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ARTICLES

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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.

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

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The Supreme Court's latest term demonstrated several unprecedented usurpations of power from the nation's true sovereign—the people. With a landmark presidential election on the horizon, America stands to choose between two futures. Will the people limit government to its intended realm, so that personal freedom and liberty can flourish, providing greater opportunity and prosperity for future generations? Or will we elect leaders with no respect for our founding principles, and take our place as a once-great nation.

Serious discussion of the issues is too often lost in the buzz of a presidential election dominated by twenty-second sound bites. The *Review* continues to stand in sharp contrast to the short-game, hype-driven world of politics, delivering serious legal scholarship chock-full of viable, conservative solutions to the day's most pressing issues. The *Review*'s 20th volume is no exception.

Professor John Yoo leads the issue with *Judicial Supremacy Has Its Limits.* In light of *Obergefell,* Professor Yoo calls for a deeper understanding of the separation of powers to resist the Court's activist decision. He argues that the Constitution denies any one branch the final word on constitutional disputes, and instead demands that each independent branch interpret the Constitution in the course of performing its own unique functions. He then reminds us that some of our nation's greatest leaders understood that, in a self-governing republic, the *people,* not the courts, must settle fundamental constitutional issues.

In that same spirit, Professor Brent G. McCune follows with a thorough analysis of the dangers of judicial activism in *Judicial Overreach and America's Declining Democratic Voice: The Same-Sex Marriage Decisions.* He discusses the expanded role of the federal judiciary in the context of the same-sex marriage decisions. He concludes that the activist decisions have short-circuited the democratic process, stunted healthy debate on a critical issue, and stifled the voice of the people.

Is the voice of the people being heard by the Supreme Court through their elected representatives? Professor Judithanne Scourfield McLauchlan and Thomas Gay present a quantitative study of the question in *When Congress Speaks, Does the Supreme Court Listen? Evaluating the Effectiveness of Congressional Participation as Amicus Curiae Before the U.S. Supreme Court During the Rehnquist Court.* Following up on Professor McLauchlan's earlier book over the subject and completing her analysis of the Rehnquist Court, the article shows that even though congressional amicus briefs steadily increased through the Rehnquist Court, they have had little to no effect on the actual outcome of the targeted case.

In *Religious Accommodation in the Workplace: Why Federal Courts Fail to Provide Meaningful Protection of Religious Employees,* Professor Debbie N. Kaminer draws upon her employment law expertise to examine the federal courts' treatment of Title VII § 701(j). She gives an extensive overview of where religious accommodation in the workplace currently stands and how it may change in light of the Supreme Court's recent decision, *EEOC v. Abercrombie.*

Finally, Professor Lino A. Graglia provides a review of Louis Michael Seidman's book, *On Constitutional Disobedience.* In *But the Constitution Is Not the Problem,* Professor Graglia rebuts Seidman's argument that we ought to systematically ignore the Constitution, and welcomes the invitation to rethink the premise of constitutionalism and its near-sacred status.

I would like to thank our distinguished authors for their incisive contributions and the *Review* staff for their enthusiasm, hard work, and dedication in editing the articles. The support of Adam Ross, Brantley Starr, and Amy Davis has been indispensable and greatly appreciated. We remain optimistic that 2016 will usher in a resurgence of conservatism. Our hope is that this issue provokes meaningful debate about the proper role of our three branches of government and gives valuable insight for constructive conservative reform.

Allison Allman
Editor in Chief

Austin, Texas
December 2015

JUDICIAL SUPREMACY HAS ITS LIMITS

BY JOHN YOO*

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This article began as an opinion piece, John Yoo, *Judicial Supremacy Has Its Limits*, NAT'L REV. (July 6, 2015, 6:00 PM), http://bit.ly/1OpgDff [perma.cc/WMU7-DHDH], and draws from his previous scholarship on related topics. John Yoo, *Andrew Jackson and Presidential Power*, 2 CHARLESTON L. REV. 521 (2008); John Yoo, *Jefferson and Executive Power*, 88 B.U. L. REV. 421 (2008); John Yoo, *Lincoln at War*, 38 VT. L. REV. 3 (2013).

I. INTRODUCTION

Obergefell v. Hodges[1] has renewed debate over the proper scope of judicial review. After the steady expansion of gay rights in the 1990s and 2000s in *United States v. Windsor*,[2] *Lawrence v. Texas*,[3] and *Romer v. Evans*,[4] it should have come as no surprise that Justice Anthony Kennedy would join with Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan to strike down state bans on gay marriage. Supporters of gay rights will no doubt claim that *Obergefell* has finally settled the constitutionality of the question. In this essay, I will set out why Supreme Court decisions may settle questions of constitutional interpretation for the judiciary, but not for the other branches of government.

Many leading scholars have recently questioned the very existence of judicial review.[5] A broader group has debated the supremacy of judicial interpretation of the Constitution over the other branches.[6] Much of this discussion was precipitated by the Rehnquist Court's declaration in *City of Boerne v. Flores*[7] that its interpretation of the Fourteenth Amendment binds Congress's interpretation.[8] Academics may not have displayed the same level of concern over the Supreme Court's unprecedented declaration of authority to review the legal status of enemy prisoners of war,[9] or the *Obergefell* decision, but the question remains the same. These scholars draw on a deeper trend of skepticism toward judicial review inspired by *Cooper v. Aaron*,[10] the decisions of the Warren

1. 135 S. Ct. 2584 (2015).
2. 133 S. Ct. 2675 (2013).
3. 539 U.S. 558 (2003).
4. 517 U.S. 620 (1996).
5. *See, e.g.*, Richard A. Posner, Frontiers of Legal Theory 15–27 (2001); Mark Tushnet, Taking the Constitution Away from the Courts 129–76 (1999); Jeremy Waldron, Law and Disagreement 285–89 (1999); Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 Nw. U. L. Rev. 145 (1998); Adrian Vermuele, *Judicial Review and Institutional Choice*, 43 Wm. & Mary L. Rev. 1557 (2002).
6. *See, e.g.*, Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83 (1998); Sanford Levinson, *Could Meese be Right This Time?*, 61 TUL. L. REV. 1071 (1987); Michael McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997); Robert Nagel, *Judicial Supremacy and the Settlement Function*, 39 WM. & MARY L. REV. 849 (1998); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).
7. 521 U.S. 507 (1997).
8. *Id.* at 536.
9. *See* Rasul v. Bush, 542 U.S. 466 (2004).
10. 358 U.S. 1, 18 (1958) ("[*Marbury v. Madison*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and

Court in the 1960s,[11] and the decisions of the Four Horsemen in the New Deal period.[12] In this respect, these authors are tackling the same problems as did Jesse Choper,[13] John Hart Ely,[14] Learned Hand,[15] and Herbert Wechsler.[16]

Our starting point should be common ground for these scholars: the Constitution requires each branch of government to interpret the Constitution for itself.[17] Early critics of judicial review argued that the Constitution did not expressly authorize judicial review.[18] But from the beginning, judicial review has been on firm ground, and it is has been frequently (but incorrectly) claimed that the other branches have no place in interpreting the Constitution. As Sai Prakash and I have argued, the judicial power to hear cases arising under the Constitution was understood to include the authority to decide the meaning of the Constitution.[19] When faced with a case where one party claims a right under an Act of Congress and another relies upon the Constitution, the federal courts must choose between the sources of law.[20] Judicial review flows from the federal courts' duty to choose the higher law of the Constitution over the statute as a rule of decision-making.[21] If Congress, for

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indispensable feature of our constitutional system.").

11. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261–62 (1964) (upholding the constitutionality of Title II of the Civil Rights Act of 1964, which prohibits racial discrimination in places of public accommodation); Katzenbach v. McClung, 379 U.S. 294, 305 (1964) (upholding the constitutionality of the Civil Rights Act of 1964 as applied against a racially-discriminatory restaurant, citing Congress's finding that such discrimination was a "national commercial problem of the first magnitude" and therefore within the scope of its Commerce Clause powers).

12. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 303–04 (1936) (striking down the Bituminous Coal Conservation Act of 1935 because it regulated outside the bounds of the Court's narrowly-construed definition of "commerce"); United States v. Butler, 297 U.S. 1, 64–66 (1936) (interpreting Congress's tax-and-spend power as granting it broad authority to promote the general welfare).

13. Jesse H. Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court 129–70 (1980).

14. John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980).

15. Learned Hand, The Bill of Rights (1958).

16. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 3–5 (1959).

17. *See* U.S. CONST. art. I, § 8, cl. 18 (empowering Congress to execute the powers given to it by the Constitution); U.S. CONST. art. II, § 3, cl. 1 (implied in the Executive's duty to "take Care that the Laws be faithfully executed" is the need to interpret the Constitution); U.S. CONST. art. III, § 2, cl. 1 (judicial powers extend to all cases arising under the Constitution).

18. Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 894–913 (2003).

19. *Id.*

20. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803) ("So if a law be in opposition to the constitution . . . the court must determine which of these conflicting rules governs the case.").

21. *Id.* at 180 ("[A] law repugnant to the constitution is void").

example, defined treason as a crime provable with the testimony of only one witness, a federal court would have to refuse to convict because the Constitution requires two witnesses. Judicial review is the manner in which federal judges implement their obligation to obey the written limits on the delegation of power to the government while performing their unique function of deciding Article III cases or controversies.

Other provisions confirm this reading. Article VI requires that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made . . . under the Authority of the United States, shall be made the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[22] In order to decide whether a state law conflicts with a constitutional provision, federal courts must interpret the Federal Constitution first.[23] The Supremacy Clause also makes clear that the Constitution itself is law to be enforced in court, rather than a set of mere unenforceable political goals.[24] Both Article III[25] and Article VI[26] include the Constitution as a source of law for the courts. If the Constitution can supply rules of decision for cases or controversies, judicial review becomes inevitable.

If the courts draw their authority of judicial review from the higher status of the Constitution, a similar obligation must apply to the executive and legislative branches. Members of each branch take an oath to the Constitution just as judges do.[27] To fulfill their oath, federal officials must discern the meaning of the Constitution first.[28] The President, for example, bears the responsibility to

22. U.S. CONST. art. VI, cl. 2.

23. *See* Prakash & Yoo, *supra* note 18, at 905 ("To vindicate the Constitution against the states, the courts must be able to interpret the entire Constitution.").

24. U.S. CONST. art. VI, cl. 2.

25. *Id.* art. III, § 2, cl. 1.

26. *Id.* art. VI, cl. 2.

27. *Id.* art. II, § 1, cl. 8 (executive oath); *id.* art. VI, cl. 3 (requiring all senators, representatives, state legislators, and executive and judicial officers to be bound by oath to support the Constitution, the phrasing of which is codified in 5 U.S.C. § 3331 (2012), and supplemented by 28 U.S.C. § 453 (2012) for federal judges only).

28. I understand that a constitution might enshrine one institution as the final arbiter of a constitution's meaning, in which case all others must adhere to that institution's readings of the constitution. But even if a constitution contained such a provision, one would still have to interpret the constitution to see if it contained the interpretational supremacy provision described above. Some level of independent interpretation is simply unavoidable. I, of course, do not believe that the Federal Constitution contains any provision relating to interpretational supremacy.

preserve, protect, and defend the Constitution.[29] To defend the Constitution, the President must decide what offends it. As a participant in the legislative process, the President at a minimum should veto laws that he or she believes violates the Constitution. This is not *judicial* review because it does not arise in the course of deciding a case or controversy. It is instead *presidential* review because the President interprets the Constitution in the performance of his or her unique constitutional responsibilities.

A similar analysis applies to Congress. Congressmen, like the President and judges, take an oath to uphold the Constitution.[30] Congress cannot enact laws that it believes to be unconstitutional, as it is the Constitution that creates the Congress[31] and defines its powers.[32] Individual members of Congress, therefore, have the independent duty to review the constitutionality of proposed legislation before them and to refuse to enact unconstitutional laws. As President Andrew Jackson observed when vetoing legislation re-chartering the Bank of the United States:

> It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision.[33]

This departmentalist approach to constitutional review by the three branches rejects judicial supremacy. No branch is supreme in interpreting the Constitution. The constitutional text and structure create the duty of judicial review in the courts in the same way that it places the duty on the other branches to interpret the Constitution while performing their roles. If anything, the authority of the federal courts is weaker than that of the other branches. While the judiciary enjoys the independence to oppose the other branches without fear of retaliation, it has no mechanisms to execute its constitutional views. Enforcement of the Supreme Court's decisions, as many have noted,[34] ultimately depends on the

29. U.S. CONST. art. II, § 1, cl. 8.
30. *Id.* art. VI, cl. 3; 5 U.S.C. § 3331 (2012).
31. U.S. CONST. art. I, § 1.
32. *Id.* art. I, § 8.
33. Andrew Jackson, Veto Message (July 10, 1832), *in* 2 A Compilation of the Messages and Papers of the Presidents, 1789—1897, 576, 582 (James D. Richardson, ed., D.C., Gov't Printing Off. 1897).
34. The judiciary, as Alexander Hamilton explained, has "no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor

agreement of the other branches and the support of the public.

On the other hand, it is fair to say that the majority of scholars support judicial supremacy.[35] That is, the Court is the final interpreter of the Constitution, and its decisions bind the other branches not just in the case before it but in all other similar cases. Professor Laurence Tribe speaks for most when he says that "the Executive Branch must enforce the law according to the Executive's view of what the Constitution requires . . . so long as the Executive does not thereby usurp the role of the Article III Judiciary as the ultimate expositor of the Constitution in actual cases and controversies."[36]

Nonetheless, each branch need not adopt the views of the others in interpreting the Constitution. The Constitution makes each branch supreme in performing its respective functions. The courts, for example, are supreme in resolving cases. We can criticize these judgments, but they are final and to be enforced because the Constitution commits the resolution of certain disputes to the courts.[37]

But there is a difference between a judgment and an opinion. The judgment is the necessary and legally operative action of the federal courts, and as such, it is the only part of a decision that has constitutional force. It is the result of the judiciary's power to decide cases or controversies. In contrast, the opinion is merely the court's explanation of its judgment. While the opinion may in some ways bind lower courts, the Supreme Court's explanation does not bind the other branches. Only the judgment binds them. Suppose federal courts only issued judgments and not opinions. The other branches would still have a constitutional duty to implement those judgments as the final exercise of a coordinate branch's constitutional authority.

Other branches also enjoy supremacy within their own sphere. The President, for example, may pardon someone on a wholly idiosyncratic and misguided understanding of the Constitution.[38]

WILL, but merely judgment . . . ." THE FEDERALIST No. 78 (Alexander Hamilton). Even to enforce its judgments, he observed, the judiciary "must ultimately depend upon the aid of the executive arm . . . ." *Id.*

35. Larry D. Kramer, *Judicial Supremacy and the End of Judicial Restraint*, 100 CAL. L. REV. 621, 630 (2012) ("In the years after *Brown* [*v. Board of Education*], the idea of judicial supremacy seemed, at long last, gradually to find wide public acceptance.").

36. Laurence H. Tribe, American Constitutional Law 726 (3d ed. 2000).

37. U.S. CONST. art. III.

38. *See* U.S. CONST. art. II, § 2, cl. 1 ("The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of

Nonetheless, the pardon is final, and the judiciary cannot ignore it on the grounds that the President read the Constitution incorrectly. Suppose that the President issued the pardon because he interprets the Constitution to bar prosecution. Suppose further that a future prosecutor under a subsequent President believes prosecution is warranted. Neither the prosecutor nor the judiciary can ignore the pardon on the ground that the previous President misunderstood the Constitution. When the judiciary permits the defendant to raise the pardon as a defense, the judiciary need not accept the President's reading of the Constitution. Instead the judiciary accords to the pardon the legal effect that the Constitution assigns to it: immunity from prosecution and punishment.

Judgments have the same feature. When the judiciary issues a judgment, the other branches must regard it as the final disposition of a dispute.[39] When the President enforces a judgment, he performs one of the time-honored functions of the executive branch. But he need not acquiesce in the constitutional logic behind the Court's decision.

Judicial supremacy, however, may be only a short practical step removed from coordinate branch construction. Presidents and Congress would find little incentive to pursue their own independent interpretations if they continue to lose in court. They can cede the Constitution to the courts to focus on the political issues that will lead to their re-election.

This raises the question in *Obergefell*: how should the other branches respond to judgments beyond what they consider constitutional? One is tempted to say that the Constitution permits the President to ignore judgments that fall outside the bounds of reasonable interpretation. But the Framers do not appear to have contemplated a response to completely unfounded judgments. They did not grant the President the right to review judgments. Instead, the President has the duty to enforce the law, which presumably includes judgments. Presidential refusal to implement judgments is an extra-constitutional measure that ought to be reserved for only the gravest circumstances. While we might

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Impeachment.").

39. *See* Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539, 1541 (2005) ("Because the courts have the judicial power and jurisdiction over cases arising under the Constitution, when they issue final judgments in cases that involve constitutional interpretation, other branches must obey and enforce such judgments.").

applaud such presidential defiance, it would rely on one constitutional violation to counter-balance an earlier violation by the judiciary.

II. DEPARTMENTALISM IN PRACTICE

This Part describes the views of significant Presidents and their arguments against judicial supremacy. Presidents have long interpreted the Constitution, beginning with President Washington's decisions to sign the law creating the First Bank of the United States[40] and to proclaim neutrality in the wars surrounding the French Revolution.[41] Thomas Jefferson recognized that the power of judicial review did not curtail the President's right to interpret the Constitution.[42] Over time, Presidents developed the theory that while Supreme Court opinions might bind the courts, they did not control the views of the other branches in the performance of their own constitutional responsibilities. These examples lend support to the argument that the Supreme Court cannot settle as final the constitutional question raised in *Obergefell.*

A. Thomas Jefferson

Jefferson's views on executive enforcement of the law laid a strong claim to presidential equality with the other branches. One of the most hated pieces of Federalist legislation was the Alien and Sedition Acts of 1798, which made it a crime to defame or libel the government.[43] Even though Jefferson and Madison had secretly drafted the Kentucky and Virginia Resolutions, which suggested that the states could resist unconstitutional federal laws, the Supreme Court issued no decisions striking down the law as a violation of the First Amendment, and the lower federal courts allowed prosecutions to move forward.

While parts of the Act expired at the end of the Adams administration, Jefferson proceeded to pardon ten individuals convicted under the law and ordered all prosecutions dropped. "A legislature had passed a sedition law. The federal courts had

40. William J. Kambas, The Development of the U.S. Banking System: From Colonial Convenience to National Necessity, 28 RUTGERS L. REV. 4 (2004).

41. John Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935, 1966 (2009).

42. Wythe Holt, *George Wythe: Early Modern Judge*, 58 ALA. L. REV. 1009, 1015 n.26 (2007).

43. Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired); Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (current version at 50 U.S.C. § 21–24 (2012)); Alien Friends Act, ch. 58, 1 Stat. 570 (1798) (expired); Naturalization Act, ch. 54, 1 Stat. 566 (1798) (repealed 1802).

subjected certain individuals to its penalties of fine and imprisonment," Jefferson explained in 1819.[44] "On coming into office, I released these individuals by the power of pardon committed to executive discretion, which could never be more properly exercised than where citizens were suffering without the authority of law, or, which was equivalent, under a law unauthorized by the constitution, and therefore null."[45] Even though the courts and Congress had found the Alien and Sedition Acts to be constitutional, Jefferson used his power as President to prevent execution of the law.

Jefferson's decision was rooted in a strict view of the separation of powers and the right of each branch to interpret the Constitution for itself. He utterly rejected the notion that the courts have the last word on the meaning of the founding document. In a letter to Abigail Adams explaining his actions, Jefferson asserted that the executive and judiciary are "equally independent" in reviewing the constitutionality of the laws:

> You seem to think it devolved on the judges to decide on the validity of the sedition law. But nothing in the Constitution has given them a right to decide for the executive, more than to the executive to decide for them. Both magistrates are equally independent in the sphere of action assigned to them.[46]

While the courts can view a law as constitutional and allow cases to move forward, the President can hold a different view and refuse to bring prosecutions against those who violate the law and pardon those already convicted. In an 1819 letter, Jefferson cited his reversal of the Sedition Act convictions to show that "each department is truly independent of the others, and has an equal right to decide for itself what is the meaning of the constitution in the cases submitted to its action; and especially, where it is to act ultimately and without appeal."[47] While Jefferson did not challenge the Court's right to interpret the Constitution or review the constitutionality of statutes, he denied that the judiciary's thinking bound him in the exercise of his own responsibilities.

Jefferson's vision went further. He believed that Presidents ought

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44. Thomas Jefferson, To Judge Spencer Roane (Sep. 6, 1819), *in* 12 THE WORKS OF THOMAS JEFFERSON 135, 138 (Paul L. Ford ed., 1905).

45. *Id.*

46. Thomas Jefferson, To Mrs. Adams (Sep. 11, 1804), *in* 4 THE WRITINGS OF THOMAS JEFFERSON 560, 561 (H. A. Washington ed., D.C., Taylor & Maury 1854).

47. Jefferson, *supra* note 44, at 137.

to use the veto only when they were fairly certain that Congress had passed an unconstitutional law.[48] It does not appear Jefferson thought he should veto laws simply because he disagreed with Congress's policy choices.[49] On the other hand, Jefferson viewed his right to interpret the Constitution as extending beyond the President's role in the legislative process. As the Alien and Sedition Acts episode shows, he believed a President could decline to prosecute laws that in his opinion violated the Constitution.[50] Similarly, Jefferson would not have expected the courts to feel bound by the views of the President and Congress on the constitutionality of the laws that they enact.

B. Andrew Jackson

Andrew Jackson placed the constitutional powers of the executive—removal, the veto, and the power to execute and interpret the law—in the service of a new constitutional theory of the office. For Jackson, the Presidency did not just rest on the same plateau with the other branches. Rather, Jackson conceptualized the Presidency as the direct representative of the American people, the only official in the federal government elected by the majority.[51] He proceeded to exercise a broad interpretation of his constitutional powers, sometimes in conflict with Congress and the Court, because he believed he was promoting the wishes of the people.[52] Jackson's vision came through in the symbolic—as in his First Inaugural, when he opened the White House to the public, which then proceeded to storm through the building destroying

48. *See* Thomas Jefferson, Opinion on the Constitutionality of a National Bank (Feb. 15, 1791), *in* 6 THE WORKS OF THOMAS JEFFERSON 197, 204 (Paul L. Ford ed., 1904) ("It must be added, however, that unless the President's mind on a view of everything which is urged for and against this bill, is tolerably clear that it is unauthorised [sic] by the Constitution; if the pro and the con hang so even as to balance his judgment, a just respect for the wisdom of the legislature would naturally decide the balance in favor of their opinion.").

49. *See id.*

50. Jefferson, *supra* note 44, at 138.

51. Andrew Jackson, First Annual Message to Congress (Dec. 8, 1829), *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, 442, 448 (James D. Richardson, ed., D.C., Gov't Printing Off. 1897) (declaring that "the first principle of our system" is "*that the majority is to govern*"); Andrew Jackson, Protest to the Senate (Apr. 15, 1834), *in* 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, 69, 90 (James D. Richardson, ed., D.C., Gov't Printing Off. 1897) ("The President is the direct representative of the American people" and he is "elected by the people and responsible to them.").

52. *See* Robert V. Remini, *The Constitution and the Presidencies: The Jackson Era*, *in* THE CONSTITUTION AND THE AMERICAN PRESIDENCY 29, 31–38 (Martin L. Fausold & Alan Shank eds., 1991).

furniture, carpets, and fine china[53]—and the real, as when he took his re-election as a mandate to destroy the Bank of the United States.

Jackson made a point of mentioning the Bank at the end of his First Annual Message to Congress.[54] He observed that "[b]oth the constitutionality and the expediency of the law creating this bank are well questioned by a large portion of our fellow-citizens" and declared that "it has failed in the great end of establishing a uniform and sound currency."[55] Jackson recommended that if Congress were to keep the bank, significant changes in its charter were necessary.[56] At the time, many Americans shared Jackson's hostility toward the Bank.[57]

The Bank was a wholly different creature from today's Federal Reserve. The legislation establishing the First Bank of the United States, the one signed by George Washington and over which Hamilton and Jefferson had fought, expired just before the War of 1812.[58] Part of the responsibility for the Madison administration's setbacks fell on its difficulties in financing the war.[59] Congress established the Second Bank of the United States in 1816, and Madison, who had argued against the constitutionality of the First Bank while a Congressman, signed the legislation.[60] In a veto of an earlier version of the bill, Madison had "[w]aiv[ed] the question of the constitutional authority of the Legislature" because of "repeated recognitions under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches . . . ."[61] Madison conceded that the Bank's legality had been established by additional "indications, in different modes, of a concurrence of the general will of the nation . . . ."[62] In 1819, Chief Justice Marshall had upheld the Bank's constitutionality along lines similar to those of Alexander Hamilton's: although unmentioned

53. DONALD B. COLE, THE PRESIDENCY OF ANDREW JACKSON 34 (1993).

54. Andrew Jackson, First Annual Message to Congress (Dec. 8, 1829), *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, 442, 462 (James D. Richardson, ed., D.C., Gov't Printing Off. 1897).

55. *Id.*

56. *Id.*

57. ROBERT V. REMINI, ANDREW JACKSON AND THE BANK WAR: A STUDY IN THE GROWTH OF PRESIDENTIAL POWER 28 (1967).

58. COLE, *supra* note 53, at 57.

59. *Id.*

60. *Id.*

61. James Madison, Veto Message (Jan. 30, 1815), *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, 555, 555 (James D. Richardson, ed., D.C., Gov't Printing Off. 1897).

62. *Id.*

in the constitutional text, a national bank fell within Congress's Necessary and Proper Clause power because it allowed the government to exercise its tax, spending, commerce, and war powers.[63]

Jackson did not feel bound by the views of Madison or the Supreme Court. Jackson's objections to the Bank were not just constitutional; he believed that its concentration of power threatened individual liberties.[64] The Second Bank had come to dominate the American economy in a way unmatched by any other company or institution.[65] Jackson viewed it as an institution that benefited only a small financial elite.[66] Its first president, a former Navy and Treasury Secretary appointed by Madison, speculated in the Bank's stock, benefited from corrupt branch operations, and almost drove it into bankruptcy.[67] During the Monroe administration, the Bank was widely blamed for the Panic of 1819, which closed many state banks, bankrupted many farmers and businesses, and sparked a sharp increase in unemployment.[68] The years after the War of 1812 witnessed a dramatic increase in land speculation fueled by bank notes.[69] During the Panic, the Second Bank demanded that state banks redeem their notes in hard currency, which caused a sharp contraction of credit, a run of bankruptcies, and a rapid increase in unemployment.[70] Political movements rose to oppose the Bank, with states enacting laws heavily taxing the Bank or trying to drive branches out of their territory.[71]

Ironically, by the time Jackson became President, the Bank had changed its ways and become a powerful aid to the economic expansion of the 1820s and 1830s.[72] Through its special relationship with the federal government and its holdings of specie and state bank notes, it effectively controlled the national money supply and had a profound effect on the amount of credit and

63. McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 424 (1819).

64. Andrew Jackson, Veto Message (July 10, 1832), *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, 576, 576 (James D. Richardson, ed., D.C., Gov't Printing Off. 1897).

65. *Id.*

66. *Id.* at 577.

67. REMINI, *supra* note 57, at 27.

68. *Id.* at 27–28.

69. *See id.* at 19–20.

70. *See generally* MURRAY N. ROTHBARD, PANIC OF 1819: REACTIONS AND POLICIES (1962) (detailing the 1819–1921 depression following the postwar economic boom).

71. REMINI, *supra* note 57, at 30–31.

72. *Id.* at 37–39.

growth in the economy.[73] Under President Nicholas Biddle, the Second Bank cleaned up its finances, ended internal corruption, and kept a reserve of hard currency to reduce speculation in government notes.[74] Biddle believed that government oversight and public involvement in the Bank's operations were unwelcome and unnecessary,[75] and made sure his influence was felt by paying newspaper editors and legislators to defend the Bank.[76]

The approach of the 1832 presidential election prompted the first round in the fight between Jackson and the Bank. In his Second Annual Message to Congress, Jackson proposed folding the Bank into the Treasury Department, even though the legislation establishing the Bank itself was not up for re-authorization until 1836.[77] However Jackson later agreed not to seek any changes in the Bank's charter until after the 1832 election.[78] A convention of National Republicans—the group that split off from the Democratic Party to oppose Jackson—nominated Henry Clay as their presidential candidate.[79] Sensing a political opportunity, Clay convinced Biddle to seek renewal of the Bank's charter four years early.[80] Both the House Ways and Means Committee and the Senate Finance Committee had issued reports the previous year finding the Bank constitutional and praising its operations.[81] Clay's supporters passed the bill in the summer of 1832 by a vote of 28-20 in the Senate and 107-85 in the House.[82] To throw salt on President Jackson's wounds, the Senate, with Vice President Calhoun casting the tie-breaking vote, at the same time rejected Martin Van Buren's nomination as Minister to Great Britain.[83]

Jackson issued a thundering veto on July 10, 1832. For the first time in presidential history, a veto message extensively discussed political, social, economic, and constitutional objections to legislation.[84] Jackson portrayed the bill as a "gratuity" and a

73. *Id.*
74. *Id.* at 32–33, 39.
75. *See id.* at 34–35.
76. *Id.* at 70–71.
77. Andrew Jackson, Second Annual Message to Congress (Dec. 6, 1830), *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1896, 500, 529 (James D. Richardson, ed., D.C., Gov't Printing Off. 1897).
78. REMINI, *supra* note 57, at 74.
79. *Id.* at 92.
80. *Id.* at 75–76.
81. *Id.* at 67.
82. *Id.* at 80.
83. *Id.* at 93–94.
84. Jackson, *supra* note 64, at 576–91.

"present" transferred from the American people to the Bank's shareholders.[85] The Bank occupied the position of a monopoly that benefited "a privileged order, clothed both with great political power and enjoying immense pecuniary advantages from their connection with the Government" at the expense of "merchant, mechanic, or other private citizen[s]" who are not allowed to pay their debts with notes, rather than with hard currency.[86] Such wealth, Jackson argued, ought to give "cause to tremble for the purity of our elections in peace and for the independence of our country in war" because the wealthy would "influence elections or control the affairs of the nation."[87] Foreign shareholders, Jackson feared, might cause the financial system to collapse during a war—"[c]ontrolling our currency, receiving our public moneys, and holding thousands of our citizens in dependence" would pose a greater threat to national security than an enemy army or navy.[88]

Jackson's message broke from practice by introducing his policy views. But its lasting impact remains in its claim of independent authority to interpret and enforce the Constitution. Jackson conceded that the Supreme Court and previous Congresses had upheld the constitutionality of the Bank.[89] Jackson, however, declared that the Constitution established the Executive as an independent and coordinate branch whose decisions could not be dictated by the Court: "The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution."[90] In fulfilling its constitutional functions, each branch has an equal and independent duty to decide upon the constitutionality of legislation, whether in passing, enforcing, or adjudicating it: "The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges . . . ."[91] And, he emphasized, "on that point the President is independent of both."[92] He concluded that "[t]he authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities . . . ."[93] Jackson would only grant the courts "such

85. *Id.* at 576–77.
86. *Id.* at 578.
87. *Id.* at 581.
88. *Id.*
89. *Id.* at 582.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*

influence as the force of their reasoning may deserve."[94]

Jackson remained convinced that Jefferson had been right in 1791: a national bank was neither necessary nor proper to execute the government's constitutional powers, because it was not truly indispensable.[95] Congress, for example, has the power to coin money,[96] and it had already established a mint. Therefore, a national bank could not truly be necessary and proper to execute that power. Jackson's veto of the Bank presented a striking declaration of independence from the other branches of government. He gave no deference to the views of Congress, the Supreme Court, or even past Presidents. Jackson believed that he had a duty to decide for himself what the Constitution meant and to use his powers to advance that vision. Of course, the other branches were also free to use their authority to advance their constitutional views, and they were in no way bound by the President.

Jackson's veto was greeted with howls of protest. Biddle wrote to Clay that Jackson was a demagogue calling for anarchy.[97] Daniel Webster told the Senate the President was grabbing for "despotic power."[98] "[A]lthough Congress may have passed a law, and although the Supreme Court may have pronounced it constitutional, yet it is, nevertheless, no law at all, if he, in his good pleasure, sees fit to deny it effect; in other words, to repeal and annul it."[99] Webster foresaw that Jackson's example would lead to today's presidential influence over legislation. Jackson's veto message "claim[s] for the President, not the power of approval, but the primary power, the power of originating laws."[100] Clay followed with the claim that the veto was reserved for extraordinary moments when Congress had acted rashly.[101] Now, Clay observed, the President's veto had become a threat used to influence legislation, which was "hardly reconcilable with the genius of representative government."[102]

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94. *Id.*
95. *Id.* at 586.
96. U.S. CONST. art. I, § 8, cl. 5.
97. REMINI, *supra* note 57, at 84.
98. *Id.* at 85; *see also* 8 REG. DEB. 1232 (1832), 22d Congress, 1st Session.
99. REMINI, *supra* note 57, at 84; *see also* 8 REG. DEB. 1232 (1832).
100. REMINI, *supra* note 57, at 85; *see also* 8 REG. DEB. 1240 (1832).
101. REMINI, *supra* note 57, at 85; *see also* 8 REG. DEB. 1265 (1832).
102. REMINI, *supra* note 57, at 85; *see also* 8 REG. DEB. 1265 (1832).

C. Abraham Lincoln

Perhaps the President whose example bears the most relevance to disagreement with the Supreme Court is Abraham Lincoln. Lincoln's rise to political prominence centered on his opposition to the Supreme Court case *Dred Scott v. Sandford*, which recognized the ownership of slaves as a property right that Congress could not regulate in the territories.[103] In his losing 1858 campaign against Stephen Douglas for the Illinois Senate seat, Lincoln argued that *Dred Scott* applied only to the parties in the case.[104] Supreme Court decisions, in Lincoln's view, could not bind the President or Congress, both of which also had the right to interpret the Constitution. In his first Inaugural Address, Lincoln "[did not] deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit . . . ."[105] Judicial opinions should receive "very high respect and consideration, in all paralel [sic] cases, by all other departments of the government."[106] But "if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal."[107] No other President has challenged the binding scope of Supreme Court decisions as did Lincoln.

Lincoln's view of coordinate branch construction of the Constitution was put to the test soon after he took office. Upon the fall of Fort Sumter, Lincoln sprung to action. He called forth 75,000 state troops, issued a call for volunteers, increased the size of the regular Army, and ordered the Navy to enlist more sailors and purchase additional warships.[108] He also removed millions of

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103. Dred Scott v. Sandford, 60 U.S. (1 How.) 393, 450 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIII.

104. *See* Abraham Lincoln, First Debate with Stephen A. Douglas at Ottawa, Ill. (Aug. 21, 1858), *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 1858–1860, 1, 16 (Roy P. Basler ed., 1953) (asserting that his rejection of *Dred Scott* jurisprudence does not imply a desire to see social equality between blacks and whites, or to "directly or indirectly . . . interfere with the institution of slavery in the States where it exists"); *see also* Abraham Lincoln, "A House Divided" Speech at Springfield, Ill. (June 16, 1858), *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 1848–1858, 461, 466 (Roy P. Basler ed., 1953) (noting that the *Dred Scott* decision did not hold that a state, for example, may not forbid slavery).

105. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 1860–1861, 262, 268 (Roy P. Basler ed., 1953).

106. *Id.*

107. *Id.*

108. DANIEL FARBER, LINCOLN'S CONSTITUTION 117–18 (2003) (quoting Abraham Lincoln, Proclamation Calling Militia and Convening Congress (Apr. 15, 1861), *in* 4 THE

dollars from the Treasury for military recruitment and pay.[109] He ordered a blockade of Southern ports and dispatched troops against rebel-held territory.[110] He called Congress into special session, but significantly, not until July 4.[111] While of obvious symbolic importance, the July 4 date ensured that the executive branch, not Congress, would set the initial outlines of national policy. Lincoln had three months to establish a status quo that would be difficult for Congress to change.

Rapid events forced Lincoln to defy the courts. Maryland was a slave-holding state, and the state legislature and the mayor of Baltimore were pro-Confederacy.[112] If Maryland seceded, the nation's capital would be utterly isolated.[113] Mobs in Baltimore attacked the first military units from Massachusetts and Pennsylvania traveling to reinforce the Capital, and rebel sympathizers cut the telegraph and railroad lines to Washington.[114] On April 27, 1861, Lincoln unilaterally suspended the writ of habeas corpus on the route from Philadelphia to Washington and replaced civilian law enforcement with military detention.[115] Suspension prevented rebel spies and operatives detained by the military from petitioning the civilian courts for release.[116] The Constitution describes this power in the passive tense: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[117] But it is located in Article I, which enumerates Congress's powers and their limits.

Union officers arrested John Merryman, an officer in a secessionist Maryland militia, for participating in the destruction of the railroads near Baltimore.[118] Upon the petition of Merryman's lawyer, Chief Justice Roger Taney issued a writ of habeas corpus ordering the commander of Union forces in Maryland to produce

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COLLECTED WORKS OF ABRAHAM LINCOLN, 1860–1861, 331, 331–32 (Roy P. Basler ed., 1953)).

109. FARBER, *supra* note 108, at 118.

110. *Id.* at 117.

111. *Id.*

112. *Id.* at 16.

113. *Id.*

114. *Id.* at 16, 117.

115. Abraham Lincoln, Letter to Winfield Scott (Apr. 27, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 1860–1861, 347, 347 (Roy P. Basler ed., 1953).

116. PHILLIP SHAW PALUDAN, THE PRESIDENCY OF ABRAHAM LINCOLN 73–75 (1994).

117. U.S. CONST. art. I, § 9, cl. 2.

118. FARBER, *supra* note 108, at 17.

Merryman in court.[119] The General refused to appear and instead sent an aide to notify Taney that Merryman had been detained under the President's suspension of habeas.[120] Taney held the General in contempt, but the Marshal serving the order could not gain entry to Fort McHenry.[121] Taney was left to issue an opinion, which sought to pull the heart out of Lincoln's energetic response to the attack on Fort Sumter.[122] Taney held that the Suspension Clause's placement in Article I, and judicial commentary since ratification, recognized that only Congress could suspend the writ.[123] If military detention without trial were permitted to continue, Taney wrote, "the people of the United States are no longer living under a government of laws."[124] Under presidential suspension, "every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found."[125] Taney's opinion clearly questioned the legal bases for Lincoln's other responses to secession. Beyond suspending habeas corpus, he wrote, the Lincoln administration "has, by force of arms, thrust aside the judicial authorities and officers to whom the constitution has confided the power and duty of interpreting and administering the laws, and substituted a military government in its place, to be administered and executed by military officers."[126]

Merryman was not just an attack on Lincoln's suspension of the writ, but upon the President's right to interpret the Constitution. Taney declared that it was the responsibility of "that high officer, in fulfillment of his constitutional obligation" under the Take Care Clause to enforce the Court's orders.[127] It was another declaration of judicial supremacy in interpreting the Constitution—to be expected of the Justice who wrote *Dred Scott*, though perhaps not from Jackson's Attorney General. Taney wanted to dramatize the conflict between the President and the judiciary. He appeared before a crowd of 2,000 on the Baltimore courthouse steps to

119. Ex Parte Merryman, 17 F. Cas. 144, 147–49 (C.C.D. Md. 1861); *see also* Arthur T. Downey, *The Conflict between the Chief Justice and the Chief Executive:* Ex Parte Merryman, 31 J. SUP. CT. HIST. 262, 263 (2006).

120. Downey, *supra* note 119, at 264–265.

121. *Id.* at 265, 268.

122. John Yoo, Merryman *and* Milligan *(and* McCardle*)*, 34 J. SUP. CT. HIST. 243, 247 (2009).

123. *Ex Parte Merryman*, 17 F. Cas. at 148.

124. *Id.* at 152.

125. *Id.*

126. *Id.*

127. *Id.*

receive the Commanding General's response, and declared that the officer was defying the law and that the Chief Justice might be under military arrest soon.[128]

Lincoln answered Taney and the widespread claims of executive dictatorship in his message to the July 4, 1861, session of Congress. Lincoln stressed that the Confederacy had fired the first shot before the national government had taken any action that might threaten slavery.[129] Secession did not answer any unconstitutional action of the government, but sought to overturn the constitutional process of "time, discussion, and the ballot-box."[130] In response, "no choice was left but to call out the war power of the Government; and so to resist force, employed for its destruction, by force, for its preservation."[131] He recited the litany of actions that followed: calling out the militia, the blockade, the call for volunteers, and the expansion of military spending. Lincoln claimed that he had moved forcefully with the support of public opinion. "These measures, whether strictly legal or not, were ventured upon, under what appeared to be a popular demand, and a public necessity; trusting, then as now, that Congress would readily ratify them."[132] Lincoln avoided the question whether he had acted unconstitutionally. He sought justification from Congress's political support, after the fact. "It is believed that nothing has been done beyond the constitutional competency of Congress."[133] Congress enacted a statute that did not explicitly authorize war against the South, but declared that:

> [Lincoln's actions] respecting the army and navy of the United States, and calling out or relating to the militia or volunteers from the States, are hereby approved and in all respects legalized and made valid, to the same intent and with the same effect as if they had been issued and done under the previous express authority and direction of the Congress of the United States.[134]

Congress gave approval through its explicit control over the size and funding of the military, but did not seek to direct Lincoln's war aims or the conduct of hostilities. It would be a year and a half

128. PALUDAN, *supra* note 116, at 76.
129. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 1860–1861, 421, 425 (Roy P. Basler ed., 1953).
130. *Id.* at 423.
131. *Id.* at 426.
132. *Id.* at 429.
133. *Id.*
134. Act of Aug. 6, 1861, ch. 63, § 3, 12 Stat. 326.

before the Supreme Court considered the constitutionality of Lincoln's immediate actions in *The Prize Cases.*[135] *The Prize Cases* presented a demand for damages by the owners of several vessels seized by blockading Union warships in the summer of 1861.[136] They argued that international law limited blockades only to wars between nations, which conflicted directly with Lincoln's theory that the Confederacy was only a conspiracy of law-breakers.[137] If the Civil War were a war, the plaintiffs continued, Lincoln could not act without a declaration of war from Congress first.[138]

A 5-4 majority of the Court upheld Lincoln's actions, with or without congressional authorization.[139] It began by endorsing Lincoln's initial judgment that secession had begun an insurrection, not a war with a separate nation.[140] They also agreed that the scope of the insurrection nevertheless granted the United States the rights and powers of war against a belligerent nation: "[I]t is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents, claims sovereign rights as against the other."[141] Even though the Confederacy would never be recognized as a nation by the United States, the very nature of the conflict required that it be recognized as war, rather than as a matter for the criminal justice system.[142] "When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a *war.*"[143] Lincoln's imposition of a blockade on Southern ports, though legal under international law only against another nation, was a legitimate exercise of war power under the Constitution.

The Court found that Lincoln did not need a declaration of war to respond to the attack on Fort Sumter: "If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but

135. The Prize Cases, 67 U.S. (2 Black) 635 (1862).
136. *Id.* at 636–38.
137. *Id.* at 641–43.
138. *Id.* at 688–90.
139. *Id.* at 668.
140. *Id.* at 641–42.
141. *Id.* at 666.
142. *Id.* at 692.
143. *Id.* at 666–67.

is bound to accept the challenge without waiting for any special legislative authority."[144] It did not matter whether the attacker was a foreign nation or a seceding state. The firing on Fort Sumter constituted an act of war against which the President automatically had authority to use force: "And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be '*unilateral*.'"[145] The Court expressly declared that the scope and nature of the military response rested within the hands of the executive: "Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him* . . . ."[146]

Judicial review would not extend to the President's decisions on whether to consider the Civil War an actual war, and what type of military response to undertake. Justice Grier, writing for the majority, said that "this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted."[147] The Justices only entertained the need for legislative approval as a hypothetical to buttress its conclusion, and never held that Congress's approval was necessary as a constitutional matter:

> If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861, which was wholly employed in enacting laws to enable the Government to prosecute the war with vigor and efficiency.[148]

Both the courts and Congress vindicated Lincoln's constitutional position from the early days of the war.

The normal process of law could not handle the unique nature of the rebellion. Confederate leaders, for example, were not being detained because they were guilty of a crime, but because their release would pose a future threat to the safety of the country. What if federal authorities, Lincoln wrote in a letter published in June of 1863, could have arrested the military leaders of the

144. *Id.* at 668.
145. *Id.*
146. *Id.* at 670.
147. *Id.*
148. *Id.*

Confederacy, such as Generals Breckinridge, Lee, and Johnston, at the start of the war?[149] He continued, "Unquestionably if we had seized and held them, the insurgent cause would be much weaker. But no one of them had then committed any crime defined in the law. Every one of them, if arrested, would have been discharged on Habeas Corpus, were the writ allowed to operate."[150] Suspension of the writ made clear that captured Confederates could not seek the benefits of the very civilian legal system that they sought to overthrow.

Lincoln's July 4, 1861, message to the special session of Congress mounted a powerful defense of his suspension of the writ.[151] He argued that his presidential duty called upon him to protect the Constitution over and above the decisions of the Supreme Court: "The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States."[152] Saving the Union from a mortal threat, Lincoln suggested, could justify a violation of the Constitution and the laws, and certainly a single provision of them:

> Must they be allowed to finally fail of execution, even had it been perfectly clear, that by the use of the means necessary to their execution, some single law, made in such extreme tenderness of the citizen's liberty, that practically, it relieves more of the guilty, than of the innocent, should, to a very limited extent, be violated?[153]

Lincoln then famously asked the question "more directly": "[A]re all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?"[154] He suggested that painstaking attention to the habeas corpus provision would come at the expense of his ultimate constitutional duty: saving the Union. "Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?"[155]

Lincoln performed some acrobatics to pull back from a direct

149. Abraham Lincoln, To Erastus Corning and Others (June 12, 1863), *in* 6 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 1862–1863, 260, 265 (Roy P. Basler ed., 1953).
150. *Id.*
151. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 1860–1861, 421, 428–31 (Roy P. Basler ed., 1953).
152. *Id.* at 430.
153. *Id.*
154. *Id.*
155. *Id.*

constitutional conflict. It was obvious that the nation indeed was confronted with "rebellion or invasion."[156] Written in the passive tense, the Constitution's habeas corpus provision did not specify which branch had the right to suspend it.[157] Lincoln quickly returned to the need for prompt executive action to address the crisis: "[A]s the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together . . . ."[158] A rebellion might even prevent Congress from meeting.

In an opinion issued the next day, Attorney General Bates agreed that the President's duty to execute the laws and uphold the Constitution required him to suppress the rebellion using the most effective means available.[159] If the rebels sent an army, the President had the discretion to respond with an army.[160] Bates also said that "if they employ spies and emissaries, to gather information, to forward rebellion, he may find it both prudent and humane to arrest and imprison them."[161] A President must have the ability to suspend habeas in case of an emergency that required him to call out the military, the vagueness of the Suspension Clause notwithstanding.[162] In times of emergency, "the President must, of necessity, be the sole judge, both of the exigency which requires him to act, and of the manner in which it is most prudent for him to employ the powers entrusted to him . . . ."[163]

Bates's legal opinion launched a frontal assault on Taney's claim to judicial supremacy in *Merryman*. "To say that the departments of our government are co-ordinate, is to say that the judgment of one of them is not binding upon the other two, as to the arguments and principles involved in the judgment."[164] Independence required that no branch could compel another. No court could issue a writ requiring compliance by the President, just as no President could order a court how to decide a case. Bates's opinion ventured even

156. *See* U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion . . . .").

157. *Id.*

158. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 1860–1861, 421, 431 (Roy P. Basler ed., 1953).

159. Suspension of the Privilege of the Writ of Habeas Corpus, 10 U.S. Op. Att'y Gen. 74, 82–83 (1861).

160. *Id.* at 83.

161. *Id.*

162. *Id.* at 87, 90–92.

163. *Id.* at 84.

164. *Id.* at 77.

further than Lincoln's view on *Dred Scott*, in which Lincoln at least agreed to enforce against the parties in the case.[165] Bates's claim of the independent status of each branch implied that the President had no obligation to obey a court judgment even in that narrow case[166]—a position that the administration had to adopt because Lincoln had already ignored Taney's order releasing Merryman.[167]

Bates questioned whether the courts had any competence to decide questions relating to the war:

> [T]he whole subject-matter is political and not judicial. The insurrection itself is purely political. Its object is to destroy the political government of this nation and to establish another political government upon its ruins. And the President, as the chief civil magistrate of the nation, and the most active department of the Government, is eminently and exclusively political, in all his principal functions.[168]

A court, Bates concluded, had no authority to review these political decisions of the President.[169] The Attorney General suggested that something like the modern Political Question Doctrine be applied to judicial review of the President's wartime decisions.[170] Almost as an aside, Bates addressed the merits of the constitutional question. He observed that the Suspension Clause was vague and did not specify whether Congress alone, or the President too, could suspend habeas corpus.[171] He argued that it was absurd to allow habeas corpus to benefit enemies in wartime, as it would imply that the enemy could sue for damages when the Union destroyed their arms and munitions.[172]

Lincoln represents the high point of presidential opposition to judicial supremacy in interpreting the Constitution. With *Dred Scott*, he argued that the President had a constitutional duty to enforce a judgment against the parties of the case itself. The opinion of the Court was just that: an opinion. The President could hold his own interpretation of the Constitution even while enforcing a judgment

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165. *See* Lincoln, *supra* note 105, at 268.

166. Suspension of the Privilege of the Writ of Habeas Corpus, *supra* note 159, at 78 (arguing that the judicial branch has powers that are "ample and efficient" for resolving conflicts between individual parties, but that it is "powerless to impose rules of action and of judgment upon other departments.").

167. FARBER, *supra* note 108, at 164–66.

168. Suspension of the Privilege of the Writ of Habeas Corpus, *supra* note 159, at 86.

169. *Id.*

170. *See id.*

171. *Id.* at 88–89.

172. *Id.* at 91.

with which he disagreed. During the Civil War, Lincoln went even further. In *Merryman*, Lincoln eventually refused even to carry out a judgment—a writ of habeas corpus—that he believed intruded upon his constitutional authority as Commander-in-Chief during wartime.

III. MODERN RESPONSE TO *OBERGEFELL*

Part II describes the rejection of judicial supremacy by some of America's greatest Presidents. Chief executives have reached their own interpretation of the Constitution in the course of performing their unique responsibilities. Jefferson used his plenary power over prosecution and the granting of pardons to advance his vision of free speech. Jackson wielded the veto to carry out his understanding of the limits on federal power vis-à-vis the states. Lincoln exercised his functions as Commander-in-Chief according to a more robust theory of the government's war powers. In each of these cases, presidential views deviated sharply from those of the Supreme Court.

These examples show the way forward for critics of *Obergefell.* Presidents can use their own powers to advance a reading of the Constitution's protection for gay rights at odds with judicial doctrine. Most prominent among these powers is the power of judicial appointment, which the President of course shares with the Senate's right of advice and consent.[173] While Jefferson never changed the arc of the Court's nationalist decisions, Lincoln and Franklin Roosevelt had more success in appointing Justices that turned the Court in a more congenial direction. Opponents of *Obergefell* could begin most immediately by seeking to appoint one Justice to the Court who might reverse *Obergefell*'s 5-4 vote.

Prominent defenders of traditional marriage, however, have gone beyond the usual criticism of a mistaken judicial decision to attack the Supreme Court as an institution. "I will not acquiesce to an imperial court any more than our Founders acquiesced to an imperial British monarch," said Mike Huckabee, former governor of Arkansas and GOP presidential candidate.[174] "We must resist and reject judicial tyranny, not retreat."[175] Fellow candidate and

173. U.S. CONST. art. II, § 2, cl. 2.

174. Reid J. Epstein, *Move On or Keep Fighting? GOP Candidates React to Gay-Marriage Ruling*, WALL ST. J., (June 26, 2015, 12:01 PM), http://on.wsj.com/1W4yQDV [perma.cc/BG5R-CX3D].

175. *Id.*

Republican Senator Ted Cruz proposed constitutional amendments not only to overturn *Obergefell*, which other candidates support, but to subject Supreme Court justices to periodic elections.[176] Others have proposed a constitutional amendment that would subject Supreme Court decisions to override by a supermajority of Congress,[177] an idea proposed by Judge Robert Bork in the 1990s.[178]

Such efforts forget the coordinate nature of the separation of powers in the area of constitutional interpretation. While the Constitution does not grant federal courts the final word, it implicitly gives the courts *a* right to interpret the Constitution. As Chief Justice John Marshall famously observed in *Marbury v. Madison*, which established the power of judicial review, "It is emphatically the province and duty of the judicial department to say what the law is."[179] When judges confront a case where one side relies on a federal statute and the other on the Constitution, they must choose the Constitution as the higher law and put aside the act of Congress. The judiciary's power to interpret the Constitution derives from its responsibility to decide cases and controversies under federal law.

Opponents of gay marriage are summoning this deeper understanding of the separation of powers to resist *Obergefell*. But the Constitution itself provides less drastic means than attacking the Court's independence. Rather than subject Justices to term limits or elections, critics must persuade the American people that the courts have overstepped their proper role by reading their personal preferences into the Constitution. They can change *Obergefell*'s result by seeking judicial nominees who will restore primary control over family law and marriage to the states. Like the opponents of *Roe v. Wade*, they can seek to create a political and cultural environment that makes a return to the Court's proper role possible. While such a campaign could take decades, as has the movement to restore control over abortion to the states, critics of *Obergefell* should work within the bounds of tradition, even when

176. Ted Cruz, Constitutional Remedies to a Lawless Supreme Court, NAT'L REV. (June 26, 2015, 5:39 PM), http://bit.ly/1ZiMymw [perma.cc/9MQD-H3FA].

177. Carol Nackenoff, Constitutional Reforms to Enhance Democratic Participation and Deliberation: Not All Clearly Trigger the Article V Amendment Process, 67 MD. L. REV. 62, 65–68 (2007).

178. Robert H. Bork, Slouching Towards Gomorrah: Modern Liberalism and American Decline 117–19 (2003).

179. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

the Court does not.

JUDICIAL OVERREACH AND AMERICA'S DECLINING DEMOCRATIC VOICE: THE SAME-SEX MARRIAGE DECISIONS

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I. INTRODUCTION

America began as the "great experiment";[1] an experiment to see if people could govern themselves. It would be a country with a "government of laws and not of men."[2] The Bill of Rights provided the governed protections against government abuse, and put securities in place to balance the separation of powers among the tripartite federal government and to protect federalism principles. Never before in the history of the world had such a bold experiment unfolded.[3] Not even one hundred years later, the "experiment" was sorely tested when the Civil War divided America and called into question whether "government of the people, by the people, for the people"[4] could work. America's sovereign, the people, showed they could govern themselves. One hundred and fifty years later, another question has surfaced—do the people still govern themselves?

This article discusses the expanded role of the federal judiciary, particularly regarding the same-sex marriage decisions; decisions which have reverberating consequences for the present and future of this country. Part II provides a brief overview of the historical role of the federal judiciary. Part III reviews the United States Supreme Court same-sex marriage decisions of *Hollingsworth v. Perry* and *United States v. Windsor* and discusses how the Court overstepped its role in deciding these cases. Part IV illustrates how the federal judiciary exceeded its role in relying on these Supreme Court decisions, and more particularly the *Windsor* decision, to bypass the voice of the people. Part V reviews *Obergefell v. Hodges*, the Supreme Court decision that legalized same-sex marriage in all states. Finally, Part VI suggests that the people have a right to decide the same-sex marriage issue and that they should not have been denied this right by an overreaching federal judiciary.

II. THE JUDICIARY'S HISTORICAL ROLE: A BRIEF OVERVIEW

At the outset, it is important to note some of the difficulties

1. 2 HENRY CABOT LODGE, AMERICAN STATESMEN: GEORGE WASHINGTON 48–49 (John T. Morse, Jr. ed., 1889) ("The establishment of our new government . . . seemed to be the last great experiment for promoting human happiness by a reasonable compact in civil society.").

2. MASS. CONST. art. XXX; *see also* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 349 (1833).

3. Abraham Lincoln, *The Gettysburg Address*, LIBRARY OF CONGRESS (Nov. 19, 1863), http://1.usa.gov/1OhkJrE [perma.cc/D6RU-6PDM].

4. *Id.*

surrounding the creation and ratification of the Constitution as it concerns the judiciary. The delegates at the Constitutional Convention of 1787 agreed that a judicial branch, coequal with and separate from the legislative and executive branches, was necessary to a well-organized, republican government.[5] The delegates differed, however, on how to organize this independent judiciary.[6] Debates centered on the manner of judicial appointment, whether to establish inferior federal courts at the convention, and James Madison's proposal for a council of revision.[7] Regarding the manner of judicial appointment, it was not until the final two weeks of the Convention that a consensus was reached to grant the appointment power of Supreme Court judges to the President, with the advice and consent of the Senate.[8] The longest debate concerning the judiciary centered on James Madison's proposed council of revision.[9] In the end, the delegates drafted Article III of the Constitution.

Article III creates the judicial powers of the United States and vests them "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[10] And Article III extends these judicial powers to:

> [A]ll Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[11]

Section 2 of Article III further outlines the Supreme Court's

5. FED. JUD. CTR., 1 DEBATES ON THE FEDERAL JUDICIARY: A DOCUMENTARY HISTORY [1787–1875] 7 (Bruce A. Ragsdale ed., 2013).

6. *See id.*

7. *See id.* at 9–22.

8. *Id.* at 10.

9. *See id.* at 19 (Modeled after the New York state constitution, Madison's proposed council of revision would consist of the president and a group of judges. The council would review legislation prior to adoption and have the authority to suggest revisions to, or a veto of, an act. The council would also be authorized to review any recommendation by Congress to disallow state legislation.).

10. U.S. CONST. art. III, § 1.

11. *Id.* at § 2, cl. 1.

original and appellate jurisdictions, and guarantees trial by jury in criminal cases.[12]

While the delegates were able to reach consensus with the Constitution, securing that consensus amongst the several states was another matter. During the nine months before the Constitution was ratified, many issues were raised and debated among the Anti-Federalists, who opposed ratification, and the Federalists, who advocated for adoption of the Constitution.[13] Some of these issues concerned the federal judiciary.[14]

The Anti-Federalists were concerned that the proposed judiciary would overpower or consume state courts, and possibly even the states themselves.[15] The "Brutus" letters, which outlined some of the strongest critiques of the proposed federal judiciary, articulated the Anti-Federalists' concerns. "Brutus I" argued that the federal judiciary "will eclipse the dignity, and take away from the respectability, of the state courts. . . . that they will swallow up all the powers of the courts in the respective states."[16] "Brutus XV" warned that the Supreme Court would be "exalted above all other power in the government, and subject to no controul."[17] This letter further cautioned that the proposed Constitution:

> [M]ade the judges *independent*, in the fullest sense of the word. There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven.[18]

Surely the Anti-Federalists would agree with Alexis de Tocqueville's observation that "[n]o nation ever constituted so great a judicial power . . . . [and that] a more imposing judicial power was never

12. U.S. CONST. art. III, § 2.

13. DAVID J. SIEMERS, RATIFYING THE REPUBLIC: ANTIFEDERALISTS AND FEDERALISTS IN CONSTITUTIONAL TIME 1–2 (2002).

14. Perhaps the strongest critique against the proposed federal judiciary as outlined in the U.S. Constitution was the lack of a guaranteed right to a trial by jury in civil cases. *See* FED. JUD. CTR., *supra* note 5, at 25–26. As this article focuses on the scope of federal judicial review, and federal judicial power, in general, this critique is not discussed.

15. FED. JUD. CTR., *supra* note 5, at 25.

16. Brutus I Letter (Oct. 18, 1787), *in* 1 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 168 (Bernard Bailyn ed., 1993), *reprinted in* FED. JUD. CTR., 1 DEBATES ON THE FEDERAL JUDICIARY: A DOCUMENTARY HISTORY [1787–1875] 27 (Bruce A. Ragsdale ed., 2013).

17. Brutus XV Letter (Mar. 20, 1788), *in* 1 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION, *supra* note 16, at 29.

18. *Id.* at 30–31.

constituted by any people."[19]

The Federalist papers of Alexander Hamilton, James Madison, and John Jay championed the Constitution and advocated for its ratification, and essays 78–83 specifically addressed the federal judiciary.[20] In an oft-quoted passage from Federalist No. 78, Hamilton reassured the Anti-Federalists that the judiciary has "neither *force* nor *will*, but merely judgment."[21] Any time the courts "exercise *will* instead of *judgment*, the consequence would equally be the substitution of their pleasure to that of the legislative body."[22] According to Hamilton, "the judiciary . . . will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them."[23] And quoting Montesquieu, Hamilton confidently declared, "[T]he judiciary is beyond comparison the weakest of the three departments of power."[24]

Concerning the federal judiciary powers, the debates surrounding ratification of the Constitution make clear that the scope of these powers was anything but settled. Of course, it would be unreasonable to expect the judiciary powers to be perfectly settled under a new form of government, new to both the people governed by it and to the world at large. After all, this was a "great experiment."[25] Perhaps the Framers understood the need for a flexible federal judiciary, with its expansion and contraction that would, over time, help define the scope of its powers.

Throughout our nation's history, the scope of the federal judiciary has indeed waxed and waned. The Marshall Court breathed life and legitimacy into the Supreme Court with such landmark cases as *Marbury v. Madison*, *McCulloch v. Maryland*, *Cohens v. Virginia*, and *Gibbons v. Ogden*, among others.[26] During The Great Depression, the Court was accused of being "a static judiciary."[27]

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19. I ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 150 (Phillips Bradley ed., 1835).
20. *See* THE FEDERALIST NOS. 78–83 (Alexander Hamilton, James Madison & John Jay).
21. THE FEDERALIST NO. 78 (Alexander Hamilton).
22. *Id.*
23. *Id.*
24. *Id.*
25. LODGE, *supra* note 1, at 50.
26. Harold H. Burton, *John Marshall—The Man*, 104 U. PA. L. REV. 3, 6 n.7 (1955–56) (According to Justice Burton, the Supreme Court decided sixty-two cases on questions of constitutional law while John Marshall was a member of the Court. Of these sixty-two cases, Chief Justice Marshall wrote thirty-six opinions, opinions that are "foundation stones of our constitutional law.").
27. President Franklin D. Roosevelt, President's Message to Congress (Feb. 5, 1937), *in* 75 CONG. REC. 81, 877 (1937), *reprinted in* FED. JUDICIAL CTR., 2 DEBATES ON THE FEDERAL

The Warren Court expanded federal court jurisdiction to ensure the protection of constitutional rights, while the Burger Court, with confidence in state courts, narrowed federal court jurisdiction.[28] The above is only a small and incomplete sampling of the "quest for a viable line between judicial activism and judicial restraint."[29] Even as this quest for balanced judicial review continues to unfold, it is important to remember, as Professor Raoul Berger noted, that "[j]udicial review was conceived in narrow terms."[30]

Some of the Court's influential justices have contributed to the debate surrounding the appropriate scope of the federal judiciary. In the landmark case of *Marbury v. Madison*, Chief Justice Marshall established, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[31] Indeed, the Supreme Court is "the ultimate interpreter of the Constitution."[32] And Justice Field proclaimed it "the imperative duty of the court to enforce with a firm hand every guarantee of the constitution."[33] While not a Supreme Court Justice, Judge Wright, of the D.C. Circuit Court, noted that courts have the inevitable task of maintaining substantial rights when the legislative process cannot or will not do so.[34] Furthermore, Judge Wright believed that the Court remains neutral when it protects interests that have been repeatedly ignored by the political process.[35]

At the same time, Chief Justice Marshall observed, "[c]ourts are the mere instruments of the law, and can will nothing."[36] Justice Frankfurter warned that "it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving

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JUDICIARY: A DOCUMENTARY HISTORY [1875–1939] 222 (Daniel S. Holt ed., 2013).

28. *See* Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 234–35 (1988).

29. Henry J. Abraham, *"Equal Justice Under Law" or "Justice At Any Cost"? The Judicial Role Revisited: Reflections on Government by Judiciary: The Transformation of the Fourteenth Amendment*, 6 HASTINGS CONST. L.Q. 467, 478 (1979).

30. Raoul Berger, *The Role of the Supreme Court in a Democratic Society*, 26 VILL. L. REV. 414, 420 (1981).

31. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

32. Baker v. Carr, 369 U.S. 186, 211 (1962).

33. Stephen J. Field, *The Centenary of the Supreme Court of the United States*, 24 AM. L. REV. 351, 367 (1890).

34. J. Skelly Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1, 9 (1968) (Judge Wright was a judge for the United States Court of Appeals for the District of Columbia Circuit when this article was published.).

35. *Id.* at 17.

36. Robert H. Jackson, *The Task of Maintaining Our Liberties: The Role of the Judiciary*, 39 A.B.A. J. 961, 961 (1953).

effect to its own notions of what is wise or politic."[37] Justice Jackson noted that "overstepping or irresponsible use of judicial power is as much an evil as lawlessness in either of the other branches of government."[38] And Justice Harlan explained that the Court should not be viewed "as a general haven for reform movements" and should avoid "experiment[s] in venturesome constitutionalism."[39]

Supreme Court Justices have also opined as to what should be considered in federal judicial review. To quote Justice Jackson: "To the extent that public opinion of the hour is admitted to the process of constitutional interpretation, the basis for judicial review of legislative action disappears."[40] Yet, Justice Cardozo recognized that much turns "upon the social or juridical philosophies of the judges who constitute the Court at one time or another."[41] These philosophies are arguably influenced by the public opinion of the day. Recognizing this, Justice Frankfurter admitted, "It is not easy to stand aloof and allow want of wisdom to prevail, to disregard one's own strongly held view of what is wise in the conduct of affairs."[42] And on another occasion, Justice Frankfurter instructed, "As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard."[43] Of course, one could argue that this is a nice theoretical ideal, but is not possible; while the cynic would assert that Justices frequently invoke their private views in deciding constitutional issues of the day.[44]

As the quest for an appropriate balance of federal judicial review powers proceeds, the Court continues to hear and decide a wide range of contentious cases. Far from being "static," the Court presses on with a "firm hand" in hearing and deciding cases on matters such as segregation,[45] contraception,[46] abortion,[47] the

37. Trop v. Dulles, 356 U.S. 86, 120 (1958) (Frankfurter, J., dissenting).

38. Jackson, *supra* note 36, at 961.

39. Reynolds v. Sims, 377 U.S. 533, 625 (1964) (Harlan, J., dissenting).

40. Jackson, *supra* note 36, at 964.

41. *Id.* at 962.

42. *Trop*, 356 U.S. at 120.

43. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 647 (1943) (Frankfurter, J., dissenting).

44. Constitutional expert and professor Erwin Chemerinsky would disagree with this characterization. In his view, the Court decides cases independent of outside pressures, external lobbying, or the Justices' personal interests. *See* Erwin Chemerinsky, *The Supreme Court, Public Opinion, and the Role of the Academic Commentator*, 40 S. TEX. L. REV. 943, 947 (1999).

45. *See, e.g.*, Dred Scott v. Sanford, 60 U.S. 393 (1856); Plessy v. Ferguson, 163 U.S. 537 (1896); Brown v. Bd. of Educ., 347 U.S. 483 (1954); Milliken v. Bradley, 433 U.S. 267 (1977).

death penalty,[48] and the end-of-life right to die,[49] among others. In the 2013 Term, the United States Supreme Court decided two same-sex marriage cases.[50] It is to these cases that we now turn.

III. THE SAME-SEX MARRIAGE CASES

It is difficult to imagine an issue more important and impactful to our society and future generations than that of same-sex marriage.[51] To be sure, how marriage is defined impacts over one thousand federal laws, as the United States Supreme Court established in *United States v. Windsor*.[52] But defining marriage in the black letter law concerns more than guaranteeing rights under the law; redefining marriage under the law is really about changing the meaning of marriage in American society.[53] Same-sex marriage is about altering "the fundamental group unit of society."[54] It is about changing an institution that has existed for millennia. It is about reaching above the natural law and fitting this institution to our preferences.

We would do well to pause and reflect on what exactly we are doing in redefining marriage. For instance, what gives us the *right* to redefine marriage? And what are the consequences, particularly the long-term consequences that will stem from marriage redefined? Of course, these questions are beyond the scope of this article, but we should take a step back and reflect on this "reform movement." We should consider how we evolved from a society that "gave heavy weight to collective rights and individual

46. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

47. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Maher v. Roe, 432 U.S. 464 (1977); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Gonzales v. Carhart, 550 U.S. 124 (2007).

48. *See, e.g.*, Furman v. Georgia, 408 U.S. 238 (1972); Coker v. Georgia, 433 U.S. 584 (1977); Atkins v. Virginia, 536 U.S. 304 (2002); Roper v. Simmons, 543 U.S. 551 (2005).

49. *See, e.g.*, Cruzan by Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990); Washington v. Glucksberg, 521 U.S. 702 (1997); Vacco v. Quill, 521 U.S. 793 (1997); Gonzales v. Oregon, 546 U.S. 243 (2006).

50. *See* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013); United States v. Windsor, 133 S. Ct. 2675 (2013).

51. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2601 (2015) ("Marriage remains a building block of our national community.").

52. *Windsor*, 133 S. Ct. at 2683.

53. Ralph Richard Banks, *Rights and Meanings: How Same Sex Marriage Will Change Marriage for Everyone*, 17 J. GENDER, RACE & JUST. 1, 8 (2014).

54. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 74 (Dec. 10, 1948) (Article 16 of the UDHR provides in part, "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.").

responsibilities" to one that values "individual rights and collective responsibilities."[55]

With this in mind, let us proceed to the two landmark cases on same-sex marriage from the Supreme Court's 2013 Term: *Hollingsworth v. Perry* and *United States v. Windsor.* What follows is a discussion and analysis of each case. This article will then explain why the Court engaged in judicial overreach in deciding these cases.

A. Hollingsworth v. Perry

This case came to the Court by way of California. In 2000, California citizens passed Proposition 22, an initiative that amended the California Family Code to provide, "Only marriage between a man and a woman is valid or recognized in California."[56] Eight years later, in *In re Marriage Cases,* the California Supreme Court held that this statutory definition limiting marriage to only opposite-sex couples violated the Equal Protection Clause of the California Constitution.[57] Later that same year, California citizens passed Proposition 8, another ballot measure, which amended the California Constitution by providing, "Only marriage between a man and a woman is valid or recognized in California."[58] In a subsequent state case, *Strauss v. Horton,* the California Supreme Court held that, under California law, Proposition 8 was properly enacted.[59]

Notably, the court in *In re Marriage Cases* also concluded that "the right to marry, as embodied in . . . the California Constitution, guarantees same-sex couples . . . all of the constitutionally based incidents of marriage."[60] And the California Supreme Court later explained in *Strauss* that Proposition 8 had only "reserv[ed] the official *designation* of the term 'marriage' for the union of opposite-sex couples as a matter of state constitutional law."[61] In other words, Proposition 8 left in place all of the incidents of marriage to same-sex couples without designating their unions as marriages.[62]

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55. DAVID HACKETT FISCHER, PAUL REVERE'S RIDE xvii (1994).
56. In re Marriage Cases, 183 P.3d 384, 410 (Cal. 2008).
57. Hollingsworth v. Perry, 133 S. Ct. 2652, 2659 (2013) (citing In re Marriage Cases, 183 P.3d 384 (Cal. 2008)).
58. *Id.* (quoting CAL. CONST. art. I, § 7.5).
59. *Id.* (citing Strauss v. Horton, 207 P.3d 48, 122 (Cal. 2009)).
60. *In re Marriage Cases,* 183 P.3d at 433–34.
61. *Strauss,* 207 P.3d at 61.
62. *See* Perry v. Brown, 671 F.3d 1052, 1064 (9th Cir. 2012).

At this point, one wonders why any further litigation was necessary since same-sex couples enjoyed equal protection under California law. And yet, litigation continued, not under state law—the guardian of marriage[63]—but under federal law.

Two same-sex couples wanting to marry filed suit in the United States District Court for the Northern District of California challenging the constitutionality of Proposition 8 under the U.S. Constitution.[64] California government officials refused to defend the law, but the district court permitted the official proponents of Proposition 8 (hereinafter "official proponents") to defend it.[65] The district court declared Proposition 8 unconstitutional.[66] The official proponents then appealed the decision, the elected officials having refused to do so.[67] A jurisdictional issue arose as to whether the official proponents had standing in the case. The Ninth Circuit certified the standing question to the California Supreme Court, which concluded:

> In a postelection challenge to a voter-approved initiative measure, the official proponents of the initiative are authorized under California law to appear and assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so.[68]

Relying on the California Supreme Court's determination, the Ninth Circuit found that the official proponents had standing under federal law and then proceeded to affirm the district court on the merits.[69] The U.S. Supreme Court granted certiorari to review the standing determination.

The Supreme Court specifically decided whether the official proponents had standing to appeal the district court's order.[70] Relying on the seminal standing case of *Lujan v. Defenders of Wildlife*, the Supreme Court held that the official proponents had no direct stake in the case.[71] "Their *only* interest in having the District Court order reversed was to vindicate the constitutional validity of a

63. *See* Robert Barnes, *Federal appeals court may be roadblock to gay marriage cases in four states*, WASH. POST, (Aug. 6, 2014), http://wapo.st/1sf1F4S [perma.cc/38LR-DRR7].
64. Hollingsworth v. Perry, 133 S. Ct. 2652, 2660 (2013).
65. *Id.*
66. *Id.*
67. *Id.*
68. Perry v. Brown, 265 P.3d 1002, 1007 (Cal. 2011).
69. *Hollingsworth*, 133 S. Ct. at 2660–61.
70. *Id.* at 2661.
71. *Id.* at 2661–63.

generally applicable California law."[72] Arguably, however, the official proponents had *multiple* interests in the case.

To be sure, one such interest was to have the constitutionality of a state constitutional amendment upheld. But there could be other interests as well. For instance, the official proponents likely had an interest in the legitimacy and effectiveness of the initiative process. As the California Supreme Court noted, the primary purpose of the initiative system is "to afford the people the ability to propose and to adopt constitutional amendments or statutory provisions that their elected public officials had refused or declined to adopt."[73] And as Justice Kennedy observed in his *Hollingsworth* dissent, "The California Supreme Court has determined that this purpose is undermined if the very officials the initiative process seeks to circumvent are the only parties who can defend an enacted initiative when it is challenged in a legal proceeding."[74] Where is "government of the people, by the people, for the people"[75] if the people, having complied with the political process, lose their majority will because state elected officials abdicate their public duty?[76]

On a broader scale, the official proponents likely had an interest in remaining an active participant in the ongoing debate surrounding same-sex marriage. As the Ninth Circuit observed, the question of a constitutional right to same-sex marriage "is currently a matter of *great debate* in our nation."[77] And as the petitioners argued, "Controversial social policy issues such as [same-sex marriage] are particularly well suited . . . for the give and take of the democratic process."[78] Civilized dialogue can foster compromise and advance novel and unique solutions to the matter at hand. Persuasion and advocacy are found in a rich and vigorous debate. The federal judiciary, however, circumvented the debate by hearing the case. The federal courts effectively eliminated the people from the ongoing discussion, and by extension, the

72. *Id.* at 2662 (emphasis added).
73. *Perry*, 265 P.3d at 1016.
74. *Hollingsworth*, 133 S. Ct. at 2671 (Kennedy, J., dissenting).
75. Lincoln, *supra* note 3.
76. *See* CAL. CONST. art. XX, § 3 (Section 3 provides the oath of office of California public officials, who swear to "support and defend . . . the Constitution of the State of California [and to] . . . bear true faith and allegiance to . . . the Constitution of the State of California.").
77. Perry v. Brown, 671 F.3d 1052, 1064 (9th Cir. 2012) (emphasis added).
78. Brief of Petitioners at 56, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144).

opportunity for the people to decide their own fate. This is tragic as the benefits of the democratic process are substantial and undeniable.[79] The democratic process should be valued and respected by the government so long as the conversation continues forward and remains thoughtful.

In addition to deciding that the official proponents had only one interest in the case, the *Hollingsworth* Court further concluded that the official proponents had no personal stake in defending the enforcement of Proposition 8 because they had no role in the enforcement of Proposition 8.[80] Of course they had no role in the enforcement of Proposition 8; that is the role of California's public officials. But the issue was not the *enforcement* of Proposition 8; this, the public officials were doing. The issue was the *defense* of Proposition 8. And if public officials refuse to defend the law, who is to provide that defense? Here, the official proponents had a vested interest in the defense of Proposition 8. They were, after all, *official* proponents of the ballot initiative.[81] It is a shallow democratic process if all it takes to sidestep the voice of the people is for public officials to abandon their duty by not pursing an appeal the people would surely seek but are precluded from pursuing because they do not have a direct or personal stake in the matter.

In his dissent, Justice Kennedy recognizes what the Court does not: "Proper resolution of the justiciability question requires, in this case, a threshold determination of state law."[82] Indeed, the dissent goes so far as to say that "the State Supreme Court's definition of proponents' powers is binding on [the U.S. Supreme] Court."[83] Furthermore, the dissent instructs, "[i]t is for California, not [the U.S. Supreme] Court, to determine whether and to what extent the Elections Code provisions are instructive and relevant in determining the authority of proponents to assert the State's interest in post[-]enactment judicial proceedings."[84] Nevertheless, the Court dictates, as the dissent acknowledges, that "standing in

79. *Id.* at 57.
80. *Hollingsworth*, 133 S. Ct. at 2663.
81. *Id.* at 2670 (Kennedy, J., dissenting) (As the dissent points out, "Proponents' authority under state law is not a contrivance. It is not a fictional construct. It is the product of the California Constitution and the California Elections Code. There is no basis for this Court to set aside the California Supreme Court's determination of state law.").
82. *Id.* at 2668.
83. *Id.*
84. *Id.* at 2669.

federal court is a question of federal law, not state law."[85]

Relying on *Maine v. Taylor*,[86] the Court admitted that a "[s]tate has a cognizable interest 'in the continued enforceability' of its laws that is harmed by a judicial decision declaring a state law unconstitutional."[87] And referencing a case from 1885, the Court instructed that states must designate agents to represent them in federal court.[88] The Court then discussed, at some length, the aspects of agency law and how "the most basic features of an agency relationship are missing here."[89] It seems strange that the official proponents can argue in defense of a state constitutional amendment, but only up to a point because they have not been conferred designated agents. They may not be designated agents *de jure*, but they are certainly designated agents *de facto* for they represent the principal—the majority of Californians who passed Proposition 8.[90] The sad reality here is that the *de jure* agents, California's public officials, failed to fulfill their duties as agents to the people of California and yet there is no recourse for the principal because *de facto* agents do not make the cut.

The irony here is clear.[91] The Court acknowledged that the official proponents have taken no oath of office.[92] Again, they are not designated agents *de jure*. Apparently, public officials, who have taken an oath of office and thus qualify as *de jure* agents, are still *the* agents of the people of California even if they do not fulfill that oath of office. All the official proponents sought to do was to stand in as temporary *de facto* agents in defending Proposition 8.[93] Seeing that the people of California could not assert their defense in court, and seeing that the public officials refused to assert the principal's defense in court, it is difficult to understand why the official proponents, authorized to defend Proposition 8, were precluded from doing so. Who, if not the official proponents, can

85. *Id.* at 2667.

86. Maine v. Taylor, 477 U.S. 131 (1986).

87. *Hollingsworth*, 133 S. Ct. at 2664 (quoting *Maine*, 477 U.S. at 137).

88. *Id.* (citing Poindexter v. Greenhow, 114 U.S. 270, 288 (1885) ("The State is a political corporate body [that] can act only through agents.")).

89. *Id.* at 2666 (The dissent, however, disagrees, and argues that a formal agency relationship is unnecessary in this case under the Court's precedents. *See Hollingsworth*, 133 S. Ct. at 2672–73 (Kennedy, J., dissenting)).

90. The dissent agreed with the California Supreme Court, "If there is to be a principal . . . it must be the people of California, as the ultimate sovereign in the State." *Id.* at 2671 (citing Perry v. Brown, 265 P.3d 1002, 1015–16 (Cal. 2011)).

91. In the words of the dissent, "There is much irony in the Court's approach to justiciability in this case." *Hollingsworth*, 133 S. Ct. at 2674.

92. *Id.* at 2667.

93. *Id.* at 2666.

argue in defense of Proposition 8?

The Court expressed concern that the official proponents "are free to pursue a purely ideological commitment to the law's constitutionality without the need to take cognizance of resource constraints, changes in public opinion, or potential ramifications for other state priorities."[94] The Court, however, does not explain how these concerns do not apply to public officials. Indeed, that California's public officials pursued "a purely ideological commitment to the law's constitutionality" without considering "changes in public opinion" is evidenced in their refusal to appeal the district court's decision.

The Court concluded that it never has, and will not now, uphold "the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to."[95] Consistent with this holding, the Court vacated the Ninth Circuit's judgment.[96] This leaves us with a disturbing reality and a dangerous precedent. The majority will of California voters was set aside by one federal judge, who ruled the state constitutional amendment unconstitutional under the U.S. Constitution, and a handful of elected officials, who refused to appeal that judge's ruling. The reality is that over seven million California voters were silenced by a few public officials.[97] In the words of the dissent, "the Court's opinion today means that a single district court can make a decision with far-reaching effects that cannot be reviewed."[98] This cannot be the democratic process the Founding Fathers envisioned. And it cannot be the democratic process we want going forward. Yet, *Hollingsworth* establishes that judicial fiat and abandonment of public duty are practices by which to engage in the political process.

The *Hollingsworth* Court engaged in judicial overreach by eliminating the voice of the people in the ongoing debate over California's constitutional right to same-sex marriage. California's determination of the official proponents' powers was ignored. The lengthy but crucial democratic process came to an abrupt halt when the official proponents were found to have lacked standing.

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94. *Id.* at 2667.

95. *Id.* at 2668. It is unclear why the Court discusses the constitutionality of a state statute when the constitutionality of a state constitutional amendment is at issue.

96. *Id.*

97. DEBRA BOWMEN, CALIFORNIA SECRETARY OF STATE, STATEMENT OF VOTE: NOVEMBER 4, 2008, GENERAL ELECTION 7 (2008), http://bit.ly/1OP1Iu0 [perma.cc/B7BG-4SXD].

98. *Hollingsworth*, 133 S. Ct. at 2674 (Kennedy, J., dissenting).

The ballot initiative measures—the state statute and the state constitutional amendment—were set aside. The official proponents were left with no recourse. The Court's ruling confirmed that the district court's decision and the state public officials' refusal to pursue an appeal rendered the matter a *fait accompli.*

B. United States v. Windsor

This case involved the applicability of the federal estate tax marital exemption to same-sex couples. Edith Windsor and Thea Spyer were in a long-term relationship, and in 2007, while living in New York, they married in Canada.[99] New York considered their marriage to be valid.[100] Spyer died in 2009 and Windsor paid $363,053 in estate taxes. She was subsequently denied a refund because she did not qualify as a "surviving spouse" under the Defense of Marriage Act (DOMA).[101] At the heart of this case is Section 3 of DOMA, which amended the Dictionary Act to provide that:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.[102]

Windsor filed suit in the United States District Court for the Southern District of New York claiming that DOMA violated the Federal Government's guarantee of equal protection under the Fifth Amendment.[103] While this suit was underway, the Department of Justice decided it would no longer defend the constitutionality of Section 3 of DOMA.[104] The Bipartisan Legal Advisory Group (BLAG) of the House of Representatives intervened in the case, its motion having been granted by the district court.[105] On the merits of the case, the district court held that Section 3 of DOMA is unconstitutional,[106] and the Second Circuit affirmed the district

99. United States v. Windsor, 133 S. Ct. 2675, 2683 (2013).
100. *Id.* (citing Windsor v. United States, 699 F.3d 169, 177–78 (2d Cir. 2012)).
101. *Id.*
102. 1 U.S.C. § 7 (1996), *amended by* Pub. L. No. 104–199, § 3(a) (held unconstitutional in *Windsor*, 133 S. Ct. at 2696).
103. *Windsor*, 133 S. Ct. at 2683.
104. *Id.*
105. *Id.* at 2684.
106. *Id.*

court's judgment.[107] The United States Supreme Court granted certiorari and, before reaching the merits of the case, addressed Article III jurisdictional issues.

1. Article III Jurisdictional Issues

Article III's case-or-controversy and standing requirements were at issue in this case. The case-or-controversy issue—whether judicial review is precluded because the United States agrees with Windsor's legal position[108]—was present because the Government did not seek redress from the judgments below entered against it. As the amicus position concluded, the United States and Windsor were no longer adverse parties because they both prevailed in the proceedings below.[109] But the Court admitted, "In an appropriate case, appeal may be permitted . . . at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Art. III."[110] The Court concluded that the Government had indeed retained a sufficient stake in the appeal.[111] The dissenting justices, however, did not find the Court's reasoning persuasive.

As Justice Scalia questioned, Windsor and the Government "agree entirely on what should happen in this lawsuit. They agree that the court below got it right; and they agreed in the court below that the court below that one got it right as well. What, then, are we *doing* here?"[112] The Government did not ask for relief from the judgment below; rather, it asked the Court to say that the judgment was correct.[113] Quoting Justice Brandeis, Justice Scalia instructed that "we cannot 'pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding'; absent a 'real, earnest and vital controversy between individuals.'"[114] Interestingly, at oral argument the United States conceded, "In the more than two centuries that this Court has existed as an institution, [the Court has] never suggested that [it has] the power to decide a question

107. *Id.*
108. *Id.* at 2685.
109. *Id.*
110. *Id.* at 2687 (quoting Deposit Guar. Nat. Bank v. Roper, 445 U.S. 326, 333–34 (1980) (internal quotations omitted)).
111. *Id.* at 2686.
112. *Id.* at 2698 (Scalia, J., dissenting) (C.J. Roberts and J. Thomas joined Part I of J. Scalia's dissent, which discussed the Article III jurisdictional issues of the case.).
113. *Id.* at 2700.
114. *Id.* at 2699 (quoting Ashwander v. TVA, 297 U.S. 288, 346 (1936) (concurring opinion) (internal citation omitted)).

when every party agrees with both its nominal opponent *and the court below* on that question's answer."[115] Justice Scalia finds that there is no controversy in this case.[116] If Justice Scalia is correct, why does the Court proceed to decide the merits of the case?

As to Article III's standing requirement, the Court decided whether BLAG had standing to appeal the case.[117] The Court was careful to recite the requirements of Article III standing from *Lujan v. Defenders of Wildlife*[118] and concluded that the BLAG had standing.[119] What is confusing is how the Court reached this conclusion. Rather than apply *Lujan's* three elements of standing to the BLAG,[120] the Court discussed the reach of DOMA's sweep and concluded that "the prudential and Article III requirements are met here; and, as a consequence, the Court need not decide whether BLAG would have standing to challenge the District Court's ruling and its affirmance in the Court of Appeals on BLAG's own authority."[121]

Irony and confusion surface when one compares the Court's decisions regarding Article III standing in *Windsor* and in *Hollingsworth.* As Justice Alito observed in his dissent in *Windsor*:

> It is remarkable that the Court has simultaneously decided that the United States, which 'receive[d] all that [it] ha[d] sought' below, *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 333 (1980), is a proper petitioner in this case but that the intervenors in *Hollingsworth*, who represent the party that lost in the lower court, are not.[122]

In *Hollingsworth*, only the Article III case-or-controversy requirement was met since the *official* proponents of Proposition 8—official under California law—were found to lack standing.[123] The case was jurisdictionally barred from going forward, leaving the official proponents without any remedy after having spearheaded the important democratic process of an initiative measure. Contrastingly, in *Windsor*, both the Article III case-or-

115. *Id.* at 2700 (quoting Tr. of Oral Argument at 19–20, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307)).

116. *Id.* at 2701.

117. *Id.* at 2684 (majority opinion).

118. *See id.* at 2685–86 (citing Lujan v. Def. of Wildlife, 504 U.S. 555, 560–61 (1992)).

119. *Windsor*, 133 S. Ct. at 2686.

120. *See id.* The Court instead seems to apply *Lujan*'s three elements of standing to the United States.

121. *Id.* at 2688; *but see id.* at 2712 n.1 (Alito, J., dissenting).

122. *Id.* at 2712 (Alito, J., dissenting).

123. Hollingsworth v. Perry, 133 S. Ct. 2652, 2668 (2013).

controversy and standing requirements were met. The Court's analysis regarding Article III standing appears incomplete, and its reasoning concerning an Article III case-or-controversy leaves much to be desired. It is important to remember, as Justice Scalia observed, that an Article III controversy may still be lacking even though the moving party has standing before the Court.[124] And to permit the Court to find Article III standing whenever it would like is to jettison "[a] principled and predicable system of jurisprudence."[125]

Nevertheless, the Court in *Windsor* found that Article III jurisdictional requirements were satisfied. In doing so, the Court, "enthroned[] at the apex of government,"[126] proceeded to "render an advisory opinion"[127] with far-reaching consequences. This is particularly interesting given Justice Kennedy's comment in his dissent in *Hollingsworth*: "The Court must be cautious before entering a realm of controversy where the legal community and society at large are still formulating ideas and approaches to a most difficult subject."[128] If ever there was an issue for the Court to be cautious, it is same-sex marriage. Yet, despite genuine Article III jurisdictional issues—issues that would allow the Court to be understandably cautious—the Court jumped in to opine on the constitutionality of same-sex marriage. The Court did not heed the "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere . . . [and failed to] put aside the natural urge to proceed directly to the merits of [an] important dispute and to 'settle' it for the sake of convenience and efficiency."[129]

The perplexing reasoning in *Windsor* is found, not only in the issues of Article III jurisdictional requirements, but also in the merits of the case. It is difficult to identify the specific rationale for why Section 3 of DOMA is unconstitutional because the Court discussed federalism, due process, animus, and equal protection guarantees.[130] And "[m]uch early commentary . . . has found Justice Kennedy's opinion for the Court to be 'muddled' and unclear as to

124. *Windsor*, 133 S. Ct. at 2701 (Scalia, J., dissenting).
125. *Id.* at 2703 n.3.
126. *Id.* at 2698.
127. *Id.* at 2712 (Alito, J., dissenting).
128. Hollingsworth v. Perry, 133 S. Ct. 2652, 2674 (2013) (Kennedy, J., dissenting).
129. Raines v. Byrd, 521 U.S. 811, 820 (1997) (footnote omitted).
130. Mark Strasser, *What's Next After Windsor?*, 6 ELON L. REV. 387, 391–399 (2014).

its actual rationale."[131] Rather than pinpoint the precise bases upon which the opinion relies, this article will address two rationales that Justice Kennedy discussed at length—equal protection under the law and Congress's alleged motivation of animus in passing DOMA.[132]

2. Equal Protection Rationale

As mentioned earlier, Edith Windsor claimed that Section 3 of DOMA violated the guarantee of equal protection under the law.[133] Justice Kennedy framed the issue as "whether the resulting injury and indignity [from Section 3 of DOMA] is a deprivation of an essential part of the liberty protected by the Fifth Amendment."[134] According to the Court, "DOMA seeks to injure the very class New York seeks to protect."[135] DOMA's "avowed purpose and practical effect . . . are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."[136] DOMA's "principal purpose is to impose inequality"[137] as it "writes inequality into the entire United States Code."[138] The Court provides a few, of what are surely many, examples of how DOMA burdens same-sex married couples through federal laws impacting health care, bankruptcy, taxes, veterans' benefits, and the penal system.[139]

In his dissent, Justice Scalia notes that the majority opinion did not address the level of scrutiny question in its equal protection analysis.[140] And the Court did "not *apply* anything that resembles [the rationality] deferential framework."[141] Justice Alito felt the equal protection approach of Windsor and the United States was

131. Ernest A. Young, *United States v. Windsor and the Role of State Law in Defining Rights Claims*, 99 VA. L. REV. ONLINE 39, 40 (2013) (footnote omitted); *but see id.* (Prof. Young believes "the rationale is . . . quite evident on the face of Justice Kennedy's opinion.").

132. *See infra* Part IV. The equal protection rationale carried the day as this rationale was cited most frequently by the federal district court judges and circuit court judges who have held state same-sex marriage bans unconstitutional post-*Windsor*.

133. United States v. Windsor, 133 S. Ct. 2675, 2683 (2013).

134. *Id.* at 2692.

135. *Id.* at 2693.

136. *Id.*

137. *Id.* at 2694.

138. *Id.*

139. *See id.* at 2694–95; *see also id.* at 2694 ("Among the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits.").

140. *Id.* at 2706 (Scalia, J., dissenting).

141. *Id.* Justice Scalia concludes that the Court did not apply strict scrutiny and that it relies on rational-basis cases.

"misguided"[142] and that the equal protection framework was "ill-suited for use in evaluating the constitutionality of laws based on the traditional understanding of marriage, which fundamentally turn on what marriage is."[143] Nevertheless, the Court, in part, engaged in an equal protection analysis to invalidate Section 3 of DOMA as unconstitutional.

It would be interesting to consider what would have happened had Section 3 of DOMA included additional language that granted individuals in legal same-sex unions under state law all of the legal incidents of marriage under federal law. It would be the federal parallel to California after Proposition 8 was approved. In short, what if DOMA only "reserv[ed] the official *designation* of the term 'marriage' for the union of opposite-sex couples"?[144] Arguably, there would be no equal protection issue, for "if the relationships outside of marriage carry the same legal incidents as conventional and traditional marriage, it would be safe to say that the law has come to treat both sets of relationships equally."[145] How can the Constitution require that the "legitimacy"[146] and "symbolic benefits"[147] of traditional marriage be extended to same-sex unions if the latter enjoy all the legal incidents of the former? Yet, this moral stamp of approval is exactly what was appealed for in *Hollingsworth.*

3. Unconstitutional Animus Rationale

As Justice Kennedy made clear, "the design, purpose, and effect of DOMA should be considered as the beginning point in deciding whether it is valid under the Constitution."[148] The Court looked to "[d]iscriminations of an unusual character" in determining whether DOMA was motivated by "improper animus."[149] DOMA disadvantaged and stigmatized those who had entered lawful same-sex marriages. The Court was careful to cite the House Report, which concluded that DOMA conveys "both moral disapproval of homosexuality, and a moral conviction that heterosexuality better

142. *Id.* at 2716 (Alito, J., dissenting).
143. *Id.*
144. Strauss v. Horton, 207 P.3d 48, 61 (Cal. 2009).
145. Peter J. Riga, *The Supreme Court's View of Marriage and the Family: Tradition or Transition?*, 18 J. FAM. L. 301, 325 (1979–80).
146. Banks, *supra* note 53, at 2.
147. Strasser, *supra* note 130, at 408.
148. United States v. Windsor, 133 S. Ct. 2675, 2689 (2013).
149. *Id.* at 2693.

comports with traditional (especially Judeo-Christian) morality."[150] DOMA ensured that legal same-sex marriages under state law would be "second-class marriages"[151] or "second-tier marriage[s]"[152] under federal law, "marriages less respected than others."[153] This other class or tier of marriage "demeans the couple" and "humiliates tens of thousands of children now being raised by same-sex couples."[154] DOMA demeans, disparages, and injures those protected by state marriage laws.

Two of the three dissenting opinions take issue with the Court's conclusion that DOMA was motivated by animus, and that this animus was enough, in and of itself, to invalidate the statute. Chief Justice Roberts would not "tar the political branches with the brush of bigotry" without more "convincing evidence that the Act's principal purpose was to codify malice."[155] Justice Scalia is "sure [the Majority's accusations against the Congress and the President] are quite untrue,"[156] and that hurling these accusations against its coordinate branches demeans the Court.[157] And according to one scholar, the majority opinion includes "at least two dozen pejorative terms describing the Act and the intents, purposes, and motives of the members of Congress who enacted Section 3 of DOMA."[158] Seeing as the Court did in fact rely on the doctrine of unconstitutional animus, a brief discussion of the doctrine is warranted.

Professor Susannah W. Pollvogt instructs, "Unconstitutional animus can essentially be understood as an expression of prejudice against a particular social group."[159] She notes that the doctrine is "inherently enigmatic," that the Court has not yet presented a "unified theory of animus," and that the Court's precedent "presents a shifting, incomplete portrait."[160] According to Professor Pollvogt, there are three unanswered questions about the doctrine of unconstitutional animus, unanswered both before and after the

150. *Id.* (quoting H.R. REP. NO. 104–664, at 16 (1996) (footnote omitted)).
151. *Id.*
152. *Id.* at 2694.
153. *Id.* at 2696.
154. *Id.* at 2694.
155. *Id.* at 2696 (Roberts, C.J., dissenting).
156. *Id.* at 2708 (Scalia, J., dissenting).
157. *Id.*
158. Lynn D. Wardle, *"Sticks and Stones": Windsor, the New Morality, and its Old Language*, 6 ELON L. REV. 411, 419 (2014).
159. Susannah W. Pollvogt, *Windsor, Animus, and the Future of Marriage Equality*, 113 COLUM. L. REV. SIDEBAR 204, 208 (2013).
160. *Id.*

Windsor decision.[161] She is surprised unconstitutional animus can function as an operative doctrine considering the ambiguity surrounding it and how it has been applied.[162] This begs the question of whether it *should* function as an operative doctrine, particularly in a case of such significance as *Windsor*. And it is especially troubling that the Court treated animus as a "doctrinal silver bullet."[163] The Court concluded that Section 3 of DOMA was "invalid, for *no* legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."[164] Indeed, the Court rejected Congress's primary interest "to defend the institution of traditional heterosexual marriage."[165]

In the not too distant past, the Court recognized a legitimate state interest in promoting and protecting the traditional family in America.[166] How has this *legitimate* interest been marginalized to a point where it is trumped by the unclear doctrine of unconstitutional animus? It would be one thing if the *Windsor* Court had discussed away this interest, but it is not discussed at all. It is both inadequate and tragic that an opinion which significantly helped to alter the traditional family in America does not even discuss in its analysis the state interest of promoting and protecting that traditional family. And assuming for the moment that the state interest in promoting and protecting the traditional family is indeed legitimate, how does Congress's intent to defend traditional marriage rise to the level of animus? As Justice Scalia observed, "To defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements, any more than to defend the Constitution of the United States is to condemn, demean, or humiliate other constitutions."[167] It is a one-sided approach to label as prejudice the defense of traditional marriage, especially when there is no neutral marriage policy.[168]

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161. *Id.* at 205 (The three unanswered questions are: "(1) how the Court define[s] animus; (2) what the Court accept[s] as evidence of animus; and (3) what the Court underst[ands] the relationship between animus and rational basis review to be.").

162. *Id.* at 210.

163. *Id.* at 213.

164. United States v. Windsor, 133 S. Ct. 2675, 2696 (2013) (emphasis added).

165. *Id.* at 2693 (quoting H.R. REP. NO. 104–664, at 12 (1996)).

166. Riga, *supra* note 145, at 312 (citing, *e.g.*, Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173 (1972); Labine v. Vincent, 401 U.S. 532, 536 (1971)).

167. *Windsor*, 133 S. Ct. at 2708 (Scalia, J., dissenting).

168. Sherif Girgis, Robert P. George & Ryan T. Anderson, *What is Marriage?*, 34 HARV. J.L. & PUB. POL'Y 245, 286 (2011); *see also Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting) ("Windsor and the United States . . . [sought] to have the Court resolve a debate between

The *Windsor* Court exhibited judicial overreach in its decision invalidating Section 3 of DOMA as unconstitutional. While the end result may not be a product of judicial overreach, the way the Court reached that end result is. The Court did something it has never done before—it decided a question that the parties and the court below agreed on. The Court did not articulate a level of scrutiny nor engage in an analysis under that standard of scrutiny in its equal protection discussion. The ambiguous unconstitutional animus doctrine trumped any legitimate state interest. And the previously recognized legitimate state interest of promoting and protecting the traditional family was left out of the equation entirely. With a case of such consequence, the way the Court reaches its decision must match the decision itself.

IV. FEDERAL SAME-SEX MARRIAGE CASES POST-*WINDSOR*

Windsor's reach has been debated since the day its opinion was published. In fact, the opinion itself discusses the reach of the Court's holding that Section 3 of DOMA is unconstitutional. The Court's language is clear: "This opinion and its holding are confined to [state-mandated] lawful marriages,"[169] to "those persons who are joined in same-sex marriages made lawful by the State."[170] The Court's confined holding is one of Chief Justice Roberts's main points in his dissent. As the Chief Justice emphasized:

> I write only to highlight the limits of the majority's holding and reasoning today, lest its opinion be taken to resolve not only a question that I believe is not properly before us—DOMA's constitutionality—but also a question that all agree, and the Court explicitly acknowledges, is not at issue.[171]

That question is "whether the States, in the exercise of their 'historic and essential authority to define the marital relation,' may continue to utilize the traditional definition of marriage."[172] Justice Scalia, however, feels the Court's "bald, unreasoned disclaimer" is toothless, as "[t]he only thing that will 'confine' the Court's holding is its sense of what it can get away with."[173]

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two competing views of marriage.").

169. *Windsor*, 133 S. Ct. at 2696.

170. *Id.* at 2695.

171. *Id.* at 2697 (Roberts, C.J., dissenting).

172. *Id.* at 2696 (quoting *id.* at 2692 (majority opinion)).

173. *Id.* at 2709 (Scalia, J., dissenting) (citation omitted).

The debate continued in early post-*Windsor* commentary. Professor Lynn D. Wardle concluded that *Windsor* "is the first, big step to Supreme Court-mandated legalization of same-sex marriage throughout the United States."[174] He believes *Windsor* has had a significant impact in the efforts to legalize same-sex marriage.[175] Professor Pollvogt asserted that the same-sex marriage issue has essentially been decided if lower courts interpret *Windsor*'s unconstitutional animus analysis as a "doctrinal silver bullet."[176] Yet, Professor Richard Myers concluded that *Windsor* "will not have a major impact,"[177] "will not control in subsequent cases involving the constitutionality of state laws prohibiting same-sex marriage,"[178] and "is unlikely to settle the issue of the constitutionality of state laws prohibiting same-sex marriage."[179] We can look to post-*Windsor* federal cases to see which viewpoint carried the day.

Professor Robert E. Riggs captured the trend of same-sex marriage litigation in federal and state courts by totaling the number of cases that contained the expression "same-sex marriage" in a Westlaw search.[180] Duplicating this search nearly ten years later, it seems clear that *Windsor* has had a significant impact in the same-sex marriage debate.[181] In 2013, the year *Hollingsworth* and *Windsor* were decided, there were thirty-three "same-sex marriage" federal cases. In 2014, the number of "same-sex marriage" federal cases more than tripled to one hundred.[182] While this basic tally of "same-sex marriage" federal cases is by no means dispositive, it does suggest that lower federal courts have marched forward after *Windsor*. And according to Freedom to Marry, a campaign for same-sex marriage nationwide, federal district courts have issued forty-

174. Wardle, *supra* note 158, at 413.

175. *Id.* at 425.

176. Pollvogt, *supra* note 159, at 219.

177. Richard S. Myers, *The Implications of Justice Kennedy's Opinion in United States v. Windsor*, 6 ELON L. REV. 323, 323 (2014).

178. *Id.* at 331.

179. *Id.* at 335.

180. *See* Robert E. Riggs, *The Supreme Court and Same-Sex Marriage: A Prediction*, 20 BYU J. PUB. L. 345, 355 (2006).

181. In January 2015, a Westlaw search was conducted with the expression "same-sex marriage." The author confined the search to federal courts only. Out of eight total data points, two differed from Prof. Riggs's search. Prof. Riggs reported twelve federal cases from 1996–2000, *id.* at 356, while the duplicated search produced thirteen. The reason for this discrepancy is not known. And for 2005, Prof. Riggs's search revealed nine federal cases, while the duplicated search produced eleven. This disparity can be explained. Prof. Riggs's search was conducted in September 2005 and there were two subsequent cases decided in November 2005. *Id.*

182. Westlaw query, http://bit.ly/1mH2UsX [perma.cc/TN9X-4D8Y] (search term "same-sex marriage"; date range 01/01/14 to 12/31/14; federal cases only).

one pro-marriage rulings and federal appellate courts have issued five pro-marriage rulings after the *Windsor* decision in June 2013.[183]

Before *Windsor*, there were thirty states with state constitutional provisions that recognized marriage as a union between only one man and one woman.[184] After *Windsor*, federal courts ruled as unconstitutional under the U.S. Constitution twenty-three of these state constitutional amendments.[185] This is quite telling considering that only five states had their constitutional same-sex marriage prohibitions upheld by a federal court (four states by way of the Sixth Circuit[186]), while two other states with constitutional same-sex marriage prohibitions had their respective bans placed on hold as federal district courts suspended the proceedings pending the U.S. Supreme Court's decision on the issue.[187] This means that post-*Windsor* and pre-*Obergefell*, federal courts ruled as unconstitutional over three-fourths of state constitutional amendments recognizing only traditional marriage.[188] Setting aside the *DeBoer v. Snyder* case, which the Supreme Court decided in June 2015, only three of the thirty state constitutional provisions survived post-*Windsor*. That certainly sounds like the "death knell . . . for state same-sex marriage prohibitions."[189] Below is a sampling of some post-*Windsor* federal cases.

A. Kitchen v. Herbert

In December 2013, the United States District Court for the District of Utah held that Utah's same-sex marriage prohibition is unconstitutional because it violates "the United States Constitution's guarantees of equal protection and due process

183. Freedom to Marry, *Marriage Rulings in the Courts*, http://bit.ly/1POn1RD [perma.cc/26PD-HRRA] (last updated March 2, 2015).

184. MARYLAND OFFICE OF THE ATT'Y GEN., THE STATE OF MARRIAGE EQUALITY IN AMERICA 1 (Apr. 2015), http://bit.ly/1RaXTpE [perma.cc/GNZ4-CN6Z].

185. *Id.* at 3 (In Arkansas, a state court invalidated Arkansas's constitutional same-sex marriage ban six months before a federal court took the same action. *Id.* at 40; *see also* Order Granting Mot. Summ. J., Wright v. State, 60CV-13-2662 (May 9, 2014). In California, *Hollingsworth v. Perry* is the case that invalidated its constitutional same-sex marriage ban. *See* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013)).

186. *See* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *cert. granted sub nom.* Tanco v. Haslam, 135 S. Ct. 1040 (2015); Bourke v. Beshear, 135 S. Ct. 1041 (2015), and *rev'd sub nom.* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

187. In September 2014, Louisiana's same-sex marriage laws were found to be constitutional by a federal district court. Maryland, *supra* note 184, at 55; *see also* Robicheaux v. Caldwell, 2 F. Supp. 3d 910 (E.D. La. 2014). The two states with their respective same-sex marriage prohibitions on hold are Georgia (Maryland, *supra* note 184, at 47, 95 n.139) and North Dakota (Maryland, *supra* note 184, at 71, 107 n.381).

188. *See* Maryland, *supra* note 184.

189. Strasser, *supra* note 130, at 388.

under the law."[190] In reaching this decision, the court noted that Utah's "current laws deny its gay and lesbian citizens their fundamental right to marry and, in so doing, demean the dignity of these same-sex couples for no rational reason."[191] Six months later, the Tenth Circuit, in affirming the district court, held that:

> [T]he Fourteenth Amendment protects the fundamental right to marry, establish a family, raise children, and enjoy the full protection of a state's marital laws. A state may not deny the issuance of a marriage license to two persons, or refuse to recognize their marriage, based solely upon the sex of the persons in the marriage union.[192]

In October 2014, the United States Supreme Court denied certiorari in the case.[193]

B. Bostic v. Rainey

In February 2014, the United States District Court for the Eastern District of Virginia felt "compelled to conclude that Virginia's Marriage Laws unconstitutionally den[ied] Virginia's gay and lesbian citizens the fundamental freedom to choose to marry."[194] In doing so, the court found that Virginia's recognition of only marriages between one man and one woman denied those same-sex couples seeking to marry their due process and equal protection rights guaranteed under the Fourteenth Amendment of the United States Constitution.[195] Six months later, the Fourth Circuit, in affirming the district court, found that Virginia's prohibition on same-sex marriage infringed on its citizens' fundamental right to marry.[196] Specifically, the Fourth Circuit concluded, "Virginia Marriage Laws violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the extent that they prevent same-sex couples from marrying and prohibit Virginia from recognizing same-sex couples' lawful out-of-

190. Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1188 (D. Utah 2013), *aff'd*, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014).

191. *Kitchen*, 961 F. Supp. 2d at 1188.

192. *Kitchen*, 755 F.3d at 1199.

193. *Kitchen*, 135 S. Ct. at 265.

194. Bostic v. Rainey, 970 F. Supp. 2d 456, 483 (E.D. Va. 2014), *aff'd sub nom.* Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014), *cert. denied sub nom.* Rainey v. Bostic, 135 S. Ct. 286 (2014), and *cert. denied*, 135 S. Ct. 308 (2014), and *cert. denied sub nom.* McQuigg v. Bostic, 135 S. Ct. 314 (2014).

195. *Bostic*, 970 F. Supp. 2d at 484.

196. *Schaefer*, 760 F.3d at 367.

state marriages."[197] In October 2014, the United States Supreme Court denied certiorari in the case.[198]

C. De Leon v. Perry

In February 2014, the United States District Court for the Western District of Texas held that "Texas' prohibition on same-sex marriage conflicts with the United States Constitution's guarantees of equal protection and due process."[199] In reaching this conclusion, the court found that Texas' marriage laws demean the dignity of homosexual couples for no legitimate reason by denying them the right to marry.[200] Texas marriage laws were found to:

> [D]eny [same-sex couples] access to the institution of marriage and its numerous rights, privileges, and responsibilities for the sole reason that [same-sex couples] wish to be married to a person of the same sex. The Court finds this denial violates [same-sex couples'] equal protection and due process rights under the Fourteenth Amendment to the United States Constitution.[201]

In July 2015, after the Supreme Court's *Obergefell* decision, the Fifth Circuit affirmed the district court's decision.[202]

D. DeBoer v. Snyder

In March 2014, the United States District Court for the Eastern District of Michigan held that Michigan's voter-approved amendment to the Michigan Constitution prohibiting same-sex marriage was unconstitutional.[203] In doing so, the court affirmed "the enduring principle that regardless of whoever finds favor in the eyes of the most recent majority, the guarantee of equal protection must prevail."[204] Eight months later, the Sixth Circuit reversed the district court, as well as the federal district courts in Ohio, Tennessee, and Kentucky.[205] In reversing the district court, the circuit court found that none of the same-sex marriage

197. *Id.* at 384.
198. *Bostic*, 135 S. Ct. at 286.
199. De Leon v. Perry, 975 F. Supp. 2d 632, 639 (W.D. Tex. 2014), *aff'd sub nom.* De Leon v. Abbott, 791 F.3d 619 (5th Cir. 2015).
200. De Leon v. Perry, 975 F. Supp. 2d at 639.
201. *Id.* at 666.
202. *De Leon*, 791 F.3d at 625.
203. DeBoer v. Snyder, 973 F. Supp. 2d 757, 759 (E.D. Mich.), *rev'd*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
204. *DeBoer*, 973 F. Supp. 2d at 775.
205. *Snyder*, 772 F.3d at 420–21.

plaintiffs' theories "makes the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters."[206] And according to the Sixth Circuit, any changes to marriage law should change through the established political processes.[207] To date, the Sixth Circuit is the only federal appellate court to reverse a federal district court that ruled as unconstitutional state marriage laws, and specifically state constitutional provisions, that prohibit same-sex marriages.[208] The United States Supreme Court granted certiorari in the case, heard oral arguments in April 2015, and rendered its decision in June 2015.[209]

E. Latta v. Otter

In May 2014, the United States District Court for the District of Idaho held that Idaho's marriage laws were unconstitutional.[210] In reaching this conclusion, the court found that "Idaho's Marriage Laws deny its gay and lesbian citizens the fundamental right to marry and relegate their families to a stigmatized, second-class status without sufficient reason for doing so."[211] The court relied on Supreme Court cases, such as *Loving v. Virginia*, *Romer v. Evans*, *Lawrence v. Texas*, and *Windsor*, to conclude that:

> The logic of these precedents virtually compels the conclusion that same-sex and opposite-sex couples deserve equal dignity when they seek the benefits and responsibilities of civil marriage. Because Idaho's Marriage Laws do not withstand any applicable form of constitutional scrutiny, the Court finds they violate the Fourteenth Amendment to the United States Constitution.[212]

Five months later, the Ninth Circuit affirmed the district court and held that Idaho's marriage laws "violate the Equal Protection Clause of the Fourteenth Amendment because they deny lesbians and gays who wish to marry persons of the same sex a right they afford to individuals who wish to marry persons of the opposite

206. *Id.* at 403.
207. *Id.* at 421.
208. Lyle Denniston, *Sixth Circuit: Now, a split on same-sex marriage*, SCOTUSBLOG (Nov. 6, 2014, 9:56 PM), http://bit.ly/1TF3nqm [perma.cc/MND2-8VHZ].
209. *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015) and discussion *infra* Part V.
210. Latta v. Otter, 19 F. Supp. 3d 1054, 1060 (D. Idaho 2014), *aff'd*, 771 F.3d 456 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2931 (2015), and *cert. denied sub nom.* Idaho v. Latta, 135 S. Ct. 2931 (2015), and *cert. dismissed sub nom.* Coal. for the Prot. of Marriage v. Sevcik, 133 S. Ct. 2885 (2015).
211. *Latta*, 19 F. Supp. 3d at 1060.
212. *Id.* at 1086.

sex".[213] Because Idaho's marriage laws were not shown to further any legitimate purpose, "they unjustifiably discriminate on the basis of sexual orientation, and are in violation of the Equal Protection Clause."[214] In June 2015, after its *Obergefell* decision, the United States Supreme Court denied certiorari in the case.[215]

F. Wolf v. Walker

In June 2014, the United States District Court for the Western District of Wisconsin ruled in summary judgment that Wisconsin laws banning same-sex marriage violate (1) the equal protection clause because they discriminate on the basis of sexual orientation, and (2) the due process clause because they interfere with same-sex couples' right to marry.[216] The court, relying on *Windsor* and its progeny, noted, "it appears that courts are moving toward a consensus that it is time to embrace full legal equality for gay and lesbian citizens."[217] Only three months later, the Seventh Circuit affirmed the district court and found that even if the discrimination against same-sex couples is not subjected to heightened scrutiny, the discrimination is unconstitutional because it is irrational.[218] The Seventh Circuit also concluded that "*groundless* rejection of same-sex marriage by government must be a denial of equal protection of the laws."[219] Finally, the Seventh Circuit observed, "the grounds advanced by Indiana and Wisconsin for their discriminatory policies are not only conjectural; they are totally implausible."[220] In October 2014, the United States Supreme Court denied certiorari in the case.[221]

G. Brenner v. Scott

In August 2014, the United States District Court for the Northern District of Florida held that Florida's same-sex marriage provisions were unconstitutional under a strict scrutiny review after having found that marriage is a fundamental right under the

213. *Latta*, 771 F.3d at 464–65 (footnote omitted).
214. *Id.* at 476.
215. Otter v. Latta, 135 S. Ct. 2931 (2015).
216. Wolf v. Walker, 986 F. Supp. 2d 982, 987 (W.D. Wis. 2014), *aff'd sub nom.* Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014), and *cert. denied sub nom.* Walker v. Wolf, 135 S. Ct. 316 (2014).
217. *Wolf*, 986 F. Supp. 2d at 1027.
218. *Baskin*, 766 F.3d at 656.
219. *Id.* at 659.
220. *Id.* at 671.
221. *Walker*, 135 S. Ct. at 317.

Fourteenth Amendment's Due Process and Equal Protection Clauses.[222] The court noted, "Almost every court that has addressed the issue [of whether the right to same-sex marriage was a fundamental right] since the Supreme Court's 2013 decision in *Windsor* has said the answer is yes."[223] And the court further observed that since *Windsor*, "19 different federal courts, now including this one, have ruled on the constitutionality of state bans on same-sex marriage. The result: 19 consecutive victories for those challenging the bans."[224] The case was appealed to the Eleventh Circuit,[225] but the Eleventh Circuit placed on hold any same-sex marriage cases until after the Supreme Court ruled on the issue in *Obergefell v. Hodges*.[226]

H. Rosenbrahn v. Daugaard

In January 2015, the United States District Court for the District of South Dakota ruled in summary judgment that South Dakota's same-sex marriage prohibitions violate the Constitution. The court found that marriage is a fundamental right.[227] And the court further concluded that since South Dakota's laws banning same-sex marriage were not shown to be narrowly tailored to serve a compelling state interest, they violated the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by impermissibly denying same-sex couples their fundamental right to marry.[228] The court also observed, "The majority of courts that have addressed the issue of the constitutionality of same-sex marriage bans after *Windsor* have found that same-sex marriage bans deprive homosexual couples of their fundamental constitutional right to marriage."[229] In August 2015, after the Supreme Court's *Obergefell* decision, the Eighth Circuit affirmed the district court's decision.[230]

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222. Brenner v. Scott, 999 F. Supp. 2d 1278, 1281–82 (N.D. Fla. 2014), *order clarified by*, No. 4:14CV107-RH/CAS, 2015 WL 44260 (N.D. Fla. 2015).

223. *Brenner*, 999 F. Supp. 2d at 1287.

224. *Id.* at 1281.

225. *11th Circuit Court*, FREEDOM TO MARRY, http://bit.ly/1SAFQbC [perma.cc/RFH6-3MZU] (last visited Dec. 27, 2015).

226. Lyle Denniston, *Eleventh Circuit puts off same-sex marriage cases*, SCOTUSBLOG (Feb. 5, 2015, 7:31 AM), http://bit.ly/22LrQjZ [perma.cc/59HS-8BQL].

227. Rosenbrahn v. Daugaard, 61 F. Supp. 3d 862, 869 (D.S.D. 2015), *aff'd*, 799 F.3d 918 (8th Cir. 2015) (per curiam).

228. *Rosenbrahn*, 61 F. Supp. 3d at 875–76.

229. *Id.* at 870 (footnote omitted).

230. *Rosenbrahn*, 799 F.3d at 922 (per curiam).

I. Judicial Overreach Post-Windsor, Pre-Obergefell

The eight cases summarized above, though only a sampling of post-*Windsor* same-sex marriage federal cases, highlight three significant aspects about what the federal judiciary has done in the two-year period following the *Windsor* decision and preceding the *Obergefell* decision. First, before the *Obergefell* case there was at least one federal district court in every federal circuit in the nation that had ruled as unconstitutional state marriage laws that include same-sex marriage bans. Second, *Windsor* was used as precedent for a set of cases for which it was never meant to be used as precedent. And third, the federal judiciary has clearly stepped into the states' arena of defining marriage. Each point is briefly discussed below.

Before *Windsor*, most states had same-sex marriage bans in the form of constitutional amendments or state statutes.[231] After *Windsor*, several states have come to recognize same-sex marriages, many through federal judicial decree.[232] And, as mentioned earlier, the Sixth Circuit is the only circuit court to uphold state same-sex marriage bans.[233] Notably, after *Windsor* but before the Sixth Circuit's reversal in November 2014, Justice Ginsburg stated that "'there will be some urgency' [for the Supreme Court to hear another same-sex marriage case] if that appeals court allows same-sex marriage bans to stand."[234] This is interesting when one considers, as did Professor Wardle, the applicability of Justice Ginsburg's comments regarding the Court's *Roe v. Wade* decision to the Court's *Windsor* decision.[235] Justice Ginsburg observed:

> *Roe*, I believe, would have been more acceptable as a judicial decision if it had not gone beyond a ruling on the extreme statute before the Court. The political process was moving in the early 1970s. . . . Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict.[236]

The same could be said of *Windsor*. The Court went beyond a ruling on DOMA, alleged to be an extreme statute; the political process

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231. *See* Maryland, *supra* note 184.

232. Adam Liptak, *Supreme Court to Decide Marriage Rights for Gay Couples Nationwide*, N.Y. TIMES, (Jan. 16, 2015), http://nyti.ms/1kMNOk9 [perma.cc/CJC4-XYYQ].

233. *Id.*

234. Jacob Gershman, *Justice Ginsburg: Future of Gay Marriage Bans Could be Decided in Ohio*, WALL ST. J. L. BLOG, (Sept. 17, 2014, 12:21 PM), http://on.wsj.com/1SAAxch [perma.cc/8GKT-E7SG].

235. Wardle, *supra* note 158, at 428.

236. *Id.* (quoting Ruth Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 385–86 (1985) (internal quotation marks omitted)).

regarding same-sex marriage reform was alive and well; and the Court's heavy-handed judicial intervention, especially when considering the substantial Article III jurisdictional issues, was difficult to justify in *Windsor*. Why, then, did the Supreme Court act on its urgency and grant certiorari on appeal from the Sixth Circuit's ruling? Regarding *Roe*, Justice Ginsburg concluded that the Supreme Court "moved too far, too fast."[237] The same is true of *Windsor* and its progeny.

Second, *Windsor* has been inappropriately relied on as controlling precedent.[238] As discussed earlier, *Windsor's* holding was limited to only those cases where the state had legalized same-sex marriage. The dilemma in *Windsor* was that federal law did not afford the same rights to same-sex couples as did New York law.[239] A parallel situation is not present in any of the above cases. In fact, in all eight of the cases discussed, the states had constitutional provisions that limited marriage to a union between only one man and one woman. *Windsor*, then, should not have been cited as controlling precedent. But, by citing *Windsor* as controlling authority, these federal district courts, and some federal circuit courts, engaged in judicial overreach.

Two years after *Windsor*, Justice Scalia's words do not seem so overblown: "[*Windsor's*] proceedings have been a contrivance, having no object in mind except to elevate a District Court judgment that has no precedential effect in other courts, to one that has precedential effect throughout the Second Circuit, and then (in this Court) precedential effect throughout the United States."[240] One might reply that this is what happens when a case makes its way through the appeals process to the United States Supreme Court. But, the federal judiciary should not apply precedent beyond the limits outlined by the Supreme Court in the very case that sets that precedent. In essence, even though the Supreme Court confined *Windsor* to only 'A' cases, virtually the rest of the federal judiciary has extended *Windsor* to not only 'A' cases, but to 'B' cases as well.

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237. Wardle, *supra* note 158, at 429 (citing Gillian Metzger & Abbe Gluck, *A Conversation with Justice Ruth Bader Ginsburg*, 25 COLUM. J. GENDER & L. 6, 16 (2013) (internal quotation marks omitted) (Justice Ginsburg reached this conclusion about the United States Supreme Court's decision in *Roe v. Wade.*)).

238. *See* Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1195 (D. Utah 2013) (acknowledging *Windsor* is not controlling precedent); *see also* Rosenbrahn v. Daugaard, 61 F. Supp. 3d 862, 869 (D.S.D. 2015); *but see* discussion *supra* notes 169–172.

239. United States v. Windsor, 133 S. Ct. 2675 (2013).

240. *Id.* at 2700 (Scalia, J., dissenting).

Third, the federal judiciary has usurped the state's "historic and essential"[241] role of defining marriage. The *Windsor* Court recognized that the "regulation of domestic relations . . . has long been regarded as a virtually exclusive province of the States."[242] *Windsor* showed that federal law usually takes state marriage law as it finds it.[243] As Professor Ernest A. Young noted, "What the [*Windsor*] Court said was simply that once New York had made its choice, Congress could not validly set that choice aside by enacting DOMA."[244] Apparently not, but it seems the Court can set aside a state's choice. Of course, the *Windsor* Court upheld New York's choice. In the eight cases mentioned above, however, the federal judiciary set aside the choices of Utah, Virginia, Texas, Michigan, Idaho, Wisconsin, Florida, and South Dakota. It is not "[a] principled and predicable system of jurisprudence"[245] when courts can pick and choose when to rely on a state's choice and when to abandon that state choice. The regulation of domestic relations no longer belongs solely to the states.

The federal judiciary engaged in judicial overreach in its post-*Windsor* line of cases. Many federal courts have erroneously relied on *Windsor* as case precedent for deciding whether state bans on same-sex marriages are unconstitutional under the U.S. Constitution. *Windsor* did not speak to this question. Furthermore, several federal courts have ruled as unconstitutional state constitutional provisions that prohibit same-sex marriages even though *Windsor* was a case where the state (New York) already recognized same-sex marriages. While improperly relying on *Windsor*, the federal judiciary has assumed the role of regulating domestic relations. The states' historic and essential role of defining marriage must now be shared with the federal judiciary. The federal courts no longer take state marriage law as they find it. Instead, federal courts dictate through judicial fiat how states must define marriage.

V. *OBERGEFELL V. HODGES*

Obergefell v. Hodges involves six different cases from Michigan,[246]

241. *Id.* at 2692 (majority opinion).
242. *Id.* at 2691 (quoting Sosna v. Iowa, 419 U.S. 393, 404 (1975)).
243. Young, *supra* note 131, at 45.
244. *Id.* at 44–45.
245. *Windsor*, 133 S. Ct. at 2703 n.3 (Scalia, J., dissenting).
246. DeBoer v. Snyder, 973 F. Supp. 2d 757 (E.D. Mich. 2014).

Kentucky,[247] Ohio,[248] and Tennessee[249] where each state's prohibition on same-sex marriages was challenged in federal court. Each federal court found for the respective plaintiffs, and all but one court found the respective state prohibitions unconstitutional.[250] The respondents, state officials who enforced the laws at issue, appealed to the Sixth Circuit. The circuit court consolidated the cases and reversed the judgments of the district courts.[251] The U.S. Supreme Court granted certiorari and limited review to two questions: whether the Fourteenth Amendment requires a State to (1) "license a marriage between two people of the same sex," and (2) "recognize a same-sex marriage licensed and performed in a State which does grant that right."[252] Before answering these two questions, the majority opinion briefly reviewed the history of marriage.

A. History of Marriage

In reviewing the history of marriage, the Court noted both the "ancient origins of marriage" and its "developments in law and society."[253] The majority opinion summarized the "ancient origins of marriage" in two statements. First, the Court recognized that marriage is central to the human condition and has existed for millennia and across cultures and civilizations.[254] Second, the Court admitted that "since the dawn of history" people understood marriage to be a union between two persons of the opposite sex.[255] The majority opinion did not say much more than this regarding the centrality of marriage throughout the ages. As Chief Justice Roberts noted, the majority "relegat[ed] ages of human experience with marriage to a paragraph or two."[256] And the majority did not

247. Bourke v. Beshear, 996 F. Supp. 2d 542 (W.D. Ky. 2014); *see also* Love v. Beshear, 989 F. Supp. 2d 536 (W.D. Ky. 2014).

248. Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (S.D. Ohio 2013); *see also* Henry v. Himes, 14 F. Supp. 3d 1036 (S.D. Ohio 2014).

249. Tanco v. Haslam, 7 F. Supp. 3d 759 (M.D. Tenn. 2014).

250. Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015). The federal court in Tennessee did not "directly hold[] that Tennessee's Anti-Recognition Laws are necessarily unconstitutional or that Tennessee's ban on the consummation of same-sex marriages within Tennessee is unconstitutional." *Tanco*, 7 F. Supp. 3d at 772. It did, however, find that the plaintiffs were likely to succeed on the merits and thus granted a preliminary injunction prohibiting state officials from enforcing Tennessee's anti-recognition laws. *Id.*

251. *See* DeBoer v. Snyder, 772 F.3d 388, 388 (6th Cir. 2014).

252. *Obergefell*, 135 S. Ct. at 2593.

253. *Id.* at 2595.

254. *Id.* at 2594.

255. *Id.*

256. *Id.* at 2612 (Roberts, C.J., dissenting).

observe, as the Chief Justice did, that marriage "arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship."[257] In the end, perhaps the majority did not deliberate on the history of marriage because "the meaning of 'marriage' went without saying."[258]

As for the historical developments of marriage, the Court noted that these revisions were not "mere superficial changes"; rather, they were "deep transformations in its structure."[259] The Court discussed how marriage evolved from arranged agreements to voluntary contracts, and highlighted how coverture was abandoned as women gained rights.[260] Interestingly, no other "deep transformations" were discussed. Instead, the majority turned to the "Nation's experiences with the rights of gays and lesbians."[261] This discussion is certainly relevant to the case, but absent the debate of same-sex marriage it is not clear how the rights of gays and lesbians over the past 225 years informs the historical development of an institution that has existed for millennia. After all, same-sex marriage first became legal in 2001 in the Netherlands, a mere fourteen years ago.[262]

The history and tradition of the institution of marriage are important because they should be included in the analysis of whether there is a fundamental right to same-sex marriage. As *Washington v. Glucksberg* reiterated, "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'"[263] Requiring fundamental rights to be deeply rooted in history and tradition ensures that "when unelected judges strike down democratically enacted laws, they do so based on something more than their own beliefs."[264] Stated differently, the history and tradition requirement prevents "five unelected Justices from imposing their personal vision of liberty upon the American

257. *Id.* at 2613 (Roberts, C.J., dissenting) (citations omitted).
258. *Id.* at 2614 (Roberts, C.J., dissenting).
259. *Id.* at 2595; *but see id.* at 2614 (Roberts, C.J., dissenting) (explaining that changes to the institution of marriage did not "work any transformation in the core structure of marriage as the union between a man and a woman").
260. *Id.* at 2595.
261. *Id.* at 2596.
262. *Id.* at 2640 (Alito, J., dissenting).
263. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (citations omitted).
264. *Obergefell*, 135 S. Ct. at 2622–23 (Roberts, C.J., dissenting).

people."[265] As will be seen, however, the majority Justices did not "exercise the utmost care"[266] in "discovering"[267] a fundamental right to same-sex marriage.[268] Instead, the right to marry was "subtly transformed into the policy preferences of the Members of [the U.S. Supreme] Court."[269]

B. Marriage – A Fundamental Right

The Court made clear that it has long held in many contexts that the right to marry is a fundamental right protected by the Constitution.[270] In doing so, the Court relied on key marriage precedents, such as *Loving v. Virginia*[271] (invalidated prohibitions on interracial marriages), *Zablocki v. Redhail*[272] (invalidated marriage bans on fathers who were behind on child support), and *Turner v. Safley*[273] (invalidated regulations prohibiting prison inmates from marrying). After reiterating that the right to marry is a fundamental right, the Court then identified and discussed "four principles and traditions . . . [which] demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples."[274] These principles and traditions are briefly discussed below.

The first principle is that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy."[275] Dignity is found in the bond of same-sex couples who want to marry and in "their autonomy to make such profound choices."[276] If this is true, Chief Justice Roberts asks, "why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry?"[277] Chief

265. *Id.* at 2640 (Alito, J., dissenting).
266. *Id.* at 2616 (Roberts, C.J., dissenting) (quoting *Glucksberg*, 521 U.S. at 720 in stating "[o]ur precedents have . . . insisted that judges 'exercise the utmost care' in identifying implied fundamental rights") (internal quotation marks omitted).
267. *Id.* at 2618 (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST 44 (14th ed.1980) in explaining when "discovering" a fundamental right, a judge is likely discovering "his own values").
268. *Obergefell*, 135 S. Ct. at 2640 (Alito, J., dissenting) ("For today's majority, it does not matter that the right to same-sex marriage lacks deep roots or even that it is contrary to long-established tradition.").
269. Washington v. Glucksberg, 521 U.S. 702, 720 (1997).
270. *Obergefell*, 135 S. Ct. at 2598.
271. Loving v. Virginia, 388 U.S. 1 (1967).
272. Zablocki v. Redhail, 434 U.S. 374 (1978).
273. Turner v. Safley, 482 U.S. 78 (1987).
274. *Obergefell*, 135 S. Ct. at 2599.
275. *Id.*
276. *Id.*
277. *Id.* at 2622 (Roberts, C.J., dissenting).

Justice Roberts is not trying to equate same-sex marriage with plural marriage in all respects,[278] but his question does highlight how the majority's first principle of a constitutional right to same-sex marriage applies to plural marriage. The question illustrates a critical doctrine from *Glucksberg*: "That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected."[279]

The second principle is that "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals."[280] Supreme Court precedent, as applied to the *traditional* definition of marriage, makes this clear.[281] But since this precedent presumed relationships involving opposite-sex partners,[282] it is unclear whether this principle applies to same-sex couples. The majority seemed to excuse the Court for making these presumptions about marriage by noting that it, "like many institutions, has made assumptions defined by the world and time of which it is a part."[283] Of course, it is difficult to see how the Court no longer makes these assumptions. It is more likely that the Court is simply making different assumptions, assumptions which suggest this second principle applies to same-sex partners.

The third principle for protecting the right to marry is that "it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education."[284] The Court acknowledged that childbearing is only one of many aspects of the constitutional right to marry,[285] and further observed that the permanency and stability marriage affords are important to children's best interests.[286] Citing *Windsor*, the Court reasoned that the "marriage laws at issue here . . . harm and humiliate children of same-sex couples" because the laws tell children they are part of lesser families.[287] And the Court ultimately concluded that

278. *See id.* (Roberts, C.J., dissenting).
279. Washington v. Glucksberg, 521 U.S. 702, 727 (1997).
280. *Obergefell*, 135 S. Ct. at 2599.
281. *See id.* at 2599–2600 (discussing Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965), and Turner v. Safley, 482 U.S. 78, 95–96 (1987)).
282. *Id.* at 2598.
283. *Id.*
284. *Id.* at 2600 (citations omitted).
285. *Id.* at 2601.
286. *Id.* at 2600 (citation omitted).
287. *Id.* at 2600–01 (quoting United States v. Windsor, 133 S. Ct. 2675, 2694–95 (2013)).

"[e]xcluding same-sex couples from marriage . . . conflicts with a central premise of the right to marry."[288] While raising and protecting a family is certainly central to marriage, so is creating that family. And procreation, whether directly or indirectly, is required to create families. Perhaps this is why "recent cases have directly connected the right to marry with the 'right to procreate.'"[289]

The fourth and final principle is that Supreme Court cases and "the Nation's traditions make clear that marriage is a keystone of our social order."[290] Quoting a case from the nineteenth century, the Court emphasized that "marriage is 'the foundation of the family and of society, without which there would be neither civilization nor progress.'"[291] This, of course, presumes the *traditional* definition of marriage. And while the Court recognized that the "States have contributed to the fundamental character of the marriage right,"[292] it did not explain why, if that is true, the Court can usurp the right to regulate marriage from the states. As Chief Justice Roberts put it, "[t]he fundamental right to marry does not include a right to make a State change its definition of marriage."[293]

The Court also declared that the "limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest."[294] It is not clear, however, how the traditional definition of marriage morphed from something natural and just, to something inconsistent with the fundamental right to marry. To the contrary, it seems more accurate to conclude that the fundamental right to marry originates from the traditional definition of marriage. The Court referenced marriage precedents (*Loving*, *Turner*, and *Zablocki*)[295] to explain why, in this case, it chose not to follow the precedent established in *Glucksberg* to carefully

288. *Id.* at 2600.

289. *Id.* at 2614 (Roberts, C.J., dissenting) (quoting Zablocki v. Redhail, 434 U.S. 374, 386 (1978)).

290. *Id.* at 2601.

291. *Id.* (quoting Maynard v. Hill, 125 U.S. 190, 211 (1888)).

292. *Id.*

293. *Id.* at 2611 (Roberts, C.J., dissenting).

294. *Id.* at 2602.

295. The *Obergefell* majority indicated that in each of these cases the Court "inquired about the right to marry in its comprehensive sense." *Id.* Yet, as Chief Justice Roberts recognized, "the 'right to marry' cases stand for the important but limited proposition that particular restrictions on access to marriage as *traditionally defined* violate due process." *Id.* at 2619 (Roberts, C.J., dissenting).

describe fundamental rights.[296] Of course, how can the Court be cautious when describing a fundamental right to marry when the very definition of that right is changed?

After outlining the four principles and traditions that illustrate how the fundamental right to marry extends to same-sex couples, the Court explained how the right to same-sex marriage is derived from the Fourteenth Amendment's guarantee of equal protection of the laws.[297] Notably, the Court did not engage in its typical equal protection analysis.[298] Instead, it discussed the synergistic relationship between liberty and equality. The majority opinion looked to case precedent to illustrate that "in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."[299] The majority ultimately concluded: it is "now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality."[300] This analysis, however, leaves much to be desired, particularly in a case of such magnitude. As Chief Justice Roberts commented, the "majority does not seriously engage with [the petitioners' Equal Protection] claim. Its discussion is, quite frankly, difficult to follow."[301] Chief Justice Roberts further noted that the majority "fails to provide even a single sentence explaining how the Equal Protection Clause supplies independent weight for its position."[302]

The majority concluded its opinion with the following: "[Petitioners] ask for equal dignity in the eyes of the law. The Constitution grants them that right."[303] This is surprising since, as Chief Justice Roberts observed, there is no "'Nobility and Dignity' Clause in the Constitution."[304] Justice Thomas made this same observation and spent the last part of his dissent discussing the

296. *Id.*; *but see id.* at 2619 (Roberts, C.J., dissenting) ("None of the laws at issue in those cases purported to change the core definition of marriage as the union of a man and a woman.").

297. *Id.* at 2602.

298. *See* 16B AM. JUR. 2D *Constitutional Law* § 857 (2015) (discussing the three-tiered approach often used by courts in their analysis of the Equal Protection Clause).

299. *Obergefell*, 135 S. Ct. at 2603.

300. *Id.* at 2604.

301. *Id.* at 2623 (Roberts, C.J., dissenting).

302. *Id.*

303. *Id.* at 2608.

304. *Id.* at 2616 (Roberts, C.J., dissenting).

majority's notion of "equal dignity in the eyes of the law."[305] Consistent with the Declaration of Independence, Justice Thomas recognized that all humans have inherent worth with innate dignity.[306] This is why the government cannot bestow or take away one's dignity.[307] Yet, this is exactly what the petitioners sought—"the State's *imprimatur* on their marriages."[308] One wonders how the Court can enhance one's intrinsic dignity by sanctioning a non-traditional institution.

C. Who Decides Marriage – Judges or The People?

Even though the Court took "the drastic step of requiring every State to license and recognize marriages between same-sex couples,"[309] it acknowledged that "it is most often through democracy that liberty is preserved and protected in our lives."[310] The Court did not explain why the issue of same-sex marriage was only appropriate for the democratic process up to a point, but it did decide that the democratic process had reached that point.[311] Presumably, the majority decided to hear the case because "the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights."[312] After all, "[t]he Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter."[313]

Each of the dissenting Justices raised concerns about the Court seizing the debate of same-sex marriage out of the hands of the people.[314] The petitioners asked "nine judges on [the Supreme] Court to enshrine their definition of marriage in the Federal

305. *See id.* at 2639–40 (Thomas, J., dissenting).
306. *Id.* at 2639 (Thomas, J., dissenting).
307. *Id.*
308. *Id.* at 2636 (Thomas, J., dissenting).
309. *Id.* at 2623–24 (Roberts, C.J., dissenting).
310. *Id.* at 2605.
311. *See id.* at 2605–06.
312. *Id.* at 2605.
313. *Id.* If these principles apply in this case, a case involving an *implied* constitutional right under the Fourteenth Amendment, they also must surely apply in *Hollingsworth*. Yet, in *Hollingsworth*, the Court abridged the petitioners' *enumerated* constitutional right under the First Amendment. Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).
314. *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting) (asserting that the decision to decide this case is "[s]tealing this issue from the people."); *id.* at 2627 (Scalia, J., dissenting) ("Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best."); *id.* at 2639 (Thomas, J., dissenting) ("[T]he majority's decision short circuits . . . [the political] process."); *id.* at 2642 (Alito, J., dissenting) ("Today's decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage.").

Constitution and thus put it beyond the reach of the normal democratic process for the entire Nation."[315] By granting that request, the Court "place[d] the matter [of same-sex marriage] outside the arena of public debate and legislative action."[316] Assuming a "*super*-legislative—power,"[317] and "exalt[ing] the role of the judiciary in delivering social change,"[318] the Court "order[ed] the transformation of a social institution that has formed the basis of human society for millennia . . . ."[319] This led the Chief Justice to ask, "Just who do we think we are?"[320]

Our time-honored democracy was abruptly halted at a time when "the people [were] engaged in a vibrant debate" on the question of same-sex marriage.[321] Deciding what the law *should* be came at a cost as the political process was disregarded. As Justice Scalia commented, "Th[e] practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves."[322] Notably, just last term the Supreme Court observed:

> [F]reedom does not stop with individual rights. Our constitutional system embraces, too, the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times and the course of a nation that must strive always to make freedom ever greater and more secure.[323]

Yet, the *implied* constitutional right to same-sex marriage trumped the *enumerated* constitutional right of citizens to debate, deliberate, and decide the course of our nation.[324] This implies that there are degrees of fundamental constitutional rights. It seems, though, that an *enumerated* fundamental right should weigh more than an *implied* constitutional right, especially when the latter is not measured by a

315. *Id.* at 2631 (Thomas, J., dissenting).
316. Washington v. Glucksberg, 521 U.S. 702, 720 (1997).
317. *Obergefell*, 135 S. Ct. at 2629 (Scalia, J., dissenting).
318. *Id.* at 2624 (Roberts, C.J., dissenting).
319. *Id.* at 2612 (Roberts, C.J., dissenting). And Justice Alito observed, "It is far beyond the outer reaches of this Court's authority to say that a State may not adhere to the understanding of marriage that has long prevailed." *Id.* at 2642 (Alito, J., dissenting).
320. *Id.* at 2612.
321. *Id.*
322. *Id.* at 2627 (Scalia, J., dissenting).
323. Schuette v. Coal. to Def. Affirmative Action, 134 S. Ct. 1623, 1636–37 (2014).
324. *See Obergefell*, 135 S. Ct. at 2616 (Roberts, C.J., dissenting).

constitutional test.[325] Yet the majority opinion does not clearly articulate why these First Amendment rights are unequal and inferior to Fourteenth Amendment rights. In the end, *Obergefell's* holding is "an unprecedented restriction on the exercise of a fundamental right held not just by one person but by all in common."[326]

Even though Justice Scalia joined Chief Justice Roberts' dissent "in full," he wrote "separately to call attention to this Court's threat to American democracy."[327] Similarly, Justice Alito expressed concern that after *Obergefell*, "the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate."[328] Justice Alito further warned that "all Americans, whatever their thinking on [same-sex marriage], should worry about what the majority's claim of power portends."[329] These are legitimate concerns and warnings, which can be seen as we apply the language of the *Glucksberg* holding to *Obergefell*: "Throughout the Nation, Americans [were] engaged in an earnest and profound debate about the morality, legality, and practicality of [same-sex marriage]. Our holding [*does not*] permit[] this debate to continue, as it should in a democratic society."[330]

Obergefell "wip[ed] out with a stroke of the keyboard the results of the political process in over 30 States."[331] The majority allowed litigants something it has consistently refused them in the past, "to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State."[332] And the majority did so by yielding to "the temptation to achieve what is viewed as a noble end by any practicable means."[333] The means the *Obergefell* Court used to reach its decision are difficult to follow.[334]

Consider, for example, the questionable doctrine of unconstitutional animus the *Windsor* Court relied on in reaching its decision. The doctrine is largely absent in *Obergefell*. While the

325. *See* Lyle Denniston, *Same-sex marriage: The decisive questions*, SCOTUSBLOG (Apr. 26, 2015, 3:22 PM), http://bit.ly/1SACKEH [perma.cc/3YBT-TVJA].
326. *Schuette*, 134 S. Ct. at 1637.
327. *Obergefell*, 135 S. Ct. at 2626 (Scalia, J., dissenting).
328. *Id.* at 2643 (Alito, J., dissenting).
329. *Id.*
330. Washington v. Glucksberg, 521 U.S. 702, 735 (1997).
331. *Obergefell*, 135 S. Ct. at 2632 (Thomas, J., dissenting).
332. *Id.* at 2620 (Roberts, C.J., dissenting) (citations omitted).
333. *Id.* at 2643 (Alito, J., dissenting).
334. *See id.* at 2630 (Scalia, J., dissenting).

majority opinion in *Obergefell* did discuss how gays and lesbians, and their children, have been harmed and disparaged by those opposed to same-sex marriage,[335] the word "animus" does not appear in the majority opinion. This is both troubling and surprising for two reasons. First, *Windsor* was principally an animus case.[336] If this is indeed an accurate description of *Windsor*, and if *Windsor* is a key precedent for *Obergefell*, why is the questionable doctrine of unconstitutional animus absent from the majority opinion? The answer may be found in the second reason, which comes from the U.S. government's amicus brief. The government argued, "[i]t is unnecessary to characterize those who voted for the laws at issue here as having acted out of conscious ill will in order to recognize the laws' inconsistency with the fundamental guarantee of equal protection."[337] In the Supreme Court's same-sex marriage jurisprudence, it is difficult to see how animus is essential to its decision in one case, but unnecessary in the very next case it hears on the subject.

Consider as well the Court's equal protection analysis, as discussed above. That analysis, or lack thereof, "is one of the truly strange facts about the Supreme Court's modern history of ruling on gay rights . . . ."[338] Before the Court decided *Obergefell*, one prescient legal commentator predicted it would be unsurprising if the Court avoided establishing a constitutional standard by which the right to same-sex marriage is advanced.[339] After the *Obergefell* decision, this same commentator noted:

> A curious aspect of the new ruling was that, once again, Justice Kennedy did not spell out what constitutional test he was applying to a claim of gay equality. It simply discussed a series of court precedents, and his own recitation of notions of liberty, without saying what burden those challenging the bans had to satisfy before winning the right to equality.[340]

It is truly ironic that recent Supreme Court cases granting a new right to same-sex marriage under the Constitution lack a

335. *See id.* at 2626 (Roberts, C.J., dissenting) (discussing the majority's use of pejorative terms to characterize the same-sex marriage debate).

336. Dale Carpenter, *Windsor Products: Equal Protection from Animus*, SUP. CT. REV. 183, 203 (2013).

337. Brief for the United States as Amicus Curiae Supporting Petitioners at 34–35, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571 and 14-574).

338. Denniston, *supra* note 325.

339. *Id.*

340. Lyle Denniston, *Opinion analysis: Marriage now open to same-sex couples*, SCOTUSBLOG (Jun. 26, 2015, 3:01 PM), http://bit.ly/1n4UTyn [perma.cc/3Q69-VDBT].

constitutional standard by which that new right is measured.

Finally, the same-sex marriage political movement mattered to the *Obergefell* Court. The majority engaged in "any practicable means"[341] as a result of the same-sex marriage questions presented to it. As one observer concluded, "The fight for gay marriage was, above all, a political campaign—a decades-long effort to win over the American public and, in turn, the [C]ourt. It was a campaign with no fixed election day, focused on an electorate of nine people."[342] It is disconcerting to elevate the Court to the arbiter of political campaigns. Doing so says "that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court."[343] One wonders what would happen if the Court elevated both itself and its authority, as it did in *Obergefell*, in another case with another issue. What if the Court acted similarly in a less politically charged and emotional issue? People who approve of *Obergefell* because they agree with the end result would likely disapprove of the Court's *Obergefell*-type means in another case where the end result is not so polarizing. Simply change the issue from same-sex marriage, and what would be the people's reaction then?

Similar to the *Hollingsworth* and *Windsor* Courts, the *Obergefell* Court engaged in judicial overreach when it held that same-sex couples may exercise the fundamental right to marry. It did not "exercise the utmost care"[344] in reaching its decision. Like the *Windsor* Court, the *Obergefell* Court failed to articulate a level of scrutiny and to provide an analysis under that standard of scrutiny in its equal protection discussion. The U.S. Constitution was found to grant same-sex couples equal dignity under the law even though there is no "'Nobility and Dignity' Clause in the Constitution."[345] *Windsor's* questionable doctrine of unconstitutional animus was largely absent from the *Obergefell* decision. And the Court elevated an *implied* constitutional right under the Fourteenth Amendment above an *enumerated* constitutional right under the First Amendment. The *Obergefell* Court acted as "an electorate of nine

341. Obergefell v. Hodges, 135 S. Ct. 2584, 2643 (2015) (Alito, J., dissenting).

342. Molly Ball, *How Gay Marriage Became a Constitutional Right: The untold story of the improbable campaign that finally tipped the U.S. Supreme Court*, THE ATLANTIC (Jul. 1, 2015), http://theatln.tc/1n4V9NP [perma.cc/AUZ3-NJXZ].

343. *Obergefell*, 135 S. Ct. at 2627 (Scalia, J., dissenting).

344. *See id.* at 2616 (Roberts, C.J., dissenting).

345. *See id.*

people."[346] It denied certiorari in cases where circuit court decisions found state same-sex marriage prohibitions unconstitutional, and only granted certiorari after the Sixth Circuit found similar state marriage laws constitutional. As with the *Hollingsworth* case, so with the *Obergefell* case—it was a *fait accompli.* And as with the *Windsor* case, so with the *Obergefell* case—the way the Court reached its decision needed to match the decision itself, especially in such an important matter.

VI. THE DECLINING VOICE OF THE PEOPLE

Judge Sutton, writing for the Sixth Circuit in *DeBoer v. Snyder,* made the following observation:

> Of all the ways to resolve [the same-sex marriage] question, one option is not available: a poll of the three judges on this panel, or for that matter all federal judges, about whether gay marriage is a good idea. Our judicial commissions did not come with such a sweeping grant of authority, one that would allow just three of us—just two of us in truth—to make such a vital policy call for the thirty-two million citizens who live within the four States of the Sixth Circuit: Kentucky, Michigan, Ohio, and Tennessee.[347]

The dissenting Justices in both the *Windsor* and *Obergefell* cases would agree with Judge Sutton. Chief Justice Roberts reiterated that the "Court is not a legislature" and that "[b]y deciding [the same-sex marriage] question under the Constitution, the Court removes it from the realm of democratic decision."[348] Justice Thomas indicated that the *Obergefell* majority "undermin[ed] the political processes that protect our liberty,"[349] while Justice Scalia observed that the *Windsor* Court "[should] have let the People decide."[350] Justice Alito noted that under the Constitution same-sex marriage is a choice for the people.[351] He elaborated, "'[i]n our system of government, ultimate sovereignty rests with the people, and the people have the right to control their own destiny. Any change on a question so fundamental should be made by the people through their elected officials.'"[352]

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346. *See* Ball, *supra* note 342.
347. DeBoer v. Snyder, 772 F.3d 388, 396 (6th Cir. 2014).
348. *Obergefell,* 135 S. Ct. at 2611, 2625 (Roberts, C.J., dissenting).
349. *Id.* at 2638 (Thomas, J., dissenting).
350. United States v. Windsor, 133 S. Ct. 2675, 2711 (2013) (Scalia, J., dissenting).
351. *Id.* (Alito, J., dissenting).
352. *Obergefell,* 135 S. Ct. at 2642 (Alito, J., dissenting) (quoting *Windsor,* 133 S. Ct. at 2715–16 (Alito, J., dissenting)).

Ironically, Justice Kennedy's view in *Hollingsworth* is in line with these principles. He observed, "The essence of democracy is that the right to make law rests in the people and flows to the government, not the other way around. Freedom resides first in the people without need of a grant from government."[353] And on another occasion Justice Kennedy noted, "Federalism . . . allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power."[354] These principles outlined by Justice Kennedy have not been followed in same-sex marriage federal jurisprudence. The right to make law has flowed "the other way around," from government, and specifically the federal judiciary, to the people. Federalism principles have not allowed States to regulate marriage without interference from "a remote central power." And "those who [sought] a voice in shaping the destiny of their own times" were dismissed from the ongoing debate. Surely the principles Justice Kennedy mentioned are fundamental principles, principles that should not be discarded to reach a predetermined end result.

Consider, for example, as commentators have noted, that the *Windsor* Court "focused on the fact that the great state of New York had already resolved—and as a matter for federalism, was *entitled* to resolve—[the same-sex marriage] question through its own democratic processes."[355] If this is indeed true for New York, then it is also true for the eight states mentioned in Section III—they "had already resolved—and as a matter for federalism, [were] entitled to resolve" the same-sex marriage question in their respective states.[356] Yet, for those eight states, the federal judiciary resolved that question and set aside the states' respective determinations.

The United States Supreme Court is "the final arbiter of the law."[357] This we know. But one Supreme Court Justice believes the Court has also "proclaim[ed] itself sole arbiter of our Nation's

353. Hollingsworth v. Perry, 133 S. Ct. 2652, 2675 (2013) (Kennedy, J., dissenting).

354. Bond v. United States, 131 S. Ct. 2355, 2364 (2011) (*quoted in* Ernest A. Young & Erin C. Blondel, *Federalism, Liberty, and Equality in United States v. Windsor*, CATO SUP. CT. REV. 117, 146 (2012–13)).

355. Young, *supra* note 354, at 135.

356. *See* discussion *supra* note 184.

357. Chief Justice Charles Evans Hughes, *The Republic Endures and this is the Symbol of its Faith*, Cornerstone Address at the Supreme Court Building (Oct. 13, 1932), http://1.usa.gov/1FtQiZk [perma.cc/ZS67-N5PX] (last visited Dec. 23, 2015).

moral standards."[358] While many are likely comfortable with the Court deciding matters of law, many are likely not as comfortable with the Court deciding matters of morality. And yet, the Court continues to decide our Nation's moral standards. Consider the following Court proclamations from two death penalty cases:

> [T]he Constitution contemplates that in the end *our own judgment* will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.[359]

> We then must determine, in the exercise of *our own independent judgment*, whether the death penalty is a disproportionate punishment for juveniles.[360]

The Court's own independent judgment has been applied not only in death penalty cases, but in same-sex marriage cases as well. After all, it is "difficult for courts to resolve [the same-sex marriage] question as a matter of legal interpretation, without recourse to the judges' moral priors."[361] The same is true of other moral questions, for the Court's morality is often read into the Constitution.[362] Seemingly, "Court majorities . . . are quite prepared to change the meaning of the Constitution as necessary to keep it in tune with the times."[363] But where is America's democratic voice when not only the nation's laws, but the nation's morals as well, are decided by five judges? As has been observed, democracy is not well served when five people make decisions for the nation.[364]

Equally troubling is the belief that "the Constitution simply does not 'let the People decide' when it comes to fundamental rights and liberties."[365] If this is the prevailing belief of those in the legal community and the judiciary, then "government of the people, by the people, for the people"[366] has vanished. It seems the people should always be able to decide matters of such importance as our nation's fundamental rights and liberties. After all, "the right to make law rests in the people and flows to the government, *not the*

358. Roper v. Simmons, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting).
359. Coker v. Georgia, 433 U.S. 584, 597 (1977) (emphasis added).
360. *Roper*, 543 U.S. at 564 (emphasis added).
361. Young, *supra* note 131, at 43.
362. Riggs, *supra* note 180, at 365 n.116 (Commenting on *Lawrence v. Texas*, 539 U.S. 558 (2003), Professor Riggs observed that "the Court was indeed establishing its own moral code and cementing it into the Constitution.").
363. *Id.* at 364 n.114.
364. *Id.* at 386.
365. Elizabeth B. Wydra, *Reading the Opinions—and the Tea Leaves—in United States v. Windsor*, CATO SUP. CT. REV. 95, 114 (2012–13).
366. Lincoln, *supra* note 3.

other way around."[367] Another disturbing belief is that "[t]he Constitution stands for the proposition that some rights aren't left to the whims of a democratic majority."[368] This implies that it is preferable to place those cherished rights in the hands of five judges and their whims. This cannot be the ideal the Founding Fathers intended for our Nation.

Arguably, a right to same-sex marriage is not a fundamental right and liberty. Instead, a right to same-sex marriage is a new right.[369] As Justice Alito noted:

> What Windsor and the United States seek, therefore, is not the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from unelected judges. Faced with such a request, judges have cause for both caution and humility.[370]

The Supreme Court did not, however, exercise caution and humility in deciding the *Hollingsworth* and *Windsor* cases. Similarly, many federal district courts and some federal circuit courts abandoned caution and humility in overturning state constitutional provisions prohibiting same-sex marriages. And, the Supreme Court completed the circle in *Obergefell* by granting same-sex couples the right to marry. In short, the federal judiciary failed to give respect to the democratic majority's views.[371]

According to the *Obergefell* majority, it did not matter whether advocates of same-sex marriage had momentum in the democratic process.[372] This is a curious position since recognizing a new constitutional right requires judges to consider, among other things, "the public acceptability of a decision recognizing the new

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367. Hollingsworth v. Perry, 133 S. Ct. 2652, 2675 (2013) (Kennedy, J., dissenting) (emphasis added).

368. Wydra, *supra* note 365, at 114.

369. *See* Richard A. Posner, *Should There Be Homosexual Marriage? And If So, Who Should Decide?*, 95 MICH. L. REV. 1578, 1585 (1997).

370. United States v. Windsor, 133 S. Ct. 2675, 2715 (2013) (Alito, J., dissenting).

371. Posner, *supra* note 369, at 1586 (observing that some landmark Supreme Court decisions implicating individual rights respected the democratic majority, including Brown v. Board of Education, 347 U.S. 483 (1954), which "buck[ed] a regional majority but a national minority"; Loving v. Virginia, 388 U.S. 1 (1967), which was handed down when "only a minority of states had [laws forbidding racially mixed marriages] on their books"; and Griswold v. Connecticut, 381 U.S. 479 (1965), which was decided "[o]nly when all but two states had repealed their laws forbidding the use of contraceptives even by married couples." And, the Court "created a right of abortion against a background of a rapid increase in the number of lawful abortions.").

372. Obergefell v. Hodges, 135 S. Ct. 2584, 2606 (2015).

right."[373] And the Supreme Court has looked to "evidence of national consensus"[374] in other cases that involved fundamental rights. In January 2015, a few months before the Court heard oral arguments in the *Obergefell* case, thirty-six states allowed same-sex marriage and over seventy percent of Americans lived in places where same-sex couples could marry.[375] While this appears to be a clear national consensus, it is not. Instead, it is a consensus among the federal judiciary "that it is time to embrace full legal equality for gay and lesbian citizens."[376] It is a judicially created and agreed-upon view among many federal judges.[377] It is not a consensus among the people who reside in the states who have had their respective same-sex marriage bans overturned by the federal judiciary. Nor is it a consensus among democratically elected state congressmen and congresswomen.

In an article, now ten years old, Professor Riggs quoted Abraham Lincoln to warn against America's declining democratic voice. It is worth revisiting President Lincoln's observation in the context of the *Hollingsworth, Windsor,* and *Obergefell* Supreme Court decisions. In his first Inaugural Address, President Lincoln stated:

> [T]he candid citizen must confess that if the policy of the government upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.[378]

The people "have ceased to be their own rulers" in the same-sex marriage debate. This is not because the people have chosen to voluntarily leave the debate or to let others decide. Quite to the contrary, the people have engaged in the democratic process by

373. Posner, *supra* note 369, at 1585.

374. Roper v. Simmons, 543 U.S. 551, 564 (2005).

375. Liptak, *supra* note 232.

376. Wolf v. Walker, 986 F. Supp. 2d 982, 1027 (W.D. Wis. 2014), *aff'd sub nom.* Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014), *cert. denied sub nom.* Walker v. Wolf, 135 S. Ct. 316 (2014).

377. *See* Brenner v. Scott, 999 F. Supp. 2d 1278, 1281 (N.D. Fla. 2014), *order clarified,* No. 4:14CV107-RH/CAS, 2015 WL 44260 (N.D. Fla. 2015) (noting the 19 consecutive victories for the legalization of same-sex marriage).

378. Riggs, *supra* note 180, at 386 (quoting Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 268 (Roy P. Basler ed., 1953)); *see also* Obergefell v. Hodges, 135 S. Ct. 2584, 2629 (2015) (Scalia, J., dissenting) ("A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.").

passing many state constitutional provisions prohibiting same-sex marriages. Sadly, however, the people, and their democratic initiatives, have been pushed aside by a federal judiciary that has overstepped its historical role, donned itself the final arbiter of the nation's morals, and discovered a right to same-sex marriage in the Constitution.

As the ultimate sovereign of our country, the people should and *do* "have the right to control their own destiny"[379] in matters of such importance as marriage and family. This right should not have been usurped by a federal judiciary pressured by a powerful political minority to move quickly and universally. The people should not have been bypassed in so fundamental a debate. In the end, the people may have voted for a right to same-sex marriage. Indeed, this had already happened in some states. But, we should have let it happen by the voice of the people in other states. The federal judiciary should have, with caution and humility, confined itself to its historical role. America's democratic voice should have been heard.

379. United States v. Windsor, 133 S. Ct. 2675, 2716 (2013) (Alito, J., dissenting).

WHEN CONGRESS SPEAKS, DOES THE SUPREME COURT LISTEN? EVALUATING THE EFFECTIVENESS OF CONGRESSIONAL PARTICIPATION AS AMICUS CURIAE BEFORE THE U.S. SUPREME COURT DURING THE REHNQUIST COURT

BY JUDITHANNE SCOURFIELD MCLAUCHLAN & THOMAS GAY*

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I. INTRODUCTION

A. Congress-Court Relations During the Rehnquist Court

The Rehnquist Court (OT1986–OT2005) has been described as an ideologically divided Court with two blocs of "stalwarts" (a conservative bloc and a liberal bloc) and with Justice O'Connor as the pivotal swing vote.[1] The Rehnquist Court was also known for its (conservative) activism.[2] Professor Cass Sunstein noted that "In its first seventy-five years, the Supreme Court struck down only two acts of Congress. In the eighteen years since Ronald Reagan nominated William H. Rehnquist as Chief Justice, the Court has invalidated more than three dozen. Under Rehnquist, the Court has compiled a record of judicial activism that is, in some ways, without parallel in the nation's history."[3] Professor Mark Tushnet argued that on the Rehnquist Court:

> Everyone is a judicial activist. The Rehnquist Court has invalidated laws whose constitutionality was clear under long-established doctrine, using novel analyses that it has sometimes acknowledged cannot be tied closely to the Constitution's text or original understandings. In addition, the Rehnquist Court has asserted, more strongly than the Warren Court, a primary role in enforcing the legal boundaries Congress has to respect, so much so that two respected scholars have written an important article with the accurate title "Dissing Congress."[4]

During the "Second Rehnquist Court," the Court pursued a federalism agenda and was active in striking down congressional statutes.[5] Professor Thomas Keck concluded, "In its view toward federal legislative power . . . the later Rehnquist Court has been the least deferential of any in the history of the U.S. Supreme Court, striking down thirty provisions of federal law from 1995 to 2001."[6]

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1. *See* NANCY MAVEETY, QUEEN'S COURT: JUDICIAL POWER IN THE REHNQUIST ERA (2008); THOMAS R. HENSLEY, THE REHNQUIST COURT: JUSTICES, RULINGS, AND LEGACY (2006).

2. *See, e.g.*, Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1092 (2001) ("[The Warren Court's] judicial activism has been replaced with one much harsher and more conservative, protecting state governments from civil rights plaintiffs, state officers from federal regulatory mandates, property owners from environmental regulation, and whites from affirmative action.").

3. Cass R. Sunstein, *The Rehnquist Revolution*, THE NEW REPUBLIC, (Dec. 26, 2004) http://bit.ly/1RAKNSW [perma.cc/UCX8-ZCLN].

4. MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 11 (2005).

5. THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 2 (2004).

6. *Id.*

In total, the Rehnquist Court struck down federal legislation (in whole or in part) in fifty-three cases.[7] This led some to label Congress as the "High Court's Target."[8] In noting the Rehnquist Court's hostility towards Congress, several law professors argued that the Court was increasingly "obliterating a role for Congress as a separate institution."[9] Indeed, several Court-watchers claimed that the Rehnquist Court was on an "Anti-Congress Crusade."[10]

What factors contributed to this sad state of affairs for Congress? Some argued that Congress signaled that it had little institutional stake in the federalism-related matters that dominated the Second Rehnquist Court[11] and noted that many of those landmark Rehnquist Court rulings were *not* followed by talk of stripping the Court's jurisdiction, amending the Constitution, or enacting counter-legislation.[12] Instead, Congress enacted fast-track provisions into legislation, seeking expedited review by the courts, which in effect delegated its authority to interpret the Constitution to the Supreme Court.[13] Examples of legislation with such fast-track provisions include the Communications Decency Act, the Line Item Veto Act, the McCain-Feingold campaign finance legislation, census reform legislation, and library internet filtering legislation.[14]

Professor Neal Devins asserted that Congress seemed oblivious to its fate, and "rather than condemn the Court and launch a counter-offensive, Congress has paid little notice to the Court's decision-making."[15] Indeed, Devins argued that Congress may have actually spurred the Court into action "by signaling its indifference to the constitutional fate of its handiwork."[16]

On the contrary, as the data in the present study reveals, members of Congress, rather than being oblivious or indifferent, have been active in filing amicus curiae briefs before the Supreme

7. Thomas M. Keck, *Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes?*, 101 AM. POL. SCI. REV. 321, 327, 330, 332 (2007).

8. *E.g.*, Linda Greenhouse, *The High Court's Target: Congress*, N.Y. TIMES, (Feb. 25, 2001) http://nyti.ms/1mVhGgg [perma.cc/VEC6-LHDA].

9. *Id.* (quoting Robert Post); *see also* Larry Kramer, *The Arrogance of the Court*, WASH. POST, (May 23, 2000) http://bit.ly/1J1p8Au [perma.cc/7DMY-GDT7].

10. *E.g.*, Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 DUKE L.J. 435, 435 (2001).

11. Neal Devins, *Congress and the Making of the Second Rehnquist Court*, 47 ST. LOUIS U. L.J. 773, 777 (2003).

12. *Id.*; *see also* Devins, *supra* note 10, at 441–42.

13. Devins, *supra* note 11, at 778.

14. *Id.*

15. Devins, *supra* note 10, at 436.

16. *Id.*

Court, including those very cases in which the Court has considered the constitutionality of the legislation with the fast-track provisions mentioned above.

The Court's role in interpreting and even striking down legislation—and subsequent congressional action in response to such occurrences—tend to dominate the literature involving Congress-Court relations.[17] Congress's use of amicus curiae briefs during the Court's review process is generally overlooked. Amicus curiae ("friend of the court") briefs are defined by Supreme Court Rule 37 as bringing "to the attention of the Court relevant matter not already brought to its attention by the parties."[18] Members of Congress have filed amicus briefs in every term dating back to October Term 1977[19] and thus have taken an active role as lobbyists before the Supreme Court, defending their legislative actions. Whether working with organized interest groups or on their own, congressional amicus briefs provide additional information and context in cases in which the Court has relatively little information.[20]

This article will update the previously published book, *Congressional Participation as Amicus Curiae before the U.S. Supreme Court* by Judithanne Scourfield McLauchlan, which analyzed data from October Terms 1953 through 1997.[21] An overview of the findings from recent data collection efforts (October Terms 1998 through 2004) will be provided in order to undergo further analysis of the Rehnquist Court (October Terms 1986 through 2004). We will also compare the results of the original study with the findings gleaned from an examination of the congressional briefs filed during the latter half of the Rehnquist Court. This will allow us to test previously established patterns in congressional activity as well as recognize newly emerging trends. Finally, we will reflect on the implications of these findings for our understanding of Congress-Court relations during the Rehnquist Court.

17. MARK C. MILLER, THE HIGH PRIESTS OF AMERICAN POLITICS: THE ROLE OF LAWYERS IN AMERICAN POLITICAL INSTITUTIONS 96 (1995).

18. SUP. CT. R. 37 (2013).

19. JUDITHANNE SCOURFIELD MCLAUCHLAN, CONGRESSIONAL PARTICIPATION AS *AMICUS CURIAE* BEFORE THE U.S. SUPREME COURT 66–70 (2005).

20. Thomas G. Hansford, *Information Provision, Organizational Constraints, and the Decision to Submit an Amicus Curiae Brief in a U.S. Supreme Court Case*, 57 POLI. RES. Q. 219, 219–30 (2004).

21. SCOURFIELD MCLAUCHLAN, *supra* note 19, at 16.

B. Brief History of Amicus Curiae

Despite having a long history in both Roman civil law and English common law, amicus curiae briefs were extremely rare in the United States until the 1930s (the Court first issued explicit rules on amicus participation in 1937); an exception to this was the accepted motion of Speaker of the House Henry Clay in 1823 in the case of *Green v. Biddle.*[22] Table 1 displays the increasing rate of amici participation during the past seventy-five years; what once was uncommon has now become routine. Only once during the last seven years of the Rehnquist Court did amicus participation drop below 90% in cases receiving plenary review.[23] This increase in activity has not been entirely positive for the Court. While Rule 37 of the *Rules of the Supreme Court* welcomes briefs that will bring new, relevant material, it also warns that "[a]n amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored."[24] This change occurred after the 1988 term in which the *Webster v. Reproductive Health Services*[25] and *Patterson v. McLean Credit Union*[26] cases dealt the court an "avalanche of amicus briefs"[27]—specifically a combined ninety briefs joined by 5,775 parties in the two cases alone.[28] Despite inserting this restrictive language, amicus participation is clearly becoming more commonplace.

Table 1. Amicus Participation from the Taft Through the Rehnquist Courts

Court(s)	% Cases with Amici
Taft, Hughes Courts* 1928–1949	1.6%
Stone, Vinson Courts* 1941–1952	18.2%
Warren Court** 1953–1969	39.0%

22. *Id.* at 5.
23. Data collected in longitudinal study, October Terms 1998–2004. *See infra* Table 1.
24. SUP. CT. R. 37 (2013).
25. 492 U.S. 490 (1989).
26. 491 U.S. 164 (1989).
27. Tony Mauro, *Courts Get a Tad Less Friendly to Amici*, LEGAL TIMES, Feb. 19, 1990, 10.
28. SCOURFIELD MCLAUCHLAN, *supra* note 19, at 6.

Burger Court** 1969–1986	67.5%
Rehnquist Court** 1986–1997	83.0%
Rehnquist Court*** 1998–2004	91.6%

*Data compiled by Nathan Hackman. Cited in Karen O'Connor & Lee Epstein, AMICUS PARTICIPATION IN U.S. SUPREME COURT LITIGATION: AN APPRAISAL OF HAKMAN'S 'FOLKLORE', 16 LAW AND SOCIETY REV. 316 (1981–82).

**Data compiled by Judithanne Scourfield McLauchlan. *See* SCOURFIELD MCLAUCHLAN, *supra* note 19, at 26.

***Data compiled by Judithanne Scourfield McLauchlan, Thomas Gay, Ryan Nevel, Steve Lapinski, and George Meehan.

C. Research Design and Methodology

Whether congressional participation was also increasing was one of the questions the initial study sought to answer. The specific objectives were to determine how often members of Congress participate as amici, what types of cases they participate in, what their motivation was, and whether their efforts influenced Supreme Court decision-making.[29] This was done through the use of a longitudinal study examining briefs in Supreme Court cases; a qualitative study involving interviews of current and former members of Congress, their staff, and Supreme Court law clerks; an examination of briefs to determine how often Justices refer to congressional amicus briefs in their opinions; the formulation of a win/loss record for congressional amicus briefs; and a review of the bench memos of Justice Thurgood Marshall.[30] The focus of the current effort was to update the data for October Terms 1998 through 2004, closing out the tenure of Chief Justice William Rehnquist. A similar longitudinal study was initiated involving the cases in those seven terms. Citations of congressional amicus briefs were noted, as well as the type of case, and whether the Court's decision represented a win or a loss.[31]

There are some notable differences between the original and the current study that should be acknowledged. Previously, *U.S. Law*

29. *Id.* at 2.

30. *Id.* at 16.

31. We reviewed all amicus curiae briefs filed between the October Terms of 1998 and 2004 to identify those joined by members of Congress. The authors wish to thank the law library of Florida A&M University for access to the *Supreme Court Records and Briefs* on microfiche.

Week was consulted for a list of all docket numbers for all plenary review cases in a given term.[32] While it served as an effective and comprehensive list of Supreme Court cases, it resulted in numbers that differed from those collected by the *Harvard Law Review*,[33] as well as the collection of opinions found in the *United States Reports*.[34] Explanations for the variance included cases being consolidated, cases where certiorari was dismissed, cases that were postponed to a later term or reheard from a previous term, and cases with per curiam decisions that did not receive a complete review including oral arguments. As it was and is the stated intent to include only cases receiving plenary review, the *United States Reports* are to be treated as the governing authority as to what cases are to be included in each year. This process also brought the number of cases classified for each year in line with the results published yearly in the November issue of the *Harvard Law Review* detailing the activities of the previous Supreme Court term.

While this allowed for consistent standards to be applied to the October Terms 1998–2004, there was still the question of the previous terms of the Rehnquist Court. As the original study examined each brief for each docket number, it was not a question of having missed or skipped any cases, but instead one of counting a case and/or an amicus brief more than once.[35] To compensate for the differing methodologies, each case that had been noted with a congressional brief in the data set was located in the *United States Reports*, using both Westlaw and Lexis-Nexis. This was done to ensure that each case was included in the section of each bound volume of opinions (*United States Reports*) and to allow for a consistent standard to be applied across both data sets. The numbers provided and referenced in each table, as well as the presented findings, have been adjusted accordingly.

II. Overview of Congressional Participation as Amicus Curiae During the Rehnquist Court

The findings through the October Term 1997 revealed that congressional participation before the Supreme Court was steadily

32. Scourfield McLauchlan, *supra* note 19, at 17.

33. *The Supreme Court, 1986 Term*, 101 Harv. L. Rev. 362 (1987).

34. Data compiled by examining each *United State Report* for the October Terms 1998–2004 (Vols. 525–545), http://1.usa.gov/1P8uvtC [perma.cc/4L92-76YM].

35. This could happen when docket numbers were consolidated or when a case/docket number was carried over to the next term.

rising.[36] Table 2 expands on those findings to include all of the years of the Rehnquist Court. The data reveal a continued upward trend, though the increase is significantly more pronounced when measuring by percentage of cases rather than the total number of cases. This is due to the caseload of the Court falling dramatically during the latter term of Chief Justice Rehnquist. In each of Justice Rehnquist's first four terms, the Court heard more than 140 cases, whereas from 1992 onwards, that Court never heard more than 100 cases.[37] For the time period covering the most recent data (OT1998–OT2004), the average annual caseload was 80.3.[38] While both the October 1986 and 1998 terms had seven cases with congressional participation, the discrepancy in caseload between the terms means that 1986 represented approximately 1 in 22 cases while in 1998 the same number of briefs accounted for 1 in approximately 11.5 cases. It is notable, then, that despite this reduction of cases, the raw number of congressional amicus briefs still trends positive during the Rehnquist term. In percentage terms, the rate of frequency during the latter part of the Rehnquist term nearly doubles that of the former, and no single year from the October Term 1998 through 2004 falls below the average of the previous twelve.[39]

Table 2. Congressional Amicus Participation During the Rehnquist Court, OT1986–OT2004[40]

Term	# Cases with Congressional Participation	% Cases with Congressional Amici	# Briefs Filed by Members of Congress	# Members of Congress Joining Briefs
OT04	8	10.1%	9	41 Members

36. SCOURFIELD MCLAUCHLAN, *supra* note 19, at 42.

37. CHRISTOPHER E. SMITH ET AL., THE REHNQUIST COURT AND CRIMINAL JUSTICE 13 (2011).

38. Guy Taylor, *Nominee Sees 'Room' for Bigger Caseload; Rehnquist's Court Handled Less*, WASH. TIMES, (Sept. 15, 2005) http://bit.ly/1UMMz0V [perma.cc/C4F5-W83N].

39. *See infra* Table 2.

40. An earlier version of this Table (through OT1997) appears in SCOURFIELD MCLAUCHLAN, *supra* note 19, at 34.

OT03	10	12.5%	24	182 Members, U.S. House of Representatives, U.S. Senate
OT02	11	14.9%	20	458 Members, Congressional Black Caucus
OT01	5	6.2%	5	34 Members
OT00	5	5.8%	8	53 Members
OT99	12	15.6%	19	334 Members, House Leadership, Bipartisan Legal Advisory Group of U.S. House
OT98	7	8.6%	8	20 Members
OT97	2	2.2%	5	11 Members, US. Senate
OT96	11	12.8%	14	183 Members, Congressional Hispanic Caucus, Congressional Asian Pacific American Caucus, U.S. Senate, Bipartisan Legal Advisory Group of U.S. House
OT95	4	5.1%	4	65 Members, Congressional Black Caucus
OT94	7	8.1%	12	78 Members, Congressional Black Caucus, Congressional Asian Pacific American Caucus
OT93	3	3.4%	4	56 Members
OT92	8	7.0%	9	72 Members, Congressional Black Caucus

OT91	9	7.9%	11	335 Members, Congressional Black Caucus
OT90	4	3.3%	5	212 Members, U.S. Senate, Congressional Black Caucus
OT89	7	5.1%	11	48 Members, Congressional Black Caucus, Speaker and House Leadership, U.S. Senate
OT88	6	4.2%	12	463 Members, U.S. Senate, Speaker and House Leadership
OT87	5	3.5%	6	26 Members, U.S. Senate, Speaker and House Leadership
OT86	7	4.6%	9	54 Members, Congressional Black Caucus

Avg. 1986–97 %	5.4%
Avg. 1998–2004 %	10.3%
Rehnquist Term %	6.8%

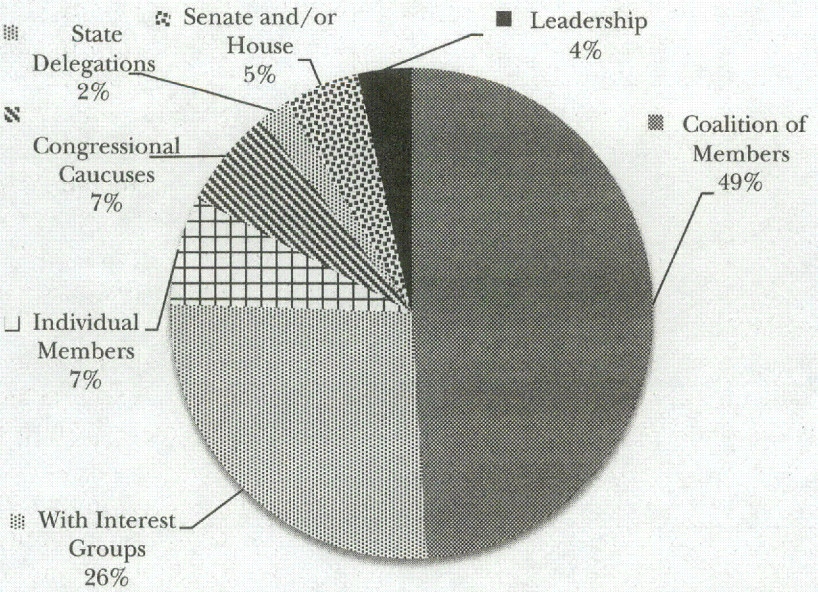
A. Who Chooses to File?

Each congressional brief was coded as falling into one of six categories: (1) coalition of members, (2) with interest groups, (3) individual members, (4) state delegations, (5) congressional caucuses and/or committees, and (6) the U.S. Senate, U.S. House and/or leadership structure.[41] Of the ninety-three congressional amicus briefs filed from OT1998 through OT2004, fifty-two of them consisted of a coalition of members, twenty-two with interest

41. SCOURFIELD MCLAUCHLAN, *supra* note 19, at 39.

groups, eight with individual members, three with state delegations, two with congressional caucuses, and six with the Senate, House, or leadership structure.

Figure 1. Forms and Frequencies of Congressional Amicus Curiae Participation, OT1986–OT2004[42]



The only significant change from the OT1986–OT1997 data is an increase in the proportion of filings by coalitions of members compared to that of those filing with interest groups. Previously, the two categories were fairly even (36% and 33%, respectively);[43] however, during OT1998–OT2004, filings by a coalition of members more than doubled that of filings with interest groups (56% and 24%, respectively). A closer examination of the data reveals that this is largely due to an increase in filings by a few members of Congress. For example, the three cases dealing with the Americans with Disabilities Act each drew a brief from key individuals in the passing of the ADA (Senators Harkin and

42. An earlier version of this Figure (through OT1997) appears in SCOURFIELD MCLAUCHLAN, *supra* note 19, at 39.

43. SCOURFIELD MCLAUCHLAN, *supra* note 19, at 39.

Kennedy, Representatives Hoyer and Owens, and retired Senator Dole).[44] A later ADA case, *PGA Tour, Inc. v. Martin*, attracted a similar brief from members who helped draft and pass the law in question seeking to clarify the legislative history and intent of Congress.[45] Members of the Judiciary Committee are no strangers to amicus filings,[46] with Senator Hatch joining colleagues in amicus filings three times during the OT2004.[47]

More than half of the individuals listed on the frequent filer table[48] have ties to the Judiciary Committee, though other trends are noticeable as well. In addition to briefs filed by the Congressional Black Caucus (and thus not attributed to members individually), several members can be found inside and just outside the listed top twenty.[49] In a phone interview, Representative Ron Dellums stated that "[w]e were willing to turn to the Court for a remedy that could not be satisfied in the political arena . . .We came to trust the Court as the best chance to seek relief—where we as Black people could seek relief."[50] Another trend noted in the original study was that of the presence of national political figures, such as Senators Kennedy, Simon, and Hatch (all former presidential candidates).[51] Joining that list is Senator Charles Schumer, who currently serves as the fourth-ranking Democrat in Senate leadership and is slated to become the next Democratic Leader of the Senate.[52] Falling just outside the list at twelve filings are former presidential candidates Representative Duncan Hunter and Senator John Kerry.[53] Other members in leadership positions who have filed ten or more briefs include former House Speaker Nancy Pelosi and former Representatives Dick Armey, Tom DeLay, and Bob Livingston.[54]

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44. Albertson's, Inc. v. Kirkinburg, 527 U.S. 555 (1999); Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999); Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).

45. 532 U.S. 661 (2001).

46. *See infra* Table 3.

47. United States v. Booker, 543 U.S. 220 (2005); Cutter v. Wilkinson, 544 U.S. 709 (2005); Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).

48. *See infra* Table 3.

49. *See id.*

50. SCOURFIELD MCLAUCHLAN, *supra* note 19, at 69 (quoting Congressman Ron Dellums).

51. *Id.* at 38 n.108; *see infra* Table 3.

52. Siobhan Hughes, *Schumer Locks up Support of Democratic Leadership*, WALL ST. J., (Mar. 30, 2015) http://on.wsj.com/1PpUk9c [perma.cc/2E5H-57ZH].

53. *See infra* Table 3.

54. *Id.*

Table 3. Frequent Filer List: Top 20 Most Active Filers, OT1953–OT2004[55]

Name	Briefs	Party	Affiliation
Sen. Edward "Ted" Kennedy	26	D	Judiciary Committee, Labor & Human Resources Committee
Rep. John Conyers, Jr.	22	D	Judiciary Committee, Congressional Black Caucus, Congressional Progressive Caucus
Rep. William "Don" Edwards	22	D	Judiciary Committee
Sen. Orrin Hatch	22	R	Judiciary Committee, Republican Policy Committee
Rep. Barnett "Barney" Frank	21	D	Judiciary Committee, Congressional Progressive Caucus
Rep. Henry Hyde	21	R	Judiciary Committee, Republican Policy Committee
Rep. Howard Berman	20	D	Judiciary Committee
Rep. Major Owens	20	D	Education & Labor Committee, Congressional Black Caucus, Congressional Progressive Caucus
Rep. Patricia Schroeder	19	D	Judiciary Committee, Congressional Caucus for Women's Issues
Rep. George Miller	16	D	Education & Labor Committee, Democratic Policy Committee, Congressional Progressive Caucus
Rep. Robert "Bob" Dornan	15	R	Armed Services Committee, Republican Study Committee
Sen. Charles "Chuck" Schumer	15	D	Judiciary Committee
Rep. Fortney "Pete" Stark	15	D	Ways & Means Committee, Congressional Progressive Caucus
Rep. Edolphus "Ed" Towns, Jr.	15	D	Congressional Black Caucus, Committee on Oversight and Government Reform
Rep. Joe Barton	14	R	Energy & Commerce Committee, Republican Study Committee
Sen. Barbara Boxer	13	D	Commerce, Science and Transportation Committee
Sen. Paul Simon	13	D	Judiciary Committee

55. *See* BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, http://1.usa.gov/1ZiUcxw [perma.cc/KM8F-5KNW] (last visited Dec. 20, 2015); for biographical information *see* SCOURFIELD MCLAUCHLAN, *supra* note 19, at 41.

Rep. Louise Slaughter	13	D	Rules Committee, Congressional Progressive Caucus
Rep. Henry Waxman	13	D	Energy & Commerce Committee, Congressional Progressive Caucus
Congressional Black Caucus	13		

This finding contrasts with Solberg and Heberlig's finding. Solberg and Heberlig found that committee and party leaders were "no more likely than any other member to participate."[56] Beyond party leadership and attempts at national office, numerous members of the frequent filer table also served as committee chairs. This can partially be explained by Solberg and Heberlig's finding that members of committees of jurisdiction, along with Judiciary Committee members, are "significantly more likely to sign briefs."[57] Also, not all of the briefs signed on to by members of party leadership occurred while they were in their leadership positions. However, both Minority Leader Pelosi and former Majority Leader DeLay remained quite active following their rise to power, signing on to four briefs each during the latter part of the Rehnquist Court while serving in leadership roles.

There are some areas of agreement with the Solberg and Heberlig study. This data largely supports the study on the role of ideologues; extreme ideology was found to be the most significant indicator of participation.[58] Numerous members of both the Progressive Caucus on the left, as well as the Republican Study Committee on the right, appear on the frequent filer list. Solberg and Heberlig's finding that lawyers are less likely than non-lawyers to sign congressional amicus curiae briefs[59] correlates with both the data from OT1986–OT1997, finding that legal training is not necessary to participate,[60] as well as the data from OT1998–OT2004. This is because of the high frequency of filings in cases dealing with "hot button" issues.[61] The only case listed in Table 4 that does not specifically fall into this category would be *Crosby v.*

56. Rorie L. Spill Solberg & Eric S. Heberlig, *Communicating to the Courts and Beyond: Why Members of Congress Participate as Amici Curiae*, 29 LEGIS. STUD. Q. 591, 601 (2004).
57. *Id.* at 603.
58. *Id.* at 600.
59. *Id.* at 607, n.12.
60. SCOURFIELD MCLAUCHLAN, *supra* note 19, at 42–43.
61. *Id.* at 43.

National Foreign Trade Council.[62] This case dealt with a Massachusetts law, which restricted foreign commerce and thus attempted to preempt federal legislation on the subject.[63] Types of cases in which members choose to file will be covered in more detail in the "When to File" section of this paper.[64]

Table 4. Cases with at Least 10% of Congress Participating (54 Members or More), OT1986–OT2004

Cases with at least 10% of Congress participating (54 members or more)	**Issue**
Patterson v. McLean Credit Union (OT1988)	Racial Discrimination
Webster v. Reproductive Health Services (OT1988)	Abortion
Rust v. Sullivan (OT1990)	Abortion
I.N.S. v. Doherty (OT1991)	Immigration
Planned Parenthood v. Casey (OT1992)	Abortion
Felker v. Turpin (OT1995)	Death Penalty
Arizonans for Official English v. Arizona (OT1996)	English as Official Language
Stenberg v. Carhart (OT1999)	Abortion
Crosby v. Nat'l Foreign Trade Council (OT1999)	Congressional power to preempt state law in foreign commerce (the "Massachusetts Burma Law")
Grutter v. Bollinger (OT2002)	Affirmative Action
Gratz v. Bollinger (OT2002)	Affirmative Action
Elk Grove Unified School District v. Newdow (OT2003)	Pledge of Allegiance, "under God," and the First Amendment

Though the percentage of filings with interest groups was down slightly from one-third,[65] the presence of groups such as the Washington Legal Foundation (eleven briefs, OT1998–OT2004), the Allied Educational Foundation (seven briefs, OT1998–OT2004), and the American Center for Law & Justice (three briefs, OT1998–OT2004) continue to make a strong impact on conservative public interest law.[66] Though most interest groups do not target members of Congress for participation, perhaps

62. 530 U.S. 363 (2000).
63. *Id.*
64. *See infra* Part II.B.
65. SCOURFIELD MCLAUCHLAN, *supra* note 19, at 46.
66. *See id.* at 47.

believing that the Court is not interested in legislative history and intent, some staff members in Congress believe that those that do recruit congressional amici do so in order to aid their fundraising efforts.[67] Other interviewees go on to describe the process as fairly removed from that of Congress itself because they believe that interest groups do most, if not all, of the work themselves.

Still, there are occurrences when members file amicus briefs on their own, in contrast to those times when members take a hands-off approach and work with interest groups. This occurred eight times during October Terms 1998–2004.[68]

Table 5. Members of Congress Who Filed Amicus Curiae Briefs as Individuals, Warren through Rehnquist Courts[69]

Name	Case	Term
Sen. J. William Fulbright	*Cooper v. Aaron*	OT1958
Sen. William B. Spong, Jr.	*Swann v. Charlotte-Mecklenburg Bd. of Educ.*	OT1970
Rep. Charles Bennett	*Swann v. Charlotte-Mecklenburg Bd. of Educ.*	OT1970
Rep. Henry Waxman	*Regents of the Univ. of Cal. v. Bakke*	OT1977
Rep. Roberta "Bobbi" Fiedler	*Crawford v. Bd. of Educ. of the City of Los Angeles*	OT1981
Rep. Charles "Trent" Lott	*Bob Jones Univ. v. United States*	OT1982
Rep. Silvio Conte	*United States v. Ptasynski*	OT1982
Sen. Lowell Weicker, Jr.	*Wallace v. Jaffree*	OT1984
Sen. Joseph "Joe" Biden, Jr.	*United States v. Eichman*	OT1989
Rep. Michael "Mike" Synar	*Arkansas v. Oklahoma*	OT1991
Rep. Henry Hyde	*U.S. Term Limits, Inc. v. Thornton*	OT1994
Sen. Robert "Bob" Bennett	*Agostini v. Felton*	OT1996
Sen. Theodore "Ted" Stevens	*Alaska v. Native Vill. of Venetie Tribal Gov't*	OT1997
Sen. Joseph "Joe" Biden, Jr.	*United States v. Morrison*	OT1999
Rep. James "Jim" McDermott	*Bartnicki v. Vopper*	OT2000
Rep. John Boehner	*Bartnicki v. Vopper*	OT2000
Sen. Orrin Hatch	*Eldred v. Ashcroft*	OT2002
Rep. John "Dennis" Hastert	*McConnell v. Fed. Election Comm'n*	OT2003
Rep. Frederick "Rick" Boucher	*Nixon v. Mo. Municipal League*	OT2003
Sen. John Cornyn	*Medellín v. Dretke*	OT2004
Rep. Steve "Steve" Chabot	*San Remo Hotel, L.P. v. City and Cnty. of San Francisco*	OT2004

67. *Id.* at 48.
68. *See infra* Table 5.
69. SCOURFIELD MCLAUCHLAN, *supra* note 19, at 66.

Through October Term 1997, individualized briefs were all filed in cases dealing with issues important to the member's home state, constituency, or area of expertise.[70] That established pattern continues unbroken, as all instances here involved an area of a member's expertise or legislation with which he was directly involved. Though filing individually, members of Congress still tend to employ outside counsel to aid in the preparation of the brief. However, in the case of *United States v. Morrison*,[71] then-Senator Joe Biden was listed as the counsel of record in the amicus brief arguing that a provision of the Violence Against Women Act that he authored should be deemed constitutional.[72] The Court disagreed by a 5-4 margin in that landmark decision.[73] We should note that, in dissent, Justice Souter relied heavily on the legislative history as well as statements and evidence from hearings of the Senate Judiciary Committee chaired by Senator Biden.[74]

The other forms of participation were found to be used sparingly during this latter portion of the Rehnquist Court. Cases that included Senate and/or House participation as amici in a larger, institutional sense were fairly rare, having only occurred thirteen times since 1978.[75] Except in circumstances where a member of Congress was being sued,[76] each case involving the House or Senate took place during a period of divided government[77] until 2004. *Elk Grove Unified School District v. Newdow*[78] challenged the words "under God" in the Pledge of Allegiance as violating the First Amendment. A record nine congressional briefs, involving seventy-eight members of Congress (mostly Republicans and a few Southern Democrats) as well as the Republican-led House and Senate, all filed on behalf of the petitioners in defense of the Pledge.

70. *Id.* at 61.
71. 529 U.S. 598 (2000).
72. Brief of Senator Joseph R. Biden, Jr. as Amicus Curiae in Support of Petitioners, United States v. Morrison, 529 U.S. 598 (2000) (Nos. 99–5, 99–29).
73. *Morrison*, 529 U.S. 598 (2000).
74. *Id.* at 628–655 (Souter, J. dissenting).
75. *See infra* Table 6.
76. Helstoski v. Meanor, 442 U.S. 500 (1979); Hutchinson v. Proxmire, 443 U.S. 111 (1979).
77. SCOURFIELD MCLAUCHLAN, *supra* note 19, at 55.
78. 542 U.S. 1 (2004).

Table 6. House and Senate Amicus Curiae Participation, with Party Identification, Warren Through Rehnquist Courts[79]

Term	Case Name	House	Senate	President
OT1978	*Helstoski v. Meanor*	D*	D	D
OT1978	*Hutchinson v. Proxmire*	D*	D*	D
OT1985	*Am. Cetacean Soc'y v. Baldridge*	D*	R	R
OT1985	*Japan Whaling Ass'n v. Am. Cetacean Soc'y*	D*	R	R
OT1987	*Morrison v. Olson*	D*	D*	R
OT1988	*Am. Foreign Serv. Ass'n v. Garfinkel*	D*	D*	R
OT1988	*Mistretta v. United States*	D	D*	R
OT1989	*United States v. Eichman*	D*	D*	R
OT1989	*Metro Broad. v. Fed. Commc'ns Comm'n*	D	D*	R
OT1996	*Raines v. Byrd*	R*	R*	D
OT1997	*Clinton v. City of N.Y.*	R	R*	D
OT1999	*Dickerson v. United States*	R*	R	D
OT2003	*Elk Grove Unified Sch. Dist. v. Newdow*	R*	R*	R

* Indicates that chamber filed an amicus curiae brief

Also filing separate briefs (both on the merits and at the certiorari stage) in the *Newdow* case was the congressional delegation from Idaho.[80] Along with the delegation from Hawaii in *Rice v. Cayetano*,[81] a case dealing with race-based voting qualifications (specifically with native Hawaiians), these three briefs were the only ones to fall into this category. Finally, despite a historical pattern of activity, the Congressional Black Caucus filed in only one case, *Branch v. Smith*,[82] though individual members remained busy. Representative John Conyers, Jr., for example, remained one of the more frequent amicus filers with eight briefs during the studied time period.[83]

79. An earlier version of this Table (through OT1997) appears in SCOURFIELD MCLAUCHLAN, *supra* note 19, at 53.

80. Brief for Idaho Governor Dirk Kempthorne et al. as Amici Curiae in Support of Petitioner, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (No. 02-1624).

81. 528 U.S. 495 (2000); Brief for the Hawaii Congressional Delegation as Amicus Curiae Supporting Respondent, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818).

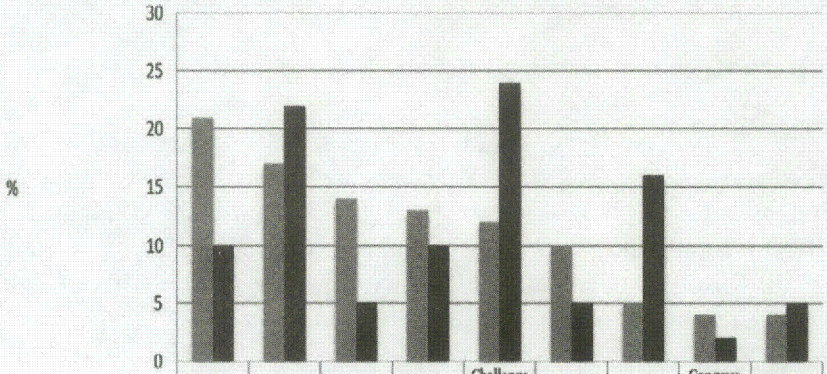
82. 538 U.S. 254 (2003).

83. *See* SCOURFIELD MCLAUCHLAN, *supra* note 19, at 41.

B. When to File?

The previous section dealt with examining those members of Congress who file amicus briefs in Supreme Court cases. In what type of cases are these members likely to participate? The previously established typology included nine different classifications of cases that are listed below in Figure 2. As with the earlier study,[84] some cases could have been classified as falling into multiple categories; each case was labeled with the classification that applied to the arguments presented most to those present in the congressional briefs. Due to the relatively small sample size (fifty-eight cases) during the time period covered by the present study (OT1998–OT2004), this serves as more of a qualitative assessment than a quantitative one.

Figure 2. Types of Cases in Which Members of Congress File Amicus Curiae Briefs[85]



	Challenge Executive	"Hot Button"	Home State	Electoral	Challenge Federal Court	Separation of Powers	Federalism	Congressional Practice	Religious Freedom
Percentage-OT 1986-1997	21	17	14	13	12	10	5	4	4
Percentage-OT 1998-2004	10	22	5	10	24	5	16	2	5

Classifications that saw notable increases are "hot button" issues, challenges to a federal court, and challenges to federalism. "Hot button" cases are defined as those cases that deal with politically

84. *Id.* at 79–81.
85. *Id.* at 82.

charged, highly publicized issues of the day.[86] Notable cases in this category have, for example, featured court battles concerning abortion. *Stenberg v. Carhart*[87] resembled previous abortion cases by drawing more than one hundred members of Congress on both sides. Additional "hot button" issues include English-only ordinances in *Alexander v. Sandoval*,[88] race-based admissions in the University of Michigan cases,[89] and the defense of laws targeting sexual predators in *Kansas v. Crane*.[90]

Cases classified as "federal court challenges" are those in which members of Congress are "engag[ing] in a dialogue with the federal courts about the proper construction of federal legislation or the [F]ederal [C]onstitution, as well as [offering up opinions] about the merit[s] of various Supreme Court precedents and lower federal court decisions."[91] Cases in this category tend to either consist of a challenge of judicial activity by members of Congress joining with conservative interest groups or by members of Congress defending their legislation against what they see as misinterpretation by federal courts. When a lower court held that the Children's Internet Protection Act was unconstitutional in *United States v. American Library Association*,[92] Republican representatives joined with the American Center for Law and Justice to protest the federal district court's interpretation of the First Amendment and its applicability to the legislation in question.[93] Republicans also defended 18 U.S.C. § 3501 as governing the admissibility of confessions in court as opposed to the Court's *Miranda* decision[94] in *Dickerson v. United States*.[95] The results were mixed with a win in the former case and a loss in the latter case. Concerning federalism, seven Republican representatives joined with the government in *Gonzales v. Raich*,[96] challenging California's medical marijuana laws as contradicting

86. *Id.* at 93.
87. 530 U.S. 914 (2000).
88. 532 U.S. 275 (2001).
89. Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003).
90. 534 U.S. 407 (2002).
91. SCOURFIELD MCLAUCHLAN, *supra* note 19, at 117.
92. 539 U.S. 194 (2003).
93. Brief for American Center for Law and Justice et al. as Amici Curiae Supporting Appellants, United States v. Am. Library Ass'n, Inc. 539 U.S. 194 (2003) (No. 02-361).
94. Brief for Senator Orrin Hatch et al. as Amici Curiae Supporting Respondent, Dickerson v. United States, 530 U.S. 428 (2000) (No. 99-5525).
95. 530 U.S. 428 (2000).
96. 545 U.S. 1 (2005).

the federal Controlled Substances Act.[97]

There were fewer cases where the executive branch was being challenged; in those cases that were, home state issues and separation of power issues were at play. In past years, challenges to the executive branch were the most frequently filed amicus briefs.[98] Using the combined data, Democrats historically signed on to amicus briefs 59% of the time.[99] Yet, in the latter portion of the Rehnquist term, Republicans were more active. Of the ninety-three briefs filed, fifty could be classified as Republican, thirty-five as Democratic, and eight as bipartisan.[100] With more than four-and-a-half terms featuring a Republican Solicitor General, it stands to reason that executive branch challenges would be down while court challenges, federalism, and "hot button" cases (areas that draw conservative attention) saw increased participation. The small sample size and large number of categories should dissuade concrete conclusions from being drawn. Executive branch challenges, as well as home state issues and separation of powers cases, may have declined due to a lack of such cases being reviewed by the Court. Electoral issues remained fairly constant with a mixture of campaign finance cases and redistricting issues.[101] Cases involving congressional practice (rules governing procedure or the ability of members to carry out duties), along with cases involving religious tolerance and freedom, continued to constitute a small portion of congressional amicus briefs.[102]

Regardless of the typology one might develop to analyze these cases, one thing is clear: members of Congress have filed briefs in many of the Rehnquist Court's landmark constitutional law cases. On a listserv of legal academics and political scientists who study law and courts, the following question was posed: "What were the Rehnquist Court's greatest or most important constitutional decisions?"[103] While not "scientific," a consensus emerged, producing a list of thirteen cases.[104] Of those thirteen cases,[105]

97. Brief for U.S. Representative Mark E. Souder et al. as Amici Curiae Supporting Petitioner, Gonzales v. Raich, 545 U.S. 1 (2005) (No. 03-1454).
98. SCOURFIELD MCLAUCHLAN, *supra* note 19, at 81.
99. *See supra* Table 2.
100. *See id.*
101. *See supra* Figure 2.
102. *Id.*
103. MAVEETY, *supra* note 1, at 66.
104. *Id.*
105. *Id.*

members of Congress filed amicus curiae briefs in seven.[106] Of the forty-three cases cases in which the Rehnquist Court struck down a federal statute, members of Congress filed briefs in fifteen (or 35%) of those cases.[107]

III. DID CONGRESS INFLUENCE THE REHNQUIST COURT?

When discussing the subject of amicus briefs in general, Justice Sandra Day O'Connor declared, "These amicus briefs invaluably aid our decision-making process and often influence either the result or the reasoning of our opinions."[108] Regarding congressional amicus briefs in particular, a former law clerk, when asked about their influence, responded, "The last place one would look for dispassionate legal advice is from a politician."[109] This study attempts to measure the influence of amicus briefs on judicial decision-making in two ways: by reviewing court opinions for citations of congressional amicus briefs and by determining a win/loss record for congressional amici in cases where there was a clear winner and loser.

A. Citations of Congressional Amici in the Opinions of the Court

Between 1976 and 1985, amici in general were cited 27.6% of the time. Between 1986 and 1995, that number jumped to 37%.[110] Data collected through October Term 1997 demonstrated that congressional amici were cited just one in ten times (10%). Data for OT1998–OT2004 showed a slight uptick; eight out of fifty-eight (13.8%) cases included an explicit reference, while two additional cases alluded to the congressional amicus brief (for a total of 17%). Citation did not equal agreement; in only two of these cases did the party supported by congressional amici prevail.

However, the citations do acknowledge that the Justices read the briefs and feel a need to respond to the arguments made by members of Congress. On the occasions when the United States Senate or House of Representatives filed briefs on behalf of the

106. City of Boerne v. Flores, 521 U.S. 507 (1997); Dickerson v. United States, 530 U.S. 428 (2000); Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bolligner, 539 U.S. 306 (2003); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Planned Parenthood v. Casey, 505 U.S. 833 (1992); Shaw v. Reno, 509 U.S. 630 (1993); United States v. Lopez, 514 U.S. 549 (1995).

107. *See* KECK, *supra* note 5.

108. SCOURFIELD MCLAUCHLAN, *supra* note 19, at 165.

109. *Id.*

110. *See* Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 758 (2000) (discussing the percentage of cases that refer to an amicus in all cases where there was an amicus).

legislative chamber, it was more likely that those briefs would be cited in one of the opinions of the Court than a brief filed by a single member of Congress. Examples include *Morrison v. Olson*, in which the United States Senate was cited and was also granted fifteen minutes during oral argument.[111] In *American Foreign Service Ass'n v. Garfinkel*, the United States Senate, the Speaker, and leadership of the House were cited.[112] And in *Raines v. Byrd*, the United States Senate and the Bipartisan Legal Advisory Group of the House of Representatives were cited.[113]

Table 7. Supreme Court Opinions Citing Congressional Amicus Briefs

Case	Justice[114]	Win/ Loss	Party	Bill/ Legislation	Overview of Citation/Filing
Morrison v. Olson (1987)	Rehnquist	Win	Bipartisan	Independent Counsel Act	U.S. Senate granted 15 minutes of oral argument
Am. Foreign Serv. Ass'n v. Garfinkel (1988)	Per Curiam	Win	Bipartisan	Continuing Resolution Section 630	Briefs filed by House and Senate leadership cited
United States v. Eichman (1990)	Brennan	Loss	Bipartisan	Flag Protection Act of 1989	Briefs filed by House, Senate, and Senator Biden cited
Wisconsin v. Mitchell (1993)	Rehnquist	Win	Democrat	WI hate crime legislation	Brief by Congressman Chuck Schumer *et al.* cited
Raines v. Byrd (1997)	Rehnquist (Stevens dissent)	—	Bipartisan	Line Item Veto Act of 1996	Brief filed by Senate and House Bipartisan Legal Advisory Group cited
Reno v. Am. Civil Liberty Union (1997)	Stevens	Loss	Republican	Communicati on Decency Act of 1996	Brief filed by 8 Senators and 17 Representatives cited

111. 487 U.S. 654, 659 (1988); *see* Oral Argument at 1:30:18, Morrison v. Olsen, 487 U.S. 654 (1988) (No. 87-1279), http://bit.ly/1ZiUggw [perma.cc/9Q82-J5NQ].

112. 490 U.S. 153, 161 (1989).

113. 521 U.S. 811, 818 n.2 (1997).

114. Justice who authored the opinion.

Printz v. United States (1997)	Scalia	Loss	Bipartisan	Brady Handgun Violence Protection Act	Brief by Senator Paul Simon *et al.* cited
Rice v. Cayetano (2000)	Kennedy (Stevens dissent)	Loss	Democrat	U.S. Govt. Relations with Indigenous People	Hawaii delegation brief cited in Justice Stevens's dissent
United States v. Morrison (2000)	Rehnquist (Souter dissent)	Loss	Democrat	Violence Against Women Act	Senator Biden cited in Justice Souter's dissent
Natsios v. Nat'l Foreign Trade Council (2000)	Souter	—	Briefs filed on both sides	"Massachusetts Burma Law"	Brief by Senator Barbara Boxer *et al.* cited
Kansas v. Crane (2002)	Breyer	Loss	Republican	Kansas Sexually Violent Predator Act	Brief by Representatives Todd Tiahrt, Jim Ryun, and conservative groups (WLF, AEF) cited
Eldred v. Ashcroft (2003)	Ginsburg	Win	Briefs filed on both sides	Copyright Laws	Brief by Rep. Sensenbrenner *et al.* cited
Demore v. Kim (2003)	Rehnquist	Win	Republican	Immigration and Nationality Act	Brief by 6 Republicans, WLF, and AEF
Grutter v. Bollinger (2003)	O'Connor	Win	Democrat	Race as a factor in admissions	Congressional brief mentioned from bench when decision handed down
McConnell v. Fed. Election Comm'n (2003)	Multiple (Kennedy dissent)	—	Briefs filed on both sides	Bipartisan Campaign Reform Act of 2002	Congressional brief cited in Justice Kennedy's dissent
United States v. Booker (2005)	Stevens/ Breyer	Loss	Bipartisan	Sentencing standards	Brief by Senators Hatch, Kennedy, and Feinstein cited

B. Win/Loss Record for Members of Congress as Amici Curiae

If congressional amici citations do not appear to correlate with any influence over the Court's decision-making, what then of the win/loss record? The win/loss record was determined by evaluating

cases in which there was a clear winner and loser and where congressional activity was limited to advocating for one side. The findings of the study of congressional participation before the Court from October Terms 1953 to 1997 did not suggest influence over the Court's decision-making either. In eighty cases, congressional participants clearly won forty-three times (54%) and lost thirty-two times (40%), with the other five cases yielding no definitive result.[115] Our study of October Terms 1998 to 2004 added forty-five cases to the tally, with twenty-one representing congressional wins (47%), twenty-three representing congressional losses (51%), and one yielding no definitive result. This means that the win/loss record for Congress is 64-55-6, or a winning percentage of 53.8%. This result pales in comparison to the success rate of the Solicitor General as an amicus curiae: 87%.[116]

But when looking only at those cases in which members signed on to briefs with interest groups, congressional amici increased their winning percentage 69%, with Republicans at 71% and the Washington Legal Foundation at 80%.[117] A similar finding exists in the OT1998–OT2004 data set, with interest groups combining for a 10-6 mark (63%), with conservative interest groups (such as the American Center for Law & Justice and the Allied Educational Foundation) at 9-5 (65%) and the Washington Legal Foundation (WLF) at 6-2 (75%). Examples of the Washington Legal Foundation's successful litigation strategy include *FDA v. Brown & Williamson Tobacco Corp.*, in which the Court agreed with the WLF and Representatives Cass Ballenger and Howard Coble that Congress had not granted the FDA jurisdiction to regulate tobacco products;[118] *Duckworth v. French*, in which the Court agreed with the WLF, Senator Spencer Abraham, and Representative Tom DeLay that the Prison Litigation Reform Act's limitation on courts to exercise their equitable powers did not violate separation of powers;[119] and *Reno v. American-Arab Anti-Discrimination Committee*, in which the Court agreed with the WLF and Representative Gerald Solomon when it upheld the Immigration Reform and Immigrant Responsibility Act of 1996 (IRIRA).[120]

115. SCOURFIELD MCLAUCHLAN, *supra* note 19, at 173–74.
116. *Id.*
117. *Id.* at 185.
118. 529 U.S. 120, 161 (2000).
119. 528 U.S. 1045 (1999) (granting certiorari); consolidated into *Miller v. French*, 530 U.S. 327 (2000).
120. 525 U.S. 471, 500 (1999).

Table 8. Win/Loss Record for Members of Congress as Amici Curiae

Ideology	Wins	Losses	Pct.	Groups	Wins	Losses	Pct.
Overall Congressional Win/Loss Ratio	57	47	.548	Leadership	5	1	.833
Republicans	31	22	.585	With an Interest Group	24	10	.706
Bipartisan/Leadership	11	8	.579	Multiple Members	27	28	.491
Democrats	15	17	.469	Individual Member	5	6	.455
				Caucus	2	5	.286

Issues	Wins	Losses	Pct.	Issues	Wins	Losses	Pct.
Challenging a Federal Court	7	2	.778	Hot Button Issues	17	18	.486
Separation of Powers	10	4	.714	Legislative Intent	6	8	.429
Religious Freedom/Toleration	3	2	.600	Home State Cases	2	4	.333
Federalism	10	8	.556	Challenging Executive Branch	2	6	.250
Electoral Issues	5	5	.500				

IV. IMPLICATIONS AND CONCLUSION

Songer and Sheehan found that when one controls for issues and ideology, support from an amicus curiae has no significant impact on the chance of success.[121] Taken in that context, the conclusion that members of Congress are not effective advocates before the Court would be expected.[122] When Congress appears to have some success (e.g., when Republicans were in front of the Rehnquist Court), one might see that success as the result of a friendly majority, not of powerfully wielded influence.[123]

Congressional participation as amicus curiae before the Court

121. Donald R. Songer & Reginald S. Sheehan, *Interest Group Success in the Courts: Amicus Participation in the Supreme Court*, 46 POL. RES. Q. 339, 350 (1993).

122. SCOURFIELD MCLAUCHLAN, *supra* note 19, at 201.

123. *Id.* at 212.

continues to increase (both in number and in relation to the number of cases before the Court). Congressional amicus filing is still largely dominated by the members of the Judiciary Committee, members of the Congressional Black Caucus, and party leadership. Trends on what types of cases members were drawn to are less clear, though it can be concluded that conservative targets (federal courts, federalism, and various "hot button" issues) are receiving more attention from congressional amici.[124]

Concerns involving judicial independence continue to be misplaced; members of Congress lobby the Court for reasons other than asserting congressional control and the Court seems more than content to politely reject their overtures. As previously asserted, "Congressional *amici* assist the Court by addressing some of its alleged weaknesses without compromising the principle of judicial independence."[125] Members of Congress are able to bring their policy expertise before the Court;[126] while the Justices rarely seem to acknowledge this explicitly in their opinions, the information is there to be reviewed and used if deemed necessary. Prior to formal, institutional steps being taken (e.g., proposing legislation to "overturn" Court decisions), members of Congress are able to file amicus briefs to help keep an avenue of communication open that might not otherwise exist.[127]

Congressional amicus briefs may, indeed, have very little influence on the decision-making of the Court. However, as long as there are other benefits to filing (gaining favor with interest groups, constituents, and colleagues), then it seems that this practice will continue to occur and perhaps increase along the current lines. Likewise, as long as there is an occasional use for these briefs in crafting opinions (as there is with all amicus briefs filed with the Court), they will continue to be welcomed. If the Court declines to find the brief useful, or if the Court perhaps persists in misconstruing the intent of Congress, the amicus briefs will at least have provided members an opportunity to be heard.

As groups from all backgrounds and from across the country seek to lobby the Court, it makes sense to provide an opportunity for the deliberative body of the people's representatives to have their say.

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124. *See* Songer & Sheehan, *supra* note 121, at 340.
125. SCOURFIELD MCLAUCHLAN, *supra* note 19, at 216.
126. *Id.* at 217.
127. *Id.* at 224.

RELIGIOUS ACCOMMODATION IN THE WORKPLACE: WHY FEDERAL COURTS FAIL TO PROVIDE MEANINGFUL PROTECTION OF RELIGIOUS EMPLOYEES

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I. INTRODUCTION

In June 2015, the United States Supreme Court handed down its decision in *EEOC v. Abercrombie & Fitch Stores,*[1] the Court's first case involving an employee's right to religious accommodation in the workplace since 1986.[2] In an 8-1 opinion, the *Abercrombie* Court held that an employer is obligated to reasonably accommodate an employee's religious needs, even when the employer does not have explicit knowledge that the employee needs an accommodation.[3] Rather, if the employer even suspects that an employee *might* need an accommodation, and this suspected need is the motivating factor in the employer's refusal to hire the employee, then the employer may be liable for discrimination.[4] *Abercrombie* is the latest in a series of decisions by the Roberts Court that supports religious rights.[5]

While *Abercrombie* may be the latest pro-religion decision of the Roberts Court, it is also notable because it is the first time the Supreme Court has ruled in favor of a religious employee in a case involving religious accommodation in the private workplace under § 701(j) of the Civil Rights Act of 1964.[6] Section 701(j) both prohibits religious-based discrimination and affirmatively requires that an employer accommodate its employees' religious needs when accommodation can be made without undue hardship.[7] While courts have long struggled with how best to balance the rights of religious employees who request accommodation in the workplace with an employer's right to run its business free from interference[8] this has become an area of growing controversy and

1. 135 S. Ct. 2028 (2015).
2. *See* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986).
3. *Abercrombie,* 135 S. Ct. at 2030, 2032–34.
4. *Id.* at 2032–33.
5. *See, e.g.,* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (holding that requiring a closely held corporation to provide insurance coverage for contraception under the Affordable Care Act violated the Religious Freedom Restoration Act); Greece v. Galloway, 134 S. Ct. 1811 (2014) (upholding the constitutionality of beginning a town hall meeting with a Christian prayer); Pleasant Grove City v. Summum, 555 U.S. 460 (2009) (affirming a town's ability to display the Ten Commandments in a public park); Salazar v. Buono, 559 U.S. 700 (2010) (upholding the constitutionality of displaying a six-foot cross on National Park Service land).
6. 42 U.S.C. § 2000e(j) (2012).
7. *Id.*
8. *E.g.,* Cooper v. Oak Rubber Co., 15 F.3d 1375 (6th Cir. 1994) (holding there is no requirement for an employer to provide extra paid holidays to accommodate religion); Brown v. F.L. Roberts & Co., 419 F. Supp. 2d 7 (D. Mass. 2006) (holding that an employer failed to show an undue hardship by allowing a Rastafarian to keep his dreadlocks as opposed to complying with its haircut policy); Cloutier v. Costco Wholesale, 390 F.3d 126 (1st Cir. 2004) (holding an employer offered reasonable accommodations, band aids and

importance over the last fifteen years, with the number of religion-based discrimination charges filed with the EEOC having almost doubled.[9]

This increase is due, in part, to changes in the religious landscape of the United States. According to a major recent survey, the United States has become significantly more religiously diverse.[10] The number of Americans who consider themselves Christian has significantly decreased while the number of Americans who affiliate with a non-Christian faith has increased.[11] Additionally, the number of Americans who are religiously unaffiliated has also increased; while some of the unaffiliated individuals describe themselves in secular terms, almost a third of them state that religion is "very" or "somewhat important to them."[12] Americans have also become more likely to bring their religion and accompanying requests for religious accommodation into the workplace.[13] These changes have led—and will continue to lead—to increasing religious conflict in the American workplace.

This article examines whether there are any unifying principles that can best explain the legal system's treatment of religion in the American workplace. While there has been scholarship addressing specific aspects of § 701(j),[14] this is the first article to provide a comprehensive analysis of the unifying principles that the federal courts have relied on in interpreting § 701(j).There are three principles with which we can interpret the judiciary's treatment of §

clear plastic retainers, to an employee whose religion required her to wear various facial piercings).

9. *Religion-Based Charges FY 1997–FY 2014*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://1.usa.gov/1RxNVPq [perma.cc/4727-VARY] (showing that from 1999–2014 the number of discrimination charges filed with the EEOC increased from 1,811 to 3,549).

10. *America's Changing Religious Landscape*, PEW RESEARCH CTR. (May 12, 2015), http://pewrsr.ch/1cAYVbV [perma.cc/39MR-HJ9P].

11. *Id.* (The percentage of American adults who consider themselves Christian dropped almost eight percentage points, from 78.4% to 70.6% between 2007 and 2014. The percentage of Americans who identify as a member of a non-Christian faith increased 1.2 percentage points, from 4.7% to 5.9% during the same time period).

12. *Id.* (The percentage of American adults who are religiously unaffiliated has increased over six percentage points from 16.1% to 22.8% between 2007 and 2014. Thirty percent of these religiously unaffiliated Americans consider religion either "very" or "somewhat" important to them).

13. Dallan F. Flake, *Image is Everything: Corporate Branding and Religious Accommodation in the Workplace*, 163 U. PA. L. REV. 699, 705–08 (2015).

14. *See id.* at 701 (explaining that there is a tension between an employee's right to religious expression in the workplace and a corporation's right to control its image); Roberto L. Corrada, *Toward an Integrated Disparate Treatment and Accommodation Framework for Title VII Religion Cases*, 77 U. CIN. L. REV. 1411 (2009) (exploring the interrelationship between accommodation and discrimination in Title VII religion cases and proposing an integrated disparate treatment and accommodation framework).

701(j).[15] First, despite the fact that § 701(j) mandates differential treatment of religious employees or reasonable accommodation absent "undue hardship," courts tend to read § 701(j) as requiring little more than formal equality.[16] Second, courts regularly hold that only immutable characteristics should be protected under anti-discrimination law.[17] Since § 701(j) mandates accommodation of religious conduct and collapses the conduct-status distinction, the question of whether religious conduct is mutable or immutable should be irrelevant. However, many courts nonetheless imply that religion is a matter of personal choice when denying employees the right to religious accommodation.[18]

Third, there is a lack of consensus in American society—and in the courts—regarding the importance of religion and the appropriate role of religion in public life. While religious freedom has always been one of the most important civil rights in the United States,[19] there are segments of American society that doubt the validity or importance of religion. This dichotomy regarding the appropriate role of religion is evident in the case law interpreting § 701(j).[20] There are courts that express skepticism and seem hesitant to mandate accommodation based on concerns that requests for accommodation are somehow unfair or not genuinely

15. The author previously wrote three articles addressing religion in the workplace; this article incorporates and further develops the ideas discussed in those earlier articles. *See* Debbie N. Kaminer, *Religious Conduct and the Immutability Requirement: Title VII's Failure to Protect Religious Employees in the Workplace*, 17 VA. J. SOC. POL'Y & L. 453 (2010) [hereinafter Kaminer, *Religious Conduct and the Immutability Requirement*] (explaining that many courts continue to rely on the mutable-immutable distinction in a manner that limits an employee's right to religious accommodation in the workplace); Debbie N. Kaminer, *When Religious Expression Creates a Hostile Work Environment: The Challenge of Balancing Competing Fundamental Rights*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 81 (2001) [hereinafter Kaminer, *When Religious Expression Creates a Hostile Work Environment*] (developing a framework to balance an employee's right to religious accommodation in the workplace with the rights of other employees to be free from religious harassment); Debbie N. Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 BERKELEY J. EMP. & LAB. L. 575 (2000) [hereinafter Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees*] (discussing that while courts have generally interpreted § 701(j) narrowly, with some courts expressing hostility toward religion, there are also cases that have required more meaningful accommodation of religious employees).

16. *See* Kaminer, *Religious Conduct and the Immutability Requirement*, *supra* note 15, at 456, 458–59.

17. *See id.* at 454 (noting that courts routinely hold that mutable characteristics are not protected under Title VII).

18. *Id.* at 457–58, 465.

19. Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees*, *supra* note 15, at 576.

20. *Id.* at 577.

motivated by religious beliefs.[21] However, these narrow holdings represent only part of the picture, as there are also cases which mandate that religious employees receive greater and more meaningful accommodation.[22] These decisions often express an understanding of the employee's religious needs or some displeasure at what some courts view as anti-religious bias on the part of the employer.[23] This third unifying principle is, therefore, a recognition that there is a lack of consensus regarding the appropriate role of religion in the workplace. The result of the federal courts' jurisprudence, best viewed through these three principles, has been a minimal and inconsistent protection of religious employees in the workplace.

Part II of this article discusses formal equality, mutability, and their application to § 701(j). Part III of this article examines the three Supreme Court cases that have addressed an employer's obligation to accommodate religious employees under § 701(j), focusing on both the American legal system's lack of consensus regarding the appropriate treatment of religion, as well as the Court's overall narrow interpretation of an employee's right to religious accommodation in the workplace. Part IV of this article addresses the role formal equality has played in lower court cases involving an employee's right to religious accommodation in the workplace. Part V of this article addresses lower court cases that have focused on the mutable-immutable distinction. Part VI of this article discusses the union dues cases that illustrate that courts require significantly more accommodation once doubts about the sincerity of an employee's religious convictions are removed. The article concludes with a discussion of the potential impact of *Abercrombie* on future lower court cases.

II. FORMAL EQUALITY AND IMMUTABILITY

Two of the underlying principles of employment discrimination law in the United States are formal equality[24] and immutability.[25]

21. *Id.* at 577–78.
22. *Id.* at 579.
23. *Id.*
24. *See generally* Lisa Eichhorn, *Hostile Environment Actions, Title VII, and the ADA: The Limits of the Copy-and-Paste Function*, 77 WASH. L. REV. 575, 580–82 (2002) (discussing formal equality and the origins of the hostile environment claim); Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891, 906 (2014) ("The dominant view of equality in employment discrimination law is based on the idea of sameness."). For a general discussion of theories of equality, *see* Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. 955, 957 (2012) (arguing that employment discrimination statutes have

Since § 701(j) collapsed the conduct-status distinction, neither formal equality nor immutability should play a large role in federal courts' analysis of § 701(j). Yet courts continue to rely on both of these principles in refusing to mandate accommodation of religious employees.[26] This Part will provide a brief overview of the scholarship on formal equality and immutability and examine how these concepts have applied to religious accommodation in the workplace.

A. Formal Equality

Formal equality focuses on protecting employees from an employer's biased consideration of certain protected characteristics, such as race or gender, which should be irrelevant to job performance.[27] As one commentator explained, "[t]he canonical idea of 'antidiscrimination' in the United States condemns the differential treatment of otherwise similarly situated individuals" based on protected categories.[28] This "sameness" model requires similarly situated individuals to be treated in a like manner. Many courts view employment discrimination statutes as requiring little more than formal equality and are often hesitant to require what they consider differential or preferential treatment of employees.[29] There are exceptions where statutes[30] or court

recently focused more strongly on anti-classification principles).

25. *See generally* Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483 (2011); Kaminer, *Religious Conduct and the Immutability Requirement*, *supra* note 15; Jessica L. Roberts, *Preempting Discrimination: Lessons from the Genetic Information Nondiscrimination Act*, 63 VAND. L. REV. 439 (2010); Sandi Farrell, *Toward Getting Beyond the Blame Game: A Critique of the Ideology of Voluntarism in Title VII Jurisprudence*, 92 KY. L.J. 483 (2004); Roberto J. Gonzalez, *Cultural Rights and the Immutability Requirement in Disparate Impact Doctrine*, 55 STAN. L. REV. 2195 (2003); Mark R. Bandsuch, *Dressing up Title VII's Analysis of Workplace Appearance Policies*, 40 COLUM. HUM. RTS. L. REV. 287, 291–92 (2009) (criticizing courts for their overemphasis on the immutability standard).

26. Kaminer, *Religious Conduct and the Immutability Requirement*, *supra* note 15, at 456, 484; Eichhorn, *supra* note 24, at 584–90.

27. *See* Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 646 (2001) (defining "antidiscrimination" as a series of constitutional and statutory prohibitions against race-based, sex-based, and national origin-based discrimination).

28. *Id.* at 643 (discussing how antidiscrimination and accommodation are overlapping rather than fundamentally distinct categories, despite the frequent claims of commentators to the contrary).

29. *See* Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 562–69 (2001).

30. For example, the Family and Medical Leave Act of 1993 (FMLA) mandates unpaid medical and family leave in certain circumstances. 29 U.S.C. § 2612 (2012). Similarly, Title I of the Americans with Disabilities Act (ADA) includes an affirmative requirement of accommodation and looks at whether an employee is qualified for the job either "with or without reasonable accommodation." 42 U.S.C. § 12111(8) (2012).

decisions[31] mandate "differential" treatment of employees and many scholars have criticized the theory of formal equality.[32] Yet, generally, courts are more comfortable prohibiting discrimination than they are in mandating accommodation. As a result, employees tend to fare poorly in accommodation cases.[33]

Despite the fact that § 701(j) passed with the explicit purpose of mandating religious accommodation in the workplace, both the Supreme Court and lower courts have continued to rely on formal equality in refusing to mandate accommodation of religious employees under § 701(j).[34] Since § 701(j) does, in fact, mandate accommodation, courts do not explicitly state that formal equality is all that is required, but a careful reading of the case law illustrates that many courts have relied on this "sameness" doctrine when deciding these cases.[35] However, there are also decisions that have refused to rely on formal equality and have instead mandated a more meaningful level of accommodation of religious employees in the workplace, further illustrating the legal system's lack of consensus regarding the appropriate treatment of religion.[36]

Courts have also relied on formal equality in cases interpreting the Americans with Disabilities Act (ADA).[37] Like § 701(j), the ADA mandates "reasonable accommodation,"[38] unless the accommodation would cause "undue hardship."[39] In enacting the ADA, Congress explicitly rejected § 701(j)'s *de minimis* standard, determining instead that "undue hardship" is an "action requiring

31. *See, e.g.*, United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979) (upholding an affirmative action plan aimed at eliminating race-based discrimination); Johnson v. Transp. Agency, 480 U.S. 616, 627–31, 642 (1987) (applying the rationale of *Weber* to a gender-based affirmative action plan).

32. *See, e.g.*, Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 B.U. L. REV. 1713, 1724–25 (2012) (comparing the legal culture of equality in the United States with the legal culture of equality in other constitutional democracies); Jolls, *supra* note 27, at 698–99.

33. *See generally* Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1819–20 (2005) (explaining that courts dislike accommodation since they view it as an "unwelcome species of affirmative action"); Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1200 (2003) (describing how Title VII requires a "sameness" model of discrimination).

34. *See infra* Part IV.

35. *Id.*

36. *See, e.g., infra* Part IV.A.1.

37. Cheryl L. Anderson, *What is "Because of the Disability" Under the Americans with Disabilities Act? Reasonable Accommodation, Causation, and the Windfall Doctrine*, 27 BERKELY J. EMP. & LAB. L. 323, 346–47 (discussing the ways courts have applied formal equality principles to ADA cases).

38. 42 U.S.C. § 12112(b)(5)(A) (2012).

39. *Id.*

significant difficulty or expense."[40] Nonetheless, courts have still required only minimal accommodation of disabled employees.[41]

There are times when formal equality would be sufficient to reasonably accommodate a religious employee, and no differential or preferential treatment would be necessary. For example, some employers permit employees to engage in voluntary shift swaps to eliminate various workplace conflicts.[42] If an observant religious employee is permitted to swap shifts with a colleague and the swap eliminates the conflict between his work responsibilities and his religious observance then he has been fully accommodated and nothing more is required.[43] However, in consistently relying on formal equality, many courts do not distinguish between this type of case and a case where more than formal equality is necessary (for example, when no employee is willing or able to swap shifts with the religious employee).[44]

B. Immutability

The federal courts often distinguish between mutable and immutable characteristics in deciding cases involving Title VII and other anti-discrimination statutes and regularly hold that only immutable traits are entitled to protection.[45] As a result, employees regularly lose in cases where they challenge an employer's dress or grooming codes as violating Title VII's prohibition of race discrimination.[46] Similarly, employees tend to fare poorly in cases where plaintiffs claim that English-only rules violate Title VII's

40. H.R. REP. NO. 101–485, pt. 2, at 68 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 350 ("The Committee wishes to make it clear that the principles enunciated by the Supreme Court in *TWA v. Hardison*, U.S. 63 (1977) are not applicable to this legislation. In *Hardison*, the Supreme Court concluded that under Title VII of the Civil Rights Act of 1964 an employer need not accommodate persons with religious beliefs if the accommodation would require more than a de minimus [sic] cost for the employer. By contrast, under the ADA, reasonable accommodations must be provided unless they rise to the level of 'requiring significant difficulty or expense' on the part of the employer, in light of the factors noted in the statute—i.e., a significantly higher standard than that articulated in *Hardison*.").

41. *See* Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2071 (2013) (concluding that in post-amendment cases courts are more likely to find that employees have standing under the statute but are also more likely to hold that plaintiffs cannot be reasonably accommodated without undue hardship).

42. *See infra* Part IV.A.1.

43. *See id.*

44. *See id.*

45. *See, e.g.*, Garcia v. Gloor, 618 F.2d 264, 269 (5th Cir. 1980) (explaining that the EEO Act "focuses its laser of prohibition" on discrimination outside of a victim's control, with the exception of religion).

46. Kaminer, *Religious Conduct and the Immutability Requirement*, *supra* note 15, at 454.

prohibition on national origin discrimination.[47] In these cases, courts have held that employees are not being discriminated against based on an immutable characteristic, but on a choice the employee has made regarding dress or language.[48]

The mutable-immutable distinction should not be an issue in religious accommodation cases, since § 701(j) specifically collapsed the conduct-status distinction. Further, § 701(j) both prohibits discrimination and mandates accommodation. Therefore, religious conduct should be entitled to "reasonable accommodation" regardless of whether this conduct is mutable or immutable. As explained in Part III, the Supreme Court implied in *Philbrook*[49] that religion meets at least one definition of immutable.[50] However, some lower courts have ignored this holding and relied on the fact that religion is mutable in denying employees the right to religious accommodation in the workplace.[51]

The most common definition of immutability refers to characteristics that an individual cannot change or alter, but rather are "accident[s] of birth."[52] Religion might not be considered immutable under this strict definition—particularly to secularists—since there are individuals whose religious beliefs and levels of observance change over time. It is noteworthy that the percentage of Americans who switch their religious affiliation is quite high. According to a recent comprehensive survey, between 34% and 42% of adult Americans have a different religious affiliation than their childhood religion.[53] Some secularists would argue that this

47. *See, e.g.*, Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993); *Gloor*, 618 F.2d at 264. *But see* Maldonado v. City of Altus, 433 F.3d 1294 (10th Cir. 2006) (holding that employer must show English-only rules are justified by business necessity).

48. *See, e.g.*, Daniels v. City of Arlington, 246 F.3d 500, 505 (5th Cir. 2001); *Spun Steak Co.*, 998 F.2d at 1487; *Gloor*, 618 F.2d at 270.

49. *See* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 70 (1986).

50. *See infra* Part III.C.3.

51. *See Daniels*, 246 F.3d at 505 (stating that the plaintiff "undoubtedly ha[d] myriad alternative ways to manifest this tenet of his religion"); Chrysler Corp. v. Mann, 561 F.2d 1282, 1286 (8th Cir. 1977) (deciding against the plaintiff seeking a religious accommodation after finding that he had not "consider[ed] any sort of a compromise insofar as his religion was concerned.").

52. *See* Hoffman, *supra* note 25, at 1511–14.

53. PEW RESEARCH CTR., *supra* note 10. ("If all Protestants were treated as a single religious group, then fully 34% of American adults currently have a religious identity different from the one in which they were raised. This is up six points since 2007, when 28% of adults identified with a religion different from their childhood faith. If switching among the three Protestant traditions [*e.g.*, from mainline Protestantism to the evangelical tradition, or from evangelicalism to a historically black Protestant denomination] is added to the total, then the share of Americans who currently have a different religion than they did in childhood rises to 42%.").

illustrates that religion is a matter of personal choice.[54] But there is a flaw in the assumption that religion is simply a matter of personal choice.[55] As Professor Michael McConnell has noted, "It would come as some surprise to a devout Jew to find that he has 'selected the day of the week in which to refrain from labor,' since the Jewish people have been under the impression for some 3,000 years that this choice was made by God."[56]

A second, broader definition of immutability refers to traits that are fundamental to one's identity.[57] This definition captures the fact "that certain characteristics are core to an individual's sense of self and thus must be deemed unalterable."[58] Religion would meet this definition of immutability—even if an individual *could* change his religion, he should not be *required* to do so. The legislative history of § 701(j) indicates that Congress thought that religion met this broad definition of immutability, and wanted to ensure that, absent undue hardship to an employer, employees would not need to choose between their jobs and their religions.[59] Yet, there are still courts that hold religion is little more than a matter of personal choice and that employees, therefore, should be required to compromise on their religious observance.[60]

III. OVERVIEW OF SECTION § 701(J)

Title VII of the Civil Rights Act of 1964 was enacted with the goal of prohibiting employment discrimination against protected groups.[61] As originally passed, Title VII focused on formal equality (treating religion the same as race, color, sex, and national origin) and prohibited discrimination based on religious beliefs or status.[62] However, it contained no language specifically requiring

54. *See, e.g.*, RATIONAL CHOICE THEORY AND RELIGION (Lawrence A. Young ed., 1997).

55. *See* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 125 (1992) (responding to Justice Sandra Day O'Connor's concurrence in Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 711 (1985), which struck down a Connecticut statute that provided employees with the absolute right not to work on their Sabbath).

56. *Id.*

57. *See* Hoffman, *supra* note 25, at 1509–19.

58. *Id.* at 1513.

59. *See generally* Herbert Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law*, 2 BERKELEY J. OF EMP'T & LABOR L. 1, 53 (1977).

60. *See infra* Part V.

61. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1964).

62. *Id.* at § 2000e-2(a)(1) ("It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.").

accommodation of religious conduct.[63] In 1972, Congress amended the Civil Rights Act to include an affirmative duty of accommodation.[64] Under § 701(j) of the Civil Rights Act of 1964, "[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 employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[65]

This Part analyzes the history leading up to the enactment of § 701(j) and the three Supreme Court cases addressing the scope of § 701(j). The first two cases addressed the extent to which an employer must accommodate religious employees in the workplace.[66] The third case addressed the exact scope of § 701(j)'s notice requirement.[67] The notice requirement is important because an employer's obligation to accommodate a religious employee is only triggered once the employer has been given notice of the need for accommodation.

There are two noteworthy trends in examining the legislative history and the Supreme Court decisions. First, the legal system (i.e., the courts, Congress, and the EEOC) displays a striking lack of consensus regarding the appropriate treatment of religious employees in the workplace.[68] It is not surprising that Congress and the EEOC advocate a higher level of accommodation than the courts. However, it is noteworthy that the Supreme Court essentially ignored Congress's intent and the EEOC Guidelines in reaching its decisions and that, in all three cases, the reasoning of the district court was rejected by the appellate court and the appellate court's reasoning was ultimately rejected by the Supreme Court.[69] It is also noteworthy that Congress and the EEOC overturned their own decisions.

Second, despite the fact that § 701(j) was passed with the explicit purpose of mandating religious accommodation in the workplace, the Supreme Court ultimately determined that only a minimal level

63. *See id.*
64. 42 U.S.C. § 2000e(j) (1972).
65. *Id.*
66. Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).
67. EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015).
68. *See* Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees*, *supra* note 15, at 594, 606.
69. *See Abercrombie*, 135 S. Ct. at 2028; *Philbrook*, 479 U.S. at 60; *Hardison*, 432 U.S. at 63.

of accommodation was required of employers under § 701(j).[70] The Court reached this conclusion by relying on formal equality and expressed skepticism regarding an employee's request for religious accommodation.[71] Interestingly, the Supreme Court in *Philbrook* implied that religion meets one definition of immutability.[72] However, lower courts have tended to ignore this holding.[73] Moreover, the Court's most recent decision, *EEOC v. Abercrombie*, held for the religious employee, with the Court emphasizing for the first time that something more than formal equality is required under § 701(j).[74] In the aftermath of *Abercrombie*, it is unclear if the lower courts will be less likely to rely on formal equality.

A. Religious Accommodation Prior to 1972

The EEOC first addressed the issue of reasonable accommodation of religious employees in its 1966 Guidelines.[75] Initially, the EEOC emphasized the importance of neutrality, stating that an employer could establish a "normal work week . . . generally applicable to all employees,"[76] but also stating that accommodation of reasonable religious needs of employees should be made only "where such accommodation can be made without serious inconvenience to the conduct of the business."[77] However, the following year, the Commission essentially reversed itself, amending the Guidelines to require affirmative accommodation unless the accommodation would result in "undue hardship" (as opposed to "serious inconvenience").[78]

Many courts chose not to follow the 1967 EEOC Guidelines; two cases led to the eventual enactment of § 701(j) in 1972. In a 1971 case, *Dewey v. Reynolds Metal Co.*, the Supreme Court affirmed the Sixth Circuit's determination that failure to accommodate a

70. *See Philbrook*, 479 U.S. at 70–71; *Hardison*, 432 U.S. at 84–85.

71. *See Philbrook*, 479 U.S. at 70 (explaining that a religious accommodation of unpaid leave may be such an accommodation); *Hardison*, 432 U.S. at 85 ("[W]e will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath.").

72. *See Philbrook*, 479 U.S. at 69–70.

73. *See infra* Part V.

74. 135 S. Ct. at 2036 ("The prohibition of discrimination because of religious practices is meant to force employers to consider whether those practices can be accommodated without undue hardship.").

75. 29 C.F.R. § 1605.1 (1967) (codifying the 1966 EEOC Guidelines).

76. Cooper v. Gen. Dynamics, 533 F.2d 163, 167 (5th Cir. 1976) (quoting 29 C.F.R. § 1605.1(c) (1967)).

77. *Id.*

78. 29 C.F.R. § 1605.1(b)(c) (1968) (codifying the 1967 Guidelines).

Sabbatarian who refused to work on Sundays for religious reasons was not religious discrimination.[79] The same year, a district court in *Riley v. Bendix Corp.* followed *Dewey*'s reasoning in determining that failure to accommodate a Seventh Day Adventist who refused to work on his Sabbath was not religious discrimination.[80] Both the *Dewey* and *Riley* courts emphasized the concept of neutrality or formal equality, and emphasized that the plaintiffs were not discriminated against based on their religious beliefs or status.[81]

B. Congress Enacts § 701(j)

In 1972, in response to the refusal of the courts to follow the 1967 EEOC Guidelines, Congress enacted § 701(j), which tracked the language of the 1967 Guidelines, stating 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 employee's [or prospective employee's] religious observance or practice without undue hardship on the conduct of the employer's business."[82] The Supreme Court and a number of scholars[83] have suggested that the legislative history of § 701(j) is not particularly helpful in interpreting the statute; but Congress clearly intended to require more than formal equality. The amendment was introduced by Senator Jennings Randolph, a Seventh Day Baptist, with the express purposes of protecting Sabbatarians and, more generally, protecting religious conduct and religious belief or status.[84] Copies of the *Dewey* and *Riley* decisions, discussed above, were included in the Congressional Record. While not all accommodations were required, employers were required to provide religious accommodation unless it would cause "undue hardship."[85] Undue hardship was not specifically defined, but the Congressional Record indicates that "undue hardship" referred to a significant or

79. Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd mem.*, 402 U.S. 689 (1971) (by an equally divided Supreme Court).

80. Riley v. Bendix Corp., 330 F. Supp. 583, 590–91 (M.D. Fla. 1971), *rev'd*, 464 F.2d 1113 (5th Cir. 1972).

81. *Dewey*, 429 F.2d at 330–31; *Riley*, 330 F. Supp. at 591.

82. 42 U.S.C. § 2000e(j) (1984).

83. *E.g.*, Peter Zablotsky, *After the Fall: The Employer's Duty to Accommodate Employee Religious Practices under Title VII after Ansonia Board of Education v. Philbrook*, 50 U. PITT. L. REV. 513, 515-16 (1989); Sara L. Silbiger, *Heaven Can Wait: Judicial Interpretation of Title VII's Religious Accommodation Requirement Since Trans World Airlines v. Hardison*, 53 FORDHAM L. REV. 839, 841–42 (1985).

84. 118 Cong. Rec. 705 (1972).

85. *Id.*

meaningful expense.[86] Senator Randolph, who sponsored the legislation, stated that, in most cases, accommodation would be required, but that only "in perhaps a very, very, small percentage of cases" accommodation would not be required.[87] Additionally, the common understanding of the term "undue hardship" seems to anticipate a meaningful level of accommodation.[88]

C. The Supreme Court Interprets § 701(j)

The Supreme Court has interpreted § 701(j) three times. In the first two cases, it narrowly defined an employer's obligation to accommodate an employee's religious conduct. The history and reasoning of these cases illustrates the legal system's lack of consensus regarding the appropriate treatment of religion. In all three cases, the reasoning of the district court was rejected by the appellate court and the appellate court's reasoning was rejected by the Supreme Court. Ultimately, in *Hardison*[89] and *Philbrook*,[90] the Court, focusing on formal equality and showing skepticism regarding employees' requests for religious accommodation, mandated only minimal accommodation of religious employees. While the Court in *Philbrook* implied that religion meets one definition of immutability,[91] some lower courts have ignored this. It is significant that the Court recently came down with its first pro-employee decision interpreting § 701(j) in *Abercrombie*[92] and emphasized that § 701(j) requires more than formal equality and mandates "favored treatment."[93]

1. *Trans World Airlines, Inc. v. Hardison*

In *Trans World Airlines, Inc. v. Hardison*, the Supreme Court narrowly defined "undue hardship" under § 701(j) as any cost greater than *de minimis* and addressed the deference that should be given to a collective bargaining agreement.[94] *Hardison* involved a Sabbatarian who was a member of the Worldwide Church of God

86. *Id.*
87. *Id.*
88. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 92 n.6 (1977) (Marshall, J., dissenting) ("As a matter of law, I seriously question whether simple English usage permits 'undue hardship' to be interpreted to mean 'more than *de minimis* cost.'").
89. *Hardison*, 432 U.S. at 84–85.
90. Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 70–71 (1986).
91. *Id.* at 69–70.
92. EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015).
93. *Id.* at 2034.
94. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977).

and who was ultimately discharged by Trans World Airlines ("TWA") for refusing to work on his Sabbath.[95] TWA rejected Hardison's proposal that he work a four-day week.[96] When Hardison refused to work on the Sabbath, he was discharged for insubordination.[97] This case illustrates the legal system's lack of consensus regarding the appropriate treatment of religion in the workplace; the reasoning of the district court was rejected by the appellate court and the appellate court's reasoning was rejected by the Supreme Court.

The Supreme Court held that TWA was not required to accommodate Hardison.[98] In reaching this conclusion, the Court relied heavily on the concept of formal equality, ignoring the fact that § 701(j) was enacted to mandate accommodation or differential treatment of religious employees. The Court was concerned that requiring TWA to violate a valid seniority agreement would amount to discrimination in favor of religious employees.[99] The Court explained that the "repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities."[100]

The *Hardison* Court also relied on the concept of formal equality in defining undue hardship as any cost greater than *de minimis*.[101] In relying on the de minimis standard, the Court essentially held that little more than virtual identical treatment of religious employees was required. According to the Court, allowing Hardison to work a four-day week and replacing him on his Sabbath with either supervisory personnel or employees from other departments would have led to less efficiency and, therefore, constituted more than a de minimis cost.[102]

2. The EEOC's Broad Definition of Religion and Its Response to *Hardison*

In 1980, in an effort to respond to the Supreme Court's decision

95. *Id.* at 67–69.
96. *Id.* at 68.
97. *Id.* at 69.
98. *Id.* at 84–85.
99. *Id.* at 84.
100. *Id.* at 81.
101. *Id.* at 84.
102. *Id.*

in *Hardison*, the EEOC issued its "Guidelines on Discrimination Because of Religion," which broadly defined religion "to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."[103] The Guidelines further stated that "[t]he fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee."[104]

This broad definition of religion was aimed specifically at protecting religious employees who did not follow mainstream religious dogma.[105] However, this broad definition has unexpectedly limited an employee's right to religious accommodation in the workplace.[106] Since religion is defined so broadly and since the potential class of employees with standing under § 701(j) is large, courts may be more hesitant to require accommodation than if the definition of religion were more limited. The impact of this broad definition of religion is likely to increase in importance as the United States continues to become more religiously diverse, with the percentage of adults who identify as Christian decreasing and the percentage of adults who identity as members of a non-Christian faith or unaffiliated faith increasing.[107]

The Guidelines also mandated a higher level of accommodation of religious employees than the *Hardison* Court. The Guidelines tightened the undue hardship standard, specifically determining that, in some cases, an employer would be required to absorb an economic loss in accommodating a religious employee.[108] The EEOC also stated that undue hardship referred to an actual hardship and would not be found in cases where there was merely an anticipated or hypothetical hardship.[109] In addition, the EEOC suggested a number of possible accommodations, including the use

103. 29 C.F.R. § 1605.1 (2012) (these Guidelines were an issue in EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 1117 (10th Cir. 2013), *rev'd*, 135 S. Ct. 2028 (2015)).

104. *Id.*

105. United States v. Seeger, 380 U.S. 163, 175 (explaining that "it becomes readily apparent that the Congress deliberately broaden[ed] [the statutory definition] by substituting the phrase 'Supreme Being' for the appellation 'God.' And in so doing it is also significant that Congress did not elaborate on the form or nature of this higher authority which it chose to designate as 'Supreme Being.'").

106. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

107. PEW RESEARCH CTR., *supra* note 10.

108. 29 C.F.R. § 1605.2(e)(1) (2015).

109. *Id.* § 1605.2(c)(1).

of voluntary substitutes, the implementation of flexible work schedules, and, if such accommodations were not possible, the use of a lateral transfer.[110] Additionally, the Commission determined an employee is entitled to his preferred accommodation—which would presumably be the accommodation that least disadvantages the employee—so long as it does not cause undue hardship.[111]

3. *Ansonia Board of Education v. Philbrook*

Six years after the EEOC issued its 1980 Guidelines, the Supreme Court narrowly interpreted the reasonable accommodation requirement of § 701(j) in *Philbrook.*[112] This case held that "where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship."[113] In reaching this conclusion, the Court disregarded the EEOC's 1980 Guidelines, which stated that an employer should accept the employee's preferred accommodation so long as it does not cause undue hardship, and specifically determined that this part of the Guidelines was "inconsistent with the plain meaning of the statute."[114] It should be noted that the history of this case, like the history of *Hardison,*[115] illustrates the legal system's lack of consensus regarding the appropriate treatment of religion in the workplace. Here, again, the reasoning of the district court was rejected by the appellate court and the appellate court's reasoning was rejected by the Supreme Court.

Philbrook involved a high school teacher who was a member of the Worldwide Church of God and whose religious beliefs required that he miss approximately six school days a year to celebrate his religious holidays.[116] Under the terms of the collective bargaining agreement in place, Mr. Philbrook was entitled to three religious days off, as well as an additional three days off without pay.[117] Philbrook, like all employees, was also given three paid personal days off, but personal days could not be used for days for which

110. *Id.* § 1605.2(d).
111. *Id.* § 1605.2(c)(2)(ii).
112. Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 69 (1986).
113. *Id.* at 68.
114. *Id.* at 69 n.6.
115. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).
116. *Philbrook,* 479 U.S. at 62–63.
117. *Id.* at 63–64.

there was already designated leave.[118] Philbrook was therefore denied his preferred accommodation of using his personal days as additional paid time off for religious holidays.[119] While the Court remanded the case to determine whether unpaid leave would be a reasonable accommodation in this particular case, it held that unpaid leave was generally a reasonable accommodation since an employee was merely giving up pay for the day that he did not work.[120]

In reaching its conclusion, the Court relied on formal equality. The Court held that Philbrook was not entitled to any special treatment based on his specific religious convictions; he was entitled to the three paid religious days that all employees were entitled to, plus three unpaid days off.[121] However, the Court also emphasized that Philbrook could not be treated worse than nonreligious employees requesting time off.[122] While unpaid leave is generally a reasonable accommodation, the Court explained that "unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes *except* religious ones. . . . Such an arrangement would display a discrimination against religious practices that is the antithesis of reasonableness."[123] In other words, religious leave is no different than any other type of leave and employees requesting religious leave should not be treated differently than employees requesting leave for another reason.

The *Philbrook* Court did not explicitly address whether religion was a mutable or immutable characteristic. However, the Court implied that religion met one definition of immutability, since it is a trait that is so fundamental to one's identity that an employee should not be expected to change it. [124] The *Philbrook* Court specifically stated that a reasonable accommodation is an accommodation that "*eliminates* the conflict between [the employee's] employment requirements and religious practices."[125] In emphasizing that the conflict must be eliminated, the Court recognized that religious beliefs are not something that an employee should be expected to alter.

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118. *Id.* at 64.
119. *Id.* at 64–65.
120. *Id.* at 70–71.
121. *Id.* at 63.
122. *Id.* at 71.
123. *Id.*
124. *See supra* Part II.B.
125. *Philbrook*, 479 U.S. at 70 (emphasis added).

The Court held that the employer's accommodation was reasonable because Philbrook was not required to compromise on his religious beliefs.[126] Rather, the compromise he was required to make was purely secular: lost pay.[127] The Court emphasized that "bilateral cooperation" between the employer and employee was appropriate in reaching an accommodation; the Court did not state that cooperation extends to compromising on one's religious beliefs.[128] However, some lower courts have extended the reasoning of *Philbrook* requiring a religious employee to compromise on his religious beliefs.[129]

It is also noteworthy that the Court used language that revealed a distrust of a religious employee's motives in requesting an accommodation. In holding that employees were not entitled to their preferred accommodation, the Court implied that religious employees do not merely want to resolve their religious conflict, but, rather, are attempting to use religion for their personal advantage. As the Court explained, "[u]nder the approach articulated by the Court of Appeals, however, *the employee is given every incentive to hold out for the most beneficial accommodation*, despite the fact that an employer offers a reasonable resolution of the conflict."[130] In other words, the religious employee is not merely trying to resolve his or her conflict, but will somehow try to take advantage of the employer.

4. *EEOC v. Abercrombie & Fitch*

Unlike *Hardison* and *Philbrook*, which addressed the extent to which an employer must accommodate religious employees in the workplace,[131] the Supreme Court's most recent § 701(j) decision, *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*,[132] addressed the exact scope of § 701(j)'s notice requirement.[133] Specifically, the Supreme Court addressed whether

126. *See id.* at 66.
127. *See id.*
128. *Id.* at 69 (quoting Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 145–46 (5th Cir. 1982)).
129. *See infra* Part V.
130. *Philbrook*, 479 U.S. at 69 (emphasis added).
131. *Id.* at 60; Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).
132. 135 S. Ct. 2028 (2015).
133. *Id.* at 2035 ("The relevant provisions of Title VII, however, do not impose the notice requirement that formed the basis for the Tenth Circuit's decision." (reversing EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 1123 (10th Cir. 2013) ("Under Title VII, the burden is on applicants or employees to initially inform employers of the religious nature of their conflicting practice and of the need for an accommodation."))).

an employer's obligation to accommodate a religious employee is only triggered once the employer has "actual knowledge" of the employee's need for accommodation.[134]

Abercrombie involved a Muslim job applicant, Samantha Elauf, who wore a hijab (or head covering).[135] Abercrombie refers to its sales floor employees as "models" and expects them to conform to its "Look Policy" which is intended to promote a "preppy" and "collegiate" style of clothing and which prohibits caps or head coverings.[136] One of the primary ways that Abercrombie markets its products is through the in-store experience, and, particularly, through its Look Policy.[137] Prior to her job interview, Elauf had a friend who worked at Abercrombie check with an assistant store manager who stated that Elauf should be able to wear her hijab to work.[138] Elauf, therefore, assumed that there was no conflict between the job requirements and her religious apparel.[139] Elauf wore her hijab to the interview but the question of whether she could wear the hijab if hired was not raised by either Elauf or the interviewer.[140] Elauf's candidacy was then ranked based on a number of criteria, including "appearance."[141] While the interviewer believed that Elauf was a good candidate for the job, she was unsure of how to rank Elauf in the "appearance" category and consulted with a senior manager.[142] The manager informed the interviewer that Elauf should not be hired because she wore a headscarf.[143]

The district court granted summary judgment for Elauf, determining that the EEOC had established a prima facie case of religious discrimination since Abercrombie had enough information to realize that there was a conflict between the applicant's religious practice and the job requirement.[144] The district court specifically determined that Elauf did not have to personally inform Abercrombie that she needed religious

134. *Id.* at 2032.
135. *Id.* at 2031.
136. EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 1111 (10th Cir. 2013), *rev'd*, 135 S. Ct. 2028 (2015).
137. *Id.*
138. *Id.* at 1113.
139. *Id.*
140. *Id.*
141. *Id.* at 1113–14.
142. *Id.*
143. *Id.* at 1114.
144. EEOC v. Abercrombie & Fitch Stores, Inc., 798 F. Supp. 2d 1272, 1286 (N.D. Okla. 2011).

accommodation since "Abercrombie was on notice that Elauf wore a head scarf for religious reasons."[145] The court further determined that accommodation would not cause an undue hardship since Abercrombie had made many exceptions to its Look Policy in recent years—including permitting employees to wear headscarves.[146]

The Tenth Circuit reversed and granted summary judgment to Abercrombie concluding that the EEOC could not establish a prima facie case of religious discrimination since the company did not have actual knowledge that Elauf needed a religious accommodation.[147] While the interviewer correctly assumed that Elauf was a Muslim who wore her hijab for religious reasons, Elauf never explicitly asked for a religious accommodation.[148] The Tenth Circuit took an unrealistic and inflexible approach to the notice requirement; Elauf did not ask for an accommodation because she had not known that there was a conflict and had assumed—based on what she had been told by a friend who worked at Abercrombie—she could wear the hijab to work.[149] On the other hand, Abercrombie knew of the conflict and knew it was not hiring Elauf because she wore a hijab.[150] As the dissent explained, once "the employer knows of, or should know of, a conflict, or the likelihood of a conflict, the employer is then obligated to interact with the job applicant. . .to determine if there is a reasonable accommodation [available]."[151]

The Tenth Circuit majority relied on the EEOC Guidelines, which were passed to protect religious employees, as a justification for denying the employee's claim of religious discrimination. The majority explained that religion is defined very broadly under Title VII and by the EEOC, as "a uniquely personal and individual matter" and is not limited to beliefs associated with traditional organized religions.[152] Therefore, the only way an employer could

145. *Id.* at 1287 n.11.
146. *Id.* at 1287.
147. *Abercrombie*, 731 F.3d at 1116 ("[W]e hold that, under the governing substantive law, Abercrombie is entitled to summary judgment because there is no genuine dispute of material fact regarding this key point: Ms. Elauf never informed Abercrombie prior to its hiring decision that her practice of wearing a hijab was based on her religious beliefs and (because she felt religiously obliged to wear it) that she would need an accommodation for the practice[.]").
148. *Id.*
149. *Id.* at 1112–13.
150. *Id.* at 1114.
151. *Id.* at 1149 (Ebel, J., dissenting).
152. *Id.* at 1116–17.

know that an employee's conduct is based on a religious belief is if the employee gives direct and explicit notice. Simply knowing that an employee is a member of a particular religious group would not be sufficient since not all members of a religious group practice their religion in an identical manner.[153] The majority ignored the purpose of the EEOC Guidelines—to protect employees whose religious beliefs do not conform to the dogma of an established organized religion, not to deny protection to those employees, like Elauf, whose religious beliefs do conform.[154] The Tenth Circuit avoided the facts at hand: Elauf was wearing her hijab based on her religious beliefs as a Muslim and her prospective employer correctly assumed that she was wearing the hijab because of those beliefs.

In an 8-1 decision, the United States Supreme Court reversed and remanded the Tenth Circuit decision, holding that an employer can be liable for religious discrimination in cases where the employer does not have "actual knowledge" of an applicant or employee's need for religious accommodation.[155] The Court distinguished between motive and knowledge, explaining that the plaintiff only had to show that her need for accommodation was a "motivating factor" in the employer's refusal to hire her.[156] The Court explained that there are times an employer "thinks" an employee needs an accommodation, "though he does not know for certain."[157] If the employer makes "an applicant's religious practice, confirmed or otherwise, a factor in employment decisions" the employer may be liable under Title VII.[158] The Court remanded the case and did not address whether accommodation was possible absent undue hardship in this case.

The Court also dismissed Abercrombie's argument that a claim alleging failure to accommodate a religious practice must be raised

153. *Id.* at 1116–18.

154. When § 701(j) was first enacted, courts determined that only religious observances that were mandated by an institutional religion were protected and other religious beliefs were simply a matter of personal choice. The EEOC responded by issuing its "Guidelines on Discrimination Because of Religion in 1980," which defined religious practices to "include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." 29 C.F.R. § 1605.1 (1980).

155. *Abercrombie*, 135 S. Ct. at 2032–34 (Alito, J., concurring in the judgment) (arguing that there is a knowledge requirement and that in this case there was "ample evidence" that "Abercrombie's decisionmakers knew that Elauf was a Muslim and that she wore the headscarf for a religious reason.").

156. *Id.*

157. *Id.* at 2033.

158. *Id.*

as a disparate impact claim.[159] Rather, the Court explained that since § 701(j) defines religion to include practice as well as belief, failure-to-accommodate claims can constitute "intentional discrimination" and may be raised as disparate-treatment claims.[160] It is noteworthy that in reaching this conclusion, the Supreme Court, for the first time, emphasized that § 701(j) mandates more than formal equality. According to the Court, "Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment[.]"[161] The Court used different rhetoric than it had in its earlier decisions in *Hardison* and *Philbrook*, where it emphasized formal equality.[162] It is unclear what impact this change will have on future lower court decisions.

Justice Thomas, the lone dissenter, determined that Abercrombie could not have engaged in intentional discrimination since it applied the same neutral Look Policy to Elauf's religious practice of wearing a headscarf as was applied to similar secular practices.[163] Justice Thomas opined that there are times when an employer's refusal to accommodate an employee's religious practices can constitute intentional discrimination.[164] For example, if an employer refuses to accommodate "a particular religious practice, yet accommodates a similar secular (or other denominational) practice, then that may be proof that he has 'treated a particular person less favorably than others because of [a religious practice].'"[165] But, Thomas argued, where there is no intent to discriminate, the effects of a neutral policy impacting individuals such as Elauf who wear religious head coverings do not give rise to a claim.[166] He argued that this was just a "classic case of an alleged disparate impact."[167]

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159. *Id.* at 2033–34.
160. *Id.*
161. *Id.* at 2034.
162. *See, e.g.*, Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 71 (1986) (explaining that unpaid leave is a reasonable accommodation unless "paid leave is provided for all purposes *except* religious ones."); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 81 (1977) (the "repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities.").
163. EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2038 (2015) (Thomas, J., concurring in part and dissenting in part).
164. *Id.* at 2039.
165. *Id.* (quoting Ricci v. DeStefano, 557 U.S. 557, 577 (2009)).
166. *Id.* at 2038.
167. *Id.*

D. Conclusion

Despite a congressional determination that an employee's religious beliefs should be accommodated in the workplace, the Supreme Court, in its first two decisions, narrowly interpreted an employer's obligation under § 701(j) in a manner that is at odds with congressional intent. The Court's most recent decision in *Abercrombie* does take a different tone. Two main themes are evident in these Supreme Court decisions that have continued to arise in the lower court decisions. First, The Supreme Court, Congress, and the EEOC displayed a striking lack of consensus regarding the appropriate treatment of religious employees in the workplace.[168] Second, in the past, the Court generally interpreted § 701(j) in a narrow manner, determining that only a minimal level of accommodation was required. Despite the fact that § 701(j) was passed with the explicit purpose of mandating religious accommodation in the workplace, both *Hardison* and *Philbrook* focused on formal equality.[169] The Supreme Court also used rhetoric which shows distrust of religious employees and this was an issue in the lower courts as well. While *Philbrook* recognized that religion met one definition of immutability, since it was a trait so fundamental to one's identity that an employee should not be expected to change it,[170] many lower courts have ignored this holding and have determined that an accommodation can be reasonable even if an employee is required to compromise his or her religious beliefs.[171] However, *Abercrombie* recognized that § 701(j) required more than formal equality, stating that "Title VII does not demand mere neutrality with regard to religious practices" but instead "gives them favored treatment."[172] We have yet to see how the lower courts will apply *Abercrombie.*

IV. FORMAL EQUALITY AND THE LOWER COURTS

This Part looks at the lower court decisions that have focused on formal equality in analyzing § 701(j). These lower court

168. In all three Supreme Court cases, the appellate court rejected the district court's rationale and the Supreme Court rejected the appellate court's rationale. *See Abercrombie,* 135 S. Ct. at 2028; *Philbrook,* 479 U.S. at 60; *Hardison,* 432 U.S. at 63.

169. *Philbrook,* 479 U.S. 60; *Hardison,* 432 U.S. 63.

170. *See Philbrook,* 479 U.S. 76–78 (Stevens, J., concurring in part and dissenting in part).

171. *See* EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 314 (4th Cir. 2008); Sturgill v. United Parcel Serv., Inc., 512 F.3d 1024, 1033 (8th Cir. 2008).

172. EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2034 (2015).

decisions,[173] relying on *Hardison* and *Philbrook*, have focused on formal equality in determining that only minimal accommodation is required. Courts have relied upon formal equality in interpreting both the reasonable accommodation and undue hardship provisions of § 701(j).[174] As previously explained, under the Supreme Court's decision in *Philbrook*, once an employer has offered an employee a reasonable accommodation, "the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship."[175] Therefore, if a court, relying upon formal equality, determines that an accommodation is reasonable, an employee will not be entitled to any additional protection, even if accommodation that is more meaningful is available without undue hardship. There are times that little more than formal equality is required to remove the conflict faced by a religious employee. However, courts tend to rely upon formal equality even in cases where the religious employee is not accommodated and accommodation is possible without undue hardship. It is too early to tell if the lower courts, relying upon the rhetoric of *Abercrombie*, will decrease their focus on formal equality.

A. Reasonable Accommodation

1. Shift Swaps and Schedule Changes

Courts have generally found that a voluntary shift swap, particularly within a neutral rotating shift system, was a reasonable means of accommodating a religious employee, regardless of whether there were other employees willing to shift swap with the religious employee.[176] There are certainly cases where a voluntary

173. *See* O'Neill v. City of Bridgeport Police Dep't, 719 F. Supp. 2d 219, 226 (D. Conn. 2010) (holding that employer reasonably accommodated a religious employee by giving all employees a set number of vacation days); Wilson v. U.S. West Commc'ns, 58 F.3d 1337, 1339 (8th Cir. 1995) (holding that an employer was justified in requiring employee to cover the graphic anti-abortion button she wore for religious reasons since the button caused disruptions at work, including a 40% decline in productivity of information specialists); Cook v. Chrysler Corp., 981 F.2d 336, 339 (8th Cir. 1992) (holding that Chrysler was not required to excuse an employee from work every Friday for religious reasons since accommodation proposals involved significant economic costs); Cooper v. Oak Rubber Co., 15 F.3d 1375, 1380 (6th Cir. 1994) ("Title VII does not require an employer to bear more than a *de minimis* cost in accommodating an employee's religious beliefs. Either alternative available to Oak, the hiring of an additional worker or risking the loss of production, would have entailed more than a *de minimis* cost, relieving Oak of the obligation to accommodate.").

174. *Id.*

175. *Philbrook*, 479 U.S. at 68.

176. *See, e.g.*, Henry v. Rexam Beverage Can of N. Am., No. 3:10-2800-MBS-SVH, 2012

shift swap will reasonably accommodate the religious employee and nothing additional is required. However, it is difficult to understand how a shift swap could be a reasonable accommodation when co-workers are unable or unwilling to swap shifts with the religious employee. In reaching this conclusion, courts essentially stated that little more than formal equality—in this case, permitting an employee to resolve his own conflict—was required. Further relying on formal equality, a court has held that an employer did not need to assist its employee in coordinating a shift swap, but rather the employer needed only to be receptive to its employee's efforts.[177]

Some courts, similarly relying on formal equality in their decisions, have held that voluntary shift swaps are *not* a reasonable accommodation. For example, the Sixth Circuit held that a voluntary shift swap was not a reasonable accommodation in a case where the employer circulated surveys in the workplace that created negative attitudes about religion and made it virtually impossible for the plaintiff to find a colleague willing to swap shifts with him.[178] The court explained that the shift swap was not reasonable since the employer did not stay neutral towards religion but rather discriminated against religion.[179]

Similarly, a recent district court decision was sympathetic to an employee who was unable to arrange a shift swap and was later the

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WL 2501994, at *8 (D.S.C. Apr. 18, 2012); Berry v. Meadwestvaco Packaging Sys., LLC, No. 3:10CV78-WHA-WC, 2011 WL 867218, at *5 (M.D. Ala. Mar. 14, 2011); Morgan v. City and Cty. of Denver, No. 10-CV-00157-REB-BNB, 2010 WL 5811831, at *5; (D. Colo. Dec. 29, 2010); Sanchez-Rodriguez v. AT&T Wireless, 728 F. Supp. 2d 31, 42–43 (D.P.R. 2010); Morrissette-Brown v. Mobile Infirmary Med. Ctr., 506 F.3d 1317, 1323 (11th Cir. 2007); Thomas v. Nat'l Ass'n of Letter Carriers, 225 F.3d 1149, 1156–57 (10th Cir. 2000); Beadle v. Hillsborough Cty. Sheriff's Dep't, 29 F.3d 589, 593 (11th Cir. 1994); Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 145 (5th Cir. 1982); *see also* Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees*, *supra* note 15, at 605. Courts are also particularly likely to find a shift swap is a reasonable accommodation if it is offered as part of a combination of accommodations. *See, e.g.*, *Morrissette-Brown*, 506 F.3d at 1323–24 (explaining a reasonable accommodation existed where an employer permitted shift swaps, refrained from disciplining employee for absenteeism from Friday shifts for three months, and offered employee a transfer to a position); *Nat'l Ass'n of Letter Carriers*, 225 F.3d at 1156–57 (explaining a reasonable accommodation existed where an employer approved the employee's use of leave on Saturdays, approved the use of substitutes for the employee on Saturdays when such substitutes could be found, sought a waiver from the employee's union of the requirement that all letter carriers work five out of six Saturdays, and recommended that the employee bid for a position that would not require him to work on Saturdays, even though it also told him he was unlikely to succeed in getting such a position because of the governing seniority agreement and the employee's lack of seniority).

177. *Morrissette-Brown*, 506 F.3d at 1323 (concluding that employers need not "actively assist in coordinating other shift arrangements").

178. McGuire v. Gen. Motors Corp., 956 F.2d 607, 609–10 (6th Cir. 1992).

179. *Id.* at 610.

subject of retaliation by his employer.[180] The employee, a Sabbatarian, was terminated for excessive absenteeism.[181] The court denied summary judgment to the employer, explaining that the employer's policy permitted consideration of an employee's particular circumstances in determining whether to impose corrective action for excessive absenteeism.[182] Since the employer had exercised discretion with other employees, it should have exercised discretion with the religious employee as well.

However, illustrating the lack of consensus regarding the appropriate treatment of religion in the workplace, there are also courts that have not taken an absolutist position and have not relied upon formal equality when deciding on shift swaps. For example, a court has held that a shift swap was not a reasonable accommodation when the religious employee could not find a co-worker to swap shifts with him.[183] One appeals court has held that a voluntary shift swap was not a reasonable accommodation because the religious plaintiff believed it was a sin to ask a colleague to work on the Sabbath.[184] But other courts have held shift swaps to be reasonable accommodations, even when the religious employees' conflicts are not eliminated; these courts have emphasized the religious employees' failures to actively attempt to swap shifts.[185]

2. Costs to the Employee

In determining whether an employee has been offered a reasonable accommodation, courts have unanimously agreed that employees may be required to bear some costs.[186] This issue of cost arises in cases where an employee asking for religious leave must either take unpaid time off or use his or her vacation days. It also arises in cases where an employee transfers to a less desirable position. In doing so, courts have tipped the balance in favor of employers. These decisions indirectly rely on formal equality,

180. Kilpatrick v. Hyundai Motor Mfg. 911 F. Supp. 2d 1211, 1214–15 (M.D. Ala. 2012).
181. *Id.* at 1217.
182. *Id.*
183. Berry v. Meadwestvaco Packaging Sys., LLC, No. 3:10CV78-WHA-WC, 2011 WL 867218, at *6 (M.D. Ala. Mar. 14, 2011).
184. Smith v. Pyro Mining Co., 827 F.2d 1081, 1088 (6th Cir. 1987).
185. EEOC v. Thompson Contracting, Grading, Paving, & Utilities, Inc., 793 F. Supp. 2d 738, 745 (E.D.N.C. 2011); Beadle v. Hillsborough Cty. Sheriff's Dep't, 29 F.3d 589, 593 (11th Cir. 1994); *see* Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees, supra* note 15, at 606.
186. *See* Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees, supra* note 15, at 606–09.

essentially holding that the religious employee is entitled to little more in the way of accommodation than what is generally available to all employees.[187] However, other decisions have mandated more meaningful accommodation.[188]

a. Use of Vacation and Unpaid Leave

The *Philbrook* Court determined that providing an employee unpaid leave would generally be a reasonable accommodation.[189] Relying on formal equality, the Court emphasized that the plaintiff was being treated the same as nonreligious employees requesting time off and was simply not being paid for days he did not work.[190] The *Philbrook* Court added that while unpaid leave was generally a reasonable accommodation, "unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes *except* religious ones.... [s]uch an arrangement would display a discrimination against religious practices that is the antithesis of reasonableness."[191] Relying on *Philbrook*, lower courts have held that providing employees with unpaid leave is generally a reasonable accommodation.[192]

Lower courts, relying on *Philbrook*, have also held that use of vacation time is a reasonable accommodation since the religious employee, like all employees, has the right to take paid leave whenever he or she wishes and is therefore not being discriminated against.[193] In reaching this determination, courts have implicitly relied upon formal equality. For example, a recent district court case explained that the plaintiff "was not deprived of a material benefit, he simply chose to use the benefit in a particular way. Defendant gave each of its employees a certain number of vacation days based on seniority, and each employee could use his days however he pleased."[194]

Another recent district court case similarly relied on formal

187. *Id.* at 609.
188. *Id.* at 610.
189. Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 71 (1986).
190. *Id.*
191. *Id.*
192. *See, e.g.*, Guy v. MTA N.Y.C. Transit, No. 10 CV 1998 (KAM) (LB), 2012 WL 4472112 (E.D.N.Y. Aug. 6, 2012) (holding that the employer reasonably accommodated a religious employee who was a Sabbatarian by providing him with a combination of paid and unpaid leave).
193. *See* EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 316 (4th Cir. 2008); O'Neill v. City of Bridgeport Police Dep't, 719 F. Supp. 2d 219, 226 (D. Conn. 2010); Durant v. NYNEX, 101 F. Supp. 2d 227, 233 (S.D.N.Y. 2000).
194. *O'Neill*, 719 F. Supp. 2d at 226.

equality and determined that all employees were given paid personal days, which constituted a reasonable accommodation.[195] The reasoning of this case is striking because while all employees were given paid personal leave, the plaintiff, as a 90-day probationary employee, was unable to take advantage of the leave policy.[196] Nonetheless, the court determined that it was irrelevant that the plaintiff could not use the leave policy and this "does not negate the reasonableness of the accommodation."[197] According to the court, all probationary employees were being treated identically, so the leave policy was reasonable.[198]

However, illustrating the legal system's lack of consensus regarding the appropriate treatment of religion, there have also been cases that have required a higher level of accommodation and more than formal equality. For example, in one case, the Sixth Circuit explained that a Sabbatarian "was faced with the choice of working on the Sabbath or potentially using all her accrued vacation to avoid doing so . . . [the plaintiff] stands to lose a benefit, vacation time, enjoyed by all other employees who do not share the same religious conflict and is thus discriminated against[.]"[199] There have also been decisions that held allowing employees to use vacation days for religious leave is not *per se* reasonable and that courts should make an "inquiry into the specific facts" of each case.[200]

b. Transfer to a Less Desirable Position

Transferring an employee to a less desirable position has been found to be a reasonable accommodation.[201] Courts have generally determined that transfers not affecting pay or benefits are reasonable.[202] However, courts have also held that employees are

195. EEOC v. Thompson Contracting, Grading, Paving, & Utilities, Inc., 793 F. Supp. 2d 738, 745 (E.D.N.C. 2011).

196. *Id.*

197. *Id.* (quoting *Firestone Fibers & Textiles Co.*, 515 F.3d at 315).

198. *See id.* (holding that "[t]hese pre-existing attendance policies, as well as Thompson's personal efforts to accommodate [the employee], satisfied Thompson's Title VII obligations").

199. Cooper v. Oak Rubber Co., 15 F.3d 1375, 1379 (6th Cir. 1994) (affirming the district court decision in favor of the employer, on the grounds that accommodation would have caused an undue hardship).

200. Jacobs v. Scotland Mfg., Inc., No. 1:10CV814, 2012 WL 2366446, at *7 (M.D.N.C. June 21, 2012).

201. Sturgill v. United Parcel Serv., Inc., 512 F.3d 1024, 1033 (8th Cir. 2008).

202. *See, e.g.*, Porter v. City of Chi., 700 F.3d 944, 952 (7th Cir. 2012); Shelton v. Univ. of Med. & Dentistry of N.J., 223 F.3d 220, 226 (3d Cir. 2000); Rodriguez v. City of Chi., 156 F.3d 771, 777 (7th Cir. 1998).

reasonably accommodated even in cases where the employee has to take a reduction in salary or benefits.[203] Courts in these cases have implicitly relied upon formal equality in stating that an employee has the right to be transferred to a generally available position and to be paid what similarly situated employees receive.

Interestingly, the Fifth Circuit stated that it required differential treatment of a religious employee in a case where it ultimately required little more than formal equality.[204] The plaintiff, who had been given the opportunity to transfer to a position with a significant reduction in salary, had argued that she was not accommodated since she was only "giv[en] . . . the same opportunities as are available to all other persons[.]"[205] The Court disagreed, holding that simply allowing Bruff, an at-will employee, the opportunity to transfer to another lower paying position provided her with reasonable differential treatment.[206] The Court stated that additional preferential treatment was not required since it would involve "discriminating against one in favor of another, which, in the context of religion is exactly the conduct proscribed by Title VII."[207]

Yet, illustrating the lack of consensus of the appropriate treatment of religion, there have also been courts that have held a transfer to a position that would impose significant work-related burdens on an employee might not be reasonable.[208] At least one court has, in dicta, also stated that even non-work-related costs could lead to an accommodation being unreasonable.[209]

B. Undue Hardship

In defining undue hardship as any cost greater than *de minimis*, the *Hardison* Court[210] essentially held that little more than formal equality or virtually identical treatment of religious employees was required. The dissent argued that the statute, by definition,

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203. *See, e.g.*, Morrissette-Brown v. Mobile Infirmary Med. Ctr., 506 F.3d 1317, 1323 (11th Cir. 2007); Bruff v. N. Miss. Health Servs. Inc. 244 F.3d 495, 502 n.23 (5th Cir. 2001); Eversley v. MBank Dall., 843 F.2d 172, 176 (5th Cir. 1988).

204. *Bruff*, 244 F.3d at 501–02.

205. *Id.* at 502.

206. *Id.* at 501–04.

207. *Id.* at 502 n.22.

208. Haliye v. Celestica Corp., 717 F. Supp. 2d. 873 (D. Minn. June 10, 2010); Cosme v. Henderson, 287 F.3d 152 (2d Cir. 2002); Wright v. Runyon, 2 F.3d 214 (7th Cir. 1993).

209. *Haliye*, 717 F. Supp. 2d at 880 n.3 ("[T]he Court is reluctant to say that personal hardships imposed as a result of the employer's proposed accommodation can never be relevant.").

210. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

requires some unequal treatment and that if "an accommodation can be rejected simply because it involves preferential treatment, then the regulation and the statute, while brimming with 'sound and fury,' ultimately 'signif(y) nothing.'"[211] Relying on *Hardison*, lower courts have held that little more than formal equality is required since virtually any type of cost constitutes undue hardship.[212] Courts generally agree that accommodations that violate statutes or regulations, as well as those that would cause a health or safety hazard, or would lead to economic costs, are not required.[213] However, illustrating the courts' lack of consensus regarding the appropriate treatment of religion, it is unclear when an accommodation that affects a religious employee's colleagues rises to the level of an undue hardship. Courts have generally relied upon formal equality and have not required accommodation of religious expression that others found harassing.

1. Violations of Statutes and Regulations

Courts have essentially adopted a per se rule that employers are not required to accommodate a religious employee if doing so would violate a statute or regulation.[214] This line of cases is justifiable under the undue hardship standard of § 701(j), since regardless of the *de minimis* standard of *Hardison*,[215] it would be a

211. *Id.* at 87 (Marshall, J., dissenting).

212. *See* Sides v. NYS Div. of State Police, No. 03-CV-153, 2005 WL 1523557, at *4 (N.D.N.Y. June 28, 2005).

213. *See, e.g.*, *See* Yeager v. FirstEnergy Generation Corp., 777 F.3d 362, 363–64 (6th Cir. 2015) (holding an employer did not violate § 701(j) in refusing to hire or terminate an employee who, for religious reasons, refused to provide his Social Security number as required by federal law); Webb v. City of Phila., 562 F.3d 256, 259–62 (3d Cir. 2009) (holding that a police department did not need to accommodate an officer's request to wear khimar when department prohibited wearing of khimars for safety reasons).

214. *See* Yeager v. FirstEnergy Generation Corp., 777 F.3d 362, 363–64 (6th Cir. 2015) (holding an employer did not violate § 701(j) in refusing to hire or terminate an employee who, for religious reasons, refused to provide his Social Security number as required by federal law); Tagore v. United States, 735 F.3d 324, 329 (5th Cir. 2013) (holding an employer could prohibit a Sikh employee from wearing a kirpan in the workplace since doing so would violate federal law prohibiting "'dangerous weapons' into federal buildings."); Hill v. Premier Healthcare Serv., LLC, No. CV09-1956-PHX-DGC, 2010 WL 1408830, at *2 (D. Ariz. Apr. 7, 2010) (determining an employer did not violate § 701(j) in refusing to hire the plaintiff who, for religious reasons, refused to provide his Social Security number as required by federal law); Seaworth v. Pearson, 203 F.3d 1056, 1057 (8th Cir. 2000) (holding an employer did not need to accommodate a religious employee when doing so would violate federal law); Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 830–31 (9th Cir. 1999) (holding an employer did not violate § 701(j) in refusing to hire the plaintiff who, for religious reasons, refused to provide the employer with his Social Security number as required by federal law).

215. *Hardison*, 432 U.S. at 84 (1977).

significant burden to require an employer to violate a valid law.[216]

2. Health and Safety Concerns

Courts have also essentially adopted a per se rule that employers do not need to accommodate religious employees in a manner that would result in health or safety hazards.[217] The concern with health and safety is most likely to be an issue with employers in the business of public safety such as police departments,[218] or the FBI,[219] as well as in prisons.[220] Requiring an employer to accommodate an employee in a manner that seriously affects health and safety would be an undue hardship under the plain language of § 701(j).

3. Economic or Efficiency Costs

Relying on the *de minimis* standard of *Hardison*,[221] courts have

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216. Courts have consistently held that Title VII's religious accommodation provision does not violate the Establishment Clause. *See, e.g.*, Hickey v. State Univ. of N.Y. at Stony Brook Hosp., No. 10-CV-1282(JS)(AKT), 2012 WL 3064170, at *9 (E.D.N.Y. July 27, 2012) (holding that a hospital would not violate the Establishment Clause by permitting an employee to wear a lanyard printed with the phrase "I [heart] Jesus"); EEOC v. Ithaca Indus., Inc., 849 F.2d 116, 119 (4th Cir. 1988) (holding that § 701(j) does not violate the Establishment Clause); Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1344 (9th Cir. 1981) (holding that minority religions can be accommodated without violating the Establishment Clause).

217. *See, e.g.*, EEOC v. Geo Group, Inc., 616 F.3d 265, 273–76 (3d Cir. 2010) [hereinafter "Geo Group"] (holding that a private company that was contracted to run a prison could prohibit Muslim employees from wearing head coverings since wearing them posed a safety risk); Webb v. City of Phila., 562 F.3d 256, 259–62 (3d Cir. 2009) (holding that a police department did not need to accommodate an officer's request to wear a khimar when department prohibited wearing of khimars for safety reasons); EEOC v. JBS USA, LLC, No. 8:10CV318, 2013 WL 6621026, at *19 (D. Neb. Oct. 11, 2013) (holding that employer who ran beef plants did not need to accommodate Muslim employees' requests for unscheduled prayer breaks since "employees' demands would have resulted in food safety and employee safety concerns"); Kalsi v. N.Y.C. Transit Auth., 62 F. Supp. 2d 745, 760 (E.D.N.Y. 1998) (holding that employer did not violate § 701(j) in discharging an employee who, for religious reasons, refused to wear a hard hat since the employer required that all similarly situated employees wear hard hats for safety reasons). *But see* Toledo v. Nobel-Sysco, Inc., 892 F.2d 1481, 1488 (10th Cir. 1989) (holding that employer violated § 701(j) in refusing to hire an employee who occasionally used peyote for religious reasons, since the employer could have accommodated the employee by requiring him to take a day off each time he used peyote).

218. *See, e.g.*, *Webb*, 562 F.3d at 259–62; Beadle v. City of Tampa, 42 F.3d 633, 637 (11th Cir. 1995) ("We agree with the magistrate court's refusal to interfere with the Department's scheduling and training programs. When the employer's business involves the protection of lives and property, 'courts should go slow in restructuring [its] employment practices.'" (quoting United States v. City of Albuquerque, 545 F.2d 110, 114 (10th Cir. 1976)).

219. Ryan v. U.S. Dep't of Justice, 950 F.2d 458, 462 (7th Cir. 1991) (upholding the discharge of an FBI agent who refused to investigate an unsolved nonviolent federal offense for religious reasons).

220. *See, e.g.*, *Geo Group*, 616 F.3d at 273–76.

221. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977).

almost unanimously held that employers do not need to incur any economic costs or costs in terms of lost efficiency to accommodate a religious employee.[222] For example, relying on formal equality, one recent decision emphasized that the employer did not need to accommodate the employee, a Sabbatarian, since its "general policy is to require all Store Managers to work [on] Saturdays."[223] However, illustrating the legal system's lack of consensus about the appropriate treatment of religion in the workplace, some courts have required accommodations that mandated a cost to the employer.[224] As will be explained in Part VI, in the union dues cases, courts have uniformly required a significant cost, which are lost union dues.[225]

The federal courts' pro-employer bias is evident in these cases. In the vast majority of cases, the employer, rather than the employee, would be better able to bear the cost associated with accommodation. However, courts have regularly held that virtually any economic or efficiency costs constitute an undue hardship to

222. *See, e.g.*, Litzman v. N.Y.C. Police Dep't, No. 12 Civ. 4681 (HB), 2013 WL 6049066, at *6 (S.D.N.Y. Nov. 15, 2013) (holding employer did not need to incur efficiency costs in accommodating religious employee); *JBS USA, LLC*, No. 8:10CV318, 2013 WL 6621026 at *16–17 (determining employee did not need to accommodate Muslim employees' need for unscheduled prayer breaks since doing so would be an undue hardship); EEOC v. Rent-A-Center, Inc., 917 F. Supp. 2d 112, 118 (D.D.C. 2013) (holding an employer did not need to incur costs in accommodating employee who was a Sabbatarian); Loftus v. Blue Cross Blue Shield No. 08–13397, 2010 WL 1139338, at *5 (E.D. Mich. Mar. 24, 2010) (holding an employee did not need to accommodate an employee who requested a six-month leave for religious reasons); Baker v. Home Depot, 445 F.3d 541, 548 (2nd Cir. 2006); Augustus v. Brookdale Hosp. Med. Ctr., No. 13–CV–5374, 2015 WL 5655709, at *6 (E.D.N.Y. Sept. 24, 2015) ("An accommodation is said to cause an undue hardship whenever it results in 'more than a de minimis cost' to the employer." (quoting *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977)); Wilson v. U.S. W. Commc'ns, 58 F.3d 1337, 1339 (8th Cir. 1995) (holding that an employer was justified in requiring an employee to cover the graphic anti-abortion button she wore for religious reasons since the button caused disruptions at work, including a 40% decline in productivity of information specialists); Cook v. Chrysler Corp., 981 F.2d 336, 339 (8th Cir. 1992) (holding that Chrysler was not required to excuse an employee from work every Friday for religious reasons, since the accommodation proposal involved significant economic costs); Cooper v. Oak Rubber Co., 15 F.3d 1375, 1380 (6th Cir. 1994) ("Title VII does not require an employer to bear more than a *de minimis* cost in accommodating an employee's religious beliefs. Either alternative available to [the employer], the hiring of an additional worker or risking the loss of production, would have entailed more than a *de minimis* cost, relieving [the employer] of the obligation to accommodate"); Lee v. ABF Freight Sys., Inc., 22 F.3d 1019, 1023 (10th Cir. 1994) (holding that an employer did not have to provide full-time benefits to a part-time employee or incur the cost of a replacement employee).

223. *Rent-A-Center, Inc.*, 917 F. Supp. 2d at 118.

224. *See, e.g.*, Adeyeye v. Heartland Sweeteners, LLC, 721 F.3d 444, 455 (7th Cir. 2013) (dismissing the employer's argument "that *any* inconvenience or disruption, no matter how small, excuses its failure to accommodate").

225. *See, e.g.*, Tooley v. Martin-Marietta Corp., 648 F.2d at 1242; *see also* Nottelson v. Smith Steel Workers D.A.L.U. 19806, 643 F.2d 445, 449–50 (7th Cir. 1981).

the employer.[226] On the other hand, courts have unanimously agreed that an accommodation is reasonable even when the religious employee is required to bear some cost.[227]

4. Impact on Co-Workers

While § 701(j) refers to "undue hardship on the conduct of an employer's business," the lower courts have agreed any accommodation that has a significant negative impact on the religious employee's colleagues may constitute an undue hardship.[228] However, the lower courts have not agreed at what point an accommodation that impacts a religious employee's colleagues—for example, by inconveniencing a colleague and requiring him to work a less desirable shift—would rise to the level of constituting an undue hardship.[229] While some courts have required little more than formal equality,[230] other courts have required more meaningful accommodation.[231] These decisions demonstrate the American legal system's lack of consensus regarding the appropriate role of religion in the workplace.

A number of appeals courts are quick to hold that accommodation may not be required if there is any possibility that co-workers could be negatively impacted or if co-workers simply complain about the accommodation. In doing so, these courts have essentially relied upon formal equality and have not required differential treatment. For example, the Fifth Circuit has held that even the "mere possibility of an adverse impact on co-workers . . . is sufficient to constitute undue hardship."[232] Relying on the Fifth Circuit's reasoning, a district court recently held that the employer

226. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84–85 (1977) (explaining the standard for economic requirements is no more than *de minimis* cost).

227. *See supra* Part IV.A.2.

228. *See* Harrell v. Donahue, 638 F.3d 975, 982 (8th Cir. 2011) (holding that an accommodation that deprives co-workers of seniority rights constitutes undue hardship); Dallan F. Flake, *Bearing Burdens: Religious Accommodations that Adversely Affect Coworker Morale*, 76 OHIO ST. L.J. 169, 180–90 (2015) (discussing the statutory, EEOC, and common law analysis of co-worker's rights).

229. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 79–80 (1977) (explaining that employers are not required to violate a seniority provision of a collective bargaining agreement to accommodate a religious employee).

230. *See, e.g.*, Weber v. Roadway Express, Inc., 199 F. 3d 270, 274 (5th Cir. 2000); Abdelwahab v. Jackson State Univ., No. 3:09CV41TSL-JCS, 2010 WL 384416, at *2 (S.D. Miss. Jan. 27, 2010); Chalmers v. Tulon Co., 101 F.3d 1012, 1021 (4th Cir. 1996); EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 318 (4th Cir. 2008); Harrell v. Donahue, 638 F.3d 975, 981–82 (8th Cir. 2011).

231. *See, e.g.*, Crider v. Univ. Tenn., 492 F. App'x 609, 613 (6th Cir. 2012); Opuku-Boateng v. State of Cal., 95 F.3d 1461, 1473–74 (9th Cir. 1996).

232. Weber v. Roadway Express, Inc., 199 F.3d 270, 274 (5th Cir. 2000).

need not attempt to arrange a shift swap based on its belief that the swap would be unfair to other employees.[233]

The Fourth Circuit has also relied heavily on any potential impact that an accommodation might have on a religious employee's colleagues.[234] The Fourth Circuit went so far as to hold that accommodating a Sabbatarian with unpaid leave would unfairly impose on the religious employee's colleagues *despite* the fact that several of his colleagues stated that they did not mind covering for him.[235] The Fourth Circuit determined that while "that may have been the case at the time, it was reasonable for [the employer] to be concerned that such feelings would not be long-lived."[236] In doing so, the Fourth Circuit substituted the employer's judgment for the co-workers' judgment as to whether there was an unfair imposition.[237] The Eighth Circuit has also relied heavily on any potential impact that an accommodation would have on a religious employee's colleagues.[238]

However, other Circuits have required accommodation that is more meaningful and have not been so quick to find that employee complaints automatically constitute an undue hardship. The Sixth Circuit has stated that "objections and complaints of fellow employees, in and of themselves, do not constitute undue hardship in the conduct of an employer's business."[239] In one recent case, a religious employee who was a Sabbatarian, refused to operate an emergency phone on his Sabbath, placing the burden of operating the phone on a co-worker who threatened to quit because of the extra responsibility.[240] Despite the potential personnel problems, the Sixth Circuit denied summary judgment for the employer

233. Abdelwahab v. Jackson State Univ., No. 3:09CV41TSL-JCS, 2010 WL 384416, at *2 (S.D. Miss. Jan. 27, 2010).

234. Chalmers v. Tulon Co., 101 F.3d 1012, 1021 (4th Cir. 1996) (holding that the employer does not have to accommodate a religious employee if it would "impose personally and directly on fellow employees").

235. EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 318 (4th Cir. 2008).

236. *Id.*

237. *Id.*; *but see* Batson v. Branch Banking & Trust Co., No. RDB-11-01690, 2012 WL 4479970, at *3, *5 (D. Md. 2012) (discussing that after religious employee was terminated she was replaced by other employees who worked without complaint and with no additional cost to the employer indicating the impact of the accommodation on the religious employee's colleagues would not have caused an undue hardship).

238. *See* Harrell v. Donahue, 638 F.3d 975, 981–82. (8th Cir. 2011) (holding that accommodating a Sabbatarian with leave without pay "would have substantially imposed on [the plaintiff's] co-workers" and that "Title VII does not contemplate such unequal treatment.").

239. Crider v. Univ. Tenn., 492 F. App'x 609, 613 (6th Cir. 2012) (quoting Draper v. U.S. Pipe and Foundry Co., 527 F.2d 515, 520 (6th Cir. 1975)).

240. *Id.* at 618.

holding that that there was "nothing to show that [the colleague's] threat was more than mere 'grumbling.'"[241] It is hard to reconcile this case with the Fourth Circuit's determination[242] that an employer did not need to "impose" on colleagues in a case where the colleagues were willing to cover for the religious employee. The Ninth Circuit, like the Sixth Circuit, has also determined that accommodations affecting a religious employee's colleagues do not always rise to the level of an undue hardship.[243]

5. Accommodation of Religious Expression

The lower courts have often focused on formal equality in cases involving an employee's right to engage in religious expression in the workplace that others may find offensive.[244] Courts have tended to view Title VII as a broad anti-discrimination statute and are more concerned with stopping discrimination in the form of harassing speech than with accommodating religious expression. As a result, when employers have policies prohibiting certain types of "offensive" or harassing expression, courts have uniformly upheld these policies in cases where the expression stems from an individual's religious beliefs. In doing so, courts may fail to distinguish between animus-based religious expression, such as religious epithets and slurs, and non-animus based religious speech, which is still sometimes inherently offensive to others.[245] The EEOC Compliance Manual specifically recognizes this distinction.[246]

Courts may also tend to ignore the reality that many employees routinely discuss religion in the workplace and the vast majority of employees do not find these discussions problematic or unwelcome. According to a recent survey, only twenty-two percent

241. *Id.* at 615.

242. EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 316 (4th Cir. 2008).

243. *See, e.g.*, Opuku-Boateng v. State of Cal., 95 F.3d 1461, 1473–74 (9th Cir. 1996) (holding that "proof that employees would grumble about a particular accommodation is not enough to establish undue hardship" and that a Sabbatarian could be accommodated since he was willing to propose and try several alternative ways to be accommodated).

244. *See, e.g.*, Chalmers v. Tulon Co., 101 F.3d 1012 (4th Cir. 1996) (holding that the employer was justified to discharge an employee after her religious beliefs compelled her to send letters that were characterized as offensive to two co-workers); Wilson v. U.S. W. Commc'ns, 58 F.3d 1337 (8th Cir. 1995) (holding that employer was not required to permit an employee to wear a graphic anti-abortion button which showed a color photograph of a fetus).

245. For example, telling an employee that he or she must accept certain religious beliefs to be saved may be offensive to others but is not animus-based.

246. *Questions and Answers: Religious Discrimination in the Workplace*, U.S. EQUAL EMP'T. OPPORTUNITY COMM'N. (Jan. 31, 2011), http://1.usa.gov/1IZ9Qfz [perma.cc/64YV-LXZT].

of employees are "somewhat" or "very" uncomfortable discussing religion in the workplace while seventy-seven percent of employees are "somewhat" or "very" comfortable discussing religion in the workplace.[247] The EEOC has recognized that the "distinction between welcome and unwelcome conduct is especially important in the religious context in situations involving proselytizing of employees who have not invited such conduct."[248] However, courts may still automatically assume that religious speech is unwelcome.

For example, the Fourth Circuit held an employer was justified in firing a management level employee whose religious beliefs compelled her to send letters, which the court characterized as upsetting and distressing to two of her colleagues.[249] The court assumed the letters were offensive and ignored the fact that one of the employees did not find the letter harassing.[250] Clearly, there are times that non-animus based religious speech is unwelcome and can create a hostile work environment; rather than assume that religious speech is unwelcome, courts should do a full hostile-work-environment analysis.

Two recent cases from the Seventh Circuit illustrate the court's failure to do a thorough analysis when religious expression is offensive to an employee's colleagues.[251] In one case, an employee distributed pamphlets known as "gospel tracts" that negatively depicted Catholics and Muslims and warned they would go to hell.[252] The employee was ultimately fired for violating the company's anti-harassment policy.[253] With minimal analysis, the court concluded that the employer was "not required to accommodate [the employee's] religion by permitting her to

247. *What American Workers Really Think About Religion: Tannenbaum's 2013 Survey of American Workers and Religion*, TANENBAUM CTR. FOR INTERRELIGIOUS UNDERSTANDING (2013), http://bit.ly/1N3snlB [perma.cc/7K68-VT4H] (note that this survey involved all discussions of religion, not only discussions of religion that others might find offensive).

248. *EEOC Compliance Manual*, U.S. EQUAL EMP'T. OPPORTUNITY COMM'N. (Jul. 22, 2008), http://1.usa.gov/1ZX2nBL [perma.cc/JSU5-VEN7].

249. *See Chalmers*, 101 F.3d at 1021.

250. *See id.* at 1024.

251. *See* Ervington v. LTD Commodities, LLC, 555 F. App'x 615 (7th Cir. 2014); Matthews v. Wal-Mart Stores, Inc., 417 F. App'x 552 (7th Cir. 2011); *see also* Peterson v. Hewlett-Packard Co., 358 F.3d 599 (9th Cir. 2004) (holding that employer was not required to accommodate religious expression that others found offensive); *Chalmers*, 101 F.3d 1012; Wilson v. U.S. W. Commc'ns, 58 F.3d 1337 (8th Cir. 1995) (holding that the employer was not required to accommodate an employee's religious need to wear a graphic anti-abortion button which showed a color photograph of a fetus).

252. *Ervington*, 555 F. App'x at 617.

253. *Id.*

distribute pamphlets offensive to other employees."[254] Rather than explaining why the employee's speech created a hostile work environment, the court simply emphasized the importance of formal equality, holding that the employee could not show that "the company would have applied its anti[-]harassment policy differently if she belonged to another religion."[255] In a similar case, the Seventh Circuit held that Wal-Mart was justified in firing an employee who was an Apostolic-Christian and who shared her religious belief, that gays were sinners and would go to hell, with colleagues.[256] Relying on formal equality, the court emphasized that she was not fired because of her religious beliefs, but rather for violating the company's anti-harassment policy and harassing a co-worker.[257] While the speech in both of these cases likely caused a hostile work environment, the courts should have done a more thorough analysis and not simply relied on formal equality.

C. Summary of Formal Equality

Overall, the lower courts have relied on formal equality in requiring minimal accommodation of religious employees in the workplace.[258] Further, lower courts have relied on formal equality both in interpreting the reasonable accommodation provision[259] as well as the undue hardship provision[260] of § 701(j). However,

254. *Id.* at 618.

255. *Id.*

256. *Matthews*, 417 F. App'x at 553–55.

257. *Id.* at 554 (explaining that, in this case, the employer "need not relieve workers from complying with neutral workplace rules as a religious accommodation").

258. *See* Mann v. Frank, 7 F.3d 1365, 1369–70 (8th Cir. 1993) (reasoning that requiring the employer to "just do without" the employee in need of accommodation would result in lost productivity); Wisner v. Truck Cent., 784 F.2d 1571, 1573 (11th Cir. 1986) (affirming the district court's conclusion that an employer would suffer undue hardship if it accommodated a religious employee's inability to work on his Sabbath); Lee v. ABF Freight Sys., Inc., 22 F.3d 1019, 1021–23 (10th Cir. 1994) (observing that an employee's proposed accommodation would allow him to obtain benefits that he had not earned under the collective bargaining agreement); Cook v. Chrysler Corp., 981 F.2d 336, 339 (8th Cir. 1992) (noting that the proposed accommodation would allow an employee to receive undeserved benefits).

259. *See* EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 316 (4th Cir. 2008); O'Neill v. City of Bridgeport Police Dep't, 719 F. Supp. 2d 219, 226 (D. Conn. 2010); Guy v. MTA N.Y.C. Transit, No. 10 CV 1998 (KAM) (LB), 2012 WL 4472112 (E.D.N.Y. Aug. 6, 2012).

260. *See* Wilson v. U.S. W. Commc'ns, 58 F.3d 1337, 1339 (8th Cir. 1995) (holding that employer was justified in requiring employee to cover the graphic anti-abortion button she wore for religious reasons since the button caused disruptions at work, including a 40% decline in productivity of information specialists); *Cook*, 981 F.2d at 339 (8th Cir. 1992) (holding that Chrysler was not required to excuse employee from work every Friday for religious reasons, since accommodation proposals involved significant economic costs); Cooper v. Oak Rubber Co., 15 F.3d 1375, 1380 (6th Cir. 1994) ("Title VII does not require an employer to bear more than a *de minimis* cost in accommodating an employee's religious beliefs. Either alternative available to [the employer], the hiring of an additional worker or

illustrating the legal system's lack of consensus regarding the appropriate treatment of religion, there are also cases that have refused to rely on formal equality and that have mandated more meaningful accommodation of religious employees.[261] It is unclear if lower courts, relying on the rhetoric of *Abercrombie,* will be less likely to focus on formal equality in future cases.

V. IMMUTABILITY AND THE LOWER COURTS

The federal courts have often distinguished between mutable and immutable characteristics in deciding cases involving Title VII and other anti-discrimination statutes and regularly hold that only immutable traits are entitled to protection.[262] The mutable-immutable distinction should not be an issue in religious accommodation cases since § 701(j) specifically collapsed the conduct-status distinction and § 701(j) both prohibits discrimination and mandates accommodation. However, courts have still relied on this distinction in denying employees the right to religious accommodation.[263] Mutability has arisen in cases where courts have held that an employee's obligation to cooperate with his employer includes an obligation to compromise on his religious beliefs.[264] The issue has also been raised in cases where employees did not follow all or mainstream religious dogma and where their levels of religious observance changed over time.[265]

A. The Duty to Cooperate and the Duty to Compromise

The *Philbrook* Court stated that employees have an obligation to cooperate with their employers in resolving the conflict between their religion and work requirements,[266] and thus, employees

risking the loss of production, would have entailed more than a *de minimis* cost, relieving [the employer] of the obligation to accommodate").

261. *See* Crider v. Univ. Tenn., 492 F. App'x 609, 613 (6th Cir. 2012); Adeyeye v. Heartland Sweeteners, LLC, 721 F.3d 444, 455 (7th Cir. 2013); Cosme v. Henderson, 287 F.3d 152 (2d Cir. 2002); Opuku-Boateng v. State of Cal., 95 F.3d 1461, 1473–74 (9th Cir. 1996).

262. *See generally* Hoffman, *supra* note 25; Kaminer, *Religious Conduct and the Immutability Requirement, supra* note 15; Roberts, *supra* note 25; Farrell, *supra* note 25; Gonzalez, *supra* note 25; Bandsuch, *supra* note 25 (criticizing courts for their overemphasis on the immutability standard).

263. *E.g.*, Sturgill v. United Parcel Serv. Inc., 512 F.3d 1024, 1033 (8th Cir. 2008).

264. *Id.*

265. *E.g.*, EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de P.R., 279 F.3d 49, 57 (1st Cir. 2002).

266. Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 69 (1986) (quoting Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 145–46 (5th Cir. 1982) ("[B]ilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's

regularly lose in cases in which they failed to use employer-provided means to resolve their religious conflict.[267] Lower courts have also held that employees can be required to bear some secular costs in having their religious needs accommodated.[268]

However, lower courts do not agree about whether an accommodation that requires an employee to compromise on his religious beliefs is reasonable. It would appear that such an accommodation is not reasonable under *Philbrook*, which states that a reasonable accommodation "eliminates the conflict between employment requirements and religious practices."[269] Yet, despite this seemingly clear language, there is a split in the Circuits. While courts in these cases do not explicitly state that religion is mutable or a matter of personal choice, the concept of mutability is implicit in their reasoning. This split illustrates the lack of consensus regarding the appropriate treatment of religion by the U.S. legal system, with some courts viewing religion as important and worthy of protection and others considering religion little more than a matter of personal choice.

The Second,[270] Seventh,[271] and Ninth[272] Circuits have stated that a reasonable accommodation must eliminate the conflict between the employee's religious practice and work responsibilities. An accommodation is therefore per se unreasonable if it requires an employee to compromise on his or her religious beliefs. In doing so, these circuits have followed the reasoning of *Philbrook*.

The Fourth[273] and Eighth[274] Circuits have held that an accommodation can be reasonable even if it requires an employee to compromise on his or her religious beliefs. Both the Fourth and Eighth Circuits use rhetoric indicating that it is unreasonable for

religion and the exigencies of the employer's business.")).

267. *See, e.g.*, EEOC v. AutoNation USA Corp., 52 F. App'x 327 (9th Cir. 2002).

268. *See supra* Part IV.A.2.

269. *Philbrook*, 479 U.S. at 70.

270. Baker v. Home Depot, 445 F.3d 541, 548 (2d Cir. 2006) (holding that the "offered accommodation cannot be considered reasonable . . . because it did not eliminate the conflict between the employment requirement and the religious practice" (quoting EEOC v. Ilona of Hung., Inc., 108 F.3d 1569, 1576 (7th Cir. 1996)).

271. Porter v. City of Chi., 700 F.3d 944, 951–54 (7th Cir. 2012) (holding that a reasonable accommodation must eliminate the conflict between an employee's religious practice and job requirements).

272. Opuku-Boateng v. State of Cal., 95 F.3d 1461, 1467 (9th Cir. 1996) (holding that the employer must "eliminate the religious conflict" or "either accept the employee's proposal or demonstrate that it would cause undue hardship were it to do so." (quoting EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 615 (9th Cir. 1988)).

273. EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 314 (4th Cir. 2008).

274. Sturgill v. United Parcel Serv., Inc., 512 F.3d 1024, 1033 (8th Cir. 2008).

an employee to expect the conflict between his work requirements and his religion to be eliminated. Emphasizing the obligation of an employee to alter his religious conduct, the Eighth Circuit stated that § 701(j) "requires *accommodation by the employee,* and a reasonable jury may find in *many* circumstances that the employee must either compromise a religious observance or practice, or accept a less desirable job or less favorable working conditions."[275] This is a striking statement because it presumes that an employee will regularly need to compromise his or her religious beliefs and because it implies that compromises of a secular nature and compromises of a religious nature are equivalent. Similarly, the Fourth Circuit has stated that the "duty of 'reasonableness' cannot be read as an *invariable* duty to eliminate the conflict between workplace rules and religious practice."[276]

Courts that require an employee to compromise on his or her religious beliefs[277] seem to miss the policy rationale for § 701(j). That is, Congress passed § 701(j) specifically to protect individuals whose religious convictions were so strong that they felt their beliefs could not be compromised.[278] Absent this type of unbending belief system, there would be no need for a statute mandating religious accommodation. There are times when religious conduct cannot be accommodated absent undue hardship, but relying on undue hardship in no way implies that religion is mutable. Rather, it simply recognizes the reality that some accommodations are simply too expensive for an employer to implement.[279] However, the Fourth and Eighth Circuits have held that it is reasonable to require an employee to alter his religious conduct even in cases where accommodation would be available without undue hardship.[280]

B. Religious Employees Who Do Not Follow All or Mainstream Religious Dogma, or Who Change Their Levels of Religious Observance

The EEOC Guidelines on Discrimination Because of Religion state that religious practices "include moral or ethical beliefs as to what is right and wrong, which are sincerely held with the strength

275. *Id.* (emphasis added).
276. *Firestone,* 515 F.3d at 314 (emphasis added).
277. *E.g., id.*
278. Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1245 (9th Cir. 1981).
279. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977).
280. *Firestone,* 515 F.3d at 314–17; Sturgill v. United Parcel Serv., Inc., 512 F.3d 1024, 1033 n.4 (8th Cir. 2008).

of traditional religious beliefs."[281] The Guidelines have extended protection beyond institutional or traditional religions explaining that the "fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee."[282] Relying on this broad definition, courts have rarely held that a plaintiff's purported religious belief is in fact not religious in nature,[283] particularly at the summary judgment stage.[284] However, courts have nonetheless used rhetoric expressing skepticism of an employee's beliefs when these beliefs do not stem from a traditional organized religion.[285] In these cases courts have implied that the beliefs were mutable and simply a matter of personal choice. This will likely become an issue of growing importance since Americans have become more religiously diverse. According to a recent national survey, the percentage of Americans who identify as Christians has continued to decline and the percentage of Americans who identify as members of a non-Christian faith or who are religiously unaffiliated has increased.[286]

In some cases, courts have used rhetoric implying the employee's religious conduct is really just a matter of personal choice *after* explicitly stating that they are not questioning the sincerity of the plaintiff's religious beliefs. For example, in a case involving a Baptist police officer who had a religious objection to working in a casino, the Seventh Circuit explained that officers did not have the right to "*choose* which laws they will enforce."[287] The Seventh Circuit

281. 29 C.F.R. § 1605.1 (2015). The definition of religion in the Guidelines is based on two Supreme Court cases involving conscientious objectors. *See* United States v. Seeger, 380 U.S. 163 (1965); Welsh v. United States, 398 U.S. 333 (1970). This sub-part involves the further development of an article previously published by the author. *See* Kaminer, *Religious Conduct and the Immutability Requirement*, *supra* note 15.

282. 29 C.F.R. § 1605.1 (2015).

283. *See, e.g.*, Peterson v. Wilmur Commc'ns, Inc., 205 F. Supp. 2d 1014 (E.D. Wis. 2002) (holding that Creativity, a white supremacist belief system, was a religion). *But see* Brown v. Pena, 441 F. Supp. 1382 (S.D. Fla. 1977) (holding that belief in the power of cat food was not a religious belief).

284. Cloutier v. Costco Wholesale Corp., 311 F. Supp. 2d 190 (D. Mass. 2004) (explaining that at the summary judgment state it is difficult for a defendant to challenge "the contention that the plaintiff's belief is religious, no matter how unconventional the asserted religious belief may be.").

285. *See generally* Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees*, *supra* note 15.

286. *See* PEW RESEARCH CTR., *supra* note 10.

287. Endres v. Ind. State Police, 349 F.3d 922, 925 (7th Cir. 2003) (emphasis added). *See also* Wilson v. U.S. W. Commc'ns, 58 F.3d 1337 (8th Cir. 1995) (holding that the employer reasonably accommodated the religious employee's need to wear a graphic antiabortion

further stated that it is "difficult for any organization to accommodate employees who are *choosy* about assignments."[288] Similarly, *Cloutier v. Costco Wholesale Corporation*[289] involved an employee who was a member of the Church of Body Modification and who claimed a religious need to wear and display facial piercings at all times: a violation of Costco's dress code.[290] The court upheld the employer's proposed accommodation of permitting the employee to wear her facial piercings covered, explaining that displaying the facial piercings "represents the plaintiff's personal interpretation of the stringency of her beliefs" and her "strong *personal preference*."[291] In these cases, courts do not explicitly question the sincerity of the plaintiffs' religious beliefs but rather use rhetoric implying that the beliefs were just a matter of personal choice.

In cases where religious employees do not follow all church dogma, courts may also view religion as mutable because the employee was "choosing" how to interpret his religion. This all-or-nothing approach ignores the reality that many religious individuals do not follow all of the tenets of their religion. For example, the First Circuit denied summary judgment to an employee who was a Seventh Day Adventist and had a religious objection to joining a union,[292] since the employee had engaged in some conduct contrary to the Church's teachings, including divorce, taking an oath before a notary, and lying on an employment application.[293]

Mutability is also an issue in cases where an employee's religious beliefs change over time, with some courts implying that these beliefs are by definition mutable and a matter of personal choice.[294] Courts may be hesitant to acknowledge that many deeply religious

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button by permitting her to wear the button covered and implying that the employee could have chosen another way to express her opposition to abortion).

288. *Endres*, 349 F.3d at 926 (quoting Ryan v. U.S. Dep't of Justice, 950 F.2d 458, 462 (7th Cir. 1991) (emphasis added)).

289. 311 F. Supp. 2d 191.

290. *Id.*

291. *Id.* at 199.

292. EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de P.R., 279 F.3d 49 (1st Cir. 2002).

293. *Id.*; *see also* EEOC v. Ilona of Hung., 108 F.3d 1569 (7th Cir. 1996) (emphasizing that a Jewish employee had a sincerely held religious belief that she could not work on Yom Kippur even though she was not consistently observant).

294. *See, e.g.*, Cloutier v. Costco Wholesale Corp., 311 F. Supp. 2d 190 (D. Mass. 2004) (expressing skepticism of employee's claim that her religious beliefs required her to wear and display facial piercings, since she originally had been willing to cover her facial piercings).

individuals have beliefs that develop over time. For example, the First Circuit was skeptical of an employee who claimed he had a sincerely held religious objection to joining a union when he had originally been willing to join a union and had only objected to certain union requirements.[295] While the Second Circuit refused to grant summary judgment to an employer in a case where the employee became a strict Sabbatarian during his employment, the court felt compelled to emphasize that the religious beliefs could be sincerely held even though they had evolved over time.[296] This is likely to become an issue of increased importance since the percentage of Americans who switch their religious affiliation has increased in recent years.[297] According to one comprehensive survey, between 34% and 42% of adult Americans have a different religious affiliation than the one they had in their childhood.[298]

C. Summary of Immutability

Although § 701(j) specifically collapsed the conduct-status distinction, courts have continued to rely on the perceived mutability of religion in cases that deny an employee's right to religious accommodation in the workplace. A number of cases have held that an employee's obligation to cooperate with his employer includes an obligation to compromise on his religious beliefs.[299] Courts have also relied on mutability in cases where employees did not follow all or mainstream religious dogma and where their levels of religious observance changed over time.[300] However, illustrating the legal system's lack of consensus regarding the appropriate treatment of religion, there are also decisions that have implied

295. *Union Independiente de la Autoridad de Acueductos y Alcantarillados de P.R.*, 279 F.3d at 56–67 (acknowledging that a sincerely held religious belief could change over time, despite the court's own skepticism). *But see* Cloutier v. Costco Wholesale Corp., 311 F. Supp. 2d 190 (D. Mass. 2004) (expressing skepticism of employee's claim that her religious beliefs required her to wear and display facial piercings, since she originally had been willing to cover her facial piercings).

296. Baker v. Home Depot, 445 F.3d 541, 547 (2d Cir. 2006).

297. *See* PEW RESEARCH CTR., *supra* note 10.

298. *See id.* ("As the shifting religious profiles of these generational cohorts suggest, switching religion is a common occurrence in the United States. If all Protestants were treated as a single religious group, then fully 34% of American adults currently have a religious identity different from the one in which they were raised. This is up six points since 2007, when 28% of adults identified with a religion different from their childhood faith.").

299. *See* Chrysler Corp. v. Mann, 561 F.2d 1282, 1285–86 (8th Cir. 1977); Sturgill v. United Parcel Serv., Inc., 512 F.3d 1024, 1033 (8th Cir. 2008); Daniels v. City of Arlington, 246 F.3d 500, 505–06 (5th Cir. 2001).

300. *See Cloutier*, 311 F. Supp. 2d at 196; Endres v. Ind. State Police, 349 F.3d 922, 925–26 (7th Cir. 2003); Wilson v. U.S. W. Commc'ns, 58 F.3d 1337, 1341–42 (8th Cir. 1995).

religion is immutable and that religious employees should not be required to alter their religious conduct.[301]

VI. UNION DUES CASES AND JUDICIAL SKEPTICISM REGARDING RELIGION

Judicial decisions interpreting § 701(j) have emphasized a skepticism regarding the sincerity of an employee's religious beliefs and have underscored concerns that religious employees will try to take advantage of their employers.[302] This skepticism was apparent in the Supreme Court's decision in *Philbrook*,[303] which explains why some lower courts have failed to mandate meaningful accommodation.

This skepticism is most apparent in the union dues cases.[304] These cases illustrate that the lower courts require significantly more accommodation once doubts about the sincerity of an employee's religious convictions are removed.[305] In the union dues cases, courts have unanimously agreed that employees with a religious objection to paying union dues are permitted to pay an amount equal to their union dues to charity.[306] In these cases, courts apply a less restrictive definition of undue hardship because they are the only § 701(j) cases where courts regularly require an economic cost—the lost union dues.[307] Since the religious employee makes a charitable contribution of equal value to the union dues and since the religious employee suffers the same financial burden as a dues paying employee, courts do not doubt

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301. Baker v. Home Depot, 445 F.3d 541, 548 (2d Cir. 2006) (holding that the "offered accommodation cannot be considered reasonable . . . because it did not eliminate the conflict between the employment requirement and the religious practice" (quoting EEOC v. Ilona of Hung., Inc., 108 F.3d 1569, 1576 (7th Cir.1996)); Porter v. City of Chi., 700 F.3d 944, 951–54 (7th Cir. 2012) (holding that a reasonable accommodation must eliminate the conflict between an employees' religious practice and job requirements); Opuku-Boateng v. State of Cal., 95 F.3d 1461, 1467 (9th Cir. 1996) (holding that the employer must "eliminate the religious conflict" or "either accept the employee's proposal or demonstrate that it would cause undue hardship were it to do so." (quoting EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 615 (9th Cir. 1988)).

302. *See* Ansonia Bd. of Ed. v. Philbrook, 479 U.S. 60, 68 (1986) (noting that "where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship.").

303. *Id.* at 68.

304. *See* Yott v. N. Am. Rockwell Corp., 602 F.2d 904, 906 (9th Cir. 1979) (narrowly construing § 701(j) and refusing to accommodate employee).

305. *See, e.g.*, Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1242 (9th Cir. 1981); *see also* Nottelson v. Smith Steel Workers D.A.L.U 19806, 643 F.2d 445, 449–50 (7th Cir. 1981).

306. *See Nottelson*, 643 F.2d at 451.

307. *See id.* at 452 ("The Union would not be financially injured by the loss of plaintiff's dues, which represented only .02% of the Union's annual budget.").

the sincerity of the employee's religious beliefs.[308] This lack of skepticism is best seen in the lower courts' dismissals of the union's argument that plaintiffs in these cases are "free riders" seeking something for nothing.[309] Courts seem to ignore the fact that the union is not able to collect its dues when religious employees make charitable donations instead.

The lack of judicial skepticism towards a religious employee's request to make a *mandatory* charitable contribution is affirmed by the Ninth Circuit in *Yott.*[310] In that case, the plaintiff objected to paying union dues and to making a mandatory voluntary charitable contribution because a tenet of his religion was that all charitable contributions should be voluntary.[311] The Ninth Circuit determined that it "is undisputed that [the employee] has a sincere belief," but the court interpreted § 701(j) narrowly, refusing to mandate accommodation of the employee.[312] While the court accepted that the employee's beliefs were sincerely held, the court nonetheless viewed his request with skepticism because the belief would have permitted him to receive a financial advantage.[313]

The union dues cases also illustrate that some courts are more skeptical about the sincerity of employees' religious beliefs than they are of the sincerity of employees' non-religious beliefs. This is evident when courts mandate a higher level of accommodation of secular beliefs—such as political beliefs—than they do of religious beliefs. In *Communication Workers of America v. Beck,* the Supreme Court held that employees were not required to pay union dues to cover political activities they do not support.[314] Further, employees who object to political activities were completely exempt from payment of dues that conflict with this free speech right.[315] In this

308. *See, e.g., Yott,* 602 F.2d. at 909 ("Exemption involves no payment at all, and the history at Rockwell indicates friction has resulted from 'free-riders' defined as those who pay neither union dues nor the equivalent thereof to a charity.").

309. *See, e.g., id.*

310. *See id.* at 906 ("One of the tenets of Yott's religion is that Christians are not to become members of or pay dues to labor unions. Another tenet is that contribution to a charitable organization must be voluntary. It is undisputed that Yott has a sincere belief in these tenets.").

311. *Id.*

312. *Id.* at 906, 909 ("[T]he judgment of the district court [that Rockwell and Local 887 could not reasonably accommodate Yott's religious convictions without incurring undue hardship] is affirmed.").

313. *See id.* at 907–08 ("Yott clearly supports his religion, thus, his refusal to accept the proposed accommodation is not entirely consistent with his otherwise unrestricted support of The Church Which is Christ's Body.").

314. 487 U.S. 735, 751–52 (1988).

315. *Id.*

political speech case, the employees objecting to the representation fee were not required to make a voluntary substitute charitable contribution that was equivalent to the remaining ideological portion of the fees.[316] These employees received a financial benefit since they paid less in union dues than religious objectors or employees with no objection to paying union dues did.

The Sixth Circuit is the only appellate court to have addressed whether requiring religious objectors to pay more than *Beck*-objectors violates § 701(j).[317] The court held for the employer and determined that the religious employee could not even establish a prima facie case of discrimination because the financial burden suffered by the employee was not an adverse action.[318] According to the majority, the plaintiff simply incurred a financial cost and a plaintiff cannot "carry his burden merely by showing that he has lost some amount of pay as a result of a proffered accommodation."[319] The dissent strongly disagreed with the majority opinion, expressing concern that the union specifically wanted religious objectors to pay the increased amount so there would not be "any financial incentive for employees to claim religious objection[.]"[320] The majority was concerned that religious objectors would take advantage of the union in a manner that *Beck*-objectors would not and therefore wanted to deter religious objectors.[321] Similarly, a federal district court held that it was permissible to require religious objectors to pay more than *Beck*-objectors since it "counteracts the incentive that employees might otherwise have to become 'free riders.'"[322] These decisions illustrate that some courts are either more skeptical of religious beliefs than secular beliefs or are more concerned with religious believers taking advantage of free-riding incentives than they are with political objectors taking similar advantage.

316. *Id.*

317. *See* Reed v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., 569 F.3d 576, 583 (6th Cir. 2009).

318. *Id.* at 580–82.

319. *Id.* at 581.

320. *Id.* at 588 (McKeague, J., dissenting).

321. *See id.* ("The value of the higher amount is precisely its deterrence . . . of religious objections.").

322. Madsen v. Assoc'd. Chino Teachers, 317 F. Supp. 2d 1175, 1182 (C.D. Cal. 2004) (quoting Abood v. Detroit Bd. of Ed., (1977)). *But see* O'Brien v. City of Springfield, 319 F. Supp. 2d 90, 106–07 (D. Mass. 2003) (finding a requirement to pay full union dues to charity instead of lower *Beck* dues to be an unreasonable accommodation of a religious employee).

VII. CONCLUSION

The federal courts have interpreted § 701(j) in a manner that has provided both minimal and inconsistent protection of religious employees in the workplace. As this article has explained, there are three reasons why courts have interpreted § 701(j) in this manner. First, despite the fact that § 701(j) specifically mandates differential treatment of religious employees or reasonable accommodation absent "undue hardship," courts have tended to read § 701(j) as requiring little more than formal equality. Second, courts have implied that religion is mutable and a matter of personal choice and therefore not worthy of protection. Third, there has been a lack of consensus in American society regarding the importance of religion and the appropriate role of religion in public life; this dichotomy regarding the appropriate role of religion is evident in the case law interpreting § 701(j). While some courts have mandated meaningful protection of religious employees in the workplace, other courts have expressed skepticism and have seemed hesitant to mandate accommodation based on their concern that an employee's request for accommodation may not have been actually motivated by religious beliefs.[323]

It is unclear at this early date what the impact of *Abercrombie* will be on future § 701(j) jurisprudence. While *Abercrombie* may simply be the latest in a series of pro-religion decisions by the Roberts Court, it is notable because it is the first time the United States Supreme Court has ruled in favor of a religious employee in a § 701(j) case. What is particularly striking about *Abercrombie* is the Court's rhetoric emphasizing that § 701(j) mandates more than formal equality.[324] In pre-*Abercrombie* cases, the lower courts[325] often

323. *See, e.g.*, Endres v. Ind. State Police, 349 F.3d 922, 926 (7th Cir. 2003) (dismissing as "choosy" a religious police offer who refused to work at a casino); Cloutier v. Costco Wholesale Corp., 311 F. Supp. 2d 190, 199 (D. Mass. 2004), *aff'd*, 390 F.3d 126 (1st Cir. 2004) (dismissing as mere "personal preference" the belief of a member of the Church of Body Modification that she must display facial piercings at all times); *see also* Kaminer, *supra* note 15, at 472–78 (discussing these and other examples of judicial skepticism regarding the sincerity of plaintiffs' religious beliefs).

324. EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2036 (2015) ("The prohibition of discrimination because of religious practices is meant to force employers to consider whether those practices can be accommodated without undue hardship.").

325. *See* Protos v. Volkswagen of Am., Inc., 797 F.2d 129, 134 (3d Cir. 1986); *see also* Smith v. Pyro Min. Co., 827 F.2d 1801, 1805 (6th Cir. 1987); Opuku-Boateng v. State of Cal., 95 F.3d 1464, 1468 (9th Cir. 1996); Heller v. EBB Auto Co., 8 F.3d 1433, 1438 (9th Cir. 1993); Wilson v. U.S. W. Commc'ns, 58 F.3d 1337, 1339 (8th Cir. 1995) (holding that an employer was justified in requiring employee to cover the graphic anti-abortion button she wore for religious reasons since the button caused disruptions at work, including a 40% decline in productivity of information specialists); Cook v. Chrysler Corp., 981 F.2d 336, 339

relied on the language of *Hardison*[326] and *Philbrook*[327] in emphasizing that § 701(j) only required formal equality. It should be noted that the *Abercrombie* Court did not address the appropriate interpretation of the reasonable accommodation or undue hardship provisions of § 701(j).[328] Rather, the Court focused on preferential treatment in explaining why the plaintiff could bring her claim as a disparate treatment claim.[329] Further research will be necessary to see if *Abercrombie* will more generally lead to a decreased focus on formal equality in lower court cases analyzing the reasonable accommodation and undue hardship provisions of § 701(j).

Finally, it should be noted that there will likely continue to be an increase in the number of § 701(j) cases brought by religious employees. Over the last fifteen years, the number of religion-based discrimination charges filed with the EEOC has almost doubled and the trends that have led to this increase have continued.[330] The United States is becoming more religiously diverse and the number of Americans who affiliate with a non-Christian faith or who are religiously unaffiliated has increased.[331] Americans have also become more likely to bring their religion and accompanying requests for religious accommodation into the workplace.[332] The result of these changes in the American landscape has been—and will likely continue to be—increasing religious conflict and an increased number of § 701(j) cases.

(8th Cir. 1992) (holding that Chrysler was not required to excuse an employee from work every Friday for religious reasons since accommodation proposals involved significant economic costs); Cooper v. Oak Rubber Co., 15 F.3d 1375, 1380 (6th Cir. 1994) ("Title VII does not require an employer to bear more than a *de minimis* cost in accommodating an employee's religious beliefs. Either alternative available to Oak, the hiring of an additional worker or risking the loss of production, would have entailed more than a *de minimis* cost, relieving Oak of the obligation to accommodate.").

326. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

327. Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986).

328. *See Abercrombie*, 135 S. Ct. at 2037 (Alito, J., concurring in the judgment) (noting that the Tenth Circuit must, on remand, address whether Abercrombie would suffer undue hardship).

329. *See id.* at 2034 (emphasizing that Title VII gives religious practices "favored treatment").

330. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 9.

331. PEW RESEARCH CTR., *supra* note 10.

332. Flake, *supra* note 13.

BUT THE CONSTITUTION IS NOT THE PROBLEM

ON CONSTITUTIONAL DISOBEDIENCE. Louis Michael Seidman. New York: Oxford University Press, 2012. 162 pages. $23.95.

REVIEWED BY LINO A. GRAGLIA*

Georgetown law professor Louis Seidman really dislikes the United States Constitution, which he describes as a "deeply flawed, eighteenth-century document"[1] laden with "silly or pernicious"[2] provisions reflecting some "quite unlovely"[3] motivations. Observance of the Constitution, he argues, is based on the "pernicious myth that we are bound in conscience to obey the commands of people who died several hundred years ago."[4] It is inconsistent not only with our "pretending that we have a polity based on popular sovereignty" but also with "the kind of open-ended and unfettered dialogue that is the hallmark of a free society."[5] Thus, he argues, the Constitution should be "systematically ignore[d]."[6] Though written as a brief, popular, unfootnoted polemic, his book provides a valuable invitation to rethink the premises of constitutionalism and the "near-sacred status" of the Constitution.[7] It correctly insists on the essential irrationality of deciding present-day issues of public policy on the basis of decisions made by a select group of people in the distant past.[8]

Seidman has cause to complain of our loss of a large degree of popular sovereignty in the name of constitutionalism.[9] He is mistaken, however, in attributing the loss exclusively to the Constitution—and, therefore, recommending as a solution that the

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1. LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE 4 (2012).
2. *Id.* at 46.
3. *Id.* at 21.
4. *Id.* at 9.
5. *Id.* at 10.
6. *Id.* at 5.
7. *Id.*
8. *See, e.g., id.* at 30–31 ("Instead of talking about, say, whether national health care is good for the country, we end up talking about whether the framers would have thought that it was good for the country.").
9. *See id.* at 10 (arguing that adherence to the Constitution is at odds with popular sovereignty).

Constitution simply be ignored.[10] The restrictions on popular choice that he laments are less the result of the commands of the Constitution than of the Supreme Court's supposed enforcement of these commands through the power of judicial review. It is true that, as Seidman argues, without the Constitution, there would be no constitutionalism and therefore no judicial review, but that does not make the Constitution the sole or even the main source of the problem.

Constitutional theorists, Seidman argues, are "obsessed with the false problems of judicial power and techniques of constitutional interpretation."[11] Obsessing over these false problems "avoid[s] the deeper issue": Why should government officials obey the Constitution in the first place?[12]

The source of this alleged obsession, according to Seidman, is the work of Alexander Bickel, a mid-twentieth-century Yale law professor—specifically his 1962 book, *The Least Dangerous Branch.*[13] Bickel criticized judicial review as a "deviant institution" that raises the "countermajoritarian difficulty" of unelected judges "mak[ing] public policy that binds the rest of us."[14] Seidman writes, "[A]lmost a half century after the book was published, Bickel's thesis continues to haunt constitutional debate. . . . Although Bickel himself is rarely cited in public debate, his claim has been repeated countless times in newspaper editorials, talk show rants, pompous confirmation hearing speeches, and boring law school lectures."[15]

Bickel "made a crucial mistake," Seidman believes—"a mistake that we need to correct if we are ever to engage seriously with the real problems of constitutionalism."[16] Bickel's crucial mistake was his alleged failure to see that "judicial review is merely a technique for enforcing the commands of the Constitution. The *Constitution* is countermajoritarian, at least in a certain sense."[17] Seidman

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10. *See id.* at 5.
11. *Id.* at 32.
12. *Id.*
13. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962). Criticism of judicial review as inconsistent with democracy did not begin, of course, with Bickel. A prominent and influential early example is James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law,* 7 HARV. L. REV. 129 (1893). Nor did it end with him. *See, e.g.,* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review,* 115 YALE L.J. 1346 (2006).
14. SEIDMAN, *supra* note 1, at 32.
15. *Id.*
16. *Id.*
17. *Id.* at 35–36.

concludes, "The real countermajoritarian difficulty, then, is not with judicial power, but with the power we have ceded to the Constitution itself."[18] Once one sees that judicial review is "only a technique for ensuring constitutional obedience, then Bickel's worry should extend to constitutional obligation."[19]

It is not credible, of course, that Professor Bickel did not realize that the Constitution itself is undemocratic. The point of his book was to show that judicial review is nonetheless inconsistent with democracy to the extent that the Court's rulings of unconstitutionality are *not* based on the Constitution.[20] He rejected as unrealistic Alexander Hamilton's famous defense of judicial review—adopted by Seidman—as merely judicial enforcement of "the will . . . of the people, declared in the Constitution."[21] In fact, Bickel argued, the Court's rulings of unconstitutionality are "not in behalf of the prevailing majority, but against it . . . an altogether different kettle of fish, and . . . the reason the charge can be made that judicial review is undemocratic."[22] The difference between Bickel and Seidman is not that Bickel did not realize that the Constitution is undemocratic, but that he realized, as Seidman does not, that many of the Court's most important rulings of unconstitutionality are not mandates of the Constitution.[23]

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18. *Id.* at 36.

19. *Id.* It is surprising to see a present-day constitutional scholar repeat the often-derided argument made by Justice Owen Roberts:

> It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the Government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.

United States v. Butler, 297 U.S. 1, 62 (1936).

20. *See* BICKEL, supra note 13, at 16–18, 21.

21. *Id.* at 16.

22. *Id.* at 17.

23. In a later work, Bickel specified some of these decisions:

> *Brown v. Board of Education* was the beginning. Subsequently, the Court declared Bible reading and all other religious exercises in public schools unconstitutional; it ordered the reapportionment of the national House of Representatives . . . it reformed numerous aspects of state and federal criminal procedure, significantly enhancing the rights of the accused. . . . In addition, the Court limited the power of state and federal government to forbid the use of birth-control devices, to restrict travel, to expatriate naturalized or native-born citizens, to deny employment to persons whose associations are deemed subversive, and to apply the laws of libel.

Needless to say, this listing is not comprehensive. ALEXANDER M. BICKEL, THE SUPREME

In attributing our loss of popular sovereignty solely to the undemocratic Constitution, it is Seidman who makes a crucial mistake. He fails to distinguish between constitutionalism as such—judicial invalidation of policy choices clearly prohibited by the Constitution—and "living constitutionalism," judicial invalidation of policy choices not clearly prohibited by the Constitution.[24] Seidman correctly criticizes constitutionalism as amounting to rule of the living by the dead. Living constitutionalism, however justified, amounts as a practical matter to rule by judges limited only by their willingness to abstain from removing an issue from the ordinary political process.[25] The Constitution does impose some dubious limitations on democratic government—for example, that only a "natural born Citizen" can be president,[26] and that California gets the same number of senators as Wyoming[27]—but it is the Court's rulings of unconstitutionality *not* clearly required by the Constitution that present the primary challenge to maintaining a "polity based on popular sovereignty."[28]

Seidman attempts to downplay the radicalism of his recommendation that the Constitution be ignored in two ways. First, in a chapter headed "The Banality of Constitutional Violation,"[29] he notes that we have had examples of constitutional disobedience since the beginning of the Republic.[30] President

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COURT AND THE IDEA OF PROGRESS 7–8 (1st ed. 1970) (citations omitted). Roe v. Wade, 410 U.S. 113 (1973) must be added to this list.

24. As Professor Thayer pointed out, the Court should invalidate only policy choices clearly prohibited by the Constitution because, in a democracy, the legislative judgment should prevail in cases of doubt. Thayer, *supra* note 13, at 18. Examples of the opposite—the Court upholding as constitutional a policy choice that the Constitution does clearly prohibit—are very rare. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 447 (1934), which failed to invalidate debtor-relief legislation prohibited by the Obligation of Contracts Clause, is perhaps the clearest example. These examples should be seen, in any event, as examples of restraint and not as anti-democratic.

25. Because, as Seidman argues, following constitutional restrictions is inherently undemocratic, it would seem that these restrictions should be at least disfavored—not expanded or multiplied—if not necessarily disobeyed. *See* SEIDMAN, *supra* note 1, at 69–82, 87–89. The result of disfavoring constitutional restrictions would be to reduce the occasions and need for disobedience.

26. U.S. CONST. art. II, § 1, cl. 4; *see also* SEIDMAN, *supra* note 1, at 4 ("Suppose . . . President Obama really were born outside the United States. Why should this matter to us?").

27. *See* U.S. CONST. art. I, § 3, cl. 1 ("The Senate . . . shall be composed of two Senators from each State[.]").

28. SEIDMAN, *supra* note 1, at 10.

29. *Id.* at 63–91.

30. *See id.* at 73 (observing that in 1803 President Jefferson negotiated the Louisiana Purchase even though he had "the gravest of doubts" about its constitutionality); see also Louis Michael Seidman, *Let's Give Up on the Constitution*, N.Y. TIMES (Dec. 30, 2012), http://nyti.ms/113AE2n [perma.cc/8YVX-2QAM] (noting that the Constitution itself was

Jefferson negotiated the Louisiana Purchase, President Lincoln unilaterally suspended the writ of habeas corpus, and Justice Jackson voted for the *Brown v. Board of Education* decision, although each doubted his action's constitutionality.[31] These actions, Seidman concludes, show that "departures—even frequent and serious departures—from the Constitution's commands do not produce chaos."[32]

Second, Seidman argues, Americans might have a "very different attitude" about obeying the Constitution if they "would only acknowledge what should be obvious to everyone—that constitutional language is broad enough to encompass an almost infinitely wide range of positions[.]"[33] Of course, if the Constitution's language could mean anything, the Constitution would be essentially meaningless, as Seidman himself recognized earlier in the book.[34] Constitutional provisions would not be meaningful restrictions or policy guidelines, but mere transfers of lawmaking power to the Court. The Court's decisions, however, could not then be described as merely enforcing the Constitution's commands. As Bickel said, those decisions must be the source of the countermajoritarian difficulty, not the Constitution itself.[35]

It is not true, however, that the Constitution's language must or should be read so broadly as to be meaningless, which could hardly have been the intent of its authors or ratifiers. To the extent that the Constitution's language seems meaningless now, it is mostly the result of the Court's decisions, particularly under the Fourteenth Amendment.[36] The purpose of the Fourteenth Amendment is clear: It was adopted to constitutionalize the 1866 Civil Rights Act, which guaranteed basic civil rights to the newly emancipated slaves.[37] The Court converted the amendment's Due Process

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"born of constitutional disobedience," since its provision that it take effect upon ratification by only nine of the thirteen states violated the Articles of Confederation).

31. *See* SEIDMAN, *supra* note 1, at 70–73.

32. *See id.* at 70; *see also id.* at 90 (rejecting the notion that American democracy will "not survive widespread constitutional violation.").

33. *Id.* at 142.

34. *See id.* at 13 ("If 'due process' means whatever contemporaries think that it ought to mean, then we are no longer bound by constitutional language in a meaningful sense.").

35. *Id.* at 36; *see also* BICKEL, *supra* note 13, at 16.

36. *See* Lino A. Graglia, *Constitutional Law Without the Constitution: The Supreme Court's Remaking of America*, *in* A COUNTRY I DO NOT RECOGNIZE: THE LEGAL ASSAULT ON AMERICAN VALUES 13 (Robert H. Bork ed., 2005) (arguing that a single sentence in the Fourteenth Amendment—the one that contains the due-process and equal-protection clauses—has "in effect become our second Constitution, largely replacing the original.").

37. *See* DAVID R. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 348–49 (1985) ("[The 1866 Civil Rights Act] did three things.

Clause, a guarantee of procedural regularity,[38] and Equal Protection Clause, a guarantee of equal enforcement of legal protection,[39] from meaningful provisions of law into virtually unlimited grants of policymaking power. If the Fourteenth Amendment were returned to its intended meaning and purpose—or, indeed, given any definite meaning—then the supposed need to disobey the Constitution would be largely eliminated.

Seidman is also mistaken in contending that we would be "stuck with eighteenth-century judgments about twenty-first-century problems" if we were to confine "general guarantees like equal protection and due process of law" to their "original public meaning" or the Framers' intent.[40] All we would be "stuck with" is the quite limited and uncontroversial meanings those clauses were intended to have. They would very rarely, if ever, solve or get in the way of solving contemporary problems. They would no longer be obstacles to policy changes. They would no longer effectively serve as blank checks for judicial policymaking—permitting decision of issues of domestic policy to return to the ordinary political process.

Seidman found Bickel's concern about judicial review being countermajoritarian to be misguided (based on a failure to recognize the Constitution as the source of the problem); Seidman also found Bickel's concern to be excessive. In recent years, a "growing body of scholarship" has "questioned just how countermajoritarian Supreme Court decisions really are."[41] Seidman asserts that the Court's decisions have "only rarely . . .

First, it extended citizenship without regard to race; this provision was essentially copied into the first clause of the [fourteenth] amendment granting citizenship to 'all persons born or naturalized in the United States and subject to the jurisdiction thereof.' Second, the statute forbade racial discrimination with respect to certain enumerated rights: to contract, to sue, to deal with property; and at the end it forbade racial discrimination in the infliction of punishment. The second clause of the fourteenth amendment seems to generalize these provisions: all legal privileges and immunities are protected–not only the privileges of contracting and suing, and not only the immunity from punishment. That the provision is merely a guarantee of equal treatment is strongly suggested by the choice of the language of Article IV, which the Court had already so construed . . . equal protection seems to mean that the states must protect blacks to the same extent that they protect whites: by punishing those who do them injury. 'Protection of the laws' is, after all, a peculiar way to express a general freedom from discrimination"); *see also* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1409–10 (1992).

38. *See generally* EDWARD S. CORWIN, LIBERTY AGAINST GOVERNMENT (1948).

39. *See* Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 47–48 (2005) ("[T]he framers and ratifiers of the Equal Protection Clause had intended only to protect blacks against the withdrawal of the standard police protections that whites received, so that blacks would not be outlaws in a literal sense.").

40. SEIDMAN, *supra* note 1, at 13.

41. *Id.* at 33.

frustrate[d] popular majorities for very long. For the most part, the justices have been quite cautious."[42] This assertion has long been a standard response to critics of the constitutional revolution that began with the Warren Court.[43] But, as Professor Justin Driver concluded in a very recent and thorough discussion of the claim, this assertion reflects an "anemic notion" of the Court's countermajoritarian capabilities and "makes for bad history . . . [and] worse law."[44] If the Court's recent decisions on corporate campaign contributions,[45] gun control,[46] term limits,[47] and homosexuality,[48] for example—to say nothing of school busing[49] and abortion[50]—are "quite cautious,"[51] one wonders what a daring Court might do. The reality—the countermajoritarian difficulty—is that the Court has given itself the final word on important issues of domestic social policy, regardless of popular opposition.

In further rejecting the countermajoritarian objection to judicial review, Seidman runs down the hoary list of supposed political controls on the Court. Adopting Hamilton's argument that there is no need to fear misuse of power by the Court because it "has no influence over either the sword or the purse,"[52] Seidman points out that the Justices "must depend on the political branches for enforcement of their decisions."[53] Moreover, he writes, "Congress and the president have a number of means at their disposal to discipline a Court that is too far out of step with prevailing political values."[54] Congress can "limit the Court's jurisdiction to hear cases," "overrule[] unpopular decisions by constitutional

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42. *Id.*

43. *See, e.g.*, Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1365 (2004) (arguing that the Warren Court did not "act in a manner truly deserving of its countermajoritarian image.").

44. Justin Driver, *The Consensus Constitution*, 89 TEXAS L. REV. 755, 794 (2011); *see also id.* at 757 (criticizing "consensus constitutionalism," the notion that the Supreme Court "interprets the Constitution in a manner that reflects the 'consensus' views of the American public.").

45. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

46. McDonald v. City of Chicago, 561 U.S. 742 (2010); District of Columbia v. Heller, 554 U.S. 570 (2008).

47. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

48. Obergefell v. Hodges, 135 S. Ct. 2584 (2015); Lawrence v. Texas, 539 U.S. 558 (2003).

49. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

50. Roe v. Wade, 410 U.S. 113 (1973).

51. SEIDMAN, *supra* note 1, at 33.

52. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton).

53. SEIDMAN, *supra* note 1, at 34.

54. *Id.*

amendment," or "impeach a justice."[55]

Seidman concedes that the political branches have rarely if ever refused to enforce a Court decision or exercised their power to discipline the Court.[56] However, he writes, that is because the Court has not "decide[d] cases in a way that would trigger" discipline.[57] The reality is that the supposed political constraints on the Court are more theoretical than real.[58] The Constitution is extremely difficult to amend—apparently the most difficult in the world[59]—and very few decisions have been overturned by amendment.[60] Congress can attempt to limit the Court's jurisdiction, but it has rarely made the attempt.[61] When Congress does attempt to do so, the Court gets to pass on the validity of any such attempt, and the Court does not always agree with Congress.[62] Hamilton put great faith in impeachment,[63] but it failed the one time it was tried.[64]

Finally, Seidman rejects the "originalist" view, prominently urged by Robert Bork, that judges would be more restrained—and the countermajoritarian difficulty less pronounced—if they confined themselves to interpreting the Constitution to mean what it was understood to mean when it was adopted.[65] A constitution divorced from its original meaning becomes meaningless, Bork argued.[66] Seidman responds that it is "patently false" that rejecting originalism "left judges with the power to decide cases based on

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55. *Id.* at 35.

56. *Id.*

57. *Id.*

58. *See* Posner, *supra* note 39, at 32, 41–42 ("The Justices who formed the majority in *Roper* [*v. Simmons*] did not have to worry about being reversed by a higher court if they gave the 'wrong' answer, let alone being removed from office for incompetence or having their decision nullified by Congress, the President, or some state official. That is, there were no external constraints on the Justices' decision.").

59. *See* Donald S. Lutz, *Toward a Theory of Constitutional Amendment, in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 260–61 (Sanford Levinson ed., 1995) (contending that the United States has the second-most-difficult constitutional-amendment process, after the now-defunct Yugoslavia).

60. *See* Lynn A. Baker, *Governing by Initiative: Constitutional Change and Direct Democracy*, 66 U. COLO. L. REV. 143, 156 n.41 (1995) (observing that four of the twenty-seven amendments to the Constitution were adopted to overturn a U.S. Supreme Court decision).

61. *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 29 (17th ed. 2010) ("Congressional proposals to eliminate the Court's appellate jurisdiction in such controversial areas as busing, abortion and school prayer, for example, failed in the 1970s and 1980s.").

62. *See* United States v. Klein, 80 U.S. 128, 147–48 (1871).

63. *See* THE FEDERALIST NO. 81, at 485 (Alexander Hamilton) (contending that the threat of impeachment would deter judicial "usurpations on the authority of the legislature").

64. SULLIVAN, *supra* note 61, at 28.

65. SEIDMAN, *supra* note 1, at 38–40.

66. *Id.*

their uncontrolled discretion."[67] Judges who adopt non-textual theories of judicial review are not unconstrained, Seidman argues.[68] They are simply constrained by something other than the Constitution. For example, they might be constrained "by moral philosophy, by American traditions, by prior precedent, or by a commitment to democratic politics."[69] Or, "[p]erhaps more fancifully, judges who did not obey the Constitution might instead be constrained by the teachings of the Bible, John Stuart Mill, John Rawls, or the United Nations Declaration of Human Rights."[70]

"To be convincing," Seidman concludes, "Bork must explain to us why the views of James Madison are more worthy of respect than the views of a host of other great thinkers."[71] The explanation, one is tempted to respond, is that James Madison was the principal author of the Constitution.[72] But that explanation obviously will not do for someone who, like Seidman, denies that the Constitution is the necessary basis of constitutional law and would permit judges to invalidate laws as unconstitutional on the basis of whatever else they find appealing.[73] Consistency would seem to require, however, that a law invalidated on, say, the basis of the Bible be declared "unbiblical," not "unconstitutional." And if a law may be invalidated on a basis other than the Constitution, it would seem impossible to argue that it is the Constitution, rather than judicial review, that is the source of the countermajoritarian difficulty.

In his conclusion, Seidman notes "the obviously partisan nature of constitutional argument."[74] It is not "mere coincidence that, say, Justice Ginsburg and Justice Alito regularly read the same document in ways that correspond to the political orientation of liberals and conservatives."[75] But that, of course, is to recognize that judicial review involves something more than the Court merely enforcing the commands of the Constitution.[76] The fact is that the

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67. *Id.* at 39.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *See* Colleen Sheehan, James Madison: Father of the Constitution, HERITAGE FOUNDATION (Apr. 8, 2013), http://herit.ag/1LvM6g7 [http://perma.cc/6BE6-X7PK].
73. *See* SEIDMAN, *supra* note 1, at 8 (arguing that the Constitution should be read as a "work of art, designed to evoke a mood or emotion, rather than as a legal document commanding specific outcomes.").
74. *Id.* at 140.
75. *Id.*
76. As Judge Richard A. Posner, probably the most thoughtful and surely the most candid of our federal judges, has put it: "A constitutional court is a political court . . . having

Constitution rarely settles or even addresses the policy issues involved in actual constitutional cases.[77] If the question were in practice what it is in theory—does the Constitution clearly preclude the challenged legislative policy choice—the answer in nearly all cases would be that it does not.

That the Constitution does not settle the issue involved in controversial cases should also be clear enough from the remarkable consistency with which the votes of eight of the Justices on most issues are evenly split, apparently along "conservative" and "liberal" ideological lines, leaving the decision to the vote of the ninth Justice, Justice Kennedy.[78] Congress cannot restrict corporate campaign contributions, for example, because Justice Kennedy resolved a four-four conservative-liberal split on the issue by voting with conservatives[79]; the states may not impose term limits on their federal representatives because faced with a similar four-four split, he voted with the liberals.[80] The Constitution would rest equally unconcerned if in each case he had voted the other way. It would seem difficult, therefore, not to avoid Judge Posner's conclusion that the Justices are "politician[s] in robes"[81] and that ideology "plays a significant role" in the Court's decisions.[82]

Seidman's book importantly challenges the near-scriptural reverence shown to the Constitution, and the wisdom of deciding current issues of public policy by studying an ancient text.[83] It is difficult to see, however, how this situation can be improved by following his recommendation to disobey or ignore the Constitution. The correct response to an argument that a desired policy choice cannot be adopted because it is prohibited by the

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and exercising discretionary power as capacious as a legislature's. It cannot abdicate that power, for there is nothing on which to draw to decide constitutional cases of any novelty other than discretionary judgment." Judge Posner urges the Justices to recognize that they are "politician[s] in robes" and to "acknowledge[] . . . the essentially personal, subjective, and indeed arbitrary character of most of their constitutional decisions," which might lead them to be "less aggressive upsetters of political and policy applecarts than they are." Posner, *supra* note 39, at 39–40, 54, 56.

77. *See* SEIDMAN, *supra* note 1, at 20. District of Columbia v. Heller, 554 U.S. 570 (2008), offered the unusual case in which a constitutional provision, the Second Amendment, actually did address the issue presented—the issue of gun control. However, as the opinions of the closely divided Court show, it did not settle the issue.

78. *See* Richard Wolf, From Gay Marriage to Voting Law, Kennedy is the Key, USA TODAY (June 27, 2013), http://usat.ly/1nfV3mI [http://perma.cc/4NM8-X797].

79. Citizens United v. FEC, 558 U.S. 310 (2010).

80. United States Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

81. Posner, *supra* note 39, at 54.

82. *Id.* at 48–49.

83. SEIDMAN, *supra* note 1, at 95–96 ("[T]he last thing we need is scholars poring over the Constitution as if it were holy scripture.").

Constitution is not, as he recommends, to shrug and say, "So what?" Rather, the correct response is to point out that the argument is almost surely mistaken because the Constitution does not in fact prohibit the choice. The wise Framers left us, happily, with little need to disobey the Constitution.


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