on the bar exam.[272]

Law School Transparency considers scores between 150 and 152 a "modest risk."[273] Scores between 147 and 149 are "high risk."[274] Lower scores are "higher risk" and even lower ones are "extreme risk."[275]

At UALR, for the data set analyzed here, the bottom quartile LSAT score for students who graduated is 149. Thus, 25% of the graduating classes had LSAT scores deemed high risk. However, this bottom-quartile group did not have comparable proportions of ethnic cohorts. Over two-thirds of graduating African-American students were admitted with LSAT scores in the bottom quartile of the class. Similarly, almost half of the African-Americans obtained a law school GPA in the bottom quartile.

The bottom quartile for the LSAT is 149.

| LSAT: less than 149 |
| --- |
| White: 15.91% |
| African-American: 69.05% |

270. Mike Stetz, *Law Schools Admitting More At-Risk Students, Study Says*, NAT'L JURIST (Nov. 16, 2015), http://bit.ly/20l6x6A [perma.cc/3PVA-GHNM].

271. *Id.*

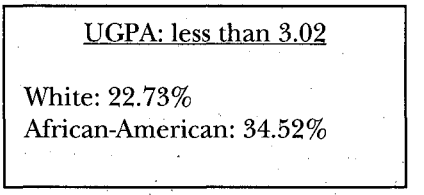
272. Olson, *supra* note 267.

273. Stetz, *supra* note 270.

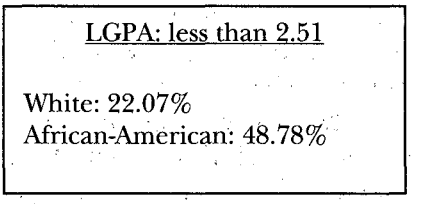
274. *Id.*

275. *Id.* Legal educators who have followed law school admission trends agree that the drop in LSAT scores is concerning. However, some, such as Derek Muller, a professor at Pepperdine University School of Law, question how much of an indicator the LSAT score is: LSAT is not the sole, or even best, predictor of bar pass rates or even first-year grades . . . It does a good job, but there are better measures — the index score, which combines LSAT and UGPA, is a better predictor of both; and first-year law school GPA is a much better predictor for bar pass rates. But with limited data disclosed from schools, LSAT is an important factor to consider.

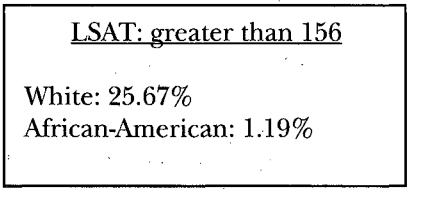
The bottom quartile for undergraduate GPA is 3.02.

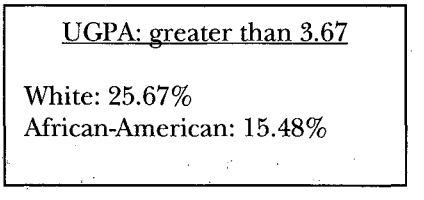


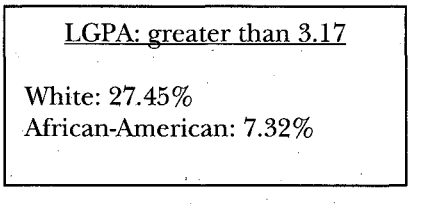

The bottom quartile for law school GPA is 2.51.




The data show a similar starkness for the top quartile for each metric.



The data analysis confirms three hypotheses about the population studied:

> 1. Ethnicity was significantly related to success in UALR's law school, as measured by probability of passing the bar exam and law school GPA.
>
> 2. When factors related to preparation for law school, such as LSAT score and undergraduate GPA are accounted for, there was no longer a relationship of ethnicity to success in law school as measured by probability of passing the bar exam and law school GPA.
>
> 3. Thus, the metrics related to preparation for law school—LSAT score and undergraduate GPA—for students admitted and enrolled by UALR's law school were significantly related to ethnicity, specifically for Whites and African-Americans.

When viewed together, these results demonstrate that African-Americans performed significantly worse in law school and on the bar exam than Whites at UALR as a consequence of being admitted with significantly lower objective metrics. While there is nothing intrinsic to ethnic identity that determines success in law school, measures related to preparation for law school were significantly different between these ethnic groups at UALR in the studied population—and these factors are strong predictors of success.

### 4. What to Make of the Results

Richard Lempert—ardent proponent of race-based admissions—describes his experience with affirmative action and his test for success:

> My impression of the law school's first few cohorts of affirmative action admittees was that we had to admit two [B]lack students to produce one competent graduate, and it was the students who did not succeed and not the school that paid the price. This experience[] quickly disabused the faculty of the romantic notion that their superior teaching or identifiable student characteristics not captured in academic indicators could make up for the academic deficiencies of some of those whom the school accepted. . .
>
> But as schools refined their affirmative action admissions procedures and set floors on the academic qualifications of those whom they would admit, far fewer minority students struggled just to maintain passing grades, although as a group affirmative action admittees still tended to cluster in the bottom ranks of

> their classes, as would be expected from their admissions credentials relative to those of their [W]hite classmates. . .
>
> So the real issue is not how well affirmative action minorities do gradewise relative to their [W]hite counterparts, but whether academic weaknesses keep them from graduating, and if they do graduate, from succeeding as they continue their education or enter the job market.[276]

At UALR's law school, academic weaknesses kept a disproportionate percentage of some minorities from succeeding in passing the bar—the entrance exam to the legal-practice. (Graduation rates were not measured.) Employing Lempert's test, UALR's efforts do not pass.

### *E. 2013 UALR Data*

#### 1. Institutional Review Board (IRB) Déjà Vu

Well after receiving the longitudinal data discussed above, the administration collected some data on the 2013 bar results, which Steinbuch asked for at that point. To its credit, the administration did not, then, claim that Steinbuch was not entitled to any of the data. This complied with the FOIA. Receipt of the information, however, was not wholly unremarkable. First, Steinbuch received an e-mail from the Dean of the Law School stating, in relevant part:

> After our exchange of emails, I developed a concern about whether I needed to have evidence that you have obtained IRB approval to give you the data. Yesterday afternoon, I spoke with . . . [the] Research Compliance Officer for UALR's IRB, and she told me that I could give you the information now, but that you would need IRB approval to publish something about the data. I thought you would like to know the UALR IRB's position. . . . Regardless of what the UALR IRB asks of you, I would also like to request, out of respect to the students whose data you possess, that, if you do publish something about the data, you follow the standard practice of referring to Bowen without identifying it by name, such as "a law school affiliated with a medium-sized Southern university."[277]

Steinbuch responded as follows:

> I appreciate your request that I conceal the source of the data. I

276. Lempert, *supra* note 17, at 10, 21.

277. E-mail from Michael Hunter Schwartz, Dean, UALR Law School, to Robert Steinbuch, Professor, UALR Law School (Nov. 14, 2013) (on file with author).

> see that you refer to this as "standard practice." Respectfully, however, concealing the source of data is not "standard practice" in empirical research. I've attached, merely as an example, an article on bar passage rates by a noted Indiana professor, who writes therein: "The dataset consists of the graduates of the Indiana University Robert H. McKinney School of Law, Indianapolis, who took the Indiana bar examinations in the two sittings in 2012."[278]

And Steinbuch received the following message from the IRB after submitting the information thereto:

> Please see the attached official memo from the IRB regarding your protocol submission. *Once again, the finding was NHSR (Not Human Subject Research).* The Board thanks you for your prudence and diligence in submitting this, and reminds you that once you've received an NHSR determination on a particular study, you are not required to submit that same study again. The IRB's finding of NHSR is permanent UNLESS you change something in your study that could impact their decision. In that case, it is good to call and check with me first.
>
> *Therefore, this NHSR finding means this project as submitted does not fall under the jurisdiction of the IRB because it does not meet federal criteria for the definition of research. And if it's not research, the IRB has no say.* You can repeat this study over and again exactly as you submitted it without having to come back to the IRB.[279]

This is reminiscent of prior experiences with regard to investigating race-based admissions. As discussed above, Silverstein and Steinbuch were incorrectly told that their prior requests required approval by the Institutional Review Board (IRB).[280] And when Richard Sander and his colleagues sought to (and did) obtain data from the California Bar, a pro-affirmative-action academic argued that Sander needed approval from UCLA's IRB.[281]

The 2013 data consist of 139 individuals: 127 total students took the Arkansas Bar Exam (12 did not), and of those, 89 or 70.1% passed the bar exam. Table 10 provides details according to

278. E-mail from Robert Steinbuch, Professor, UALR Law School, to Michael Hunter Schwartz, Dean, UALR Law School (Nov. 14, 2013) (on file with author).

279. E-mail from Rhiannon Gschwend, Research Compliance Officer, Inst. Review Bd., to Robert Steinbuch, Professor, UALR Law School (Dec. 12, 2013) (on file with author) (emphasis added).

280. Steinbuch, *Four Easy Pieces*, *supra* note 5, at 194 (citing E-mail from John DiPippa, Dean, UALR Law School, to Robert Steinbuch, Professor, UALR Law School (Feb. 20, 2012)); *Id.* (citing Memorandum from Elisabeth Sherwin, Inst. Review Bd. Chair, Inst. Review Bd., to Robert Steinbuch, Professor, UALR Law School) (Mar. 7, 2012)).

281. SANDER & TAYLOR, *supra* note 1, at 240–41 (letter on file with author).

ethnicity. The number of exam-takers in all groups except for White and African-American is too small to include in an analysis; even the African-American numbers are rather low for a very detailed analysis. A Fisher's exact test of independence was conducted between White and African-American exam-takers, and no significant difference was found in bar passage in this data set ($p = 0.3101$).

Table 10. Bar Exam-Takers and Passage Rates by Ethnicity, 2013

| Ethnicity | No. of Eligible Students | No. of Arkansas Bar Exam-Takers | No. Passed | Passage Rate |
|---|---|---|---|---|
| White | 106 | 99 | 70 | 70.7% |
| African-American | 12 | 11 | 6 | 54.5% |
| Asian-American | 4 | 3 | 3 | 100.0% |
| Hispanic | 9 | 6 | 3 | 50.0% |
| Native-American | 4 | 4 | 3 | 75.0% |
| Multiracial | 0 | - | - | - |
| Undeclared | 4 | 4 | 4 | 100.0% |
| Total | 139 | 127 | 89 | 70.1% |

In terms of comparing the two data sets, the percentage of Whites is lower in the 2013 data (76.26% vs. 83.20%), which is just barely statistically significant according to a chi-square test of independence ($\chi^2(1) = 3.98$, $p = 0.0460$). The percentage of White graduates taking the bar exam is also lower, as a consequence of this lower eligibility (77.95% vs. 86.31%; $\chi^2(1) = 5.93$, $p = 0.0149$). The percentage of African-American graduates taking the bar exam has not significantly changed (8.66% vs. 7.75%; $\chi^2(1) = 0.13$, $p = 0.7239$). The ratio of African-American to White has also not

changed significantly between the two data sets ($\chi^2(1) = 0.00$, $p = 0.9803$), remaining near 0.112 in both data sets. For all individuals, the overall passage rate has decreased from the earlier data set to the 2013 data set, dropping from 77.3% to 70.1%, which is not quite a statistically significant decrease ($\chi^2(1) = 3.53$, $p = 0.0603$). However, among White students alone, the bar passage rate dropped from 79.81% to 70.71%, which is a statistically significant decrease ($\chi^2(1) = 4.20$, $p = 0.0404$). The pass rate of African-Americans decreased slightly from 58.93% to 54.55%; however, given the small number of African-American individuals in the 2013 data set, this is not statistically significant according to a Fisher exact test ($p = 1.0000$).

The following sections will compare the 2013 outcomes to the larger data set. Because the number of non-White and non-African-American individuals in this data set is so small, we will only make this comparison for White and African-American individuals.

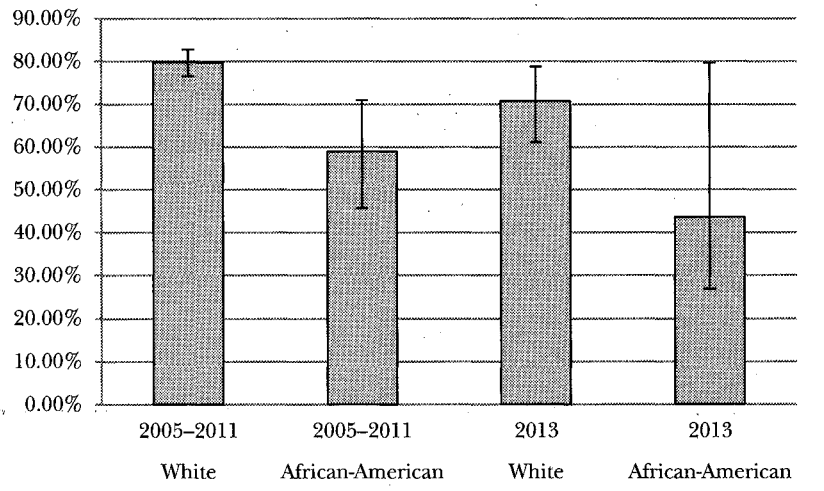
### 2. Measures of Law School Success by Ethnicity Alone

First, bar passage rates are compared between the earlier data set and the 2013 data set. The results of a logistic regression including the effect of ethnicity, the data set, and an interaction between the two are shown in Table 11. While ethnicity is shown to remain statistically significant across the two data sets ($\chi^2(1) = 5.87$, $p = 0.0154$), there is no interaction between ethnicity and data set ($\chi^2(1) = 0.20$, $p = 0.6563$). This implies that the difference in bar passage rates between White graduates and African-American graduates has remained the same.

Table 11. Logistic Regression by Ethnicity and Data Set

| Effect | DF | Wald Chi-Square | P-value |
|---|---|---|---|
| Ethnicity | 1 | 5.87 | 0.0154 |
| Data Set | 1 | 0.90 | 0.3417 |
| Ethnicity*Data Set | 1 | 0.20 | 0.6563 |

Figure 10. Bar Passage Rate by Ethnicity and Dataset




* Figure includes standard error bars.

Regarding law school GPA, a similar analysis with results in Table 12 indicates that there is also no change in the difference between average GPAs of White and African-American students across the two data sets. But it is clear that overall GPAs have changed from the previous data set to the 2013 data set.

Table 12. Results of Linear Regression Comparing Law School GPA by Ethnicity and Data Set

| Source | DF | F-value | P-value |
|---|---|---|---|
| Ethnicity | 1 | 21.68 | <.0001 |
| Data Set | 1 | 36.58 | <.0001 |
| Ethnicity*Data Set | 1 | 0.13 | 0.7173 |

Table 13 provides details comparing the average law school GPAs across the two data sets and ethnicities. Note that while in each data set the gap between White and African-American GPAs has remained similar, law school GPAs increased in the 2013 data set, leading the scores of the African-American students in 2013 to be

statistically similar to the scores of the White students from the earlier data set. The law school began mandatory mean grading in the fall of 2011.

Table 13. Average Law School GPA by Ethnicity and Data Set

| Ethnicity | No. of Students | Mean | Standard Deviation | Mean Comparisons |
|---|---|---|---|---|
| African-American, 2005–2011 | 84 | 2.59 | 0.35 | A |
| White, 2005–2011 | 748 | 2.89 | 0.44 | B |
| African-American, 2013 | 12 | 2.99 | 0.61 | B |
| White, 2013 | 106 | 3.35 | 0.44 | C |

### 3. Complex Examination of Measures of Law School Success Across Data Sets

Here we again examine the relationship of multiple factors, including ethnicity, undergraduate GPA, LSAT score, and law school GPA to bar passage. We include interactions of each of these factors with the data set here, in order to determine whether these relationships have changed between the older data set and the 2013 data set. Table 14 shows the results of a full logistic regression model including all of these factors.

Table 14. Logistic Regression Results for Probability of Passing Bar Exam, Two Data Sets

| Effect | DF | Wald Chi-Square | P-value |
|---|---|---|---|
| Law School GPA | 1 | 22.46 | <.0001 |
| LSAT Score | 1 | 7.99 | 0.0047 |
| Undergraduate GPA | 1 | 24.48 | <.0001 |
| Gender | 1 | 0.82 | 0:3657 |
| Ethnicity | 1 | 5.13 | 0.0235 |
| Data Set | 1 | 3.78 | 0.0518 |
| Law School GPA*Data Set | 1 | 3.31 | 0.0688 |
| LSAT Score*Data Set | 1 | 1.23 | 0.2679 |
| Undergraduate GPA*Data Set | 1 | 16.49 | <.0001 |
| Gender*Data Set | 1 | 0.03 | 0.8530 |
| Ethnicity*Data Set | 1 | 4.38 | 0.0363 |

As before, a backward selection is performed to eliminate insignificant factors and stabilize results for the factors that are significant. Table 15 shows the same model after statistically insignificant factors are removed.

Table 15. Logistic Regression Results for Probability of Passing Bar Exam, Two Data Sets, Best Model

| Effect | DF | Wald Chi-Square | P-value |
|---|---|---|---|
| Law School GPA | 1 | 20.36 | <.0001 |
| LSAT Score | 1 | 9.06 | 0.0026 |
| Undergraduate GPA | 1 | 23.90 | <.0001 |
| Data Set | 1 | 5.50 | 0.0190 |
| Law School GPA*Data Set | 1 | 7.17 | 0.0074 |
| Undergraduate GPA*Data Set | 1 | 15.58 | <.0001 |

According to this final model, there are still no effects by ethnicity once other significant factors are accounted for (ethnicity is not significant overall, nor has the relationship of ethnicity to bar passage changed over the two data sets). As when looking at only the older data set, law school GPA, LSAT score, and undergraduate GPA are all significant predictors of passing the bar. Note that here, data set is significant, indicating that there have been changes in the bar passage rate across the two data sets ($\chi^2(1) = 5.87$, $p = 0.0190$), even after accounting for other factors. Additionally, there are interactions of data set with law school GPA ($\chi^2(1) = 7.17$, $p = 0.0074$) and undergraduate GPA ($\chi^2(1) = 15.58$, $p < 0.0001$), indicating that the relationship of these two measures to the probability of bar passage is different from the older data set to the 2013 data set.

Table 16 provides odds ratios for each of these effects, which help to better understand the reason for these results. According to Table 16, the odds of passing the bar between 2005 and 2011 increased 13.67 times for each additional law school GPA point. This was reduced to just 1.93 times for each additional GPA point in 2013. In other words, the law school GPA's relationship to bar passage diminished in 2013. This may be related to the effect of the mandatory mean that was adopted between these periods, which led to grade compression. On the other hand, the effect of undergraduate GPA was the opposite. Between 2005 and 2011, the odds of passing the bar increased by 1.69 times for each additional undergraduate GPA point. In 2013, the odds of passing the bar increased 150 times for each additional undergraduate GPA point.

Table 16. Odds Ratios for Passing Bar Exam

| Effect | Odds Ratio | 95% Wald Confidence Lower Limit | 95% Wald Confidence Upper Limit |
|---|---|---|---|
| Law School GPA, 2005–2011 | 13.67 | 7.22 | 25.87 |
| LSAT (both data sets) | 1.07 | 1.02 | 1.11 |
| Undergraduate GPA, 2005–2011 | 1.69 | 1.05 | 2.71 |
| Data Set | 0.00 | 0.00 | 0.24 |
| Law School GPA, 2013 | 1.93 | 1.02 | 1.11 |
| Undergraduate GPA, 2013 | 150.55 | 17.11 | 1324.65 |

Next, undergraduate GPA, LSAT scores, ethnicity, and gender, are examined for their relationship to law school GPA across the two data sets. Table 17 provides the results of a full general linear model.

Table 17. General Linear Model Results for Law School GPA, Two Data Sets

| Source | DF | F-value | P-value |
|---|---|---|---|
| LSAT Score | 1 | 7.04 | 0.0081 |
| Undergraduate GPA | 1 | 41.23 | <.0001 |
| Gender | 1 | 1.29 | 0.2570 |
| Ethnicity | 1 | 4.23 | 0.0400 |
| Data Set | 1 | 35.83 | <.0001 |
| LSAT Score*Data Set | 1 | 36.31 | <.0001 |
| Undergraduate GPA*Data Set | 1 | 4.28 | 0.0389 |
| Gender*Data Set | 1 | 4.98 | 0.0259 |
| Ethnicity*Data Set | 1 | 3.10 | 0.0785 |

Applying backward selection to remove non-significant factors leads to the model presented in Table 18. Of note is that ethnicity is not statistically significantly related to law school GPA once other factors are accounted for. This is true in both data sets; there is no interaction between ethnicity and the data set. However, LSAT score interacts with data set, as does undergraduate GPA and gender.

Table 18. General Linear Model Results for Law School GPA, Two Data Sets, Best Model

| Source | DF | F-value | P-value |
|---|---|---|---|
| LSAT Score | 1 | 10.50 | 0.0012 |
| Undergraduate GPA | 1 | 50.68 | <.0001 |
| Gender | 1 | 0.97 | 0.3243 |
| Data Set | 1 | 33.20 | <.0001 |
| LSAT Score*Data Set | 1 | 33.98 | <.0001 |
| Undergraduate GPA*Data Set | 1 | 6.81 | 0.0092 |
| Data Set*Gender | 1 | 4.51 | 0.0339 |

The equation relating each of these terms to law school GPA is:

> Law School GPA = -3.1088 + 0.0335 LSAT + 0.2609 UGPA – 0.0449 (if female) + 6.1101 (if 2013 data) – 0.0431 LSAT (if 2013 data) + 0.3021 UGPA (if 2013 data) + 0.1678 (if female and 2013 data).

This equation and Table 18 show that the relationship between LSAT score and law school GPA decreased from the earlier data set to the 2013 data set ($F(1,916) = 33.98$, $p < 0.0001$). On the other hand, the relationship between undergraduate GPA and law school GPA increased ($F(1,916) = 6.81$, $p = 0.0092$). Note also that females increased their law school GPA between the two data sets ($F(1,916) = 4.51$, $p = 0.0339$).

Once again, from examining the relationships between ethnicity and law school GPA in the presence of other factors, it is not surprising to see that there is no intrinsic relationship between

ethnicity and law school GPA; this was true both for the earlier data set and the 2013 data set.

4. Ethnicity and Law School Preparation Across Two Data Sets

Table 19 provides the results of a linear model, which determines whether the relationship between ethnicity and LSAT scores has changed from the earlier data set to the 2013 data set. According to this table, the difference in ethnicity did not change from the older data set to the 2013 data set ($F(1,946) = 0.48$, $p = 0.4880$). Note that the average LSAT score also did not change between the two data sets ($F(1,946) = 0.57$, $p = 0.4485$). Means and standard deviations of LSAT scores are provided in Table 20.

Table 19. Linear Model Results for LSAT Score by Ethnicity and Data Set

| Effect | DF | F-value | P-value |
|---|---|---|---|
| Ethnicity | 1 | 59.70 | <0.0001 |
| Data Set | 1 | 0.57 | 0.4485 |
| Ethnicity*Data Set | 1 | 0.48 | 0.4880 |

Table 20. Average LSAT Score by Ethnicity and Data Set

| Ethnicity | No. of Students | Mean | Standard Deviation | Mean Comparisons | |
|---|---|---|---|---|---|
| White, 2013 | 106 | 153.49 | 5.51 | A | |
| White, 2005–2011 | 748 | 153.44 | 5.13 | A | |
| African-American, 2013 | 12 | 147.67 | 5.05 | | B |
| African-American, 2005–2011 | 84 | 146.46 | 4.06 | | B |

Finally, Table 21 provides the results of a linear model determining whether the relationship between ethnicity and undergraduate GPA has changed from the earlier data set to the 2013 data set. According to these results, the difference in undergraduate GPAs across ethnicities from the earlier data set to the 2013 data set is not statistically significant ($F(1,946) = 2.49$, $p = 0.1151$). Unlike LSAT scores, however, there is an overall change in undergraduate GPA from the earlier data set to the 2013 data ($F(1,946) = 23.72$, $p < 0.0001$). Table 22 shows the means and standard deviations of these values across ethnicities and data sets, and indicates that the undergraduate GPAs of White students in 2013 were statistically similar to the undergraduate GPAs of African-American students in the earlier data set. However, within each data set, the difference in the average undergraduate GPAs of White and African-American students remains similar. Overall, from the earlier data set to 2013, the average undergraduate GPA became lower.

Table 21. Linear Model Results for Undergraduate GPA by Ethnicity and Data Set

| Effect | DF | F-value | P-value |
|---|---|---|---|
| Ethnicity | 1 | 13.33 | 0.0003 |
| Data Set | 1 | 23.72 | <0.0001 |
| Ethnicity*Data Set | 1 | 2.49 | 0.1151 |

Table 22. Average Undergraduate GPA by Ethnicity and Data Set

| Ethnicity | No. of Students | Mean | Standard Deviation | Mean Comparisons |
|---|---|---|---|---|
| White, 2005–2011 | 748 | 3.33 | 0.45 | A |
| African-American, 2005–2011 | 84 | 3.18 | 0.47 | B |
| White, 2013 | 106 | 3.09 | 0.34 | B |
| African-American, 2013 | 12 | 2.72 | 0.23 | C |

### *F. 2015 Unsuccessful Data Request*

#### 1. Pre-Attorney General Opinion Déjà Vu

In 2015, Steinbuch made a request for UALR's latest data compilation that the administration had used to make another presentation to the faculty on bar passage, as it had done with the 2013 data. The university provided Steinbuch with a chart like the one it provided him for the 2013 data. That is where the similarity ended, however. Upon examination of the spreadsheet containing ten years of data, Steinbuch discovered that all race, LSAT score, and undergraduate GPA data were redacted. But law school GPA and individual grades were provided. Steinbuch thereafter requested the excised data, and the university invoked the same reasoning it employed prior to the Attorney General's opinion of 2012.

The Dean wrote:

> Because you served on the law school's admissions committee throughout the time period when all of the students in this spreadsheet applied to the law school,[282] it is reasonable to

282. Steinbuch was not employed by UALR during some of the time in which students in the spreadsheet applied to the UALR Law School and he did not serve on the admissions

assume your knowledge of the applicants, particularly applicants whose credentials are distinctive in terms of being higher or lower relative to their peers.[283] Likewise, it is likely there are combinations of undergraduate GPA and LSAT score that would be memorably distinctive. Those issues would be exacerbated by ethnicity data, particularly because the law school admits so few students of color. It is therefore reasonably likely that, if we were to provide the redacted information, you would be able to infer identity and therefore the data is data that could reasonably be expected to lead to personally identifiable information. For similar reasons, as a professor at a small law school like Bowen that has only a very small number of students of color, the ethnicity data needed to be redacted in any event because providing even the ethnicity data alone would reasonably be expected to lead to personally identifiable information.[284]

Steinbuch responded:

Regarding the refusal to provide the race, LSAT, and undergraduate GPA, please note the following:

1. I received this very information separately from both you (Dean Schwartz) and [then interim-]Dean [Paula] Casey previously for two distinct data sets. If the currently posited position regarding the FOIA would be correct, then those previous releases violated the law. The alternative, which is the case, is that the current refusal to produce the records violates the Arkansas FOIA.[285] As such, please place the records on a litigation hold pending further disposition of the matter.

I will note that the school's current position is the same as it was prior to—and seems not to consider—AG Opinion 2012-083.[286]

2. Regarding the process of the admissions committee, faculty only sees a portion of the applicants for screening. Those applicants approved by faculty on the committee go to the chair for potential admission. The chair then decides who's admitted, and the faculty on the committee do not receive a list of who is admitted and enrolled.

Therefore, the assertion that "it is likely there are combinations

committee when some of the other students applied.

283. Michael Hunter Schwartz, Dean of UALR Law School, did not continue Professor Robert Steinbuch's long tenure on the admissions committee beginning in the fall of 2014, just prior to Steinbuch serving as a Fulbright Scholar in 2015. Steinbuch has not been reappointed to the committee.

284. E-mail from Michael Hunter Schwartz, Dean, UALR Law School, to Robert Steinbuch, Professor, UALR Law School (Oct. 17, 2015) (on file with author).

285. Ark. Code Ann. § 25-19-103 (2015).

286. 83 Op. Ark. Att'y Gen. (2012).

> of undergraduate GPA and LSAT score that would be memorably distinctive"[287] is factually unsupportable. In fact, I wonder whether there are any significant unique LSAT & GPA combinations in the whole cohort, although this doesn't matter under the FOIA,[288] as discussed below.
>
> 3. The assertion that "it is therefore reasonably likely that, if we were to provide the redacted information, you would be able to infer identity and therefore the data is data that could reasonably be expected to lead to personally identifiable information,"[289] as a basis to refuse production of the requested records is improper under the Arkansas FOIA.
>
> Citing the Wisconsin case[290] that the Attorney General relies upon in AG Opinion 2012-083, [the treatise on the Arkansas FOIA by] Watkins & Peltz state[s] that unless the:
>
> [I]nformation would [] "make a student's identity easily traceable," . . . its disclosure would not violate FERPA. This approach is consistent with the Arkansas FOIA's requirement that records containing both exempt and non-exempt information be disclosed with the latter deleted. . . . The court was undaunted by the possibility "that in a small number of situations the requested information could possibly create a list of characteristics that would make an individual personally identifiable." [291]

The school's website lists the most recent publicly released application data (which is one year delayed from the current class), which shows that in one year alone the school had 624 applications, leading to 125 enrollees; and the J.D. Enrollment and Ethnicity section shows 18.8% minority enrollment.[292]Apparently, that's a "very small number of students of color . . . [such that] providing even the ethnicity data alone would reasonably be expected to lead to personally identifiable information."[293] Moreover, the LSAT and

287. E-mail from Michael Hunter Schwartz, Dean, UALR Law School, to Robert Steinbuch, Professor, UALR Law School (Oct. 17, 2015) (on file with author).

288. *Id.*

289. E-mail from Michael Hunter Schwartz, Dean, UALR Law School, to Robert Steinbuch, Professor, UALR Law School (Oct. 17, 2015) (on file with author).

290. Osborn v. Bd. of Regents of Univ. of Wis. Sys., 647 N.W.2d 158 (Wis. 2002).

291. E-mail from Robert Steinbuch, Professor, UALR Law School, to Michael Hunter Schwartz, Dean, UALR Law School, and Judy Williams, Associate Vice Chancellor of Communications and Marketing, UALR Law School (Oct. 19, 2015) (on file with author) (citing JOHN J. WATKINS & RICHARD J. PELTZ-STEELE, THE ARKANSAS FREEDOM OF INFORMATION ACT 120 (5th ed. 2010)).

292. UALR LAW SCHOOL STANDARD 509 INFORMATION REPORT (2014), http://bit.ly/1OSKcEU [perma.cc/U3VA-RBFZ].

293. E-mail from Michael Hunter Schwartz, Dean, UALR Law School, to Robert Steinbuch, Professor, UALR Law School (Oct. 17, 2015) (on file with author).

undergraduate GPA data were redacted for *all* ethnicities, including, inter alia, the approximately 1,000 White graduates in the spreadsheet—not just a "very small" cohort.

Thereafter, Steinbuch filed suit against Dean Schwartz and the University of Arkansas at Little Rock for violating the FOIA.[294] Two days later, the same day that the local newspaper reported on the case, the Associate Dean called a minority student enrolled in one of Steinbuch's class and asked whether Steinbuch ever discussed his research, for which he made FOIA requests. Thereafter, in an effort to distinguish its current refusal from its prior FOIA productions of information, the school contended that it broke the law in providing the 2013 data.[295] The case is still pending.[296]

## V. CONCLUSION

This third article, in an unexpected trilogy, documents the difficulties that a tenured, now-former member of the admissions committee had in obtaining public data from a state law school in Arkansas in which he is faculty. The story contains both the success of ultimately obtaining some—but not all the requested—public data about affirmative action, and the analysis of the ensuing unique information. The former is a tale of ongoing roadblocks presented to getting public information. The ultimate success in obtaining the key documents led to the largest contemporary longitudinal case study of race admissions at any law school. And the results are dramatic: Ethnicity has been significantly related to success in the University of Arkansas at Little Rock School of Law, as measured by probability of passing the bar exam and law school GPA, because African-Americans as a cohort had been admitted with significantly lower objective metrics than Whites. Consequently, African-Americans have performed significantly poorer in law school and on the bar exam than Whites at UALR Law School. The affirmative action program at UALR Law School often harmed the very individuals it was designed to help.

294. John Lynch, Law School Violates Open-Records Act, Suit Says, ARKANSAS ONLINE (Nov. 19, 2015), http://bit.ly/1P6ei9t [perma.cc/Z9F7-U986].

295. Lynch, *supra* note 220.

296. *Id.*

# CRIMINAL JUSTICE REFORM AT THE CROSSROADS

BY JOHN G. MALCOLM*

I. INTRODUCTION ..... 250
II. HOW WE GOT HERE ..... 250
III. STATE REFORM EFFORTS AND PRELIMINARY RESULTS ..... 254
IV. FEDERAL REFORM EFFORTS ..... 258
V. FRONT-END REFORM ..... 259
VI. BACK-END REFORM ..... 267
VII. *MENS REA* REFORM ..... 272
VIII. WHO BENEFITS FROM *MENS REA* REFORM ..... 289
IX. CONCLUSION ..... 292

* Director and Ed Gilbertson and Sherry Lindberg Gilbertson Senior Legal Fellow, Edwin Meese III Center for Legal and Judicial Studies, The Heritage Foundation. The views expressed in this article are my own and should not be construed as representing any official position of the Heritage Foundation.

This article borrows from and expands upon other articles I have written on the subject. *See* John G. Malcolm, *The Pressing Need for Mens Rea Reform*, HERITAGE FOUND. LEGAL MEMORANDUM NO. 160 (Sept. 1, 2015), http://herit.ag/1lHBOSg [perma.cc/K8BM-99CY]; John G. Malcolm, *Why Conservative Governors Are Embracing Criminal Justice Reform*, DAILY SIGNAL (Aug. 4, 2015), http://dailysign.al/1ImHJk5 [perma.cc/2CWG-8Q3V]; John Malcolm, *Criminal Law and the Administrative State: The Problem with Criminal Regulations*, HERITAGE FOUND. LEGAL MEMORANDUM NO. 130 (Aug. 6, 2014), http://herit.ag/1QXREpQ [perma.cc/NM8H-KLA6]; John Malcolm, *The Case For the Smarter Sentencing Act*, 26 FED. SENT'G REP. 298 (2014), http://herit.ag/1X4wy7E [perma.cc/H6RP-G244]; Criminal Justice Reform, Part II: Testimony before the Committee on Oversight and Government Reform, 114th Cong. (2015) (statement of John G. Malcolm, Director and Ed Gilbertson and Sherry Lindberg Gilbertson Senior Legal Fellow, Edwin Meese III Center for Legal and Judicial Studies, The Heritage Foundation); *see also* Michael B. Mukasey & John G. Malcolm, *Criminal Law and the Administrative State: How the Proliferation of Regulatory Offenses Undermines the Moral Authority of Our Criminal Laws*, in LIBERTY'S NEMESIS 283 (Dean Reuter & John Yoo, eds., 2016) (discussing problems that stem from the dramatic proliferation of regulatory crimes).

## I. INTRODUCTION

Criminal justice reform, in its many manifestations, is a difficult and controversial issue. Some "believe that our current sentencing regime is unfair, that too much discretion has been removed from judges, that the pendulum has swung too far in terms of imposing harsh sentences, and that increased incarceration has led to other inequities in our society."[1] Others believe that increased incarceration and harsh sentences have taken some very dangerous people off of the streets and have resulted in dramatic decreases in crime, and that, if such sentences are cut, crime may well increase to the detriment of society.[2] Some believe that there are too many crimes with weak (or non-existent) criminal intent standards that result in morally blameless individuals and small entities being branded for life with a scarlet letter "C" for "criminal." Others believe that providing more robust criminal intent standards will enable others, particularly high-level corporate executives, to avoid the consequences of their actions, which can pose health and safety hazards to the environment and the public at large.[3]

Both of these perspectives are reasonable; people of good will disagree passionately about these issues.[4] Yet, there is no question that those who favor criminal justice reform are making progress at the state level and, haltingly, at the federal level.

## II. HOW WE GOT HERE

When crime rates soared in the 1960s, the idea of putting more people in prison for longer periods of time made a lot of sense, and

---

1. *Criminal Justice Reform, Part II: Testimony Before the Committee on Oversight and Government Reform*, 114th Cong. 1 (2015) [hereinafter *Hearings*] (statement of John G. Malcolm, Director and Ed Gilbertson and Sherry Lindberg Gilbertson Senior Legal Fellow, Edwin Meese III Center for Legal and Judicial Studies, The Heritage Foundation).

2. *Id.*

3. *See, e.g.*, John G. Malcolm, *The Pressing Need for Mens Rea Reform*, HERITAGE FOUND. LEGAL MEMORANDUM NO. 160 (Sept. 1, 2015), http://herit.ag/1lHBOSg [perma.cc/2QU7-WKNQ].

4. *See, e.g.*, Letter from former U.S. Attorney General Michael B. Mukasey, former U.S. Deputy Attorney General Larry D. Thompson, former FBI Directors William S. Sessions and Louis J. Freeh, and a host of former U.S. Attorneys and federal judges, among others to Hon. Mitch McConnell and Hon. Harry Reid (Jan. 19, 2016), http://bit.ly/1LJNeAC [perma.cc/9ESZ-4X5T] (supporting S. 2123, the Sentencing Reform and Corrections Act of 2015); Letter from former U.S. Attorneys General John Ashcroft and William Barr, former Associate Attorney General Rudolph W. Giuliani, former directors of the White House Office of National Drug Control Policy William J. Bennett and John P. Walters, and a number of former U.S. Attorneys, among others, to Hon. Mitch McConnell and Hon. Harry Reid (Dec. 10, 2015), http://bit.ly/1U4uNbi [perma.cc/2RDA-ZXBS] (opposing S. 2123, the Sentencing Reform and Corrections Act of 2015).

the idea worked, at least to some extent.[5] Crime rates eventually leveled off and, since the 1990s, crime rates have dropped rather precipitously.[6] While there are certainly places in this country where crime rates are staggeringly and persistently high, we are, for the most part, much safer now than we were then.

According to the Bureau of Justice Statistics (BJS), from 1993 to 2014, violent crime rates fell from 79.8 to 20.1 victimizations per 1,000 people, and property crime rates fell from 351.8 to 118.1 victimizations per 1,000 households.[7] Increased incarceration, especially of violent offenders, certainly deserves some of the credit for this steep drop in crime rates, but just how much is a matter of some debate among criminologists.

At the high end, University of Chicago economist Steven Levitt has estimated that approximately 25% of the decline in violent crime can be attributed to increased incarceration.[8] William Spelman of the University of Texas at Austin estimates that the

---

5. *Hearings*, *supra* note 1 (statement of John G. Malcolm).

6. *Id.*

7. *See* JENNIFER L. TRUMAN & LYNN LANGTON, DEPT. OF JUST., BUREAU OF JUST. STATS., CRIMINAL VICTIMIZATION, 2013 (2014), http://1.usa.gov/1v4STGl [perma.cc/4R3C-GB7S]; FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, PRELIMINARY SEMIANNUAL UNIFORM CRIME REPORT JAN.–JUNE 2014 (2015), http://1.usa.gov/20VGdQy [perma.cc/V46F-XCAF] (Preliminary data indicates that violent crime and property crime continued to drop through the first half of 2014. The FBI estimates that the number of violent crimes dropped by 4.6% through the first six months of 2014 as compared to figures from the first six months of 2013, and that the number of property crimes dropped by 7.5% through the first six months of 2014, as compared to figures from the first six months of 2013.); FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE U.S. 2013 (2014), Table 1 Data Declaration, http://1.usa.gov/1X4Aaql [perma.cc/KBR4-ZTBN] (The FBI's numbers, although different, support this conclusion. The primary reason for the differences is that the BJS and the FBI use different definitions; for example, the BJS includes simple assault but not homicide when calculating violent crime rates, whereas the FBI does just the opposite. Similarly, the BJS includes simple theft when calculating property crime rates, whereas the FBI does not. Furthermore, while the BJS calculates violent and property crime rates per 1,000 victims and households, respectively, the FBI calculates crime rates per 100,000 people in the entire United States. According to the FBI's Uniform Crime Reporting (UCR) Program, the total number of violent crimes dropped from an estimated 1,857,670 in 1994 (a rate of 714 violent crimes per 100,000 people) to an estimated 1,163,146 in 2013 [a rate of 368 violent crimes per 100,000 people]. The total number of property crimes also dropped from an estimated 12,131,873 in 1994 [a rate of 4,660 property crimes per 100,000 people] to an estimated 8,632,512 in 2013 [a rate of 2,731 property crimes per 100,000 people].).

8. Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSPS. 163, 186 (2004). *But see* Ilyana Kuziemko & Steven D. Levitt, *An Empirical Analysis of Imprisoning Drug Offenders*, 88 J. PUB. ECON. 2043, 2056–62 (2004), http://bit.ly/1Rvj28Z [perma.cc/7QPB-M22H] (Levitt acknowledged that the continued increase in the number of drug offenders in prisons may lead to a "crowding out" effect in which the high number of incarcerated drug offenders prevents the incarceration of offenders prone to more serious crime, thereby reducing the effectiveness of incarceration to reduce crime).

figure may be as high as 35%.[9] While hardly insignificant, this means that there are other factors—such as more police officers, the development of wide-scale deployment of COMPSTAT (short for "computer statistics") policing techniques, community policing, and greater attention by homeowners to self-protection through the installation of locks and burglar alarms, and other measures—that would account for the remaining 65% or more of the reduction in violent crime.[10]

But incarceration, while certainly necessary, is a very expensive option.[11] The cost of incarcerating a single federal prisoner has steadily risen over the past 15 years. In Fiscal Year 2000, the average per capita cost of incarceration for a single federal prisoner was $21,603.[12] In Fiscal Year 2014, the cost was $30,619.85.[13] Further, it costs even more to incarcerate a prisoner in the state system.[14] As of Fiscal Year 2010, the average annual cost of incarcerating a state prisoner was $31,286, with the costs ranging from $14,603 in Kentucky to $60,076 in New York.[15]

In addition to large budgetary expenditures, increased incarceration comes with an equally large human cost that should not be ignored. There are now over two million adults behind bars in the United States.[16] As of March 2009, roughly one out of every 31 adults was under some form of correctional control, either through incarceration or supervision; compare this to one out of every 77 adults during Ronald Reagan's presidency.[17] This impacts both the life prospects of the offenders themselves and the lives of their family members, who are often unintended casualties when their loved ones are incarcerated for a long time. The Pew

9. William Spelman, *The Limited Importance of Prison Expansion, in* THE CRIME DROP IN AMERICA 108 (Alfred Blumstein & Joel Wallman eds., 2000).

10. *See* Dara Lind & German Lopez, *16 Theories for Why Crime Plummeted in the US*, VOX (May 20, 2015), http://bit.ly/1yJEPAj [perma.cc/R287-VB9W]; *see generally* FRANKLIN E. ZIMRING, THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL (2013).

11. *See* CONG. RESEARCH SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 15 (2014), http://bit.ly/1QlISuQ [perma.cc/E6VZ-CM2U].

12. *Id.*

13. Annual Determination of Average Cost of Incarceration, 80 Fed. Reg. 45, 12523 (Mar. 9, 2015).

14. CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUST., THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 8–9 (2012), http://bit.ly/1C8xE6x [perma.cc/EP5H-3ABD].

15. *Id.*

16. PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 1 (2009), http://bit.ly/1L9n1M0 [perma.cc/4V8Y-D3TA].

17. *Id.* at 5.

Charitable Trusts estimates that, as of 2010, one out of every 28 children had a parent behind bars—up from one out of every 125 children in 1985.[18]

Some parental figures are violent; some commit crimes that endanger their children. Not surprisingly, when these parents are incarcerated, family prospects may actually improve.[19] But that is not the case for the vast majority of families that have a parental figure incarcerated. Parents who commit crimes may not be the best role models, but they often remain positive influences in their children's lives.[20] Without positive role models in their lives, many children flounder. Studies show that the children of incarcerated fathers struggle more in school, act more aggressively, and have difficulty forming positive relationships with their peers.[21] Many studies indicate that children with incarcerated parents often turn to crime themselves.[22] Furthermore, parents who stay out of prison remain breadwinners; it is no surprise that families with fathers in prison experience higher risks of poverty and homelessness.[23]

Nobody in his right mind disputes the fact that there are some people who should go to prison and never return to society because of the continuing threat they pose to public safety. However, most inmates do not fall into that category; indeed, the vast majority (approximately 95%) of them will, in fact, return to our communities.[24]

---

18. BRUCE WESTERN & BECKY PETTIT, PEW CHARITABLE TR., COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 4 (2010), http://bit.ly/1YjcAau [perma.cc/8XMP-S5GF]; *see also* TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 103 (2007); Jeffrey Fagan, *Crime, Law, and the Community: Dynamics of Incarceration in New York City*, *in* THE FUTURE OF IMPRISONMENT 27, 42–47 (Michael Tonry ed., 2004).

19. *Hearings*, *supra* note 1 (statement of John G. Malcolm).

20. *See* WESTERN & PETTIT, *supra* note 18, at 21 (Two-thirds of men in state prisons were employed at the time of their incarceration, 44% lived with their children prior to incarceration, and more than half [52% of mothers and 54% of fathers] were the primary earners for their children. The average child's family income decreased by 22% the year after a father was incarcerated.).

21. *See, e.g.*, WESTERN & PETTIT, *supra* note 18, at 21; Amanda Geller et al., *Beyond Absenteeism: Father Incarceration and Child Development*, 1 DEMOGRAPHY 49 (2012), http://1.usa.gov/1qDj88t [perma.cc/PS34-VKQZ].

22. *See, e.g.*, Joseph Murray & David P. Farrington, *The Effects of Parental Imprisonment on Children*, 37 CRIM. & JUST.: A REVIEW OF RESEARCH 133 (2008), http://bit.ly/1p91Xvi [perma.cc/C6PP-M3TB]; Joseph Murray et al., *Children's Antisocial Behavior, Mental Health, Drug Use, and Educational Performance After Parental Incarceration: A Systematic Review and Meta-Analysis*, 138 PSYCHOLOGICAL BULL. 175 (2012), http://bit.ly/1p920XW [perma.cc/37RS-GUSD]; ELIZABETH DAVIES ET AL., UNDERSTANDING THE EXPERIENCES NEEDS OF CHILDREN OF INCARCERATED PARENTS: VIEW FROM MENTORS, URBAN INST. (2008), http://urbn.is/1p0iG3e [perma.cc/LMT4-89LR].

23. *Hearings*, *supra* note 1 (statement of John G. Malcolm).

24. *See* DEPT. OF JUST., BUREAU OF JUST. STATS., REENTRY TRENDS IN THE U.S. (2016),

## III. STATE REFORM EFFORTS AND PRELIMINARY RESULTS

It used to be that criminal justice reform, like entitlement spending, "was a third rail in politics—touch it, and you could be sure that your next opponent would run a commercial saying you were 'soft on crime.' It was a one-way ticket to 'Loserville,'" especially in conservative states.[25]

But see what some conservative governors are saying now. In a recent interview, former Texas Governor Rick Perry stated, "now we've expanded [specialized courts] into prostitution courts and veteran courts [which] gives the courts the flexibility to deal with nonviolent drug-related events."[26] He added, "That's not to say that the people didn't make a mistake, that they weren't going to be punished for it, but we're not going to throw them in jail and throw away the key."[27]

In Alabama, Governor Robert Bentley, after signing a criminal justice reform bill into law, told Congress, "I believe that our prison reform efforts have created a healthy foundation that can, over time, transform the landscape of the entire criminal justice system for the better."[28] And, upon signing a criminal justice reform bill in his state, Mississippi Governor Phil Bryant, a former law enforcement officer, stated, "We pledged to Mississippians that we would make this the 'public safety session', and we have worked hard to develop this 'Right on Crime' research-based plan that is tough on crime while using resources wisely where they make the most impact."[29] After signing a reform bill in the Sooner state, Oklahoma Governor Mary Fallin stated,

> [f]or those who have just a problem—they're not a criminal, but they have a problem—try to get them treatment, try to get them help, keep the family together, let them support their families, let them get back into society with treatment, with help, once they prove they're willing to do that, and become productive

---

http://1.usa.gov/1TBKV5A [perma.cc/QFQ6-4Q2A].

25. John G. Malcolm, *Why Are Conservatives Embracing Criminal Justice Reform?*, NEWSWEEK (Aug. 4, 2015), http://bit.ly/1DtOvYz [perma.cc/X6R6-9MEC].

26. Samantha-Jo Roth, *Rick Perry: Obama Is Following Our Lead in Texas on Criminal Justice Reform*, HUFFPOST POLITICS (July 13, 2015), http://huff.to/1CACAb2 [perma.cc/2GL9-SVJY].

27. *Id.*

28. Press Release, Office of the Governor, State of Alabama, Governor Bentley Addresses Congress on Alabama's Prison Reform Efforts (July 14, 2015), http://1.usa.gov/21Q8PyX [perma.cc/U6HH-MC740].

29. Press Release, Office of the Governor, State of Mississippi, Mississippi Enacts Comprehensive, Bipartisan Criminal Justice Reforms (Mar. 31, 2014), http://bit.ly/1NkQROj [perma.cc/U7QE-7VNK].

citizens.[30]

And upon signing a sweeping criminal justice reform package, Utah Governor Gary Herbert stated,

> Utahns understand our prison gates must be a permanent exit from the system, not just a revolving door. Just like every other area of government, we need to ensure we are getting the best possible results for each taxpayer dollar. We have taken significant steps to rebuild lives with a smarter, more efficient criminal justice system while enhancing public safety.[31]

In his second inaugural address, Georgia Governor Nathan Deal said:

> In Georgia, we have taken monumental steps in recent years to give nonviolent offenders a new beginning. As a result, our alternative courts are paying dividends for offenders, their families and taxpayers. . . . For those who are already in our prison system, many of them now have the chance for a new beginning too. Approximately 70 percent of Georgia's inmates don't have a high school diploma. If their lack of an education is not addressed during their incarceration, when they re-enter society they have a felony on their record but no job skills on their résumé. I am here to tell you, an ex-con with no hope of gainful employment is a danger to us all. This is why we must work to get these individuals into a job. Our prisons have always been schools. In the past, the inmates have learned how to become better criminals. Now they are taking steps to earn diplomas and gain job skills that will lead to employment after they serve their sentences. . . . Our message to those in our prison system and to their families is this: If you pay your dues to society, if you take advantage of the opportunities to better yourself, if you discipline yourself so that you can regain your freedom and live by the rules of society, you will be given the chance to reclaim your life. I intend for Georgia to continue leading the nation with meaningful justice reform.[32]

I could cite many similar statements from other conservative governors, but you get the point: attitudes towards criminal justice

30. Brian Hardzinski, *Fallin Addresses Corrections Reform, 2016 Election During Colorado Governors Panel*, KGOU (July 27, 2015), http://bit.ly/1SsjRUV [perma.cc/BQ56-FTL6].

31. Press Release, Office of the Governor, State of Utah, Governor signs 82 bills, education funding, criminal justice reform (Mar. 31, 2015), http://1.usa.gov/20VVNM3 [perma.cc/E7SM-BHAC]; Robert Gehrke, *Sentences for Some Drug Crimes Reduced Under Newly Signed Utah Law*, SALT LAKE TRIBUNE (Mar. 31, 2015), http://bit.ly/1I586ii [perma.cc/S5ZM-YCM4].

32. Greg Bluestein, *Four Keys to Nathan Deal's Inaugural Speech*, AJC.COM (Jan. 12, 2015), http://on-ajc.com/17AUU5k [perma.cc/CY6S-LHTJ].

reform have shifted dramatically, and the results speak for themselves. Conservative governors in states like Alabama, Arkansas, Georgia, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Montana, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, and Utah, as well as governors in other states, are taking action to reform a broken criminal justice system. Thus far, these measures have proven to be popular with their voters.[33]

So what changed? Several years ago, many states began to face shrinking budgets, rising prison costs, and dangerously overcrowded prisons.[34] Necessity being the mother of invention, governors in red, blue, and purple states began thinking that there might be smarter ways to address their prison systems—ways that would lower costs and might even enhance public safety—and that there might be sensible alternatives to incarceration for some categories of offenders. They began implementing some measured reforms to see what would happen.[35]

The vast majority of states now provide incentives to offenders, particularly in the form of "earned time" credit that can result in sentence reductions.[36] Offenders who complete specified educational, treatment, or vocational training programs, or offenders who engage in productive work assignments within prison or on work crews, may earn some time back.[37] Since 2000, well over half of the states have taken steps to roll back minimum mandatory sentences in drug cases.[38] Most states now authorize diversion of lower-level drug offenders into community supervision and treatment programs. Many states now use risk-and-needs assessments to tailor supervision and treatment programs based on each offender's recidivism risk and particular treatment needs.[39]

---

33. *See, e.g.*, *Public Opinion on Sentencing and Corrections Policy in America*, PUB. OPINION STRAT. & MELLMAN GROUP (2012), http://bit.ly/1QcpXUJ [perma.cc/6SJR-D5VG].

34. Malcolm, *supra* note 26.

35. *Id.*

36. *Hearings*, *supra* note 1 (statement of John G. Malcolm).

37. *See* ALISON LAWRENCE, NAT'L CONF. OF STATE LEGISLATURES, CUTTING CORRECTIONS COSTS: EARNED TIME POLICIES FOR STATE PRISONERS (2009), http://bit.ly/1TBCdEv [perma.cc/SMS2-9XAL]; ALISON LAWRENCE, NAT'L CONF. OF STATE LEGISLATURES, TRENDS IN SENTENCING AND CORRECTIONS: STATE LEGISLATION (2013), http://bit.ly/1JAJni5 [perma.cc/TNE5-CFRF].

38. RAM SUBRAMANIAN & RUTH DELANEY, VERA INST. OF JUST., PLAYBOOK FOR CHANGE? STATES RECONSIDER MANDATORY SENTENCES (2014), http://bit.ly/1SqE4Xi [perma.cc/PXJ4-EH3T].

39. *See Risk/Needs Assessment 101: Science Reveals New Tools to Manage Offender*, PEW CENTER ON THE STATES: SUBJECT SAFETY PERFORMANCE PROJECT (2011), http://bit.ly/1TjKDA2 [perma.cc/A8JH-SUYT].

Many states have also created specialized courts, such as substance abuse, mental health, and veterans' courts, to address offenders whose criminogenic needs and risk factors stem from those experiences.[40]

And what have the results been so far? In a September 2015 report, The Pew Charitable Trusts found that, over a five-year period (from 2009 to 2014), the ten states that instituted reforms and cut their imprisonment rates the most experienced *greater* drops in crime (16% average crime rate reduction) than the ten states that increased their imprisonment rates the most (13% average crime rate reduction).[41] Some states that were not in the top ten (in terms of cutting their imprisonment rates) also experienced dramatic reductions in crime. Texas, for instance, cut its incarceration rate by 11% over this time period and experienced a 24% reduction in crime.[42] Michigan cut its incarceration rate by 4% and experienced a 26% reduction in crime.[43] Virginia cut its incarceration rate by 7% and experienced a 21% reduction in crime.[44] Wisconsin cut its incarceration rate by 6% and experienced a 17% reduction in crime.[45] And North Carolina cut its incarceration rate by 4% and experienced a 21% reduction in crime.[46]

Of course, every state is different; some anomalies exist. It is also important to remember that a causal relationship cannot be assumed from a mere correlation. Nonetheless, what these results strongly suggest is that we should no longer take it as a given that simply putting more offenders away for longer periods of time is the only—or even the best—way of reducing crime in our communities.[47] When it comes to criminal justice reform, it seems that a number of states are picking up the mantle suggested to them by Supreme Court Justice Louis Brandeis: A "single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the

40. LAWRENCE, TRENDS IN SENTENCING AND CORRECTIONS: STATE LEGISLATION, *supra* note 37.

41. *Imprisonment, Crime Rates Fell in 30 States over 5 Years*, PEW CHARITABLE TR. (Sept. 28, 2015), http://bit.ly/1PJLvsh [perma.cc/8GDB-UPSA].

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. Malcolm, *supra* note 25.

rest of the country."[48] The results, so far, look very promising.

## IV. FEDERAL REFORM EFFORTS

Congress has recently taken up the issue of criminal justice reform, although it remains to be seen what, if anything, will result from those efforts.[49] While such efforts appeared to be gaining momentum, recent—and, in some cases, dramatic—spikes in violent crime[50] and drug overdoses,[51] and the controversy surrounding *mens rea* reform, among other things,[52] appear to have halted that momentum, at least for the time being.[53]

While many proposals addressing a wide array of important issues have been introduced, this article will focus on three of those: front-end reform (which some refer to as "sentencing reform"), back-end reform (which some refer to as "prison reform"), and *mens rea* (Latin for "guilty mind") reform.[54] Because

48. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

49. *See Hearings*, *supra* note 1 (statement of John G. Malcolm).

50. *See, e.g.*, Max Ehrenfreund & Denise Lu, *More People Were Murdered Last Year than in 2014, and No One's Sure Why*, WASH. POST (Jan. 27, 2016), http://wapo.st/1nOY79H [perma.cc/9UW6-GZGK] (noting that preliminary data indicates that 36 cities had more homicides in 2015 than in 2014, while only 13 cities had fewer; citing dramatic increases in homicides in Baltimore, Cleveland, and Washington, D.C., among others, and noting that FBI preliminary crime statistics for the first half of 2015 indicates that homicides increased by 10.8% in jurisdictions with at least one million people and by 12.4% in cities with populations between 500,000 and one million residents); Aamer Madhani, *Chicago Records 51 Homicides in January, Highest Toll Since 2000*, USA TODAY (Feb. 1, 2016), http://usat.ly/1NMdcOe [perma.cc/A8LP-XRKV]; Josh Sanburn, *Murders Are Up in Many U.S. Cities Again This Year*, TIME (May 13, 2016), http://ti.me/1TRx4qG [perma.cc/SFH2-9KJE] (citing a survey by the Major Cities Chiefs Association that homicides have risen by 9% and non-fatal shootings have risen by 21% in the largest 63 cities in the first quarter of 2016 compared to the first quarter of 2015).

51. *See, e.g.*, Scott Wegener, *James Comey: FBI Director Sees 'No End in Sight' to Heroin Epidemic*, WCPO (Oct. 14, 2015), http://bit.ly/1UKKpBp [perma.cc/6F7Y-N6MR]; Pete Williams, *DEA Finds Heroin Use Skyrocketing Across U.S.*, NBC NEWS (Nov. 4, 2015), http://nbcnews.to/1GMv1jS [perma.cc/HA68-5XT3].

52. Other reasons would include the reluctance of conservatives to compromise with, or appear to make common cause with, those on the left who continue to insist—wrongly in my view—that any inequities (perceived or real) that exist in our criminal justice system are the result of inveterate and systemic racism, as well as the inclusion in some bills of provisions that would likely reduce the sentences of some offenders who have been convicted of violent offenses under the Armed Career Criminal Act of 1984, 18 U.S.C. § 924.

53. *See, e.g.*, Susan Ferrechio, *Senate GOP at War with Itself Over Criminal Justice Bill*, WASH. EXAMINER (Feb. 4, 2016), http://washex.am/21fu9rK [perma.cc/59JQ-UGUD]; *Warren's Criminal Complaint*, WALL ST. J. (Feb. 5, 2016), http://on.wsj.com/23P3ZAf [perma.cc/5LZD-5A7K].

54. Some of the important issues that are beyond the scope of this article would include, among other things, civil asset forfeiture reform, the use of body cameras by law enforcement officials, collateral consequences imposed on many offenders upon their release from prison, juvenile justice reform, the appropriate use of solitary confinement, and the sealing or expungement of criminal records for certain types of offenses or offenders. I have, however, written about some of these topics elsewhere. *See, e.g.*, John Malcolm, *Civil*

it is unclear which iteration of these reforms, if any, will survive the sturm und drang (the "storm and stress") of the legislative process, this article addresses the nature and significance of these types of reforms at a more generic level, rather than the specifics of proposals that may be scrapped or substantially revised.

Front-end reform involves proposals that would reduce the amount of time that certain offenders are sentenced to serve. Most prominently, these proposals seek to reform federal mandatory minimum laws. Back-end reform involves mechanisms that would enable an offender to get time cut off his sentence or to change his conditions of confinement by engaging in productive activities designed to reduce the risk of recidivism based on that offender's particular needs. While sentencing reform—front-end and back-end—addresses how long people should serve once convicted, *mens rea* reform addresses those who never should have been convicted in the first place—those people who engaged in conduct without any knowledge of, or intent to violate, the law and which they could not have reasonably anticipated would violate a criminal law.

## V. FRONT-END REFORM

The federal prison population increased dramatically after the enactment of mandatory minimum sentencing laws for drug offenses in the 1980s. There were just over 24,000 offenders in federal prisons in 1980, but, by 2013, the number had grown to nearly 220,000.[55] In February 2016, there were 196,000 offenders in federal prison; 46.5% of those offenders were incarcerated for federal drug-related offenses.[56]

Our federal prisons are not filled with offenders convicted of simple drug possession (and the few who are likely bargained their way down to that charge). Moreover, drug dealing is harmful to society and poses a threat to public safety. The potential for violence, gang involvement, and lethal overdose is inherent in most drug transactions. Therefore, the question is not *whether* drug dealers should be punished, but rather *how long* they should be punished.

---

*Asset Forfeiture: Good Intentions Gone Awry and the Need for Reform*, HERITAGE FOUND. LEGAL MEMORANDUM NO. 151 (Apr. 20, 2015), http://herit.ag/1DzIP8U [perma.cc/5XQH-8K6K].

55. *Federal Prison System Shows Dramatic Long-Term Growth*, PEW CHARITABLE TR. (2015), http://bit.ly/1SkEEWF [perma.cc/7SRA-NSDZ].

56. *See* FED. BUREAU OF PRISONS, STATISTICS: TOTAL FEDERAL INMATES (2016), http://1.usa.gov/1QAfkia [perma.cc/2PD8-JDWD]; FED. BUREAU OF PRISONS, STATISTICS: OFFENSES (2016), http://1.usa.gov/1VlRkTO [perma.cc/7QUS-F3VM].

In 2014, 50.1% of all federal drug offenders were convicted of an offense carrying a mandatory minimum sentence[57] (62.1% in 2013),[58] and 48.6% of drug offenders had little or no criminal history[59] (49.6% in 2013).[60] Only 7% of drug offenders in both 2013 and 2014 were sentenced under the "career offender" sentencing guideline, which requires two prior convictions for a drug offense or a crime of violence.[61] And in 2014, only 142 federal drug offenders—0.7%—used violence or the threat of violence in committing their crimes; only 12.3% used or possessed a weapon.[62]

There are dozens of mandatory minimum penalties covering a variety of offenses.[63] Mandatory minimums for drug offenses are primarily triggered by the type and amount of drug involved. For example, if someone possesses with intent to distribute 1 gram of LSD (less than a teaspoon) or 5 grams of pure methamphetamine (a packet), a mandatory minimum of 5 years is triggered for a first offense, 10 years for a second offense, 20 years for a first offense in which death or serious bodily injury resulted, or life for a second offense in which death or serious bodily injury resulted.[64] If the amount is 10 grams of LSD or 50 grams of pure meth (less than 2 ounces), a mandatory minimum of 10 years is triggered for a first offense, 20 years for a second offense or a first offense in which death or serious bodily injury resulted, or life imprisonment for a third offense or a second offense in which death or serious bodily injury resulted.[65] Many drug offenders caught dealing small amounts of narcotics end up being held responsible for much larger amounts, thereby triggering a mandatory minimum penalty, sold by others who are deemed to be their co-conspirators in a drug ring. In general, judges must impose these mandatory minimum

57. U.S. SENT'G COMM'N, ANNUAL REPORT FISCAL YEAR 2014, at A-5, http://bit.ly/21Qjmds [perma.cc/5CHQ-7VA9].

58. U.S. SENT'G COMM'N, ANNUAL REPORT FISCAL YEAR 2013, at A-42, http://bit.ly/1p0t3E4 [perma.cc/E5S2-65SS].

59. U.S. SENT'G COMM'N, 2014 SOURCEBOOK OF FED. SENT' STATS., at Table 37, http://bit.ly/1TBYD8C [perma.cc/4Y8A-FHNK].

60. U.S. SENT'G COMM'N, 2013 SOURCEBOOK OF FED. SENT'G STATS., at Table 37, http://bit.ly/1pt55SB [perma.cc/22T6-PJ3U].

61. *See id.* at Figure B & Table 22, http://bit.ly/1L9tCG0 [perma.cc/9AGM-PZEN] & http://bit.ly/1YjCScO [perma.cc/5BT3-FU7F]; U.S. SENT'G COMM'N, 2014 SOURCEBOOK OF FED. SENT'G STATS., at Figure B & Table 22, http://bit.ly/1ROe4H6 [perma.cc/QVU7-MC8E] & http://bit.ly/1p0veaL [perma.cc/U33D-HEWC].

62. U.S. SENT'G COMM'N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS GUIDELINE CALCULATION BASED 28 (2014), http://bit.ly/1OWUl3i [perma.cc/E3G5-2UBW].

63. *See* FEDERAL MANDATORY MINIMUMS, FAMILIES AGAINST MANDATORY MINIMUMS (2013), http://bit.ly/VKrZFV [perma.cc/S3P6-PV8K].

64. *Id.*

65. *Id.*

sentences although federal drug crimes invariably carry statutory maximum sentences well above these minimums.[66]

Under existing federal law, there are only two ways for an offender convicted of a mandatory minimum offense to avoid receiving the minimum penalty: by persuading the prosecutor to file a motion for a substantial assistance departure with the sentencing judge, or by qualifying for the "safety valve." [67] Regarding the former, if an offender provides information about others who are engaging in criminal activity and the government successfully uses that information to prosecute those individuals, the government may choose, in its sole discretion,[68] to file a substantial assistance motion.[69] If the motion is granted, the court is permitted to sentence the offender below the mandatory minimum.[70] But, of course, low-level drug offenders would likely have little useful information to provide, which makes it highly unlikely that the government would file such a motion for those offenders.

Under the current "safety valve,"[71] the offender may qualify for a sentence below the mandatory minimum if he satisfies five objective criteria. First, a defendant cannot be an organizer, leader, manager, or supervisor of the drug activity (i.e., he must be a street dealer, a lookout, a "mule," or otherwise engaged in the kinds of activities that are typically performed by someone at the very bottom of the totem pole in the drug ring).[72] Second, the defendant must provide complete and truthful information to the government (since the defendant is at the lowest level in the organization, the government is likely to already know what the

66. *See, e.g., id.* (demonstrating that possession with intent to distribute one gram of LSD carries a minimum mandatory sentence of 5 years and a statutory maximum sentence of 40 years; a second offense [or first offense involving 10 grams of LSD] carries a minimum mandatory sentence of 10 years and a statutory maximum sentence of life imprisonment.).

67. *See* 18 U.S.C. § 3553 (2012) (explaining if a prosecutor engages in "charge bargaining" and never charges the offender with a mandatory minimum offense, then the offender would not be subject to a mandatory minimum penalty); *see also* U.S. CONST. art. 2, § 2, cl. 1 (noting the president could invoke his Pardon Power authority and grant clemency to reduce the sentence of someone who has received a mandatory minimum penalty, but this would occur—if at all—long after the defendant was sentenced by a judge).

68. The only exception to this rule is if the government's refusal to file a substantial assistance motion is based on an unconstitutional motive such as the defendant's race or religion. *See* Wade v. United States, 504 U.S. 181, 185–86 (1992).

69. This is sometimes referred to as a § 5K1.1 motion. *See* U.S. SENT'G COMM'N, 2011 FEDERAL SENTENCING GUIDELINES MANUAL, Chapter Five, Park K § 5K1.1 Departures (2011).

70. 18 U.S.C. § 3553(e) (2012) (codifying the substantial assistance provision).

71. 18 U.S.C. § 3553(f) (2012) (codifying the safety valve).

72. 18 U.S.C. § 3553(f)(4) (2012).

defendant has to say). Third, the offense cannot have resulted in death or serious bodily injury. Fourth, the offense cannot have involved the use or possession of a dangerous weapon or the making of a credible threat of violence. And fifth, the defendant cannot have more than one criminal history point (i.e. no more than one prior conviction which resulted in a sentence of 60 days incarceration or less). These are stringent criteria to meet and few offenders qualify. In 2014, for example, 66.7% of drug offenders did not receive relief under the safety valve[73] (65.3% in 2013).[74]

In a 2014 speech at Georgetown Law School, Patti Saris, Chief Judge of the United States District Court for the District of Massachusetts and current Chair of the United States Sentencing Commission, stated:

> [M]andatory minimum penalties sweep more broadly than Congress likely intended. Many in Congress emphasized the importance of these penalties for targeting kingpins and high-level members of drug organizations. Yet the Commission found that 23 percent of federal drug offenders were low-level couriers who transported drugs, and nearly half of these were charged with offenses carrying mandatory minimum penalties. The category of offenders most often subject to mandatory minimum penalties were street level dealers—many levels down from kingpins and organizers.[75]

Similarly, appearing before the House Judiciary Committee's Subcommittee on Crime and Criminal Justice in 1993, Judge Vincent Broderick testified:

> There are few Federal judges engaged in criminal sentencing who have not had the disheartening experience of seeing major players in crimes before them immunize themselves from the mandatory minimum sentences by blowing the whistle on their minions, while the low-level offenders find themselves sentenced to the mandatory minimum prison term so skillfully avoided by the kingpins.[76]

---

73. U.S. SENT'G COMM'N, 2014 SOURCEBOOK OF FED. SENT'G STATS., Table 44, http://bit.ly/1p9iXl6 [perma.cc/AR4C-JBHC].

74. U.S. SENT'G COMM'N, ANNUAL REPORT FISCAL YEAR 2013, at A-42, http://bit.ly/1p0t3E4 [perma.cc/E5S2-65SS].

75. *See* Hon. Patti B. Saris, Chair, U.S. Sent'g Comm'n, Address at the Georgetown University Law Center: A Generational Shift For Drug Sentences 4 (Mar. 26, 2014), http://bit.ly/1XP3Bxh [perma.cc/7PYL-R3W9].

76. *Federal Mandatory Minimum Sentencing: Hearing before the Subcommittee on Crime and Criminal Justice of the Committee on the Judiciary*, 103rd Cong. (1993) (testimony of Vincent Broderick).

We should also consider the costs of incarceration and its ramifications. In Fiscal Year 2000, the Bureau of Prisons constituted roughly 18% of the Department of Justice's ("DOJ") discretionary budget.[77] Today, it is 26% of DOJ's budget,[78] and it is projected to exceed 28% by Fiscal Year 2018.[79] This does not include the costs of detaining and transferring prisoners, which is currently 6.5% of the Department's budget.[80] This means less money for investigators, prosecutors, victims' services, grants to state and local law enforcement authorities, and other departmental priorities. The growth of the prison system presents other problems as well. In a November 2015 report, DOJ's Office of Inspector General stated: "Though the number of federal inmates has declined for a second year in a row, the Department of Justice . . . continues to face a crisis in the federal prison system. Continued high rates of overcrowding both negatively impact the safety and security of staff and inmates and drive costs upward."[81] The report further noted:

> [A]lthough overall overcrowding decreased from 33 percent in June 2014 to 26 percent in August 2015, overcrowding at high security institutions has actually increased from 42 percent to 51 percent. This presents a particularly significant concern because more than 90 percent of high security inmates have a history of violence, making confinement in such conditions especially problematic.[82]

Overcrowding jeopardizes the safety of correctional officers and the prisoners they oversee. It also diverts the attention of treatment staff, which limits the availability of substance abuse and mental health care, as well as other programs designed to reduce recidivism.

Regarding costs, the report stated that the Federal Bureau of Prisons:

---

77. *Hearings*, *supra* note 1 (statement of John G. Malcolm).

78. *See* DEPT. OF JUST., FED. PRISON SYS., FY 2016 BUDGET REQUEST AT A GLANCE, http://1.usa.gov/1TqkIUK [perma.cc/V4GR-ABJ2]; DEPT. OF JUST., FY 2016 BUDGET SUMMARY, http://1.usa.gov/1TZFLxO [perma.cc/ZQ4Z-SDX4].

79. *See* Memorandum from Michael E. Horowitz, Inspector General, on DOJ's Top Management and Performance Challenges, to Attorney General (Dec. 11, 2013), http://1.usa.gov/1Wjwq69 [perma.cc/47G5-42AA].

80. *See* DEPT. OF JUST., U.S. MARSHALS SERV., FY 2016 BUDGET REQUEST AT A GLANCE, http://1.usa.gov/1UaaqdK [perma.cc/2HN4-X5NH]; *see also* DEPT. OF JUST., FY 2016 BUDGET SUMMARY, http://1.usa.gov/1YNJIqz [perma.cc/QE6R-WV2P].

81. *See* Memorandum from Michael E. Horowitz, Inspector General, on DOJ's Top Management and Performance Challenges, to Attorney General (Nov. 10, 2015), http://1.usa.gov/1WWjRQA [perma.cc/Q7LF-HU6Q].

82. *Id.*

> [C]urrently has the largest budget of any Department component other than the [FBI], accounting for more than 25 percent of the Department's discretionary budget in FY 2015, and employing 34 percent of the Department's staff. The BOP's enacted budget was nearly $7 billion in FY 2015, an 11-percent increase since FY 2009, despite a decline in the federal prison population from 214,149 in FY 2014 to 206,176 in FY 2015—its lowest level in 6 years. Further, the BOP has requested an additional 6-percent increase for next year, despite projecting that its population will decrease by an additional 12,000 inmates."[83]

The Department of Justice's budget has declined every year—excluding last year—since 2010.[84] Given current fiscal constraints, it is safe to say that the federal government will not embark on a large scale federal prison expansion project for the foreseeable future. Much as some might wish that the federal government would make cuts elsewhere (while others might wish for tax increases) in order to increase the Justice Department's budget for prison expansion, wishing will not make it so.

Given this reality, each prison cell is very valuable real estate that ought to be occupied by individuals who pose the greatest threat to public safety. Under our current system, too many relatively low-level drug offenders are locked up for 5, 10, and 20 years when lesser sentences would, in all likelihood, more than satisfy the legitimate penological goals of general deterrence, specific deterrence, and retribution.

There are many ways to reform mandatory minimum laws. One way is to restore the discretion of federal judges to sentence an offender below a mandatory minimum sentence, regardless of the type of offense. Another is to reduce the length of the mandatory minimum sentences for all drug offenders or to expand the number of offenders who qualify for the "safety valve" that currently exists, or some combination thereof.[85] While each

83. *Id.* at 3.

84. DEPT. OF JUST., TOTAL DISCRETIONARY BUDGET AUTHORITY AND FULL-TIME EQUIVALENT, FY 2006–FY 2016, http://1.usa.gov/26lLEfp [perma.cc/74YB-F86Z].

85. The safety valve is codified at 18 U.S.C. § 3553(f) (2012). Under the current "safety valve," the offender may qualify for a sentence below the mandatory minimum if he satisfies five objective criteria. First, a defendant cannot be an organizer, leader, manager, or supervisor of the drug activity (i.e., he must be a "mule" or street dealer; in other words, he must be someone at the very bottom of the totem pole in the drug ring). Second, the defendant must provide complete and truthful information to the government (though, since the defendant is at the lowest level in the organization, the government is likely to know already what the defendant has to say). Third, the offense cannot have resulted in death or serious bodily injury to anyone. Fourth, the offense cannot have involved the use or possession of a dangerous weapon or the making of a credible threat of violence. And, fifth,

approach has its pros and cons, I favor the approach that modestly reduces the length of mandatory minimum sentences for drug offenders to more reasonable levels (except in instances in which the offender's actions resulted in death or serious bodily injury) and expands the safety valve. This will ensure that most of the relief is given to low-level, nonviolent offenders who pose less risk to public safety, are less likely to recidivate, and are more likely to become productive, law-abiding members of society.[86]

Some people fear that reforming mandatory minimum laws will reduce the incentives of low-level drug dealers (so-called "little fish") to cooperate with law enforcement authorities in their efforts to go after the organizers and leaders of such activity (so-called "big fish"). Others fear that loosening mandatory minimum laws will result in the premature release of dangerous criminals, thereby threatening to undermine the gains we have made in terms of reduced crime rates.[87] Both concerns are understandable and legitimate.

Reforming mandatory minimum laws would reduce some of the incentives for "little fish" to cooperate against "big fish," and lowering mandatory minimum sentences or expanding the current safety valve would reduce some of the leverage that prosecutors currently enjoy to induce cooperation. Yet, if our federal mandatory minimum laws were revised, there would still be plenty of incentives for defendants to cooperate against "bigger fish."

First, those who wish to qualify for the existing (or any expanded version of the) safety valve would still have to provide complete and truthful information to the government, given that is one of the existing conditions for qualification.[88] Second, most of the reforms proposed to date would reduce the level of mandatory minimum sentences, but would not eliminate them.[89] Third, it is worth

---

the defendant must have no more than one criminal history point (i.e., no more than one prior conviction which resulted in a sentence of 60 days incarceration or less).

86. Some of the proposals that have been introduced in Congress have included mandatory minimum relief for some offenders who have been convicted of violent felony offenses, including armed career criminals. I do not favor such proposals because, in my view, such offenders pose an undue risk to public safety and the benefits of keeping such offenders incarcerated for longer periods of time outweigh any benefit to be derived by reducing their sentences or releasing them early.

87. *See, e.g.*, William G. Otis, *The Case Against the Smarter Sentencing Act*, 26 FED. SENT'G REP. 302–06 (2014).

88. *See supra* note 85.

89. *But see* S. Res. 353, 114th Cong. § 2 (2015); H.R. 706, 114th Cong. § 2 (2015) (An exception to these proposed reforms is the Justice Safety Valve Act of 2015; the Senate version of this bill, S. 353, was introduced by Sen. Rand Paul (R-KY) and Sen. Patrick Leahy

remembering that we are talking about the *minimum* sentence that a judge must impose; drug crimes invariably carry statutory maximum sentences that are well above these minimums, so a sentencing judge is always free to impose a higher sentence if he believes it is warranted under the circumstances.

Fourth, even if there were no mandatory minimum sentences, there would still be incentives for defendants to cooperate in order to obtain favorable recommendations from prosecutors, which often carry considerable sway with sentencing judges. A sentencing judge is far more likely to look favorably on a defendant when the prosecutor says, "Your honor, the defendant told us everything he knows and is cooperating with our ongoing investigation," as opposed to when a prosecutor says, "Your honor, we have reason to believe that the defendant has useful information, but he has refused to cooperate with our ongoing investigation."

And finally, as a general matter, people are sentenced based on what they deserve, considering the gravity of the crimes they commit. If all we cared about was leveraging cooperation against other wrongdoers, then we would make all federal crimes involving more than one person, including all conspiracy charges, mandatory minimum offenses. The reason we do not is because it would result in many disproportionate sentences—which is precisely what too many "little fish" involved in the drug trade currently receive.

Moreover, if Congress were to pursue front-end reform by expanding the number of people who qualify for the safety valve—rather than by lowering mandatory minimum sentences—the concerns of law enforcement officials would be ameliorated, for two reasons. First, as noted above, it is already a requirement that anyone hoping to qualify for the current safety valve must provide complete and truthful information to the government.[90] Second, by limiting the safety valve expansion to relatively low-level drug offenders, the government would still be able to exert the same pressure it currently does, on those with the most information to provide; specifically, those individuals who are most involved would not qualify for the expanded safety valve and who would, therefore, be subject to the current mandatory minimum penalties unless they

(D-VT), and the House version, H.R. 706, was introduced by Rep. Bobby Scott (D-VA)). It would expand the discretion of sentencing judges to sentence offenders without regard to a mandatory minimum sentence when they believe that such a sentence would be unduly harsh; neither version has, to date, received a vote in the House and Senate Judiciary Committees.

90. *See supra* note 85.

rendered "substantial assistance"[91] to the government.

Additionally, those who fear that reforming mandatory minimum laws would invariably lead to increases in crime should consider the fact that over thirty states have taken steps to roll back mandatory sentences, especially for low-level drug offenders, since 2000.[92] As noted above, crime rates have mostly continued to drop in those states. Michigan, for example, eliminated mandatory minimum sentencing for most drug offenses in 2002, applied the change retroactively, and made nearly 1,200 inmates eligible for immediate release; yet, between 2003 and 2012, violent crime rates dropped 13% and property crime rates dropped 24%.[93] Texas also reduced sentences for drug offenders;[94] its crime rates are at their lowest level since 1968.[95]

## VI. BACK-END REFORM

Our collective faith in the correction system's ability to successfully rehabilitate offenders has waxed and waned over the years; we have viewed prison as a place for confinement, and, alternatively, as a place that should serve as a correctional institution for those amenable to and capable of being "corrected." The latter view of the prison is a reasonable one. While some hardened and violent offenders will likely always pose a threat to public safety and should remain incarcerated, many offenders—

91. *See* USSG § 5K1.1 (2015); 18 U.S.C. § 3553(e) (2012); 28 U.S.C. § 994(n) (2012).

92. According to the Vera Institute of Justice, at least 29 states have revised their mandatory sentences since 2000. *See* RAM SUBRAMANIAN & RUTH DELANEY, *supra* note 38. Since then, at least two states (Maryland and Florida) have also revised their mandatory minimum laws. *The State of Sentencing 2014: Developments in Policy and Practice*, SENT'G PROJECT (2015), http://bit.ly/18ATuIZ [perma.cc/T5F5-B5TU]; Mike Riggs, *Maryland Passes Mandatory Minimum Sentencing Reform*, FAMILIES AGAINST MANDATORY MINIMUMS (2015), http://bit.ly/1FdVM9W [perma.cc/PF7V-U9PP]. For additional information about new sentencing initiatives recently enacted by various states, *see* Ram Subramanian et al., *Recalibrating Justice: A Review of 2013 State Sentencing and Corrections Trends*, VERA INST. OF JUST. (2014), http://bit.ly/1r8UzwE [perma.cc/RU6S-SH88].

93. *Criminal Justice Reform: Suggested Changes for Tennessee: Hearing before the Tennessee Senate Judiciary Committee* (2014) (statement of John G. Malcolm, Heritage Foundation), http://herit.ag/1SXhOnq [perma.cc/U2BT-UV4C].

94. Other changes include more substance abuse and mental health treatment programs in prison and post-release programs in communities, intermediate sanctions facilities for probation and parole violators giving them a short-term alternative instead of a direct return to prison for longer periods of incarceration, expanded use of specialty courts (mental health, drugs, veterans, and prostitution), and alternatives for low-level, nonviolent offenders, including some drug offenders.

95. *See Lessons from the States: Responsible Prison Reform: Hearing before Subcomm. on Crime, Terrorism, Homeland Security, and Investigations of the H. Comm. on the Judiciary*, 113th Cong., 30 (2014) (statement of Jerry Madden, former Chairman, Texas House Corrections Committee).

particularly those with only a modest prior record who take advantage of prison rehabilitation and skills training programs—could become productive, law-abiding members of society. So long as we are realistic and methodical in our approach, and the results are rigorously analyzed and our approaches continuously re-evaluated, we should not give up on those whose lives can be reformed and salvaged.

Most of the proposals under consideration have similar characteristics: first, they direct the U.S. Attorney General to develop a robust, scientifically sound, and statistically valid, post-sentencing risk-and-needs assessment tool that incorporates both static and dynamic factors; second, they require all eligible offenders[96] to undergo regular risk-and-needs assessments to determine whether they represent a low, moderate, or high risk of reoffending; and third, they provide incentives to eligible offenders who participate in and successfully complete programs or engage in other productive activities that are designed to meet their particular needs and which would decrease the likelihood that they would recidivate once released.

These incentives are in the form of "earned time credit"[97] for low- and moderate-risk offenders (with offenders of lower risk receiving greater benefits), which can result in early release or a change in conditions of confinement to a halfway house or home confinement. High-risk offenders, who are deemed too dangerous to be released early or to be confined in less restrictive settings, could earn other benefits that are meaningful to them, such as increased phone use or visitation privileges, that pose no threat to public safety.

Predicting the future, including the risk that a particular offender will reoffend upon release, is a difficult undertaking

96. Some categories of offenders—such as terrorists, certain repeat offenders, sex offenders, and violent offenders—would be ineligible under most proposals that Congress has considered to date.

97. Earned time credit should be distinguished from good time credit, which is awarded based on being compliant with prison rules and not causing problems, rather than on completing programs or engaging in other productive activities designed to improve the skill sets of inmates which make those inmates less likely to recidivate upon release. *See* 18 U.S.C. § 3624(b) (2015) ("a prisoner who is serving a term of imprisonment of more than 1 year other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations.").

under any circumstances, especially when that prediction is made on a subjective basis. Risk-and-needs assessment tools, which are already being used by several states,[98] are designed to help predict the recidivism risks for different offenders at different points in the criminal justice system, objectively.[99] Although such tools vary somewhat, they typically utilize an actuarial approach based on data compiled in a large number of cases, are designed to assess risks and needs associated with an offender, and are accompanied by a professional evaluation of criminogenic risk factors associated with that offender. Such factors typically include criminal history, employment history, financial stresses, educational background, familial relations, residential stability, substance abuse history, associations with criminal peers, anti-social thinking, mental health history, emotional control and aggression, coping mechanisms, problem solving abilities, and other pertinent personality traits.[100]

Most proposals envision incorporating both "static" and "dynamic" risk factors. Static factors relate to a defendant's background, past actions, and current conditions that might be predictive of future criminal behavior and which will not change.

---

98. *See* RAM SUBRAMANIAN & RUTH DELANEY, VERA INST. OF JUST., PLAYBOOK FOR CHANGE? STATES RECONSIDER MANDATORY SENTENCES (2014), http://bit.ly/1SqE4Xi [perma.cc/PXJ4-EH3T] (listing states that have recently expanded their use of risk-and-needs assessments).

99. For a general discussion of risk-and-needs assessment tools and good time credits, *see* Paul J. Larkin, Jr., *Managing Prison By The Numbers: Using the Good-Time Laws and Risk-Needs Assessments to Manage the Federal Prison Population*, 1 HARV. J.L. & PUB. POL'Y 1 (2014). Some, including former U.S. Attorney General Eric Holder, have questioned whether the use of such assessments might undermine the values of individualized and equal justice and might exacerbate unjust disparities in sentencing practices. *See, e.g.*, Eric Holder, U.S. Attorney General, Remarks Before the Nat'l Ass'n of Criminal Defense Lawyers 57th Annual Meeting and 13th State Criminal Justice Network Conference (Aug. 1, 2014), http://1.usa.gov/1u785ki [perma.cc/EY7A-GGJP]; Jesse Jannetta et al., *Could Risk Assessment Contribute to Racial Disparity in the Justice System?* URBAN INST. (Aug. 11, 2014), http://urbn.is/24edMiP [perma.cc/M9LB-BWLE]; Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 4 STAN. L. REV. 66 (2014); Margaret Etienne, *Legal and Practical Implications of Evidence-Based Sentencing by Judges*, 1 CHAP. J. CRIM. JUST. 43 (2009). Although not as accurate as the "precogs" in the 2002 movie *Minority Report*, when it comes to predicting criminal conduct, the evidence strongly supports the notion that risk assessments can be very effective at identifying risk factors that can be of invaluable assistance in devising educational or treatment programs that may reduce the likelihood of recidivism and increase the likelihood of successful re-entry into society. And, of course, if certain controversial, but predictive, variables associated with protected categories are eliminated from risk assessment tools, the less useful those tools become in terms of assessing the risks of recidivism and the need for certain treatments.

100. *See, e.g.*, John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391 (2006); Edward J. Latessa & Brian Lovins, *The Role of Offender Risk Assessment: A Policy Maker Guide*, 5 VICTIMS & OFFENDERS 203 (2010); FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES 96–97, 318 & n.19 (2003) (listing studies favoring actuarial assessments).

Dynamic factors, on the other hand, can change over time through positive or negative behavior.[101] Dynamic factors are important—at least to the extent they are scientifically sound, are statistically valid, and are not utilized or manipulated solely to reach a certain politically correct result—because they give inmates hope that, by taking positive steps to improve their prospects, they can increase the likelihood of ultimately becoming a productive member of society and can shorten the amount of time before they can leave prison to be reintegrated into society.[102]

This type of reform, however, has critics. Some fear that white-collar criminals will end up spending very little time in prison and that this may exacerbate racial disparities among the prison population.[103] This might happen, but back-end reforms are still worth supporting.

Back-end reform is important because huge numbers of state and federal inmates have mental health problems, substance abuse issues, or both.[104] Both conditions are associated with staggeringly high rates of recidivism, and prison programs addressing these conditions are sparse. As things stand, billions of dollars are spent cleaning up the mess left by recidivating offenders who suffer from untreated alcohol abuse, drug dependency, and mental health problems. We should spend some of that money helping people overcome these problems at a time when we have control over them and at a time when we can provide incentives, both positive (in the case of prisoners) and negative (in the case of probationers), to participate in and complete such programs.[105]

---

101. CONG. RESEARCH SERV., R44087, RISK AND NEEDS ASSESSMENT IN THE CRIMINAL JUSTICE SYSTEM (2015), bit.ly/1U4wl58 [perma.cc/YP6Q-4LRR].

102. *Hearings*, *supra* note 1 (statement of John G. Malcolm).

103. *See, e.g.*, Dara Lind, *The Best Hope for Federal Prison Reform: A Bill That Could Disproportionately Help White Prisoners*, VOX (Feb. 12, 2015), bit.ly/1X4CIo8 [perma.cc/TD2J-GBNM].

104. It is estimated that 65% of all inmates meet the medical criteria for substance abuse or addiction, but that only 11% receive treatment at federal and state prisons and local jails. *See Behind Bars II: Substance Abuse and America's Prison Population*, NAT'L CTR. ON ADDICTION AND SUBSTANCE ABUSE AT COLUM. UNIV. (Feb. 2010), bit.ly/1TBzzyI [perma.cc/S9N6-MRM7]. Studies have also indicated that over half of inmates have mental health problems. *See, e.g.*, DORIS J. JAMES & LAUREN E. GLAZE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES, DEPT. OF JUSTICE, BUREAU OF JUST. STATS. (2006), http://1.usa.gov/1rtoEvg [perma.cc/BC9R-FNP9]; KIDEUK KIM ET AL., URBAN INST., THE PROCESSING AND TREATMENT OF MENTALLY ILL PERSONS IN THE CRIMINAL JUSTICE SYSTEM: A SCAN OF PRACTICE AND BACKGROUND ANALYSIS (2015), http://urbn.is/1g2aISN [perma.cc/C7TQ-5MFG].

105. Various states have, for example, adopted innovative programs designed to help probationers with substance abuse problems through rigorous testing with the threat of swift and certain, but measured, punishment for those who fail those tests. Such programs include

Without these changes, prisons are likely to remain what they too often are today: revolving doors.

Although it is too early to come to any definitive conclusions, such programs show great promise. Some state experiments with back-end reform are already yielding benefits. In 2013, the RAND Corporation issued a report consisting of a meta-analysis of other studies. Based on an evaluation of what it deemed to be "high quality" studies, RAND concluded that inmates who participated in educational programs while behind bars were 43% less likely to reoffend upon release.[106] RAND also concluded that every dollar invested in correctional education resulted in nearly five dollars in savings that would otherwise go toward the costs of re-incarcerating recidivating offenders.[107] Other studies indicate that incentives may be a powerful tool to motivate people to complete treatment, meet planned goals, and effectuate positive changes in behavior.[108] With hundreds of thousands of state and federal prisoners returning to our communities each year, the cost-savings and public safety improvements over time could be considerable.

Regardless of any immediate impact, helping inmates to overcome addiction and problems with mental illness and teaching them job skills or parenting skills or to be able to read and write, to draft a resume, to complete a job application, to know how to dress for an interview, to know how to respond to questions during an interview, to learn how to balance a checkbook, to know how to respond appropriately to adverse situations at work or in their personal lives—these are all worthwhile endeavors that can change

---

Hawaii's Opportunity Probation with Enforcement (HOPE) program and South Dakota's 24/7 sobriety program. The Heritage Foundation, *24/7 Sobriety and HOPE: Creative Ways to Address Substance Abuse and Alcohol Abuse*, YOUTUBE (Aug. 21, 2014), http://bit.ly/23XO7sD [perma.cc/8ZF7-2MUV] (a videotaped program with Hon. Larry Long (who devised South Dakota's 24/7 Sobriety program) and Hon. Steven Alm (who devised the HOPE program)); *see also* Paul Larkin, *The Hawaii Opportunity Probation with Enforcement Project: A Potentially Worthwhile Correctional Reform*, HERITAGE FOUND. LEGAL MEMORANDUM NO. 116 (2014), http://herit.ag/1e68U9e [perma.cc/8SE4-KCCU].

106. RAND found that lower-quality studies also indicated reductions in recidivism rates, but those studies did not show as high of recidivism reduction rates. LOIS M. DAVIS ET AL., RAND CORP., EVALUATING THE EFFECTIVENESS OF CORRECTIONAL EDUCATION: A META-ANALYSIS OF PROGRAMS THAT PROVIDE EDUCATION TO INCARCERATED ADULTS 57 (2013), http://bit.ly/1X4MWoF [perma.cc/W7G2-CG68].

107. *Id.* at 59 ("[E]stimates show that the direct costs of providing education to a hypothetical pool of 100 inmates would range from $140,000 to $174,400 with three-year reincarceration costs being between $0.87 million to $0.97 million *less* for those who receive correctional education than for those who do not.").

108. *See* D.A. Andrews et al., *The Risk-Need-Responsivity (RNR) Model: Does Adding the Good Lives Model Contribute to Effective Crime Prevention?* 38.7 CRIMINAL JUSTICE AND BEHAVIOR 735–55 (2011) (citing numerous studies).

their lives. They are certainly a better use of an inmate's time than sitting around watching TV or, even worse, hanging out with veteran criminals who provide a different sort of training.

## VII. *MENS REA* REFORM

One of the greatest safeguards against overcriminalization—the misuse and overuse of criminal laws and penalties to address societal problems—is ensuring that there is an adequate *mens rea* requirement in criminal laws.[109] The notion that a crime ought to involve a purposeful culpable intent has solid historical grounding.[110] Under the common law, it was clear that convicting someone of a crime required the union of a prohibited act (the "*actus reus*") and a guilty mind ("*mens rea*").[111] Unfortunately, for many crimes today, that is no longer the case.

In 1952, in *Morissette v. United States*, the Supreme Court held:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.[112]

Just last year, in *Elonis v. United States*, the Supreme Court emphasized the need for an adequate *mens rea* requirement in criminal cases.[113] In that case, the Court reversed a man's conviction for violating 18 U.S.C. § 875(c) by transmitting threatening communications after he posted deeply disturbing comments about his estranged wife and others on his Facebook page that she regarded, quite reasonably, as threatening; the defendant, however, claimed that they were self-styled "rap"

---

109. *See generally*, Paul J. Larkin, Jr., *Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 HOFSTRA L. REV. 745 (2014); Brian W. Walsh, *The Criminal Intent Report: Congress is Eroding the Mens Rea Requirement in Federal Criminal Law*, HERITAGE FOUND. (May 14, 2010), herit.ag/1OVeGWX [perma.cc/2NTC-ZV62]; BRIAN W. WALSH & TIFFANY M. JOSLYN, HERITAGE FOUND., WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW, (2010), herit.ag/1So4oVS [perma.cc/GQU7-45JZ].

110. *See* Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishment Clause*, 37 HARV. J.L. & PUB. POL'Y 1065 (2014); Roscoe Pound, *Introduction* to FRANCIS BOWES SAYRE, A SELECTION OF CASES ON CRIMINAL LAW 8–9 (1927) ("Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice be-tween [sic] doing right and doing wrong and choosing freely to do wrong.").

111. 4 WILLIAM BLACKSTONE, COMMENTARIES 432 (9th ed., Callahan & Co. 1913).

112. Morissette v. United States, 342 U.S. 246, 250 (1952).

113. Elonis v. United States, 135 S. Ct. 2001, 2002 (2015).

lyrics.[114] The Court noted that the statute was silent as to whether the defendant must have a specific mental state with respect to the elements of the crime and, if so, what that state of mind must be.[115] The Court stated that, "[t]he fact that the statute does not specify any required mental state, however, does not mean that none exists," and, quoting *Morissette*, continued, the "'mere omission from a criminal enactment of any mention of criminal intent' should not be read 'as dispensing with it.'"[116] The Court, citing to four other cases in which it had provided a missing *mens rea* element,[117] proceeded to read into the statute a *mens rea* requirement and reiterated the "basic principle that 'wrongdoing must be conscious to be criminal.'"[118] The Court focused on the actor's intent rather than the recipient's perception: "'Having liability turn on whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks—'reduces culpability on the all-important element of the crime to negligence.'"[119] While the Court declined to identify exactly what the appropriate *mens rea* standard was and whether recklessness would suffice, the Court recognized that a defendant's mental state is critical when he faces criminal liability and that courts should read federal criminal statutes silent on *mens rea* as incorporating "that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'"[120]

If it were a guarantee that courts would always devise and incorporate an appropriate *mens rea* standard into a criminal statute when one was missing, there might be no need for Congress to do so. But, as the *Elonis* Court noted, there are exceptions to the "'general rule' . . . that a guilty mind is 'a necessary element in the indictment and proof of every crime.'"[121] Despite the *Elonis* Court's recent warning about the need to interpret *mens rea* requirements to distinguish between those who engage in "wrongful conduct" and those who engage in "otherwise innocent conduct," courts

114. *Id.*
115. *Id.*
116. *Id.* at 2009 (quoting *Morissette*, 342 U.S. at 250).
117. *Id.* at 2009–10 (citing United States v. X-Citement Video, Inc., 513 U.S. 64 (1994); Posters 'N' Things, Ltd. v. United States, 511 U.S. 513 (1994); Liparota v. United States, 471 U.S. 419 (1985); and *Morissette*, 342 U.S. at 250).
118. *Elonis*, 135 S. Ct. at 2009 (quoting *Morissette*, 342 U.S. at 252).
119. *Id.* at 2011 (citing U.S. v. Jeffries, 692 F.3d 473, 483–84 (6th Cir. 2012) (Sutton, J., dubitante)).
120. *Id.* at 2010 (quoting Carter v. United States, 530 U.S. 255, 269 (2000)).
121. *Id.* at 2009 (quoting United States v. Balint, 258 U.S. 250, 251 (1922)).

(including the Supreme Court) have, unfortunately, upheld criminal laws lacking mens rea requirements based on a presumption that Congress deliberated and made a conscious choice to create a strict liability crime.[122] Although this is a doubtful

122. *See, e.g.*, Shevlin-Carpenter Co. v. State of Minn., 218 U.S. 57 (1910) (holding that a corporation can be convicted for trespass without proof of criminal intent); *Balint*, 258 U.S. at 254 (holding that a real person can be convicted of the sale of narcotics without a tax stamp without proof that he knew that the substance was a narcotic) ("Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided."); United States v. Behrman, 258 U.S. 280, 285 (1922) (*Balint* companion case) (holding that a physician can be convicted of distributing a controlled substance not "in the course of his professional practice" without proof that he knew this his actions exceeded that limit); United States v. Dotterweich, 320 U.S. 277, 284–85 (1943) (holding that the president and general manager of a company can be convicted of distributing adulterated or misbranded drugs in interstate commerce without proof that he even was aware of the transaction) ("Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless."); United States v. Park, 421 U.S. 658 (1975) (upholding conviction of company president for unsanitary conditions at a corporate warehouse over which he had supervisory authority, but not hands-on control); United States v. Goff, 517 F. App'x 120, 123 (4th Cir. 2013) (holding that the government need not prove that a defendant knew blasting caps qualified as explosives or detonators, and that government need not prove that a defendant knew that he had stored blasting caps in an illegal manner) ("We cannot believe that Congress set out to police a myriad of dangerous explosives regardless of their explosive power but considered the policing of detonators necessary only when they actually possess an ability to detonate."); United States v. Burwell, 690 F.3d 500, 523 (D.C. Cir. 2012) (holding that the government need not prove that a defendant knew the weapon he carried was capable of firing automatically in order to support sentence enhancement for use of a machine gun while committing a violent crime) (Rogers, J., dissenting) ("Thus, neither of the first two interpretative rules—grammatical rules of statutory construction nor the presence of otherwise innocent conduct—counseled in favor of requiring proof of *mens rea*, and the Court thus held that no such proof was required. In so holding, the Court did not, however, classify the provision as a public welfare offense. Nor did it frame the question before it as a choice between offenses that have *mens rea* requirements and public welfare offenses that do not."); United States v. Langley, 62 F.3d 602, 605 (4th Cir. 1995) (holding that the government does not need to prove that a defendant knew of his status as a convicted felon in order to prove knowing possession of a firearm by someone who has been convicted of a felony) (Because "Congress is presumed to enact legislation with . . . the knowledge of the interpretation that courts have given to an existing statute. . . . [W]e may assume that Congress was aware that: (1) no court prior to FOPA required the government to prove knowledge of felony status and/or interstate nexus in prosecutions under [the statute's] predecessor statutes; (2) the only knowledge the government was required to prove in a prosecution under [the statute's] predecessor statutes was knowledge of the possession, transportation, shipment, or receipt of the firearm; and (3) Congress created the FOPA version of [the statute] consistent with these judicial interpretations."); United States v. Harris, 959 F.2d 246, 258 (D.C. Cir. 1992) (holding that Congress intended to apply strict liability to the machine gun provision of § 924(c)) ("The language of the section is silent as to knowledge regarding the automatic firing capability of the weapon. Other *indicia*, however, namely the structure of section 924(c) and the function of *scienter* in it, suggest to us a congressional intent to apply strict liability to this element of the crime."); United States v. Montejo, 353 F. Supp. 2d 643, 655–56 (E.D. Va 2005) (holding that a defendant need not have knowledge that identification actually belonged to another

proposition to begin with, the moral stakes are too high to leave such matters to guessing by a court as to whether Congress truly intended to create a strict liability offense or, more likely, in the rush to pass legislation, simply neglected to consider the issue. And even if a court concluded that Congress did not mean to create a strict liability crime, there is an ever-present risk that the court would pick an inappropriate standard that fails to provide adequate protection to the accused.

In May 2013, the U.S. House of Representatives Committee on the Judiciary established an Over-Criminalization Task Force, which held a series of hearings over the course of a year.[123] The need for meaningful *mens rea* reform was a consistent theme throughout those hearings. During the task force's first hearing, Subcommittee Chairman James Sensenbrenner asked four witnesses[124] to name their top priority to address overcriminalization; each wanted: *mens rea* reform.[125] The task force subsequently devoted an entire hearing to the issue, titled "Mens Rea: The Need for a Meaningful Intent Requirement in Federal Criminal Law."[126]

There was bipartisan recognition of the problem and support for *mens rea* reform. Republican Chairman Sensenbrenner stated that

---

person (rather than being completely false) to be convicted under the Aggravated Identity Theft Penalty Enhancement Act. The Court found against the defendant even though it recognized that the defendant "correctly points out that the conduct that Congress appeared most concerned with when it enacted [the statute] was that of individuals who steal the identities of others for pecuniary gain. . . . However, Congress did not make pecuniary gain and victimization elements of the offense. So long as the language and structure of the statute do not countervail the clearly expressed intent of the legislature—to prevent identity theft and for other purposes— the statute cannot be said to be ambiguous."), *aff'd by* United States v. Montejo, 442 F.3d 213 (2006), *abrogated in part by* Flores-Figueroa v. United States, 556 U.S. 646 (2009); United States v. Averi, 715 F. Supp. 1508, 1509–1510 (M.D. Ala 1989) (holding that the government need not prove a defendant knew about record-keeping requirements as an element of a crime of "knowingly" failing to maintain records) (". . . Congress may have used the term "knowingly" in [the statute] to mean only that the defendant must have been aware that he was not maintaining reasonably informative records on his usage of controlled substances. . . . [T]his statute falls into 'the expanding regulatory area involving activities affecting public health, safety and welfare' in which the traditional rule of guilty purpose or intent has been relaxed.") (quoting United States v. Freed, 401 U.S. 601, 607).

123. Evan Bernick, et al., *Is Congress Addressing Our Overcriminalization Problem? Reviewing the Progress of the Overcriminalization Task Force,* HERITAGE FOUND. LEGAL MEMORANDUM NO. 131 (Aug. 12, 2014), herit.ag/1BbVxgh [perma.cc/A77T-5353].

124. Deputy Attorney General George Terwilliger, then-Chairman of the American Bar Association's Criminal Justice Section, William Shepherd, then-President of the National Association of Criminal Defense Lawyers, Steven Benjamin, and myself.

125. *Defining the Problem and Scope of Over-Criminalization and Over-Federalization: Hearing Before the Over-Criminalization Task Force of the H. Comm. on the Judiciary,* 113th Cong. (2013).

126. *See Mens Rea: The Need for a Meaningful Intent Requirement in Federal Criminal Law: Hearing Before the Over-Criminalization Task Force of the H. Comm. on the Judiciary,* 113th Cong. (2013).

"[t]he lack of an adequate intent requirement in the Federal Code is one of the most pressing problems facing this Task Force . . ."[127] Lending his support to the issue, Ranking Member Robert "Bobby" Scott stated:

> The *mens rea* requirement has long served as an important role in protecting those who did not intend to commit a wrongful act from prosecution or conviction. . . . Without these protective elements in our criminal laws, honest citizens are at risk of being victimized and criminalized by poorly crafted legislation and overzealous prosecutors.[128]

During another hearing, Congressman Scott added:

> The real question before us is how to address not only the regulations that carry criminal sanctions, but also numerous provisions throughout the Criminal Code that also have inadequate or no *mens rea* requirement. . . . Addressing and resolving the issue of inadequate or absent *mens rea* and in all the criminal code would benefit everyone.[129]

Similarly, during a hearing about the scope of regulatory crimes, Democratic Congressman John Conyers stated:

> First, when good people find themselves confronted with accusations of violating regulations that are vague, address seemingly innocent behavior and lack adequate *mens rea*, fundamental Constitutional principles of fairness and due process are undermined. . . . Second, *mens rea*, the concept of a "guilty mind", is the very foundation of our criminal justice system.[130]

Following the completion of the task force's hearing, the Democratic members of the task force and the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations issued a report in which they stated:

> Federal courts have consistently criticized Congress for imprecise drafting of intent requirements for criminal offenses. . . . It is clear that the House and Senate need to do better. We can do so by legislating more carefully and articulately regarding *mens rea* requirements, in order to protect against unintended and unjust

127. *Id.* at 2 (statement of Rep. James Sensenbrenner).

128. *Id.* at 3 (statement of Rep. Robert Scott).

129. *Regulatory Crime: Solutions: Hearing Before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, 113th Cong. 2 (2013) (statement of Rep. Robert Scott).

130. *Regulatory Crime: Identifying the Scope of the Problem: Hearing Before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, 113th Cong. 5 (2013) (statement of Rep. John Conyers).

> conviction. We can also do by ensuring adequate oversight and default rules when we fail to do so.[131]

There are different *mens rea* standards, providing varying degrees of protection to the accused (or, depending on your perspective, challenges for the prosecution). The following recitation of the different *mens rea* standards is somewhat broad and simplified, and courts often differ in how they define those standards, which can make a huge difference in close cases.[132] The "willfully" standard provides the highest level of protection to an accused, requiring proof that the accused acted with the knowledge that his conduct was unlawful. A "purposefully" or "intentionally" standard requires proof that the accused engaged in conduct with the conscious objective to cause a certain harmful result. A "knowingly" standard provides less protection—how much less depends to a great extent on how that word is defined. Some courts define the term "knowingly" to mean that the accused was aware of what he was doing (i.e., he was not sleepwalking, having a psychotic episode, or something of that nature) and that he was aware to a practical certainty that his conduct would lead to a harmful result.[133] Other courts define the term to only require the former.[134] A *mens rea*

131. BOBBY SCOTT, DEMOCRATIC VIEWS ON CRIMINAL JUSTICE REFORMS RAISED BEFORE THE OVER-CRIMINALIZATION TASK FORCE & THE SUBCOMMITTEE ON CRIME, TERRORISM, HOMELAND SECURITY, AND INVESTIGATIONS 120, (2014), 1.usa.gov/1SozxIO [perma.cc/9FLM-PBHH].

132. *See, e.g.*, MODEL PENAL CODE § 2.02 (1981) (general requirements of culpability); United States v. Bailey, 444 U.S. 394, 403–07 (1980) (discussing different standards and noting the difficulty of discerning the proper definition of *mens rea* required for any particular crime); United States v. Pomponio, 429 U.S. 10, 12 (1976) (holding that "willfulness" requires proof of "an intentional violation of a known legal duty") (citing United States v. Bishop, 412 U.S. 346, 360 (1973)); Bryan v. United States, 524 U.S. 184, 191–92 (1998) ("As a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.' In other words, in order to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'") (quoting Ratzlaf v. United States, 510 U.S. 135, 137 (1994)); Holloway v. United States, 526 U.S. 1 (1999) (discussing the use of "intentional" and not reading it to require proof of knowledge of illegality); United States v. Cooper, 482 F.3d 658, 667–68 (4th Cir. 2007) (discussing "knowing" standard); United States v. Sinskey, 119 F.3d 712, 715–16 (8th Cir. 1997) (discussing "knowing" standard); United States v. Hopkins, 53 F.3d 533, 537–41 (2d Cir. 1995) (discussing "knowing" standard); United States v. Weitzenhoff, 35 F.3d 1275, 1284 (9th Cir. 1993) (en banc) (discussing "knowing" standard); United States v. Baytank (Houston), Inc., 934 F.2d 599, 613 (5th Cir. 1991) (discussing "knowing" standard); United States v. Ortiz, 427 F.3d 1278, 1282–83 (10th Cir. 2005) (discussing "negligence" standard); United States v. Hanousek, 176 F.3d 1116, 1121 (9th Cir. 1999) (discussing "negligence" standard); United States v. Frezzo Bros., Inc., 602 F.2d 1123, 1129 (3d Cir. 1979) (discussing "negligence" standard).

133. *Bailey*, 444 U.S. at 403–05.

134. *See, e.g.*, United States v. X-Citement Video, Inc., 513 U.S. 64, 71–73 (1994); United States v. Cooper, 482 F.3d 658, 665 (4th Cir. 2007).

standard of "recklessly" or "wantonly" requires proof that the accused was aware of what he was doing, that he was aware of the substantial risk that such conduct could cause harm, and that, despite this knowledge, he acted in a manner that grossly deviated from the standard of conduct that a reasonable, law-abiding person would have employed in those circumstances. Finally, the "negligently" standard, which, save for strict liability, provides the least level of protection for the accused, only requires proof that the accused did not act in accordance with how a reasonable, law-abiding person would have acted under those circumstances. "Negligently" is often utilized in connection with criminal statutes that define *mens rea* based on what a defendant "reasonably should have known." "Negligence" is a term traditionally used in tort law and is extremely ill-suited to criminal law. Indeed it is arguably not a *mens rea* standard at all; someone who causes an accident because they were slightly careless cannot be said to have acted with a "guilty mind."

Today, there are nearly 5,000 federal criminal statutes scattered throughout the 52 titles of the federal code[135] and buried within the Code of Federal Regulations, which is comprised of approximately 200 volumes with over 80,000 pages; there are an estimated 300,000 or more criminal regulatory offenses,[136] or so-

135. *The Crimes on the Books and Committee Jurisdiction: Hearing Before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, 113th Cong. 22 (2014) (testimony of John S. Baker, Professor Emeritus, LSU Law School), http://1.usa.gov/1QyTgku [perma.cc/TY29-JQK5]; *see also* Gerald E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 37 (1997) ("Legislatures, concerned about the perceived weakness of administrative regimes, have put criminal sanctions behind administrative regulations governing everything from interstate trucking to the distribution of food stamps to the regulation of the environment."); Paul Larkin, *Regulatory Crimes and the Mistake of Law Defense*, HERITAGE FOUND. (July 9, 2015), herit.ag/1I8EHmT [perma.cc/B4SA-HN8A]; Morissette v. United States, 342 U.S. 246, 253–54 (1952) (stating that the Industrial Revolution "multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanisms" and resulted in "[c]ongestion of cities and crowding of quarters [that] called for health and welfare regulations undreamed of in simpler times.").

136. There are many instances in which Congress grants a broad delegation to regulatory agencies to promulgate regulations, violations of which can result in criminal prosecution. For example, pursuant to 42 U.S.C. § 6921(a) & (b) (2006), the EPA is granted broad authority to characterize and list "hazardous materials," which it has done on several occasions: 40 C.F.R. § 261.3 (2016) (generally defining "hazardous waste"); §§ 261.20–261.24(a) (defining as hazardous waste solid waste that has the characteristics of ignitability, corrosivity, reactivity, or toxicity); §§ 261.4, 261.38–261.40 (defining "exclusions" from "hazardous waste"); § 261.5 (defining special requirements for hazardous waste generated by "conditionally exempt small quantity generators"); § 261.6 (defining requirements for "recyclable materials" as an exemption from "hazardous waste"); § 261.10 (specifying criteria for identifying "the characteristics of hazardous waste"); § 261.11 (defining requirements for listing "hazardous waste"); § 261.24(b) (listing "toxic wastes"); § 261.31 (listing hazardous wastes from "nonspecific sources"); and § 261.32 (listing hazardous wastes from "specific

called "public welfare" offenses. It is a dirty little secret that nobody—not even Congress or the Department of Justice—knows precisely how many criminal laws and regulations currently exist.[137] Many of these laws lack adequate, or even any, *mens rea* standard; a prosecutor need not prove that the accused had any intent to violate the law, or even had any knowledge that he was violating a law, in order to convict. That means that innocent mistakes or accidents can—and frequently do—become crimes.

Consider how many people would know that the following are federal crimes:

- To make unauthorized use of the 4-H club logo,[138] the Swiss Confederation coat of arms,[139] or the "Smokey the Bear" or "Woodsy Owl" characters.[140]
- To misuse the slogan "Give a Hoot, Don't Pollute."[141]
- To transport water hyacinths, alligator grass, or water chestnut plants.[142]
- To possess a pet (except for a guide dog) in a public building, a beach designated for swimming, or on public transportation.[143]
- To fail to keep a pet on a leash that does not exceed six feet in length on federal park land.[144]
- To dig or level the ground at a campsite on federal land.[145]

---

sources"). Violations of provisions pertaining to hazardous waste can subject individuals or entities to criminal prosecution under 42 U.S.C. § 6928 (2012). Similarly, pursuant to 29 U.S.C. § 655(b) (2012), the Department of Labor (DOL) is empowered to establish national occupational health and safety standards. Once established, the DOL may require the use of signs warning employees about particular hazards, the use of particular types of protective gear, and the type and number of medical examinations for particular employees. Violations of such rules can result in criminal prosecution pursuant to 29 U.S.C. § 666 (2012). Also, Congress has empowered the President to list articles and services that are subject to strict export restrictions because of their potential military uses. The State Department has done so under far-reaching International Traffic in Arms Regulations (ITAR), 22 C.F.R. §§ 120–130 (2016), violations of which may result in criminal prosecution.

137. It is worth noting that Congress is currently considering a proposal that would require the U.S. Attorney General and the heads of all federal regulatory agencies to compile a list of all criminal statutory and regulatory offenses, including a list of the *mens rea* requirements and all other elements for such offenses, and to make such indices available and freely accessible on the websites of the Department of Justice and the respective agencies. *See* Smarter Sentencing Act of 2015 § 7 (2015). (The Senate version of this bill, which was introduced by Sen. Mike Lee (R-UT) and Sen. Richard Durbin (D-IL), is S. 502, and the House version of this bill, which was introduced by Rep. Raul Labrador (R-ID), is H.R. 920.).

138. 18 U.S.C. § 707 (2014).
139. 18 U.S.C. § 708 (2014).
140. 18 U.S.C. § 711–711a (2014).
141. *Id.* at § 711a (2014).
142. 18 U.S.C § 46 (2014).
143. 36 C.F.R. § 2.15(a)(1) (2016).
144. *Id.* at (a)(2).
145. 36 C.F.R. § 2.10(b)(1) (2016).

- To picnic in a non-designated area on federal land.[146]
- To poll a service member before an election.[147]
- To manufacture and transport dentures across state lines if you are not a dentist.[148]
- To sell malt liquor labeled "pre-war strength."[149]
- To write a check for an amount less than $1.[150]
- To install a toilet that uses too much water per flush.[151]
- To roll something down a hillside or mountainside on federal land.[152]
- To toss a rock into a valley or a canyon on federal land.[153]
- To park your car in a way that inconveniences someone on federal land.[154]
- To ski, snowshoe, ice skate, sled, inner tube, toboggan, or do any "similar winter sports" on a road or "parking area . . . open to motor vehicle traffic" on federal land.[155]
- To "allow . . . a pet to make a noise that . . . frightens wildlife on federal land."[156]
- To use aircraft on a hunting or fishing expedition on federal land.[157]
- To operate a "motorized toy, or an audio device, such as a radio, television set, tape deck or musical instrument, in a manner . . . [t]hat exceeds a noise level of 60 decibels measured on the A-weighted scale at 50 feet."[158]
- To "[b]ath[e] or wash[] food, clothing, dishes, or other property at public water outlets, fixtures or pools" not designated for that purpose.[159]
- To "[a]llow[] horses or pack animals to proceed in excess of a slow walk when passing in the immediate vicinity of persons on foot or bicycle."[160]
- To operate a "snowmobile that makes excessive noise" on federal land.[161]

---

146. 36 C.F.R. § 2.11 (2016).
147. 18 U.S.C. § 596 (2014).
148. 18 U.S.C. § 1821 (2014).
149. 27 U.S.C. §§ 205, 207 (2014); 27 C.F.R. §7.29(f) (2016).
150. 18 U.S.C. § 336 (2014).
151. *See* Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 751 (2013).
152. 36 C.F.R. §2.1(a)(3) (2016).
153. *Id.*
154. 36 C.F.R. § 261.10(f) (2016).
155. 36 C.F.R. § 2.19(a) (2016).
156. 36 C.F.R. § 2.15(a)(4) (2016).
157. 36 C.F.R. § 13.450(a) (2016).
158. 36 C.F.R. § 2.12(a)(1) (2016).
159. 36 C.F.R. § 2.14(a)(5) (2016).
160. 36 C.F.R. § 2.16(e) (2016).
161. 36 C.F.R. § 2.18(d)(1) (2016) ("Excessive noise for snowmobiles manufactured after July 1, 1975 is a level of total snowmobile noise that exceeds 78 decibels measured on

- To use "roller skates, skateboards, roller skis, coasting vehicles, or similar devices" in non-designated areas on federal land.[162]
- To "fail to turn in found property" to a national park superintendent "as soon as practicable."[163]
- To use a surfboard on a beach designated for swimming.[164]

There are, of course, certain kinds of crimes such as murder, rape, arson, robbery, and fraud, which are referred to as *malum in se* (Latin for "wrong in itself") offenses, that are clearly morally opprobrious. It is completely appropriate and necessary in such cases to bring the moral force of the government in the form of a criminal prosecution in order to maintain order and respect for the rule of law.

As the examples cited above should make clear, however, some criminal statutes and many regulatory crimes do not fit into this category. Such crimes are known as *malum prohibitum* (Latin for "wrong because prohibited"). This category of offenses would not raise red flags to average citizens (or even to most lawyers and judges) and are "wrong" only because Congress or some regulatory authority says they are, not because they are inherently blameworthy.[165] The matter is even more complicated in the case of regulations. Unlike *malum in se* offenses, which are always wrong and always prohibited absent a morally-justified and well-recognized exception or circumstance (such as a legitimate claim of self-defense in a murder case), most regulations *allow* conduct; however, they circumscribe when, where, how, how often, and by whom certain conduct can be done, often in ways that are hard for non-experts to understand or predict. Such regulatory infractions are enforced and penalized through the same traditional process used to investigate, prosecute, and penalize rapists and murderers even though many of the people who commit such infractions were unaware that they were exposing themselves to potential criminal liability.[166]

---

the A-weighted scale measured at 50 feet. Snowmobiles manufactured between July 1, 1973 and July 1, 1975 shall not register more than 82 decibels on the A-weighted scale at 50 feet. Snowmobiles manufactured prior to July 1, 1973 shall not register more than 86 decibels on the A-weighted scale at 50 feet. All decibel measurements shall be based on snowmobile operation at or near full throttle.").

162. 36 C.F.R. § 2.20 (2016).

163. 36 C.F.R. § 2.22(a)(3) (2016).

164. 36 C.F.R. § 3.17(b) (2016).

165. Richard L. Gray, *Eliminating the (Absurd) Distinction Between Malum In Se and Malum Prohibitum Crimes*, 73 WASH. U.L.Q. 1369, 1370 (1995).

166. There are additional problems with respect to regulatory crimes, specifically,

In *Rogers v. Tennessee*, the Supreme Court cited to "core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct."[167] The threat of unknowable, unreasonable, and vague laws—all of which pertain to one's ability to act with a "guilty mind"—troubled our Founding Fathers as well. In Federalist No. 62, James Madison warned, "It will be of little avail to the people that laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood . . . [so] that no man who knows what the law is today, can guess what it will be like tomorrow."[168] It is a serious problem when reasonable, intelligent people are branded as criminals for violating laws or regulations that they had no intent to violate, never knew existed, and would not have understood to apply to their actions even if they had known about them.

The relationship between criminal and administrative law dates back to the turn of the twentieth century, when Congress established federal administrative agencies, to protect the public from potential dangers posed by an increasingly industrialized society, and a regulatory framework that included both civil and criminal penalties for failing to abide by the rules those agencies promulgated.[169] Those regulations cover many aspects of our lives, including our environment, the food we eat, the drugs we take, our health, transportation, and housing. As the administrative state has grown, so has the number of criminal regulations.

There are, however, important differences between criminal laws and regulations; the most important difference is that they largely serve different purposes.[170] Criminal laws are meant to enforce a commonly-accepted moral code, set forth in language readily

---

regulations in which violations are punishable as criminal offenses. In addition to the fact that many regulations are vague and overbroad, many regulations are so abstruse that they may require a technical or doctoral degree in the discipline covered by the regulations to understand them. Further, because there are so many regulations located in so many places, lay people and small companies subject to those regulations likely have too few resources to locate them, and understand them. In addition to actual regulations, there are also agency "guidance" documents and "frequently-asked-questions" that agencies sometimes try to pass off as having the same legal effect as regulations.

167. 532 U.S. 451, 459 (2001).

168. THE FEDERALIST NO. 62, at 323–24 (James Madison) (George W. Carey & James McClellan eds., 2001).

169. John Malcolm, *Criminal Law and the Administrative State: The Problem with Criminal Regulations*, HERITAGE FOUND. LEGAL MEMORANDUM NO. 130 (Aug. 6, 2014), herit.ag/1QXREpQ [perma.cc/L852-W492].

170. *See* Larkin, *supra* note 110.

understood by an average person[171] and that clearly identifies prohibited conduct, backed by the full force and authority of the government. Regulations, on the other hand, are meant to establish rules of the road (with penalties attached for violations of those rules) to curb excesses and address consequences in a complex, rapidly evolving, highly industrialized society, which is why they are often drafted using broad, aspirational language designed to provide agencies with the flexibility they need to address societal concerns (e.g., health hazards) and to respond to new problems and changing circumstances, including scientific and technological advances. While large, heavily-regulated businesses may be able to keep abreast of complex regulations as they change over time to adapt to evolving conditions, individuals and small businesses are often less able to do so. When criminal penalties are attached to violations of obscure regulations, these traps for the unwary can have particularly dire consequences.

There is a "significant difference between regulations that carry civil or administrative penalties for violations and regulations that carry criminal penalties."[172] People "caught up in the latter may find themselves deprived of their liberty and stripped of their right to vote, to sit on a jury, and to possess a firearm, among other penalties that simply do not apply when someone violates a regulation that carries only civil or administrative penalties."[173] In addition, there is a unique stigma associated with being branded a criminal. A person loses not only his liberty and certain civil rights, but also his reputation—an intangible yet invaluable commodity, precious to entities and people alike, that once damaged, can be nearly impossible to repair.[174] "In addition to standard penalties that are imposed on those who are convicted of crimes, a series of burdensome collateral consequences often imposed by state or federal laws can follow an individual for life."[175] For businesses, just

171. *See, e.g.*, United States v. Harriss, 347 U.S. 612 (1954) (holding that the government cannot enforce a criminal law that cannot be understood by a person of "ordinary intelligence"); Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (referring to persons of "common intelligence").

172. Malcolm, *supra* note 169.

173. *Id.*

174. *Id.*

175. *Id.*; Kelly Moore et al., *The Effect of Stigma on Criminal Offenders' Functioning: A Longitudinal Mediational Model*, 37 DEVIANT BEHAVIOR 196 (2016), bit.ly/1OViR4Z [perma.cc/D72Y-KXDY]; *see generally* Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOCIOLOGY 937 (2003), http://bit.ly/1vNQBJk [perma.cc/K9A8-XYPH]; American Bar Association, *National Inventory of the Collateral Consequences of Conviction*, (May 19, 2016), http://bit.ly/1CuyVLL [perma.cc/29V4-U4YV]. In short, individuals convicted of crimes

being charged with violating a regulatory crime can sometimes result in the "death sentence" of debarment from participation in federal programs.[176]

As is the case with Congress, some regulators seem to have succumbed to the temptation to criminalize any behavior that occasionally leads to a bad outcome.[177] Many regulators, acting out of an understandable desire to protect the public from environmental hazards, adulterated drugs, and the like, believe it is appropriate—and, indeed, advantageous—to promulgate criminal statutes and regulations with weak *mens rea* standards or with no *mens rea* standards at all, in order to prosecute and incarcerate those who engage in conduct, albeit negligently or totally unwittingly, that causes harm to the public. They will cite to the fact that the Supreme Court has upheld the constitutionality of such crimes on several occasions,[178] despite significant criticism of strict

face consequences extending beyond the end of their actual sentences, potentially lasting their entire lives. Examples include being barred from entering a variety of licensed professional fields and receiving federal student aid. The Internet has spawned numerous websites designed specifically to catalog, permanently retain, and publicize individuals' criminal histories—all but guaranteeing perpetual branding as a criminal. These websites can demand payment from individuals in exchange for removing their mug shots and related personal information. For additional discussion about the detrimental nature of collateral consequences, *see* Nat'l Ass'n of Crim. Def. Lawyers, *Collateral Damage: America's Failure to Forgive or Forget in the War on Crime* (2014), bit.ly/1L9niyq [perma.cc/HTS7-YKRE].

176. *See, e.g.*, Steven D. Gordon & Richard O. Duvall, *It's Time to Rethink the Suspension and Debarment Process*, bit.ly/1M1vZpe [perma.cc/DR8D-SX5B]; Peggy Little, *The Debarment Power – No Do Business with No Due Process*, FEDERALIST SOC'Y: EXECUTIVE BRANCH REVIEW (Apr. 25, 2013), bit.ly/1Rvo2uf [perma.cc/S8UZ-4ZAC].

177. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 282–83 (1993):

> There have always been regulatory crimes, from the colonial period onward. . . . But the vast expansion of the regulatory state in the twentieth century meant a vast expansion of regulatory crimes as well. Each statute on health and safety, on conservation, on finance, on environmental protection, carried with it some form of criminal sanction for violation. . . . Wholesale extinction may be going on in the animal kingdom, but it does not seem to be much of a problem among regulatory laws. These now exist in staggering numbers, at all levels. They are as grains of sand on the beach.

Indeed, the mere existence of criminal regulations dramatically alters the relationship between the regulatory agency and the regulated power. All an agency has to do is suggest that a regulated person or entity *might* face criminal prosecution and penalties for failure to follow an agency directive, and the regulated person or entity will likely fall quickly into line without questioning the agency's authority. For an excellent article discussing the pressures that companies face when confronted with the possibility of, and the lengths to which they will go to avoid, criminal prosecution, *see* RICHARD A. EPSTEIN, HERITAGE FOUND., LEGAL MEMORANDUM NO. 129: THE DANGEROUS INCENTIVE STRUCTURES OF NONPROSECUTION AND DEFERRED PROSECUTION AGREEMENTS, (2014), herit.ag/1QqMKyc [perma.cc/4EZ4-PRUG]; *see also* James R. Copeland, *The Shadow Regulatory State: The Rise of Deferred Prosecution Agreements*, 14 CIVIL JUSTICE REPORT 1 (2012), bit.ly/1oVV0Nu [perma.cc/G57P-CATP].

178. *See, e.g.*, United States v. Park, 421 U.S. 658 (1975) (upholding conviction of company president for unsanitary conditions at a corporate warehouse over which he had

liability criminal provisions.[179] These regulators believe, or at least fear, that insisting upon robust *mens rea* standards in our criminal laws will give a "pass" to those who engage in conduct that harms our environment; in their view, those people are most likely wealthy executives working for large, multinational corporations. But this argument is misplaced. There is no question that bad outcomes do occasionally occur and that those who engage in actions that cause harm should be held accountable. But we ought to ask an appropriate follow-up question: what penalties should we impose against these actors?

Congress needs to give greater consideration to *mens rea* requirements when passing criminal legislation, to make sure that they are appropriate for the type of activity involved and to ensure that the standard separates those who are truly deserving of the government's highest form of condemnation and punishment—criminal prosecution and incarceration—from those who deserve some lesser sanction. Absent extraordinary circumstances, it should not be enough that the government proves that the accused possessed "an evil-doing hand"; the government should also have to

---

managerial control, but not hands-on control); United States v. Dotterweich, 320 U.S. 277 (1943) (holding that the president and general manager of a company could be convicted of distributing adulterated or misbranded drugs in interstate commerce without proof that he even was aware of the transaction); United States v. Balint, 258 U.S. 250 (1922) (holding that a real person can be convicted of the sale of narcotics without a tax stamp without proof that he knew the substance was a narcotic); United States v. Behrman, 258 U.S. 280 (1922) (*Balint* companion case) (holding that a physician can be convicted of distributing a controlled substance not "in the course of his professional practice" without proof that he knew that his actions exceeded that limit); Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57 (1910) (upholding corporation's conviction for trespass without proof of criminal intent).

179. *See, e.g.*, LON L. FULLER, THE MORALITY OF LAW 77 (1969) ("Strict criminal liability has never achieved respectability in our law."); H.L.A. Hart, *Negligence, Mens Rea, and Criminal Responsibility*, *in* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 136, 152 (1968) ("[S]trict liability is odious."); Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 72 (1933) ("To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice; and no law which violates this fundamental instinct can long endure."); A.P. Simester, *Is Strict Liability Always Wrong?*, APPRAISING STRICT LIABILITY 21 (A.P. Simester ed., 2005) (Strict liability is wrong because it "leads to conviction of persons who are, morally speaking, innocent."); Richard G. Singer, *The Resurgence of Mens Rea: The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337, 403–04 (1989); Rollin M. Perkins, *Criminal Liability Without Fault: A Disquieting Trend*, 68 IOWA L. REV. 1067, 1067–70 (1983); Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1109 (1952):

> The most that can be said for such provisions [prescribing liability without regard to any mental factor] is that where the penalty is light, where knowledge normally obtains and where a major burden of litigation is envisioned, there may be some practical basis for a stark limitation of the issues; and large injustice can seldom be done. If these considerations are persuasive, it seems clear, however, that they ought not to persuade where any major sanction is involved.

prove that the accused had an "evil-meaning mind."[180]

In addition to undertaking the arduous task of reviewing existing criminal statutes and regulations for adequate and appropriate *mens rea* standards, which ought to be done, Congress should pass a default *mens rea* provision that would apply to crimes in which no *mens rea* has been provided. In other words, if there is an element of a criminal statute or regulation that is missing a *mens rea* requirement, a default *mens rea* standard—preferably a robust one—should be presumed for that element. A number of states, most recently Michigan and Ohio, have enacted default *mens rea* provisions—in some cases, with overwhelming bipartisan support—yet prosecutions have continued apace and defendants in those states are still being convicted of the crimes with which they have been charged.[181] In other words, the sky has not fallen (and the public's respect for the moral force of the criminal law in those states has likely been enhanced).

A default *mens rea* provision would not prohibit Congress from creating strict liability crimes (so long as Congress made clear that a crime was meant to be strict liability). Such a default provision would only come into play if Congress were to pass a criminal statute that did not contain any *mens rea* requirement whatsoever. Clearly, Congress will, at times, want to pass a strict liability crime, at least with respect to some, if not all, of the elements of that offense. The federal child pornography statute[182]—which currently gives prosecutors the ability to convict someone for producing child pornography without proof that the offender knew that the youth involved was a minor[183]—comes to mind.

Likewise, Congress should clarify that the government should not have to prove any *mens rea* standard for an element of a crime

180. *See* Morissette v. United States, 342 U.S. 246, 251–52 ("Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil.").

181. *See* Josh Siegel, *How Michigan and Ohio Made It Harder to Accidentally Break the Law*, DAILY SIGNAL (Jan. 27, 2016), http://dailysign.al/21L3b0L [perma.cc/8F4W-L6J7]; JOHN S. BAKER, JR., FEDERALIST SOC'Y, MENS REA AND STATE CRIMES (2012), http://bit.ly/1QwwzRq [perma.cc/5QFF-4AHB] (noting states that have default *mens rea* provisions, including Alaska, Arkansas, Delaware, Hawaii, Illinois, Kansas, Missouri, North Dakota, Oregon, Pennsylvania, Tennessee, Texas, and Utah).

182. 18 U.S.C. § 2251(a) (2014).

183. *See, e.g.*, United States v. Griffith, 284 F.3d 338, 349 (2d Cir. 2002); United States v. Malloy, 568 F.3d 166, 171–72 (4th Cir. 2009); United States v. Fletcher, 634 F.3d 395, 400 (7th Cir. 2011); United States v. Pliego, 578 F.3d 938, 943 (8th Cir. 2009); United States v. U.S. Dist. Ct. for the Cent. Dist. of Cal., 858 F.2d 534, 538 (9th Cir. 1988).

that relates only to subject matter jurisdiction or venue.[184] For example, when a defendant is charged with assaulting, resisting, or impeding a federal officer or employee[185] or with killing a federal officer engaged in the performance of his duties,[186] the government should not have to prove that the defendant knew that the individual he was harming or impeding was a federal officer. Similarly, if a defendant is charged with murdering a U.S. national outside the United States,[187] the government should not have to prove that the defendant knew that the person he was killing was a U.S. national. Likewise, if a defendant is charged with robbing a federally insured financial institution,[188] the government should not have to prove that the defendant knew that the bank was federally insured or that he targeted the victim bank because it was federally insured.[189]

Some have argued that requiring the government to prove that somebody acted with a bad intent would encourage individuals—especially corporate officers—to act recklessly while putting on blinders to consciously avoid learning the law, facts, and circumstances surrounding their actions which would otherwise render them criminally liable; this is commonly referred to in the law as acting with "willful blindness." Others argue that requiring the government to prove that somebody acted with a bad intent would violate the fundamental precept that "ignorance of the law is no excuse."

These are straw man arguments. With respect to the first argument, it is well-established in the law that proof of someone acting with willful blindness serves to satisfy the element of criminal intent; in other words, someone who acts with deliberate ignorance is just as culpable and is treated exactly the same under the law as someone who acts with positive knowledge.[190] With respect to the

184. Just recently, in Luna Torres v. Lynch, 136 S. Ct. 1619, 1633–34 (2016), the Supreme Court reiterated that while courts should generally interpret criminal statutes to require that the defendant possess a *mens rea* as to every element of an offense, that presumption does not apply to jurisdictional elements. *See also* United States v. Yermian, 468 U.S. 63, 68 (1984) ("Jurisdictional language need not contain the same culpability requirement as other elements of the offense."); United States v. Feola, 420 U.S. 671, 677, n.9 (1975) ("the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute.").

185. 18 U.S.C. § 111 (2014).

186. 18 U.S.C. § 1114 (2014).

187. 18 U.S.C. § 2332 (2014).

188. 18 U.S.C. §2113 (2014).

189. *See, e.g.*, Loughrin v. United States, 134 S. Ct. 2384, 2386–87 (2014); *see also* 18 U.S.C. § 1344(2) (2014).

190. *See, e.g.*, United States v. Gabriele, 63 F.3d 61, 66 n.6 (1st Cir. 1995); United States

second argument, the law generally does not require proof that a defendant knew his conduct was *unlawful* (if it did require such proof, then there might be some validity to the argument). Rather, intent generally requires proof that the defendant knew his conduct was *wrongful*; that means he did something knowing it was unlawful, that he did something knowing that his conduct would likely cause some harmful result, or that he did something recklessly disregarding the fact that it would likely cause some harmful result.[191] Moreover, as stated above, a legislature could provide that proof of mere negligence—which would not require proof that the accused knew his conduct was unlawful or that he acted knowing that there was a substantial likelihood of harm—would be sufficient to satisfy the criminal intent element.

Indeed, Congress can *always* obviate the need to resort to a default *mens rea* provision by including its own preferred *mens rea* requirement, including a lower one, with respect to the statute or element in question. And on those (hopefully rare) occasions when Congress wishes to pass a criminal law with no *mens rea* requirement whatsoever, it can and should make its intentions clear by stating in the statute itself that Congress has made a conscious decision to dispense with a *mens rea* requirement for the particular conduct in question. Such an extraordinary legislative act—which, when executed, can result in branding someone a criminal for engaging in conduct without any intent to violate the law or to cause harm—should not be accomplished through sloppy legislative drafting or arrived at through guesswork by a court trying to divine whether the omission was intentional or not. This need not, however, be an onerous requirement; Congress could, for example, choose to make its intent clear by adding a provision to a criminal statute (e.g., "This section shall not be construed to require the Government to prove a culpable state of mind with respect to any element of the offense defined in this section."). Further, there is no magic formulation of words that Congress would need use to make its intent clear, as long as its intent was, indeed, clear.

---

v. Goffer, 721 F.3d 113, 126 (2d Cir. 2013); United States v. Richard Stadtmauer, 620 F.3d 238 (3d Cir. 2010); United States v. Schnitzer, 145 F.3d 721 (5th Cir. 1998); United States v. Lee, 991 F.2d 343, 349 n.2 (6th Cir. 1993); United States v. Carrillo, 435 F.3d 767, 780 (7th Cir. 2006); United States v. King, 351 F.3d 859 (8th Cir. 2003); United States v. Jewell, 532 F.2d 697 (9th Cir. 1975); United States v. Delreal-Ordones, 213 F.3d 1263, 1268 (10th Cir. 2000); United States v. Schlei, 122 F.3d 944 (11th Cir. 1997).

191. *See, e.g.*, United States v. Yielding, 657 F.3d 688, 708 (8th Cir. 2011) (stating that the statute required proof that "the defendant knew that his conduct was wrongful" rather than proof that he knew it violated a known legal duty).

Congress can consider, just as some states have in enacting their own *mens rea* reform measures, whether a default *mens rea* provision should apply only prospectively or whether it should also be applied to existing laws that lack *mens rea* requirements. Choosing to apply a default standard retrospectively could lead to unintended consequences; it could make it tougher to prosecute certain, discrete offenses that, perhaps, ought to be strict liability offenses and that Congress would clearly want to be strict liability offenses. Of course, Congress could always identify those offenses before or after the fact and make clear its intention that they should be strict liability offenses. Nonetheless, reasonable minds can certainly differ on whether the benefits of applying a default standard to existing laws would outweigh the costs. Alternatively, to minimize any unintended deleterious impact from retrospective application of a default *mens rea* provision, Congress could consider an exception, such as the one offered by Senator Orrin Hatch (R-UT), for "any offense that involves conduct which a reasonable person would know inherently poses an imminent and substantial danger to life or limb."[192]

## VIII. WHO BENEFITS FROM *MENS REA* REFORM

Will some senior corporate management "fat cats" benefit from stricter *mens rea* requirements, which may make it more difficult to successfully prosecute them? Maybe, but maybe not. After all, most individuals who fall into that category work in heavily regulated industries and are usually given explicit warnings by government officials, typically as a condition of licensure, about what the law requires, including potential criminal penalties. They therefore cannot reasonably or credibly claim that they were not aware that their actions might subject them to criminal liability, so long as they acted with the requisite intent. Moreover, as Paul Larkin, a Senior Legal Research Fellow at the Heritage Foundation, has noted:

> Corporate directors, chief executive officers (CEOs), presidents, and other high-level officers are not involved in the day-to-day operation of plants, warehouses, shipping facilities, and the like. Lower level officers and employees, as well as small business owners, bear that burden. What is more, the latter individuals are

192. *See* Mens Rea Reform Act of 2015, S. 2298, 114th Cong. § 2(a) (2015) (stating that the term "covered offense" does not include "any offense that involves conduct which a reasonable person would know inherently poses an imminent and substantial danger to life or limb.").

> in far greater need of the benefits from [*mens rea* reform] precisely because they must make decisions on their own without resorting to the expensive advice of counsel. The CEO for Du-Pont has a white-shoe law firm on speed dial; the owner of a neighborhood dry cleaner does not. Senior officials may or may not need the aid of the remedies proposed here; lower-level officers and employees certainly do.[193]

Consider these examples. Wade Martin, a native Alaskan fisherman, sold ten sea otters to a buyer he thought was a native Alaskan; the authorities informed him that was not the case and that his actions violated the Marine Mammal Protection Act of 1972,[194] which criminalizes the sale of certain species, including sea otters, to non-native Alaskans. Because prosecutors would not have had to prove that he knew the buyer was not a native Alaskan, Martin pleaded guilty to a felony charge and was sentenced to two years of probation and ordered to pay a $1,000 fine.[195]

Lawrence Lewis[196] was the chief engineer at Knollwood, a military retirement home. On occasion, some of the elderly patients at Knollwood would stuff their adult diapers in the toilets, causing a blockage and sewage overflow.[197] To prevent harm to the patients, especially those in the hospice ward on the first floor, Lewis and his staff did what they were trained to do on such occasions.[198] They diverted the backed-up sewage into a storm drain that they believed was connected to the city's sewage-treatment system.[199] It turned out, unbeknownst to Lewis, that the storm drain emptied into a remote part of Rock Creek, which ultimately connects with the Potomac River.[200] Nonetheless, federal authorities charged Lewis with felony violations of the Clean Water Act, which only required proof that Lewis committed the physical acts which constituted the violation, regardless of any knowledge of

193. Larkin, *supra* note 151, at 792.

194. 16 U.S.C. §§ 1371–1423 (2014).

195. *See* Gary Fields & John R. Emshwiller, *As Federal Crime List Grows, Threshold of Guilt Declines*, WALL ST. J. (Sept. 27, 2011), http://on.wsj.com/23XqDJm [perma.cc/FNX6-AY84].

196. *See* Gary Fields & John R. Emshwiller, *A Sewage Blunder Earns Engineer a Criminal Record*, WALL ST. J. (Dec. 12, 2011), http://on.wsj.com/1XTyyQP [perma.cc/HS27-EAQV]; *Regulatory Crime: Identifying the Scope of the Problem: Hearing Before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, 113th Cong. (2013) (testimony of Lawrence Lewis), http://1.usa.gov/1Sw76ow [perma.cc/4WBN-XDP7].

197. Evan Bernick, *Diverted from the Straight and Narrow Path for Diverting Sewage*, THE DAILY SIGNAL (July 5, 2013), http://dailysign.al/1SoMO3M [perma.cc/PJ4D-A9KC] (includes videotaped interview with Lawrence Lewis).

198. *Id.*

199. *Id.*

200. *Id.*

the law or intent to violate it on his part.[201] To avoid a felony conviction and potential long-term jail sentence, Lewis pleaded guilty to a misdemeanor and was sentenced to one year of probation.[202]

In 1996, Bobby Unser, a three-time Indianapolis 500 winner, and his friend got lost in a blinding snowstorm while driving a snowmobile; they ended up spending two harrowing nights lost in the New Mexico wilderness.[203] Unser was prosecuted and convicted of violating the Wilderness Act of 1964[204] because, during the blizzard, Unser inadvertently drove on to federal land and, fearing for his and friend's lives, abandoned the vehicle.[205]

Were Wade Martin, Lawrence Lewis, and Bobby Unser high-level corporate executives? Hardly. Yet, they now carry the stigma of a criminal conviction and all the attendant collateral consequences that flow from it. When morally blameless people unwittingly commit acts that turn out to be crimes and are prosecuted for those offenses (instead of merely having to pay for the harms they caused, through the civil justice system), not only are their lives adversely impacted, perhaps irreparably, but the public's respect for the fairness and integrity of our criminal justice system is diminished. This is something that should concern everyone.

In the classic 1933 law review article coining the term "public welfare offenses," Columbia Law Professor Francis Sayre stated: "To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice; and no law which violates this fundamental instinct can long endure."[206] Sadly, that has not proven to be the case. In fact, quite the opposite is true; such laws have flourished.

To those who would argue that corporate big wigs might benefit

---

201. *Id.*

202. *Id.*

203. *See Bobby Unser Survives Snowmobiling Ordeal*, N.Y. TIMES (Dec. 23, 1996), http://nyti.ms/1VPh6Qj [perma.cc/9SXA-RR45]; Jack Thompson, *Bobby Unser Convicted On Wilderness Law*, CHICAGO TRIBUNE (June 13, 1997), http://trib.in/1Nvdm30 [perma.cc/8WY8-QUHN]; *Reining in Overcriminalization: Assessing the Problems, Proposing Solutions: Making an American Racing Legend Prove He Did Not Commit a "Crime," Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security, of the Comm. on the Judiciary*, 111th Cong. (2010) (testimony of Robert "Bobby" Unser), http://1.usa.gov/1NvcZFQ [perma.cc/H85T-E2DC]. *See generally* Heritage Found., *Indy 500 Winner Bobby Unser vs. the U.S. Government*, YOUTUBE (Mar. 10, 2011), http://bit.ly/1VcpisD [perma.cc/X82H-TRNA] (Bobby Unser describing his ordeal in a video).

204. *See* 16 U.S.C. § 1131 (2014).

205. *See supra* note 203.

206. Francis B. Sayre, Public Welfare Offenses, 33 COLUM. L. REV. 55, 72 (1933).

from *mens rea* reform, Larkin would likely eloquently respond:

> To be sure, [*mens rea* reform would] not, and could not be, limited to the lower echelons of a corporation or to persons earning below a certain income. The indigent can demand the appointment of counsel at the government's expense, but the criminal law has never created a similar divide for defenses to crimes, with some available only for the poor. Just as the sun 'rise[s] on the evil and on the good' and it rains 'on the just and the unjust,' [*mens rea* reform] will aid senior corporate executives as well as entry-level employees. But any remedy for any of the ills caused by overcriminalization will have that effect. We ought not to reject remedies for a serious problem because the neediest are not the only ones who will benefit from them.[207]

Some people or entities intentionally pollute our air and water, or deliberately engage in other conduct knowing it will cause harm; in those cases, criminal prosecution is entirely appropriate. But it is unavoidable that bad outcomes will occur from time to time, by sheer accident and by unwitting or negligent acts. The intent of the actor should make a difference in whether he is criminally prosecuted or is dealt with, perhaps severely, through the civil or administrative justice systems—which would likely be sufficient to remedy the problem he caused and to compensate victims—without saddling him with the lifelong burdens that come with criminal conviction. After all, as Oliver Wendell Holmes, Jr., who would later be appointed to the Supreme Court, once observed, "Even a dog distinguishes between being stumbled over and being kicked."[208]

## IX. CONCLUSION

Whether criminal justice reform, including *mens rea* reform, will advance in Congress over the coming years is an open question. However, such efforts appear to have firmly taken root at the state level, where the preliminary results look promising, and are likely to continue apace. Moreover, while much of the public's attention has been focused on the robust debate going on at the federal level, it is the states that have primary responsibility under our Constitution for exercising "police power"[209] and there are far

207. Larkin, *supra* note 151, at 792.

208. Oliver Wendell Holmes, Jr., *The Common Law* 3 (1881).

209. *See* Bond v. United States, 134 S. Ct. 2077, 2086 (2014) ("In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. The States have broad authority to enact legislation for the public good—what

more offenders in state prisons than there are in federal prisons. Some of these state reforms are controversial; not all of them will likely work. But if some of these experiments prove unsuccessful, legislators can always return to their old way of doing things. After all, with the exception of alleviating prison overcrowding, these changes are not constitutionally required.

Whether the current spike in crime rates[210] will become a new trend or whether it will prove to be a blip in the overall progress that has been made in combating crime over the past two decades, remains to be seen. If the former, the public's appetite for more reform will likely wane and harsher forms of punishment may return. If the latter, we may end up with the best of both worlds—continued reductions in crime, safer neighborhoods, and a fairer criminal justice system that incarcerates only those who act with criminal intent, that punishes those who commit crimes in an appropriate, yet measured way, and that addresses some of the underlying issues that offenders face, so that they are more likely to eventually become law-abiding, productive citizens.

---

we have often called a 'police power.' The Federal Government, by contrast, has no such authority and 'can exercise only the powers granted to it'") (citations omitted) (quoting McCulloch v. Maryland, 17 U.S. 316, 405 (1819)); *see also* United States v. Morrison, 529 U.S. 598, 618 (2000); United States v. Lopez, 514 U.S. 549, 566–67 (1995).

210. *See, e.g.*, Max Ehrenfreund & Denise Lu, *More People Were Murdered Last Year than in 2014, and No One's Sure Why*, WASH. POST (Jan. 27, 2016), http://wapo.st/1nOY79H [perma.cc/9UW6-GZGK]; Andrea Noble, *Police Grasp for Answers as Homicides, Violent Crimes Spike in U.S. Cities*, WASH. TIMES (May 15, 2016), http://bit.ly/1XGb1Vy [perma.cc/RNQ5-QPUV].

# A TEXT-BASED INTERPRETATION OF TITLE VII'S RELIGIOUS-EMPLOYER EXEMPTION

BY STEPHANIE N. PHILLIPS*

I. INTRODUCTION ..... 297
II. TITLE VII BACKGROUND ..... 298
III. PROPER INTERPRETATION OF THE RELIGIOUS-EMPLOYER EXEMPTION ..... 301
A. A Text-Based Interpretation Clarifies that Religious Employers May Make Employment Decisions Based on Religion in Order to Carry Out Their Missions ..... 301
B. The Case Law Affirms that Permission to Consider an Individual's "Particular Religion" Means More Than Permission to Consider Mere Affiliation ..... 303
C. Some Courts Rely on a Misinterpretation of Legislative History to Add an Extra "Religious-Claims-Only" Limitation to the Text ..... 307
D. Addressing Counterarguments to a Text-Based Interpretation ..... 313
IV. THE PROPER TEXTUAL FRAMEWORK HELPS PREVENT COURTS FROM UNCONSTITUTIONAL ENTANGLEMENT WITH RELIGION AND PROTECTS RELIGIOUS EMPLOYERS' FIRST AMENDMENT RIGHTS ..... 315
A. The First Amendment Protects the Internal Decision-Making Process of Religious Employers from Government Intrusion ..... 315
B. A Text-Based Interpretation of the Religious-Employer Exemption Lessens the Risk of Unconstitutional Entanglement in Religion ..... 317
C. Pretext Inquiries Often Lead to Unconstitutional Entanglement in Religion ..... 318

* Stephanie N. Phillips is the Judicial Fellow in Constitutional Law at First Liberty Institute; J.D. 2014, Harvard Law School. She would like to thank those who reviewed earlier drafts of this article and provided invaluable edits: Stephanie Barclay, Justin E. Butterfield, Cleve W. Doty, and Matthew J. Kacsmaryk.

D. Courts Decline to Hear Employment Discrimination Cases Involving Ministers Due to the High Risk of Constitutional Infringement..... 321
E. For Title VII Cases Not Involving Ministers, Courts Should Analyze the Risk of Unconstitutional Entanglement on a Case-by-Case Basis ..... 322
V. *HERX* CASE STUDY ..... 323
A. Factual Background ..... 324
B. Summary Judgment ..... 325
1. The Court Erroneously Dismissed the Religious-Employer Exemption, Leaving the Court Without a Clear Framework for Analysis.. 325
2. The Court's Opinion Included Conflicting Rulings on Whether Catholic Schools May Have Moral Standards Regarding IVF ..... 327
3. The Court Ignored the Diocese's Constitutional Objection, Relying on a Jury Instruction to Cure First Amendment Injuries... 329
C. Trial ..... 330
1. The Court Allowed Evidence About the Morality of IVF Despite the Parties' Stipulation about Catholic Doctrine ..... 331
2. The Court Allowed Evidence About the School's Treatment of Employees Who Violated Several Different Church Doctrines..... 332
3. Allowing Improper Comparator Evidence Forced the Court to Consider Testimony About How the Catholic Church Weighs Different Sins..... 333
4. The Court Allowed Mrs. Herx's Counsel to Argue that a Catholic School Cannot Enforce a Catholic Rule Against IVF..... 334
D. Jury Instructions..... 336
E. Verdict..... 337
F. *Herx* Case Study Applying the Proper Framework..... 337
VI. CONCLUSION ..... 340

## I. INTRODUCTION

Is going to a strip club as immoral as undergoing in vitro fertilization (IVF)[1] according to the Roman Catholic Church? Does the Roman Catholic Church consider remarriage after a civil divorce to be more sinful than IVF? If a particular IVF procedure did not destroy any embryos, would the Roman Catholic Church then deem it morally permissible?

It seems obvious that secular courts and juries should not be answering these inherently religious questions. Yet, a federal district court in Indiana asked a jury to decide these precise issues. In *Herx v. Diocese of Fort Wayne-South Bend, Inc.*,[2] the jury was asked to determine why a Catholic school strictly disciplined a teacher who underwent IVF, when that school did not discipline other teachers who visited strip clubs and remarried post-divorce.[3] The jury ultimately concluded that the reason was sex discrimination, awarding the plaintiff $1.95 million in compensatory damages.[4]

The *Herx* case is not an outlier. Federal employment discrimination cases often involve similar questions when religious employers are involved.[5] Using *Herx* as a case study, this article explores the constitutional danger of asking secular courts and juries to scrutinize religious doctrines.[6]

My thesis is that risk of unconstitutional entanglement could be mitigated by a proper interpretation of Title VII's religious-employer exemption. Courts should return to a text-based, rather

1. IVF is a procedure used to assist reproduction. "*In vitro*" means outside the body. During an IVF procedure, an egg and a sperm are combined in a laboratory dish before being transferred to a woman's uterus. *In Vitro Fertilization (IVF)*, U.S. NAT'L LIBR. MED.: MEDLINEPLUS, http://1.usa.gov/1xxGJcA [perma.cc/53VL-P8YB] (last updated Mar. 2, 2016).

2. 48 F. Supp. 3d 1168 (N.D. Ind. 2014), *appeal dismissed by* Herx v. Diocese of Fort Wayne-S. Bend, Inc., 772 F.3d 1085 (7th Cir. 2014).

3. Herx v. Diocese of Fort Wayne-S. Bend, Inc., No. 1:12-CV-122 RLM, 2015 U.S. Dist. LEXIS 28224, at *7–9 (N.D. Ind. Mar. 9, 2015).

4. The amount was reduced by the district court due to a statutory cap on damages. *Id.* at *1.

5. In federal employment discrimination cases involving religious employers, courts consider whether exemptions for religious employers apply, such as the First Amendment's ministerial exemption or Title VII's religious-employer exemption. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012) (holding that, under the First Amendment, the ministerial exemption bars courts from hearing all Title VII cases involving religious employers and their employees in ministry positions); Curay-Cramer v. Ursuline Acad. of Wilmington, Inc., 450 F.3d 130, 140–41 (3d Cir. 2006) (holding that Congress's application of Title VII to religious employers is limited to cases that do not require courts to compare violations of different religious doctrines).

6. Pursuant to the First Amendment, secular courts may not weigh the truth, importance, or centrality of different religious doctrines. *See infra* note 117.

than legislative-history-based, interpretation of the religious-employer exemption. Not only does this interpretation best align with the statute's meaning, it also best respects the First Amendment.

## II. TITLE VII BACKGROUND

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination because of an employee's race, color, religion, sex, or national origin.[7] Title VII also contains an exemption for religious employers and religious schools, codified in Section 702(a)[8] and Section 703(e)(2).[9]

Since its earliest drafts, Title VII has contained exemptions for religious employers.[10] Some of these early drafts show that Congress considered granting absolute immunity to religious employers from all Title VII claims.[11] Because this version was rejected and because a qualified exemption was enacted in its place, religious employers are sometimes subject to suit for employment discrimination.[12] There is less consensus on the precise contours of the conditions which trigger the exemption.[13] The original exemption, enacted in 1964, read:

> This title shall not apply to an employer with respect to . . . a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities or to an educational institution with respect to the employment of

7. 42 U.S.C. § 2000e-2(a) (2012). Pursuant to the Pregnancy Discrimination Act of 1978, pregnancy discrimination is a type of sex discrimination. 42 U.S.C. § 2000e(k) (2012).

8. 42 U.S.C. § 2000e-1(a) (2012).

9. 42 U.S.C. § 2000e-2(e)(2).

10. Little v. Wuerl, 929 F.2d 944, 949 (3d Cir. 1991). An analysis of covered "religious employers" is outside the scope of this article. For important cases on the topic, *see* Spencer v. World Vision, Inc., 619 F.3d 1109, 1113 (9th Cir. 2010) (noting that religious employers are not limited to churches or entities similar to churches), *aff'd and amended by* 633 F.3d 723 (9th Cir. 2011); LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 230–31 (3d Cir. 2007) (holding the same). For a discussion, *see generally* Roger W. Dyer, Jr., *Qualifying for the Title VII Religious Organization Exemption: Federal Circuits Split over Proper Test*, 76 MO. L. REV. 545 (2011).

11. *See* Curay-Cramer v. Ursuline Acad. of Wilmington, Inc., 450 F.3d 130, 140 (3d Cir. 2006) ("The original version of the 1964 Civil Rights Act, H.R. 7152, excluded religious employers from all of Title VII.").

12. *Id.* at 140–41 (holding that Congress's application of Title VII to religious employers is limited to cases that do not require courts to compare violations of different religious doctrines).

13. *Id.* at 141 ("[T]here are circumstances in which Congress'[s] intention to apply Title VII to religious employers is less clear.").

> individuals to perform work connected with the educational activities of such institution.[14]

Congress later concluded that this exemption was "unnecessarily narrow."[15] In 1972, the exemption was amended.[16] Section 702(a) of Title VII, as currently numbered, reads:

> This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.[17]

The exemption permits religious employers to make employment decisions based on religion so that they can carry out their missions.[18] Congress defined "religion" for Title VII purposes to include "all aspects of religious observance and practice, as well as belief."[19] Thus, permission to employ individuals "of a particular religion" includes permission to employ people "whose beliefs and conduct are consistent with the employer's religious precepts."[20] In this way, religious employers are permitted "to create and maintain communities composed solely of individuals faithful to their doctrinal practices."[21]

---

14. Title VII—Equal Employment Opportunity, Pub. L. No. 88-352, § 702, 78 Stat. 253, 255 (1964) (codified as amended at 42 U.S.C. § 2000e-1(a) (2012)).

15. Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338 (1987) ("[T]he fact that Congress concluded after eight years that the original exemption was unnecessarily narrow is a decision entitled to deference . . . .").

16. 42 U.S.C. § 2000e-1(a) (2012) (1972 Amendment).

17. 42 U.S.C. § 2000e-1(a) (2012).

18. *See Amos*, 483 U.S. at 335 (holding the religious-employer exemption furthered the permissible legislative purpose of "alleviat[ing] significant governmental interference with the ability of religious organizations to define and carry out their religious missions").

19. 42 U.S.C. § 2000e(j) (2012).

20. Kennedy v. St. Joseph's Ministries, Inc., 657 F.3d 189, 194 (4th Cir. 2011) (quoting Little v. Wuerl, 929 F.2d 944, 951 (3d Cir. 1991)); *see also* Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 624 (6th Cir. 2000) ("The decision to employ individuals 'of a particular religion' under § 2000e–1(a) . . . has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer."); Killinger v. Samford Univ., 113 F.3d 196, 200 (11th Cir. 1997) ("[The Section 702 exemption] allows religious institutions to employ only persons whose beliefs are consistent with the employer's when the work is connected with carrying out the institution's activities."); Newbrough v. Bishop Heelan Catholic Sch., No. C13-4114, 2015 U.S. Dist. LEXIS 22053, at *32–35 (N.D. Iowa Feb. 23, 2015) (relying on *Hall*, 215 F.3d at 624); Saeemodarae v. Mercy Health Services-Iowa Corp., 456 F. Supp. 2d 1021, 1039–40 (N.D. Iowa 2006) (also relying on *Hall*, 215 F.3d at 624); Hopkins v. Women's Div., Gen. Bd. of Glob. Ministries, 238 F. Supp. 2d 174, 179–80 (D.D.C. 2002), *summary judgment granted and case dismissed by* 284 F. Supp. 2d 15 (D.D.C. 2003), *aff'd*, 98 F. App'x 8 (D.C. Cir. 2004) (discussing *Hall*, 215 F.3d at 622, 625).

21. Curay-Cramer v. Ursuline Acad. of Wilmington, Inc., 450 F.3d 130, 141 (3d Cir. 2006) (quoting *Little*, 929 F.2d at 951).

In the 1972 amendment, Congress removed the word "religious" in the phrase "religious activities," which expanded the reach of the religious-employer exemption to cover *all* activities of religious employers.[22] This means that these employers can make employment decisions based on religion with respect to *all* positions in the organization.[23]

In 1987, the Supreme Court entertained a constitutional challenge to this amendment in *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos.*[24] There, the Court held that applying the religious-employer exemption to secular activities, in addition to religious activities, did not violate the Establishment Clause.[25] The Court reasoned that it was "a significant burden" on religious organizations to demand they try to discern whether a particular employee's duties are sufficiently religious to be covered.[26] As originally enacted, religious organizations were required "on pain of substantial liability, to predict which of its activities a secular court will consider religious."[27] The Court reasoned that "an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission."[28] In *Amos*, the Court approved Congress's legislative purpose of minimizing governmental interference with the religious decision-making process.[29] Expanding the exemption to cover all employees of a religious organization granted religious organizations more independence and eliminated a potential entanglement problem.[30]

---

22. *See Amos*, 483 U.S. at 339 ("Congress acted with a legitimate purpose in expanding the § 702 exemption to cover all activities of religious employers."); Spencer v. World Vision, Inc., 619 F.3d 1109, 1117 (9th Cir. 2010) ("Congress amended the statute, however, to remove the limiting reference to 'religious activities.'").

23. Little v. Wuerl, 929 F.2d 944, 950 (3d Cir. 1991) (explaining that Congress broadened "the exception to cover all employees rather than only those engaged in 'religious activities'"); Lown v. Salvation Army, Inc., 393 F. Supp. 2d 223, 247 (S.D.N.Y. 2005) ("This revised language applied Section 702's exemption to any activities of religious organizations, regardless of whether those activities are religious or secular in nature.").

24. 483 U.S. at 329–30 (rejecting an Establishment Clause claim).

25. *Id.* at 339 ("It cannot be seriously contended that § 702 impermissibly entangles church and state; the statute effectuates a more complete separation of the two and avoids the kind of intrusive inquiry into religious belief that the District Court engaged in in this case.").

26. *Id.* at 336.

27. *Id.*

28. *Id.*

29. *Id.*

30. *See Amos*, 483 U.S. at 339 ("It cannot be seriously contended that § 702

In addition to the Section 702 exemption for religious employers, Congress codified another Title VII protection specifically for religious schools. Section 703(e)(2) reads:

> [I]t shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.[31]

Having walked through the relevant statutory framework, the next section explains the article's main thesis. Courts should return to a text-based, rather than legislative-history-based, interpretation of Section 702(a)'s religious-employer exemption.

## III. PROPER INTERPRETATION OF THE RELIGIOUS-EMPLOYER EXEMPTION

Courts have not consistently applied Title VII's religious-employer exemption, and the Supreme Court has not yet clarified the proper interpretation.[32] This section proposes that courts should adopt a text-based interpretation and courts should refuse to read in non-textual limitations.

### *A. A Text-Based Interpretation Clarifies that Religious Employers May Make Employment Decisions Based on Religion in Order to Carry Out Their Missions*

The religious-employer exemption in Section 702(a) starts with "*This title*[33] *shall not apply to [a religious employer]*[34] *with respect*

---

impermissibly entangles church and state; the statute effectuates a more complete separation of the two and avoids the kind of intrusive inquiry into religious belief that the District Court engaged in in this case.").

31. 42 U.S.C. § 2000e-2(e)(2) (2012).

32. Curay-Cramer v. Ursuline Acad. of Wilmington, Inc., 450 F.3d 130, 141 (3d Cir. 2006) ("[T]here are circumstances in which Congress'[s] intention to apply Title VII to religious employers is less clear. These cases tend to involve the interplay of Title VII's exemption for religious employers and the application of Title VII's remaining substantive provisions.").

33. Title VII refers to "section 2000e et seq. of this title." 42 U.S.C. §2000e-1 (2012).

34. For simplicity, I refer to a "religious corporation, association, educational institution, or society" as a "religious employer."

*to . . . .*"[35] As this excerpt shows, religious employers are not absolutely exempt from Title VII. If they were, the text would stop at "Title VII shall not apply to religious employers." Instead, the text continues. Congress therefore enacted a qualified exemption, rather than an absolute exemption, for religious employers. Whether a religious employer is exempt in any particular case depends on whether it meets the conditions set forth in the rest of the text.

The rest of the text reads: "*[W]ith respect to the employment of individuals of a particular religion to perform work connected with the carrying on by [the religious employer] of its activities.*"[36] This section shows that a religious employer may consider the "particular religion" of employees or potential employees in order to employ the individuals best suited to carry out its mission.[37] When a religious employer makes an employment[38] decision in this way, then the employer is exempt from all of Title VII.[39]

The final piece of relevant statutory text is Title VII's definition of "religion." Congress defined "religion" for Title VII purposes to include "*all* aspects of religious observance and practice, as well as belief."[40] Thus, permission to consider an individual's "particular

35. 42 U.S.C. § 2000e-1(a) (2012) (emphasis added).

36. *Id.* (emphasis added).

37. Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 339 (1987) ("[Section] 702 is rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions."); Larsen v. Kirkham, 499 F. Supp. 960, 966 (D. Utah 1980) ("[I]t is inconceivable that the exemptions would purport to free religious schools to employ those who best promote their religious mission, yet shackle them to a legislative determination that all nominal members are equally suited to the task."), *aff'd without opinion*, No. 80-2152, 1982 WL 20024 (10th Cir. Dec. 20, 1982).

38. The definition of "employment" used throughout Title VII "covers the breadth of the relationship between the employer and employee, clearly indicat[ing] that [the religious-employer exemption] should not be limited to hiring and firing decisions." Kennedy v. St. Joseph's Ministries, Inc., 657 F.3d 189, 193 (4th Cir. 2011). "[I]f Congress had wished to limit the religious organization exemption to hiring and discharge decisions, it could clearly have done so. Instead, it painted with a broader brush, exempting religious organizations from the entire 'subchapter' of Title VII with respect to the 'employment' of persons of a 'particular religion.'" *Id.* at 194; *see also* Hopkins v. Women's Div., Gen. Bd. of Glob. Ministries, 238 F. Supp. 2d 174, 179 (D.D.C. 2002) ("[T]he exemption of Section 702(a) quite clearly applies to all forms of employment decisions, not just the initial hiring decision."), *summary judgment granted and case dismissed by* 284 F. Supp. 2d 15 (D.D.C. 2003), *aff'd*, 98 F. App'x 8 (D.C. Cir. 2004).

39. *See* Carl H. Esbeck, *Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?*, 4 OXFORD J.L. & RELIGION 368, 375 (2015) (noting that the religious-employer exemption begins with a "sweeping override of everything else in all of Title VII").

40. 42 U.S.C. § 2000e(j) (2012) (emphasis added). Section 701(j) provides that "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an

religion" includes permission to consider the person's beliefs and conduct.[41]

Read together, this exemption enables faith-based organizations to employ only those people "whose beliefs and conduct are consistent with the employer's religious precepts."[42] In other words, when a religious employer makes an employment decision based on its religious beliefs, Title VII does not apply.

This text-based reading is consistent with the Supreme Court's *Amos* decision. The *Amos* decision clarified that Congress broadened the religious-employer exemption in order "to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."[43] By enabling religious employers to make employment decisions based upon their beliefs, Congress enabled "religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's 'religious activities.'"[44]

### *B. The Case Law Affirms that Permission to Consider an Individual's "Particular Religion" Means More Than Permission to Consider Mere Affiliation*

Courts uniformly reject the theory that the license to consider an employee's "particular religion" means a license to consider his or

---

employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* Although the second portion of the definition most directly pertains to claims of religious discrimination against employers, this broad definition of religion applies to all of Title VII. *See* EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2033–34 (2015) (holding that 701(j) includes religious practice as well as belief); Little v. Wuerl, 929 F.2d 944, 950–51 (3d Cir. 1991) (noting that the definition of religion applies to the religious-employer exemption and concluding that "religion" as used in the exemption includes belief and conduct); *Larsen*, 499 F. Supp. at 966 (concluding that "religion" in Section 701(j) means more than nominal religious affiliation). For a discussion of Section 701(j), see Debbie N. Kaminer, *Religious Accommodation in the Workplace: Why Federal Courts Fail to Provide Meaningful Protection of Religious Employees*, 20 TEX. REV. L. & POL. 107, 111, 120–31 (2015).

41. *Little*, 929 F.2d at 951.

42. *Kennedy*, 657 F.3d at 194 (quoting *Little*, 929 F.2d at 951); *see also* Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 624 (6th Cir. 2000) ("The decision to employ individuals 'of a particular religion' under § 2000e-1(a) . . . has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer."); Killinger v. Samford Univ., 113 F.3d 196, 200 (11th Cir. 1997) ("[The Section 702 exemption] allows religious institutions to employ only persons whose beliefs are consistent with the employer's when the work is connected with carrying out the institution's activities."); *supra* note 20.

43. Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335 (1987).

44. *Little*, 929 F.2d at 951.

her self-identified religious *affiliation* only.[45] This theory is called the "co-religionist preference."[46]

For example, under this disfavored "co-religionist preference" reading, Mennonite universities would be permitted to have policies preferring Mennonites. However, they would not necessarily have the right to distinguish between Mennonites who believe or behave differently from each other. They would not necessarily have the right to prefer Baptists who nonetheless agree to adhere to Mennonite doctrines over Baptists who do not. Stated differently, this view would not allow a religious employer to consider employees' conduct or particular beliefs—only religious *affiliation.*

The fatal textual flaw in the "co-religionist preference" argument is that it ignores portions of the text. It seeks to cut out the last phrase of the statute.[47] The text does not say, "Title VII does not apply to a religious employer with respect to the employment of individuals of a particular religion." There is another phrase, "to perform work connected with the carrying on [of the religious employer's] activities."[48] This ending phrase would be superfluous if the exemption only covered mere religious affiliation. Instead, the religious beliefs and conduct of employees may be considered

45. *See, e.g., Kennedy*, 657 F.3d at 190–91 (permitting a Catholic nursing facility to terminate an employee for wearing Church of the Brethren religious attire); *Hall*, 215 F.3d at 626 (permitting a Baptist college to terminate a professor for assuming a leadership position in an organization that supported beliefs contrary to the college's); *Killinger*, 113 F.3d at 199 (permitting a Baptist university to terminate a Baptist professor for holding beliefs that differed from the dean's); *Little*, 929 F.2d at 945–46 (permitting a Roman Catholic school to terminate a Protestant professor for not abiding by Catholic marriage teachings); Wirth v. College of the Ozarks, 26 F. Supp. 2d 1185, 1188 (W.D. Mo. 1998) (permitting a non-denominational Christian employer to make an employment decision based on an employee's Catholic religion, even though Catholicism is a Christian denomination), *aff'd*, 208 F.3d 219 (8th Cir. 2000); *Larsen*, 499 F. Supp. at 966 (permitting the L.D.S. Business College to condition employment on church participation in addition to L.D.S. church membership).

46. *See* EEOC v. Pac. Press Publ'g Ass'n, 676 F.2d 1272, 1276 (9th Cir. 1982) ("Title VII provides only a limited exemption enabling Press to discriminate in favor of co-religionists."). Other courts also have repeated similar language. *See, e.g.*, Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410, 413 (6th Cir. 1996) ("This provision does not, however, exempt religious educational institutions with respect to all discrimination. It merely indicates that such institutions may choose to employ members of their own religion without fear of being charged with religious discrimination."); Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1166 (4th Cir. 1985) ("The statutory exemption applies to one particular reason for employment decision—that based upon religious preference."); *see also* Lederman, *supra* note 47 (making this argument).

47. *See* Martin Lederman, *Why the Law Does Not (and Should Not) Allow Religiously Motivated Contractors to Discriminate Against Their LGBT Employees*, BERKLEY CENTER: CORNERSTONE (July 31, 2014), bit.ly/1WlNruq [perma.cc/FE3G-Z66Q] (omitting the final phrase of Section 702(a) during argument in support of narrow co-religionist preference).

48. 42 U.S.C. § 2000e-1(a) (2012).

because religious employers must be able to determine who would best *carry out* the employer's religious mission. As one district court affirmed by the Tenth Circuit succinctly phrased it:

> [The] notion that the religious school exemption permits no more than a religious school's preference for those ostensibly affiliated with the religion operating it ignores both reason and policy. . . . [I]t is inconceivable that the exemptions would purport to free religious schools to employ those who best promote their religious mission, yet shackle them to a legislative determination that all nominal members are equally suited to the task. In short, nothing in the language, history or purpose of the exemption supports such an invasion of the province of a religion to decide whom it will regard as its members, or who will best propagate its doctrine. That is an internal matter exempt from sovereign interference.[49]

Multiple district and appellate courts hold that the religious-employer exemption bars cases in which an employee was dismissed based on criteria other than mere religious affiliation, such as immoral behavior or beliefs about specific issues.[50] These opinions show that permitting religious employers to make employment decisions based upon religion is more than mere license to prefer people who self-identify as *affiliated* with a given faith, denomination, or sect.

---

49. *Larsen*, 499 F. Supp. at 966.

50. *See supra* note 45; *see also* O'Connor v. Roman Catholic Church of the Diocese of Phx., No. CV 05-1309 PHX-SMM, 2007 U.S. Dist. LEXIS 38141, at *14–15 (D. Ariz. May 24, 2007) ("As Plaintiff's job description unequivocally demonstrates, being an active practicing Catholic in full communion with the Church was a required term of her employment. Determining whether a particular marriage conforms with the Catholic Church's teachings on marriage and whether an individual is in full communion with the Church are clearly matters of religious interpretation. Accordingly, the Court finds that Defendant is exempt from liability under Title VII pursuant to the § 702 exemption and Plaintiff's retaliation claim will be dismissed with prejudice."); Wirth v. College of the Ozarks, 26 F. Supp. 2d 1185, 1188 (W.D. Mo. 1998) ("Even though a Christian corporation or organization is non-denominational, it nevertheless may subscribe to particular religious views with which other Christians do not agree, and conversely, it may disagree with the religious views of other Christians. . . . [T]he college took such action because it did not subscribe to the [Catholic] religious views which Plaintiff espoused. This is precisely the situation for which the exemptions were enacted; the exemptions allow religious institutions to employ only persons whose beliefs are consistent with the views of the religious organization."), *aff'd*, 208 F.3d 219 (8th Cir. 2000); Maguire v. Marquette Univ., 627 F. Supp. 1499, 1503 (E.D. Wis. 1986) ("If the Court were to grant plaintiff the relief she requests, a place on Marquette's theology faculty, the government would, in effect, be forcing its interpretation of what Catholicism demands on the University and its students. Such a ruling would not only interfere with the theology department's right to freely exercise its religion through the explication and analysis of Catholicism and other religions, but would also result in a governmental imprimatur of approval on a particular set of beliefs as 'Catholic.'"), *aff'd in part and vacated in part*, 814 F.2d 1213 (7th Cir. 1987).

For example, in *Killinger*, the Eleventh Circuit concluded the religious-employer exemption applied to a Baptist university that removed a Baptist teacher whose religious beliefs on some issues differed from those of the school's dean.[51] The plaintiff argued that the exemption only permits a general preference for Baptists, but not any further inquiry into religious differences.[52] The court rejected this argument.[53] Although the plaintiff self-identified as a Baptist, the qualified exemption still applied to exempt the school from Title VII.[54] The court wrote: "The Section 702 exemption's purpose and words easily encompass Plaintiff's case; the exemption allows religious institutions to employ only persons whose beliefs are consistent with the employer's when the work is connected with carrying out the institution's activities."[55] Thus, it is not identification with a particular faith, denomination, or sect that is protected. It is the school's right to make the religious decisions about which tenets of faith are important to its religious mission.

Moreover, several courts have held the exemption covers conduct in addition to beliefs. For instance, the Third Circuit, in *Little v. Wuerl*,[56] held that the exemption applied to a Roman Catholic school that terminated a Protestant teacher who did not properly seek an annulment of her first marriage before remarrying.[57] The school required a Protestant to abide by Roman Catholic doctrine regarding marriage as a condition of employment, even though the Protestant did not share the religious belief that her marriage needed to be validated by the Roman Catholic Church.[58] In this way, the Roman Catholic school was allowed to maintain a community faithful to its Roman Catholic faith.[59]

In sum, courts have widely concluded that the religious-employer

51. Killinger v. Samford Univ., 113 F.3d 196, 200 (11th Cir. 1997).

52. *Id.* at 199 ("Plaintiff further argues that Section 702 requires that Samford act pursuant to a specific religious policy, as opposed to 'ad hoc acts of religious discrimination.' Plaintiff seeks to distinguish between the religious requirements of Samford as an institution and the religious views of the divinity school's dean. According to Plaintiff, the former constitute legitimate religious requirements with which he has complied, while the latter constitute religious discrimination.").

53. *Id.* at 199–200.

54. *Id.*

55. *Id.* at 200.

56. 929 F.2d 944 (3d Cir. 1991).

57. *Id.* at 946, 951.

58. *See id.* at 945 (noting that the employment contract at issue allowed the Roman Catholic school to terminate employment for public rejection of official Roman Catholic teachings).

59. *Id.*

exemption's license to consider an individual's "particular religion" means more than mere license to consider religious affiliation. The next section addresses a different idea that has also been used to limit the scope of the exemption: the extra-textual "religious-claims-only" limitation.

### *C. Some Courts Rely on a Misinterpretation of Legislative History to Add an Extra "Religious-Claims-Only" Limitation to the Text*

Some courts have theorized that the religious-employer exemption only exempts religious employers from claims of *religious* discrimination.[60] Proponents of this theory assert that the exemption has no application when plaintiffs claim other types of discrimination, such as sex discrimination.[61] This theory may be called the "religious-claims-only" limitation. This section demonstrates the flawed reasoning behind this frequently repeated limitation.

The religious-claims-only limitation is not found in the statute's text.[62] The religious-employer exemption does not make any reference to the type of claim a plaintiff brings.[63] The text does not say that "Title VII shall not apply to a religious-employer when a plaintiff claims religious discrimination" or that the "provisions of Title VII related to religious discrimination shall not apply to religious-employers."[64]

Instead, the text begins with "*This subchapter* shall not apply to [religious employers] with respect to . . . ."[65] This means that when

60. *See, e.g.*, Feldstein v. Christian Sci. Monitor, 555 F. Supp. 974, 976, 979 (D. Mass. 1983); EEOC v. Pac. Press Publ'g Assoc., 676 F.2d 1272, 1276–77 (9th Cir. 1982).

61. *See, e.g.*, *Pac. Press*, 676 F.2d at 1276–77.

62. Courts are prohibited from reading limitations into Title VII which are not found in the text. EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2033 (2015). Title VII contains no limitation stating that the religious-employer exemption cannot be invoked if an employee alleges sex discrimination. *See* Esbeck, *supra* note 39, at 376 (observing that "there is no limitation that turns on the mere chance that the employee-plaintiff complains of religious discrimination as opposed to claiming under some other protected class such as sex."); *supra* note 60 (the cited cases applying the religious-claims-only limitation do not point to an explicit limitation in the text of the statute). Moreover, courts have applied the religious-employer exemption as a defense to sex discrimination claims. *See* Maguire v Marquette Univ., 627 F. Supp. 1499 (E.D. Wis. 1986) (applying the religious-employer exemption as a defense to a sex discrimination claim), *aff'd in part and vacated in part*, 814 F.2d 1213 (7th Cir. 1987); EEOC v. Miss. Coll., 626 F.2d 477, 485–86 (5th Cir. 1980) (holding that if the religious college could show that its hiring decision was based upon its religious beliefs, the EEOC would be barred from investigating whether or not that decision was "a guise" for sex discrimination).

63. *See* 42 U.S.C. § 2000e-1(a) (2012).

64. *See id.*

65. *Id.*

the conditions in the rest of the text are met, religious employers are exempt from the entirety of Title VII—including every claim of discrimination, harassment, or retaliation.[66] There are no other limitations in the text.[67]

If the religious-claims-only limitation is not found in the text, where did it arise?

The opinions that do give a reason for adopting the religious-claims-only interpretation rely almost exclusively on legislative history.[68] I argue that, although some information may be gleaned from the legislative history, the history does not fully resolve interpretive questions in the way some opinions suggest.

The Ninth Circuit's *EEOC v. Pacific Press Publishing Association*[69] opinion is one of the most cited opinions developing the legislative history argument.[70] Because courts often rely upon it, I have

66. *See supra* note 38 (explaining that the religious-employer exemption covers all employment decisions); *infra* note 69 (explaining that the religious-employer exemption covers all of Title VII, including retaliation claims). Additionally, the broad coverage of the exemption cannot be waived by the parties. "Once Congress stated that this title shall not apply to religiously-motivated employment decisions by religious organizations, neither party could expand the statute's scope." Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 625 (6th Cir. 2000) (quoting Siegel v. Truett-McConnell Coll., Inc., 13 F. Supp. 2d 1335, 1345 (N.D. Ga. 1994) (quoting Little v. Wuerl, 929 F.2d 944, 951 (3d Cir. 1991))) (some quotations omitted).

67. *See* Esbeck, *supra* note 39, at 376 ("There are no other limitations to the invoking of 702(a) and 703(e)(2). In particular, there is no limitation that turns on the mere chance that the employee-plaintiff complains of religious discrimination as opposed to claiming under some other protected class such as sex.").

68. *See, e.g.*, Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1166–67 (4th Cir. 1985) (relying upon the ministerial exemption instead of the statutory exemption); EEOC v. Pac. Press Publ'g Ass'n, 676 F.2d 1272, 1276–77 (9th Cir. 1982); Feldstein v. Christian Sci. Monitor, 555 F. Supp. 974, 976, 979 (D. Mass. 1983).

69. 676 F.2d 1272 (9th Cir. 1982). In addition to the religious-claims-only limitation, *Pacific Press* posited another non-textual limitation based upon legislative history, and this limitation has been widely rejected. *Pacific Press* held that the religious-employer exemption does not apply to *retaliation* claims. *Id.* at 1276 ("The legislative history of this exemption shows that . . . religious employers are not immune from liability for . . . retaliatory actions against employees who exercise their rights under the statute."). This limitation has been rejected as contrary to the text, which makes clear that the exemption covers all of the employment relationship. *See supra* note 38; *see also* Saeemodarae v. Mercy Health Services-Iowa Corp., 456 F. Supp. 2d 1021, 1041 (N.D. Iowa 2006) (stating that Plaintiff's Title VII retaliation claim should be dismissed because of the "broad language" of the religious-employer exemption); Lown v. Salvation Army, Inc., 393 F. Supp. 2d 223, 254 (S.D.N.Y. 2005) ("Plaintiffs' Title VII retaliation claim must be dismissed because the broad language of Section 702 provides that 'this subchapter shall not apply . . . to a religious . . . institution . . . with respect to the employment of individuals of a particular religion . . . .' 42 U.S.C. § 2000e-1(a). Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3(a), is contained in the same subchapter as Section 702. Accordingly, it does not apply here.").

70. *See, e.g.*, Curay-Cramer v. Ursuline Acad. of Wilmington, Inc., 450 F.3d 130, 140 (3d Cir. 2006); EEOC v. Fremont Christian Sch., 781 F.2d 1365–66 (9th Cir. 1986); *Rayburn*, 772 F.2d at 1166; Herx v. Diocese of Fort Wayne-S. Bend, Inc., 48 F. Supp. 3d 1168, 1176 (N.D. Ind. 2014), *appeal dismissed by* Herx v. Diocese of Fort Wayne-S. Bend, Inc., 772 F.3d 1085 (7th Cir. 2014); O'Connor v. Roman Catholic Church of the Diocese of Phx., No. CV 05-

included the entire legislative argument here, with the court's internal citations omitted:

> The original version of the 1964 Civil Rights Act passed by the House, H.R. 7152, contained a broad exemption entirely excluding religious employers from coverage under the Act: "s 703. This title shall not apply . . . to a religious corporation, association, or society." A substitute bill proposed by Senators Humphrey, Dirksen and Mansfield adopted a more limited exemption, making Title VII applicable to religious employers, but permitting them to employ individuals of a particular religion to perform work connected with its religious activities. The Senate declined an opportunity to revert to a total exemption for religious organizations proposed in a later substitute bill by Senators Clark and Case. After debate on the various proposals, the Senate passed the Dirksen-Mansfield substitute. The House accepted the substitute without amendment.
>
> During the 1972 Amendments, Senators Ervin and Allen proposed that the employment practices of all religious institutions be removed completely from EEOC jurisdiction. Again the Senate rejected the blanket exemption.
>
> The Senate accepted a subsequent proposal by Senator Ervin that broadened the scope of the exemption only slightly to allow religious employers to discriminate on the basis of religion with respect to all—not just religious activities.[71]

From these facts, the Ninth Circuit in *Pacific Press* drew the following conclusions:

> Although the Senate accepted the subsequent amendment, this action does not support Press' argument that section 702 broadly exempts religious organizations from charges of discrimination based on nonreligious grounds. The legislative history shows that Congress consistently rejected proposals to allow religious employers to discriminate on grounds other than religion: "[church-affiliated] organizations remain subject to the provisions of Title VII with regard to race, color, sex or national origin."[72]

As *Pacific Press* held, it is clear from the legislative history that Congress did not intend to grant *absolute* immunity to religious employers. Congress, instead, granted religious employers a partial

---

1309 PHX-SMM, 2007 U.S. Dist. LEXIS 38141, at *7 (D. Ariz. May 24, 2007); Hopkins v. Women's Div., Gen. Bd. of Glob. Ministries, 238 F. Supp. 2d 174, 180 (D.D.C. 2002), *summary judgment granted and case dismissed by* 284 F. Supp. 2d 15 (D.D.C. 2003), *aff'd*, 98 F. App'x 8 (D.C. Cir. 2004); Vigars v. Valley Christian Ctr., 805 F. Supp. 802, 809 (N.D. Cal. 1992).

71. *Pac. Press*, 676 F.2d at 1276–77 (internal citations omitted).

72. *Id.* at 1277 (internal citations omitted).

exemption. I agree with *Pacific Press*, and with every other court to repeat the legislative history, on this point.

This result is also clearly evident from the text of the provision itself. Here it is again: "This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."[73]

As can be seen, the text does not stop with "Title VII shall not apply to religious employers." There is more. The exemption also includes a condition or a qualifier: "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on [of the religious employer's] activities."[74] Thus, instead of granting an absolute exemption to religious employers by virtue of being religious employers, Congress granted them a qualified exemption.

My thesis is simply stated: whenever the qualifier applies, religious employers are exempt, regardless of the particular type of Title VII discrimination that is claimed.[75]

To recap: Everyone agrees that Congress did not grant religious employers absolute immunity from Title VII.[76] Everyone agrees that religious employers are not categorically exempt from claims of discrimination based upon race, color, sex, or national origin.[77] The problem is that, from these uncontroverted statements, courts such as the Ninth Circuit in *Pacific Press* reasoned that Congress must have intended the religious-employer exemption to apply only when a plaintiff claims a certain kind of discrimination.[78]

---

73. 42 U.S.C. § 2000e-1(a) (2012).

74. *Id.*

75. *See* Esbeck, *supra* note 39 (explaining that the religious-employer exemption's application does not depend upon the type of discrimination claimed).

76. *See, e.g., Pac. Press*, 676 F.2d at 1276–77.

77. *See, e.g., id.*

78. *Id.* at 1276. Several judges and legal scholars have called into question the value of determining "legislative intent." For instance, Professor Laurence H. Tribe commented: "I never cease to be amazed by the arguments of judges, lawyers, or others who proceed as though legal texts were little more than interesting documentary evidence of what some lawgiver had in mind. . . . [I]t is the *text*'s meaning, and not the content of anyone's expectations or intentions, that binds us as law." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 398 (2012) (emphasis in original) (quoting Laurence H. Tribe, "Comment," *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 65–66 (1997)). Similarly, Judge Easterbrook cautioned: "An opinion poll revealing the wishes of Congress would not translate to legal rules. Desires become rules only after clearing procedural hurdles,

However, there is no textual or logical reason to assume that the religious-employer exemption must be paired with a *religious* claim. If the exemption were intended to have a one-to-one correspondence with plaintiffs' claims (such that *religious* employers were only exempt from claims of *religious* discrimination), Congress could have drafted the exemption that way. The mere fact that Congress rejected absolute immunity does not mean that a one-to-one claim correspondence was necessarily its intent or design.[79]

The religious-claims-only limitation may have come about due to the co-religionist reading of the phrase "particular religion."[80] Courts that initially propagated the religious-claims-only interpretation may have believed that the exemption would never actually apply in cases where plaintiffs claimed something other than religious discrimination. For instance, if the religious-employer exemption only allowed employers to consider an individual's "particular religion," and "particular religion" only meant religious *affiliation*, then the exemption could only apply as a defense against claims of religious discrimination. However, as explained above, the case law widely rejects the narrow definition of "particular religion" and the narrow co-religionist interpretation of the test.[81] Therefore, the religious-claims-only limitation should also be rejected.

Even though it is now widely acknowledged that "particular religion" is broader than mere religious affiliation, the religious-claims-only limitation lingers in the case law.[82] Repetition of the

---

designed to encourage deliberation and expose proposals (and arguments) to public view and recorded vote. Resort to 'intent' as a device to short-circuit these has no more force than the opinion poll—less, because the legislative history is written by the staff of a single committee and not subject to a vote or veto. The Constitution establishes a complex of procedures, including presidential approval (or support by two-thirds of each house). It would demean the constitutionally prescribed method of legislating to suppose that its elaborate apparatus for deliberation on, amending, and approving a text is just a way to create some *evidence* about the law, while the *real* source of legal rules is the mental processes of legislators." In re Sinclair, 870 F.2d 1340, 1343–44 (7th Cir. 1989) (emphasis in original).

79. It is a logical fallacy to assume that the religious-employer exemption must not apply *at all* to claims of sex, race, color, or national origin because Congress did not provide religious employers with absolute immunity. The lack of one extreme does not imply the opposite extreme.

80. *See Pac. Press*, 676 F.2d at 1276 (noting that the Dirksen-Mansfield substitute bill, which the Senate passed, "adopted a more limited exemption, making Title VII applicable to religious employers, but permitting them to employ individuals of a particular religion to perform work connected with its religious activities").

81. *See supra* Part III.B.

82. Some courts follow *Pacific Press*, adopting the religious-claims-only limitation. *See, e.g.*, Hopkins v. Women's Div., Gen. Bd. of Glob. Ministries, 238 F. Supp. 2d 174, 180 (D.D.C. 2002), *summary judgment granted and case dismissed by* 284 F. Supp. 2d 15 (D.D.C. 2003), *aff'd*, 98 F. App'x 8 (D.C. Cir. 2004). Other courts merely recite the truism that religious

religious-claims-only limitation, ease of use, and over-emphasis on legislative history may have contributed to its longevity.

Courts should return to the text. The text clarifies that religious employers may consider their employees' religion (the statute defines religion as including beliefs and conduct)[83] in order to employ only those persons who will assist in carrying out the employer's religious mission.[84] Thus, a more accurate reading is that whenever religious employers make employment decisions based on their religious tenets, they are exempt from Title VII.[85] This exemption, allowing employers to discriminate based on religion, applies regardless of the type of discrimination a plaintiff claims. However, if an employment decision is not based on religion, then religious employers are not entitled to the exemption.[86]

In this way, religious employers are subject to some Title VII claims based on race, color, sex, or national origin. At the same time, religious employers are not subject to Title VII claims that involve the most risk of unconstitutional government entanglement

---

institutions are not categorically immune from claims of sex discrimination without further analysis. *See, e.g.*, Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 658 (6th Cir. 1999); Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410, 413 (6th Cir. 1996).

83. 42 U.S.C. § 2000e(j) (2012).

84. *See* Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335 (1987) (explaining, in a discussion of § 702, that "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions"); Kennedy v. St. Joseph's Ministries, Inc., 657 F.3d 189, 192 (4th Cir. 2011) (noting that, under the religious-employer exemption, the choice to employ also includes the ability to fire those whose beliefs do not match those of the religious employer); Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 624 (6th Cir. 2000) (making the same point); Killinger v. Samford Univ., 113 F.3d 196, 200 (11th Cir. 1997) ("[The Section 702 exemption] allows religious institutions to employ only persons whose beliefs are consistent with the employer's when the work is connected with carrying out the institution's activities."); Little v. Wuerl, 929 F.2d 944, 951 (3d Cir. 1991) ("[W]e are also persuaded that Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's 'religious activities.'").

85. *See* EEOC v. Miss. Coll., 626 F.2d 477, 485 (5th Cir. 1980) (holding the religious-employer exemption could be invoked as a defense to a sex discrimination claim); *Little*, 929 F.2d at 949 ("In this case, the inquiry into the employer's religious mission is not only likely, but inevitable, because the specific claim is that the employee's beliefs or practices make her unfit to advance that mission. It is difficult to imagine an area of the employment relationship *less* fit for scrutiny by secular courts.") (emphasis in original).

86. Regardless of whether a particular religious employer's decision is based on religion, the religious employer could still be protected under the U.S. Constitution. For instance, under the First Amendment, the ministerial exemption bars courts from hearing all Title VII cases involving religious employers and their employees in ministry positions. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012). This ministerial exemption is distinct from the statutory religious-employer exemption.

with religion.

*D. Addressing Counterarguments to a Text-Based Interpretation*

A proponent of the religious-claims-only limitation may object that the cases this article uses to clarify and describe permissible religious employer discrimination are primarily cases in which plaintiffs claim religious discrimination. In practice, courts have not often applied the exemption when plaintiffs claim race, national origin, color, or sex discrimination. However, I argue that this is because of the mistaken impression that there is a categorical religious-claims-only limitation. Consequently, cases explaining the exemption are generally cases where plaintiffs claim religious discrimination.

More importantly, the text does not change depending upon the type of discrimination claimed.[87] Any case that wrestles with the language can be helpful for interpreting the exemption. Thus, the cases rejecting the narrow, co-religionist interpretation are helpful for interpreting the qualifier ("with respect to the employment of individuals of a particular religion to perform work connected with the carrying on [of the religious employer's] activities").[88] Such cases establish that an employer may make employment decisions based upon an individual's religion, manifested in his or her beliefs or conduct.[89] Because there is no claim limitation in the exemption's text, whenever this qualifier applies, the exemption bars suit.

Proponents of the limitation might also argue that a textual interpretation opens the door to religious employers legally discriminating against women by invoking sexist religious doctrines. However, since 1972, religious doctrines have not been invoked in this way.[90] With the exception of ministerial cases

87. *See* Esbeck, *supra* note 39, at 376 ("There are no other limitations to the invoking of 702(a) and 703(e)(2). In particular, there is no limitation that turns on the mere chance that the employee-plaintiff complains of religious discrimination as opposed to claiming under some other protected class such as sex.").

88. *See infra* Part II.C (discussing cases that support the proposition that the religious-employer exemption is a defense to discrimination claims regardless of whether the employee-plaintiff belongs to a protected class).

89. *See infra* Part II.C (arguing that case law supports the idea that the purpose of the religious-employer exemption is "to safeguard the religious liberty of religious organizations to a high degree" and that "[t]hat same high degree of liberty is threatened without regard to the nature of plaintiff's protected class").

90. At the time of the enactment of the Civil Rights Act of 1964, few would have envisioned the forthcoming expanding definition of sex to include conduct. There was no manifested intent to prohibit religious employers from having codes of conduct related to

involving issues such as the ordination of women, almost no Title VII cases involved employers relying on religious standards that were different for men than for women.[91] Instead, plaintiffs more commonly alleged that a sex-neutral religious rule was applied in a discriminatory way.[92] Under this article's proposed interpretation, those cases could still reach a jury. If there are no constitutional problems with allowing a trial in the particular case, plaintiffs may submit the factual question of whether an alleged religious rule was mere pretext for sex discrimination.[93] Additionally, even without applying the religious-employer exemption, most courts uphold the ability of religious organizations to maintain religion-based codes of conduct.[94]

---

abortion, extra-marital sex, or IVF.

91. With only a few exceptions, such as EEOC v. Fremont Christian Sch., 781 F.2d 1362 (9th Cir. 1986) (involving a religious school that paid health insurance only to heads of households, a category the school believed included only men). It is unclear whether the religious employer in *Pacific Press* also asserted that its "head of household" pay differences were based on religious belief. In *Pacific Press*, the Ninth Circuit found that "[p]reventing discrimination can have no significant impact upon the exercise of Adventist beliefs because the Church proclaims that it does not believe in discriminating against women or minority groups, and that its policy is to pay wages without discrimination on the basis of race, religion, sex, age, or national origin. Thus, enforcement of Title VII's equal pay provision does not and could not conflict with Adventist religious doctrines, nor does it prohibit an activity 'rooted in religious belief.'" *Pac. Press*, 676 F.2d at 1279. It is unclear whether the religious employer asserted a conflict with its religious beliefs or whether the Ninth Circuit took it upon itself to interpret the requirements of the employer's religion.

92. *See, e.g.*, Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 655–56 (6th Cir. 1999) (involving a Catholic school that did not renew the contract of a teacher who engaged in premarital sex); Feldstein v. Christian Sci. Monitor, 555 F. Supp. 974, 975 (D. Mass. 1983) (involving a journalist whose application for a position with a Christian Scientist journal was rejected because he was not a member of the Christian Scientist Church).

93. *See infra* Part IV.C.

94. *See* Boyd v. Harding Acad., 88 F.3d 410, 414 (6th Cir. 1996) (affirming that it was permissible for a religious school to terminate plaintiff because "[plaintiff]'s action violated the [moral] code of conduct that Harding teachers are required to follow"); Ganzy v. Allen Christian Sch., 995 F. Supp. 340, 359–60 (E.D.N.Y. 1997) ("As a sectarian private institution, the School has the right to employ only teachers who adhere to the school's moral code and religious tenets."), *summary judgment denied by* 995 F. Supp. 340 (E.D.N.Y. 1998); Dolter v. Wahlert High Sch., 483 F. Supp. 266, 270 (N.D. Iowa 1980) ("[Catholic Church] can define moral precepts and prescribe a code of moral conduct that its teachers . . . must follow."). Additionally, cases applying Title VII's religious-employer exemption also emphasize that faith-based conduct codes are permissible. *See* Kennedy v. St. Joseph's Ministries, Inc., 657 F.3d 189, 194 (4th Cir. 2011) (quoting Little v. Wuerl, 929 F.2d 944, 951 (3d Cir. 1991)) (permission to employ individuals "of a particular religion" includes permission to employ people "whose beliefs and conduct are consistent with the employer's religious precepts"); Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 624 (6th Cir. 2000) ("The decision to employ individuals 'of a particular religion' under § 2000e–1(a) . . . has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer."); Killinger v. Samford Univ., 113 F.3d 196, 200 (11th Cir. 1997) ("[The Section 702 exemption] allows religious institutions to employ only persons whose beliefs are consistent with the employer's when the work is connected with carrying out the institution's activities."); *Little*, 929 F.2d at 951 ("[W]e are also persuaded that Congress intended the explicit exemptions to Title VII to enable religious organizations

Having addressed the proper interpretation of the religious-employer exemption, the next section describes how applying the appropriate framework for analysis would help courts avoid unconstitutional entanglement in religion.

## IV. The Proper Textual Framework Helps Prevent Courts from Unconstitutional Entanglement with Religion and Protects Religious Employers' First Amendment Rights

The First Amendment and the religious-employer exemption allow religious organizations to maintain internal standards of conduct based upon their faith.[95] The text of the religious-employer exemption makes clear that whenever religious employers make an employment decision based upon their religious beliefs, they are exempt from further scrutiny.[96] Occasionally, there may be a factual question about whether an employment decision was, in fact, based upon a religious belief or precept.[97] In those instances, courts must, on a case-by-case basis, address whether submitting the particular issue to the jury involves unconstitutional entanglement with religion.[98] Applying this framework allows juries to hear cases that do not involve significant risk of unconstitutionality, thereby effecting Congress's goal of minimizing invidious discrimination. At the same time, it respects the constitutional right of religious organizations to hold true to their faith.

### *A. The First Amendment Protects the Internal Decision-Making Process of Religious Employers from Government Intrusion*

"Courts are not arbiters of scriptural interpretation."[99] Secular courts are not competent to question "the centrality of particular beliefs or practices to a faith,"[100] to question "the validity of particular litigants' interpretations of those creeds,"[101] or to determine which of two litigants has "more correctly perceived the commands of their common faith."[102]

---

to create and maintain communities composed solely of individuals faithful to their doctrinal practices . . . .").

95. *See infra* Part IV.A.
96. *See supra* Part II; Part III.A.
97. *See infra* Part IV.A.
98. *See infra* Part IV.A.
99. Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 716 (1981).
100. Hernandez v. Comm'r, 490 U.S. 680, 699 (1989).
101. *Id.*
102. *Thomas*, 450 U.S. at 716; *see also* Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d

Likewise, courts cannot tell religious organizations "how to carry out their religious missions or how to enforce their religious practices."[103] According to the Supreme Court, "[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them."[104] The First Amendment's separation of church affairs from government interference "radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[105]

Cases involving government interference in religious organizations can implicate both clauses of the First Amendment.[106] The Supreme Court has stated that "intrusive inquiry into religious belief" could impermissibly entangle church and state under the Establishment Clause.[107] Additionally, according to the Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,[108] when a case "concerns government interference with an internal church decision that affects the faith and mission of the church itself," the government action is subject to a more searching Free Exercise analysis than

144, 171–72 (3d Cir. 2002) (reasoning that courts should not become involved in adjudicating whether a particular religious practice is mandatory or optional, as that would require them to delve into individual members' interpretations to determine which seemed more correct).

103. Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 626 (6th Cir. 2000); *see also* Maguire v. Marquette Univ., 627 F. Supp. 1499, 1500 (E.D. Wis. 1986) ("Setting aside the question of the competence of this Court to decide who is and who is not a good Catholic, I think for the reasons stated in this decision that Title VII and the First Amendment to the United States Constitution, which provides for the separation of church and state, preclude this Court from assuming jurisdiction of the subject matter of this action."), *aff'd in part and vacated in part*, 814 F.2d 1213 (7th Cir. 1987).

104. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 704 (2012) (quoting Watson v. Jones, 80 U.S. 679, 727 (1872)).

105. *Id.* (quoting Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952)).

106. *See, e.g.*, Janet S. Belcove-Shalin, *Ministerial Exception and Title VII Claims: Case Law Grid Analysis*, 2 NEV. L.J. 86, 105, 126 (2002) (noting in an analysis of twenty-eight Title VII ministerial exemption cases that, in twenty-four cases, courts conducted both Free Exercise Clause and Establishment Clause analyses; in five cases, courts conducted an analysis under only one clause, and in one case, the court did not address either clause).

107. *See* Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 339 (1987) (stating that the religious-employer exemption "effectuates a more complete separation of [church and state] and avoids . . . intrusive inquiry into religious belief").

108. 132 S. Ct. 694 (2012).

*Employment Division v. Smith*[109] would otherwise require.[110]

### *B. A Text-Based Interpretation of the Religious-Employer Exemption Lessens the Risk of Unconstitutional Entanglement in Religion*

Title VII's exemption for religious employers, when properly understood, provides a solution that lessens the risk of courts unconstitutionally weighing different religious doctrines. The exemption provides that religious employers may consider the religious beliefs and conduct of their employees in order to choose which individuals would be best suited to carrying out the employers' religious missions.[111] In cases where religious employers do not rely on their religious beliefs to make an employment decision, then those cases are treated just as if they involved any other employer.[112] Conversely, whenever religious employers base their employment decisions upon their religious precepts, they are exempt. This rule severely reduces the risk of unconstitutional involvement in religious matters, while still allowing some cases to move forward.

In a case where a plaintiff alleges that the asserted religious rationale for an employment action against him or her was not the real reason for the employment action, this factual issue could go before a jury.[113] Because these employment discrimination cases turn on whether the real motivation for an employment decision was a religious employer's religious precepts or whether the religious rationale was mere pretext for unlawful discrimination, such as sex discrimination, the *McDonnell Douglas*[114] burden-shifting framework is appropriate.[115] *McDonnell Douglas* is the standard

109. 494 U.S. 872 (1990).

110. *Hosanna-Tabor*, 132 S. Ct. at 707.

111. *See* 42 U.S.C. § 2000e-1(a) (2012) (stating that "[t]his subchapter shall not apply to . . . [a religious employer] with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities"); *Amos*, 483 U.S. at 335 (stating that "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions").

112. *See* 42 U.S.C. § 2000e-2(a) (forbidding employment discrimination on the basis of race, color, religion, sex, or national origin).

113. *See infra* Part IV.C.

114. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

115. *See Hall*, 215 F.3d at 625 ("In the absence of direct evidence of discrimination, a plaintiff must establish its case under the framework first enunciated in [*McDonnell Douglas*]."); Dias v. Archdiocese of Cincinnati, No. 1:11-CV-00251, 2013 U.S. Dist. LEXIS 12417, at *11–12 (S.D. Ohio Jan. 30, 2013) (holding, where plaintiff was terminated for being "unwed and pregnant" or "pregnant by artificial insemination" in violation of church doctrine, "[t]he correct analysis in this case is through circumstantial evidence, that is, the burden-shifting model of [*McDonnell Douglas*]").

employment discrimination framework for addressing pretext issues on summary judgment.[116] The mixed-motive framework, which often involves direct evidence, will generally not be appropriate in light of the religious-employer exemption's grant of permission to religious organizations to make employment decisions based upon their religious beliefs.

However, courts must be aware of potential constitutional violations when submitting a pretext issue to a jury—especially where the jury is asked to weigh different doctrines of faith. Courts may not ask juries to weigh the truth, importance, or centrality of different religious doctrines.[117] For this reason, some circuits have held that pretext inquiries are impermissible where a religious employer "presents convincing evidence that the challenged employment practice resulted from discrimination on the basis of religion."[118]

### *C. Pretext Inquiries Often Lead to Unconstitutional Entanglement in Religion*

Several courts considering employment discrimination claims

---

116. Young v. UPS, 135 S. Ct. 1338, 1345 (2015).

117. *See* Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); Thomas v. Rev. Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 716 (1981) ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."); Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 450 (1969) ("A civil court can make this determination only after assessing the relative significance to the religion of the tenets from which departure was found. Thus, the [theory at issue] requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role."); United States v. Ballard, 322 U.S. 78, 86 (1944) (quoting in part Watson v. Jones, 80 U.S. 679, 728 (1871)) ("[W]e do not agree that the truth or verity of respondents' religious doctrines or beliefs should have been submitted to the jury. Whatever this particular indictment might require, the First Amendment precludes such a course, as the United States seems to concede. 'The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.'"); *see also* State *ex rel.* Gaydos v. Blaeuer, 81 S.W.3d 186, 193 (Mo. Ct. App. 2002) (holding judges may "not become entangled in questions which are essentially religious."); Jackson v. Light of Life Ministries, Inc., No. 2:05-cv-1779, 2006 U.S. Dist. LEXIS 75265, at *14-15 (W.D. Pa. Oct. 16, 2006) ("An inquiry by a federal court into whether an entity is faithfully adhering to its statements of purpose is fraught with danger, will have a chilling effect on the religious organization's right of free exercise, and will unnecessarily entangle the government in religious affairs.").

118. EEOC v. Miss. Coll., 626 F.2d 477, 485 (5th Cir. 1980); *see also* Curay-Cramer v. Ursuline Acad. of Wilmington, Inc., 450 F.3d 130, 141 (3d Cir. 2006) (limiting permissible pretext inquiries to those "in which a plaintiff avers that truly comparable employees were treated differently following substantially similar conduct.") (quoting *Miss. Coll.*, 626 F.2d at 485).

have cautioned that permitting a jury to evaluate pretext issues can create excessive government entanglement with religion.[119] "The 'very process of inquiry' can impinge on rights guaranteed by the First Amendment."[120]

For instance, in the Third Circuit's case, *Curay-Cramer v. Ursuline Academy of Wilmington, Inc.*,[121] a teacher was fired by a Catholic school for her pro-abortion advocacy.[122] She argued that because similarly situated male employees were treated less harshly for their beliefs or conduct, she must have been fired for being a woman.[123] The plaintiff pointed to men who were Jewish and others who opposed the war in Iraq, alleging that the Catholic school should have treated them similarly to how it treated her.[124] The Third Circuit, quoting the district court approvingly, noted that evaluating the comparators in that case would require the following:

> [A]n analysis of Catholic doctrine to determine whether the decision to employ a teacher of a different religious background constitutes an affront to the Catholic faith and, if so, whether it is an affront of at least the same seriousness as the Plaintiff's repudiation of Catholic doctrine on when life begins and the responsibility to preserve life *in utero*.[125]

---

119. A court permitting evidence of pretext to be submitted to the trier of fact must be wary of whether the particular case involves unconstitutional government entanglement with religion. *See* NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 507 (1979) (holding that "in the absence of a clear expression of Congress' [s] intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses"); Curay-Cramer v. Ursuline Acad. of Wilmington, Inc., 450 F.3d 130, 138–42 (3d Cir. 2006) (noting that, under the analytical framework set forth by the Supreme Court, a court must ensure that applying Title VII liability to a religious employer does not infringe on First Amendment rights); O'Connor v. Roman Catholic Church of the Diocese of Phx., No. CV 05-1309 PHX-SMM, 2007 U.S. Dist. LEXIS 38141, at *14–15 (D. Ariz. May 24, 2007) ("Determining whether a particular marriage conforms [to] the Catholic Church's teachings on marriage and whether an individual is in full communion with the Church are clearly matters of religious interpretation. Accordingly, the Court finds that Defendant is exempt from liability under Title VII pursuant to the § 702 exemption . . . ."); Leavy v. Congregation Beth Shalom, 490 F. Supp. 2d 1011 (N.D. Iowa 2007) ("The pretext inquiry asks only if the stated reasons for the discharge are the actual reasons and does not require the Court to determine if those reasons are fair or reasonable. . . . [Inquiring into Defendants' good-faith beliefs] invites improper scrutiny . . . . Any such investigation presses the civil court to become excessively entangled in internal church affairs and is prohibited by the First Amendment.").

120. *Curay-Cramer*, 450 F.3d at 138 (quoting in part *Catholic Bishop*, 440 U.S. at 502).

121. *Id.*

122. *Id.* at 132.

123. *Id.* at 132–33.

124. *Id.* at 139–40.

125. *Id.* at 140 (quoting Curay-Cramer v. Ursuline Acad. of Wilmington, Inc., 344 F.

The court concluded that it could not determine whether "being Jewish" or "opposing the war in Iraq" posed a more significant conflict with Church doctrine than "promoting a woman's right to abortion."[126] Making such a determination would infringe upon the First Amendment, and the court would be "meddling in matters related to a religious organization's ability to define the parameters of what constitutes orthodoxy."[127]

Other courts, while recognizing a potential danger of government interference, have held that the danger does not exist in the case at hand. For instance, the Second Circuit, Third Circuit, and Eighth Circuit, in cases involving age discrimination claims, have stated that sometimes a pretext inquiry may be unconstitutional. The Second Circuit, in *DeMarco v. Holy Cross High School*,[128] wrote, "We recognize that such a plausibility inquiry could give rise to constitutional problems where, as in the case at bar, a defendant proffers a religious purpose for a challenged employment action."[129] The Third Circuit, in *Geary v. Visitation of the Blessed Virgin Mary Parish School*, wrote, "[T]he First Amendment dictates that a plaintiff may not challenge the validity, existence or 'plausibility' of a proffered religious doctrine, and we caution that the ADEA would not apply in such a case."[130] Likewise, the Eighth Circuit, in *Weissman v. Congregation Shaare Emeth*,[131] wrote, "If any or all of the reasons asserted for dismissal are religious, the trial court can use the case-by-case approach to determine those rare cases where a lay employee's relationship with a religious institution is so pervasively religious that even mere pretext inquiry poses a significant risk of First Amendment infringement."[132] These circuits agree that there is a possibility of unconstitutional interference in religion in employment discrimination claims and courts must look at the questions of constitutional infringement on a case-by-case basis for cases that do not involve ministers.[133]

---

Supp. 2d 923, 934 (D. Del. 2004), *aff'd*, 450 F.3d 130 (3d Cir. 2006).

126. *Id.*

127. *Id.* at 141.

128. 4 F.3d 166 (2d Cir. 1993).

129. *Id.* at 171.

130. Geary v. Visitation of the Blessed Virgin Mary Par. Sch., 7 F.3d 324, 330 (3d Cir. 1993).

131. 38 F.3d 1038 (8th Cir. 1994).

132. *Id.* at 1045, *abrogated in part on other grounds by* Torgerson v. City of Rochester, 643 F.3d 1031, 1043, 1060 (8th Cir. 2011).

133. *See, e.g.*, *id.* at 1044 ("The significant risk of infringement which is readily apparent in *Catholic Bishop* may or may not be present in an ADEA case, but because of the minimal intrusion of the ADEA and the limited scope of its inquiry, we hold that the *Catholic Bishop*

### *D. Courts Decline to Hear Employment Discrimination Cases Involving Ministers Due to the High Risk of Constitutional Infringement*

In some strands of employment discrimination case law, such as employment discrimination involving *ministers*, the danger for unconstitutional entanglement is so great that courts categorically decline to hear those types of cases.[134]

The Supreme Court and every circuit court to consider the issue recognized that Title VII cannot apply to force a religious organization to accept an unwanted employee who serves in a ministry position.[135] In other words, religious organizations may not be sued for employment decisions involving relationships with their employees who serve in ministry positions. In 2012, the Supreme Court unanimously affirmed this categorical exemption to Title VII in *Hosanna-Tabor*.[136] The Court concluded that it would violate both the Establishment Clause and the Free Exercise Clause to fail to recognize a ministerial exemption.[137] The Court reasoned:

> By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.[138]

In a concurring opinion in *Hosanna-Tabor*, Justices Alito and Kagan also addressed the danger of probing the religious school's real reason for terminating the plaintiff. The concurrence states:

> In order to probe the *real* reason for respondent's firing, a civil court—and perhaps a jury—would be required to make a judgment about church doctrine. The credibility of Hosanna-Tabor's asserted reason for terminating respondent's

---

test should be applied on a case-by-case basis to age discrimination cases involving lay employees of religious institutions.").

134. *See infra* note 135.

135. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 714 (2012) (Alito, J., concurring) ("[E]very circuit to consider the issue has recognized the 'ministerial' exception."); *see, e.g.*, McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972) ("We find that the application of the provisions of Title VII to the employment relationship existing between The Salvation Army and Mrs. McClure, a church and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment.").

136. *Hosanna-Tabor*, 132 S. Ct. at 710.

137. *Id.* at 706.

138. *Id.*

> employment could not be assessed without taking into account both the importance that the Lutheran Church attaches to the doctrine of internal dispute resolution and the degree to which that tenet compromised respondent's religious function. If it could be shown that this belief is an obscure and minor part of Lutheran doctrine, it would be much more plausible for respondent to argue that this doctrine was not the real reason for her firing. If, on the other hand, the doctrine is a central and universally known tenet of Lutheranism, then the church's asserted reason for her discharge would seem much more likely to be nonpretextual [sic]. But whatever the truth of the matter might be, the mere adjudication of such questions would pose grave problems for religious autonomy: It would require calling witnesses to testify about the importance and priority of the religious doctrine in question, with a civil factfinder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church's overall mission.[139]

It is always unconstitutional to involve secular courts and juries in the hiring, firing, and disciplining of *ministers.* By contrast, the employment relationship between a religious employer and its *lay employees* does not always involve an unconstitutional inquiry. However, it sometimes does and, in such cases, courts must abstain.

### *E. For Title VII Cases Not Involving Ministers, Courts Should Analyze the Risk of Unconstitutional Entanglement on a Case-by-Case Basis*

When evaluating whether a pretext inquiry is constitutionally permissible for a particular case, courts should conduct a case-by-case analysis. For instance, where the danger of jurors imposing their own moral beliefs on a religious employer is too great, courts should abstain.

Courts often rely upon the framework announced in *NLRB v. Catholic Bishop of Chicago*[140] to analyze whether there is a "significant risk that the First Amendment will be infringed."[141] *Catholic Bishop* involves three steps. First, courts determine whether a statute raises "serious constitutional questions."[142] If they are raised, the court looks at the statute to determine whether Congress had clearly expressed that the act was supposed to apply to the religious

139. *Id.* at 715 (Alito, J., concurring) (emphasis in original).
140. 440 U.S. 490 (1979).
141. *See, e.g.*, Curay-Cramer v. Ursuline Acad. of Wilmington, Inc., 450 F.3d 130, 138 (3d Cir. 2006) (quoting NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 502 (1979)).
142. *Id.* (quoting *Catholic Bishop*, 440 U.S. at 501).

organization in the situation.[143] If an affirmative intention is shown, courts determine whether the statute violates the First Amendment as applied to the facts.[144] The purpose of this test is "to avoid addressing constitutional questions absent clear legislative intent to apply the statute in a way that raises a significant risk of infringing constitutional rights."[145]

Proper interpretation of the religious-employer exemption mitigates much of the risk of unconstitutionality. When a factual issue arises concerning the exemption, applying a case-by-case approach, *Catholic Bishop* double-check ensures that courts address Title VII cases within their capacity and avoid unconstitutional church-state relations.

## V. *HERX* CASE STUDY

A recent federal case in Indiana illustrates how an incorrect framework for analyzing the religious-employer exemption increases the likelihood that a court will violate a religious employer's First Amendment rights. In *Herx*, a federal district court relied upon an incorrect religious-claims-only interpretation of the religious-employer exemption.[146] As a consequence, the court dismissed the exemption without sufficient analysis. This led the court to (1) adopt an incorrect summary judgment standard, (2) allow improper comparator evidence, and (3) implement a confusing jury charge.[147]

The court's actions thus permitted jurors to invoke their own moral beliefs, rather than deferring to the school's religious doctrines, in order to decide whether a Catholic school should have punished a male teacher who went to a strip club as harshly as a female teacher who underwent IVF. The court's actions also may have led the jury to question whether a religious school may legally maintain *any* religious beliefs or standards regarding the morality of IVF. Had the court employed an interpretation of the religious-employer exemption that is faithful to the statute's text, it could have more easily avoided unconstitutional interference with religion.

143. *Id.*
144. *Id.*
145. *Id.*
146. *See infra* Part V.B.1.
147. *See infra* Part V.B.3.

### *A. Factual Background*

Mrs. Emily Herx was a junior-high-school, language-arts teacher at St. Vincent de Paul School in Fort Wayne, Indiana, until the Roman Catholic Church (vis-à-vis the Diocese of Fort Wayne-South Bend) learned that she was undergoing IVF in an effort to become pregnant.[148] In April 2011, Mrs. Herx was told that the Roman Catholic Church considers IVF to be gravely immoral.[149] When she continued with the procedure, the school decided not to renew her year-to-year teaching contract.[150] In relevant part, Mrs. Herx's year-to-year contract contained a code-of-conduct clause, which stated the following:

> This contract may be terminated prior to its expiration, or not renewed, for reasons relating to improprieties regarding Church teachings or laws . . . . Acknowledging and accepting the religious and moral nature of the Church's teaching mission, the undersigned agrees to conduct herself or himself at all times, professionally and personally, in accordance with the episcopal teaching authority, law and governance of the Church in this Diocese. Charges of immoral behavior, or of conduct violative of the Teachings of the Church shall ultimately be resolved exclusively by the Bishop, or his designee, as provided in the Diocesan Educational Policies.[151]

A Diocesan Educational Policy in effect during Mrs. Herx's tenure also listed religious standards. It stated the following:

> Since the distinctive and unique purpose of the Catholic school is to create a Christian educational community, enlivened by a shared faith among the administrator(s), teachers, students and parents, the highest priority is to hire Catholics in good standing in the Catholic Church who demonstrate a commitment to Christian living, are endowed with and espouse a Catholic philosophy of life, and believe in the Catholic Church and her teachings. Both Catholic and non-Catholic teachers who are employed in a Catholic school must, as a condition of employment, have a knowledge of and respect for the Catholic faith, abide by the tenets of the Catholic Church as they apply to that person, exhibit a commitment to the ideals of Christian

148. St. Vincent is a Catholic elementary and junior high school connected with the Diocese of Fort Wayne-South Bend. Herx v. Diocese of Fort Wayne-S. Bend, Inc., 48 F. Supp. 3d 1168, 1171 (N.D. Ind. 2014), *appeal dismissed by* Herx v. Diocese of Fort Wayne-S. Bend, Inc., 772 F.3d 1085 (7th Cir. 2014).

149. *Id.* at 1172.

150. *Id.* at 1172–73.

151. *Id.* at 1171–72.

living, and be supportive of the Catholic faith.[152]

The facts of the case are complicated because at least one school administrator, St. Vincent de Paul School Principal Sandra Guffey, was aware that Mrs. Herx had undergone IVF previously.[153] The principal did not issue a report or raise any objections at that time. Instead, she seemed to give her approval.[154] Principal Guffey testified that she did not initially know that IVF was against Roman Catholic Church policy until she read an article about it.[155] The second time Mrs. Herx attempted the procedure, the principal informed Monsignor John Kuzmich of St. Vincent de Paul Catholic Church of the situation.[156]

After her contract was not renewed, Mrs. Herx filed suit for sex discrimination[157] under Title VII against the Diocese of Fort Wayne-South Bend.[158]

### *B. Summary Judgment*

The district court's errors on summary judgment opened the door for unconstitutional government interference in religion at trial.

#### 1. The Court Erroneously Dismissed the Religious-Employer Exemption, Leaving the Court Without a Clear Framework for Analysis

Denying the Diocese's motion for summary judgment on the Title VII claim, the court reasoned that the religious-employer exemption did not apply.[159] The court did not analyze the text of the qualified exemption to determine whether the language of the qualifier applied in this case. Instead, the court applied the

152. *Id.* at 1172.

153. *Id.*

154. When Mrs. Herx emailed Principal Guffey about her procedure on February 22, 2010, she responded as follows: "Thank you for sharing this with me. I appreciate how difficult it was for you to come to this decision. I will continue to pray for you and your husband. Keep me up to date. Take care and God bless, Sandra." *Id.* at 1172 n.1; Transcript of Jury Trial, Day Two at 212:24–213:13, Herx v. Diocese of Fort Wayne-S. Bend, Inc., No. 1:12-CV-122 RLM, 2015 U.S. Dist. LEXIS 28224 (N.D. Ind., Mar. 9, 2015), ECF No. 234.

155. Transcript of Jury Trial, Day Two, *supra* note 154, at 221:13–222:4.

156. Transcript of Jury Trial, Day Two, *supra* note 154, at 219:9–14; 222:5–10.

157. *See* 42 U.S.C. § 2000e(k) (2012) (showing that pregnancy discrimination is a type of sex discrimination).

158. *Herx*, 48 F. Supp. 3d at 1170–71 (showing that Mrs. Herx also brought a claim for disability under the Americans with Disabilities Act citing her infertility; the district court granted summary judgment on this claim in favor of the Diocese).

159. *Herx*, 48 F. Supp. 3d at 1175, 1179.

religious-claims-only limitation, a commonly repeated but non-textual categorical rule that the religious-employer exemption *never* applies to sex discrimination claims arising under Title VII.[160] The court reflexively disregarded the religious-employer exemption, writing that "courts across the country have found Title VII to apply to claims against religious employers for discrimination based on race, sex, and national origin."[161] Without further analysis, the *Herx* opinion implies that because religious employers are subject to *some* claims of sex discrimination, the religious-employer exemption *never* bars such claims.[162]

Employing co-religionist language, the district court added, "Title VII's exemptions are limited specifically to claims of discrimination premised upon religious preferences, and Mrs. Herx isn't complaining about religious preference."[163] The court relied mostly upon *Rayburn v. General Conference of Seventh-Day Adventists*,[164] which also invokes the co-religionist preference's narrow interpretation of the religious-employer exemption.[165]

This court erroneously applied the non-textual religious-claims-only limitation.[166] The court's adoption of the limitation and subsequent rulings resulted in unconstitutional entanglement with religion, which may have been prevented by using a text-based interpretation of the exemption.[167] The court's lack of a consistent framework led to conflicting rulings and increased risk of unconstitutionality.[168]

---

160. *Id.* at 1175.

161. *Id.*

162. Some of the cases the court relies upon for support include broad language regarding the application of the exemptions, *see, e.g.*, Kennedy v. St. Joseph's Ministries, Inc., 657 F.3d 189, 192 (4th Cir. 2011), whereas others have narrower language, *see, e.g.*, Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1166 (4th Cir. 1985). The court did not address the differences. *Herx*, 48 F. Supp. 3d at 1175–76 (citing *Kennedy*, 657 F.3d at 192; Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410, 413 (6th Cir. 1996); *Rayburn*, 772 F.2d at 1167; EEOC v. Pac. Press Publ'g Ass'n, 676 F.2d 1272, 1279 (9th Cir. 1982); Hopkins v. Women's Div., Gen. Bd. of Glob. Ministries, 238 F. Supp. 2d 174, 180 (D.D.C. 2002), *summary judgment granted and case dismissed by* 284 F. Supp. 2d 15 (D.D.C. 2003), *aff'd*, 98 F. App'x 8 (D.C. Cir. 2004); Elbaz v. Congregation Beth Judea, Inc., 812 F. Supp. 802, 807 (N.D. Ill. 1992)).

163. *Id.* at 1175.

164. 772 F.2d 1164 (4th Cir. 1985).

165. *See id.* (quoting the *Rayburn* case at length and comparing other courts to the court in *Rayburn*).

166. *See supra* note 82.

167. *See infra* Part V.C.2.

168. *See infra* Part V.C.2.

### 2. The Court's Opinion Included Conflicting Rulings on Whether Catholic Schools May Have Moral Standards Regarding IVF

The *Herx* court made inconsistent rulings about whether federal employment discrimination law permits a religious school to enforce a rule against IVF that is based on the religious school's sincerely held religious beliefs.

On one hand, the court indicated that a reasonable jury could agree with Mrs. Herx's claim that the religious rule against IVF was "direct evidence" of unlawful sex discrimination.[169] The court treated the Diocese's statement that it non-renewed Mrs. Herx for undergoing IVF as direct evidence of unlawful sex discrimination because "the Diocese has never non-renewed a male teacher for involvement in in vitro fertilization."[170] The court weighed the fact that no male teacher had been non-renewed for involvement in IVF against the Diocese, even though the Diocese was not aware of *any* teacher other than Mrs. Herx who had participated in the procedure.[171] Thus, by suggesting that the rule against IVF was "direct evidence" of unlawful sex discrimination, the court seemed willing to adopt the plaintiff's argument that a rule against IVF is inherently discriminatory because such a rule is more likely to affect women.[172] However, the court later denied the plaintiff's motion for a directed verdict even though her motion was on the same basis.[173]

---

169. *Herx*, 48 F. Supp. 3d at 1178.

170. *Id.*

171. Instead of a direct evidence framework, the court should have applied the *McDonnell Douglas* burden-shifting framework, which is standard in pretext cases. *See* Dias v. Archdiocese of Cincinnati, No. 1:11-CV-00251, 2013 U.S. Dist. LEXIS 12417, at *11–12 (S.D. Ohio Jan. 30, 2013) (holding, where plaintiff was terminated for being "unwed and pregnant" or "pregnant by artificial insemination" in violation of church doctrine, "[t]he correct analysis in this case is through circumstantial evidence, that is, the burden-shifting model of [*McDonnell Douglas*]"). Moreover, it is unclear whether the evidence before the court was sufficient to make out a prima facie sex discrimination claim in light of Mrs. Herx's testimony that she believed that she was terminated for violating church teachings. *See* Transcript of Jury Trial, Day One at 129:13–17, Herx v. Diocese of Fort Wayne-S. Bend, Inc., No. 1:12-CV-122 RLM, 2015 U.S. Dist. LEXIS 28224 (N.D. Ind., Mar. 9, 2015), ECF No. 233; *see also* Maguire v. Marquette Univ., 814 F.2d 1213, 1216 (7th Cir. 1987) (concluding the plaintiff "failed to make out a valid claim of sex discrimination under Title VII" without reaching the question of whether the religious-employer exemption applied).

172. *See generally* Jessica L. Waters & Leandra N. Carrasco, *Untangling the Reproductive Rights and Religious Liberty Knot*, 26 YALE J.L. & FEMINISM 217 (2014) (advocating for this position and using *Herx* as an example).

173. Transcript of Jury Trial, Day Three, at 513:6–16, 516:4–12, Herx v. Diocese of Fort Wayne-S. Bend, Inc., No. 1:12-CV-122 RLM, 2015 U.S. Dist. LEXIS 28224 (N.D. Ind., Mar. 9,

A rule rejecting religious employers' ability to enforce religious-based conduct codes about sexual conduct would contradict the weight of the nation's cases,[174] including those cases that do not apply the religious-employer exemption.[175] The weight of the cases hold that Title VII permits religious employers to create conduct codes based upon their religious beliefs about moral behavior, such as sexual conduct.[176]

Even though the court entertained Mrs. Herx's erroneous argument that a religious rule about IVF could violate Title VII as a matter of law, other portions of the summary judgment opinion indicated that a religious rule about IVF could be lawful if applied

---

2015), ECF No. 235 (expressing some confusion regarding the evidentiary standard required for summary judgment as opposed to the determination of a trial jury).

174. *See, e.g.*, Boyd v. Harding Acad., 88 F.3d 410, 413 (6th Cir. 1996) (affirming the district court's determination that "defendant Harding articulated a legitimate, non-discriminatory reason for plaintiff's termination when it stated that plaintiff was fired not for being pregnant, but for having sex outside of marriage in violation of Harding's code of conduct"); O'Connor v. Roman Catholic Church of the Diocese of Phx., No. CV 05-1309 PHX-SMM 2007, 2007 U.S. Dist. LEXIS 38141, at *14–15 (D. Ariz. May 24, 2007) ("The § 702 exemption allows religious employers to discriminate in favor of members of their own faith. As Plaintiff's job description unequivocally demonstrates, being an active practicing Catholic in full communion with the church was a required term of her employment. Determining whether a particular marriage conforms [to] the Catholic Church's teachings on marriage and whether an individual is in full communion with the Church are clearly matters of religious interpretation. Accordingly, the Court finds that Defendant is exempt from liability under Title VII pursuant to the § 702 exemption and Plaintiff's retaliation claim will be dismissed with prejudice."); Gosche v. Calvert High Sch., 997 F. Supp. 867, 872 (N.D. Ohio 1998) (citing 42 U.S.C. § 2000e-1 (2012)) ("[I]t is clear that the Diocese and Parish considered [plaintiff's] sexual conduct to be relevant to her employment. This Court does not sit to redefine job qualifications, and must defer to the employer's determination of what is relevant to the job, particularly where, as here, federal law expressly permits religious corporations to discriminate on the basis of religion 'with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation . . . of its activities.'"), *aff'd without opinion by* 181 F.3d 101 (6th Cir. 1999), *reported in full at* No. 98-3201, 1999 U.S. App. LEXIS 7376 (6th Cir. 1999); Ganzy v. Allen Christian Sch., 995 F. Supp. 340, 349 (E.D.N.Y. 1997) (stating that "restrictions on sexual activity, applied equally to males and females, are not discriminatory"); Dolter v. Wahlert High Sch., 483 F. Supp. 266, 270 (N.D. Iowa 1980) (noting one of the two questions before the court was "whether Ms. Dolter was in fact discharged only because she was pregnant rather than because she obviously had pre-marital sexual intercourse in violation of defendant's moral code"); Henry v. Red Hill Evangelical Lutheran Church of Tustin, 201 Cal. App. 4th 1041, 1052 (Cal. Ct. App. 2011) (stating that "terminating the employment because the employee committed adultery—a violation of the religious organization's requirement that the employee 'live a life in conformity with the fundamentalist beliefs of the church' would not be a violation [of Title VII]").

175. *See, e.g.*, *Boyd*, 88 F.3d at 414 (affirming that it was permissible for a religious school to terminate an employee where "[employee's] action violated the [moral] code of conduct that Harding teachers are required to follow"); *Ganzy*, 995 F. Supp. at 359–60 ("As a sectarian private institution, the School has the right to employ only teachers who adhere to the school's moral code and religious tenets."); *Dolter*, 483 F. Supp. at 270 ("[Catholic school] can define moral precepts and prescribe a code of moral conduct that its teachers . . . must follow.").

176. *See supra* notes 174–175.

neutrally between men and women. The summary judgment opinion identified the "triable issue" as "whether Mrs. Herx was non-renewed because of her sex, or because of a sincere belief about the morality of in vitro fertilization."[177] Thus, the court seemed to hold that if she were terminated because of a sex-neutral religious belief about the morality of IVF, rather than because of her sex, then the Diocese would prevail. Moreover, the court declined to accept the plaintiff's argument that "the Pregnancy Discrimination Act prohibits religious organizations from drawing a line at infertility treatments they sincerely believe to be gravely immoral."[178]

Thus, the court appropriately framed the triable issue as if it were dealing with a standard pretext case.[179] The jury was asked to determine which reason was the real reason for the employment decision.[180] However, because of the incorrect direct-evidence ruling, the court declined to use the proper *McDonnell Douglas* framework—standard in employment discrimination cases—to determine whether an asserted lawful reason was mere pretext for unlawful discrimination.[181] This confusion was reflected in a muddled jury instruction.

### 3. The Court Ignored the Diocese's Constitutional Objection, Relying on a Jury Instruction to Cure First Amendment Injuries

The court rejected the Diocese's argument that comparing and evaluating the Diocese's different religious doctrines would lead to excessive entanglement or intrusion into religious tenets.[182] The Diocese argued that rejecting "application of the Title VII exemptions would produce the sort of constitutionally prohibited inquiry into religious matters and values that the exemptions were designed to prevent, offending the Religion Clauses."[183]

The court, rather than protecting the Roman Catholic school's

177. *Herx*, 48 F. Supp. 3d at 1179.
178. *Id.*
179. *See supra* Part IV.C.
180. *Herx*, 48 F. Supp. 3d at 1178–79.
181. *See id.* at 1173 (noting that the alternative to the burden-shifting framework of *McDonnell Douglas* is the direct evidence method of proving a Title VII claim); *see* Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 625 (6th Cir. 2000) ("In the absence of direct evidence of discrimination, a plaintiff must establish its case under the framework first enunciated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973).").
182. *Herx*, 48 F. Supp. 3d at 1182.
183. *Id.*

constitutional rights, relied on the jury to uphold the First Amendment.[184] According to the court's opinion, "The Diocese is understandably concerned about the possibility of a judge or jury conducting its own secular analysis of Roman Catholic doctrine on in vitro fertilization. *That shouldn't happen.*"[185] Yet, the court relied on nothing more than an ordinary jury charge to stop that from happening.[186] The court wrote:

> In the ordinary Title VII case, the employer points to a non-discriminatory reason as the reason for the adverse employment action, and the plaintiff tries to prove that she suffered the adverse action because of her sex, race, national origin, and so on. In the ordinary Title VII trial, the judge instructs the jury along these lines: "In deciding Plaintiff's claim, you should not concern yourselves with whether Defendant's actions were wise, reasonable, or fair. Rather, your concern is only whether Plaintiff has proved the Defendant [adverse employment action] him [because of race/sex] . . . ." SEVENTH CIRCUIT FEDERAL JURY INSTRUCTIONS: CIVIL 3.07 (2010).[187]

The court then opined, "The Diocese has given the court no reason to think a jury is likely to disobey that instruction in a case in which a religious employer claims to have acted for religious reasons."[188]

Unfortunately, this response does not address the First Amendment concern at the heart of the objection. The "ordinary Title VII" case does not involve any risk of secular juries scrutinizing or rejecting religious doctrines. It is the court's duty to protect religious employers from juries nullifying their moral codes.[189]

### *C. Trial*

During trial, the court allowed evidence that improperly encouraged the jury to substitute its own moral judgment for that

184. *See id.* at 1182–83 (reasoning that unconstitutional entanglement was not likely to occur because a jury would properly follow the typical jury charge to limit its inquiry).

185. *Id.* at 1182 (emphasis added).

186. *See supra* note 184.

187. *Herx*, 48 F. Supp. 3d at 1182–83.

188. *Id.* at 1183.

189. *See supra* note 117; United States v. Ballard, 322 U.S. 78, 86 (1994) (quoting in part Watson v. Jones, 80 U.S. 679, 728 (1871)) ("[W]e do not agree that the truth or verity of respondents' religious doctrines or beliefs should have been submitted to the jury. Whatever this particular indictment might require, the First Amendment precludes such a course, as the United States seems to concede. 'The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.'").

of the Roman Catholic Church employer.

### 1. The Court Allowed Evidence About the Morality of IVF Despite the Parties' Stipulation about Catholic Doctrine

The court repeatedly allowed the parties to introduce evidence about the morality of IVF. Even though jurors are not constitutionally permitted to substitute their moral beliefs for those of the religious employer and though the parties stipulated that the Roman Catholic Church views IVF as gravely immoral regardless of the circumstances,[190] the court allowed argument and testimony about whether any embryos were actually destroyed in Mrs. Herx's procedure.[191] The primary reason to reach the issue of whether embryos were actually destroyed in Mrs. Herx's procedure was to question the plausibility or validity of Roman Catholic doctrine.[192] If what the school *really* opposes is destroying embryos, and no embryos were intentionally destroyed in this particular procedure, then it is more likely that the school fired her for being a woman or for trying to become pregnant than for undergoing this procedure.

Similarly, the court also allowed the Diocese to present evidence about the morality of the decision to undergo IVF. For instance, the jury heard testimony that the plaintiff checked a box consenting to allow the clinic to use immature or unfertilized eggs, left-over sperm, or abnormal embryos for quality control and

190. Final Jury Instructions at 3, Herx v. Diocese of Fort Wayne-S. Bend, Inc., No. 1:12-CV-122 RLM, 2015 U.S. Dist. LEXIS 28224 (N.D. Ind., Mar. 9, 2015), ECF No. 203 (stipulating that "[t]he Catholic Church teaches that in vitro fertilization ('IVF') is gravely immoral and is an intrinsic evil that no circumstances can justify" and that "Mrs. Herx and her husband engaged in IVF").

191. Plaintiff's counsel presented testimony and argument that IVF violates Roman Catholic teachings because of the destruction of embryos, but that, in Plaintiff's case, no embryos were destroyed. *See* Transcript of Jury Trial, Day One, *supra* note 171, at 5:6–7, 7:17–19, 8:22–25 *Herx*, 2015 U.S. Dist. LEXIS 28224 (No. 1:12-CV-122 RLM), ECF No. 233 ("Doctor Bopp will also confirm for you that no embryos were frozen, discarded, or destroyed at any time. . . . Again, Mrs. Herx used only her own egg and her husband's sperm, and no embryos were frozen, discarded, or destroyed. . . . [The Monsignor] told [Mrs. Herx] that IVF violates the Church's teachings because of the destruction of embryos. When Mrs. Herx responded that she had only one embryo and none were destroyed, he seemed confused."); *see* Transcript of Jury Trial, Day One, *supra* note 171, at 123:11–13 ("And from what I understood and what I had done, which I had never destroyed any kind of egg or embryo, that I had done nothing wrong."); *see* Transcript of Jury Trial, Day Two, *supra* note 154, at 160:25–161:4, 169:13–21 (describing Dr. Bopp's testimony that he has never participated in the unnatural destruction of embryos); *see* Transcript of Jury Trial, Day Two, *supra* note 154, at 172:5–15, 177:1–7 (explaining that two eggs were fertilized, resulting in one embryo; the one embryo was transferred, but failed to implant.).

192. *See Herx*, 48 F. Supp. 3d at 1182 (recognizing the concern and importance to the Diocese about the possibility of a judge or jury conducting secular analysis of church doctrine on IVF).

training purposes before they are discarded.[193] If this IVF procedure involved the destruction of life, "abnormal embryos," this would add credibility to the Roman Catholic moral position against IVF. Again, this should be irrelevant if Roman Catholic doctrine prohibits IVF regardless of the circumstances.

The court allowed both sides to make their case for the morality of IVF. However, dwelling on whether embryos were actually destroyed invites the jury to come to its own moral conclusions about the reasonableness of Roman Catholic doctrine.

### 2. The Court Allowed Evidence About the School's Treatment of Employees Who Violated Several Different Church Doctrines

The school's treatment of other teachers, especially male teachers, who participated in IVF would have been helpful comparator evidence for a jury. However, here, there was no evidence that the school was aware of any other teacher who participated in IVF or any comparable procedure.[194] Instead, the court allowed the jury to hear evidence about how the school treated several other employees whose conduct violated vastly different Catholic teachings.[195]

First, the court allowed testimony from a former St. Vincent de Paul School teacher, Michael Bradley, who had gone to a strip club with other men to celebrate his birthday. [196] He testified that, when the school discovered what he had done, he was sent to meet with Monsignor Kuzmich.[197] Instead, Father Gaughan appeared and Mr. Bradley was treated leniently.[198] He was not disciplined.[199]

The court also allowed inquiry into the multiple marriages of Saint Vincent de Paul School's principal, Sandra Guffey.[200] Mrs. Herx's counsel asked her if she was aware that divorce was against

193. Transcript of Jury Trial, Day Two, *supra* note 154 at 187:20–189:5 (giving Dr. Bopp's testimony that embryos are sometimes discarded in the IVF process and that Mrs. Herx agreed that embryos could be discarded, frozen, or used for medical research).

194. *See Herx*, 48 F. Supp. 3d at 1178 (weighing the fact that no male teacher had been non-renewed for involvement in IVF against the Diocese, even though the Diocese was not aware of any male teacher who had participated in the procedure).

195. Transcript of Jury Trial, Day Two, *supra* note 154, at 239:5–8 (objecting to the introduction of strip-club evidence based upon the First Amendment).

196. Herx v. Diocese of Fort Wayne S. Bend, Inc., No. 1:12-CV-122, 2015 U.S. Dist. LEXIS 28224, at *4 (N.D. Ind. Mar. 9, 2015).

197. *Id.*

198. *Id.* at *4–5.

199. *Id.*

200. Transcript of Jury Trial, Day Two, *supra* note 154, at 248–53, 258–59.

the Church's teachings.[201] On cross, Mrs. Guffey testified that other teachers, both male and female, had been divorced and were allowed to continue employment.[202]

The court also introduced evidence of another teacher, Ally Bergman, who was required to have her marriage convalidated.[203] She complied with the instruction and was not disciplined.[204]

Where the comparators (the employees' actions) are sufficiently similar, the danger of unconstitutional entanglement in comparing church doctrines is low. However, here, the court should have undertaken a more thorough analysis of whether the jury was likely improperly to substitute its own moral judgment for that of the Roman Catholic Church's. The only reason to introduce evidence about teachers who visited a strip club or other teachers' divorces is to invite the jury to weigh the gravity of these offenses against IVF's. Allowing this evidence into the record invites the jurors to impose their own religious or moral beliefs on religious institutions—a First Amendment violation.[205]

### 3. Allowing Improper Comparator Evidence Forced the Court to Consider Testimony About How the Catholic Church Weighs Different Sins

At one point during trial, Mrs. Herx's counsel (Ms. DeLaney) made a First Amendment objection when a Catholic priest (Monsignor John Kuzmich) was asked to explain how he weighs different sins.[206] The Diocese's counsel (Mr. Theisen) responded that the evidence should not be allowed in, but because evidence of the different sins was in the record, the jury must be permitted to hear the religious employer's reasoning about how to differentiate these sins.[207] The court permitted the Diocese to testify about the Roman Catholic Church's religious beliefs and moral reasoning.[208]

---

201. *Id.* at 249:13–14.
202. *Id.* at 258:20–259:5.
203. *Id.* at 256:5–257:14.
204. *Id.* at 257:9–14.
205. *See supra* note 117; Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 450 (1969) ("A civil court can make this determination only after assessing the relative significance to the religion of the tenets from which departure was found. Thus, the [theory at issue] requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role.").
206. Transcript of Jury Trial, Day Two, *supra* note 154, at 327:13–24.
207. *Id.* at 328:3–16.
208. *Id.*

The objection shows that both parties recognized the improprieties of delving into religious doctrine for a secular jury to scrutinize. The entire exchange is reprinted below:

> **Q.** Monsignor, I want to talk to you for just a second about—how does someone like you, a priest, in the Catholic Church—how do you assess the gravity of different moral wrongs?
> **MS. DeLANEY:** I'm going to object and ask that we approach, please.
> **THE COURT:** You may.
> **(Sidebar commenced.)**
> **MS. DeLANEY:** I think that we are getting into First Amendment issues. He's opening the door to it, asking the Monsignor to explain how to weigh sins, which I don't think—everyone agreed wasn't part of the case.
> **MR. THEISEN:** Well, it's not part of it, but it's in, so I don't know how to—you're bringing up—
> **THE COURT:** Talk to me.
> **MR. THEISEN:** You're bringing up three guys going to a strip club, and I know exactly what you're going to do. You're going to say, "Oh, see. They violated it, and they're men."
> And, Judge, we're allowed to have him—he's already testified on Direct about the assessment of the gravity of the situation.
> **THE COURT:** Do you want to close on your objection?
> **MS. DeLANEY:** I'm sorry?
> **THE COURT:** Anything to close on your objection?
> **MS. DeLANEY:** Just this is violative of the Court's preliminary instructions that the Jury's not to weigh Church doctrine, and he's asking the witness to weigh—
> **THE COURT:** I think they're entitled to explain why people are treated differently, so the objection's overruled.
> **MS. DeLANEY:** Okay.
> **(Sidebar concluded.)**
> **THE COURT:** If you could, restate your question, please, sir.
> **MR. THEISEN:** Thank you, Your Honor.
> **Q.** Monsignor Kuzmich, how does a Roman Catholic priest assess the gravity of different moral wrongs?[209]

### 4. The Court Allowed Mrs. Herx's Counsel to Argue that a Catholic School Cannot Enforce a Catholic Rule Against IVF

On several occasions during trial, Mrs. Herx's counsel argued or implied that the Diocese should not be permitted to prohibit its community from participating in IVF as a matter of law because

209. Transcript of Jury Trial, Day Two, *supra* note 154, at 327:3–328:23.

such a rule disproportionately affects women.[210] This argument contradicts the case law.[211] Courts have widely affirmed religious schools' right to enforce conduct codes based on sexual conduct, whether or not the courts relied upon the religious-employer exemption to uphold this right.[212]

Plaintiff's counsel attempted to advance this argument several times. For instance, during her motion for a directed verdict, Mrs. Herx's counsel argued:

> **MS. DeLANEY:** We have direct evidence of discrimination on the basis of pregnancy and gender, and that is why we are asking for a directed verdict.
> We have testimony—in addition to Monsignor Kuzmich's admission yesterday, we have testimony from Doctor Bopp about how IVF is a gender specific procedure, how the female is required to go to the office several times, undergo all these tests, miss days of work. Whereas, the male involved only has to provide a sperm sample, which can be done on a Saturday. So the treatment itself is gender specific.[213]

In response, the Diocese's counsel pointed out a logical implication of Mrs. Herx's argument:

> **MR. THEISEN:** She's arguing that religious institutions can't ban procedures such as IVF or abortion, and we think that's just bad law, Your Honor.[214]

Although the court denied Mrs. Herx's motion for a directed verdict,[215] the court tacitly allowed her to repeat the argument in closing arguments and, arguably, in the jury instructions.[216] In the closings, Ms. Delaney argued that because women are required to miss more days of work to undergo the IVF procedure, the rule "disproportionately and adversely affects women."[217] She continued:

---

210. *See, e.g.*, Transcript of Jury Trial, Day Three, *supra* note 173, at 513.
211. *See supra* notes 174–175.
212. *Id.*
213. Transcript of Jury Trial, Day Three, *supra* note 173, at 513:7–16.
214. *Id.* at 515:15–17.
215. *Id.* at 518:7–10.
216. Transcript of Jury Trial, Day Four, at 680–81, Herx v. Diocese of Fort Wayne-S. Bend, Inc., No. 1:12-CV-122 RLM, 2015 U.S. Dist. LEXIS 28224 (N.D. Ind., Mar. 9, 2015), ECF No. 236; *see also* Final Jury Instructions, *supra* note 190, at 3 (stipulating that "[t]he Catholic Church teaches that in vitro fertilization ('IVF') is gravely immoral and is an intrinsic evil that no circumstances can justify" and that "Mrs. Herx and her husband engaged in IVF").
217. Transcript of Jury Trial, Day Four, *supra* note 216, at 681:6–7.

> **MS. DeLANEY:** Mrs. Guffey did not want to force the female employee with a pregnancy-related medical condition to choose between getting pregnant and keeping her job. . . .
> Can you imagine? She would have to live the rest of her life with the guilt of thinking that she had chosen her teaching job over her chance to have a baby. It is precisely those types of choices, ladies and gentlemen, that federal law prohibits employers from forcing their employees to make.[218]

Not only does this argument misstate what federal law prohibits, it also ignores the Diocese's statutory and constitutional right to create a community faithful to its religious beliefs, including religious beliefs about undergoing procedures such as abortions and IVF. Instead, Ms. Delaney invited the jurors to substitute their moral beliefs for those of the Diocese.

### *D. Jury Instructions*

The jury instructions included the stipulations that "[t]he Catholic Church teaches that in vitro fertilization ('IVF') is gravely immoral and is an intrinsic evil that no circumstances can justify" and "Mrs. Herx and her husband engaged in IVF."[219] The charge informed the jury that it could take the Roman Catholic Church's teachings on IVF into account when making a decision.[220] However, the charge did not clearly inform the jury that it was its responsibility to find in favor of the Diocese if it found that the Roman Catholic Church's position on IVF was the real reason for not renewing the contract.[221]

---

218. *Id.* at 681:17–19, 684:25–685:4.
219. Final Jury Instructions, *supra* note 190, at 3.
220. *Id.* at 3, 7.
221. The three most relevant jury instructions are the following:

> 10. Mrs. Herx claims that her teaching contract was not renewed by the Diocese because of her gender. To succeed on her claim, M[r]s. Herx must prove, by a preponderance of the evidence, that her teaching contract was not renewed by the Diocese because of her gender or that her teaching contract was not renewed by the Diocese because of her attempts to become pregnant.
> To determine that Mrs. Herx's employment was terminated by the Diocese because of her gender, you must decide that the Diocese would not have taken that action had Mrs. Herx been male or had she not been attempting to become pregnant.
> If you find that Mrs. Herx has proved her claim by a preponderance of the evidence, then you must find for her. If you find that Mrs. Herx did not prove her claim by a preponderance of the evidence, then you must find for the Diocese.
> 11. In deciding Mrs. Herx's claim, you should not concern yourselves with whether the Diocese's actions were wise, reasonable, or fair. Rather, you[r] concern is only whether Mrs. Herx has proved that the Diocese discriminated against her based on her gender and/or her attempts to become pregnant. You can consider whether in vitro fertilization was the reason the Diocese made its

### *E. Verdict*

The jury found in favor of Mrs. Herx, awarding her $1.95 million in compensatory damages and $1 million in punitive damages.[222] Because of the statutory cap, the court reduced the compensatory damages award to $545,803.[223]

In a motion under Federal Rule of Civil Procedure 50(b), the Diocese argued that the introduction of the strip club evidence was unconstitutional.[224] The court declined to direct the verdict.[225] According to the order, "Mrs. Herx didn't need to show *prima facie* case-quality comparators at the summary judgment stage because she made an adequate showing under the direct method of proof."[226] The court further asserted, "[J]urors can easily understand that going to a strip club isn't in the same league as IVF in the eyes of an institution that believes IVF violates the commandment that one shall not kill."[227]

The case was appealed to the United States Court of Appeals for the Seventh Circuit.[228] The case settled shortly thereafter.[229]

### *F. Herx Case Study Applying the Proper Framework*

The extensive church-state entanglement in the *Herx* case could have been largely avoided by using a text-based interpretation of the religious-employer exemption.

As with all Title VII cases, the plaintiff initially must make out a valid *prima facie* claim.[230] Here, Mrs. Herx's claim was sex discrimination. If she is able to meet her burden of demonstrating

---

decision. But you are not to decide whether the Church teachings on in vitro fertilization are right or wrong, or whether they provide a good reason or a bad reason for the decision with respect to M[r]s. Herx. Courts don't question the doctrine of any church, and you can't question church doctrine, either.

12. The fact that Mrs. Herx signed an employment contract containing a "morals clause" does not remove her from the protections of federal anti-discrimination laws.

*Id.* at 7–8.

222. Herx v. Diocese of Fort Wayne-S. Bend, Inc., No. 1:12-CV-122 RLM, 2015 U.S. Dist. LEXIS 28224, at *1 (N.D. Ind. Mar. 9, 2015).

223. *Id.* at *1–2.

224. Transcript of Jury Trial, Day Three, *supra* note 173, at 507:15–510:7, 512:17–22.

225. *Id.* at 516:4.

226. *Herx*, 2015 U.S. Dist. LEXIS 28224, at *6.

227. *Id.* at *8.

228. Herx v. Diocese of Fort Wayne-S. Bend, Inc., 772 F.3d 1085, 1086 (7th Cir. 2014).

229. *See* Waters & Carrasco, *supra* note 172, at 231 n.87 (citing the Verdict, Agreement, and Settlement form from Dec. 19, 2014).

230. *See* Maguire v. Marquette Univ., 814 F.2d 1213, 1216 (7th Cir. 1987) (concluding the plaintiff "failed to make out a valid claim of sex discrimination under Title VII" without reaching the question of whether the religious-employer exemption applied).

a *prima facie* sex discrimination claim, then the court next addresses whether the religious-employer exemption applies.

A text-based interpretation of the religious-employer exemption clarifies that a religious school may make employment decisions based on its religious tenets. As explained above, Congress enacted a qualified exemption rather than an absolute exemption.[231] The exemption states that Title VII does not apply to religious employers when a qualifier applies.[232] The qualifier is "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on [of the religious employer's] activities."[233] Congress defined "religion," for Title VII purposes, to include "all aspects of religious observance and practice, as well as belief."[234] Thus, permission to employ individuals "of a particular religion" includes permission to employ people "whose beliefs and conduct are consistent with the employer's religious precepts."[235] This enables faith-based organizations to select those it believes are best suited to carry out their missions. Therefore, regardless of the type of discrimination claimed, Title VII does not apply when a religious employer bases an employment decision on its religious beliefs.

A court adopting this interpretation would first determine whether a religious organization asserted a religious rationale for its employment decision. If the employer did not assert a religious rationale, then there is little danger of unconstitutional entanglement and the case is analyzed as if the defendant were any other employer.[236] Here, the Diocese asserted that Mrs. Herx's contract was not renewed because she violated Roman Catholic

231. *See supra* Part III.A.

232. The text does not limit the qualifier as only applying when an employee claims a certain kind of discrimination. *See supra* note 67.

233. 42 U.S.C. § 2000e-1(a) (2012).

234. 42 U.S.C. § 2000e(j).

235. Kennedy v. St. Joseph's Ministries, Inc., 657 F.3d 189, 194 (4th Cir. 2011) (quoting Little v. Wuerl, 929 F.2d 944, 951 (3d Cir. 1991)); *see also* Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 624 (6th Cir. 2000) ("The decision to employ individuals 'of a particular religion' under § 2000e–1(a) . . . has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer."); Killinger v. Samford Univ., 113 F.3d 196, 200 (11th Cir. 1997) ("[The Section 702 exemption] allows religious institutions to employ only persons whose beliefs are consistent with the employer's when the work is connected with carrying out the institution's activities.").

236. *See, e.g.*, Braun v. St. Pius X Parish, 827 F. Supp. 2d 1312, 1319–23 (N.D. Okla. 2011) (giving no religious rationale in response to age discrimination claim), *aff'd*, 509 F. App'x 750 (10th Cir. 2013).

doctrine regarding IVF.[237]

If the *Herx* court applied the exemption properly, it would have been clear that the school can maintain a faith-based code of conduct for its employees in furtherance of its religious mission. Thus, the court would not have entertained Mrs. Herx's erroneous argument that a religious school cannot abide by its religious beliefs about IVF.

Next, if a religious organization asserts a religious rationale, the court must determine whether the qualified exemption applies. The focus of the summary judgment argument would be whether Mrs. Herx presented enough evidence to show that the Diocese's rule against IVF was mere pretext for sex discrimination. In standard employment discrimination pretext cases, the evidentiary analysis at the summary judgment stage is evaluated using the *McDonnell Douglas* framework.[238] If she cannot meet her burden of showing pretext, then the qualified exemption applies.

If, instead, the court determines that there are genuine issues of material fact about whether the employer *actually* made the decision because of its religious beliefs, then it may be appropriate to submit the case to a jury. It should be noted that the qualified religious-employer exemption allows some of these cases to reach the jury, as opposed to the ministerial exception, which does not allow for any evaluation of pretext.[239]

Finally, the court must address, on a case-by-case basis, whether submitting the issues before a jury would involve a significant risk that the First Amendment would be infringed.[240] Where the comparators are sufficiently similar, the danger of unconstitutional entanglement is low. However, because of the significantly different comparators in the *Herx* case, the court should have undertaken a

237. Herx v. Diocese of Fort Wayne-S. Bend, Inc., No. 1:12-CV-122 RLM, 2015 U.S. Dist. LEXIS 28224, at *2–4 (N.D. Ind. Mar. 9, 2015).

238. *See Hall*, 215 F.3d at 625 ("In the absence of direct evidence of discrimination, a plaintiff must establish its case under the framework first enunciated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973).").

239. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 715 (2012) (reasoning that to make a judgment about Lutheran doctrine in a case in which the ministerial exception applied would be an impermissible pretext inquiry).

240. *See* Curay-Cramer v. Ursuline Acad. of Wilmington, Inc., 450 F.3d 130, 138–42 (3d Cir. 2006) (noting that, under the analytical framework set forth by the Supreme Court, a court must ensure that applying Title VII liability to a religious employer does not infringe on First Amendment rights); NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 507 (1979) (holding that "in the absence of a clear expression of Congress'[s] intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses").

more thorough analysis of whether the jury was likely to improperly substitute its own moral judgment for that of the Roman Catholic Church.

## VI. CONCLUSION

Religious employers are not granted automatic Title VII immunity, and, like other covered employers, they are subject to Title VII claims as a *prima facie* matter.[241] However, the text provides that religious employers may base employment decisions upon their religious precepts, including faith-based conduct codes, and this permission supersedes any other provision of Title VII.[242] Thus, the religious-employer exemption to Title VII applies whenever religious employers show that their employment decisions were motivated by their religious precepts. The issue of whether a decision was in fact motivated by religion or whether the religious rationale was mere pretext may sometimes be submitted to the jury for determination. In such cases, courts must evaluate whether permitting a pretext inquiry in the particular case would involve unconstitutional entanglement with religion. Accordingly, applying the qualified exemption to claims of sex discrimination in this way strikes an appropriate balance between important interests—the desire to minimize invidious discrimination on the basis of sex as well as the need to avoid interfering in the constitutionally protected internal decision-making process of religious employers.

241. Kennedy v. St. Joseph's Ministries, Inc., 657 F.3d 189, 192 (4th Cir. 2011) ("Section 2000e-1(a) does not exempt religious organizations from Title VII's provisions barring discrimination on the basis of race, gender, or national origin.").

242. 42 U.S.C. § 2000e-1(a) (2012).

# STALEMATE AT THE SUPREME COURT: *FRIEDRICHS V. CALIFORNIA TEACHERS ASSOCIATION*, PUBLIC UNIONS, AND FREE SPEECH

BY ANDREW BUTTARO*

I. INTRODUCTION ..... 342
II. THE SUPREME COURT & AGENCY SHOPS ..... 346
A. *Abood v. Detroit Board of Education* ..... 346
B. *Knox v. SEIU* ..... 351
C. *Harris v. Quinn* ..... 356
III. CALIFORNIA POLITICAL & LEGAL BACKGROUND ..... 359
A. The Beholden State? ..... 359
B. California Law ..... 366
IV. *FRIEDRICHS V. CALIFORNIA TEACHERS ASSOCIATION* ..... 368
A. Why *Abood* Should Be Overruled ..... 368
B. Why the Opt-Out Requirement Violates the First Amendment ..... 378
V. CONCLUSION ..... 383

* Andrew Buttaro is an associate at Locke Lord LLP in Dallas, Texas. He previously served as a law clerk for the Supreme Court of Texas and as a member of the legal team for the Romney for President campaign. He received his law degree and a master's in legal history from the University of Virginia in 2012. His interest in the subject stems from a research project on union membership and free speech that he conducted with the Pacific Research Institute in San Francisco, California, from 2010 to 2011. The views expressed in this article are the author's alone and do not represent the views of any employer, past or present.

## I. INTRODUCTION

Imagine, for a moment, that in order to keep your job, you were forced to donate hundreds—perhaps thousands—of dollars to an activist group whose very existence you found inappropriate. Ponder still that if you failed to object in time, automatic deductions from your paycheck would fund not only the group's operations, but overtly political campaigns that you thought profoundly misguided. In other words, a portion of your paycheck would be garnished to support political candidates and hot-button ideological causes you opposed. If such a scenario sounds like an affront to the First Amendment, well, it is. But it is nonetheless also a reality for millions of teachers, firefighters, and other government employees in the United States. The laws of more than twenty states expressly mandate arrangements like this,[1] and the United States Supreme Court upheld them as constitutional in *Abood v. Detroit Board of Education*.[2]

The arrangement in question is the "agency shop."[3] Here is how it works in practice. In agency-shop states, an employer may hire either union or non-union workers. A non-union worker need not join the union to remain employed, but is required to pay fees—known as "agency" or "fair share" fees—that approximate the cost of union dues. To comply with the Supreme Court's decision in *Chicago Teachers Union v. Hudson*,[4] the union must divide these fees into chargeable and non-chargeable portions. The chargeable amount ostensibly is limited to the cost of collective bargaining activities taken on behalf of the union for all employees (members and non-members alike), while the non-chargeable amount concerns more attenuated expenses, such as political spending and electioneering.[5] Chargeable and non-chargeable expenses are outlined in an annual *Hudson* notice sent by the union. After receiving a *Hudson* notice, an employee must opt out within a short

1. TERRY MOE, SPECIAL INTEREST: TEACHERS UNIONS AND AMERICA'S PUBLIC SCHOOLS 54–55 (2011).

2. 431 U.S. 209 (1977).

3. An "agency shop" is defined as a "shop in which a union acts as an agent for the employees, regardless of their union membership. Nonunion members must pay union dues because it is presumed that any collective bargaining will benefit nonunion as well as union members." *Agency shop*, BLACK'S LAW DICTIONARY (10th ed. 2014).

4. 475 U.S. 292 (1986).

5. "Collective bargaining" refers to "[n]egotiations between an employer and the representatives of organized employees to determine the conditions of employment, such as wages, hours, discipline, and fringe benefits." *Collective bargaining*, BLACK'S LAW DICTIONARY (10th ed. 2014).

time window—California law requires at least thirty days—or the holdout will be forced to pay the full agency fee for the year.[6]

Navigating the opt-out process is no easy task, and union holdouts face tremendous administrative challenges and social pressure when attempting to limit personal union contributions. Take the example of Brian Trygg.[7] In 2009, Trygg, a civil engineer employed by the Illinois Department of Transportation, received a letter disclosing that the Teamsters would soon be representing employees in his job classification, and he and others would be added to an existing collective bargaining agreement with the state.[8] The letter touted the benefits of union membership but did not mention that employees could limit contributions to agency fees, nor did it advise of a right to avoid paying dues on religious grounds.[9] Nonetheless, Trygg emailed his supervisor only two hours after learning of the unionization to inform him that he would not join the Teamsters.[10] In keeping with his religious beliefs, Trygg would donate his agency fee to a charity instead.[11] Shortly thereafter, a quizzical union official inquired what religion he belonged to, which tenets or teachings of his religion prohibited him from paying union fees, and what charity he would like to pay instead of the union.[12] Trygg answered within hours, but never heard back—and the state began deducting agency fees from his paychecks.[13]

Trygg initiated administrative proceedings against the union (as well as the Illinois agency that processed his department's payroll), hoping to stop the automatic deductions and force the union to be more forthcoming in its disclosures to potential members. After an administrative process that dragged on for more than three years, the Illinois Labor Relations Board unceremoniously dismissed his complaint.[14] Dejected, most litigants would probably give up at that point. But Trygg pressed on, filing a pro se appeal in the Illinois Court of Appeals in May 2013—even briefing the case himself.[15]

---

6. CAL. CODE REGS. tit. 8, § 32993(b) (2014).
7. Brief for Illinois State Workers as Amici Curiae Supporting Petitioners at 12; Trygg v. Ill. Labor Relations Bd., 9 N.E.3d 1244 (Ill. App. Ct. 2014) (No. 14-915) (serving as a part of the more general basis of Bryan Trygg's personal narrative represented in this article).
8. *Trygg*, 9 N.E.3d at 1247.
9. *Id.* at 1248.
10. *Id.* at 1247–51.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 1251.

One year later, Trygg notched a win. The appellate court held that the administrative board should not have dismissed his appeal and remanded the case for further administrative proceedings.[16] In July 2015, Trygg won a more significant victory: An administrative law judge ordered an end to the forced deductions from his paycheck, and required the union to inform employees of their right to non-association.[17] Although triumphant, Trygg's legal travail stretched more than five years.

The Supreme Court could make the protracted legal saga endured by Trygg and other public employees in more than twenty states a thing of the past. Coming into the October 2015 term, the high court seemed prepared to do just that. A group of ten California teachers, including lead plaintiff Rebecca Friedrichs, banded together to challenge the agency-shop law in California.[18] In *Friedrichs v. California Teachers Association*,[19] the plaintiffs asked the Court to decide two questions. First, whether *Abood* should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment.[20] Second, whether it violates the First Amendment to require public employees to affirmatively object to subsidizing non-chargeable speech by public-sector unions, rather than requiring employees to affirmatively consent to subsidizing such speech.[21] Argument was heard on January 11, 2016.[22] At the time, commentators suggested that the Court was poised for a decisive ruling, pointing to the trend of recent decisions and the overall tenor of oral argument.[23] The February death of Justice Antonin Scalia, however, transformed a probable 5–4 victory for the challengers into a 4–4 non-precedential per curiam opinion affirming the lower-court decision.[24] But while *Friedrichs* ended in stalemate, the issue of the

16. *Id.* at 1253–56.

17. Trygg, I.L.R.B. Nos. S-CA-10-092, S-CB-10-024 (2015), http://1.usa.gov/21BptyE [perma.cc/XK8W-8MHW].

18. *See* Allie Bidwell, *Teachers Take Union Dues to Supreme Court*, U.S. NEWS & WORLD REP. (Jan. 26, 2015), http://bit.ly/1z6UUTO [perma.cc/U5CF-P929].

19. 136 S. Ct. 1083 (2016) (per curiam).

20. Reply Brief for the Petitioners at 2; Friedrichs v. California Teachers Ass'n, 136 S. Ct. 1083 (2016) (per curiam) (No. 14-915).

21. *Id.* at 16.

22. Cole Stangler, *Supreme Court Tackles Friedrichs v. California Teachers Association*, INT'L BUS. TIMES (Jan. 11, 2016), http://bit.ly/1P4JPYa [perma.cc/B6LE-AXUM].

23. *Id.*

24. Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), http://nyti.ms/1O8GMxx [perma.cc/L9R5-TKSK]; Friedrichs v. California Teachers Ass'n, 136 S. Ct. 1083 (2016) (per curiam). The Ninth Circuit decision itself was a summary affirmance, as the three-judge panel found the issues involved in the appeal wholly

First Amendment rights of public employees remains to confront a future Court.

This article contends that the Court should follow its recent decisions to their logical conclusion and overrule *Abood v. Detroit Board of Education*.[25] The 1977 case is a constitutional anomaly that cannot be sustained by its own logic, such as it is. *Abood* purported to balance union prerogatives with First Amendment rights.[26] Whatever the merits of its original framework in theory, it has proved unworkable in practice. Even if the Court declines to expressly overrule *Abood*, it should at the very least clarify that the First Amendment requires an employee to affirmatively consent to subsidized speech. The current default presumption—which requires employees to actively opt out of such arrangements—improperly places the burden of policing constitutionality on the employee and cannot be reconciled with First Amendment jurisprudence.

This article proceeds as follows. First, it traces the background law on this subject, highlighting relevant aspects of *Abood* and its progeny to the recent argument in *Friedrichs*. Second, the California legal and political background of *Friedrichs* is illuminated, and it is shown how public-sector union power has impacted—and distorted—governance in the Golden State. Third, the central arguments in *Friedrichs* are evaluated, as they provide a clear distillation of the legal issues involved. This article contends that *Abood* should be overruled as unconstitutional, and the affirmative-objection requirement of California (and other states) is contrary to both First Amendment precedent and the relevant social science research. Finally, the article concludes with a summation of the larger public-sector union issues lingering in the wake of *Friedrichs*. If nothing else, it is hoped that this article will serve as a primer on the key issues surrounding free speech and union dues—issues that will almost surely be resolved by a future Court.

"governed by controlling Supreme Court and Ninth Circuit precedent." Friedrichs v. California Teachers Ass'n, No. 13-57095, 2014 WL 10076847, at *1 (9th Cir. Nov. 18, 2014), *cert. granted*, 135 S. Ct. 2933 (2015).

25. 431 U.S. 209 (1977).

26. *Id.*

## II. THE SUPREME COURT & AGENCY SHOPS

### *A. Abood v. Detroit Board of Education*

Like *Friedrichs*, *Abood* arose in the context of union representation of public school teachers. After a secret ballot election, the Detroit Federation of Teachers became the exclusive representative of city teachers, as permitted by Michigan law.[27] Shortly thereafter, the union and the school board negotiated a collective bargaining agreement.[28] The agreement contained an agency-shop clause providing existing teachers and new hires alike with a binary choice: They could join the union as full-fledged, dues-paying members, or pay a "service charge" equal to the dues required of regular union members.[29] Employees were given a sixty-day window to decide, and non-compliant employees faced dismissal.[30] Shortly before the agency-shop clause was scheduled to become effective, Detroit teacher Christine Warczak and a group of her colleagues initiated a class action against the union and the school board.[31] They disclaimed any interest in paying dues and flatly asserted that they were ideologically opposed to collective bargaining in the public sector as a matter of principle.[32] They further complained that the union "carries on various social activities for the benefit of its members that are not available to non-members as a matter of right" and immerses itself "in a number and variety of activities and programs which are economic, political, professional, scientific and religious in nature of which Plaintiffs do not approve."[33] The teachers' agency-shop fees, they protested, would not be limited to funding expenses incurred from collective bargaining, but would instead bankroll ideological activities that they found distasteful and disagreeable.[34]

The Supreme Court acknowledged some of the special difficulties posed by public-sector bargaining but nevertheless upheld the agency-shop clause, at least as it related to collective bargaining, contract administration, and grievance adjustment activities.[35] Justice Stewart Potter wrote for the Court.[36] In the crux

27. *Id.* at 211–12.
28. *Id.* at 212.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 212–13.
33. *Id.* at 213.
34. *Id.*
35. *Id.* at 225–26.

of the opinion—and in its central mistake—the Court declined to draw a distinction between public- and private-sector employment.[37] "Public employees are not basically different from private employees," Justice Potter wrote.[38] "[O]n the whole, they have the same sort of skills, the same needs, and seek the same advantages."[39] With the public-private distinction thus cast aside, the Court extrapolated from previous cases upholding agency-shop arrangements in the private sector and applied them to the case at hand. The two main government interests supporting agency-shop provisions were deemed identical in the public and private spheres. "The desirability of labor peace is no less important in the public sector, nor is the risk of 'free riders' any smaller."[40]

Somewhat disjointedly, however, the Court nonetheless acknowledged that public-sector bargaining was "distinctive," and inevitably contained a political hue.[41] "There can be no quarrel with the truism that because public employee unions attempt to influence governmental policymaking, their activities and the views of members who disagree with them may be properly termed political."[42] Strangely, the Court's conclusion from this truism was that such a characterization cannot "raise the ideas and beliefs of public employees onto a higher plane than the ideas and beliefs of private employees."[43] (This seems to invert the reality; recognizing the political nature of public-sector unions does not elevate the views of dissenting public employees onto a higher plane, but rather acknowledges the possibility for dissenters to be uniquely oppressed in the public-sector context.) Claiming that even "those commentators most acutely aware of the distinctive nature of public-sector bargaining and most seriously concerned with its policy implications" found the issues in both spheres to be similar, the Court concluded "[t]he differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights."[44]

---

36. *Id.* at 229.
37. *Id.*
38. *Id.*
39. *Id.* at 229–30.
40. *Id.* at 224.
41. *Id.* at 229.
42. *Id.* at 231.
43. *Id.*
44. *Id.* at 232. The Court's claim here was arguably tendentious. The "commentators" cited by the Court were Harry Wellington and Ralph K. Winter, Jr., and the quote—heavily edited—was taken from their 1971 book. *See* H. WELLINGTON & R. WINTER, JR., THE UNIONS AND THE CITIES 95–96 (1971). The Court's gloss essentially ignores the thrust of the work. For

Finally, the Court downplayed the harm imposed on a public employee who does not wish to join a union, but who must nevertheless financially contribute to its activities. "A public employee who believes that a union representing him is urging a course that is unwise as a matter of public policy is not barred from expressing his viewpoint," the Court said.[45] "Besides voting in accordance with his convictions, every public employee is largely free to express his views, in public or private orally or in writing."[46]

By discounting the public-private distinction, the majority opinion rested its holding on a porous foundation. Justices John Paul Stevens, William Rehnquist, and Lewis Powell all wrote separately. Of all the writings, the diamond in the rough of *Abood* was Justice Powell's concurrence in the judgment. With lapidarian clarity, Powell cut to the heart of the issues involved—and presciently anticipated many of the key issues at stake in *Friedrichs*.

First, Powell sharply disputed the Court's holding that "there is no constitutional distinction between what the government can require of its own employees and what it can permit private employers to do."[47] For Powell, "the distinction is fundamental."[48] The First Amendment draws a clear line between government and private actors, meaning that private parties may enter into voluntary agreements that would be off-limits to the government. This is because public-sector union activities—including collective bargaining—have an inherently political cast. Indeed, a public-sector union functions much like a political party, as the ultimate objective of both "is to influence public decisionmaking in accordance with the views and perceived interests of its membership."[49] Unlike a political party, however, most union members "are employees who share similar economic interests and

---

instance, the very first line of a contemporary review of the book reads:

Lest the point of this book be missed, the authors admonish us in a postscript: 'Make no mistake about it, government is *not* just another industry.' Because they view labor problems in public employment as being different from those in industry, the authors conclude it would be inappropriate to extend to public employment all features of private-sector collective bargaining.

Raymond Goetz, *Review of* The Unions and the Cities *by Harry H. Wellington, Ralph K. Winter, Jr.*, 40 U. CHI. L. REV. 229, 229 (1972) (some quotations omitted).

45. *Abood*, 431 U.S. at 230.

46. *Id.*

47. *Id.* at 250 (Powell, J., concurring).

48. *Id.*

49. *Id.* at 256. Other observers have elaborated on this analogy, with some even finding unions better structured than political parties; *see* WILLIAM FORM, SEGMENTED LABOR, FRACTURED POLITICS: LABOR POLITICS IN AMERICAN LIFE 262 (1995) ("On balance, labor's political structure is superior to the party's.").

who may have a common professional perspective on some issues of public policy."[50] For instance, teachers "have a common interest in fair teachers' salaries and reasonable pupil-teacher ratios."[51] Further, the Court's separation of "collective-bargaining activities" and "political activities" is a false distinction.[52] "Collective bargaining in the public sector is 'political' in any meaningful sense of the word."[53] While this is most obvious where big-picture questions of education philosophy are involved, decisions on "bread and butter" issues such as wages and pensions have an outsized impact on municipal budgets as well, and are thus inescapably political.[54]

Second, Powell questioned the proffered government interests in the agency shop. Then as now, the main justifications for the agency shop in the context of exclusive representation were avoiding free-riding by non-union employees and the promotion of labor peace. Powell noted that "[w]hile these interests may well justify encouraging agency-shop arrangements in the private sector, there is far less reason to believe they justify the intrusion upon First Amendment rights that results from compelled support for a union as a condition of government employment."[55]

Third, Powell objected to placing the burden of policing intrusions on protected speech on the non-union employees themselves. The Court's decision meant a non-union employee protecting his or her First Amendment rights must initiate a proceeding to prove that the union has allocated some portion of its budget to ideological activities unrelated to collective bargaining. Instead, the onus of First Amendment compliance should be on the union. "[T]his placement of the burden of litigation, not the Court's, gives appropriate protection to First Amendment rights without sacrificing ends of government that may be deemed important."[56] In sum, wrote Powell, the Court, working from the "novel premise that public employers are under no greater constitutional constraints than their counterparts in the private sector," held that public employees may be compelled by the state "to pay full union dues to a union with which they

50. *Abood*, 431 U.S. at 257.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 258.
55. *Id.* at 260–61.
56. *Id.* at 264.

disagree, subject only to a possible rebate or deduction if they are willing to step forward, declare their opposition to the union, and initiate a proceeding to establish that some portion of their dues has been spent on 'ideological activities unrelated to collective bargaining.'"[57] This is a "sweeping limitation of First Amendment rights" that is "unsupported by either precedent or reason."[58]

Powell's separate writing exposed the questionable assumptions undergirding the majority's analysis in *Abood*, and, in doing so, adumbrated many of the key concerns animating the *Friedrichs* litigation. Critical of the majority position as it was, Justice Powell's writing may well have been overly indulgent in accepting some of the majority's premises. For instance, in likening public-sector unions to political parties, he nonetheless granted that teachers "have a common interest in fair teachers' salaries and reasonable pupil-teacher ratios."[59] While seemingly logical on its face, that statement is undercut by the demonstrated experience of a number of teachers—including name plaintiff Rebecca Friedrichs. In a newspaper interview discussing her Supreme Court appeal, Friedrichs recounted that she fell out with the union partly due to layoffs that occurred during the economic downturn.[60] Friedrichs's school had recruited outstanding and energetic new teachers, but as the newest hires, they were the first fired under the union's rigid seniority system.[61] Friedrichs, at the time a local union official, proposed to higher-ups that district teachers consider a two-to-three percent, across-the-board pay cut in an effort to save their colleagues' jobs.[62] The incredulous union executive told her that was impossible, and refused to even put the idea up for discussion.[63] This vignette ably illustrates that teachers may have

57. *Id.* at 245.
58. *Id.*
59. *Id.* at 257.
60. Emma Brown, *Two Teachers Explain Why They Want to Take Down Their Union*, WASH. POST. (Aug. 11, 2015), http://wapo.st/1VqBFi4 [perma.cc/J442-2NFZ].
61. *Id.*
62. *Id.*
63. *Id.* The teachers explained:

I think it was 2008 or 2009, during the big crash of our economy. There were these outstanding newer teachers in our district. The kids loved them, the parents loved them, they were good teachers, doing an outstanding job. They weren't tenured yet. We find out that these teachers are all going to be pink-slipped, which means they're going to lose their jobs. At the next meeting I said look, the economy is tanking, the parents in this district are losing their jobs, they're taking huge pay cuts. I said I think that we should consider going to our district negotiations and offering like a 2 to 3 percent pay cut. I think our community would appreciate it. I also thought we could save the jobs of these teachers. They looked at me and said oh no way, the teachers will never go for a pay cut. I said how do you know if you don't ask them? They would not go to the teachers. They would not put out a survey, would

drastically different views on even core collective bargaining concerns such as wages and hiring.

### *B. Knox v. SEIU*

Two more recent cases have chipped away at *Abood*'s reasoning and conclusions, while nonetheless leaving its holding intact. The facts of the first case, *Knox v. Service Employees International Union, Local 1000*, are worth recounting at length, as the political background starkly illustrates the stakes of judicial decisions in this area.[64] They also serve to show the considerable electoral power wielded by unions in California (and elsewhere).

In 2003, California voters recalled Governor Gray Davis, replacing the longtime Democrat with actor-*cum*-politician Arnold Schwarzenegger.[65] The election of the non-traditional Republican seemed to herald a landmark political shift in the Golden State.[66] Schwarzenegger suggested as much in his inaugural address, describing the election as a call to change "the entire political climate of our state."[67] With the Democrat-controlled legislature stalling his reform agenda, in 2005, Schwarzenegger proposed or endorsed four ballot measures that he described as necessary

---

not even ask them would they be willing to take a pay cut. This is what I was told by our union leader: Rebecca, don't worry about those teachers losing their jobs. The union is going to offer a seminar on how they can obtain unemployment benefits. I swear my jaw dropped. I said are you kidding me? They've been paying $1,000 a year to this union and that's all we're going to do for them? That's when I decided to become an agency fee payer again because I knew from personal experience that no matter how hard I tried I couldn't make a difference, even with a voice.

*Id.*

64. 132 S. Ct. 2277 (2012).

65. Michael Finnegan, *Gov. Davis Is Recalled; Schwarzenegger Wins*, L.A. TIMES (Oct. 8, 2003), http://lat.ms/1TjxVAo [perma.cc/EP3L-UWBA] ("Arnold Schwarzenegger won the historic California recall election Tuesday as a tide of voter anger toppled Gray Davis just 11 months after the Democrat had been reelected governor.").

66. *Id.*

In a popular revolt unmatched in the 92 years that Californians have held the power to recall elected officials, voters chose a Republican film star with no government experience to replace an incumbent steeped for three decades in state politics. . . . Davis was the first statewide elected official in California to face a recall vote. Californians adopted the recall provision of the state Constitution in 1911 as part of Gov. Hiram Johnson's Progressive agenda to curb the power of political bosses and parties. But since then, voters have recalled only local officials and four state legislators.

*Id.*

67. Mark Z. Barabak, *Ten Years After Gray Davis Recall, California Still Feels Effects*, L.A. TIMES (Oct. 7, 2013), http://lat.ms/1Tdsepv [perma.cc/9QWV-5CEV] ("[During his campaign] Schwarzenegger vowed to slash the size of government, stop deficit spending and end the pay-to-play culture of Sacramento, which he captured with stark simplicity in a TV spot: 'Money goes in. Favors go out. The people lose.'").

reforms to reshape state government.[68] The ballot propositions would cap the growth of state spending, redraw legislative districts, require teachers to work longer before attaining tenure eligibility, and restrict political spending by public employee unions.[69] As may be imagined, the last two measures sparked particularly intense union opposition.[70]

One of the unions contesting the ballot measures was the public-sector Service Employees International Union (SEIU). In June 2005—before Schwarzenegger called for the special election—the SEIU sent its California members an annual *Hudson* notice outlining monthly dues.[71] (By way of reminder, a *Hudson* notice, named for a 1986 Supreme Court case, requires every public-sector union to break down spending between ideological and bargaining activities.)[72] The notice estimated that 56.35% of total expenditures in the coming year would be chargeable expenses, and provided non-members with thirty days to object to full payment of dues.[73] The notice also advised that the fee was subject to increase without further notice.[74] When Schwarzenegger called for the special election later that month, the SEIU announced its opposition to two ballot measures and rapidly began to raise funds.[75] By that time, the thirty-day objection period had ended.[76] Nevertheless, the SEIU sent a letter to unit employees announcing a temporary 25% increase in dues and an elimination of the monthly dues cap, billing the move as an "Emergency Temporary Assessment to Build

68. *See* John M. Broder, *Humbled Schwarzenegger Apologizes for '05 Election, and Then Proposes a Centrist Agenda*, N.Y. TIMES (Jan. 6, 2006), http://nyti.ms/1XvEHVv [perma.cc/78EU-PEZD].

69. Michael Janofsky, *In California, a Fierce Battle Is Joined Over Teachers*, N.Y. TIMES (Oct. 20, 2005), http://nyti.ms/1n8aBrZ [perma.cc/2RDF-9FXX].

In the 1920's, California became one of the first states to establish a teacher tenure law; it has maintained a two-year probationary period since 1983. All but two states now specify the length of a probationary period, with the largest number, 32, setting it at three years . . . Only two states, Indiana and Missouri, have probationary periods of as much as five years.

*Id.*

70. George Skelton, *Schwarzenegger Tries New Tactic: Tact*, L.A. TIMES (Oct. 17, 2005), http://lat.ms/21BttiF [perma.cc/7KSV-TS87] ("Labor especially is fighting Proposition 76, a state spending cap, and Proposition 75, requiring public employee unions to obtain members' permission before their dues can be spent on politics. Schwarzenegger proposed Prop. 76 and has endorsed Prop. 75. Polls show the former trailing badly, the latter leading.").

71. Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S. Ct. 2277, 2285 (2012).

72. *See generally* Chicago Teachers Union, Local No. 1, AFT, AFL-CIO, et al., v. Hudson et al., 475 U.S. 292 (1986).

73. *Knox*, 132 S. Ct. at 2285.

74. *Id.*

75. *Id.*

76. *Id.*

a Political Fight-Back Fund."[77] If not pithy, the fund's name was candid. The union made clear that the assessment was intended to combat the objectionable ballot measures in the upcoming special election and would support "a broad range of political expenses, including television and radio advertising, direct mail, voter registration, voter education, and get out the vote activities in our work sites and in our communities across California."[78] Non-union employees (i.e., agency payers) were also forced to pay into the fund.[79]

The SEIU and allied public-sector unions spent $24 million in campaigning against Schwarzenegger's fiscal reforms, with the California Teachers Association (CTA) contributing an additional $58 million.[80] The CTA even mortgaged its headquarters in—where else?—Sacramento to free up more campaign funds.[81] All told, advocacy groups and businesses spent an astounding $300 million in the campaign over the initiatives.[82] For his part, Schwarzenegger personally chipped in $1.25 million to support one measure.[83] The debate became increasingly divisive as the campaign dragged on, with Schwarzenegger belittling his opponents as "stooges" and, in only-in-California fashion, Warren Beatty leading a bus full of public employees to follow the governor and disrupt his events.[84] Ultimately, the ballot measures were unsuccessful. By narrow margins, voters defeated Proposition 74 (the plan to make teachers work longer to achieve tenure) and Proposition 75 (which would have restricted political spending by public-sector unions).[85]

A group of non-union employees forced to contribute to the political fund brought a class action against the SEIU alleging

77. *Id.*

78. *Id.* at 2286.

79. *Id.*

80. Troy Senik, *The Worst Union in America*, CITY J., Spring 2012, *in* THE BEHOLDEN STATE: CALIFORNIA'S LOST PROMISE AND HOW TO RECAPTURE IT 202 (Brian C. Anderson ed., 2013) ("And in 2005, with a special election called by Governor Arnold Schwarzenegger looming, the CTA came up with a colossal $58 million—even going so far as to mortgage its Sacramento headquarters—to defeat initiatives [favored by Schwarzenegger].").

81. Steven Malanga, *The Beholden State: How Public-Sector Unions Broke California*, CITY J., Spring 2010, *in* THE BEHOLDEN STATE at 18.

82. *Id.*

83. Robert Salladay & Dan Morain, *Gov. Donates $1.25 Million, Backs 6 Initiatives*, L.A. TIMES (Sept. 24, 2005), http://lat.ms/1XAyXb4 [perma.cc/LY3P-C4GE] ("Schwarzenegger opened his checkbook Friday for the first time in the current campaign, donating $1.25 million to the campaign for Proposition 77, the redistricting measure.").

84. Carla Marinucci, *Beatty Crashes Governor's Party*, SAN FRANCISCO CHRON. (Nov. 6, 2005), http://sfg.ly/1Q4dUvP [perma.cc/QFF8-RLCY].

85. John M. Broder, *California Voters Reject Schwarzenegger's Plan*, N.Y. TIMES (Nov. 9, 2005), http://nyti.ms/1Ub5NiY [perma.cc/E3SQ-KN3S].

violation of their First Amendment rights, and the case eventually wound its way to the Supreme Court.[86] Justice Samuel Alito wrote for the majority.[87] After brushing aside a mootness argument as a union contrivance, the Court addressed the constitutional substance of the matter[88]—and several aspects of the opinion have important ramifications for *Friedrichs*.

First, the Court noted the significant First Amendment implications presented by the union arrangement. "Closely related to compelled speech and compelled association is compelled funding of the speech of other private speakers or groups," wrote the Court.[89] Moreover, this speech contains significant ideological content. "Because a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences . . . the compulsory fees constitute a form of compelled speech and association that imposes a significant impingement on First Amendment rights."[90]

Second, the Court questioned previous justifications for unions to collect fees from nonmembers, including the "primary purpose" of these allowances: to avoid free-riding.[91] If not quite *sui generis*, the free-rider justification in this First Amendment context nonetheless "represents something of an anomaly," held to be supported by the interest in furthering "labor peace."[92] This atypical framework, having emerged by "historical accident," has proved "a remarkable boon for unions."[93] (This last point is understated if anything, given the hundreds of millions of dollars contributed to union coffers by virtue of this arrangement.)

---

86. *See* Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S. Ct. 2277, 2285–87 (2012) (explaining that the district court granted summary judgment to petitioners, which was later reversed by a Ninth Circuit decision applying the *Hudson* balancing test in finding that SEIU reasonably accommodated the interests of the union, the employer, and nonmember employees).

87. *Id.* at 2284 (indicating that Justice Alito wrote for a five-justice majority with two additional justices concurring).

88. *Id.* at 2286–87.

The SEIU argues that we should dismiss this case as moot. In opposing the petition for certiorari, the SEIU defended the decision below on the merits. After certiorari was granted, however, the union sent out a notice offering a full refund to all class members, and the union then promptly moved for dismissal of the case on the ground of mootness. Such postcertiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye.

*Id.*

89. *Id.* at 2288.

90. *Id.* at 2289.

91. *Id.* (quoting Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 181 (2007)).

92. *Id.* at 2290.

93. *Id.* at 2290, 2283.

Third, the Court rejected the SEIU's argument that there was no injury from the failure to provide a new *Hudson* notice because non-members objecting to the special assessment—who were required to pay it nonetheless—would have been able to recover the disputed funds by opting out when the next annual notice was sent. The Court denied that this would provide proper recompense, as "even a full refund would not undo the violation of First Amendment rights."[94] For the objectors taxed into temporarily supporting the union cause, a "refund provided after the union's objectives had already been achieved would be cold comfort."[95] In sum, "[t]o respect the limits of the First Amendment, the union should have sent out a new notice allowing nonmembers to opt in to the special fee rather than requiring them to opt out."[96]

Justice Sonia Sotomayor (joined by Justice Ruth Bader Ginsburg) concurred in the judgment, and Justice Stephen Breyer (joined by Justice Elena Kagan) dissented. Both writings evinced horror at what they considered a gratuitous disquisition by the Court on the constitutionality of opt-out arrangements, among other things. "I concur only in the judgment, however, because I cannot agree with the majority's decision to address unnecessarily significant constitutional issues well outside the scope of the questions presented and briefing," Sotomayor wrote.[97] "By doing so, the majority breaks our own rules and, more importantly, disregards principles of judicial restraint that define the Court's proper role in our system of separated powers."[98] Justice Breyer's dissent, in turn, argued that *Hudson* prescribed a balancing test that should have been applied, and accused the Court of abandoning stare decisis principles "without benefit of argument in a matter of such importance."[99]

94. *Id.* at 2292.

95. *Id.* at 2293 (explaining that a public union levying a loan to support a political cause and then later refunding it, as SEIU did, abridges First Amendment protections).

96. *Id.* at 2293 ("Our cases have tolerated a substantial impingement on First Amendment rights by allowing unions to impose an opt-out requirement at all."); *see also id.* ("Even if this burden can be justified during the collection of regular dues on an annual basis, there is no way to justify the additional burden of imposing yet another opt-out requirement to collect special fees whenever the union desires.").

97. *Id.* at 2296 (Sotomayor, J., concurring).

98. *Id.*

99. *Id.* at 2307 (Breyer, J., dissenting).

### *C. Harris v. Quinn*

The other leading case informing *Friedrichs* is *Harris v. Quinn*.[100] Once again, the background facts show the cozy overlap between union influence and political power. Illinois law provided for home-care workers to assist people suffering from medical or physical problems.[101] Many of these workers were simply caring for disabled family members in their own homes, relying on the government assistance to avoid institutionalizing their relatives. As a class, the workers fell into a gray area for labor organizers; they were not full-fledged state employees, but were nonetheless state subsidized.[102] The workers also were not covered by federal labor law. Looking to boost its ranks, the SEIU sought to organize them. Illinois Governor George Ryan had refused to sign an SEIU-backed bill that would have conferred bargaining rights upon home-care workers, but after his ouster on federal corruption charges—not an unusual occurrence in Springfield—Rod Blagojevich took office.[103] Soon after being elected, Blagojevich signed a 2003 executive order that enabled the SEIU to begin organizing these workers.[104] Perhaps not coincidentally, the SEIU had contributed more than $800,000 to Blagojevich's 2002 gubernatorial campaign. It donated an additional $1.8 million to his 2006 re-election effort, making it the campaign's top contributor.[105]

The *Harris* petitioners were several home-care workers who did not want to join a union, including Pamela Harris, an Illinois

---

100. 134 S. Ct. 2618 (2014); Cole Stangler, *Supreme Court Tackles Friedrichs v. California Teachers Association*, INT'L BUS. TIMES (Jan. 11, 2016), http://bit.ly/1P4JPYa [perma.cc/B6LE-AXUM].

101. *Harris*, 134 S. Ct. at 2626; ILL. ADMIN. CODE tit. 89 § 684.10 (2014).

102. *Harris*, 134 S. Ct. at 2635–36.

103. Kris Maher & David Kesmodel, *Illinois Scandal Spotlights SEIU's Use of Political Tactics*, WALL ST. J. (Dec. 20, 2008), http://on.wsj.com/1Salu9J [perma.cc/9G6W-MAHY].

104. The order reversed a 1985 ruling by a state labor board that said the workers were not state employees. While the SEIU claimed to have signed cards representing majority support of the workers, the state has not been able to prove it ever properly verified the vote. *See* Sean Higgins, *New Questions Raised About Decision to Let SEIU Represent Illinois Home Health Care Workers*, ILL. POLICY (Jan. 27, 2014), http://bit.ly/21c1fut [perma.cc/4TLC-LVMQ]. The order was later codified in Illinois state law. *See* ILL. ADMIN. CODE tit. 89 § 676.30(b) (2007).

105. The contributions were closely correlated to pending legislative and political priorities. *See* Maher & Kesmodel, *supra* note 103.

In one example, the union contributed $200,000 to Mr. Blagojevich on March 3, 2006, according to data compiled by the National Institute on Money in State Politics. Six days later, the governor signed a labor contract covering SEIU home-care workers. Following the contract, membership at SEIU Local 880 in Chicago increased to 45,000 workers from 24,000, according to Labor Department records.

*Id.*

woman who cared for her disabled son in her home.[106] Collective bargaining rules classified Harris as a home-care worker, and thus an employee of the state. Under Illinois law, she and others were therefore required to contribute their "fair share"—the agency fee—to help cover the costs of representation.[107] Harris and her co-petitioners maintained that the automatic deduction was a violation of their First Amendment rights.[108]

The Court held that the First Amendment prohibited the collection of an agency fee from home-care workers who did not wish to join or support the union, noting such "provisions unquestionably impose a heavy burden on the First Amendment interests of objecting employees."[109] It declined, however, an invitation by the petitioners to expressly overrule *Abood.* Instead, the Court ruled that the workers were not full-fledged state employees, and therefore it refused to expand the holding of *Abood* to apply to them. Were it to do so, the Court suggested, nearly any worker receiving payment from a government entity for some sort of service would potentially fall under *Abood*'s ambit. "*Abood* itself has clear boundaries; it applies to public employees," wrote the Court.[110] "Extending those boundaries to encompass partial-public employees, quasi-public employees, or simply private employees would invite problems."[111] Although seen as a setback to union advocates—the *New York Times* termed it a "limited blow to organized labor"—the importance of the decision was less in its precise holding, and more in what it portended for future cases.[112] Though left to stand, the majority was clearly unimpressed by both the logic and holding of *Abood.*

*Harris* identified several glaring flaws in *Abood.* In discussing the 1977 case, the Court noted that *Abood*'s holding rested heavily on two precedents of questionable applicability:[113] *Railway Employees' Department v. Hanson*[114] and *International Association of Machinists v.*

106. Krishnadev Calamur, *Supreme Court Rules Against Union Fees For Some Home Care Workers*, NPR (June 30, 2014), http://n.pr/1nRqvHT [perma.cc/7H6V-P4RF].

107. *Harris*, 134 S. Ct. at 2645.

108. *Id.* at 2626–27 (explaining that the district court dismissed their claim and the Seventh Circuit affirmed the decision citing Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977)).

109. *Id.* at 2643.

110. *Id.* at 2638.

111. *Id.*

112. Steven Greenhouse, *Supreme Court Ruling on Union Fees Is a Limited Blow to Labor*, N.Y. TIMES (June 30, 2004), nyti.ms/1pET8aO [perma.cc/QXR5-WP3P].

113. *Harris*, 134 S. Ct. at 2621.

114. 351 U.S. 225 (1956).

*S.B. Street*.[115] Both cases involved private-sector collective bargaining agreements, and therefore should not have been automatically applied to issues arising in the public-sector context. "The *Abood* Court seriously erred in treating *Hanson* and *Street* as having all but decided the constitutionality of compulsory payments to a public-sector union," wrote a skeptical Court.[116] Both decisions presented additional difficulties as well. "The First Amendment analysis in *Hanson* was thin," and *Street* was a statutory decision, not a constitutional one.[117] Moreover, the *Abood* majority read *Hanson* to uphold the imposition of an agency fee, when in fact the decision merely upheld the authorization of one. Thus, while *Abood* survived, the *Harris* majority strongly intimated that its days were numbered.

In a barbed dissent, Justice Kagan called the Court's refusal to overrule *Abood* a "cause for satisfaction, though hardly applause," while lambasting the majority's "potshots" at the precedent in "gratuitous dicta."[118] No doubt reading the tea leaves of the Court's criticism of *Abood*, Kagan's writing advanced three central arguments designed to rehabilitate the troubled precedent. First, she attempted to preserve the holding of *Abood* by shifting its rationale, portraying agency fees as supported by public employment case law. As Kagan put it, the Court has "long afforded government entities broad latitude to manage their workforces, even when that affects speech they could not regulate in other contexts."[119] Second, unlike a typical voluntary association, a union is required by law to represent the interests of members and nonmembers equally. Calling free-riding by public employees both "endemic" and unsurprising, Kagan mock-inquired: "Does the majority think that public employees are immune from basic principles of economics?"[120] Finally, she warned that tremendous reliance interests were at stake, and stare decisis principles foreclosed a future overruling of *Abood*. In her telling, the *Abood* rule "is the foundation for not tens or hundreds, but thousands of contracts between unions and governments across the Nation. Our precedent about precedent, fairly understood and applied, makes it

115. 367 U.S. 740 (1961).
116. *Harris*, 134 S. Ct. at 2632.
117. *Id.* at 2629.
118. *Id.* at 2645 (Kagan, J., dissenting).
119. *Id.*
120. *Id.* at 2657.

impossible for this Court to reverse that decision."[121] None of these three arguments is convincing, as the discussion of *Friedrichs* below indicates. Regardless, Kagan's dissent helps illuminate the contours of the questions presented in *Friedrichs*.

## III. CALIFORNIA POLITICAL & LEGAL BACKGROUND

### *A. The Beholden State?*

It is telling that both *Knox* and *Friedrichs* arose in California. For much of the twentieth century, California's robust economy, sustained population growth, enviable schools, solid infrastructure, and sound political leadership made it synonymous with the American Dream.[122] These days, the reality is much different. While engines of economic growth still exist—a short visit to Silicon Valley readily indicates as much—economic expansion is not nearly as broad-based and diversified as it once was.[123] Its high-tax, heavy-regulation cocktail has bequeathed an unemployment rate far above the national average and a near-bottom ranking on business climate surveys.[124] Despite high per-pupil spending, the quality of its schools—once models for the nation—has declined drastically, with student achievement results comparable to those of Mississippi.[125] And the state's balance sheet would make any accountant cringe. California is estimated to have hundreds of billions of dollars in unfunded liabilities, even while imposing a 13.3% income tax on the state's biggest earners—the highest marginal rate in the nation.[126] Governor Jerry Brown has called the

---

121. *Id.* at 2645.

122. *See generally* KEVIN STARR, CALIFORNIA: A HISTORY (2005).

123. *See* Malanga, *supra* note 81, at 9 (noting that in the 1960s, "California's aerospace industry, fueled by the Cold War, was booming; investments in water supply and infrastructure nourished the state's agribusiness; cheaper air travel and a famously temperate climate burnished tourism").

124. Steven Malanga, *Cali to Business: Get Out!*, CITY J., Autumn 2011, *in* THE BEHOLDEN STATE at 39–40.

125. Larry Sand, *Bankrolling Failure: Saving California's Schools Will Take More Than a Tax Hike*, CITY. J., http://bit.ly/1stw6al [perma.cc/CBA3-NTJ7] (last visited Apr. 15, 2016).

> In California, education spending has doubled over the last 40 years. The state's teachers are the fourth-highest-paid in the country, with an average salary of $67,871, not counting their generous pensions. What do we have to show for it? On the most recent [National Assessment of Educational Progress], California's fourth-graders ranked 45th in the nation in mathematics; in science, they ranked second to last, topping only Mississippi.

*Id.*

126. Editorial, *California Pension Debt Worse Than Acknowledged*, ORANGE COUNTY REG. (July 13, 2015), bit.ly/1M1pmGj [perma.cc/TB3E-B7WR].

> California has $94 billion in assets to cover $328 billion of liabilities, resulting in a

state budget a "pretzel palace of incredible complexity."[127] The implications of the looming pension nightmare alone prompted one writer to label California a potential "Greece on the Pacific."[128]

To understand how a once booming state became a cautionary tale, one must look to the one area thriving amidst this otherwise bleak landscape: the public sector. Public employee salaries in California are among the highest in the country; to take just one example, prison guards commonly pocket six-figure salaries that are well above the national average.[129] Non-salary benefits are even more generous, and state workers often retire at fifty-five with pensions exceeding the base pay they enjoyed for most of their careers.[130] The lucrative benefits enjoyed by public workers in California—which outpace those enjoyed by the typical private-sector worker—are a product of ceaseless union advocacy.[131] When public workers won the right to collectively bargain approximately fifty years ago, their unions rapidly amassed political clout and munificent campaign war chests. They used these resources to elect sympathetic politicians—the same politicians who would later sit at the other side of the table to negotiate contracts. In other words, public workers began electing their own bosses.[132] Lest this sound

---

> long-term deficit of $235 billion. This translates to about $20,900 per taxpayer . . . . Even this substantial sum is likely understated, as it relies on California pension funds' actuarial assumptions, which have consistently proven to be overly rosy.

*Id.*; *see* Adam Nagourney, *Two-Tax Rise Tests Wealthy in California*, N.Y. TIMES (Feb. 6, 2013), nyti.ms/1TMWkOw [perma.cc/Z673-FUAK] ("And at 13.3 percent, the top-tier California income tax is, in addition to being higher than any other state, the steepest it has been since World War II.").

127. DANIEL DISALVO, GOVERNMENT AGAINST ITSELF: PUBLIC UNION POWER AND ITS CONSEQUENCES 98 (2015).

128. Troy Senik, *The Radical Reform that California Needs*, CITY J., Winter 2011, *in* THE BEHOLDEN STATE at 76, 80; *see* Jeff Gottlieb & Ruben Vives, *Is A City Manager Worth $800,000?*, L.A. TIMES (July 15, 2010), lat.ms/QpLv7M [perma.cc/U2G9-HQB8] (revealing that Bell, a Los Angeles suburb of 37,000, is the most egregious example of pension excess; Bell's city manager, Robert Rizzo, was receiving a salary of $787,637, while the police chief made $457,000 a year and the assistant city manager made $376,288); *see also* Catherine Saillant & Jeff Gottlieb, *Huge Checks Won't End with Bell Official's Ouster*, L.A. TIMES (July 22, 2010), lat.ms/1SCZeWP [perma.cc/N9FZ-49DX] (noting that Rizzo also arranged for a pension worth $600,000 per year while the retired police chief received a pension of $411,300).

129. *See* Malanga, *supra* note 81, at 7, 10, 14; *see also* Reid Wilson, *Where Public Employees are Paid the Most*, WASH. POST (Aug. 29, 2013), wapo.st/20COVGP [perma.cc/F6ZF-V7MT] ("California pays the highest salaries to its full-time employees.").

130. Malanga, *supra* note 81, at 7. The California Correctional Peace Officers Association has established itself as one of the most powerful unions in the state. It boasts 31,000 members, a staff of 70 (including 20 lawyers), and a budget of approximately $25 million. Its members are among the highest paid in the nation. *Id.* at 13.

131. DISALVO, *supra* note 127, at 145.

132. MOE, *supra* note 1, at 112; Daniel DiSalvo, *The Trouble with Public Sector Unions*, NAT'L AFFAIRS, http://bit.ly/1oV0FDy [perma.cc/7FWM-YTPQ] (last visited Apr. 15, 2016).

like a simplification, one need only view a 2009 video of a representative from the SEIU, California's largest public-employee union, dressing down legislators while nonchalantly leaning on a podium.[133] "We helped to get you into office, and we got a good memory," the representative says in business-like fashion to the gathered politicians.[134] "Come November, if you don't back our program, we'll get you out of office."[135]

The union involved in *Friedrichs*, the California Teachers Association, starkly illustrates the considerable power wielded by public-sector unions in the Golden State. Although the group traces its lineage to 1863, the modern-day CTA can only be understood as a product of the post-war rise of public-sector collective bargaining.[136] Collective bargaining first emerged in the private sector. The National Labor Relations Act of 1935 (also known as the Wagner Act) established collective bargaining for private-sector workers and specifically excepted federal, state, and local government workers.[137] Federal workers gained the opportunity to collectively bargain in 1962, when President John F. Kennedy conferred the right by executive order.[138] Bargaining rights were also being granted at the state and local level around that time. In 1959, Wisconsin passed the nation's first public employee bargaining law.[139] Affiliates of the National Education

---

> When it comes to advancing their interests, public-sector unions have significant advantages over traditional unions. For one thing, using the political process, they can exert far greater influence over their members' employers—that is, government—than private-sector unions can. Through their extensive political activity, these government-workers' unions help elect the very politicians who will act as 'management' in their contract negotiations—in effect handpicking those who will sit across the bargaining table from them, in a way that workers in a private corporation (like, say, American Airlines or the Washington Post Company) cannot. Such power led Victor Gotbaum, the leader of District Council 37 of the AFSCME in New York City, to brag in 1975: 'We have the ability, in a sense, to elect our own boss.'

*Id.*

133. CRPTV, *SEIU Threat: Raw Video of SEIU Labor Leader Threatening Lawmakers at Budget Hearing, 5/27/09*, YOUTUBE (June 18, 2009), http://bit.ly/1oHuQxE [perma.cc/6VVT-5TJV].

134. DISALVO, *supra* note 127, at 81.

135. *Id.*

136. *The History of CTA*, CALIFORNIA TEACHERS ASS'N (Jan. 11, 2016), http://bit.ly/1RVtawx [perma.cc/BVA2-4AME].

137. 29 U.S.C. §§ 151–169 (2011).

138. *See* Exec. Order No. 10,988, 3 C.F.R. 521 (1959–1963), 1962 WL 77063. *But see* Exec. Order No. 11,491, 34 Fed. Reg. 17,605 (Oct. 29, 1969), 1969 WL 105296 (effectively replacing Executive Order 10,988); *see also* DISALVO, *supra*, note 127, at 49.

139. JOYCE M. NAJITA & JAMES L. STERN, COLLECTIVE BARGAINING IN THE PUBLIC SECTOR 70 (2015).

Association or the American Federation of Teachers won bargaining rights in New York City (1961), Denver (1962), and Chicago (1966).[140] Although late to the party, California was no exception to this trend.[141] In 1975, collective bargaining arrived in the Golden State with the CTA-sponsored Educational Employment Relations Act, more commonly known as the Rodda Act.[142] The Rodda Act proved to be a potent organizing tool. Within eighteen months, 600 out of 1,000 CTA chapters moved to collective bargaining.[143] The union's ranks swelled over the coming decades, increasing from 170,000 in the late 1970s to approximately 325,000 today.[144]

With manpower came money, and the CTA became a kingmaker in statewide elections over the coming decades, pushing its policy priorities at the ballot box and in the legislature (as the discussion of the political situation animating *Knox* made clear). In 1988, the union successfully passed Proposition 98, which dedicated 40% of the state's general fund to spending on schools and community colleges.[145] In its self-written history, the CTA explains the law was passed because teachers grew "tired of the Legislature's raiding school funding during every economic" downturn.[146] In truth, the law was a political and economic masterstroke. The measure guaranteed the CTA an inflow of cash from state coffers by couching the funding as necessary to help schoolchildren.[147] Moreover, in making education funding mandatory rather than discretionary, the union eliminated a school district's incentive to maximize the value of each allocated dollar.[148] The consequences

140. CALIFORNIA TEACHERS ASS'N, *supra* note 136.

141. *See* Joseph R. Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts*, 50 HASTINGS L.J. 717, 719–20 (1999) (noting that local government workers were awarded bargaining rights in 1968 with passage of the Meyers-Milias-Brown Act).

142. Senik, *supra* note 80, at 199 (noting that the Rodda Act, incidentally, was signed into law by Governor Jerry Brown, who is once again the chief executive of California).

143. *Id.*

144. *Id.*; *see also* DISALVO, *supra* note 127, at 40 (stating that the national shift toward public-sector collective bargaining was just as dramatic; in 1959, only three states allowed collective bargaining for state and local workers, while in 1980, thirty-three did).

145. MYRON LIEBERMAN, THE TEACHER UNIONS: HOW THE NEA AND AFT SABOTAGE REFORM AND HOLD STUDENTS, PARENTS, TEACHERS, AND TAXPAYERS HOSTAGE TO BUREAUCRACY 98 (1997).

146. CALIFORNIA TEACHERS ASS'N, *supra* note 136.

147. LIEBERMAN, *supra* note 145, at 55 ("The identification of teacher union interests with the public interest is obviously self-serving.").

148. Senik, *supra* note 80; *see generally* MOE, *supra* note 1, at 299 (stating that passage of Proposition 98 was a remarkable feat: "How often is a special interest group able to commandeer 40% of a state's entire budget for its own realm of policy?").

of the measure were eminently predictable. By cordoning off a large portion of the state's budget from review, the funding requirement exacerbated California's already volatile budget woes.[149] More cynically, the post-passage legislative maneuvering also belied the "save education" rhetoric espoused by the measure's supporters. One month after enactment, a bill was introduced that would earmark half of new Proposition 98 funds to reducing class size.[150] The CTA successfully blocked the measure, claiming it unduly restricted school board flexibility.[151] The CTA drew from the same playbook again in 1996, when it spent $1 million to convince voters of the virtues of reduced class sizes in kindergarten through third grade.[152] After passage, the state passed a law providing subsidies to schools with classes of twenty children or fewer.[153] Whatever the educational merits of the measure, smaller class sizes also meant, of course, that more teachers were needed, which in turn meant more members and funding for the CTA.[154] And so the cycle continued.

The CTA has been just as successful in killing ballot measures it deems threatening. In 1991, the CTA took aim at Proposition 174, a ballot initiative that would have offered California families universal access to school vouchers.[155] Although the union did not manage to keep the measure off the ballot, it did delay its

---

149. Senik, *supra* note 80.

> The first major win came in 1988, with the passage of Proposition 98. That initiative compelled California to spend more than 40 percent of its annual budget on education in grades K–12 and community college. The spending quota eliminated schools' incentive to get value out of every dollar: since funding was locked in, there was no need to make things run cost-effectively. Thanks to union influence on local school boards, much of the extra money—about $450 million a year—went straight into teachers' salaries. Prop. 98's malign effects weren't limited to education, however: by essentially making public school funding an entitlement rather than a matter of discretionary spending, it hastened California's erosion of fiscal discipline. In recent years, estimates of mandatory spending's share of the state's budget have run as high as 85 percent, making it highly difficult for the legislature to confront the severe budget crises of the past decade.

*Id.*

150. LIEBERMAN, *supra* note 145, at 98–99.

151. *Id.* at 99.

152. Senik, *supra* note 80, at 200.

153. *Id.*

154. *Id.*

155. The CTA's anti-Proposition 174 efforts testify to the strength not only of its financial, but in-kind contributions. A total of 24,579 volunteers completed 943,149 calls, 110,000 on the Monday before the election alone. At the time, the phone bank was judged to be the largest "in state history and the history of American politics." *See* LIEBERMAN, *supra* note 145, at 93.

appearance for two years; and in what may have been decisive in securing its defeat, it had the measure retitled from the inviting "Parental Choice" to the more austere-sounding "Education Vouchers."[156] In 1998, the CTA spent nearly $7 million to defeat Proposition 8, a measure that would have included student performance as an element of teacher reviews and required educators to pass specialized credentialing examinations.[157] That same year, it unsuccessfully spent more than $2 million in a failed attempt to block Proposition 227, which eliminated bilingual education in public schools.[158] In 2002, the union spent $26 million to defeat Proposition 38, another school voucher proposal.[159] And, as noted in the discussion of *Knox*, the CTA outlaid a colossal $58 million to defeat Schwarzenegger-backed initiatives in 2005.[160]

Perhaps due to its abundant resources, the CTA has not limited its spending to education-related causes. Instead, it has subsidized a number of progressive policies, including backing a single-payer healthcare system in California, blocking photo-identification requirements for voters, and strengthening the government's eminent domain power.[161] The CTA was the most generous opponent of Proposition 8, the controversial 2008 proposal to ban gay marriage, spending $1.3 million in a failed effort to defeat the initiative.[162] In fact, "[f]rom 2003 to 2012, the CTA spent nearly $102 million on political contributions; 0.08% of that money went to Republicans."[163] With hundreds of thousands of members paying mandatory dues of more than $1,000 apiece, the union can well afford this largesse.[164] In 2009, the union's income was more than $186 million, all of it tax-exempt.[165] Between 2000 and 2010, the CTA spent more than $210 million on political campaigning—

156. DISALVO, *supra* note 127, at 107; *see* Senik, *supra* note 80, at 200 (stating that the union campaign was marked by allegations of bribery and physical intimidation. CTA President D.A. Weber seemed to approve of the no-holds-barred approach, saying of the voucher measure: "There are some proposals so evil that they should never go before the voters.").

157. Senik, *supra* note 80, at 202.

158. Heather Mac Donald, *The Bilingual Ban That Worked*, CITY J., Spring 2012, *in* THE BEHOLDEN STATE at 214.

159. Senik, *supra* note 80, at 202.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* ("The union has also become the biggest donor to the California Democratic Party. From 2003 to 2012, the CTA spent nearly $102 million on political contributions; 0.08 percent of that money went to Republicans.").

164. *Id.*

165. *Id.*

more than any other donor in the state.[166] This sum only becomes more staggering when compared to the expenditures made by other traditional interest groups. During the same period, "the CTA outspent the pharmaceutical industry, the oil industry, and tobacco industry *combined.*"[167]

In short, the union has become a behemoth—"a relentless political machine," to borrow former Governor Pete Wilson's phrase—that is arguably the most influential actor in California state politics.[168] The CTA in its pre-collective bargaining days bears little resemblance to the powerhouse of today, and its priorities appear to have shifted with its power. To take one particularly salient example, the union has undergone a notable evolution on the propriety of work stoppages. In 1962, the executive director of the CTA admonished his colleagues that by going on strike, they were abdicating their role as educators. "The strike as a weapon for teachers is inappropriate, unprofessional, illegal, outmoded, and ineffective," Arthur F. Corey told a crowd gathered in Denver for the National Education Association annual convention.[169] "You can't go out on an illegal strike one day and expect to go back to your classroom and teach good citizenship the next."[170] A quick glance at the CTA's website today shows a marked shift in philosophy.[171] "CTA's long history is full of the sounds of school strikes and teachers chanting on picket lines, the shouts of victory on countless election nights, and the quiet conversations of educators waiting to speak out in crucial legislative hearings held over the decades in Sacramento," reads the start—the very first sentence—of the union's self-authored history.[172] It may lack the poetry of Melville, but the CTA's opening nonetheless is far more revealing than "Call me Ishmael."[173]

The CTA has been discussed at length not only because it was one of the parties to the appeal before the Court in *Friedrichs*, but because it vividly illustrates the reach of union power. Yet it is hardly the only special interest operating in Sacramento today.

166. *Id.* (showing that the 2010 figures come from the California Fair Political Practices Commission, a public institution).

167. *Id.*

168. DISALVO, *supra* note 127, at 106.

169. Senik, *supra* note 80, at 197.

170. *Id.*

171. *See generally* Cty. Sanitation Dist. No. 2 v. L.A. Cty. Emps. Ass'n, 699 P.2d 835 (1985) (holding that public-sector workers were entitled to strike for wages and benefits).

172. CALIFORNIA TEACHERS ASS'N, *supra* note 136.

173. HERMAN MELVILLE, MOBY DICK 13 (1851).

Indeed, the vise-grip that the CTA and other public unions exert on the levers of government in California has led one observer to describe it as "the beholden state."[174]

### *B. California Law*

Like other agency-shop states, California has codified the rights and prerogatives of public-sector unions, including teachers unions. A union may become the exclusive bargaining representative for "public school employees" for a given bargaining unit (e.g., a school district) by submitting proof that a majority of employees in the unit want to be represented by the union.[175] A "public school employee," in turn, is defined as "a person employed by a public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees."[176] Once a union achieves exclusive representative status, it represents all "public school employees" in collective bargaining activities.[177] The law grants the unions an expansive writ, permitting bargaining over "[t]erms and conditions of employment" such as wages, hours, health and welfare benefits, leave, transfer and reassignment policies, class size, and provisions for evaluating employees and handling grievances.[178]

Operationally, this means that even if an employee originally had no interest in union representation, the holdout is forced to contribute to union activities once a majority of employees grant it exclusive bargaining status. Although the employee need not formally join the union, subsidization of its activities is commanded by law. The Education Code mandates that school districts "deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the [union]."[179] The amount of this "fair share service fee," or agency fee, is determined by the union and "shall not exceed the dues that are payable by [union] members."[180]

In a happy coincidence, agency fees typically approximate the

174. *See* Malanga, *supra* note 81, at 174 (the author's phrase became the title of a collection of essays on governance issues confronting California).
175. CAL. GOV'T CODE § 3544(a) (West 2016).
176. *Id.* § 3540.1(j).
177. *Id.* § 3543.1(a).
178. *Id.* § 3543.2(a)(1).
179. *Id.* § 3546(a).
180. *Id.*

amount of union dues.[181] Under *Abood* and *Hudson*, however, the union must divide this fee into chargeable and non-chargeable portions. The chargeable amount purports to support union activities that are "germane to [the union's] functions as the exclusive bargaining representative."[182] Included in this category of expenses is "the cost of lobbying activities designed to foster collective bargaining negotiations and contract administration, or to secure for the represented employees advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and negotiating with the employer."[183] The only exception to paying agency fees applies where unionism impinges upon an employee's spiritual scruples, as religious objectors need not "financially support any employee organization as a condition of employment."[184] Nevertheless, a religious objector must donate the equivalent of the agency fee to a charity selected from "a list of at least three such funds, designated in the organizational security arrangement."[185] Thus, religious objectors must donate the full agency fee—not just the chargeable portion—to a union-approved charity.

Interestingly, the statutory scheme suggests legal recognition that public-sector bargaining resolves important political issues. The law requires proposals between union officials and school officials to be made public and preserved as records, and imposes a waiting period "to enable the public to become informed" and to allow the public "the opportunity to express itself regarding the proposal at a meeting of the public school employer."[186] The stated intent of these requirements is to ensure that the public is "informed of the issues that are being negotiated" and citizens have the "full opportunity to express their views on the issues to the public school employer and to know of the positions of their elected

181. DISALVO, *supra* note 127, at 63 (noting agency fees often "are very close to the amount paid by members as union dues").

182. CAL. GOV'T CODE § 3546(a) (West 2016).

183. *Id.* § 3546(b).

184. *Id.* § 3546.3.

185. *Id.*

186. *Id.* § 3547(a) ("All initial proposals of exclusive representatives and of public school employers, which relate to matters within the scope of representation, shall be presented at a public meeting of the public school employer and thereafter shall be public records."); *id.* § 3547(b) ("Meeting and negotiating shall not take place on any proposal until a reasonable time has elapsed after the submission of the proposal to enable the public to become informed and the public has the opportunity to express itself regarding the proposal at a meeting of the public school employer.").

representatives."[187]

The law incorporates relevant Supreme Court decisions as well. Each fall, the union must send a *Hudson* notice to all non-members stating the agency fee amount and delineating its chargeable and non-chargeable portions.[188] That notice must include either the union's audited financial report for the year or a certification from its independent auditor confirming that the chargeable and non-chargeable expenses have been accurately stated.[189] To avoid paying for non-chargeable expenditures, a non-member must "opt out" each year by notifying the union.[190] The period to lodge this objection must last at least thirty days.[191] Teachers who opt out—like Friedrichs and her colleagues—are entitled to a rebate or fee reduction for that year.[192]

## IV. *FRIEDRICHS V. CALIFORNIA TEACHERS ASSOCIATION*

### *A. Why Abood Should Be Overruled*

*Abood* purported to strike a balance between the First Amendment and union priorities, but the experience of almost four decades has shown the compromise to be an unworkable and unconstitutional burden on public employees' First Amendment rights. The argument against *Abood* has four main components: (1) the Court typically applies exacting review to First Amendment matters; (2) the erasure of the public-private distinction is insupportable and ignores the reality that collective bargaining in the public sphere is inherently political; (3) the traditional justifications of the union's right to agency fees—labor peace and preventing free-riding—cannot overcome the First Amendment infringements in this area; and (4) stare decisis principles cannot save *Abood*. Each contention is discussed in turn.

Laws compelling subsidization of speech or association have traditionally been subject to exacting scrutiny. Regardless of whether "the beliefs sought to be advanced by association pertain to political, economic, religious or cultural" concerns, the Court

187. *Id.* § 3547(e).

188. *Id.* § 3546(a); CAL. CODE REGS. tit, 8, § 32992(a) (2014); *see generally* Chi. Teachers Union v. Hudson, 475 U.S. 292, 304–07 (1986).

189. CAL. CODE REGS. tit, 8, § 32992(b)(1) (2014) (showing that the independent auditor does not, however, confirm that the union has properly classified its expenditures); Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S. Ct. 2277, 2294 (2012).

190. CAL. CODE REGS. tit, 8 § 32993.

191. *Id.* § 32993(b).

192. CAL. GOV'T CODE § 3546(a) (West 2016).

has held that "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."[193] In the high-profile case involving the Westboro Baptist Church's picketing of soldiers' funerals, the Court added that speech on matters of public concern is "at the heart of the First Amendment[]," and is therefore "entitled to special protection."[194] The Court has even held as much in the commercial speech context, finding mandatory advertising assessments imposed by statute on mushroom producers and handlers violated a company's First Amendment rights. "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors," the Court wrote.[195]

The reason for this exacting scrutiny is that compelled subsidization touches on—and often imperils—core First Amendment principles. The Court has consistently noted as much. "If there is any fixed star in our constitutional constellation," the Court has eloquently proclaimed, "it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[196] And in what may seem an axiom, albeit an oft-forgotten one, the Court has held that freedom of association "plainly presupposes a freedom not to associate."[197] Moreover, a government employee does not check his or her First Amendment rights at the office door, as "citizens do not surrender their First Amendment rights by accepting public employment."[198] To the contrary, the First Amendment "prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate."[199] Thus, agency-fee laws, like those at issue in *Friedrichs*, should be examined under the most exacting scrutiny.

*Abood* drew a distinction between collective bargaining expenses and core political speech, holding that the traditional prohibition on subsidization applies only to the latter. This was a crucial

193. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460–61 (1958).
194. Snyder v. Phelps, 562 U.S. 443, 451–52 (2011) (citation omitted).
195. United States v. United Foods, Inc., 533 U.S. 405, 411 (2001).
196. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
197. Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).
198. Lane v. Franks, 134 S. Ct. 2369, 2374 (2014).
199. Rutan v. Republican Party of Ill., 497 U.S. 62, 76 (1990).

mistake, predicated on a false equivalence between bargaining in the public and private sectors. Collective bargaining in the public sector is inherently political. *Abood* itself essentially admitted as much, noting "the truism" that, in collective bargaining, "public employee unions attempt to influence governmental policymaking" and decision-making by a public employer "is above all a political process" undertaken by people "ultimately responsible to the electorate."[200] *Abood* also recognized that a public employer "lacks an important discipline against agreeing to increases in labor costs that in a market system would require price increases."[201] Thus, a public employer's willingness to meet a union's demands "will depend upon a blend of political ingredients," which offers public employees "more influence in the decisionmaking process than is possessed by employees similarly organized in the private sector."[202] But despite that acknowledgment, *Abood* failed to reach the logical conclusion that collective bargaining advocacy cannot be perfectly analogized to the private sector. Instead of drawing a line between the private and public sectors, *Abood* drew a line between a union's expenditures for "collective-bargaining, contract administration, and grievance-adjustment purposes" and expenditures for "political or ideological purposes."[203]

As the previous discussion of union power in California shows, nearly any action taken by public-sector unions—including teachers' unions like the CTA—has significant public policy implications. To adapt Aristotle's immortal observation, a public union is, by nature, a political animal.[204] Unions spend hundreds of millions of dollars on campaigns, fund political action committees, dispatch personnel to serve as campaign workers, and engage in incessant lobbying. The public unions' (often decisive) support of sympathetic politicians "gives them a degree of influence that unions in the private sector can hardly imagine."[205] By virtue of this activity, "public sector unions are fundamentally political entities."[206] In their more candid moments, union officials admit as much. "We elect our bosses, so we've got to elect politicians who

200. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 228–31 (1977).
201. *Id.* at 228.
202. *Id.* at 228–29.
203. *Id.* at 232; Harris v. Quinn, 134 S. Ct. 2618, 2632 (2014).
204. ARISTOTLE, POLITICS at 1253a1-3, (C.D.C. Reeve trans., Hackett Publishing Company 1998) (c. 384-322 B.C.) ("Hence it is evident that the state is a creation of nature, and that man is by nature a political animal.").
205. DISALVO, *supra* note 127, at 19.
206. *Id.*

support us and hold those politicians accountable," the website of the American Federation of State, County and Municipal Employees (AFSCME) proclaims.[207] "Our jobs, wages, and working conditions are directly linked to politics."[208] Former California State Senate President Gloria Romero acknowledged this in criticizing the influence exerted by public unions. "There is no aspect of state government operations or public policy that is untouched by the power of public-sector unions and their allies in Sacramento," revealed Romero.[209] Calling labor's influence "omnipresent," Romero noted that union power frequently results in eleventh-hour legislative changes to hide threatening ballot initiatives, and even affects "how the state's legal counsel writes ballot summaries and titles."[210]

Even if analysis is limited to the impact that unions have on the public treasury, this alone demonstrates the policy consequences of collective bargaining activities. Cities and states across the nation are grappling with severe budgetary problems, and in almost all cases these problems have been exacerbated by unfunded liabilities stemming from lucrative benefits owed to public workers.[211] Illinois is being crushed under the weight of a $111 billion pension liability (to put that in perspective, if Illinois were a sovereign nation and its unfunded liability were GDP, it would rank 60th in the world).[212] Puerto Rico carries a $72 billion debt load and may soon end up in bankruptcy.[213] But as usual, it is California that most dramatically demonstrates the nature of the crisis. More than 20,000 state and local retirees in the Golden State receive annual pensions of more than $100,000. In Vallejo, a city of more than 100,000 northeast of

207. Jeff Jacoby, *The 'Big Dog' in Campaign Spending*, THE BOSTON GLOBE (Oct. 31, 2010), https://bit.ly/1LO55B9 [perma.cc/G6L4-D758].

208. *Id.*

209. Gloria Romero, *Fixing California: The Union Chokehold*, THE SAN DIEGO UNION-TRIB. (Aug. 10, 2013), https://bit.ly/1QFfUXq [perma.cc/XUK5-552L].

210. *Id.*

211. *See* DISALVO, *supra* note 127, at 3–4 (estimating that all state and local governments, taken in total, face a combined $3.2 trillion in unfunded liabilities; healthcare liabilities likely add an additional $1 trillion to that sum).

212. *See, e.g.*, Karen Pierog, *Illinois' Unfunded Pension Liability Rises to $111 Billion*, REUTERS (Dec. 10, 2015), http://reut.rs/1pisB4J [perma.cc/7EFG-7TAV] ("Illinois added another $6.4 billion to its already large unfunded pension liability in fiscal 2015, pushing the total to $111 billion, according to a state legislative report on Thursday."); Nicholas Confessore, *A Wealthy Governor and His Friends Are Remaking Illinois*, N.Y. TIMES (Nov. 29, 2015), http://nyti.ms/1Q8kJfr [perma.cc/CR8E-L9RZ].

213. Mary Williams Walsh, *Puerto Rico's Debt Crisis and the 1975 Law Complicating Matters*, N.Y. TIMES (Nov. 4, 2015), http://nyti.ms/1QdNeYn [perma.cc/9WG4-LUUG] ("Puerto Rico's $72 billion debt is complex, coming from almost 20 different governmental issuers and sometimes involving guarantees or other special features.").

San Francisco, 100 firefighters paid $230 in monthly dues during one year, while 140 police officers paid $254; thus, the firefighters' and police unions had a guaranteed annual income stream of $276,000 and $426,720, respectively.[214] As may be imagined, much of this money was spent electing politicians who would negotiate favorable contracts to keep this profitable arrangement in place. These monthly dues figures for Vallejo were from 2007. In 2008, the city, beset by soaring employee expenses, declared bankruptcy.[215] Mid-sized municipalities like San Bernardino, Stockton, and Mammoth Lakes have done the same.[216]

There are countless other examples of the pressure that public employee compensation and retirement schemes are placing on government budgets. The result of this automatic spending is that many other core public services are being neglected or abandoned to help feed the beast of union contracts. Citizens and politicians alike are taking notice of the "crowd out" effect that benefits expenditures are having on other government services.[217] Scott Walker and Chris Christie both made reform of public union agreements a centerpiece of their governorships.[218] More recently, Illinois Governor Bruce Rauner has done the same.[219] As former Los Angeles Mayor Richard Riordan noted, "symptoms of the municipal illness that made Detroit, with an estimated $18 billion in liabilities, the largest city in American history to declare bankruptcy are showing up" elsewhere.[220] Rising personnel costs, Riordan noted, are leading to lengthening emergency response times, closures of libraries, parks and recreation facilities, and crumbling infrastructure.[221] Ultimately, the basic services that make "urban life rewarding and uplifting [are] under increasing pressure, in large part because of unaffordable public employee pension and health care costs."[222] The Court has taken notice of this phenomenon as well. In *Harris*, the Court recognized the policy implications of collective bargaining. "In the years since

214. George F. Will, *Pension Time Bomb*, WASH. POST (Sept. 11, 2008), http://wapo.st/1LoaZ0Z [perma.cc/T9AC-5R6S].

215. DISALVO, *supra* note 127, at 67.

216. *Id.* at 98.

217. *Id.* at 4.

218. *Id.* at 6.

219. Confessore, *supra* note 212.

220. Richard J. Riordan & Tim Rutten, Opinion, *A Plan to Avert the Pension Crisis*, N.Y. TIMES (Aug. 4, 2013), http://nyti.ms/20NVcu7 [perma.cc/G895-ZUKZ].

221. *Id.*

222. *Id.*

*Abood*, as state and local expenditures on employee wages and benefits have mushroomed, the importance of the difference between bargaining in the public and private sectors has been driven home," wrote the Court.[223] Similarly, as Justice Anthony Kennedy rightly observed at oral argument in *Harris*, a union's position on spending "necessarily affects the size of government . . . which is a fundamental issue of political belief."[224]

The unique nature of public-sector bargaining explains why even organized labor's greatest champions historically drew a line between bargaining in the public and private sectors. Perhaps most famously, President Franklin D. Roosevelt cautioned that "meticulous attention should be paid to the special relationships and obligations of public servants to the public itself and to the Government."[225] In a remarkable letter, Roosevelt wrote:

> All Government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with Government employee organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employees alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters.[226]

Legendary New York City Mayor Fiorello La Guardia shared Roosevelt's reservations, saying "the right to strike against the government is not and cannot be recognized."[227] Even George Meany, the long-serving AFL-CIO president, admitted it was "impossible to bargain collectively with the government."[228]

Nevertheless, two justifications have traditionally been offered in defense of public-sector agency fees: the "desirability of labor

223. Harris v. Quinn, 134 S. Ct. 2618, 2632 (2014).

224. Transcript of Oral Argument at 36–37, *Harris*, 134 S. Ct. 2653 (2014) (No. 11-681).

225. Letter from President Franklin D. Roosevelt, U.S., to Luther C. Steward, President, Nat'l Fed'n of Fed. Emps. (Aug. 16, 1937), http://bit.ly/1ChclRh [perma.cc/U4ZZ-4WWG].

226. *Id.*

227. DISALVO, *supra* note 127, at 1, 43; Editorial, *A Union Education*, WALL ST. J. (Mar. 1 2011), http://on.wsj.com/1T3zhzZ [perma.cc/CB34-AGMN].

228. MOE, *supra* note 1, at 36.

peace" and avoiding "the risk of 'free riders.'"[229] "Labor peace," as understood by *Abood*, referred to the prevention of the "confusion and conflict that could arise if rival teachers' unions, holding quite different views . . . sought to obtain the employer's agreement."[230] In addition, the Court noted, the "designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment."[231] Thus, exclusive representation "frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations."[232] As for free-ridership, *Abood* noted that a union must "fairly and equitably" represent all employees regardless of union membership, as the Court explained: "A union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become 'free riders' to refuse to contribute to the union while obtaining benefits of union representation."[233] Neither argument is compelling.

First, the labor-peace argument cannot support the requirement that government employees either join a union or pay agency fees. The public employer (in *Friedrichs*, the school district) may well prefer to deal with a single union out of convenience. Then again, maybe not. Having multiple unions may provide a public employer with increased leverage, which could potentially offset the inconvenience of having to negotiate with multiple unions. And as one chronicler of teachers' unions has argued, "labor peace" often serves as "a rhetorical cover for stifling criticism of the incumbent union."[234] Regardless, even if one stipulates that a public employer prefers to deal with one union, that can hardly justify legislation forcing all public employees to support that appointed union. As even Justice Kagan conceded in her *Harris* dissent, a "union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked."[235] Moreover, the

229. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 224 (1977).
230. *Id.*
231. *Id.* at 220.
232. *Id.* at 221.
233. *Id.* at 221–22 (some quotations omitted).
234. LIEBERMAN, *supra* note 145, at 60.
235. Harris v. Quinn, 134 S. Ct. 2618, 2640 (2014) (Kagan, J., dissenting).

experience of unions in some federal agencies shows that labor peace does not axiomatically require non-members to contribute agency fees. For instance, the American Federation of Government Employees represented approximately 650,000 federal employees in 2012; more than half of them were not dues-paying members.[236] Nonetheless, "labor peace" was undisturbed, and no rival union emerged. And to return to the more familiar example of teachers' unions, eliminating the agency-fee requirement is unlikely to lead to the emergence of dozens of competing unions. As the histories of the American Federation of Teachers (AFT) and National Education Association (NEA) testify, multiple unions may coexist peaceably—and without spawning dozens of rival groups.[237]

But it is the second issue, the free-rider justification, that tends to emerge as the more powerful argument. This, too, is unavailing. At bottom, the free-rider justification presents a basic problem of logic: How can someone free-ride off a policy that they do not support? As noted, many teachers—including Rebecca Friedrichs—may disagree with their colleagues on the wisdom of a host of bargained-for policies, including those covering tenure, termination, or pay. Take the example of a new teacher, brimming with enthusiasm and eager to deploy the newest teaching techniques, stepping into a classroom for the first time.[238] Even if that teacher is beloved by parents and achieves extraordinary student results, he or she would nonetheless be the first fired under most union agreements, should layoffs be necessary—even if there is another teacher at the school who is notoriously ineffective.[239] The difference is that one teacher is junior, and the other is tenured. Under the vast majority of contracts, seniority would dictate termination priority.

Similarly, the fact that union agreements make it nearly

---

236. *Id.* at 2657, n.7 (citing R. KEARNEY & P. MARESCHAL, LABOR RELATIONS IN THE PUBLIC SECTOR 26 (5th ed. 2014)).

237. *See generally* LIEBERMAN, *supra* note 145, at 10–16. There is also significant empirical evidence to undermine the notion that labor peace is furthered by public-sector unionization, particularly if labor peace is defined to include strike avoidance. As DiSalvo notes, "many of the strikes of the militant period occurred *after* collective bargaining rights had been granted." DISALVO, *supra* note 127, at 215 (emphasis original).

238. Terry M. Moe, *Bottom-Up Structure: Collective Bargaining, Transfer Rights, and the Plight of Disadvantaged Schools* 10 (Sept. 14, 2006) (Dep't Educ. Reform, University of Arkansas, Working Paper Archive).

239. *See* Bhavini Bhakta, *California's Pink-Slip Shuffle*, L.A. TIMES (Dec. 16, 2012), http://lat.ms/1QstZHM [perma.cc/9XJR-Q6YT] (recounting that the author lost her teaching position four times in eight years due to her relative lack of seniority, despite being named a "Teacher of the Year").

impossible to fire an incompetent tenured teacher unfairly burdens competent teachers.[240] Picture a situation with two English teachers: One who is motivated and conscientious, and a second who merely goes through the motions, running out the clock until retirement benefits kick in. If the latter were tenured (and therefore, could not be terminated on performance grounds), the former would likely expend much more time and energy compensating for the colleague's teaching deficiencies.[241] In this way, the burden of poor teaching falls not just on students, but also on the hardest-working faculty. Finally, "single salary schedules" are a near universal feature of union agreements, and require that teacher pay be predicated almost entirely on seniority—regardless of expertise or demand.[242] These provisions artificially depress the salaries of teachers in sought-after disciplines like science and mathematics.[243] Beyond the obvious point that it makes little sense to pay a first-year Caltech graduate teaching advanced science the same salary as any other rookie teacher, there is a more fundamental observation in the free-rider area: The Caltech teacher would command a higher salary in a free-market environment. Teachers like this hardly benefit from the union agreement and thus could not be construed as free-riders, as one does not free-ride off policies inimical to them. The previous examples illustrate the limits of the free-rider argument just as readily. Thus, the free-rider argument fails as an empirical matter, as it presupposes that teachers are homogenous in their interests—a presumption that is demonstrably false.

There is a broader point to be made in response to these union justifications as well. Unions fight tooth-and-nail to establish themselves as the exclusive bargaining representatives for school districts. The reason they do this, of course, is because of the

240. *See* Steven Brill, *The Rubber Room*, THE NEW YORKER (Aug. 31, 2009), http://bit.ly/1iK7VhW [perma.cc/2KDY-8A65] (revealing that 600 New York City teachers were paid to sit in "Rubber Rooms" after being accused of misconduct, such as hitting or molesting a student, or, in some cases, of incompetence). One school principal quoted in the article asserted that Randi Weingarten, of the teachers' union, "would protect a dead body in the classroom." Another teacher profiled drew a six-figure salary in the Rubber Room after being removed as incompetent (a characterization she denied). Indeed, the removed teacher seemed to deny that any teacher would persist in the job if incompetent. "Before Bloomberg and Klein, everyone knew that an incompetent teacher would realize it and leave on their own . . . . There was no need to push anyone out." *Id.*

241. Vergara v. Cal., No. BC484642, 2014 WL 6478415, at *6 (Cal. Sup. Ct. Aug. 27, 2014) (noting "teachers . . . do not want grossly ineffective colleagues in the classroom").

242. *See* MOE, *supra* note 1, at 4.

243. *See* LIEBERMAN, *supra* note 145, at 213.

considerable financial and political benefits that flow from exclusive representation. It is odd—if not duplicitous—to strive to achieve exclusive representation status only to complain of the burden of exclusive representation once such status is achieved. And if anything, it is the unions who have been free-riding, in a broader sense, off the teachers impressed into supporting their agenda. Rebecca Friedrichs certainly argues as much. "I believe the unions have been free-riding off of me, and teachers like me, for decades," contended Friedrichs.[244] "And I have a big problem with that."[245] Here, the free-rider argument is attempting to prevail over free speech concerns. Yet, as the Supreme Court has held, free-rider arguments are "generally insufficient to overcome First Amendment objections."[246] None of the arguments advanced by the CTA suffice to overcome that presumption.

Finally, despite the assertion of the CTA (and Justice Kagan, in her *Harris* dissent), stare decisis principles, properly understood and applied, cannot salvage *Abood*. Stare decisis "is at its weakest" in constitutional cases like *Friedrichs*.[247] Thus, the Court "has not hesitated to overrule decisions offensive to the First Amendment."[248] Moreover, stare decisis will not preserve a decision found to be "unworkable."[249] As the preceding shows—and as the Court admitted in *Harris*—*Abood* "failed to appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends."[250] Indeed, *Abood*'s line-drawing spawned a host of "practical administrative problems," and the judiciary "has struggled repeatedly with this issue" in subsequent cases.[251] Justice Kagan's contention to the contrary, *Abood* has not created significant reliance interests.[252] Unions already employ a large staff that could

244. Dave Bryan, *Ahead of Supreme Court Hearing, OC Teacher Leading Fight Against Union Dues Speaks To CBS2/KCAL9*, CBS LOCAL (July 1, 2015), http://cbsloc.al/1JCl5Xs [perma.cc/FB9G-8CUP].

245. *Id.*

246. Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S. Ct. 2277, 2289 (2012).

247. Agostini v. Felton, 521 U.S. 203, 235 (1997) (citation omitted); *see also* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 2 (2001).

248. Citizens United v. FEC, 558 U.S. 310, 363 (2010) (quoting FEC v. Wis. Right To Life, Inc., 551 U.S. 449, 500 (2007)).

249. Payne v. Tennessee, 501 U.S. 808, 827 (1991) (citing Smith v. Allwright, 321 U.S. 649, 665 (1944)).

250. Harris v. Quinn, 134 S. Ct. 2618, 2632 (2014).

251. *Id.* at 2633.

252. *See* Lawrence v. Texas, 539 U.S. 558, 577 (2003) (finding no individual or societal reliance on Bowers v. Hardwick, 478 U.S. 186 (1986)).

handle any administrative issues related to dues collection, should dues no longer to be automatically deducted. Were the Court to overrule *Abood*, the unions could see a significant drop in funds generated by dues, but they would hardly be destitute. To compensate for this reduction, they could merely re-direct funding from some of the many extraneous causes they support toward more central collective bargaining activities. Indeed, the reliance interest that would be most imperiled by the Court overruling *Abood* would be the interest that union bosses and political consultants have in continued enjoyment of the largesse guaranteed by automatic deduction of dues.

### *B. Why the Opt-Out Requirement Violates the First Amendment*

Even if the Court permits *Abood* to stand, it nonetheless should strike down the opt-out requirement imposed under California law. These schemes cannot be reconciled with First Amendment jurisprudence, especially in light of the Court's recent commentary on the subject in *Knox*. Moreover, the relevant social science research related to default rules strongly suggests that the opt-out system is particularly ill-suited to the union context.

As *Knox* conceded, the Court has upheld opt-out requirements in the past, albeit implicitly and without comprehensive discussion. As the Court put it, "acceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment principles."[253] The issue first emerged in *Machinists v. Street*, which featured an objection by employees to union spending of dues money on political causes.[254] Crucially, the challenge was not a pure constitutional matter—it arose under the Railway Labor Act, a distinction that *Knox* would later note. In any event, the *Street* Court held in favor of the dissenting employees.[255] But in a passage that would reverberate over the decades to come, it also stated that "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee."[256] A related case, *Railway Clerks v. Allen*, held substantially the same (and was also decided under the Railway Labor Act).[257] Thus, the "historical accident" was born.[258]

253. Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S. Ct. 2277, 2290 (2012).
254. Int'l Ass'n of Machinists v. S.B. St., 367 U.S. 740, 744 (1961).
255. *Id.* at 750.
256. *Id.* at 774.
257. Bhd. of Ry. & S.S. Clerks v. Allen, 373 U.S. 113, 119–20 (1963).
258. *Knox*, 132 S. Ct. at 2290.

Future cases presumed the constitutionality of opt-out requirements, even while cautioning that such procedures must be "carefully tailored to minimize the infringement" of dissenting employees' First Amendment rights.[259]

*Knox* was the first case to carefully scrutinize the constitutional implications of opt-out systems, and once placed under the microscope, the Court was unimpressed by what it saw. Despite the important distinctions between opt-out and opt-in schemes, "our prior cases have given surprisingly little attention to this distinction."[260] The opt-out systems in *Allen* and *Street* "approach, if they do not cross, the limit of what the First Amendment can tolerate."[261] Opt-out schemes are plainly disfavored by the First Amendment, as courts "do not presume acquiescence in the loss of fundamental rights."[262] Given that the Court has held "that a nonmember cannot be forced to fund a union's political or ideological activities," *Knox* pondered, "what is the justification for putting the burden on the nonmember to opt out of making such a payment?"[263] Automatic deduction "creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree."[264] Thus, it is "the side whose constitutional rights are not at stake" that should bear the funding risk.[265]

*Knox* also left an important consideration largely unexplored: Unlike the 1960s cases, there is now ample evidence of how opt-out schemes operate in practice, and this half-century of experience suggests little to recommend their constitutionality. For one thing, *Hudson* rights are not easily asserted. Besides the fact that the burden of asserting them is improperly imposed upon the employee, there is the obvious reality that workers "who do not want their compulsory dues and fees used for political purposes must negotiate technical procedural hurdles that unions have erected."[266] As the saga of Brian Trygg indicates, this understates

259. Chi. Teachers Union v. Hudson, 475 U.S. 292, 303 (1986).

260. *Knox*, 132 S. Ct. at 2290.

261. *Id.* at 2291.

262. *Id.* at 2290 (quoting College Savings Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666, 682 (1999)).

263. *Id.*

264. *Id.*

265. *Id.* at 2295 (citing Ellis v. Bhd. of Ry., Airline & S.S. Clerks, 466 U.S. 435, 444 (1984)).

266. Raymond J. LaJeunesse, Jr., *The National Labor Relations Board Has Failed to Enforce Fully Workers' Rights Under* Communications Workers v. Beck *Not to Subsidize Unions' Political and Other Nonbargaining Activities*, 70 N.Y.U. ANN. SURV. AM. L. 305, 313 (2015).

the complexity of the challenge, if anything. If a union were designing, from scratch, a system deliberately constructed to ensnare unwitting or unwilling donors, it would be hard-pressed to devise an arrangement superior to the one currently in place in more than twenty states.[267]

The relevant social science research only backstops this view. Perhaps no one has studied the effects of default rules—call it "nudge theory"—more than former Obama administration official Cass Sunstein. Writing with the behavioral economist Richard Thaler, Sunstein concluded that "whatever the default choices are, many people stick with them."[268] A host of intriguing (and often amusing) examples have been furnished in proving this thesis. For instance, only 12% of Germans consent to be organ donors, whereas 99.98% of Austrians do.[269] The difference? In Austria, consent is presumed, and a citizen wishing to avoid being an organ donor must affirmatively opt out.[270] In Germany, the opposite is true: consent is not presumed, and people have to opt in.[271] To take another example, companies have routinely found that automatic enrollment in retirement savings plans has a dramatic result in employee savings—so dramatic, in fact, that automatic enrollment appears to have "a far larger effect than even substantial tax incentives."[272] The takeaway of this is that people designing default rules—"choice architects," in Sunstein's parlance—"can and do use default rules to produce outcomes that they deem desirable."[273]

The outsized influence of default rules on outcomes stems from a variety of factors. First, there is often inertia on the part of decision-makers because deviating from a default requires active rejection of that rule.[274] By nature, people are often tempted to defer a decision or abstain from making one at all, particularly if

267. *See* LIEBERMAN, *supra* note 145, at 180. ("The asymmetry in costs and incentives is decisive. Individual teachers are not going to spend thousands, perhaps tens or even hundreds of thousands, to recover non-chargeable agency fees amounting to a few hundred dollars or less." The unions, on the other hand, "have every incentive to litigate agency fee issues to the limit, to discourage any teacher opposition to paying the fees.").

268. RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 8 (2008).

269. Cass R. Sunstein, *Deciding by Default*, 162 U. PA. L. REV. 1, 4 (2013).

270. *Id.*

271. *Id.*

272. *Id.* at 5.

273. *Id.* at 6, 7.

274. *Id.* at 17; *see also* Seidemann v. Bowen, 499 F.3d 119, 126 (2d Cir. 2007) (conceding that unions "take advantage of inertia on the part of would-be dissenters who fail to object affirmatively, thus preserving more union members").

the subject matter is technical or confusing.[275] Second, default rules can be construed as carrying an "implicit endorsement," as people are inclined to believe that "the default was chosen by someone sensible and for a good reason."[276] This is particularly true where the individual confronted with the choice lacks experience or expertise. Whatever the precise reason, however, the result is clear: people often "follow authorities who set default rules, in deference to their expertise, even if the rules are objectionable or nefarious."[277] Thus, active choosing should be preferred in "circumstances in which the choice architects cannot be trusted."[278] The application of these nudge principles to the union-dues context is readily apparent. Fee-payers will often unwittingly favor the default rule in light of the technical nature of the subject; pressure to conform to union priorities renders the endorsement effect more explicit than implicit; and given that union officials are ostensibly serving the interests of members, union members will likely assume that the default rule is "sensible."[279]

In a warning with strong implications for politically charged issues surrounding union dues, Sunstein cautions that default rules "can of course be badly chosen or misused by private and public institutions alike," and indeed, some "can be extremely harmful."[280] Two of his examples are worth quoting at length. In the first, Sunstein invites readers to:

> Imagine, for example, a voting system that says that if you do nothing, your vote will be registered as favoring the incumbent—but that you can opt out if you like. Or imagine a nation that defaults you into a certain political party or religion—but that allows you to opt out. Or a rental car company that defaults you into all sorts of insurance policies and payment plans that are essentially a waste of money—but that allows you to opt out. Fortunately, market forces constrain at least some of the most harmful default rules.[281]

Automatic deduction of union dues presents similar issues to those embedded in these hypotheticals. First, given that union donations

275. LaJeunesse, Jr., *supra* note 266, at 313 ("Workers who do not want their compulsory dues and fees used for political purposes must negotiate technical procedural hurdles that unions have erected.").
276. Sunstein, *supra* note 269, at 20.
277. *Id.* at 24.
278. *Id.*
279. *Id.* at 20.
280. *Id.* at 36.
281. *Id.*

overwhelmingly fill the coffers of Democratic Party candidates and causes,[282] union dues essentially default members into a "certain political party."[283] Second, the palliative effect of market forces invoked by Sunstein is wholly absent in the public-sector union context.

In another example, Sunstein envisions a voting system that defaults voters to selections based on their previous actions—a sort of electoral version of Amazon's suggested purchases feature or Netflix's recommendation engine. Sunstein suggests that such a system is morally objectionable, and perhaps dystopian:

> A genuinely extreme case would be a political system with personalized voting defaults, so that people are defaulted into voting for the candidate or party suggested by their previous votes, subject to opt-out. In such a system, people would be presumed to vote consistently with their past votes, to such an extent that they need not show up at the voting booth at all, unless they wanted to indicate a surprising or contrary preference. Such a system would not entirely lack logic. It would certainly reduce the burdens and costs of voting, especially for voters themselves, who could avoid a trip to the polls, assured that the system would register their preferences. But there is a (devastating) problem with an approach of this kind, which has to do with what might be called the internal morality of voting. The very act of voting is supposed to represent an active choice, in which voters are selecting among particular candidates. In other contexts, there is not an equivalent internal morality, but active choosing is an individual and social good precisely because it promotes learning over time, and thus the development of informed, broadened, and perhaps new preferences.[284]

Like this voting system, automatic deduction of union dues provides efficiency gains to the union. But automatic deduction also violates the "internal morality" of free speech and association, just as the voting system darkly described above would. Sunstein's hypotheticals are meant to be cautionary, intended to convey warning of possible negative effects posed by default rules. In the union context, however, these concerns are hardly theoretical—they are an everyday reality.

In sum, the opt-out system is needlessly cumbersome, improperly places the burden of policing compliance on the party whose First

282. Senik, *supra* note 80, at 202.
283. *Id.*
284. *Id.* at 51.

Amendment rights are jeopardized, and cannot be reconciled with either recent jurisprudence or the leading social science research on default decision-making. The Supreme Court should strike these arrangements as unconstitutional.

## V. CONCLUSION

*Friedrichs* was fiercely debated in the run-up to the Court's decision, and media commentary often adopted the apocalyptic tone favored by public-sector unions and their allies. The Supreme Court's grant of certiorari "sent fear through organized labor," reported a California newspaper.[285] One writer shuddered to think that the case "could deliver a fatal blow to the financial health of already-imperiled public-employee unions."[286] Overturning *Abood* would be "a radical step" that would "deal a long-lasting blow to union power—and, perhaps by coincidence, the Democratic Party."[287] A credulous reporter for the *Los Angeles Times* agreed, saying the case potentially represented an "existential threat to public unions."[288] Even more hyperbolic, one writer warned that a victory for the plaintiffs would doom education in California.[289] "Forty-three kids in your second-grade classroom? Too bad. Out of school supplies and it's only October? Buy them yourself."[290] The new California, the author sputtered—ahistorically—would be "Scott Walker's version of manifest destiny, basically."[291]

The hand-wringing prompts several observations. First, the

285. Michael Finnegan, *Labor Fears Setback as Supreme Court Hears Case on Union Dues, Fees*, L.A. TIMES (June 30, 2015), http://lat.ms/1BYTXlj [perma.cc/8RRQ-L4CU].
'It would bankrupt the union,' said Scott Mandel, a Pacoima Middle School teacher and representative of United Teachers Los Angeles in the eastern San Fernando Valley. Mandel, who does not speak officially for the union, said atrophy of the membership rolls would pose a serious threat if unions lose the case. 'We wouldn't have the resources to protect our teachers,' he said.
*Id.*

286. Laura Moser, *Why an Upcoming Supreme Court Case Has Teachers Unions Feeling Very, Very Nervous*, SLATE (July 8, 2015), http://slate.me/1HhPSry [perma.cc/9JB2-FK7B].

287. Garrett Epps, *The End of Public-Employee Unions?*, THE ATLANTIC (Feb. 20, 2015), http://theatln.tc/1MMZdL3 [perma.cc/2KC5-X6B5].

288. David G. Savage, *Supreme Court to Hear California Teacher's Suit—A 'Life or Death' Case for Unions*, L.A. TIMES (June 30, 2015), http://lat.ms/1R2OSPZ [perma.cc/RZ5M-E2ML] ("The California case not only poses a potential existential threat to public unions, but it could also weigh heavily on the Democratic Party, which depends on strong support from public employees and labor."). The "existential" language has become a staple of this genre. *See* Andrew J. Rotherham, *Doomsday for Teachers Unions?*, U.S. NEWS & WORLD REP. (July 2, 2015), http://bit.ly/1R5YBoB [perma.cc/X4BQ-SQRX] (predicting a system of "voluntary unionism represents an existential threat to teachers unions").

289. Moser, *supra* note 286.

290. *Id.*

291. *Id.*

notion that the financial health of public-sector unions is imperiled (and would have only been made more so by the Court) is risible. As this article has shown, unions are among the wealthiest political actors operating at the state and local level today. In California, the CTA alone—one public-sector union—spent more than $211 million on political activities from 2000 through 2009.[292] In 2005, public unions expended a combined $90 million to oppose Governor Schwarzenegger's preferred ballot measures.[293] One observer conservatively estimated that California public unions, taken together, have $120 million at their disposal to spend on politics *every year* (although it is hard to arrive at a precise figure given the opacity of union finances).[294] Bear in mind that these sums reference only spending characterized as political, and do not include the collective bargaining activities that have tremendous policy implications, but are nonetheless deemed non-political. Given this reality, the only way that union finances could be viewed as "imperiled" by the Court is if one defines "imperiled" as "potentially reduced." Moreover, even if the most alarmist predictions come true, public-sector unions will hardly be paupers; they will simply have to re-direct spending from patently extraneous issues (e.g., a ballot question on gun control) to core collective bargaining activities (e.g., salary negotiations).[295]

Second, the insinuation that the Court would be politicizing union dues in striking down *Abood* misapplies responsibility. Public-sector unions, particularly in California, have established themselves as fiercely partisan. As noted, more than 99.92% of CTA donations funded Democratic Party candidates between 2003 and 2012.[296] The CTA and other public-sector unions have weighed in on a number of ballot propositions, the majority of them left-of-center, often serving as the difference-makers on these measures.[297] Thus, if the legal issues surrounding public unions are politicized, then that politicization can only be understood as a function of the unions' lopsided political activities. Stated more bluntly, if public-sector union issues are politicized, the unions have only themselves

292. Howard Blume, *A Judge Throws Out a Challenge to How Unions Spend Teachers' Money*, L.A. TIMES (Sept. 30, 2015), http://lat.ms/1oVrgAs [perma.cc/X8XK-Q56K].

293. DISALVO, *supra* note 127, at 108.

294. *Id.* at 60, 72 (establishing that at the federal level, teachers' unions have donated $60 million to candidates over the past three decades).

295. *See id.* at 118 (theorizing convincingly that unions support a host of unrelated causes to build goodwill—"amass chits"—and build alliances).

296. Senik, *supra* note 80, at 202.

297. *See* DISALVO, *supra* note 127, at 54–55.

to blame. Even worse, portraying legal issues resulting from the collection of union dues as purely partisan does a disservice to the growing ranks of elected Democrats who view runaway spending on public-sector benefits as a real threat to both the democratic process and other government obligations.[298]

Third, as the alarmist article about classroom sizes above shows, the teachers' unions almost always couch their policy preferences in the language of education quality and student achievement. To be fair, this is an understandable public-relations tactic, and they are hardly alone in advocating for priorities in this manner.[299] But given past events—e.g., the maneuvering surrounding Proposition 98, where the CTA urged increased funding to reduce classroom sizes only to block a bill to achieve that very end after the ballot measure passed—one may be forgiven for not accepting these explanations at face value.[300] As one former teacher (and union official) explained it, "In the culture of public education, 'What's good for teachers and teacher unions is good for the country' is irrefutable public policy."[301]

In truth, the consequences of overruling *Abood* may not be as dire as the public unions fear—or their opponents hope. No matter what the Court does, public-sector unions are here to stay. While agency-shop states boast membership rates of 90%, non-agency shop states still have membership rates of 68%.[302] Although significant, such a drop-off can hardly be termed "existential," most obviously because unions in those other states actually *exist.* On balance, however, there is also evidence pointing toward a more notable decline. In Colorado, a 2001 requirement that public employee unions vote annually to re-authorize the collection of dues led to a 70% membership drop for the Colorado Association

298. *See, e.g.*, Pete Peterson & Kevin Klowden, *Democrats v. Unions?* CITY J. (Apr. 25, 2014), bit.ly/1oCCyd9 [perma.cc/675C-Q526] (discussing San Jose Mayor Chuck Reed, who has said "[s]kyrocketing retirement costs are crowding out funding for essential public services," and pushed for a ballot initiative to allow the government to re-negotiate prospective benefits while leaving existing benefits untouched); Mary Williams Walsh, *Rhode Island Averts Pension Disaster Without Raising Taxes*, N.Y. TIMES (Sept. 25, 2015), http://nyti.ms/1iQYZbJ [perma.cc/5PNE-65AY] (describing how in Rhode Island, Governor Gina M. Raimondo reformed pensions without raising taxes or issuing bonds, overcoming union resistance in the process).

299. MOE, *supra* note 1, at 22.

300. LIEBERMAN, *supra* note 145, at 98–99.

301. *Id.* at 55.

302. *See* MOE, *supra* note 1, at 52–55, 420; *see also* LIEBERMAN, *supra* note 145, at 164 (estimating "that union revenues would ordinarily drop by one-third or more" in the absence of automatic dues deductions).

of Public Employees.[303] In Utah, the end of automatic dues deductions for political activities in 2001 caused teachers' payments to fall 90%.[304] In Washington, a similar law passed in 1992 led to a 71% reduction in the percentage of teachers making such contributions.[305] Even still, if unions are no longer able to rely on automatic deductions, they will not disappear—they will simply have to better demonstrate their value to those they represent. The *Friedrichs* litigation has already prompted this realization in some quarters. "I think we took things for granted," AFSCME President Lee Saunders told *The Washington Post*.[306] "We stopped communicating with people, because we didn't feel like we needed to. That was the wrong approach, and we don't want to fall back into that trap."[307] And to reiterate a point made earlier, a significant drop in union fees would only further weaken the free-rider argument pushed by the CTA and other public-sector unions, as it would suggest an attenuated cost-benefit relationship between union fees and perceived rewards.

Although "organized labor" is often portrayed as a monolith sharing uniform concerns, the reality is far more complicated. Public-sector unions often have dramatically different priorities than their private-sector counterparts. For instance, during a time of budgetary battles, the leader of a large construction union in New York City described his group as "advocating for a fiscally sane economy," and acknowledged "competing interests between public- and private-sector unions" in the wake of Governor Andrew Cuomo's proposed reforms.[308] The private union leader added, logically enough, that "without a fiscally sound environment, we will not be able to attract new businesses to the city."[309] A similar dynamic occurred in New Jersey, where Governor Christie was endorsed for re-election by many of the state's private-sector unions—even after his high-profile clashes with the state teachers' unions.[310] The difference between public and private union

303. Will, *supra* note 214.

304. George F. Will, *Liberals' Wisconsin Waterloo*, WASH. POST (Aug. 24, 2011), http://wapo.st/1Tk7JlN [perma.cc/CPB9-3B5V].

305. *Id.*

306. Lydia DePillis, *The Supreme Court's Threat to Gut Unions is Giving the Labor Movement New Life*, WASH. POST (July 1, 2015), http://wapo.st/1QPKHXW [perma.cc/93VU-L6MB].

307. *Id.*

308. Charles V. Bagli, *Cuomo Gains an Ally for a Looming Fight With the Public-Employee Unions*, N.Y. TIMES (Dec. 10, 2010), http://nyti.ms/1WBFSzK [perma.cc/V5ME-M33R].

309. *Id.*

310. Matt Friedman, *Showing Off Union Support, Christie Rallies With the Laborers*, NEWARK STAR-LEDGER (Sept. 30, 2013), http://bit.ly/1Qaeo3G [perma.cc/9CTN-MVJP]; Steven

priorities is a product of their different sources of revenue. Simply put, "private-sector unions depend on economic growth and public-sector unions depend on government growth."[311] In 2009, for the first time, public-sector union membership outnumbered that in the private sector—a shift that will only aggravate these fault lines.[312]

Even different public-sector unions are sometimes at odds with each other on political priorities. For instance, recall the instrumental role of teachers unions in the 1988 passage of Proposition 98, the ballot initiative dedicating 40% of California revenues to education. Realizing that passage of the measure would likely decrease their allocation of state revenues, other public-sector unions opposed it. Nevertheless, in a "stunning display of political muscle" the teachers' unions succeeded in passing Proposition 98 "over the opposition of other public employee unions facing the prospect of a shrinking pie."[313] As state and local budgets come under increased pressure, these internecine public-sector union fissures will only become more frequent, and more pronounced. If a state's fiscal crisis became truly pressing and extreme measures were taken—say, in the form of a bankruptcy that discharged contractual obligations—public-sector unions could ultimately be victimized by their own favored policies, ironically enough. In that case, the public-sector union revolution will have devoured its own.

The Court properly decides issues on legal grounds, and policy judgments—for better or worse—are the province of legislators. The next *Friedrichs,* when it comes, should prevail on First Amendment grounds, and on that basis alone. Yet it is hard to ignore the distorting effects that *Abood* has inflicted on the democratic process. As observed, public-sector unions essentially get "two bites at the apple" in advancing their interests.[314] First, they collectively bargain with their employers. Then, they get a second bite through their electioneering and lobbying activities, in which they influence who sits at the other side of the table in future negotiations. Government officials have far less leverage than corporate officials in the private sector. They have less reliable

---

Malanga, Opinion, *How Chris Christie Split the Labor Movement in New Jersey,* WALL ST. J. (Sept. 28, 2013), http://on.wsj.com/1QaetV0 [perma.cc/2SR8-H5AD].

311. DiSALVO, *supra* note 127, at 34.

312. *Id.* at 39.

313. LIEBERMAN, *supra* note 145, at 98.

314. DiSALVO, *supra* note 127, at 20.

indicia of productivity, represent a less engaged bloc (shareholders tend to be more interested than voters in labor negotiations, and the latter suffer from tremendous information asymmetries), and often have less incentive to adopt an adversarial posture with the unions—indeed, in many cases, the politicians are essentially elected by the unions.[315] This reality has led Daniel DiSalvo, one of the most thoughtful observers on this subject, to conclude that "it is not immediately obvious what exactly the broader benefit to the American people is to allowing its government workers to unionize and collectively bargain."[316]

The internal operations of the public unions themselves also present normative democratic concerns. Keep in mind that unions almost always establish themselves as the exclusive bargaining representative for a district by a "certification election." Once this election occurs and the union is entrenched, it remains the exclusive bargaining representative for a district until it is de-certified. In practice, this means that the union essentially remains in power for years, as it is "very difficult, especially in the public sector, to decertify a union."[317] This is fundamentally anti-democratic. Like their fellow citizens, public employees vote for congressional representatives every two years, the president every four, and senators every six. It is unclear why a public-sector union should be allowed to remain a representative for decades on the basis of one election. Once again, the personal example of Rebecca Friedrichs well illustrates this conundrum. Friedrichs began teaching in 1988.[318] Despite being a schoolteacher for nearly three decades, she has never voted in a certification election.[319] Considering that her union was certified in the 1970s, the same could likely be said for the vast majority of her colleagues.[320] When one considers unions of even longer standing—like the AFT, which was certified in New York City in 1961—the democratic problem is further magnified.[321] In short, countless unions across the nation

315. *Id.* at 28.
316. *Id.* at 22.
317. *Id.* at 63. *See also* RICHARD KEARNEY, LABOR RELATIONS IN THE PUBLIC SECTOR 95 (4th ed. 2009) (noting that while de-certification happens with some frequency in the private sector, it remains "rare" in the public sector).
318. Sean Higgins, *Plaintiff Friedrichs: I Dared Defy the Unions*, WASH. EXAMINER (Oct. 5, 2015), http://washex.am/1OFTGmX [perma.cc/68Z6-KKA3] ("I started teaching in 1988. I don't know the exact year that the union for my district was first certified. It was some time in the 1970s. But I've never had a choice. I've never had a vote.").
319. *Id.*
320. *Id.*
321. LIEBERMAN, *supra* note 145, at 13.

exert tremendous power over their member employees, even though many—sometimes all—of the employees represented never cast a single vote for that representation.

Predicting how the Supreme Court will decide a given issue is an inexact science at best—and a fool's errand at worst—but it did appear that the Court was inclined to decide in favor of Friedrichs and her colleagues. Both the *Harris* and *Knox* decisions incisively exposed the First Amendment infringements suffered by public employees in this area, and likewise scrutinized, for essentially the first time, the constitutionality of the opt-out provisions that public-sector unions across the nation impose on their members. At oral argument for *Friedrichs*, at least some members of the Court appeared troubled by possible constitutional violations in this area. Crucially, several of the justices recognized the illusory distinction between collective bargaining and political activities in the public context. "Many critical points are matters of public concern," observed Justice Kennedy, specifically listing issues like tenure, merit pay, promotions, and classroom size.[322] Similarly, Chief Justice John Roberts asked California Solicitor General Edward DuMont for an example of a collective bargaining issue that "does not present a public policy question."[323] When Dumont suggested "mileage reimbursement rates" and "public safety," Chief Justice Roberts countered that even those seemingly banal expenditures involved issues of policy.[324] "That's money. That's how much money is going to have to be paid to the teachers," Roberts said.[325] The amount of money allocated to public education, he observed, is "always a public policy issue." [326] Proving that legal necessity can make strange bedfellows, some union supporters had extolled Justice Scalia as a potential savior of *Abood*, pointing to his separate writing in *Lehnert v. Ferris Faculty Association.*[327] But Scalia seemed to agree with Kennedy and Roberts on the inherently political nature of collective bargaining activities in the public sector. "The

322. Transcript of Oral Argument at 42–43, Friedrichs v. California Teachers Ass'n, 135 S. Ct. 2933 (2016) (No. 14-915).

323. *Id.* at 46.

324. *Id.* at 45–47.

325. *Id.*

326. *Id.* at 47.

327. Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in part and dissenting in part) ("Where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost."); *see* Michael Hiltzik, *How Justice Scalia Could Become the Savior of Public Employee Unions*, L.A. TIMES (May 29, 2014), http://lat.ms/1hvIgZC [perma.cc/6KA7-H55K].

problem is that everything that is collectively bargained with the government is within the political sphere, almost by definition," he said.[328] "That changes the situation."[329] Scalia's death, however, foreclosed the possibility of a decisive ruling. Instead, on March 29, a deadlocked court affirmed the lower court ruling, sparing *Abood*.[330] Given that the *Friedrichs* opinion is non-precedential, and considering the magnitude of the stakes involved, there is little doubt the Court will again be asked to clarify the First Amendment rights of public-sector employees. How a post-Scalia Court will rule on *Abood*, of course, remains unclear.

Were the Court to strike down *Abood*, it would sound a triumph for the First Amendment. For the first time in decades, teachers and other public employees would once again have a meaningful choice on core issues of political belief and public policy. Despite the apocalyptic tenor of much of the *Friedrichs* commentary, overruling *Abood* will hardly sow disaster. It will simply restore the proper balance of union interests and the constitutional rights of public employees in all states—not just in those states that already strike this balance, and have not suffered the turmoil forebodingly predicted by the unions. Given her centrality to the case, Rebecca Friedrichs deserves the last word. "The only difference I see," she said, envisioning a post-*Abood* world, "is that workers will have a choice. If teachers see that a union is good, they'll join. If they feel like me and they're troubled in their conscience, they won't join."[331] At heart, "it's a liberty issue. I just want liberty. I want to stop this silencing of my voice and the silencing of millions of teachers out there."[332]

328. Transcript of Oral Argument at 45, Friedrichs v. California Teachers Ass'n, 135 S. Ct. 2933 (2016) (No. 14-915).
329. *Id.* at 76.
330. Friedrichs, 136 S. Ct. at 1083.
331. Brown, *supra* note 60.
332. *Id.*

# *CHEVRON*'S DOMAIN AND THE RULE OF LAW

BY CORY R. LIU*

I. COMPETING VIEWS OF *CHEVRON* ..... 393
A. Justice Breyer's Position ..... 394
B. Justice Scalia's Position ..... 396
II. NO RESOLUTION IN SIGHT ..... 397
A. Early History ..... 397
B. Modern Cases ..... 401
C. Exceptions That Swallow the Rule ..... 405
III. ABANDONING *CHEVRON* TO PRESERVE THE RULE OF LAW ..... 410
A. Earlier Arguments ..... 410
B. Rule of Law ..... 414
IV. REPLACING *CHEVRON* ..... 418

* Law Clerk, Hon. Danny J. Boggs, United States Court of Appeals for the Sixth Circuit; J.D., Harvard Law School, 2015; A.B., University of Chicago, 2012.

The *Chevron* doctrine holds that courts should defer to executive agencies' reasonable interpretations of the statutes they administer.[1] Over the years, judges and commentators have criticized *Chevron* deference on a number of grounds. Some criticisms have been formalist, focusing on the Constitution[2] and section 706 of the Administrative Procedure Act.[3] Others have been based on the separation of powers, focusing on the desirability of having a judicial check on agency action.[4] This Article proposes an additional criticism of *Chevron* based on the rule of law: that courts' unfettered discretion to decide whether to follow *Chevron*'s framework results in arbitrary and unpredictable decisions about *Chevron*'s applicability.

The late Justice Antonin Scalia described the rule of law as a law of rules.[5] Rules are generalized pronouncements that dictate the outcomes of future cases, whereas standards are tests that allow judges to make case-by-case determinations based on the totality of the circumstances.[6] Justice Scalia argued that rules are preferable to standards when it comes to judge-made law, because rules ensure uniformity and predictability and reduce the influence of judges' political biases on their decisions.[7] Adopting general rules of law instead of discretion-conferring standards ensures that our government is, as John Adams put it, one "of laws and not of men."[8]

The dichotomy between rules and standards has been an essential part of the debate over *Chevron*'s domain—that is to say, the debate about which cases require the application of *Chevron*. For many years, Justice Scalia argued that *Chevron* should be read in a manner that advances the rule of law.[9] As recently as *City of*

1. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984).

2. *See, e.g.*, Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1247–48 (1994).

3. *See, e.g.*, Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 AM. U. ADMIN. L.J. 1, 9–10 (1996); Patrick J. Smith, Chevron*'s Conflict with the Administrative Procedure Act*, 32 VA. TAX REV. 813, 818 (2013).

4. City of Arlington v. FCC, 133 S. Ct. 1863, 1877–79 (2013) (Roberts, C.J., dissenting).

5. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989).

6. *Id.* at 1176.

7. *Id.* at 1178–79.

8. *See* United States v. United Mine Workers, 330 U.S. 258, 307 (1947) (Frankfurter, J., concurring) (attributing this phrase in the Massachusetts Declaration of Rights to John Adams).

9. *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 202–03, 205 (2006).

*Arlington v. FCC*,[10] Justice Scalia argued that *Chevron* should be read as creating an across-the-board presumption of *Chevron*'s applicability.[11] By contrast, Justice Stephen Breyer argued for a case-by-case approach that looks at the specific statute in question and asks whether Congress would have intended *Chevron* deference.[12] Justice Scalia argued that his across-the-board presumption served as a clear rule-based alternative to Justice Breyer's case-by-case approach.

However, as the Court's recent decision in *King v. Burwell*[13] shows, a majority of the Justices on the Court do not share Justice Scalia's rule-based vision for *Chevron*. Instead, they believe that the Court should retain wide latitude to determine whether *Chevron* applies in a given case, depending on whether the circumstances are "extraordinary."[14] Although the pendulum may have swung toward Justice Scalia's position in *City of Arlington*, it has now swung back toward Justice Breyer's case-by-case approach.

In this Article, I argue that the jurisprudence will continue to swing back and forth between these two positions, with the effect being that there will never be a definitive resolution on the question of *Chevron*'s domain. As a result, the only way to safeguard the rule of law is to abandon *Chevron* deference completely. Part I of this Article summarizes the competing approaches to understanding *Chevron*'s domain and explains how they reflect competing views about the desirability of rules and standards. Part II discusses why the debate over *Chevron*'s domain will likely never be resolved, which would effectively lead to a standard-based approach, as opposed to a rule-based approach. Part III argues that, in light of this observation, the only way to ensure a rule-based approach to judicial review of agencies' statutory interpretations is to abandon *Chevron* deference completely.

## I. COMPETING VIEWS OF *CHEVRON*

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[15] the Supreme Court announced a two-step approach to reviewing agency interpretations of law without providing a clear sense of the

10. 133 S. Ct. 1863 (2013).
11. *Id.* at 1874.
12. *See* Sunstein, *supra* note 9, at 202–03.
13. 135 S. Ct. 2480 (2015).
14. *Id.* at 2488–89.
15. 467 U.S. 837 (1984).

theory that justified it.[16] Although *Chevron* suggested a number of possible rationales, such as political accountability and technical expertise, it was unclear which of these rationales formed the basis of the Court's decision.[17] As Professor Cass Sunstein once put it, *Chevron* consisted of "two steps in search of a rationale."[18]

Over time, the Court settled on an understanding of *Chevron* as rooted in congressional intent to delegate law-interpreting authority to the agency.[19] Under this theory, "[c]ourts defer to agency interpretations of law when, and because, Congress has told them to do so."[20] As scholars have noted, one difficulty with this theory is that courts give *Chevron* deference even when the statute in question does not explicitly call for such deference.[21] The Court's response to this concern has been to characterize statutory ambiguity as "an implicit delegation from Congress to the agency to fill in the statutory gaps."[22] This implied-delegation theory represents the Court's modern understanding of *Chevron* deference.

But even as the Court settled on the implied-delegation theory, disputes arose over what kinds of statutes and what kinds of agency actions triggered *Chevron* deference.[23] In particular, two major positions, one associated with Justice Breyer, and the other with Justice Scalia, emerged in the debate over *Chevron*'s domain. These two positions reflect the Justices' differing views about the relative merits of discretion-conferring standards and clear rules of general applicability.

### *A. Justice Breyer's Position*

The first position, articulated and advocated by Justice Breyer, argues that *Chevron*'s applicability in a given case depends on whether Congress intended the particular legal question to be resolved by the agency, rather than by the courts. Justice Breyer

16. *See* Sunstein, *supra* note 9, at 195–98.
17. 467 U.S. at 844, 865–66.
18. Sunstein, *supra* note 9, at 195.
19. *Id.* at 197–98.
20. *Id.* at 198.
21. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 833 (2001) ("[*Chevron*] posited that courts have a duty to defer to reasonable agency interpretations not only when Congress expressly delegates interpretative authority to an agency, but also when Congress is silent or leaves ambiguity in a statute that an agency is charged with administering.").
22. King v. Burwell, 135 S. Ct. 2480, 2488 (2015) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).
23. *See* Merrill & Hickman, *supra* note 21, at 835.

described this highly particularized case-by-case approach when he served as a judge on the First Circuit in *Mayburg v. Secretary of Health and Human Services*, a case that was decided just months after *Chevron*:

> [C]ourts may still infer from the particular statutory circumstances an *implicit* congressional instruction about the degree of respect or deference they owe the agency on a question of law. They might do so by asking what a sensible legislator would have expected given the statutory circumstances. The less important the question of law, the more interstitial its character, the more closely related to the everyday administration of the statute and to the agency's (rather than the court's) administrative or substantive expertise, the less likely it is that Congress (would have) "wished" or "expected" the courts to remain indifferent to the agency's views. Conversely, the larger the question, the more its answer is likely to clarify or stabilize a broad area of law, the more likely Congress intended the courts to decide the question themselves.[24]

In a subsequent law review article, then-Judge Breyer expanded on his arguments and suggested that courts should engage in "stricter review of matters of law, where courts are more expert, but more lenient review of matters of policy, where agencies are more expert."[25] This approach is based on the idea that the stringency of judicial review should be tailored to the "institutional capacities and strengths" of the judiciary.[26]

Thus, to summarize Justice Breyer's approach to *Chevron*, when courts are deciding whether to defer to an agency in a case, they should look not only at whether Congress intended the agency to interpret the statute, but also at whether Congress intended the agency to resolve the specific question before the court. In addition, the degree of deference given by the court also depends on Congress's intent. These examinations of congressional intent can and should be informed by the court's assessment of its own institutional competencies.

Justice Breyer's approach draws from the premises of "imaginative reconstruction," an interpretive technique that purports to discern what Congress would have intended if it had

24. 740 F.2d 100, 106 (1st Cir. 1984) (citations omitted).

25. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 397 (1986).

26. *Id.* at 398.

spoken on the precise issue before the court.[27] Under Justice Breyer's interpretation of *Chevron*, courts answer the question of whether Congress impliedly delegated interpretive authority to the agency by reconstructing Congress's policy goals and imagining whether—and to what degree—Congress would have wanted judicial deference. This case-by-case approach reflects Justice Breyer's preference for standards that allow judges to make individualized decisions in cases based on consequentialist reasoning.

### *B. Justice Scalia's Position*

The second major position on *Chevron* deference, articulated by Justice Scalia, agrees with Justice Breyer in approving the implied-delegation theory. However, as a proponent of rules over standards, Justice Scalia argued that *Chevron* should be read as replacing "statute-by-statute evaluation (which was assuredly a font of uncertainty and litigation) with an across-the-board presumption that, in the case of ambiguity, agency discretion is meant."[28] This presumption would operate as "a background rule of law against which Congress can legislate," meaning that Congress could always abrogate the presumption through express statutory language.[29]

Acknowledging that an across-the-board presumption of *Chevron*'s applicability was "not a 100% accurate estimation of modern congressional intent," Justice Scalia argued that "the prior case-by-case evaluation was not so either—and was becoming less and less so, as the sheer volume of modern dockets made it less and less possible for the Supreme Court to police application of an ineffable rule."[30] Drawing on his textualist instincts, Justice Scalia noted that "the quest for the 'genuine' legislative intent is probably a wild-goose chase anyway" because in the "vast majority of cases . . . Congress *neither* (1) intended a single result, *nor* (2) meant to confer discretion upon the agency, but rather (3) didn't think about the matter at all."[31] According to Justice Scalia, an across-the-board presumption "more accurately reflects the reality

27. *See* John F. Manning, *Statutory Pragmatism and Constitutional Structure*, 120 HARV. L. REV. 1161, 1161, 1164 (2007).

28. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516.

29. *Id.* at 517.

30. *Id.*

31. *Id.*

of government, and thus more adequately serves its needs."[32]

Justice Breyer disagreed, believing that an across-the-board presumption would be overly simplistic because it could not adequately address "many different types of circumstances, including different statutes, different kinds of application, different substantive regulatory or administrative problems, and different legal postures."[33] In his view, the "attractive simplicity" of an across-the-board presumption would likely prove ineffective at addressing the complex needs of the administrative state.[34] But in Justice Scalia's view, simplicity was the greatest virtue of such an approach. A simple rule of presumed deference is "easier to follow and thus easier to predict,"[35] avoiding the "font of uncertainty and litigation"[36] that would arise under Justice Breyer's case-by-case approach.

Thus, although Justice Breyer and Justice Scalia both accepted the theory of implied delegation, they had very different views about how judges should implement that theory. That disagreement was rooted in their differing views about the relative merits of rules and standards. Whereas Justice Breyer favored discretion-conferring standards because he wanted judges to address the complexity of each case on an individual level, Justice Scalia believed that a clear rule was needed to prevent confusion and eliminate unpredictability. For several decades, these differences about the proper scope of *Chevron*'s domain would be debated at the Supreme Court, with the Court swinging back and forth like a pendulum between the positions of Justice Breyer and Justice Scalia.

## II. NO RESOLUTION IN SIGHT

### *A. Early History*

In the history of the debate between Justice Breyer and Justice Scalia, the *Chevron* decision initially seemed to favor Justice Scalia's position. *Chevron* did not engage in the sort of nuanced, case-by-case analysis envisioned by Justice Breyer, but instead followed a two-step framework that appeared to be premised on an across-the-

32. *Id.* at 521.
33. Breyer, *supra* note 25, at 373.
34. *Id.* at 373.
35. Scalia, *supra* note 28, at 521.
36. *Id.* at 516.

board presumption of congressional intent to delegate law-interpreting authority. As the Court stated in *Chevron*:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. . . . If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[37]

Recognizing that this passage seemed to call for an across-the-board presumption, Justice Breyer referred to the tension between his view and the Court's approach in *Chevron* as "The Problem of the *Chevron* Case."[38] In response to this problem, Justice Breyer argued that his case-by-case approach was compatible with a "less literal"[39] and "less far-reaching"[40] interpretation of *Chevron* that better met the complex needs of the administrative state.

Although *Chevron* initially supported Justice Scalia's position, a trilogy of cases from the early 2000s involving *Chevron*'s domain brought Justice Breyer's vision of *Chevron* to the forefront. In *Christensen v. Harris County*,[41] the Court held that *Chevron*'s two-step framework did not apply in its review of a legal interpretation by the Department of Labor set forth in an opinion letter.[42] The Court reasoned that the opinion letter was not entitled to *Chevron* deference because it was not the product of "formal adjudication or notice-and-comment rulemaking" and "lack[ed] the force of law."[43] Justice Scalia disagreed, arguing that *Chevron* should apply to any interpretation that "represents the authoritative view of the Department of Labor," even if it appears in an opinion letter or amicus brief.[44] *Christensen* established the existence of boundaries to the scope of *Chevron*'s domain and opened the door to future litigation over the applicability of *Chevron*.

One year later, the Court delivered a huge victory to Justice

37. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).
38. Breyer, *supra* note 25, at 372; *see* Sunstein, *supra* note 9, at 201.
39. Breyer, *supra* note 25, at 379.
40. *Id.* at 380.
41. 529 U.S. 576 (2000).
42. *Id.* at 586–88.
43. *Id.* at 587.
44. *Id.* at 591 (Scalia, J., concurring in part and concurring in the judgment).

Breyer's position in *United States v. Mead Corp.*,[45] which held that tariff classification rulings by the United States Customs Service were not entitled to review under the *Chevron* framework.[46] Hearkening to the language of then-Judge Breyer's *Mayburg* decision and his 1986 law review article, the Court stated that the "fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position."[47] Based on an analysis of those factors, courts should follow *Chevron* when "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[48] After examining the particularities of the Harmonized Tariff Schedule of the United States—such as the legislative history and the fact that 10,000 to 15,000 tariff classification rulings are issued each year[49]—the Court concluded that the Customs Service's tariff classification was "beyond the *Chevron* pale."[50]

Justice Scalia dissented, arguing that "[w]hat was previously a general presumption of authority in agencies to resolve ambiguity in the statutes they have been authorized to enforce has been changed [by the Court] to a presumption of no such authority, which must be overcome by affirmative legislative intent to the contrary."[51] The Court "largely replaced *Chevron* . . . with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th'ol 'totality of the circumstances' test."[52] Drawing on his preference for clear rules over broad standards, Justice Scalia predicted that the "grab bag" of factors considered by the Court would lead to "protracted confusion,"[53] "uncertainty," "unpredictability," and "endless litigation."[54] *Mead* represented a significant setback for Justice Scalia's reading of *Chevron* as establishing an "across-the-board

45. 533 U.S. 218 (2001).
46. *Id.* at 221.
47. *Id.* at 228 (footnotes omitted).
48. *Id.* at 226–27.
49. *Id.* at 233–34, 238 n.19.
50. *Id.* at 234.
51. *Id.* at 239 (Scalia, J., dissenting).
52. *Id.* at 241.
53. *Id.* at 245.
54. *Id.* at 250.

presumption, which operates as a background rule of law against which Congress legislates: Ambiguity means Congress intended agency discretion."[55]

Justice Breyer's case-by-case approach to *Chevron* came to full fruition in *Barnhart v. Walton*.[56] In that case, the Court considered the legality of the Social Security Administration's interpretation of a regulation interpreting the statutory definition of a "disability."[57] Walton argued that *Chevron* was inapplicable because the agency's interpretation existed prior to its promulgation of the regulation and therefore was not achieved through notice-and-comment rulemaking.[58] Writing for the Court, Justice Breyer rejected this argument and applied the *Chevron* framework because:

> [T]he interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.[59]

Once again, the Court drew from the language of then-Judge Breyer's decision in *Mayburg* and his 1986 law review article, applying a totality-of-the-circumstances analysis to determine *Chevron*'s applicability.

*Barnhart*'s multifactor inquiry would have been totally unnecessary under Justice Scalia's interpretation of *Chevron*, as Justice Scalia noted in a separate concurrence.[60] The question of *Chevron*'s applicability would have depended simply on whether the interpretation represented the authoritative view of the agency.[61] In Justice Scalia's view, Justice Breyer's reliance on a complex multifactor inquiry was an attempt to resurrect "an anachronism—a relic of the pre-*Chevron* days."[62]

*Mead* and *Barnhart* did not represent a full implementation of the view that Justice Breyer espoused in his 1986 law review article, which would have used a totality-of-the-circumstances test as the

55. *Id.* at 257.
56. 535 U.S. 212 (2002).
57. *Id.* at 217.
58. *Id.* at 221.
59. *Id.* at 222.
60. *Id.* at 226 (Scalia, J., concurring).
61. *See id.* at 226–27.
62. *Id.*

definitive inquiry for whether courts defer to agencies.[63] Instead, *Barnhart* accepted the *Chevron* two-step framework, but used a totality-of-the-circumstances test for the threshold inquiry of whether *Chevron* applies—also known as the question of *Chevron*'s domain or *Chevron* Step Zero.[64] Although Justice Breyer was not able to fully implement his vision for agency deference, *Barnhart* nonetheless represented a significant victory for his case-by-case approach. As Justice Scalia lamented in *Mead*, this development transformed "a general presumption of authority in agencies to resolve ambiguity . . . to a presumption of no such authority, which must be overcome by affirmative legislative intent to the contrary."[65]

### *B. Modern Cases*

In 2013, however, the Court swung back to Justice Scalia's position in *City of Arlington v. FCC*.[66] In that case, the FCC issued a declaratory ruling interpreting a provision of the Telecommunications Act of 1996 that required state and local governments to act on wireless siting applications "within a reasonable period of time."[67] The declaratory ruling stated that "a reasonable period of time" to process a collocation application (an application to place a new antenna on an existing tower) was presumptively 90 days, but was 150 days for all other applications.[68] The petitioners challenged the FCC's jurisdiction to issue such an interpretation and argued that the *Chevron* framework did not apply to the question because it was jurisdictional.[69]

Writing for the majority, Justice Scalia rejected this argument, calling the distinction between jurisdictional and nonjurisdictional interpretations "a mirage," because "[n]o matter how it is framed, the question a court faces . . . is always, simply, *whether the agency has stayed within the bounds of its statutory authority*."[70] In the primary discussion in his opinion, Justice Scalia conspicuously declined to mention *Mead* or *Barnhart*. Only in his rebuttal to the dissent did Justice Scalia briefly discuss the impact of *Mead*:

63. Breyer, *supra* note 25, at 380–81.
64. *Barnhart*, 535 U.S. at 217–18.
65. United States v. Mead Corp., 533 U.S. 218, 239 (2001) (Scalia, J., dissenting).
66. 133 S. Ct. 1863 (2013).
67. *Id.* at 1866.
68. *Id.* at 1867.
69. *Id.* at 1867–68.
70. *Id.* at 1868.

> The dissent is correct that *United States v. Mead Corp.* requires that, for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted. No one disputes that. But *Mead* denied *Chevron* deference to action, by an agency with rulemaking authority, that was not rulemaking. What the dissent needs, and fails to produce, is a single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field.[71]

As Patrick Smith has argued, this passage rewrote the holding of *Mead*.[72] By describing *Mead* as denying *Chevron* deference "to action, by an agency with rulemaking authority, that was not rulemaking," Justice Scalia made it appear as though the applicability of *Chevron* turned on the mere fact that the agency action in *Mead* was not rulemaking.[73] That ignores *Mead*'s discussion of how, even though the agency action was not the product of notice-and-comment rulemaking, that fact alone was not enough to determine whether *Chevron* applied: "[A]s significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case."[74]

Justice Scalia explicitly rooted his marginalization of *Mead* in his concern for rule-of-law ideals. If "*every* agency rule must be subjected to a *de novo* determination of whether *the particular issue* was committed to agency discretion," courts would engage in an "open-ended hunt for congressional intent."[75] The result would be "[t]hirteen Courts of Appeals applying a totality-of-the-circumstances test," which would "render the binding effect of agency rules unpredictable and destroy the whole stabilizing purpose of *Chevron*."[76] Echoing his dissent in *Mead*, Justice Scalia argued that an across-the-board presumption of *Chevron*'s applicability would promote the rule of law by eliminating the need for "some sort of totality-of-the-circumstances test—which is really, of course, not a test at all but an invitation to make an ad hoc judgment regarding congressional intent."[77]

---

71. *Id.* at 1874 (citation omitted).
72. Patrick J. Smith, Chevron *Step Zero After* City of Arlington, 140 TAX NOTES 713, 714–15 (2013).
73. *City of Arlington*, 133 S. Ct. at 1874.
74. United States v. Mead Corp., 533 U.S. 218, 230–31 (2001).
75. *City of Arlington*, 133 S. Ct. at 1874.
76. *Id.*
77. *Id.*

Sensing Justice Scalia's attempt to undercut his case-by-case approach, Justice Breyer wrote a separate concurrence emphasizing the "context-specific" factors that were considered in *Mead* and *Barnhart*.[78] In addition, Chief Justice John Roberts wrote a dissenting opinion, joined by Justices Anthony Kennedy and Samuel Alito.[79] Invoking *Mead*, Chief Justice Roberts argued that "whether a particular agency interpretation warrants *Chevron* deference turns on the court's determination whether Congress has delegated to the agency the authority to interpret the statutory ambiguity at issue."[80] Unlike Justice Breyer, Chief Justice Roberts based his critique of Justice Scalia's approach on concerns about the extent to which the modern administrative state "wields vast power and touches almost every aspect of daily life."[81] Chief Justice Roberts argued that "the danger posed by the growing power of the administrative state cannot be dismissed."[82] Nonetheless, despite these contrary opinions from Justice Breyer and Chief Justice Roberts, Justice Scalia's majority opinion in *City of Arlington* received the votes of four other Justices, appearing to signal a revival of his rule-based interpretation of *Chevron*.

Just two years after *City of Arlington*, however, the pendulum swung back in the direction of Justice Breyer's position. In *King v. Burwell*,[83] the Court considered an IRS regulation interpreting the Affordable Care Act's provision of tax credits to those who buy health insurance on an "Exchange established by the State."[84] At issue was whether the IRS could interpret "Exchange established by the State" to include federally created exchanges in addition to state-created exchanges.[85] The Fourth Circuit followed the *Chevron* framework and upheld the regulation as a reasonable interpretation of the statute,[86] but the Supreme Court took a different approach.

Writing for the majority, Chief Justice Roberts affirmed the judgment of the Fourth Circuit, but disagreed with the Fourth

78. *Id.* at 1875 (Breyer, J., concurring in part and concurring in the judgment).
79. *Id.* at 1877 (Roberts, C.J., dissenting).
80. *Id.* at 1881.
81. *Id.* at 1878 (quoting Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 499 (2010)).
82. *Id.* at 1879.
83. 135 S. Ct. 2480 (2015).
84. *Id.* at 2487.
85. *Id.* at 2488.
86. *Id.*

Circuit's application of *Chevron*.[87] Chief Justice Roberts noted that although the Court "often" followed *Chevron* in cases involving agency interpretations of statutes, in "extraordinary cases" there "may be reason to hesitate" about whether Congress intended an implicit delegation of interpretive authority to the agency.[88] In the case at hand, Chief Justice Roberts observed that the Affordable Care Act's tax credits were "among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people."[89] Therefore, the availability of those credits on federal exchanges implicated a question of "deep economic and political significance" that was "central to the statutory scheme."[90] In addition, the Chief Justice noted that the IRS "has no expertise in crafting health insurance policy."[91] Based on those circumstances, Chief Justice Roberts concluded that it was "especially unlikely that Congress would have delegated this decision to the IRS."[92]

Although *King*'s discussion of *Chevron* occupied just a few paragraphs of a lengthy opinion,[93] that discussion was significant. If Chief Justice Roberts had wanted to affirm the Fourth Circuit's ruling in the least controversial way, he could have simply followed the *Chevron* framework. Given that Chief Justice Roberts expressly concluded that the statute was ambiguous,[94] he could have affirmed the regulation as a reasonable interpretation of the statute under *Chevron*. Instead, Chief Justice Roberts went out of his way to ignore *Chevron* and engage in an independent analysis of the statute's meaning.

In explaining his decision to bypass *Chevron*, Chief Justice Roberts quoted *FDA v. Brown & Williamson Tobacco Corp.*[95] and *Utility Air Regulatory Group v. EPA*.[96] Those cases differ from *King* because they purported to follow the *Chevron* framework while examining the magnitude of the statute's policy implications.[97] By contrast, *King* addressed the separate question of whether *Chevron*

87. *Id.* at 2489.
88. *Id.* at 2488–89.
89. *Id.* at 2489.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 2488–89.
94. *Id.* at 2492.
95. 529 U.S. 120, 147 (2000).
96. 134 S. Ct. 2427, 2444 (2014).
97. *Id.* at 2439; *Brown & Williamson*, 529 U.S. at 125–26.

even applied in the first place—the question of *Chevron*'s domain or *Chevron* Step Zero.[98] In analyzing the applicability of *Chevron* in *King*, Chief Justice Roberts employed a multifactor analysis of the sort used in *Mead* and *Barnhart*.[99] He looked at "the related expertise of the Agency" and the "importance of the question to administration of the statute," two factors used by Justice Breyer in *Barnhart*.[100] Thus, in *King v. Burwell*, Chief Justice Roberts seems to have picked up where he left off in *City of Arlington*, conducting what Justice Scalia referred to as a "massive revision of our *Chevron* jurisprudence."[101]

### *C. Exceptions That Swallow the Rule*

The foregoing history, spanning multiple decades, demonstrates that the back-and-forth debate over *Chevron*'s domain has no end in sight. When Justice Scalia wrote his 1989 law review article, his dissenting opinion in *Mead*, and his majority opinion in *City of Arlington*, he dreamed of establishing an across-the-board presumption of *Chevron*'s applicability. Justice Scalia hoped that such a presumption would serve as an alternative to Justice Breyer's multifactor totality-of-the-circumstances approach and promote the virtues of the rule of law—predictability, uniformity, and ease of administrability—in the complicated field of administrative law.

Unfortunately, Justice Scalia's efforts appear not to have been successful. The exceptions to *Chevron* have begun to swallow the rule. In addition to the Court's recent undermining of *Chevron* in *King*, there have been a number of smaller skirmishes over the scope of *Chevron*'s domain with respect to particular areas of law. Each of these potential exceptions to the applicability of *Chevron* threatens to undermine Justice Scalia's vision of an across-the-board presumption and bring *Chevron* even further toward a case-by-case approach of the sort envisioned by Justice Breyer.

One of the most recent examples of an effort to create a new exception to *Chevron* involves the question of whether courts should follow the *Chevron* framework when evaluating an agency's interpretation of a "hybrid statute" that has both civil and criminal applications. In *Esquivel-Quintana v. Lynch*,[102] the Sixth Circuit was

98. *King*, 135 S. Ct. at 2488–89.
99. *Id.*
100. Barnhart v. Walton, 535 U.S. 212, 222 (2002).
101. City of Arlington v. FCC, 133 S. Ct. 1863, 1874 (2013).
102. 810 F.3d 1019 (6th Cir. 2016).

confronted with this question. Juan Esquivel-Quintana was a Mexican national who pleaded guilty to statutory rape in California and then moved to Michigan.[103] After the move, the government sought to deport him from the country on the ground that he had been convicted of "sexual abuse of a minor," which is an aggravated felony under the Immigration and Nationality Act.[104] Esquivel-Quintana argued that his conviction for a consensual sex act was not "sexual abuse of a minor," but the Board of Immigration Appeals disagreed and ordered him removed from the country.[105] At issue in the case was whether the *Chevron* framework applied to the Board's decision to interpret "sexual abuse of a minor" as including Esquivel-Quintana's conviction.[106]

Although it is well established that precedential decisions of the Board of Immigration Appeals receive *Chevron* deference,[107] Esquivel-Quintana argued that there should be an exception for cases involving statutes with both civil and criminal applications.[108] The statute in his case, 8 U.S.C. § 1101(a)(43)(A), defines "sexual abuse of a minor" as an aggravated felony. Although a conviction for an aggravated felony can serve as a ground for removal under 8 U.S.C. § 1227(a)(2)(A)(iii), it can also result in an enhanced sentence for those who are convicted of illegal reentry under 8 U.S.C. § 1227(a)(2)(A)(iii). In addition, 8 U.S.C. § 1327 makes it a crime to assist an alien convicted of an aggravated felony with illegally entering the United States. Thus, the meaning of "sexual abuse of a minor" has both civil and criminal applications.

In the criminal context, the rule of lenity requires ambiguities to be resolved in favor of the defendant.[109] This ensures that the public has adequate notice of what conduct is criminalized, and preserves the separation of powers by ensuring that criminal laws are written by the legislature and not executive agencies.[110] But in the civil context, *Chevron* requires courts to resolve ambiguities in favor of the government by deferring to agencies' reasonable statutory interpretations. Because the same statute cannot have different meanings in different cases—"a statute is not a

103. *Id.* at 1021.
104. *Id.*
105. *Id.*
106. *Id.* at 1021–24.
107. *See* INS v. Aguirre-Aguirre, 526 U.S. 415, 424–25 (1999).
108. *Esquivel-Quintana*, 810 F.3d at 1023.
109. *See, e.g.*, Moskal v. United States, 498 U.S. 103, 108 (1990).
110. *Esquivel-Quintana*, 810 F.3d at 1023.

chameleon"[111]—Esquivel-Quintana argued that the court could not apply *Chevron* in his civil immigration case and was required to apply the rule of lenity instead.[112]

Writing for the majority, Judge Boggs acknowledged that "deference to agency interpretations of laws with criminal applications threatens a complete undermining of the Constitution's separation of powers."[113] Nevertheless, Judge Boggs held that, under the Supreme Court's precedent in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,[114] the court was bound to follow *Chevron*.[115] Applying the *Chevron* framework, Judge Boggs deferred to the Board's reasonable interpretation of "sexual abuse of a minor" as including Esquivel-Quintana's conviction.[116]

Judge Sutton dissented,[117] drawing extensively from his earlier concurrence in *Carter v. Welles-Bowen Realty, Inc.*,[118] which laid much of the intellectual groundwork for Esquivel-Quintana's argument. Judge Sutton would have held that "*Chevron* has no role to play in construing hybrid statutes."[119] In explaining his rationale for allowing this exception to *Chevron*, Judge Sutton noted a number of situations in which the Supreme Court has declined to follow *Chevron*:

> An exception to *Chevron* for dual-role statutes would not be the least bit unusual. Deference under that rule is categorically unavailable, the Supreme Court has held, in many settings: (1) agency interpretations of statutes the agency is not "charged with administering," *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n. 9 (1997); (2) agency interpretations of "the scope of the judicial power vested by [a] statute," such as the availability of a private right of action, *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649–50 (1990); *see Alexander v. Sandoval*, 532 U.S. 275, 288–91 (2001); (3) agency interpretations that result from procedures that were not "in the exercise" of the agency's authority "to make rules carrying the force of law," *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); (4) agency interpretations with respect to "extraordinary

111. *Id.* (quoting Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 730 (6th Cir. 2013) (Sutton, J., concurring)).
112. *Id.* at 1022–23.
113. *Id.* at 1023–24.
114. 515 U.S. 687, 704 n.18 (1995).
115. *Esquivel-Quintana*, 810 F.3d at 1024.
116. *Id.* at 1025.
117. *Id.* at 1027–1032 (Sutton, J., concurring in part and dissenting in part).
118. 736 F.3d 722, 729 (6th Cir. 2013) (Sutton, J., concurring).
119. *Esquivel-Quintana*, 810 F.3d at 1031 (Sutton, J., concurring in part and dissenting in part).

> cases" where it is unlikely Congress "intended . . . an implicit delegation" to the agency, *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015); and (5) agency interpretations of criminal statutes, *Abramski*, 134 S. Ct. at 2274.[120]

By providing this lengthy list of exceptions to *Chevron*, Judge Sutton made it clear that, in his view, hoping for an across-the-board presumption of *Chevron*'s applicability is a pipe dream. The battle to prevent case-by-case incursions on *Chevron*'s domain has already been lost, Judge Sutton argued, and with so many exceptions to *Chevron* already, we might as well add another exception when there are compelling reasons for doing so.

Another example of a skirmish over *Chevron*'s domain deals with patent law. Courts do not currently give *Chevron* deference to the United States Patent and Trademark Office when it examines patents, but a number of scholars have begun to challenge this thinking. In a 2007 law review article, Professors Stuart Benjamin and Arti Rai argued that "the analysis in *Mead* suggests that *Chevron* may be the appropriate standard for patent denials."[121] More recently, Professor Melissa Wasserman set forth a highly detailed argument for why the Leahy-Smith America Invents Act, passed in 2011, evinces a congressional intent for courts to follow *Chevron* when reviewing the Patent and Trademark Office's decisions.[122] On the other hand, Professor Orin Kerr has argued strongly against the application of *Chevron* because patent law predates the modern administrative state and operates using different mechanisms.[123] The Federal Circuit—which has near-exclusive jurisdiction over patent appeals[124]—has yet to apply *Chevron* in the context of patent law. Nevertheless, the vigorous debate between these professors provides another example of how the malleable, case-by-case inquiry set forth in *Mead*, *Barnhart*, and *King* can result in increased litigation and uncertainty over the scope of *Chevron*'s domain.

Today, the attack on *Chevron* is relentless. Several Justices have openly encouraged litigants to challenge the scope of *Chevron*'s domain. In *Whitman v. United States*, Justices Scalia and Thomas

---

120. *Id.* at 1031–32.

121. Stuart Minor Benjamin & Arti K. Rai, *Who's Afraid of the APA? What the Patent System Can Learn from Administrative Law*, 95 GEO. L.J. 269, 318 (2007).

122. Melissa F. Wasserman, *The Changing Guard of Patent Law:* Chevron *Deference for the PTO*, 54 WM. & MARY L. REV. 1959, 1977–2005 (2013).

123. Orin S. Kerr, *Rethinking Patent Law in the Administrative State*, 42 WM. & MARY L. REV. 127, 162 (2000).

124. *See* Wasserman, *supra* note 122, at 1963.

endorsed the hybrid-statute argument espoused by Judge Sutton in *Carter* and *Esquivel-Quintana.*[125] In *Perez v. Mortgage Bankers Ass'n,*[126] Justices Scalia, Thomas, and Alito signaled their willingness to eliminate deference to agencies' interpretations of their own regulations,[127] a position which Justice Thomas reiterated in *United Student Aid Funds, Inc. v. Bible.*[128] And in *Michigan v. EPA,* Justice Thomas called for a total abolition of *Chevron* deference.[129] These anti-*Chevron* positions may not gain the support of a majority of the Justices in the near future, but they do indicate a shift in thinking among the conservative Justices about the desirability of broad *Chevron* deference. Justice Scalia—who once championed an across-the-board presumption of *Chevron*'s applicability to promote the rule of law—appears to have reconsidered his support for deference in his final years on the Court. Despite his vigorous denunciation of Chief Justice Roberts's dissent in *City of Arlington,* it may well be that Justice Scalia came to be persuaded of "the danger posed by the growing power of the administrative state."[130]

As the conservative Justices have become increasingly hostile to *Chevron* deference, none of the liberal Justices have taken to championing Justice Scalia's across-the-board presumption. In light of Justice Breyer's totality-of-the-circumstances approach in *Barnhart* and Chief Justice Roberts's adoption of that approach in *King,* it now seems that support on the Court for an across-the-board presumption is at an all-time low.

In the early years of Justice Scalia's career, he envisioned a rule-based approach to *Chevron* deference. But that vision can only be realized if courts consistently and uniformly adopt his approach. That scenario is unlikely ever to occur. Because *Chevron* is a judge-made doctrine, judges will always decide the scope of *Chevron*'s domain. As history has shown, those judges will inevitably have differing opinions, oftentimes based on policy judgments. As a result, there will always be uncertainty and unpredictability about which cases are "beyond the *Chevron* pale."[131] Despite Justice Scalia's best efforts, *Chevron* has become a doctrine that

125. 135 S. Ct. 352, 352–54 (2014) (Scalia, J., statement respecting denial of certiorari).
126. 135 S. Ct. 1199 (2015).
127. *Id.* at 1210–11 (Alito, J., concurring in part and concurring in the judgment); *id.* at 1211–13 (Scalia, J., concurring in the judgment); *id.* at 1213–25 (Thomas, J., concurring in the judgment).
128. 136 S. Ct. 1607 (2016) (Thomas, J., statement respecting denial of certiorari).
129. Michigan v. EPA, 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring).
130. City of Arlington v. FCC, 133 S. Ct. 1863, 1879 (2013).
131. United States v. Mead Corp., 533 U.S. 218, 234 (2001).

undermines the rule of law.

## III. ABANDONING *CHEVRON* TO PRESERVE THE RULE OF LAW

### *A. Earlier Arguments*

In light of how far *Chevron* doctrine has deviated from rule-of-law ideals, the Supreme Court should abandon the *Chevron* framework. Although I am not the first person to call for the abandonment of *Chevron*, most critics who have done so have focused on formalist arguments and arguments based on the separation of powers.

The most prominent of the formalist arguments contends that *Chevron* violates the United States Constitution. In *Michigan v. EPA*,[132] for example, Justice Thomas wrote in a concurrence that he had "serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes."[133] In his view:

> [*Chevron* deference] wrests from Courts the ultimate interpretative authority to "say what the law is," *Marbury v. Madison*, 1 Cranch 137, 177 (1803), and hands it over to the Executive. . . . Such a transfer is in tension with Article III's Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies.[134]

In addition to raising Article III concerns, Justice Thomas also argued that *Chevron* "runs headlong" into Article I, "which vests '[a]ll legislative Powers herein granted' in Congress."[135] According to Justice Thomas, "if we give the force of law to agency pronouncements on matters of private conduct as to which Congress did not actually have an intent, we permit a body other than Congress to perform a function that requires an exercise of the legislative power."[136] Justice Thomas's strongly worded concurrence in *Michigan v. EPA* was the first time a Supreme Court Justice called for the overturning of *Chevron* on constitutional grounds, echoing concerns that commentators had been making for quite some time.[137]

Another formalist argument contends that *Chevron* violates the

---

132. 135 S. Ct. 2699 (2015).
133. *Id.* at 2712 (Thomas, J., concurring).
134. *Id.*
135. *Id.* at 2713 (quoting U.S. CONST. art. I, § 1).
136. *Id.* (citation omitted) (quoting United States v. Mead Corp., 533 U.S. 218, 229 (2001)).
137. *See, e.g.*, Lawson, *supra* note 2, at 1247–48.

Administrative Procedure Act, the quasi-constitutional statute that governs the administrative state. Section 706 of the Act provides for judicial review of agency actions and states that "the reviewing court *shall* decide all relevant questions of law, [and] interpret . . . statutory provisions."[138] Patrick Smith has argued that this mandatory language in the Act cannot be reconciled with *Chevron*'s statement that "a reviewing court must accept an agency's 'permissible construction of the statute' even if the agency interpretation is not 'the reading the court would have reached if the question initially had arisen in a judicial proceeding.'"[139] As Professor Robert Anthony put it, "[o]n the face of this statute, it is wrong for the courts to abdicate their office of determining the meaning of the agency regulation and submissively give controlling effect to a not-inconsistent agency position."[140] Because *Chevron* expressly requires courts to defer to interpretations with which they do not agree, *Chevron* arguably violates section 706 of the Administrative Procedure Act.

These formalist arguments, based on the texts of the Constitution and the Administrative Procedure Act, raise important questions about *Chevron*'s legitimacy. However, many would contend that decades of post-*Chevron* precedent and practice undercut these arguments.[141] The Supreme Court rarely overturns longstanding precedents without a compelling reason for doing so, and the Court will often sanction a practice if it is supported by historical tradition, even if that practice lacks a clear basis in constitutional or statutory text.

In constitutional law, questions about the Privileges or Immunities Clause,[142] the nondelegation doctrine,[143] and the

138. 5 U.S.C. § 706 (2012) (emphasis added).

139. Smith, *supra* note 3, at 818 (quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 & n.11 (1984)).

140. Anthony, *supra* note 3, at 9.

141. *Cf.* Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 400 (2015) (invoking precedent to criticize libertarian administrative-law decisions from the D.C. Circuit); Adrian Vermeule, *No*, 93 TEX. L. REV. 1547, 1547 (2015) (reviewing PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014)) (invoking precedent to criticize constitutional arguments against the legality of the administrative state).

142. *See* McDonald v. City of Chicago, 561 U.S. 742, 808–09 (2010) (Thomas, J., concurring in part and concurring in the judgment) (discussing the Court's "marginalization" of the Privileges or Immunities Clause).

143. *See* Whitman v. Am. Trucking Assoc., 531 U.S. 457, 474 (2001) ("In the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes . . . .").

Recess Appointments Clause[144] have all been decided based on longstanding precedent. In *McDonald v. City of Chicago*, Justice Alito noted that "many legal scholars dispute the correctness of the narrow *Slaughter-House* interpretation" of the Privileges or Immunities Clause.[145] Nevertheless, he and the other Justices in the plurality saw "no need to reconsider that interpretation" and "therefore decline[d] to disturb the *Slaughter-House* holding."[146] The Court has also found historical practice to be especially important in cases involving the separation of powers. As the Court stated in the Recess Appointments Clause case, *NLRB v. Noel Canning*, "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions regulating the relationship between Congress and the President."[147]

Precedent and practice are even more important in cases involving statutory interpretation.[148] In that context, stare decisis has "special force."[149] If Congress disagrees with the Supreme Court's interpretation of a statute, it can amend that statute to reflect the disagreement. Therefore, when an interpretation of a statute has persisted for a long time without amendment, Congress is presumed to have acquiesced to the Court's interpretation and the Court is unlikely to disturb that interpretation.[150]

Given that *Chevron* has endured for over thirty years, becoming one of the most widely cited Supreme Court cases of all time, formalist evaluations of *Chevron* alone are unlikely to persuade the Court to change its mind about *Chevron* deference. With the exception of Justice Thomas, most of the Justices are not inclined to disturb longstanding precedents.[151] Thus, any serious attempt to reevaluate *Chevron*'s legitimacy must also engage in a functional discussion of *Chevron*'s costs and benefits.

144. NLRB v. Noel Canning, 134 S. Ct. 2550 (2014).

145. 561 U.S. at 756.

146. *Id.* at 758.

147. 134 S. Ct. at 2559 (quoting Pocket Veto Case, 279 U.S. 655, 689 (1929)).

148. Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 317–18 (2005).

149. Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989).

150. Apex Hosiery Co. v. Leader, 310 U.S. 469, 488 (1940) ("The long time failure of Congress to alter the Act after it had been judicially construed . . . is persuasive of legislative recognition that the judicial construction is the correct one.").

151. *See, e.g.*, Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); McDonald v. City of Chicago, 561 U.S. 742, 855 (2010) (Thomas, J., concurring in part and concurring in the judgment); United States v. Lopez, 514 U.S. 549, 602 (1995) (Thomas, J., concurring); *see generally* RALPH A. ROSSUM, UNDERSTANDING CLARENCE THOMAS: THE JURISPRUDENCE OF CONSTITUTIONAL RESTORATION (2014).

The most common functional argument against *Chevron* is based on the separation of powers. Specifically, critics argue that it is desirable to have courts provide a strong and independent check on agency power. Chief Justice Roberts spent several paragraphs of his dissent in *City of Arlington* discussing these concerns, beginning with a quotation from James Madison:

> One of the principal authors of the Constitution famously wrote that "the accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47 (J. Cooke ed. 1961) (J. Madison). Although modern administrative agencies fit most comfortably within the Executive Branch, as a practical matter they exercise legislative power, . . . executive power, . . . and judicial power . . . . The accumulation of these powers in the same hands is not an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government.[152]

Turning his attention to *Chevron* deference, Chief Justice Roberts argued: "When it applies, *Chevron* is a powerful weapon in an agency's regulatory arsenal. . . . It would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed."[153] Thus, in Chief Justice Roberts's view, when courts apply *Chevron* deference, they abnegate their important role as a check on agency power.

This argument based on the separation of powers is not a critique of *Chevron* deference specifically. Rather, it is based on broader concerns about the size and scope of government. In Chief Justice Roberts's view, the battle over *Chevron*'s domain is just one front in a broader war against the "danger posed by the growing power of the administrative state."[154]

Although this argument naturally appeals to small-government conservatives and libertarians who are skeptical of government power, it is unlikely to speak to the concerns of those who want *better* government, rather than *less* government. Most jurists are not interested in unraveling the administrative state. Even so, there is still an important reason for those jurists to reexamine *Chevron* based on concerns about the rule of law—the need for a clear,

152. City of Arlington v. FCC, 133 S. Ct. 1863, 1877 (2013) (Roberts, C.J., dissenting).
153. *Id.* at 1879.
154. *Id.*

predictable approach to judicial review of agencies' legal interpretations.

### *B. Rule of Law*

That *Chevron* undermines the rule of law provides a powerful functional argument for abandoning it that appeals to jurists from across the ideological spectrum. With the Supreme Court's recent reaffirmation of the "extraordinary cases" exception in *King v. Burwell*, it is impossible to predict whether *Chevron* will apply to the next big case involving agency decision making. New debates over the applicability of *Chevron* to specific laws—such as hybrid statutes and patent laws—are emerging all the time, with no end in sight. Because *Chevron* is a judge-made doctrine, courts will inevitably have substantial discretion in deciding whether to apply *Chevron* in a given case. Such broad discretion leads to unpredictability, excessive litigation, disparate treatment of similarly situated parties, and decisions that are influenced by judges' personal policy preferences—in short, it undermines the rule of law, as discussed by Justice Scalia in his article on the rule of law as a law of rules[155] and his dissent in *Mead*.[156]

Abandoning *Chevron* would eliminate "unpredictab[ility]" and curtail judges' discretion to make "ad hoc judgment[s] regarding congressional intent"—concerns that Justice Scalia raised in *City of Arlington* in a majority opinion that was joined by three liberal Justices.[157] Litigants could have their day in court on the actual merits of their legal claims, without having to wonder whether the judges will choose to avoid the question by deferring to the agency. By abandoning *Chevron*, the Court would restore the rule of law in cases involving judicial review of the lawfulness of agency actions.

An abandonment of *Chevron* would be in line with the Supreme Court's recent trend, in a number of areas of law, of curtailing judicial discretion to avoid a decision on the legal merits of a claim. In *Zivotofsky ex rel. Zivotofsky v. Clinton*,[158] for example, the Court revamped the political-question doctrine in a way that minimized courts' discretion to consider prudential factors. Prior to *Zivotofsky*, the Court looked at six factors set forth in *Baker v. Carr*[159] to

155. Scalia, *supra* note 5.
156. United States v. Mead Corp., 533 U.S. 218, 245 (2001) (Scalia, J., dissenting).
157. 133 S. Ct. 1863, 1874 (2013).
158. 132 S. Ct. 1421 (2012).
159. 369 U.S. 186 (1962).

determine whether a case presented a nonjusticiable political question:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[160]

In *Zivotofsky*, the Court was asked to decide whether the political-question doctrine barred courts from considering the constitutionality of a statute requiring the State Department to print passports with "Israel" as the place of birth for Americans born in Jerusalem who wished to have that designation on their passport.[161]

Writing for a majority of the Court that included Justices Scalia, Kennedy, Thomas, Ginsburg, and Kagan, Chief Justice Roberts held that there was no political question, but mentioned only the first two factors from *Baker*.[162] The first factor did not apply because "there is, of course, no exclusive [textual] commitment to the Executive of the power to determine the constitutionality of a statute. The Judicial Branch appropriately exercises that authority . . . ."[163] The second factor did not apply because cases involving "familiar principles of constitutional interpretation" do not "turn on standards that defy judicial application."[164] After discussing these two factors, without mentioning any of the factors from *Baker*, the Court held that the political-question doctrine did not bar the Court from considering the statute's constitutionality.[165]

By ignoring the last four *Baker* factors, which sound in prudential considerations, the Court expressed its dissatisfaction with multifactor tests that give judges broad discretion to avoid a

160. *Id.* at 217.
161. *Zivotofsky*, 132 S. Ct. at 1424.
162. *Id.* at 1427.
163. *Id.* at 1428.
164. *Id.* at 1430 (*Baker*, 369 U.S. at 211).
165. *Id.* at 1430–31.

decision on the legal merits of a claim. When judges can decline to consider an argument based on prudential factors—such as the "respect due coordinate branches" or the "potentiality for embarrassment"—the outcomes of cases will be unpredictable, depending largely on the judge's views about the merits of the claim and the judge's predictions about the consequences of a merits ruling. By focusing the inquiry on the first two *Baker* factors—textual commitment and the lack of a discoverable and manageable standard—the Court sought to limit the arbitrariness of decisions involving the political-question doctrine.

Standing doctrine is another area in which the Court has reduced judges' discretion to avoid a decision on the legal merits of a claim. In *Lexmark International, Inc. v. Static Control Components, Inc.*,[166] the Court unanimously eliminated the doctrine of prudential standing. Before *Lexmark*, the Court had held that there were three requirements of prudential standing: (1) the zone-of-interest test; (2) the bar on generalized grievances; and (3) and the prohibition of third-party standing.[167] *Lexmark* eliminated two of the prudential standing requirements by recharacterizing the zone-of-interest test as a question of "statutory interpretation"[168] and the bar on generalized grievances as a requirement of Article III standing.[169] Although the Court left the fate of the prohibition on third-party standing for "another day," [170] the Court made clear that it could not survive as a prudential consideration. Using scare quotes around the words "prudential standing," the Court described prudential standing as a "misleading" label[171] and stated that the consideration of prudential factors is "in some tension" with "the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging."[172]

A third area of law in which the Court has reduced judges' discretion to avoid deciding the legal merits of a claim is the ripeness doctrine. In *Susan B. Anthony List v. Driehaus*,[173] the Court unanimously disapproved of the prudential ripeness doctrine by suggesting that it was in tension with *Lexmark*'s holding about the

166. 134 S. Ct. 1377 (2014).
167. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004).
168. *Lexmark*, 134 S. Ct. at 1387.
169. *Id.* at 1387 n.3.
170. *Id.*
171. *Id.* at 1386.
172. *Id.* (quoting Sprint Commc'ns, Inc. v. Jacobs, 134 S. Ct. 584, 591 (2013)).
173. 134 S. Ct. 2334 (2014).

"virtually unflagging" duty of courts to "hear and decide cases within [their] jurisdiction."[174] Although the Court decided that it "need not resolve the continuing vitality of the prudential ripeness doctrine"[175] in that case, the Court's analysis left little doubt about the future of the doctrine.

*Zivotofsky*, *Lexmark*, and *Susan B. Anthony List* reveal a concerted effort by several Justices with differing ideologies to eliminate broad standards and follow clear rules. From the political-question doctrine to the doctrines of standing and ripeness, the Court has sought to minimize judges' discretion to avoid a decision on the legal merits of a claim. In so doing, the Court has brought those doctrines in line with the ideals of the rule of law.

Eliminating the *Chevron* framework would have a similar effect on administrative law. When a court gives an agency *Chevron* deference on a question of law, it effectively avoids a decision on the legal merits of the claim. Under *Chevron*, the reviewing court must uphold an agency's action as long as it is "based on a permissible construction of the statute," even if the agency's interpretation is not "the reading the court would have reached if the question initially had arisen in a judicial proceeding."[176] The court "does not simply impose its own construction on the statute."[177] Furthermore, courts have substantial discretion to determine the applicability of the *Chevron* framework under *Mead*, *Barnhart*, and *King*. Giving courts such great discretion to decide whether to rule on the merits of a claim is in "tension" with the Court's "recent reaffirmation" in *Lexmark* and *Susan B. Anthony List* of the "principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging."[178] Following in the footsteps of *Zivotofsky*, *Lexmark*, and *Susan B. Anthony List*, the Court should abandon the *Chevron* framework to reduce judges' discretion to avoid deciding the legal merits of claims.

Admittedly, there are some differences between the Court's decisions in *Zivotofsky*, *Lexmark*, and *Susan B. Anthony List*, and my proposed abolition of *Chevron*. Those cases involved doctrines governing courts' jurisdiction to hear cases, whereas *Chevron* deals

174. *Id.* at 2347 (quoting *Lexmark*, 134 S. Ct. at 1386).
175. *Id.*
176. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 & n.11 (1984).
177. *Id.* at 843.
178. *Susan B. Anthony List*, 134 S. Ct. at 2347 (quoting *Lexmark*, 134 S. Ct. at 1386).

with the applicable standard of review for questions of law. Furthermore, those cases only modified the doctrines in question, whereas I am arguing for a complete abolition of *Chevron*. But these distinctions do not weaken the argument for abolishing *Chevron*. Because the political-question doctrine and the doctrines of standing and ripeness are jurisdictional requirements that stem from the Constitution, there is no way for the Court to abolish those doctrines completely. To do so would violate the legal bases for those requirements. By contrast, the prudential aspects of the above-mentioned doctrines were invented by courts and had no basis in the text of the Constitution. Therefore, the Court was free to abolish them. *Chevron*, at its core, is a prudential, judge-made doctrine with no basis in the Constitution or the Administrative Procedure Act. Although *Chevron* purports to be based on congressional intent, that construction of Congress's intent is a legal fiction invented by judges.[179] As such, there is a strong argument that *Chevron* is in tension with courts' "virtually unflagging" obligation to "hear and decide cases within [their] jurisdiction,"[180] and should be abolished.

## IV. REPLACING *CHEVRON*

If the Court does eliminate *Chevron*, there are a number of possibilities for how it can review the legality of agency actions in future cases. One possibility is to apply the standard of review that appellate courts normally use to decide questions of law—de novo review. That was the approach taken by Chief Justice Charles Evan Hughes in *Crowell v. Benson*,[181] a 1932 case that interpreted the Longshoremen's and Harbor Workers' Compensation Act before the enactment of the Administrative Procedure Act in 1946.[182] Even if the Court is unwilling to eliminate *Chevron*, Congress could enact

179. *See* David J. Barron & Elena Kagan, Chevron's *Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 203 ("Given the difficulty of determining actual congressional intent, some version of constructive—or perhaps more frankly said, fictional—intent must operate in judicial efforts to delineate the scope of *Chevron*."); Scalia, *supra* note 28, at 517 (arguing that "any rule adopted in this field represents merely a fictional, presumed intent"); Breyer, *supra* note 25, at 370 ("For the most part courts have used 'legislative intent to delegate the law-interpreting function' as a kind of legal fiction.").

180. Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1386 (2014) (quoting Sprint Commc'ns, Inc. v. Jacobs, 134 S. Ct. 584, 591 (2013)).

181. 285 U.S. 22, 49 (1932) ("The Congress did not attempt to define questions of law, and the generality of the description leaves no doubt of the intention to reserve to the Federal court full authority to pass upon all matters which this Court had held to fall within that category.").

182. *Id.* at 36–37.

legislation requiring de novo review. Because *Chevron* is "premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps,"[183] Congress can always override *Chevron* deference.[184] Senators Orrin Hatch, Chuck Grassley, and Mike Lee recently introduced a bill in the Senate to that effect, entitled the Separation of Powers Restoration Act of 2016.[185] In addition to restoring the rule of law, applying de novo review would also eliminate the concerns about courts abdicating their duties under Article III of the Constitution and section 706 of the Administrative Procedure Act, and provide a powerful check on agency action. Although this approach might increase the workload of the federal judiciary, Congress could address that problem through the creation of new Article I and Article III judgeships.

Another possibility for replacing *Chevron* would be to review pure questions of law de novo and defer to agencies on mixed questions of law and fact. That was the approach used by the Court in its 1944 decision in *NLRB v. Hearst Publications, Inc.*[186]:

> Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute. But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited.[187]

The advantage of this approach is that it prevents courts from being overloaded with administrative cases but still allows them to place a check on agencies in cases involving the most important issues.[188] The drawback of this approach, however, is that it can be

183. King v. Burwell, 135 S. Ct. 2480, 2488 (2015) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

184. Barron & Kagan, *supra* note 179, at 212 ("Congress indeed has the power to turn on or off *Chevron* deference.").

185. Separation of Powers Restoration Act of 2016, S. 2724, 114th Cong. (2016) ("Section 706 of title 5, United States Code, is amended, in the matter preceding paragraph (1), by striking 'all relevant questions of law, interpret constitutional and statutory provisions' and inserting 'de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules'.").

186. 322 U.S. 111 (1944).

187. *Id.* at 130–31 (citations omitted).

188. Mike Rappaport, *Reforming Regulation: Eliminating Chevron Deference and Constraining Guidances*, LIBERTY L. BLOG (Mar. 19, 2015), http://bit.ly/1O0Gqui [perma.cc/4X22-UHBG].

difficult to draw a clear line between pure questions of law and mixed questions of law and fact. The law-fact distinction has been notoriously difficult to define,[189] and making the applicable standard of review turn on that distinction would introduce a new source of uncertainty and unpredictability. Furthermore, it is unclear whether deference on mixed questions of law and fact is any more compatible with Article III of the Constitution and section 706 of the Administrative Procedure Act than the current *Chevron* framework.

Regardless of which approach is adopted, the abolition of *Chevron* will make administrative law simpler and more predictable. Abolishing *Chevron* would eliminate judges' discretion to determine the scope of *Chevron*'s domain on a case-by-case basis, thereby preventing judges from declining to hear legal claims in contravention of their unflagging duty to decide cases. A substantial source of litigation would be eliminated, and parties would have the merits of their legal claims properly considered by a court. Only by abolishing *Chevron*—by replacing an open-ended standard with a clear rule—can the Court finally ensure that the rule of law prevails.

189. *See, e.g.*, Dobson v. Comm'r of Internal Revenue, 320 U.S. 489, 500–01 (1943) ("Perhaps the chief difficulty in consistent and uniform compliance with the congressional limitation upon court review lies in the want of a certain standard for distinguishing 'questions of law' from 'questions of fact.' This is the test Congress has directed, but its difficulties in practice are well known and have been subject of frequent comment. Its difficulty is reflected in our labeling some questions as 'mixed questions of law and fact' and in a great number of opinions distinguishing 'ultimate facts' from evidentiary facts.").


TEXAS REVIEW OF
LAW & POLITICS