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Populism Through Traditionalism: Criticism of the School Prayer Cases and the Countermajoritarian Difficulty

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I. Introduction

In 1962 and 1963 the Supreme Court decided two of its most controversial cases of the 20th century, *Engel v. Vitale*[1] and *Abington School District v. Schempp*.[2] In these cases, together called the School Prayer Cases, the Court, respectively, banned a prayer composed by state officials read in public schools as well as mandatory Bible reading in public schools. Many people, including prominent political, religious, and media figures, loudly criticized the Court for secularizing America and for destroying centuries of American tradition. These responses fit the model of countermajoritarian criticism espoused by legal historian Barry Friedman, which itself is part of a much larger discussion about the anti-democratic effects of the institution of judicial review. But neither Friedman nor the great mass of constitutional scholars like him have included the School Prayer Cases in their analyses of whether the Court's decisions have a countermajoritarian effect. This article identifies the ways in which the reaction to the School Prayer Cases fits this countermajoritarian mold, and the benefits of including these cases for scholars answering the question of whether judicial review and democracy should be considered contradictions in terms.

The School Prayer Cases were the last in a string of decisions in which the Supreme Court repeatedly interpreted the Establishment Clause to determine the constitutionality of intersections of church and state in public schools.[3] The first case to use this clause to judge state action was *Everson v. Board of Education*.[4] In a narrow five-to-four decision, the Court held that

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1: 370 US 421 (1962).

2: 374 US 203 (1963).

3: The Establishment Clause is the first of two clauses in the First Amendment that provide religious freedom. It reads, "Congress shall make no law respecting an establishment of religion." The second clause, the Free Exercise Clause, stops Congress from "prohibiting the free exercise" of religion. US Const. amend. I.

4: 330 US 1 (1947). The First Amendment, like the rest of the Bill of Rights,

the First Amendment does not prohibit New Jersey from spending public money to reimburse students for their fares on public transportation on the way to parochial schools.[5] Despite disagreeing on the result, all nine Justices presented a more or less uniform interpretation of the First Amendment. They placed great emphasis on broad prohibitions of state support of religion stemming from the history of religious freedom in the United States and Establishment Clause precedent. Indeed, both the majority and the dissent cited Thomas Jefferson's wall metaphor to describe the relationship of church and state. As written by Justice Hugo Black, "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable."[6] Although *Everson* divided the Court, the shared rhetoric of the justices created a single definition of the Establishment Clause that could be used in future cases.

The Court next decided a pair of cases concerning released time programs, *McCollum v. Board of Education*[7] and *Zorach v. Clauson*.[8] The programs in question excused public school students from classes to receive religious instruction: in *McCollum* the religious instruction took place at school, and in *Zorach* outside of it. Using a similar interpretation of the Establishment Clause to the one it took in *Everson*, the Court held that the statute in *McCollum* was unconstitutional because it contained two violations of the Establishment Clause: the use of public funds for the benefit of religious groups,

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originally applied only to Congress, but the Court has subsequently applied, or incorporated, it to the states through the Due Process Clause of the Fourteenth Amendment. The Due Process Clause states, "nor shall any State deprive any person of life, liberty, or property, without due process of law." US Const. amend. XIV, § 1. The Court has read this clause to indicate that the protections in the Bill of Rights are part of a person's liberty that cannot be violated by state laws. The Court's earliest incorporation of the First Amendment's religious clauses occurred in *Cantwell v. Connecticut*, 310 US 296 (1940), and *Murdock v. Pennsylvania*, 319 US 105 (1943). Then, in *Everson*, all nine justices agreed that the Establishment Clause ought to apply to the states, see *Everson*, 330 US at 15, 29.

5: *Everson*, 330 US at 17.

6: *Id*. at 18, 34. Jefferson's metaphor comes from his reply to an address by a committee of the Danbury Baptist Association: "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State." Quoted in *Reynolds v. United States*, 98 US 145, 164 (1878).

7: 333 US 203 (1948).

8: 343 US 306 (1952).

and the state compulsion of students to receive religious education.[9] In his concurrence, Justice Felix Frankfurter noted the importance of this second violation. Because children are required to be at school, they experience peer pressure to join in the religious instruction that takes place at school, albeit outside of class; thus religious institutions unconstitutionally benefit.[10]

However in *Zorach*, the Court pulled back from its ruling in *McCollum* and allowed the challenged program to stand. It held that public institutions must be permitted to modify their schedules to allow for the strong religiosity of the American people; otherwise, the state would take an unconstitutionally hostile stance to religion.[11] Justice William Douglas, writing for the Court, argued that complete separation of church and state was impossible, as "[w]e are a religious people whose institutions presuppose a Supreme Being" and that "[o]therwise the state and religion would be aliens to each other–hostile, suspicious, and even unfriendly."[12] Melvin Urofsky writes that *Zorach's* more lenient stance was the Court's response to the public outcry over *McCollum*. The Court made a concerted effort in *Zorach* to quell fears that it was hostile to religion.[13] Douglas carefully distinguished *Zorach* from *McCollum* and argued that the Court could balance its desire to prevent unconstitutional incursions of religion into public life with considerations of the

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9: *McCollum*, 333 US at 210-212.

10: Frankfurter's famous quote reads, "The law of imitation operates, and nonconformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend." *Id*. at 227.

11: *Zorach*, 343 US at 315.

12: *Id*. at 312-313.

13: Melvin I. Urofsky, *The Warren Court: Justices, Rulings, and Legacy* 141 (ABC-CLIO 2001). The *McCollum* decision was controversial at the time because of the popularity of released time programs. In his dissent in *Zorach*, Justice Hugo Black stated, "I am aware that our *McCollum* decision on separation of Church and State has been subjected to a most searching examination throughout the country. Probably few opinions from this Court in recent years have attracted more attention or stirred wider debate." *Zorach*, 343 US at 317. In his concurrence in *McCollum*, Frankfurter went into detail about the importance of released time programs to church leaders. He cites a figure showing the prevalence of these programs: almost 2 million children in 2,200 communities participated in these programs in 1947. *McCollum*, 333 US at 224-25. Urofsky writes that school officials across the country either declared that the programs would continue despite the Court's ruling, or found ways to differentiate their programs from the unconstitutional one in Illinois. Urofsky, *The Warren Court* at 141. Indeed, the Attorneys General of eight states filed amicus briefs in *Zorach* in order to argue for the maintenance of the New York program in question.

strength of support for religion in contemporary American public opinion.

This line of cases came to a head in the School Prayer Cases, *Engel v. Vitale* and *Abington School District v. Schempp*. The Court did not take the balanced approach it took in *Zorach*, instead opting to eschew public opinion and adopt the strict separation doctrine of *McCollum*. In *Engel*, the Court judged the constitutionality of a short, nondenominational, and voluntary prayer (Regents' Prayer) said at the beginning of the school day after the Pledge of Allegiance.[14] Justice Black wrote, "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."[15] He dismissed the nondenominational and voluntary nature of the prayer as irrelevant in terms of the First Amendment,[16] and argued that the prayer was against both the principle behind the Establishment Clause and the clause itself.[17] For the Court, the violation of the Establishment Clause in *Engel* was blatant: a government-composed prayer read in a government institution was unconstitutional.

In *Schempp*, the Court validated its decision in *Engel*, expanding the anti-prayer rule to ban reading of the Bible in public schools as well. Pennsylvania mandated that at least ten verses of the Bible be read without comment at the start of each school day, with a provision to excuse students if they so chose.[18] To the majority, the case was unambiguous: "the laws require religious exercises and such exercises are being conducted in direct violation of the rights of the appellees and petitioners."[19] The law violated the Establishment Clause at it had been applied by the Court dating back to *Everson*.[20] In oral arguments, the school district argued that using the Bible to teach morality to children represented a secular purpose for the statute, but the Court was unconvinced by this argument, holding that the reading was a religious ceremony designed as such, and its inclusion in the public schools would would aid religion.[21]

14: The prayer read, "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Engel*, 370 US at 422.

15: *Id*. at 425.

16: *Id*. at 430.

17: *Id*. at 433. Black wrote that escaping official prayers was one of the main reasons for emigration to colonial America, and that a union of government and religion tends to damage both. *Id*. at 425, 431.

18: *Schempp*, 374 US at 205.

19: *Id.* at 224.

20: *Id*. at 222, 224-25.

21: *Id*. at 224. See also Transcript of Oral Argument, *Schempp*, 374 US at 203,

These cases, especially *Engel*, raised a public outcry from across the nation: in the media, and from many high-profile political and religious authorities. Figures estimate that 80% of Americans disapproved of the ruling in *Engel*, and the Court received more mail regarding *Engel* than any other case.[22] Among the many newspaper headlines about the decision was one particularly reactionary title, "Court Outlaws God"–as remembered by Chief Justice Earl Warren.[23] Media outlets across the country split on the decision: the Los Angeles Times, Chicago Tribune, and conservative publications like National Review condemned the outcome while the New York Times, New York Herald Tribune, Washington Post, and liberal New Republic supported it.[24] Religious leaders were similarly divided. Cardinal Francis Spellman, a powerful Catholic, and Billy Graham, a popular evangelical, were the most famous of the dozens of Catholic and Protestant leaders who opposed *Engel*, while other Protestant clergymen and many Jewish organizations defended the Court.[25] Politicians also came down on both sides of the issue. President Kennedy spoke in his press conference about the benefits that would come from allowing Americans to pray more at home and in church, but many Congressmen, and even former Presidents Eisenhower and Hoover, publicly expressed their disapproval.[26] With this much criticism levied against the Court, but also a great deal of support, the School Prayer cases, specifically

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in The Oyez Project at ITT Chicago-Kent College of Law (visited Feb. 22, 2014), online at http://www.oyez.org/cases/1960-1969/1962/1962_142.

22: Michal R. Belknap, *The Supreme Court Under Earl Warren, 1953-1969* 139 (University of South Carolina 2005).

23: Earl Warren, *The Memoirs of Earl Warren* 316 (Doubleday 1977).

24: Belknap, *The Supreme Court* at 139 (cited in note 22).

25: *Id*.

26: Eisenhower said, "I have always thought that this nation was essentially a religious one ... [The Declaration of Independence] specifically asserts that we as individuals possess certain rights as an endorsement from our creator–a religious concept." Hoover asked Congress to pass a constitutional amendment to restore "the most sacred of religious heritages." Leo Katcher, *Earl Warren: A Political Biography* 423 (McGraw-Hill 1967). Katcher also argues that the main difference between the public reaction to *Engel* and to *Brown v. Board of Education*, 347 US 483 (1954), the famous desegregation case, was that the Kennedy administration swiftly and outspokenly defended *Engel*, where the Eisenhower administration did not in *Brown*, thus giving legitimacy to the attacks. *Id*. at 425. Daryl J. Levinson and Richard H. Pildes write that the Court can be controlled when it threatens the core agenda of an extremely strong partisan majority in the political branches, but Kennedy's defense of *Engel* preempted this possibility. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 Harv. L. Rev. 2311, 2365-2366 (2006).

Engel, were–and remain–some of the Court's most controversial decisions.

In this paper I apply the theory of countermajoritarian criticism, as articulated by NYU law professor Barry Friedman, to the reaction to the School Prayer Cases. In a series of articles published between 1998 and 2002, Friedman identifies times when Supreme Court decisions have caused severe public outcry, and analyzes whether these critiques fit his theory. He defines countermajoritarian criticism as "a challenge to the legitimacy or propriety of judicial review on the grounds that it is inconsistent with the will of the people, or a majority of the people, whose will–it is implied–should be sovereign in a democracy."[27] Friedman analyzes this idea historically, finding that the tactic has been used many times in American history to question the legitimacy of a Supreme Court ruling. Friedman identifies four factors as necessary for countermajoritarian criticism to emerge: (1) public support for direct or populist democracy; (2) a period of judicial power and activism; (3) the sentiment that a decision interferes with popular will; and (4) acknowledgement of the fixed constitutional meaning of Court decisions. He argues that if all four are present, critics will describe the Court as undermining popular will, but if any are missing, the criticism will take different forms.[28]

Friedman discusses the School Prayer Cases by analyzing the context in which they were decided. He examines the Warren Court (1953-69) and its set of highly controversial and highly transformative decisions, especially in civil rights, reapportionment, and criminal procedure.[29] As a whole, these decisions raised opposition towards the Court, much of which was phrased in countermajoritarian terms.[30] Friedman dedicates a section of his analysis of the Warren Court specifically to the School Prayer Cases, arguing that the

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27: Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 72 N.Y.U. L. Rev. 333, 354 (1998) (emphasis retained).

28: *Id*. at 342-344.

29: The Warren Court's landmark civil rights decisions were *Brown*, 347 US at 483, which desegregated schools, and *Loving v. Virginia*, 388 US 1 (1967), which permitted interracial marriage. The reapportionment decisions, *Baker v. Carr*, 369 US 186 (1962), and *Reynolds v. Sims*, 377 US 533 (1964), emphasized the Court's commitment to the principle of 'one person, one vote.' The Court incorporated the Fourth, Fifth, Sixth, and Eighth Amendments to the states, dramatically expanding protections to criminal defendants. See *Mapp v. Ohio*, 367 US 643 (1961), *Robinson v. California*, 370 US 660 (1962), *Gideon v. Wainwright,* 372 US 335 (1963), and *Miranda v. Arizona*, 384 US 436 (1966).

30: Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five,* 112 Yale L.J. 153, 215-216 (2002).

opponents, while virulent, did not phrase their objections in countermajoritarian terms: "Nearly all of the criticism of these decisions was on the merits (i.e., that the Court had interpreted the Constitution incorrectly). Commentators assailed the decisions as removing religion from society and as an incorrect interpretation of precedent, tradition, and history."[31] Somewhat paradoxically, Friedman identifies the School Prayer Cases as a "genuinely countermajoritarian set of decisions," but argues that this criticism never appeared despite obvious and widespread disapproval of the rulings.[32]

However, Friedman's analysis of the backlash to the Court's decisions in the School Prayer Cases misconstrues the evidence. All of the factors identified by Friedman as necessary for countermajoritarian criticism were present in the criticism levied by the Court's opponents. In this period, religion became a major part of 20th-century American society, and legislatures made it a policy priority to integrate this religiosity into civic life. The Warren Court was one of the most activist and powerful Supreme Courts in history, and by 1962, had already made several influential and contentious decisions that created a conservative coalition antagonistic to the Court. Opponents to the decisions emphasized appeals to the religious traditions, heritage, and spirit of the American people–as I call it, populism through traditionalism. Friedman claims that this rhetoric was used to disagree with the Court's interpretation of the Constitution, but instead, the evidence shows that opponents used it differently. They argued that these cases compromised American values–the values of the majority–thus creating the majority against whose will the Court was acting. Finally, by the 1960's, people believed that the Court's decisions were binding and required enforcement.[33] Thus opponents to the School Prayer Cases could not refuse to follow the rulings, and instead advocated for a constitutional amendment to overturn them. With the four factors each present, and opponents claiming that the will of the majority had been subverted, the reaction to *Engel* and *Schempp* fits Friedman's theory of countermajoritarian criticism.

This article reassesses Friedman's interpretation of the School Prayer Cases and seeks to include these cases within the much larger discussion of the countermajoritarian difficulty. The countermajoritarian difficulty is the name given to the debate regarding whether judicial review is undemocratic and harmful to American democracy. This thesis was first articulated in 1962 by Alexander Bickel, and it became one of the most popular constitutional

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31: *Id*. at 204.

32: *Id*. at 205.

33: *Id*. at 169 (discussing the slow acceptance of the national and permanent nature of the Supreme Court's constitutional interpretation).

theories of the 20th century.[34] Bickel, with many scholars later concurring, wrote that judicial review was inherently countermajoritarian and that this adversely affects American democracy by giving sole command over constitutional interpretation to officials with no electoral connection to the people.[35]

However, many others disagree, arguing that the legislative supremacy on which countermajoritarian theory depends is not the only key feature of the American political system and that the Court's protection of minority rights is as essential for a functioning democracy.[36] However, this scholarship, on both sides, largely fails to consider the School Prayer Cases, and, Friedman included, tends to dismiss these cases as not fitting the countermajoritarian model. These legal historians, by excluding the School Prayer Cases from their countermajoritarian analyses of the Supreme Court, ignore two of the most notable countermajoritarian examples in the 20th century, and thus overly narrow their discussion of the Court's countermajoritarian impact.

The cases sparked a vigorous national debate about the proper role of religion in public life. In that debate, both sides were heard but the supporters of the Court were able to allay the fears of the critics and reassert the Court's support of religion. This article provides an alternative interpretation of the evidence that identifies the response to these cases as countermajoritarian in nature by analyzing the rhetoric of the conservative opposition to the School Prayer Cases. By doing so, it seeks to reconnect the School Prayer Cases with the countermajoritarian theory and allow scholars to utilize this reconnection in their evaluations of the Court's countermajoritarian effects.

34: Friedman, 72 N.Y.U. L. Rev. at 334-336 (cited in note 27) (addresses the prevalence of the countermajoritarian difficulty in 20th century constitutional theory).

35: Alexander Bickel, *The Least Dangerous Branch* 16-23 (Bobbs-Merill 1962). See also Robert H. Bork, *Slouching Towards Gomorrah* 96-122 (Regan Books 1996); Neal Katyal, *Legislative Constitutional Interpretation*, 50 Duke L.J. 1335, 1358-94 (2001).

36: Among many others, see Christopher Eisgruber, *Constitutional Self-Government* (Harvard 2001); Terri J. Peretti, *In Defense of a Political Court* (Princeton 1999).

IIa. The Countermajoritarian Factors: Popular Belief in Democracy

The first of the factors that Friedman identified as necessary for countermajoritarian criticism, popular belief in democracy, is seen in the overwhelming support for the insertion of religion into public life, which increased dramatically in the 1950's and continued through the School Prayer Cases. America in this period was an increasingly religious place. Bible sales and church membership rose significantly. In 1954, 96% of Americans claimed to believe in God, and a decade later 63% claimed to pray frequently while only 6% never prayed.[37] This surge of religiosity extended to government as well, as voters encouraged their representatives to insert faith into public institutions. In 1952, Congress urged the President to proclaim a "National Day of Prayer," and two years later, it added "under God" to the Pledge of Allegiance.[38] Not only were Americans asserting their faith more, but it increasingly affected their decisions as well. In the 1950's, ethnic intermarriage became more prevalent, but religious intermarriage declined. In newly created suburbs, religious segregation in schools, country clubs, and other social settings became a common feature of life.[39]

Public support for the role of religion in public life centered in part around distinguishing the United States from its Cold War Communist enemies. The doctrine of the Soviet Union and its allies' maintained official atheism, despite the highly religious nature of their citizenries. Many religious Americans believed that the School Prayer Cases were the first step in a grand conspiracy to establish atheism, or worse, Communism, in the United States. They had attempted to place evidence of their religiosity in public institutions during the 1950's, and they saw the School Prayer Cases as a dangerous undermining of their good work. Legal historian Lucas A. Powe, Jr. writes that the Regents Prayer was adopted by New York in 1951 as part of a larger national effort to consciously differentiate the United States from the Soviet Union.[40] This interpretation was used by both in Congress and the media to critique the Court and its decisions. Congressman John J. Rooney (D-NY) claimed that *Engel* made American schools equal to Russian schools,[41]

37: Belknap, *The Supreme Court* at 130 (cited in note 22).

38: *Id*.

39: *Id*. at 131.

40: Powe notes other examples of this practice, including the creation of a "Law Day" to rival the Communist May Day. Lucas A. Powe, Jr., *The Warren Court and American Politics* 186 (Harvard 2000).

41: *'School Prayer 'Unconstitutional': Mixed Views of Churchmen*, New York Herald Tribune at 1 (Jun. 26, 1962).

a sentiment that was echoed by the National Review, which wrote that "[t]he Supreme Court decision gives the United States a singular first: ours has become the only nation outside the Iron Curtain where it is unlawful to pray in the public schools."[42] Representative Mendel Rivers (D-SC) combined anti-Communist and countermajoritarian rhetoric when he declared in Congress: "I know of nothing in my lifetime that could give more aid and comfort to Moscow than this bold, malicious, atheistic and sacrilegious twist by this unpredictable group of uncontrolled despots."[43] As religion became more and more important to Americans in the 1950's, they began to consider it as important to public life as traditional notions of freedom and liberty. These powerful religious sentiments fit perfectly with the strong anti-Communism of the period, as these conservative Americans attempted to identify faith as the key difference between the United States and the Soviet Union. In the Cold War context, strong public support for religion combined with the importance of establishing a contrast with godless Communism to ensure that court decisions that went against these dual attitudes would evoke countermajoritarian criticism.

IIb. The Countermajoritarian Factors: Judicial Power and Activism

The second factor, judicial power and activism, is seen in the form of the Warren Court, one of the most activist Courts in history. The Court's decisions, including the School Prayer Cases, sparked a great deal of controversy around the country, causing the popularity of the Court to decline.[44] Earl Warren's first case as Chief Justice was *Brown v. Board of Education*,[45] the famous case which overturned the doctrine of "separate but equal" and declared

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42: *Thou Shalt Not Pray*, 13 National Review at 52 (Jul. 31, 1962) (emphasis retained).

43: Katcher, *Earl Warren* at 423 (cited in note 26).

44: Michael R. Dimino, Sr. writes that conservative countermajoritarian decisions such as *Seminole Tribe v. Florida*, 517 US 44 (1996), do not raise much public outcry because they tend to concern questions of relatively unknown legislation regarding obscure issues like federalism. *Seminole Tribe* held that Congress cannot abrogate the sovereign immunity of states. By contrast, liberal decisions often judge divisive social issues like gay marriage, religion, and abortion. These issues are in the news, are easy to understand, and can provoke strong emotional responses. Michael R. Dimino, Sr. *Counter-Majoritarian Power and Judges' Political Speech*, 58 Fla. L. Rev. 53, 65-66 (2006). The Warren Court's contentious cases largely fit into the latter category.

45: 347 US at 483.

segregation in schools unconstitutional as a violation of the Equal Protection Clause.[46] The decision itself reflected the activist principle of a living Constitution. Speaking for the unanimous Court, Warren argued that the Court must approach this question in the 20th century, not in 1868 when the Fourteenth Amendment was written, or 1896 when *Plessy v. Ferguson*[47] was decided.[48] Southerners in particular saw *Brown* as a repudiation of their way of life, and criticized the Court loudly and publicly. The Court received hundreds of bitter, vulgar letters from Southerners, while white supremacists and their political representatives denounced *Brown*.[49] These politicians were not out of line with public opinion, as support for school segregation sat at 80% with white Southerners. Accordingly, Southern jurisdictions actively attempted to avoid enforcing *Brown*. As attorney S. Emory Rogers stated to the Court, "[Southerners] would not conform–[they] would not send [their] white children to the Negro schools."[50]

The Court's jurisprudence from *Brown* in 1954 to *Engel* in 1962 only added to the Court's reputation as liberal and activist, further decreasing its popularity, especially with conservatives. In 1956 and 1957, after the era of McCarthy and the Red Scare, the Court decided ten cases regarding Communists and Communist sympathizers, and in each instance sided with the alleged Communists against the government.[51] In the 1950's atmosphere of virulent anti-Communism, the Court's stance of curtailing the activities of

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46: *Id*. at 495.

47: 163 US 537 (1896).

48: *Brown*, 347 US at 492. *Brown* overturned *Plessy,* 163 US at 537, which had upheld segregation 58 years earlier.

49: Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court–A Judicial Biography* 110 (New York University 1983). Senator James O. Eastland (D-MS) announced that the South "will not abide by or obey this legislative decision by a political court." Governor Herman Talmadge (D-GA) similarly pronounced, "The United States Supreme Court...has blatantly ignored all law and precedent...and lowered itself to the level of common politics." Governor James F. Byrnes (D-SC), a former Supreme Court justice, argued that "[t]he Court did not interpret the Constitution–the Court amended it." Katcher, *Earl Warren* at 323 (cited in note 26).

50: Quoted in Katcher, *Earl Warren*, 325-326. See also Schwartz, *Super Chief* at 114 (cited in note 49).

51: See *Pennsylvania v. Nelson*, 350 US 497 (1956); *Slochower v. Board of Education*, 350 US 551 (1956); *Cole v. Young*, 351 US 536 (1956); *Schware v. Board of Examiners*, 353 US 232 (1957); *Konigsberg v. State Bar*, 353 US 252 (1957); *Jencks v. United States,* 353 US 657 (1957); *Watkins v. United States,* 354 US 178 (1957); *Sweezy v. New Hampshire*, 354 US 234 (1957); *Yates v. United States*, 354 US 298 (1957); *Service v. Dulles*, 354 US 363 (1957).

Congress and overaggressive prosecutors in favor of the accused was viewed as undermining national security.[52] These decisions brought together disgruntled segregationists and right-wingers to create an anti-Court coalition that was wary of the long-term effects of the Court's activism.

This coalition of Southerners and conservatives, backed and emboldened by strong public opinion, reemerged after the School Prayer Cases again to criticize the Court. They did so by questioning the legitimacy of the Court in lieu of its prior decisions. Congressman George W. Andrews (D-AL) declared simply, "They put Negroes into the schools and now they have driven God out of them."[53] His colleague William G. Bray (R-IN) similarly connected *Engel* to other cases: "When the Court in one breath tells us that narcotics addiction is not a crime [see *Robinson v. California*[54]], and literature about homosexuals is not offensive [see *One, Inc. v. Olesen*[55]], but that we cannot lead our schoolchildren in prayer, they are coming dangerously close to destroying the confidence of the people in our laws and in our courts."[56] The National Review, a noted critic of the court, examined rhetoric in *Schempp* that suggested a strict constructionist approach to religious liberty–which the National Review found out of place given its opinion of the Warren Court's prior jurisprudence as dangerously activist. The author, M. Stanton Evans, wrote:

> "But do the Court and its Liberal supporters really believe... in strict construction of the Constitution? Do they truthfully think we should take alarm at the first governmental step beyond the severe limitations set down in the Constitution? Obviously not. When it comes to extending the power of the Federal Government ad libitum, to intimidating farmers, forcing laborers into trade unions, coercing businessmen, subsidizing indolence, or seizing property on the most dubious pretexts, the constitutional pieties of the Constitution and its incense-swingers evaporate into the ozone."[57]

Many of the Court's critics, such as Evans, saw the School Prayer Cases as evidence that the Court had again "gone too far" by banning children from

52: Friedman, 112 Yale L.J. at 194 (cited in note 29).
53: Belknap, *The Supreme Court* at 139 (cited in note 22).
54: 370 US 660 (1962).
55: 355 US 371 (1958).
56: Quoted in *Tempest Over School Prayer Ban*, 6 Christianity Today at 46 (Jul. 20, 1962).
57: M. Stanton Evans, *At Home*, 15 National Review at 6 (Jul. 9, 1963).

exercising basic American values.[58] These accusations are at their core countermajoritarian. The Court's opponents claimed that it had overstepped its powers by twisting the Constitution to fit whatever ends it desired. It thus was legislating and acting against the majority. Because the Warren Court was known for its unpopular decisions and commitment to liberal activism, opponents already had a framework with which to attack it for its rulings in the School Prayer Cases.

IIc. The Countermajoritarian Factors: Violations of Popular Will

Third, countermajoritarianism emerges when the Court is seen as interfering with popular will. As discussed above, the School Prayer Cases were unpopular with large majorities of Americans and were condemned by influential popular figures, especially in the media. These critics made appeals to democratic values, arguing that elected representatives and school administrators, as opposed to the Court, ought to decide for the people.[59] Others complained that nine unelected men could overturn the wishes of millions of Americans–"Are the people of the United States to be compelled to submit to a nine-man oligarchy?", asked Representative Frank J. Becker (R-NY).[60] These complaints were bolstered and made possible by the large majorities in the polls which disapproved of the Court's rulings in the School Prayer Cases.

However, most of the countermajoritarian criticism to the School Prayer Cases came not along these strictly majoritarian lines, but more subtly in the form of appeals to the heritage and tradition of the United States. I have termed this "populism through traditionalism," and I consider it to be a nuanced form of countermajoritarian criticism because it invoked American

58: See L. Brent Bozell, *Saving Our Children From God*, 15 National Review at 20 (Jul. 16, 1963). Bozell complained that the Court's power was unchecked: "There are, under these rules, no objective standards on which to base a judgment that the Court has, as a matter of law, gone too far ... the answer to the charge that the Court 'has gone too far' in the school prayer cases is that the Court is entitled to go just as far as it pleases in the direction of secularization."

59: Theologian Niels C. Nielsen argued, "It is not surprising that local and even state officials have been under public pressure not to change existing practice... The majority of parents and teachers did not wish the further secularization of public education." Niels C. Nielsen, *God in Education: A New Opportunity for American Schools* 6 (Sheed & Warn 1966).

60: *Hearings Before the Committee on the Judiciary On Proposed Amendments to the Constitution Relating to Prayers and Bible Reading in the Public Schools* at 225, ProQuest Congressional (Apr. 22, 1964).

values–which inherently are the values of the majority. Claims that the Court had violated American tradition also served to allege that the Court violated the moral will of the majority. This sort of criticism came from all lines of opposition: from religious figures, from conservative intellectuals, and from politicians. A Georgia Methodist bishop said succinctly, "It is like taking a star and stripe off the flag."[61] Again, in the National Review, conservative writer Will Herberg noted, "To the great mass of the American people, the Supreme Court decision in the *Engel* case appeared (perhaps rightly) as...a flagrant challenge to the American Way."[62] In hearings to amend the Constitution to overturn the School Prayer Cases, Representative Becker argued, "prayers and devotional exercises are a part of the cultural bloodstream of our Nation. Invocations, devotions, oaths taken on the Bible, et cetera, et cetera, are as American and as universal as a taste for apple pie, or ice cream, or watermelon."[63] By appealing to tradition, opponents of the School Prayer Cases were able to form an implicit majority of Americans behind them. Even the Americans who supported the decision were part of the shared American heritage and theoretically were part of this majority whose values the Court had violated.

The Court's critics also used appeals to history to make their countermajoritarian arguments. They invoked American history, not to criticize the Court's decision on the merits as Friedman argues, but to again create a majority of Americans that was necessarily allied with their viewpoint. Because all Americans shared this history, their democratic will had been violated by these cases. Billy Graham explained, "Prayers and Bible readings have been a part of American public school life since the Pilgrims landed at Plymouth Rock. Now a Supreme Court in 1963 says our fathers were wrong all these years."[64] Other conservatives appealed to the Founding Fathers–the authors of the First Amendment. The National Review wrote:

> "If there is any 'experiment on our liberties' taking place in the prayer controversy, it is being conducted by the Court itself. The historical evidence is overwhelming that, in proscribing an 'establishment of religion,' the Founding Fathers did not mean to separate governmental functions from the

61: Schwartz, *Super Chief* at 441 (cited in note 49).

62: Will Herberg, *Religious Symbols in Public Life*, 13 National Review at 145 (Aug. 28, 1962).

63: *Hearings Before the Committee on the Judiciary On Proposed Amendments to the Constitution Relating to Prayers and Bible Reading in the Public Schools* at 231 (cited in note 60).

64: *Response to Bible-Prayer Ban*, 7 Christianity Today at 47 (Jul. 5, 1963).

> idea of God. The words had a very specific import to them–meaning the institution of a state church... Patrick Henry, George Mason, and Richard Henry Lee–the original proponents of the Bill of Rights–would have been horrified at a ban upon reading the Bible or reciting the Lord's Prayer."[65]

In *Engel*, counsel for the Board of Education argued in oral argument that invocations of religion were present in the government and government documents through American history, and that 49 of 50 states recognized God in their state constitutions. Furthermore, he argued that the Board of Regents (the writers of the Regents Prayer) did not intend to establish a state religion, but instead to recognize and celebrate cherished American practices.[66] By using American history to make their argument, opponents to the cases in effect created a mutual heritage which the Court had rejected. Because opponents could claim that all Americans were affected by this misinterpretation, their claims were countermajoritarian.

IId. The Countermajoritarian Factors: Judicial Supremacy

Last, fury over Supreme Court decisions is strengthened if opponents do not believe that they can overturn or disregard the Court's rulings. By the 1960's, people believed that the Court's decisions were binding and required enforcement.[67] Indeed, the Court emphasized this principle as well. In *Coo-*

65: Evans, 15 National Review at 6 (cited in note 57).

66: Transcript of Oral Argument, *Engel*, 370 US at 421, in The Oyez Project at ITT Chicago-Kent College of Law (visited Feb. 22, 2014), online at http://www.oyez.org/cases/1960-1969/1961/1961_468/. Counsel Bertram R. Daiker argued, "I don't believe their purpose was to promote religion as such but they did and they so stated, they were seeking to promote a continuation of what they felt to be the traditions of this country in which God is inevitably mentioned and in which inevitably every document and every pronouncement recognizes that we got from God."

67: Friedman discusses earlier periods in American history where the public did not have so much respect for the Court's decisions. In the Jacksonian Period, other branches of government, including the President, believed that the Court held no inherent power (e.g. Jackson's famous quote, "Mr. Marshall has made his decision, now let him enforce it"). After *Dred Scott v. Sanford*, 60 US 393 (1857), antislavery forces believed that the decision would soon be overruled, by some fashion or another–and indeed it was by the Civil War. See Friedman, 72 N.Y.U. L. Rev. at 153 (cited in note 27). See also Keith E. Whittington, *Political Foundations of Judicial Supremacy* (Princeton 2007).

per v. Aaron,[68] the Court unanimously declared, "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 indispensable feature of our constitutional system."[69]

In opposition to the Court's claims, some observers called for the public simply to refuse to follow the decision. In the evangelical periodical Christianity Today, an editorial urged disobedience: "America's devout masses must act at the community level ... Citizens who pay soaring taxes with currency marked 'In God we trust' have every right to deplore any education premised on 'God we ignore.'"[70] Implicit in this message is an invocation of Justice Douglas's quote in *Zorach*: "We are a religious people whose institutions presuppose a Supreme Being."[71] Christianity Today felt that the Court in the School Prayer Cases abandoned its reasonable stance in *Zorach* and that the people's only option to continue to practice their religion was to disobey the Court. Political scientists Kenneth M. Dolbeare and Phillip E. Hammond studied school districts in unnamed Midwestern towns in 1971 and discovered that many of the schools still said prayers, read the Bible, and practiced a number of religious exercises, with little indication of impending change coming in the near future.[72] The justification for these actions came largely from a lack of respect for the Court stemming from its earlier controversial decisions. The National Review attacked the legitimacy of the Court, asking, "It remains to be seen whether the nation has energy enough to resist the Supreme Court before which we are always being told to be so reverential. The question becomes, increasingly, How can you revere this nation's historical institutions and also the Supreme Court of the United States?"[73] Here, the National Review connected the School Prayer Cases to other controversial decisions (of which the National Review also disapproved) in order to undermine the sentiment that Supreme Court rulings need be followed, with

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68: 358 US 1 (1958).

69: *Id*. at 18.

70: *Religion in the Public Schools*, 7 Christianity Today at 30 (Aug. 30, 1963).

71: *Zorach*, 343 US at 312.

72: Kenneth M. Dolbeare & Phillip E. Hammond, *The School Prayer Decisions: From Court Policy to Local Practice* 5-6 (University of Chicago 1971). The authors identified four factors which they believed hindered implementation of the School Prayer Cases: (1) officials prioritizing this issue below other policy goals, (2) officials pretending to themselves that they were in compliance, even though they were not, (3) a strong incentive to avoid conflict with constituents at all costs, (4) no interest from the people to change and no procedures on the state level by which to affect change. *Id*. at 6-8.

73: *God Go Home*, 14 National Review at 521 (Jul. 2, 1963).

the eventual goal of provoking mass disobedience of the Court on the school prayer issue.

Despite the presence of this rhetoric, few opponents actually attempted to disregard the rulings. Most recognized the legitimacy of the Court and instead attempted to amend the Constitution. They saw the School Prayer Cases as a step too far, and they wanted to undo the judgments and prevent the Court from making any further moves towards what they saw as the secularization of America. They went to this extreme step because they felt that all other avenues to achieve their desired goal were closed. The Court's decisions appeared to preclude all legislative attempts to integrate religion with schools, and the Court seemed unlikely to overrule itself.[74] In both 1962 after *Engel* and 1964 after *Schempp*, Congress held hearings to discuss a constitutional amendment which would allow prayer and Bible reading in public schools. Dozens of congressmen introduced resolutions for a possible amendment, as they feared offending their constituents in an election year.[75] These proposed amendments varied widely in their protections of religious practices–some focused specifically on public schools, while others expanded their protections of religion to all aspects of public life. One attempted to overturn *McCollum* and permit released time programs in schools, and a few more addressed the public funding issue mentioned by the Court.[76] The amendment push was led by Congressman Frank J. Becker, who argued that the majority's desire for prayer in schools should override the Court's stated concern for the protection of minority rights. In his testimony in the amendment hearings, Becker used much of the same rhetoric seen above:

> "The wisdom of our Founding Fathers is certainly demonstrated in this formula because after a measure has been approved by the Congress of the United States and then

74: The National Review complained, "But there seems to be no statutory recourse; and nobody's going to hang Earl Warren. The answer is clearly in the hands of the people: If that is what the Constitution says, then let us change the Constitution." *Bulletin*, 13 National Review at 1 (Jul. 10, 1962).

75: Belknap, *The Supreme Court* at 145 (cited in note 22). A typical resolution read, "Nothing in this Constitution shall be deemed to prohibit the offering, reading from, or listening to prayers, or biblical scriptures, if participation therein is on a voluntary basis, in any governmental or public school, institution, or place." H.J. Res. 693, Congressional Hearing, 22.

76: *Hearings Before the Committee on the Judiciary On Proposed Amendments to the Constitution Relating to Prayers and Bible Reading in the Public Schools* at 225 (cited in note 60). The public funding of religion issue was also of particular concern to Justice Douglas, see *Schempp*, 374 US at 227-230.

> approved by the legislative assemblies of the several States, who could deny that it was the will of the people, and who here is going to deny the right of the people to pass on this life-and-death issue involving the fabric of our culture, the warmth of our souls, and the dynamics of our traditions?"[77]

The push for the amendment incorporated many of the other elements of countermajoritarian criticism–public support in the form of widespread congressional backing for the amendment, disapproval of the Court's repeated rulings, and rhetoric used to defend religion–into a final concerted effort to overturn the School Prayer Cases.

If this criticism of the School Prayer Cases did not fit the countermajoritarian theory, then opponents of the position adopted by the Court would not have been able to claim that the right of the majority to practice its religion had been violated. A common belief was that the Court had undermined American tradition and robbed millions of Americans of their ability to practice their religion for the "sake of a few kooks" who did not believe in God and who wanted to force these beliefs on the rest of the country.[78] In *Engel*, a brief for families who approved of the Regents Prayer argued that subversive minorities were discriminating against the faithful majority. They wrote, "Petitioners seek, under the cloak of the First Amendment, to coerce the vast majority into subservience to their demands ... Petitioners demand that, because they do not like the Prayer or desire their children to participate, the Prayer and any other devotional reference to God must be outlawed for every teacher and child and from every public school."[79] Members of the pro-prayer majority used the First Amendment guarantee of free exercise of religion and the non-compulsory aspects of the prayer to make the countermajoritarian argument that the Court had disregarded the rights of the majority in favor of a series of small minorities. Even though the Court was unconvinced by these arguments,[80] their mere existence shows that opponents of the School

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77: *Hearings Before the Committee on the Judiciary On Proposed Amendments to the Constitution Relating to Prayers and Bible Reading in the Public Schools* at 214-15 (cited in note 60).

78: Urofsky, *The Warren Court* at 146 (cited in note 13).

79: Brief for Intervenors-Respondents, *Engel*, 370 US at 421, in Philip B. Kurland & Gerhard Casper, ed., 56 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 902 (University Publications of America 1975).

80: Speaking about the Free Exercise argument, Justice Clark wrote in *Schempp* that the purpose of the Free Exercise Clause "is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence

Prayer Cases considered themselves a majority that had been discriminated against and that were willing to employ countermajoritarian rhetoric in their effort to fix what they believed to be the Court's injustices.

Despite the prevalence of countermajoritarian criticism to the School Prayer Cases in the national discourse, not all of those who commented about the cases disapproved of the results. The supporters of the decisions largely matched the arguments used by the Court. Americans were slowly convinced that the Court's stance was the only position that unconditionally guaranteed religious freedom, and that prohibiting public religiosity actually strengthened religion. The Washington Post wrote about *Engel*:

> "[It] is an act of liberation. It frees school children from what was in effect a forced participation by rote in an act of worship which ought to be individual, wholly voluntary and devout. It frees the public schools from an observance much more likely to be divisive than unifying. And most important of all, perhaps, it frees religion from an essentially mischievous and incalculably perilous sort of secular support."[81]

A letter to the editor in the National Review agreed, criticizing the magazine's opposition to the cases, "You estimate that 'at most' ten per cent of the citizenry support the decision and offer that as a reason for ridiculing it as 'petty, niggling, nasty.' The answer, of course, is that The Bill of Rights was designed to protect the rights of the minority of citizens. The majority do not need a bill of rights."[82] These supporters of the School Prayer Cases agreed with the Court that these cases were necessary to ensure continued religious freedom in the United States. Their argument was the opposite of the coun-

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it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *Schempp*, 374 US at 223. With this definition of the Free Exercise Clause, the Court clearly did not believe that the majority's rights had been violated when it instituted a prayer in public schools. As for the compulsion argument, Chief Justice Warren in oral argument in *Engel* responded to the claim that the Regents Prayer was different to the invocation to God at the start of the Supreme Court session, "I wonder whether it would make a difference if we were to require every litigant and lawyer who comes in here to say the same prayer your school district requires." Schwartz, *Super Chief* at 441 (cited in note 48).

81: Quoted in *Tempest Over School Prayer Ban*, 6 Christianity Today at 46 (cited in note 55).

82: *Letters to the Editor,* 13 National Review at 75 (Jul. 31, 1962).

termajoritarian idea: because the majority could pass the legislation it desired, the Court's duty was to protect minorities against tyranny of the majority.

Similarly, many of those who approved of the School Prayer Cases believed that removing religion from public life would strengthen it, rather than weaken it. Many mainstream religious groups agreed with the Court's defense of the separation of church and state because the state could not help religion by picking one faith over another or by distilling it to such a basic level as to remove everything sacred from it.[83] Many Americans also believed that religion of any kind had no place in public life because it belonged in the home and the church.[84] A letter to the editor in the National Review from a minister stated, "I cannot in obedience to my Lord permit my children to engage in state-enforced prayer and Bible reading. Such training is my responsibility and privilege, and the state may not intervene in this very personal matter."[85] Large religious groups offering public support for the Court's decisions undermined the line of criticism that only small minorities of atheists disapproved of prayer in schools.

Each of the four factors identified by Friedman as necessary for the emergence of countermajoritarian criticism was present in the responses to the School Prayer Cases–and the rhetoric used was indeed countermajoritarian. The public generally supported the idea of prayer in schools because of a sentiment that the increased religiosity in the United States ought to be reflected in American institutions–especially in the Cold War context as a contrast to the atheist Soviet Union. The School Prayer Cases came in a period of judicial activism, after a series of controversial decisions which aroused criticism towards a Court seen as overly liberal and willing to twist the Constitution to any end it desired. These cases created a conservative coalition that disapproved of the Warren Court's liberalism and was fearful of any ruling which went against their beliefs. Critics of the School Prayer Cases were able to create a majority of Americans in opposition to the Court, as they invoked rhetoric of American traditions to claim that the Court had theoretically violated

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83: Urofsky, *The Warren Court* at 147-148 (cited in note 13). This matches the attitude of the Court, as many of the justices were themselves strongly religious men. Black wrote in *Engel*, "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance." *Engel*, 370 US at 435.

84: Brief of American Jewish Committee and Anti-Defamation League of B'Nai B'rith as Amicus Curiae, *Engel*, 370 US at 421, reported within Kurland & Casper, *Landmark Briefs* at 935-936 (cited in note 79).

85: *Letters to the Editor,* 15 National Review at 119 (Aug. 13, 1963).

the democratic will of every American who shared the common heritage of centuries of the inclusion of religion in public life. They leveraged this majority in support of their push for a constitutional amendment to overturn the cases. Because they felt that both disregarding the Court and circumventing the Court through legislative means were impossible, their only other option to preserve displays of religion in public schools was to amend the Constitution. Last, they claimed that the Court was preventing them from freely exercising their religion, a claim they could not have made if their rhetoric was not countermajoritarian.

III. Conclusion

The School Prayer Cases provoked a far-reaching public discussion about the proper place of religion in public life. On one side, conservative critics alleged that the Court, by rejecting American heritage and traditions, had violated the choice of the majority to pray in schools. On the other, the Court's liberal defenders argued that the Court protected religious liberty and strengthened religion by removing it from schools. This debate did not achieve the desired effect for the countermajoritarian opposition, as the proposals for a constitutional amendment never reached the two-thirds majority needed in Congress to send the amendment to the states. In the end, the countermajoritarian movement was short-lived, only lasting until the end of the summer in both 1962 and 1963.[86] Although it was probably only a small percentage of the public reaction to the cases, the support for the Court played a large role in muting the countermajoritarian rhetoric of the opposition forces and facilitating the eventual acceptance of these decisions by the public.

A few factors contributed to the overall failure of the anti-Court coalition to coalesce its countermajoritarian rhetoric into action. First and most importantly, the opponents never commanded an active majority. The inclusiveness of their rhetoric was able to create a broad theoretical faction that implicitly supported prayer in schools because of a shared heritage, but the number of people willing to act to preserve prayer in public schools was never large enough to reverse the rulings. Many of the people included in the majorities that the countermajoritarian critics described as disapproving of the School Prayer Cases actually agreed with the decisions. Furthermore, this active group quickly shrunk to a very small minority once the Court's backers

86: Both *Engel* and *Schempp* were decided in June of their respective years. However, in the National Review, the last mention of *Engel* was in late August 1962, and the last mention of *Schempp* was in late September 1963.

were able to make their arguments heard. Incendiary reactions by some political and religious leaders and in the media inflamed the public shortly after the announcements, but, eventually, commentary by other respected figures emerged to defend the Court and temper public opinion.[87]

Second, to most Americans, the existing conservative anti-Court coalition was a poor ally, as it was comprised of many segregationist Southerners who they saw as distasteful. Association with this faction cost critics of the School Prayer Cases important support from moderates, especially in mainstream Protestant communities.[88] Last, after much national deliberation, there was no agreement about which faith the government should aid, if any at all, or how the government ought to support religion. Thus it became clear that the only position that a majority of Americans could agree upon was government neutrality to religion–the position taken by the Court.[89] These forces chipped away at the opposition until it was too small to effect real change, and convinced the rest of the country that the School Prayer Cases ought to stand.

The School Prayer Cases are important for scholars of the countermajoritarian difficulty because they provoked a legitimately countermajoritarian resistance that was quickly silenced, not by the suppression of its viewpoints, but by engagement in a civil national discussion about the proper role of religion in public life. The opposition's views were respectfully noted, but, ultimately, they were shown to be the opinion of only a minority of Americans, fatally undermining their arguments. Although critics effectively used countermajoritarian rhetoric in order to fight the rulings, the final result of this national debate was an affirmation of the Court. While a few conservatives never reconciled themselves to the Court's position, many of the initial detractors of the School Prayer Cases changed their beliefs once they realized that the Court did not in fact disregard the various opinions of the people when it interpreted the Constitution. With their fears of a secular nine-man dictatorship working to destroy religion in America effectively quelled and pubic support for their position falling, they dropped their countermajoritarian rhetoric, and thus *Engel v. Vitale* and A*bington School District v. Schempp*, became the permanent law of the land.

87: Katcher, *Earl Warren* at 422-423 (cited in note 26), argues that early media coverage irresponsibly misrepresented the cases, fueling the critics. Jim Newton, *Justice For All: Earl Warren and the Nation He Made* 395 (Riverhead Books 2006), notes the importance of President Kennedy's defense of the Court in muting the opposition, even as other political leaders condemned the decision. See also Schwartz, *Super Chief* at 442-443 (cited in note 49); Powe, *The Warren Court* at 189 (cited in note 40).

88: Powe, *The Warren Court* at 190 (cited in note 40).

89: Belknap, *The Supreme Court* at 130 (cited in note 22).

Reframing Abortion in Argentina: Evolving Discourse Surrounding Abortion's Reintroduction into the Political Spotlight

Emily Heaton†

Abstract

A "silent revolution" unfolding among the Argentine constituency—a majority of which now supports the legalization of abortion—has resulted in a disconnect between the modernization of morality and the reflection of this evolution in the Argentine political sphere, where abortion policy has traditionally been "shelved" by politicians and absent from Congressional debates. In light of Argentina's socially and politically active constituency, surveys that reflect support for the legalization of abortion, and recent strides to increase women's representation within the political sphere, it is surprising that Argentina's abortion policy has until recently remained relatively unaddressed. This paper will describe how the discourse surrounding abortion has evolved over the last century in Argentina, and consider what implications this evolution holds for the political visibility of abortion policy there. I will argue that the dominant discourse surrounding abortion has shifted from a morally charged absolutist framework to a technical one, and that this shift carries with it the potential to bridge the divide between public discussion and private practice, and to bring abortion policy further into the Argentine political spotlight. Examining the evolution of this discourse is important because it will generate a better understanding of the conditions that catalyze the liberalization of restrictive policies toward women. A more complete understanding of these factors will allow policymakers to more effectively frame abortion-related discussions and overcome the high political costs of supporting such contentious policies. An analysis of several primary sources, including the platforms of major Argentine political parties, international NGO reports, and popular discourse in newspaper articles, serves to illuminate such implications.

I. Introduction

Chester Barnard famously claimed that the authority of an institution rests upon the consent of individuals and the support of public opinion.[1] While his thesis was extrapolated from his examination of American business and governmental systems in the early twentieth century, Barnard meant for this claim to be understood universally, within any organized hierarchical system. If, however, we apply Barnard's principle specifically to Argentina, and claim that the authority of Argentine policy rests upon its validation by individual citizens, we can identify a discontinuity between what is legal and publicly espoused, and what citizens may privately believe and put into practice.

In Argentina, where abortion is illegal in most cases,[2] public discussions surrounding abortion have traditionally been carried out within highly contentious, morally charged rhetorical frameworks. However, the anti-abortion stance of the Argentine public position and governmental policy has not stopped the practice of abortion—both legally and, more often, *illegally*. Indeed, in Argentina during the 1990s, there were between 300,000 and 500,000 abortions performed annually, and only approximately 30 to 50 of those were legal procedures.[3] The human tragedy and public health consequences resulting from driving abortions underground cannot be understated; many women who are unable to *legally* undergo abortion services are forced to use inhumane and life-threatening tools—such as knitting needles, rubber tubes, and parsley sprigs—to abort.[4] Such techniques are significant drivers behind Argentina's maternal mortality rate—the primary driver of which is unsafe, often underground abortions, and reported in 2010 to be at a 23-year high.[5] Yet concerns surrounding the health and humanitarian consequences

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1: Chester I. Barnard, *The Functions of the Executive* 164 (Harvard 1938).

2: In 2012 the Argentine Supreme Court reaffirmed that abortion is only permissible in cases of rape and danger to the mother's life.

3: Merike Blofield, *Women's Choices in Comparative Perspective: Abortion policies in Late-Developing Catholic Countries,* 40 Comp. Pol. 399, 404 (2012).

4: *Decisions Denied: Women's Access to Contraceptives and Abortion in Argentina,* Human Rights Watch (2005), online at http://hrw.org/reports/2005/argentina0605/.

5: Blofield, 40 Comp. Pol. at 405 (cited in note 3); Helen Morgan, *Historic Abortion Debate Begins in Congress,* Argentina Independent (Dec. 6, 2010), online at http://www.argentinaindependent.com/currentaffairs/

of restrictive abortion policies have until the past two decades remained relatively unvoiced. Despite a survey from October 2012 concluding that almost 60 percent of Argentine citizens support the legalization of abortion, most of these citizens incorrectly believe that the majority in Argentina supports the *status quo* of illegal abortion, and that they themselves would be reprimanded for vocalizing their opinion to legalize the service. Thus a "silent revolution" exists in Argentina; despite a majority of citizens who support the legalization of abortion, debates on the matter are largely absent from the political arena.[6] From this "silent revolution" emerges Argentina's "double discourse," defined as the public espousal of restrictive abortion policy despite citizens' own beliefs and life-threatening behaviors that disregard the illegality of abortion.[7]

Barnard's above-mentioned theory of the source of authority offers an interpretation of the equilibrium achieved by the "silent revolution" and the implications it holds for Argentine politics. If we are to understand the authority of Argentine abortion policy as dependent upon the Argentine constituents themselves, then we can see that there exists a disconnect between public abortion policy and those citizens' private opinions and practices in Argentina.

The implications of this disconnect are twofold. First, because the majority opinion remains silenced and fragmented "underground," there is little reason for politicians to feel incentivized to address abortion policy in their agendas. Politicians often shelve morally contentious abortion issues and instead address other, less polarizing (and, as they frame it, "more pressing") political issues.[8] On the other hand, the "silent revolution" reveals a gap between Argentine morality and the political sphere, which fails to reflect citizens' true opinions and current conceptions of morality. How long can this situation persist?

Various factors serve to maintain the equilibrium held by the "silent revolution" and "double discourse." Beyond the historical and ideological back-

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newsfromargentina/historic-abortion-debate-begins-in-congress/.

6: Mariana Carbajal, *Lo que se piense pero no se dice en voz alta,* Página 12 (Nov. 5, 2012), online at http://www.pagina12.com.ar/diario/elpais/1-207155-2012-11-05.html.

7: Bonnie Shepard, *The Double Discourse on Sexual and Reproductive Rights in Latin America: The Chasm Between Public Policy and Private Actions*, 4 Health & Hum. Rights 110, 114 (2000).

8: Carbajal, *Lo que piensa pero no se dice,* Página 12 (cited in note 6) (translated by the author: "'*Hemos tenido otras iniciativas como la tipificación del femicidio y la derogación del avenimiento," justificó la omisión en diálogo con este diario*'").

ground of Argentina that has contributed to this phenomenon, the voices employed by advocates on both sides of the abortion debate have played a major role in the development of abortion policy, and have affected the feasibility of politically addressing such issues. An analysis of the rhetorical framework surrounding abortion offers an explanation as to why and how the disconnect between public espousal and private practice of abortion policies in Argentina has historically been sustained.

It is from within the context of this double discourse and rising concerns regarding unsafe illegal abortions in Argentina that I pose the following question to guide my research: *what implications does the evolution of the discourse surrounding abortion in Argentina hold with respect to the political salience and visibility of abortion policy?*

Literature that addresses Argentina's ideological and political history and the challenges facing current efforts to liberalize abortion policy is extensive. Yet both an explicit connection between Argentina's past and the traditional discourse surrounding abortion policy (which frames abortion as morally wrong), and the recent trend to redefine abortion policy in terms of a specialized, technical framework remain largely under-examined in academic literature. What I do here, then, is begin by drawing a more explicit connection between Argentina's traditionally emotional dialogue surrounding abortion and the nation's historical narratives—especially those discussed by authors (e.g., Marcela Nari, Asunción Lavrin, and Dora Barrancos) who approach Argentine history through a gendered lens. I then categorize various primary sources—including Argentine newspapers, a Papal encyclical, Church-sponsored articles, political platforms, and NGO reports—in order to trace the emergence of a new dominant rhetorical framework and analyze the implications of this new, more technical discourse. In so doing I contribute to a more holistic understanding of the evolution, implications, and effectiveness of an emerging trend to reclassify abortion discourse under a more technical umbrella.

In this paper I argue that although cultural and ideological norms that form the foundation of Argentine society have historically defined abortion in *absolutist* terms—which convey issues as highly emotional, symbolic, and morally polarizing—these norms are losing their salience. While certain trends still suspend abortion within morally charged absolutist positions and generate a rift between *de jure* and *de facto* interpretations of reproductive health policy, there is evidence that *both* sides of the abortion debate have increasingly become framed in terms of public health and humanitarian concerns—*technical* arguments which address a policy from a specialized per-

spective, the nature of which is considerably less contentious and which usually only concerns experts within a certain field.

In addressing my research question, I use secondary historical narratives on the political and ideological roots of Argentina, in order to contextualize the traditional absolutist framework surrounding abortion. In assessing the shift in the discourse surrounding abortion, however, I primarily rely on contemporary newspaper articles, political platforms, and NGO reports. This is because, due to the relative novelty of the trend in Argentina, this transformation has yet to be fully examined in academic literature. I demonstrate the shift of the rhetorical framework by examining the influence of the historic Argentine political ideology upon traditional discourse, and comparing this to a more current discourse rooted in public health and human rights-oriented arguments.

Theoretically, this paper contributes to a greater understanding of the interplay between policy and rhetorical frameworks, and how a shift in discourse toward the technical may influence the liberalization and effective implementation of reproductive health policy. I will also suggest how a discourse can be cultivated that will more effectively and consistently protect women of all socioeconomic strata. A deeper examination of these issues might also help clarify more general mechanisms for negotiating morally charged political issues.

The paper proceeds as follows: I first address the historical and ideological factors in Argentina that have contributed to abortion's absolutist framework. I demonstrate how factors including nationalism, the pro-maternal family model, motherhood, and the Catholic Church have constructed a culture that historically has rendered abortion ideologically unacceptable within Argentine society. These factors also have contributed to the formation of the "silent revolution" and "double discourse," under which a moral shift among Argentine citizens is outwardly suppressed by absolutist forces and lacks political visibility.

The second major section exposes three important consequences of the previously hegemonic absolutist legacy in Argentina. I demonstrate how an absolutist legacy still serves to demonize abortion, which results in high political costs for officials who openly support abortion rights, polarizing and emotional clashes among advocates on respective sides of the abortion debate, and a rift between new legislation implemented in 2002 to protect women's reproductive rights and its *de facto* interpretation and implementation in Argentine public health centers. These three consequences serve to contextualize the shift from a traditionally hegemonic absolutist discourse toward a more

neutral, less "impolitic" technical one.

The third section addresses the basic shift in the rhetorical framework surrounding abortion in Argentina from a traditionally absolutist, morally charged discourse to a more technical one, in which arguments surrounding human rights and reproductive health are gaining salience. Specifically, a report published by the Human Rights Watch is especially revealing in justifying its involvement in abortion policy, which is grounded in humanitarian and public health concerns.

A final section of the paper addresses yet another dimension to the shift in the discourse surrounding abortion—this time, in the form of a technical shift *within* the very absolutist position that I address above. This trend reflects how ostensibly absolutist advocates, who traditionally have expounded uncompromisingly absolutist arguments, are now beginning to remodel their arguments to mirror the now-dominant technical discourse that advocates of the other side of the abortion debate have popularized—a discourse more palatable to modern audiences. While this trend stands as a testament to the growing relevance and deference paid toward technical concerns surrounding abortion policy, the new line of discourse nevertheless remains rooted in morally charged, theological content. Regardless, the nuance that characterizes the evolution of the rhetoric surrounding abortion in Argentina is rich, and I conclude the paper with the implications of this evolution for the possibility of transforming the "double discourse" and "silent revolution" into a greater political openness about abortion policy.

II. Abortion as Absolutist: The Cultural Construction of an Absolutist Framework

The following section establishes an explicit, and in many senses *causal*, connection between Argentina's historical narrative and the traditional absolutist rhetorical framework surrounding abortion. I argue here that elements of the Argentine political and ideological models, including demographic policies, firmly established connections among womanhood, motherhood, and patriotism, the exaltation and sanctification of the family unit, and the strong alliance between the Church and authoritarian regimes, have cultivated an absolutist—and both *oppressive* and *repressive*—discourse surrounding abortion.

Abortion policy in Argentina has historically reflected the country's political ideology, and has long been deemed both illegal *and* morally repugnant—

put simply, "the distinction between immorality and criminality is blurred."[9] As political scientist Mala Htun argues, abortion has "provoke[d] rhetorically charged public debate informed by clashing world views, principled beliefs, and religious and ethical traditions"—traditions which constitute the bedrock of Argentine political identity.[10] Htun makes an important contribution to our understanding of two opposing frameworks for gender policies:

> "'Absolutist' policies tend to be seen in symbolic terms, provoke gut responses and value clashes…Religious institutions are likely to weigh in on changes to an absolutist agenda. 'Technical' policies, by contrast, demand expert knowledge and provoke little public controversy. Change on technical issues is less likely to put religion on the defensive."[11]

She points out that absolutist discourse—rather than technical discourse—has traditionally surrounded the issue of abortion in Latin America. Importantly, there exists a connection between the current state of abortion policy in Argentina, the nation's political and ideological roots, and the absolutist discourse that has historically surrounded abortion debates there.

Today, abortion in Argentina remains illegal, yet it is considered un-punishable under two exceptions—the first being the case of rape, and the second being the case of the pregnancy's endangerment of the mother's life. Yet even in 1921 when legislators introduced these two exceptions, such changes did not reflect any growing moral acceptance of the practice of abortion among Argentine lawmakers and citizens. Rather, upon a closer analysis of this revision, it becomes clear that even the liberalization of abortion in these cases remains fully aligned with Argentina's traditional absolutist restrictions surrounding abortion.

In the case of rape, lawmakers accepted abortion as a way to reaffirm a woman's sense of honor, an especially important source of social capital for families in nineteenth and twentieth century Argentina. At this time, a woman's honor was tied to her own chastity, yet defended and supervised by the men in her family. Rape, then, was not only an affront to a woman's honor, but also an acutely felt injury to a *man's* sense of authority over his woman's

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9: Shepard, 4 Health & Hum. Rights at 114 (cited in note 7).

10: Mala Htun, *Sex and the State: Abortion, Divorce and the Family Under Latin American Dictatorships and Democracies* 4 (Cambridge 2003).

11: *Id.* at 5.

sexuality. Thus the reaffirmation of women's honor after it was wrongly impinged upon in the case of rape was *not* to acknowledge women's right to reproductive autonomy, but rather to reaffirm and restore the men's control over women's sexuality and honor. Similarly, under the second case of endangerment of the mother's life, aborting was justified by her survival as a *mother* so that she could, in the future, produce more offspring and/or care for her existing children.[12] As I discuss below, such motives for liberalizing abortion policy—to reaffirm men's control over female sexuality and to protect women's biological and social functions of procreation and childrearing—reflect women's subordination in nineteenth and twentieth century Argentine society. Thus even this apparent concession in 1921 reflects ways in which the Argentine ethos has tied women to their roles as mothers and historically categorized abortion as incompatible with the nation's interests.

One such element is the nationalist policy of various ruling parties employed as a reaction to anxieties surrounding the declining birth rate—called *denatalización*—that occurred in Argentina between 1920 and 1940 as a result of the proliferation of birth control methods among the population. In a society famously associated with the adage, "to rule is to populate," political success was closely associated with a healthy, strong, and vast population of citizens that could defend and pursue the nation's interests.[13] When between 1914 and 1936 Argentina's birth rate declined by 60 percent, leaders viewed the decline as a "catastrophe" indicative of the race's "spiritual and physical degeneration" and "moral corruption."[14] Importantly, *denatalización*—and the moral corruption from which it was perceived to have stemmed—was associated solely with women, who were blamed for "consciously rejecting" their biological functions, thus directly contributing to the country's declining birth rates.[15] In response, women who sympathized with the ruling parties' agendas consciously abstained from using birth control pills and other methods of contraception. They did so because "it was necessary to ensure that the popular sectors, from which the militancy recruited, were preserved from the indignity of contraceptive methods aimed at curbing the birth rate."[16]

12: Marcela Nari, *Políticas de maternidad y maternalismo político: Buenos Aires, 1890—1940* 193 (2004).

13: The adage, "to rule is to populate" was popularized by politician Juan Bautista Alberdi in the mid-nineteenth century.

14: Nari, *Políticas de maternidad y maternalismo político* at 28, 30 (cited in note 12).

15: *Id.* at 28.

16: Dora Barrancos, *Mujeres en la sociedad argentina: una historia de cinco siglos* 232 (Sudamericana 2007) (translated by the author: *"…era necesario asegurarles*

The self-denial of women, reflected in their deliberate rejection of their own reproductive autonomy, was a necessary element of the ruling parties' agendas to protect the interests of the nation.

Additionally, the nationalist policy surrounding demographics reflects the strong association between the growth of the Argentine population and the health of the nation as a whole—a connection which illuminates the centrality of the family and the ubiquitous expectations surrounding women's self-abnegation in Argentina. Since the act of reproduction was held sacred under the Catholic sacrament of marriage, the family unit, within which reproduction between man and wife occurred, became the fundamental unit of the Argentine political ethos. "Effectively," in Argentina "there existed a consensus that considered the family as a 'natural' institution, which presupposed the social pact." Fundamentally, then, "the family was considered the 'basis' of society"—a condition which merited state intervention.[17] Because of the inviolability of the family unit and the important biological role that women play in the formation of the family, it was accepted that women's autonomy and individual rights came second to "the supremacy of the nation's needs, represented in the basic societal unit, the family."[18] As with the case of nationalist policies surrounding *denatalización*, women's own self-abnegation in the service of the family, and of society in general, became a deeply engrained and well-accepted element of Argentina's traditional ethos.

It is due to the strong connection between women's reproductive roles and the centrality of the family that motherhood in Argentina became closely associated with patriotism. Similar to the rhetoric employed by those concerned about the "moral corruption" and "degeneration" of the "race" associated with *denatalización*, "the life of the mother" was expected to "be dedicated to" the upbringing of children, which was equated to the upbringing and care of "the State and the [Argentine] race."[19] It became women's obligation,

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a las mujeres de los sectores populares, en donde se radicaba la militancia, que serían preservadas de la indignidad de las intervenciones para dificultar la natalidad").

17: Nari, *Políticas de maternidad y maternalismo politico* at 63 (cited in note 12) (translated by the author: *"Efectivamente, existía un gran consenso en considerar a la familia como una institución 'natural', previa al pacto social, universal, ahistórica y jerárquica…Finalmente, la familia era considerada la 'base' de la sociedad"*).

18: *Id*. at 67 (translated by the author: *"Estas operaciones permitían legitimar la subsunción de los derechos individuales a los intereses supremos de la sociedad, representados en su célula básica, la familia"*).

19: *Id.* at 63 (translated by the author: *"…el Estado y la 'raza' y a cuyo cuidado y crianza quedaba dedicada a la vida de la madre"*).

as mothers, to fulfill their biologically determined—and, subsequently, socially-ascribed—function to rear healthy, strong citizens for the nation. The mother who put herself and her own needs second to the needs of her family and thus the Argentine state was glorified as the epitome of the patriotic citizen. The strong tie between motherhood and patriotism was perhaps best articulated by President Perón in 1974: "the fundamental maternal mission of women…and their natural calling," said Perón, is their role as the "protagonists of the future of the State."[20] Perón went on to address the anti-conception measures that posed a threat the nation's birth rate. Said Perón, efforts to prevent or terminate pregnancies are "against Argentine interests," and threaten "the fundamental maternal mission" natural to all women.[21] Here we can observe the extent of the Argentine ethos surrounding motherhood and its ideological incompatibility with abortion; such an act was not only conceived of as an affront to citizens' sense of morality, but also as a threat to the very cornerstone of national strength and stability.

The association between motherhood and patriotism and the ties between women's reproductive roles and the health of both the family and the nation are all symptoms of the firm connection between womanhood and motherhood in Argentina. Historian Marcela Nari refers to this linkage as the "maternalization" of women, which she describes as a trend originating in the 1920s and 1930s characterized by "the progressive confusion between the state of motherhood and womanhood, femininity and maternity."[22] Women, due to their biological functions and their reproductive roles, were seen as destined to become mothers. Historian Asunción Lavrin articulates how the link between womanhood and motherhood resulted in profound policy and social implications:

> "The lives of mother and child were indissolubly tied at all times. "Protection to the maternal womb" was a sacred undertaking…Who was at the center of the multiple efforts of

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20: Barrancos, *Mujeres en la sociedad argentina* at 235 (cited in note 16) (translated by the author: *"…la fundamental misión maternal de la mujer…[y] de su natural deber [es] como protagonista del futuro de la Patria"*).

21: *Id.* (translated by the author: *"…la denatalidad respondía a 'intereses no argentinos' y…se había afectado 'la fundamental misión de la madre desnaturalizando la fundamental función maternal de la mujer…"*).

22: Nari, *Políticas de maternidad y maternalismo político* at 101 (cited in note 12) (translated by the author: *"La maternalización de las mujeres (es decir, la progresiva confusión entre mujer y madre, femineidad y maternidad…"*).

> policy definition and execution—the mother or the child? The tension was resolved by adopting the concept of the 'mother-child dyad,' a phrase often cited in political, legal, and medical circles to support measures on behalf of motherhood, childhood, and the family. Mothers and their children were welded in a tight ideological unit that left motherhood intact as the paramount role for the female sex. Women remained subject and object of the cult of motherhood."[23]

Arguably the most important implications of the "mother-child dyad" about which Lavrin speaks were the policy measures aimed at protecting mothers and their reproductive roles. Yet although Lavrin notes that women became both the "subject and object" of such policies, the true objects of many such policies were *not* ultimately mothers, but rather Argentine families. Because of the link that Argentine society drew between women and their production of future citizens, legislators implemented policies to protect and reinforce this association. Along this line, Nari argues that for many, the objective of protectionist policies—most often geared toward working women (e.g., policies to introduce a cap on working hours, a pre- and post-natal rest period, a ban on nighttime labor, and a "motherhood subsidy" for women)—was to enable "the State to fulfill its obligation of taking care of the population and protecting the health of future citizens (not only the health of the mothers, but of the children as well)."[24] A statement issued in conjunction with protectionist policy emphasizes this point: "it is urgent 'to protect the working mother and to ensure that adequate attention is paid to her own physical and moral health, as well as that of her descendants…in order to protect the Argentine family.'"[25] Thus, through such policies, women became objectified as the nation's "reproductive goods," a relation which further tied

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23: Asunción Lavrin, *Women, Feminism, and Social Change in Argentina, Chile, and Uruguay, 1890—1940* 124 (University of Nebraska 1995).

24: Nari, *Políticas de maternidad y maternalismo político*, 158–159, 151 (cited in note 12) (translated by the author: *"…la obligación del Estado de encargarse de la población y proteger la salud de sus futuros ciudadanos (no sólo ni exclusivamente la de las mujeres sino la de sus hijos*)").

25: Barrancos, *Mujeres en la sociedad argentina* at 216 (cited in note 16) (translated by the author: *"…era urgente 'amparar adecuadamente a la madre que trabaja, asegurar la atención a su salud física y moral como a la de su descendencia…para proteger a la familia argentina*").

women to their maternal role and to society's expectations of female self-abnegation. Says Nari, "women did not control their own persons and bodies; it was society which had the right to decide how women were to use their bodies."[26] Two related trends here—the first being the allowance of privileges and protection for women grounded *not* in their humanity but rather in their roles as mothers and "reproductive goods," and the second being the tendency to prioritize the needs of society over the advancement of women—are symptoms of an absolutist legacy and, even in modern times, are central to contemporary barriers obstructing the implementation of reproductive health policy which I address below.

The trend to grant women certain privileges solely because of their status as either current or future mothers is not isolated to the realm of protectionist legislation in Argentina; rather, many women leveraged the tight association between womanhood and motherhood in order to justify greater involvement in the political sphere. Yet Lavrin describes this trend as a "double-edged sword: "Women used the appeal of culturally safe images to carve a niche in politics…and…to project the role of women as social redeemers to gain social acceptability. Since gender typing can be a double-edged sword, in politics it reinforced the stereotype of women's biological image that confined them to specific areas in public life."[27] Women gained visibility in society, yet their larger roles stayed safely within the bounds of what was considered acceptable feminine behavior. The epitome of this "double-edged sword" is illustrated in the story of the Madres de Plaza de Mayo, in which the mothers of individuals who had been kidnapped, detained, tortured and murdered by the military dictatorship during the Dirty War of 1976–1983 organized to demand the return of their children and the legal retribution of those responsible for the abduction of their children. This story, exalted by many as a case in which Argentine women justified their involvement in a political and social campaign for human rights and democracy, and cited by many as an emblematic example of female activism in Latin America, is also reflective of the constraints imposed upon women by the ties between motherhood and womanhood. On one side of the "sword," it is certainly true that women, taking advantage of their social roles as mothers and nurturers, gained a

26: Nari, *Políticas de maternidad y maternalismo político* at 151 (cited in note 12) (translated by the author: *"En este último sentido, las mujeres eran comprendidas como un 'bien reproductivo' de la nación. Prácticamente, su persona y su cuerpo no les pertenecían; no eran ellas sino la sociedad la que tenía derecho a decidir sobre ellos"*).

27: Lavrin, *Women, Feminism, and Social Change* at 13 (cited in note 23).

political consciousness—perhaps most notably so when the Madres rejected the government's exhumations after the *desaparaciones*: "'Our dead children are no use to us,'" said the Madres, "'we don't want a tomb to cry at; we want to know who was responsible and we want them in prison.'"[28] The other side of the "sword," however, demonstrates how the Madres limited themselves as they justified their actions by appealing to motherhood. Said one of the Madres—who were at times referred to as *dolientes,* or *mourners*—"'seeing how our own beloved children suffered has brought us together in this struggle, a fight of which we cannot take leave.'"[29] By tying their newly gained social and political participation to moral norms and their roles as mothers, the women further tightened their association with motherhood and, in so doing, contributed to the absolutist legacy that would later pose an obstacle to the attainment of their own *physiological* autonomy.

Of course, in a country where, as of March, 2013, ninety-two percent of citizens were "nominally Roman Catholic" (although not all of these citizens consider themselves "practicing"), no discussion of the absolutist roots of Argentine society is complete without an analysis of the Catholic Church's role in the formation of the country's moral norms.[30] An encyclical issued in 1968 by Pope Paul VI, entitled *Humanae Vitae*, epitomizes the Church's general stance on abortion and the absolutist discourse it employs in order to demonize it. The encyclical begins by exalting human procreation as "supernatural" and "eternal"—and denounces both contraceptives and abortion as morally "repugnant"—therefore placing the jurisdiction of such issues as beyond the scope of mere civil law.[31] Rather, Paul VI claims that the act of procreation is under the domain of moral and natural law, to which God entrusts the guardianship of the Church. Paul VI further makes explicit the Church's absolutist stance on abortion by tying natural law to "the will of God," a "faithful ob-

28: Jo Fisher, *Where are our Children? Mothers and Grandmothers of the Disappeared in Argentina*, in *Out of the Shadows: Women, Resistance and Politics in South America* 117 (1993).

29: Barrancos, *Mujeres en la sociedad argentina* at 259 (cited in note 16) (ranslated by the author: *"'….al ver cómo el amor y el dolor por el sufrimiento que padecen nuestros hijos, ha logrado unirnos en la lucha, una lucha que no podernos dejar'"*).

30: *Argentina: Religions,* The World Factbook (2013), online at https://www.cia.gov/library/publications/the-world-factbook/geos/ar.html.

31: Paul VI, Humanae vitae, *Encyclical Letter on the Regulation of Birth*, The Vatican (1968), online at http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html.

servance" of which is "necessary for men's eternal salvation."[32] To the Church, then, abortion is not a technical reproductive health service, but instead is a direct affront to natural law, to God's will, and to mankind's salvation.

Two threads within *Humanae Vitae* illuminate the overlap between the Church's theological stance on abortion and Argentine authoritarian regimes' ideological roots. Such similarities enabled the alignment of the Church and the Argentine state in the production and reproduction of absolutist discourse surrounding abortion. First, just as the Argentine state traditionally emphasized the centrality of the family as the key social and political unit, *Humanae Vitae* emphasizes the importance of the family in Catholic theology and its role in fulfilling the will of God: within the family, or the "primary unit of the state," the "husband and wife…develop that union of two persons in which they perfect one another, cooperating with God in the generation and rearing of new lives."[33] Along these lines, in order to sustain the family, "practices [such as abortion] which are opposed to the natural law of God" should not be tolerated.[34] Second, Paul VI, when substantiating why the act of sex should only be carried out with the intention to reproduce, states that "a man who grows accustomed to the use of contraceptive methods may forget the reverence due to a woman, and, disregarding her physical and emotional equilibrium, reduce her to being a mere instrument for the satisfaction of his own desires."[35] In this way, he is suggesting that when a woman is alienated from her primary role as a mother and "reproductive good," she loses her own dignity in her relationship with her husband. Thus through this absolutist discourse the Church has, much like the state, perpetuated gender norms and the firmly rooted association of womanhood with motherhood.

The overlapping ideologies of the Catholic Church and the state historically provided a convenient and symbiotic alliance between the two sources of authority in Argentina. Specifically, the heavy political influence and mobilization of the Catholic Church was made possible through these overlapping secular and theological ideologies. Political scientist Merike Blofield argues that this active "mobilization of the Catholic church" in Argentina is an important reason for the strict anti-abortion policies there.[36] In effect, by invoking moral and natural law through an absolutist discourse, the Church successfully extended its "demonization" of abortion into the domain of civil

32: *Id.* at § 4.
33: *Id*. at § 8, 23.
34: *Id*. at § 23.
35: *Id*. at § 17.
36: Blofield, 40 Comp. Pol. at 400 (cited in note 3).

law. It is within this context—a nation threatened by *denatalización*, deeply rooted in associations between womanhood and motherhood and between motherhood and patriotism, intimately intertwined with Catholic authority, and heavily invested in a political ideology which, in order to advance the family, relied heavily upon the reproductive role and self abnegation of women—that abortion in Argentina has traditionally been discussed and defined within a morally charged, value-laden discourse. This rhetorical framework, while at times allowing for greater female participation in the public sphere, has historically precluded women from enjoying the *physiological* freedom incompatible with absolutist dialogue.

III. A Silent Revolution

In line with Htun's classification of abortion policy as absolutist, Blofield notes that in late-developing Catholic countries such as Argentina, "women's rights in general and abortion in particular tend to be viewed as quintessential values issues, where different world-views conflict and public opinion *should* play a key role in mediating these issues."[37] Essentially, Blofield is articulating the assumption that the absolutist and emotional discourse surrounding abortion policy in Argentina is a product of the "world-views" and "values" of Argentine citizens. Indeed, even as Htun meant for the term to be defined, *absolutism* implies a sense of morality about which *all* members of a society—not solely experts—are able to (and do) weigh in. Yet, as evidenced by my discussion above, absolutist discourse surrounding abortion in Argentina has historically been produced by two hegemonic sources of authority—the Argentine state and the Church. To what extent, then, do the "world-views" and "values" of Argentine citizens contribute to the production of this discourse? Despite the historical hegemony enjoyed by the authoritarian regimes and the Church in constructing absolutist discourse and dictating abortion policy, two trends suggest that citizens, at least privately, carry different opinions than those traditionally espoused in popular discourse.

First, Argentina has seen several changes with respect to the world-views of its citizens. As I note above, in March of 2013, ninety-two percent of Argentines "claim[ed] to observe the Catholic faith" (although, importantly, less than 20 percent identified themselves as "practicing")—compared to just 62 percent who claimed to observe Catholicism in 1984, one year after a

37: *Id*. at 415 (emphasis added).

democracy was established in Argentina.[38] Yet public opinion surrounding the Church in Argentina is ambiguous. According to a study tracing world-views of citizens between 1984 and the turn of the century, while "both faith and practice aspects of religiosity have risen" in Argentina, 70 percent of Argentines "think that religious leaders should not influence peoples' electoral votes," and 60 percent believe that the Church "should not influence government's decisions at all."[39] Thus despite overall rising levels of religiosity, citizens are increasingly conceiving of a separation between the Catholic Church and the government—a separation which, of course, has not traditionally existed.

Second, recent evidence suggests changing public sentiment surrounding abortion practices—a trend which counters the assumption that politicians support policies that adhere to citizens' preferences and opinions on abortion.[40] In a survey carried out in late 2012, 57.8 percent of respondents said they believe that abortion should be legal, while considerably fewer respondents—28.3 percent—believe that it should be illegal. As I allude to in the introduction, more interesting still is that the same majority of citizens who approve of the legalization of abortion also believe that they are *not* part of the majority. Put simply, they mistakenly believe that most Argentine citizens do *not* approve of legalizing abortion.[41] Sociologists refer to this phenomenon as the "'spiral of silence,' a mechanism by which the dominant opinion remains silenced and fragmented due to the assumption that there exists a dominant climate of opinion that would reprimand them."[42] The majority's assumption that there exists a dominant world-view that opposes its support for the legalization of abortion reflects the lasting salience of Argentina's traditional political and ideological legacy. Indeed, although polls reflect increasingly liberal opinions regarding the legalization of abortion and about the Church's role in government, Argentina's ideological roots have imprinted in the Argentine historical memory the authorities' "demonization" of abortion.

38: *Argentina: Religions*, The World Factbook (cited in note 30); Marita Carballo, *Cultural Trends in Argentina, 1983-2000*, in *Changing Values, Persisting Cultures: Case Studies in Value Change* 113-14 (Leiden 2008).

39: *Id.* at 115.

40: Blofield, 40 Comp. Pol. at 406 (cited in note 3).

41: Carbajal, *Lo que piensa pero no se dice* (cited in note 6).

42: *Id*. (translated by the author: *"A este trabalenguas la sociología lo llama 'espiral del silencio', un mecanismo por el cual determinadas opiniones se mantienen en silencio y atomizadas ante la idea de que existe clima de opinión dominante que las amonestaría*").

The result of this discrepancy and "spiral of silence" is what political scientist Ronald Inglehart refers to as a "silent revolution," in which "cultural changes"—"the alteration of attitudes, values, and social norms which guide conduct"—"are often invisible" and thus lack "representation in parliamentary debates."[43] Cultural transformations continue, yet the policies addressing such cultural issues remain conservative, reflecting a "distorted image" of society and its dominant viewpoints.[44] Reproductive health and rights specialist Bonnie Shepard offers an interpretation on how the discrepancy between private beliefs and public discourse surrounding abortion has been maintained. She points out that "most studies show that in practice Latin American Catholics do not follow the official teachings of the Church on the use of contraception and abortion"—an observation confirmed by high rates of illegal abortion in Argentina.[45] Thus she suggests that in such cultures, "escape valves allow private accommodations to repressive policies, leaving the official legal and/or religious norms untouched while reducing the social and political pressure for policy advances."[46] This "escape valve" is known in Latin American countries such as Argentina as "the double discourse," or "the art of espousing traditional and repressive sociocultural norms publicly, while ignoring—or even participating in—the widespread flouting of these norms in private."[47] Because women have the option to privately "flout these norms," Shepard observes that traditional absolutist norms remain "sacred," "inviolable," and publicly accepted. Therefore, Argentina's "silent revolution" remains silent.[48]

IV. An Absolutist Legacy

As I demonstrate above, Argentina's growing "silent revolution" and increasingly liberal private viewpoints surrounding the legalization of abortion and the Church's role in governmental affairs are tenuously kept in check

43: *Id.* (translated by the author: *"…los resultados…reflejan un 'cambio cultural' que no encuentra eco en el debate parlamentario."; "Las transformaciones culturales—alteración de las actitudes, valores y representaciones sociales que guían la conducta—suelen ser poco visibles…"*).

44: *Id.* (translated by the author: "*Caso contrario, el espejo mediático nos seguirá devolviendo una imagen distorsionada…"*).

45: Shepard, 4 Health & Hum. Rights at 113 (cited in note 7).

46: *Id.*

47: *Id.* at 114.

48: *Id.* at 115.

through the "escape valve" mechanism of the "double discourse"—a phenomenon necessitated by Argentina's repressive absolutist discourse. Yet I also acknowledge above that times are changing; the Church's alliance with the state is not as seamless as it has been in prior decades, and citizens' opinions and values are becoming more liberal. I argue below that *absolutism's* historical hegemony, which dominated discourse throughout the twentieth century, is losing its salience. Yet it is first important to acknowledge that despite a new technical trend, the albeit waning hegemony of the absolutist discourse is far from extinct and carries important implications. Specifically, Argentina's absolutist legacy has generated three important consequences that help to contextualize the gradual evolution of a contending discourse over the past three decades.

First, an absolutist legacy in Argentina has resulted in high political costs of addressing any changes to abortion policy. The "double discourse," which, as Shepard suggests, developed in response to repressive public policy surrounding abortion, has also tempered much of the political pressure for policy change. Explains Shepard, "the informal mechanisms that expand choice generally are safer and more commonly available as one climbs the socioeconomic ladder, thus softening the consequences of repressive policies for members of those very sectors that influence policy decisions."[49] Shepard concludes that the "mitigation of consequences" for the policymakers themselves, when combined with high political risks associated with advocacy for the liberalization of abortion policy, result in "the lack of political will to defend [reproductive and sexual] rights."[50] Specific factors that make most politicians unwilling to advocate for liberalized abortion policies include resistance from the Vatican, anti-abortion organizations, and other religious councils. A Radical Party politician, whose bill to decriminalize abortion was left out of commission and political party discussions, sums up the political risks quite well: "'no one has demonstrated interest in considering this bill. It is an impolitic issue for the political environment of our country. To speak publicly in favor of abortion is impolitic.'"[51]

The current administration under President Cristina Fernandez de Kirchner reflects an acute awareness of the "impolitic" nature of addressing abortion in the political arena. After her 3 hour and 15 minute speech in front of Congress in March 2012, a newspaper article noted that she "covered every

49: *Id.* at 113, 129.
50: *Id.* at 129.
51: Htun, *Sex and the State* at 156, 152 (cited in note 10).

hot topic in the public agenda," including proposals to reform gender-related issues such as divorce procedures, pre-nuptial agreements, *de facto* unions, assisted reproduction, surrogate pregnancy, and adoption, yet she "failed to mention abortion."[52] Particularly ironic in light of her notable silence on abortion policy was President Kirchner's praise of the event's guest of honor for his work in defense of human rights, "'one of the landmarks of our policy and our project,' she said."[53] Importantly, Kirchner's junior officials have adopted her silent treatment. For example, when the president of the Criminal Law Committee, which in 2010 opened the debate on the decriminalization of abortion only to suspend the debate soon thereafter, was asked why he did not include the issue on the Committee's agenda for 2012, he replied that "'we have other [more pressing] initiatives.'"[54] A journalist covering the story, however, suggested a different motive: "the truth is that there was no political will to propitiate the discussion. So the issue was shelved."[55]

Importantly, the Frente Para la Victoria (FPV)—the political party with which Cristina Kirchner aligns herself—is not the only political party to avoid addressing abortion policy.[56] Rather, with the exception of one, the other major political parties in addition to the FPV—including Unión Cívi-

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52: Celena Andreassi, *A Marathon Speech to Start the Legislative Year*, Argentina Independent (Mar. 2 2012), online at http://www.argentinaindependent.com/currentaffairs/analysis/a-marathon-speech-to-start-the-legislative-year/. It is important to note that Kirchner's silence on abortion policy—especially from a human rights perspective—contrasts starkly with feminist organizations' characterization of the issue. In October of 2012, only seven months after President Kirchner's speech to Congress, Argentine women and feminists gathered at the annual National Women's Encounter, a forum for women to explore issues such as sexuality, identity, health, prostitution, politics, human rights, and education. One of the three main issues addressed at the conference was abortion.

53: *Id*.

54: Carbajal, *Lo que piensa pero no se dice,* Página 12 (cited in note 6) (translated by the author: "'*Hemos tenido otras iniciativas como la tipificación del femicidio y la derogación del avenimiento," justificó la omisión en diálogo con este diario*'").

55: *Id.* (translated by the author: "*Lo cierto es que no hubo voluntad política del oficialismo para propiciar la discusión. Y el tema quedó cajoneado*").

56: Although the FPV's electoral platform, online at http://www.frenteparalavictoria.org/plataforma.php, emphasizes human rights and advocates for a renovation to the Argentine political and institutional models, it does *not* mention abortion or women's reproductive health policy in general as a main component to its political platform and agenda.

ca Radical (UCR), Frente Amplio Progresista (FAP), and Partido Socialista—do not mention the liberalization of abortion policy in their political platforms. The UCR in its political platform promotes the "protection of sexual and reproductive rights of all people through compliance with sexual and reproductive health laws, comprehensive sex education and surgical contraception, and the full application of Article 86 of the Penal Code which addresses non-punishable abortions."[57] Yet despite its open support for these issues, the UCR's acknowledgement of sexual and reproductive rights does not call for any *change* to the existing policy. Instead it advocates for a renewed commitment to policies that have already been passed by the Kirchner administration.[58] In its platform, the FAP acknowledges abortion indirectly, criticizing the implementation of sexual and reproductive health policies under the Kirchner administration: "maternal mortality has not decreased, non-punishable abortions continue to be prosecuted, and the guide for post abortion care published by the Ministry of Health goes unimplemented."[59] Yet the FAP stops at its criticism of the policies' implementation, and does not offer an alternative plan to improve the situation, nor does it address any efforts or desire to liberalize abortion. The only party that openly advocates for an abortion policy that extends beyond policies that have already been implemented is the Partido Socialista, which, because of its commitment to "fight against the obstacles that limit the autonomy of women," promotes the "decriminalization of abortion." The Partido Socialista advocates for the decriminalization of abortion "in order to reduce the maternal deaths attributable to unsafe abortions."[60] Importantly, like the FAP, the Partido Socialista

57: *Entrevista Exclusiva con el Dr. Ricardo Gil Lavedra*, Escenarios Alternativos (Nov. 6, 2009), online at http://www.escenariosalternativos.org/default.asp?nota=3155 (translated by the author: *"La protección de los derechos sexuales y reproductivos de todas las personas a través de la garantía efectiva de cumplimiento de las leyes de salud sexual y reproductiva, educación sexual integral y anticoncepción quirúrgica, y de la aplicación plena del artículo 86 del Código Penal sobre los abortos no punibles"*).

58: The National Law on Sexual Health and Responsible Procreation (2002), passed under Cristina Kirchner's administration, is meant to ensure the provision of sexual health information and services that are legal under Article 86 of the Penal Code to all Argentine women.

59: *Programa de Gobierno Frente Amplio Progresista, 2011–2015*, Frente Amplio Progresista (visited Oct. 13, 2012), online at http://www.hermesbinner.com.ar/programa.

60: *Comisión de Programa para la Unificación del Socialismo: Los Valores Del Socialismo,* Partido Socialista (visited Oct. 13, 2012), online at http://

approaches the issue of abortion from public health and human rights perspectives, citing high maternal mortality rates as a reason for a policy change (or, in the FAP's case, as a foundation for its criticism of the existing policies' implementation). As I will later demonstrate, the reframing of abortion in a more technical discourse is an emerging strategy used to address abortion in a context separate from the morally contentious, absolutist landscape where abortion has historically been discussed. However despite its call for the decriminalization of abortion, the Partido Socialista ultimately remains ambiguous in its intentions regarding the issue; later in the platform the party also espouses "the freedom to grow" and the "right to life" of children and infants.[61] While it does not make explicit what—and perhaps more importantly, *when*—"life" begins for children, the Party's promotion of this principle illuminates its competing intentions and the costs associated with leaning too far toward one intention or the other.

Of importance to note is that, for the June 2009 legislative elections, the Partido Socialista and the UCR united in an alliance called the Acuerdo Cívico y Social (ACyS).[62] Although the alliance was most strongly tied to the parties' stance against Kirchner's agricultural policies, there existed in the ACyS the possibility for an alliance that extended to social policy as well. Htun, in her historical narrative of post-authoritarian Argentina, hints at the potential potency behind an alliance of major political parties. As Htun explains, after Argentina transitioned to democracy in 1983, "issue networks of feminists, lawyers and sympathetic government officials" were free to "organize and advance proposals for change."[63] She claims that the success of feminist organizations and those who support the liberalization of reproductive health policy in general was dependent upon their ability to leverage support from multiple political parties.[64] In much the same way, if an alliance such as the ACyS were to transcend party differences and unite behind a traditionally "costly"—or "impolitic"—social policy, the high costs behind espousing such a policy might be mitigated.

An important, ultimate outcome of the high costs of addressing abortion and the subsequent silent treatment by Argentina's politicians is the realization among a growing number of individuals that the silence must stop. Especially in light of the liberalization of private opinion, one sociologist sums up

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partidosocialista.org.ar/partido/programa.

61: *Id.*

62: The alliance was ultimately short-lived; it was dissolved in August of 2010.

63: Htun, *Sex and the State* at 113 (cited in note 10).

64: *Id.* at 122.

quite well the necessity of breaking politicians' silent treatment: "now is when the work of surveys ends, and the work of politicians must begin."[65] This is an important point of inflection for the visibility of abortion policy in the political spectrum, and one which, as I discuss below, has provided impetus for the evolution of a new technical discourse, much like that employed in the platforms of the Partido Socialista and the FAP, that might be better able to mitigate high political costs of openly addressing abortion.

A second consequence of the absolutist legacy in Argentina is its polarization of the Argentine constituency. As is discernible in popular news articles, the morally charged, emotional, and symbolic discourse surrounding abortion has elicited "gut responses" and "value clashes" among advocates on both sides of the issue.[66] Individuals on respective sides of the debate often, in recounting an event, frame themselves as the victim of the other side's antics. For example, an article about a clash of protesters in November 2012—acknowledging that a pro-abortion advocate was explaining "her version of the events"—reads, "'we came to ask them [the government] to re-consider the project [liberalization of abortion]…Then, as we traditionally do, we went to the Plaza de Mayo and passed by the Cathedral. There they began to provoke us, yelling 'murderers' and 'kicking us.'"[67] Yet the advocates against abortion framed the clash differently: "The pro-life supporters," continues the article, "claimed to be defending the Cathedral. Local priest, Francisco Javier Morad told *Página 12* that 'we just came to protect the house of god because these groups were going to attack it.'"[68] Moreover, feminist mobilization especially tends to attract much attention from those who do not support abortion. An especially lucid example of the polarization of viewpoints surrounding feminist mobilization on this issue can be seen in the disparity between two news articles addressing Argentina's National Women's Encounter. One newspaper describes the Encounter as "based on a premise of democracy and horizontal organization" and "aim[ed]…to provide a pluralist space to debate issues that are specific to women and the feminist movement." To the contrary, a

65: Carbajal, *Lo que piensa pero no se dice,* Página 12 (cited in note 6) (translated by the author: *"'Aquí termina el trabajo de las encuestas y comienza el de la política,' señaló Ramírez*").

66: Htun, *Sex and the State* at 5 (cited in note 10).

67: Hugh Davies, *Pro-Life and Pro-Choice Protestors Clash in Plaza de Mayo*, Argentina Independent (Nov. 2, 2012), online at http://www.argentinaindependent.com/currentaffairs/pro-life-and-pro-choice-protestors-clash-in-plaza-de-mayo/.

68: *Id.*

different source describes it as an event that "attracts thousands of women every year from extremist feminist groups, many of them homosexuals, to angrily demand the acceptance of their political agenda, which includes the legalization of abortion and the vindication of the homosexual lifestyle."[69] An observer of such clashes makes an excellent point; "'this is neither democratic, nor pluralistic, nor tolerable,' he emphasized."[70] The highly polarized and sometimes violent debate—a literal clashing of worldviews—underlines the necessity of a new framework for the conflict if there is hope for a more "democratic," nonviolent debate.

The clashes caused by Argentina's absolutist legacy have cultivated an interest in transcending this emotional polarization by way of re-situating the debate within a new framework. A 2005 Human Rights Watch (HRW) report on the status of abortion policy in Argentina echoes the above point when it acknowledges the polarizing—and "undemocratic"—effect of the historically contentious abortion debates in Argentina:

> In Argentina as in many other countries, the public debate on abortion and even contraceptives and sex education has sometimes included arguments and accusations that are *unworthy of a democratic society*. Decisions related to contraceptives and abortion are complicated and socially contested. They are, however, also a question of human rights…It is time to have a debate about contraceptives and abortion, and to have it in a civilized manner. Human Rights Watch intends this report to further such debate.[71]

69: Celina Andreassi, *Pretty is the Woman Who Fights*, Argentina Independent (Oct. 12, 2012), online at http://www.argentinaindependent.com/socialissues/humanrights/pretty-is-the-woman-who-fights/; Also see Matthew Cullinan Hoffman, *Video: Catholics Assaulted, Spat Upon, and Spray-Painted as They Defend Cathedral from Feminists*, LifeSiteNews (Oct. 12, 2012), online at http://www.lifesitenews.com/ news/video-catholics-assaulted-spat-upon-and-spray-painted-as-they-defend-cathed.

70: *Catholic Women in Argentina Target of Attacks at National Encounter of Women*, Catholic News Agency (Oct. 16, 2007), online at http://www.catholicnewsagency.com/news/catholic_women_in_argentina_target_of_attacks_at_national_encounter_of_women/.

71: Human Rights Watch, *Decisions Denied* at 4 (cited in note 4) (emphasis added).

Of note in the above excerpt is the reference to an absolutist discourse as "unworthy of a democratic society." What the authors advance here is a rhetorical framework that transcends the "socially contested" debate about the moral dimensions of abortion. Such discussions, according to HRW, are "unworthy" of a democratic society because the organization believes that the legality of abortion should not rest upon the extent to which it is considered "moral," but rather the extent to which is it is a threat to public health or basic human rights. The HRW authors seek a framework for discussing abortion that will enable people on both sides of the abortion debate to find a common ground that transcends the polarizing bounds of morality, and to prioritize the health and human rights of women before debating morality. As I discuss below, the authors seek to neutralize the polarization through a shift toward a technical framework for the debate.

A third and final consequence of the absolutist legacy in Argentina is the inconsistent implementation of abortion policy that has already been passed. The implementation of the National Law on Sexual Health and Responsible Procreation (NLSHRP), passed by Argentine legislators in 2002, illustrates this inconsistency. Significantly, this law represents the first time that reproductive and sexual health has been addressed in Argentina's political agenda.[72] The NLSHRP has two main goals: to provide free access to contraceptives and reproductive health services–including post-abortion care, tubal ligation, and abortion when it is legally permissible[73]–to all Argentine women, and to provide information services to women regarding their sexual health and reproductive rights. Legislators believed that ensuring access to reproductive health services and information would ultimately reduce unwanted pregnancies and high rates of maternal mortality related to post-abortion complications in Argentina. However, problems related to the policy's implementation have posed barriers to the policy's effectiveness, and have prevented women from exercising their right to self-determination with respect to their sexual and reproductive health—a phenomenon that puts women's health at risk.

The nature of barriers to the NLSHRP's implementation lies in the on-the-ground obstacles imposed by public health workers in hospitals, which oftentimes fail to provide women with the *already legally permissible* services that are supposed to be guaranteed under the policy. In the case of legal abortions, for example, The National Ministry of Health explicitly warns that when an

72: *Id.* at 14.

73: Recall that abortion in Argentina is legalized in the case of rape and threat to the mother's life.

abortion has been deemed legally permissible, "any other requirement, such as prior judicial authorization or the requirement that the woman present her case before an Ethics Committee, is a violation of her *right* to access a legal abortion."[74] Despite such explicit guidelines for performing legal abortions, however, the provision of legally permissible services is inconsistent. Specifically, the provision of these services is often delayed by "elaborate and onerous local procedures and requirements" that women obtain permission from social services and family planning officials, ethics committees, legal advisors, and their own partners.[75] Furthermore, doctors sometimes even *deny* patients care if they believe a woman has come to the hospital for post-abortion care. So recalls a Santa Fe Province social worker on the matter: "A woman...went to the…hospital in a very bad state with an abortion and she was infected and hemorrhaging. A doctor started to examine her, and when he started to see her and realized, he threw down his instruments on the floor. He said: 'This is an abortion, you go ahead and die!'"[76]

Such barriers to the implementation of the NLSHRP—which threaten women's right to receive legal health services—are a result of the absolutist legacy's demonization of abortion. Interestingly, an anonymous survey conducted among Argentine doctors demonstrates that 73.5 percent of gynecologists believe that public hospitals should, in line with the NLSHRP, perform abortions that are legally permissible, and an overwhelming majority of the same doctors agree that unsafe abortion is the most serious public health problem in the country.[77] However these statistics do not translate into policy because, according to the coordinator of the Buenos Aires Association of Psychologists' Forum on Psychoanalysis and Gender, "'doctors who work in an authoritarian society with strong religious influences, like [Argentina], fear being the object of moral sanction'" and any perceived legal consequences associated with performing abortions.[78] The consequences of this inconsistent

74: *Illusions of Care: Lack of Accountability for Reproductive Rights in Argentina*, Human Rights Watch 24 (2010), online at http://www.hrw.org/reports/2010/08/10/illusions-care (emphasis added).

75: Human Rights Watch, *Decisions Denied* at 39 (cited in note 4).

76: *Id.* at 2.

77: Pedro Lipcovich, *Temor a la sanción moral: Los médicos analizan la encuesta inédita sobre aborto*, Página 12 (May 15, 2001), online at http://www.pagina12.com.ar/2001/01-05/01-05-15/pag15.htm.

78: *Id.* (translated by the author: "'*Los médicos que trabajan en una sociedad autoritaria y con fuerte influencia religiosa, como la nuestra, temen ser objeto de sanción moral,' señaló Irene Meler, coordinadora del Foro de Psicoanálisis y Género*

implementation are powerful. As I discuss below, it is from this angle—based on healthcare and humanitarian concerns—that individuals are justifying reframing their arguments.

In sum, Argentina's absolutist legacy has generated three major consequences, including high political costs of advancing abortion policy, highly emotional social polarization, and the threat to women's health and rights posed by the inconsistent implementation of existent abortion policy. These three trends contextualize the shift toward a technical discourse—a trend which I now address.

V. Abortion as Technical: A New Trend

I have traced a discourse surrounding abortion that has historically been framed in terms of world-views and values, whereby "morality is conflated with the law, so that making…abortion…legal is tantamount to giving them [women who undergo abortions] moral approval."[79] Furthermore, I have described three significant consequences of Argentina's absolutist legacy, which help to contextualize the growing hegemony of a more technical discourse. Importantly, due to these consequences, we are at the very inflection point of the transformation: not completely uprooted from a traditional absolutist legacy, yet not consistently tied to only technical arguments either.

I present evidence here that points to the existence of a growing trend in Argentina to address abortion and reproductive policies in terms of a technical rhetorical framework—a framework defined by Htun as "demand[ing] expert knowledge and provok[ing] little public controversy."[80] This trend is only a recent development, in large part because of past constraints placed upon the collection and transmission of data surrounding abortion in Argentina. It is precisely the "silent revolution" and the "escape valve" mechanism of the "double discourse" that have afforded the Argentine government the license to deflect requests for sufficient data surrounding illegal abortion practices. Because the political and social pressure to reform the current state of abortion policy has been softened by the private opportunities to receive clandestine abortion services, and because of the incorrect assumption of the majority that most Argentine citizens want abortion to remain illegal, the Argentine government has not traditionally been forthcoming about abor-

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de la Asociación de Psicólogos de Buenos Aires").

79: Shepard, 4 Health & Hum. Rights at 132 (cited in note 7).

80: Htun, *Sex and the State* at 5 (cited in note 10).

tion-related statistics, which they perceive as fraught with high political costs and implications. In fact, 2005 is the first year in which comprehensive scientific data on reproductive health and maternal mortality was published on Argentina's Ministry of Health website.[81]

Although prior to 2005 there existed data surrounding illegal abortion and its subsequent health consequences, such numbers have often been based on the best estimates of outside experts rather than on confirmed internal government figures. The government's sanctioning of this data bolstered an already-emerging trend within the abortion debate: the growing reliance upon data such as illegal abortion rates, maternal mortality rates, and other public health statistics—in effect, *technical evidence*—in constructing forceful and legitimate arguments supporting the liberalization of abortion policy.

Technical discourse employed by pro-choice advocates in Argentina focuses most heavily on the healthcare and scientific consequences of restrictive abortion policies, yet public health discussions have also opened up the debate to humanitarian and human rights appeals. With joint goals of reopening stalled Congressional debates surrounding abortion and of opening up the debate to a "new audience," activists supporting the legalization of abortion policy now "armed with information on the negative consequences for public health of rights-denying policies" have begun to frame abortion as an issue that transcends moral implications emphasized by Argentina's absolutist legacy—hoping, in effect, to break the conflation between legality and morality.[82]

The data surrounding abortion in Argentina is, in fact, quite impressive.[83] As I note in the introduction, experts have estimated that during the 1990s, there were between 300,000 and 500,000 abortions performed annually, and only approximately 30 to 50 of those performed each year were *legal* procedures—resulting in a situation in which most women attain abortions through underground, unsafe procedures.[84] The publication of official public figures from 2005 and onward has lent more authority to technical arguments favoring the liberalization of abortion policy. According to Argentina's National Health Ministry report, the annual maternal mortality rate—more

81: *Salud: Mortalidad*, El Instituto Nacional de Estadística y Censos (visited Jan. 30, 2013), online at http://www.indec.mecon.ar.

82: Shepard, 4 Health & Hum. Rights at 131 (cited in note 7).

83: Keep in mind that estimates produced from outside experts run the risk of being drawn from less reliable or authoritative sources than official government figures.

84: Blofield, 40 Comp. Pol. at 404 (cited in note 3).

than twenty percent of which is directly attributable to unsafe abortions[85]—has increased over the last few years. Beginning at 3.9 maternal deaths per 10,000 live births reported in 2005, the most recent data indicate that, as of 2009, the number has increased to 5.5 maternal deaths per 10,000 live births. However, important to note is that the Health Ministry's measure of maternal mortality does *not* take into account accidental or incidental causes of death (e.g., abortion-related deaths).[86] Because of the government's exclusion of abortion-related deaths, in addition to other problems related to official misreporting and underreporting, experts suggest that the government-published data on maternal mortality is considerably lower than actual figures. In fact, one unpublished study by Argentina's General Directorate of Statistics and Consensuses in 2008 found two hundred percent more maternal deaths than the Health Ministry officially reported that year.[87]

Despite ambiguity surrounding underreporting, this data lends more transparency to the connection between the illegality of abortion, high rates of unsafe abortion, and high rates of maternal mortality. This has contributed to a surge in the citation of such data—or, as I refer to it above, technical evidence—within popular discourse. Specifically, two HRW reports—one conducted in 2005 and the other in 2010—investigate the implementation of the NLSHRP mentioned above. The technical evidence cited in these reports reflects a shift in the discourse, from a morally charged context to a technical one that emphasizes ties between illegal abortion and women's health.

Both HRW reports provide in-depth assessments of the barriers to the existing policy's implementation. The reports highlight problems (noted above)—including physicians' own positions and priorities, as well as procedural barriers—that deny women the right to access legal health services and that put women's health at risk. It is from this angle—based on the health and humanitarian concerns—that HRW makes its case. The 2005 report acknowledges this approach:

85: *Defunciones maternas por causas de muerte, según grupo de edad de las fallecidas. Total del país. Años 2006 –2009*, El Instituto Nacional de Estadística y Censos (Jan. 30, 2013), online at http://www.indec.mecon.ar.

86: *Defunciones y tasa de mortalidad materna por 10.000 nacidos vivos, según provincia. Total del país. Años 2005 – 2009*, El Instituto Nacional de Estadística y Censos (visited Jan. 30, 2013), online at http://www.indec.mecon.ar.

87: Fernando Althabe et al., *New Modeled Estimates of Maternal Mortality*, 375 Lancet 1967 (2010).

> "Even those who favor Argentina's restrictive legal regime on abortion…should be given pause by the cases described in this report. Given the extent of the harm and the number of women whose health and lives are destroyed as a result of current laws and practices, Human Rights Watch believes it is incumbent on all parties concerned, *whatever their position on abortion*, to give priority to ensuring women's independent control of their own fertility through the provision of accurate contraceptive information and full range of contraceptive methods. Priority should also be given to make sure that all women…receive humane and adequate health care…Decisions related to contraceptives and abortion are…a question of human rights."[88]

The HRW, then, has made explicit its purpose in helping to reframe the discourse surrounding abortion in Argentina. As I examine in my discussion above about the poor implementation of the NLSHRP, the HRW report argues for the prioritization of the protection of women's rights and health over discussing the morality of the "legal regime." HRW has identified the potential for a shift in the discourse, and, at the very point of inflection between absolutist and technical frameworks, is advancing an alternative to *absolutism*—a discourse instead rooted in public health and human rights concerns which helps to loosen the traditionally inviolable conflation between morality and legality and instead provides a neutral rhetorical framework for individuals, "whatever their position on abortion" may be.

HRW is not the only entity justifying its involvement in the debate by employing public health arguments; programs aimed at opening up the discussion of abortion to the public sphere are also introducing the topic of abortion through a more technical lens. For example, an Argentine newspaper discusses a specific program that assembles professionals from throughout one of Argentina's provinces. The meeting of the "VII Scientific Days in the Service of Gynecology in Belgrano Hospital," says the paper, "took place… under the title, 'Woman, Rights, Health.'"[89] Such a title makes explicit the

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88: Human Rights Watch, *Decisions Denied* at 4 (cited in note 4).

89: Carbajal, *Lo que piensa pero no se dice,* Página 12 (cited in note 6) (translated by the author: *"Un botón de muestra de ese cambio cultural que advierte Ramírez se reflejó en las VII Jornadas Científicas del Servicio de Tocoginecología del Hospital Belgrano, del partido bonaerense de San Martín, que tuvieron lugar el miércoles y jueves último, bajo el título 'Mujer, Derechos, Salud'. Participaron unos doscientos*

goal of the organization to place abortion under a more technical umbrella, focused on women's rights and health. Individuals, too, are relying on technical evidence by pointing toward the health consequences of unsafe abortion. When interviewed in late 2010, Marianne Mollmann, one of the lead authors of the 2010 HRW report, began by stating, "current abortion laws 'not only bring serious consequences to the health and life of a woman who needs to terminate her pregnancy, but also creates a public health problem…Unsafe illegal practices," she continued, "are the leading cause of maternal mortality in Argentina."[90] Just as the high political costs of supporting the legalization of abortion and the threat to women's health posed by the poor implementation of existent abortion policies have laid the groundwork for a newer technical framework that may help to enhance abortion policies' political visibility, individuals point to technical evidence to justify expanding the debate to a political context. One such individual, Nora Cortiñas, a founding member of the Madres de la Plaza de Mayo organization interviewed at a pro-legalization march in November of 2012, put it simply: "As one begins to understand that poor women are dying, one has to decide that this is a very serious situation. I think it has to be handled in Congress.'"[91] Even the Chairman of the Argentine Criminal Law Committee, Juan Carlos Vega, acknowledged the legitimacy of these claims in a newspaper interview. According to the article, Vega, "reminding the panel that there are at least 450,000 illegal abortions each year…maintained that 'we must open the debate.'"[92]

The expansion of the framework surrounding abortion to include technical evidence has generated widespread recognition that the health problems related to unsafe abortion demand political intercession. This demand has been bolstered by humanitarian and human rights arguments. An important element in assessing the consequences of illegal abortion in Argentina is the impact that the policy has at *all* socioeconomic strata. When discussing the "double discourse," Bonnie Shepard makes an important observation that the "escape valve" mechanism "expands citizens' sexual and reproductive choices," but since "they are makeshift, illegal, or unofficial, neither availability, safety

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profesionales de la provincia").

90: Morgan, *Historic Abortion Debate Begins in Congress,* Argentina Independent (cited in note 5).

91: Hugh Davies, *Pro-Life and Pro-Choice Protestors Clash in Plaza de Mayo*, Argentina Independent (cited in note 67).

92: Morgan, *Historic Abortion Debate Begins in Congress,* Argentina Independent (cited in note 5).

(in the case of services), nor protections of basic rights are guaranteed."[93] Because of this, continues Shepard, "political elites usually do not suffer the worst consequences of the restrictive laws." Instead, "the worst consequences of the restrictive policies fall on low-income" women who cannot afford safe clandestine procedures.[94]

Shepard's acknowledgement of the political elite's protection from the worst experiences of lower-income women—which mitigates the consequences for policymakers themselves and thus contributes to the high political costs of addressing abortion policy relative to elites' perceived personal benefit from doing so—is best supported by Blofield's description of one such member of the Latin American political elite.[95] When alluding to the rift between the policymaking elite and the women who suffer most from the "double discourse," Blofield cites a legislator who "dismisses the immediate problems caused by lack of legal abortion, arguing that the problem of abortion is already solved…because 'everyone knows a doctor.'"[96] Yet in reality, many Argentine women cannot afford to "know a doctor" when they are in need of abortion services and must resort to unsafe abortion techniques, such as using knitting needles, rubber tubes, and parsley sprigs to abort—a significant driver behind high post-abortion hospitalization and maternal mortality rates.[97] It is in this context that advocates for a more technical discourse have justified their entrance into the debate. Criticizing the state's lack of accountability for *all* social classes, individuals and organizations define the problem as "'a humanitarian issue.'"[98] An article addressing the publication of the HRW's 2005 report fleshes out the spectrum of human rights issues evoked by restrictive abortion policies. In addition to allowing for the disproportionately unsafe conditions facing women of lower socioeconomic strata, it is argued that:

> "[w]omen's severely limited access to safe and legal abortions in Argentina is inconsistent with international law because it threatens the rights to life, health, equality, privacy, phys-

93: Shepard, 4 Health & Hum. Rights at 115 (cited in note 7).
94: *Id*.
95: *Id*. at 129.
96: Blofield, 40 Comp. Pol. at 414 (cited in note 3).
97: Human Rights Watch, *Decisions Denied* at 48 (cited in note 4).
98: Lillo Montalto Monella, *The Struggle for Legal Abortion: An Interview with Marta Alanís*, Argentina Independent (Mar. 8 2012), online at http://www.argentinaindependent.com/socialissues/ humanrights/the-struggle-for-legal-abortion-an-interview-with-marta-alanis/.

> ical integrity, and freedom of religion and conscience…The denial of a pregnant woman's right to make an independent decision regarding abortion violates or poses a threat to a wide range of human rights. Any restriction on abortion that unreasonably interferes with a woman's exercise of her full range of human rights is unacceptable."[99]

An NGO representative sums up the state's detachment from human rights issues quite well: "'Nothing [comes] from the state…they don't intervene, they don't register that in that province this many women died from unsafe abortion…They operate on a very high level of abstraction.'"[100] The state's attitude of "abstraction," in this case, is exactly what advocates for a more technical rhetorical framework are fighting against. Rather than operating on a level of absolutist "abstraction" and assuming that all women can afford to "know a doctor," advocates are increasingly pointing to data in order to make the provision of basic human rights to *all* women the primary goal of abortion policy.

In one such case from 2011, the health of a candidate for abortion—an eleven-year-old girl who had become pregnant after being sexually assaulted by a male relative—was overlooked in favor of the state's absolutist "abstraction" based on "'the principle of wise naturalness [that] once a girl begins to menstruate, then her body is ready for pregnancy.'"[101] This decision was carried out "despite experts' warnings of severe health concerns for the adolescent" and despite the fact that the girl and her mother had been "'intimidated, pressured, [and] manipulated [by the case's judge] to withdraw her request for the termination of pregnancy.'"[102] This case brings up both health and human rights issues raised by advocates for a technical discourse. First, the denial of the abortion presents a direct threat to the girl's health, and second, the state's decision was made despite a clear transgression of the girl's *right* to request the abortion when she was manipulated to rescind her request. In reaction to the case, Marta Alanís, an advocate for a more technical discourse surrounding

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99: *Argentina: Limits on Birth Control Threaten Human Rights: Barriers to Contraceptives and Abortion Cause Severe Health Consequences*, Human Rights Watch (2013), online at http://www.hrw.org/news/2005/06/15/argentina-limits-birth-control-threaten-human-rights.

100: Human Rights Watch, *Illusions of Care* at 40 (cited in note 74).

101: Lillo Montalto Monella, *The Struggle for Legal Abortion*, Argentina Independent (cited in note 98).

102: *Id.*

the protection of health and human rights, expressed her disappointment that the health minister, Juan Luis Manzur, had remained silent on the issue. Said Alanís in an interview, "'if the minister won't receive us, we will be forced to start a harsher confrontation, possibly by suing him for failing to comply with his duties as a civil servant.'"[103] Alanís' threat to sue the minister is rooted in the influence of the growing trend to discuss abortion from within a technical (and, in this case, legal) framework. Just as the HRW advocates for an end to the conflation between morality and legality, Alanís' suggestion brings to light the efforts of humanitarian and human rights advocates to break the conflation between legality and the abstractions of tradition, and instead to emphasize the role of civil servants to support policy measures which first and foremost guarantee the health and safety of their constituency.

I have just argued that, propelled by the groundwork laid by the consequences of abortion policy's historical legacy, the historical hegemony of the absolutist rhetorical framework is being eclipsed by a more technical discourse rooted in women's health, human rights law, and humanitarian evidence. Yet this phenomenon is neither static nor one-dimensional. Rather, as I discuss next, there exists an additional dimension to this shift—one in which supporters of the current restrictive abortion policies are readapting elements from the growing technical framework into their own absolutist arguments.

VI. Absolutist, or Technical?

The growing hegemony of the technical discourse surrounding abortion has generated an unexpected consequence: traditional "absolutists," adapting to the dominant framework to which audiences have been increasingly receptive, have been pushed to re-situate their arguments within a technical framework—specifically, one centered around human rights. According to sociologist Gabriela Irrazábal, absolutists seeking to prevent the legalization of abortion are increasingly legitimating their participation in the debate based on their technical expertise and professional status, rather than their religious or moral stances. Says Irrazábal, "specialists, doctors, and lawyers who belong to various Catholic sects allude to their professional identities rather than to their religious ones when they present themselves in public and make recommendations in front of the Health Commission."[104] A lawyer

103: *Id.*

104: Gabriela Irrazábal, *'El útero abraza y hamaca al cigoto en su interior.' La construcción científico-religioso del hijo prenatal,* in *Madre no hay una sola:*

from Buenos Aries, Pedro Javier María Andereggen, is one example of a professional who insists that his career—described by an Argentine newspaper as an "all-terrain [militancy] against…[any] initiatives that 'offend' the convictions of the Church"—is independent of his personal Catholic identity.[105] Says Andereggen, "'I am merely a defender of human rights…I don't intercede because I am Catholic. There are many atheists, agnostics, and people of other religions who think the same.'"[106] Irrazábal observes that absolutists such as Andereggen are more consistently aligning themselves with an objective, professionalized identity within public discourse, suggesting the additional credibility and efficacy assigned to the now-mainstream technical framework rather than the traditional absolutist one. Yet despite their newly adapted rhetorical tactics modeled after traditionally technical human rights arguments, such agents are ultimately still committed to maintaining the *status quo* of restrictive abortion policy.

The most common of the technical tactics adopted by absolutists is the mimicry of human rights rhetoric. Absolutists claim that in order to uphold unborn children's basic right to life, abortion must remain illegal. Of course, this argument is based upon the fundamental assumption that life begins at the moment of conception—referred to in their arguments as a scientific fact. For example, an October 2011 homily by the bishop of Posadas, the capital city of the Argentine province of Misiones, roots the argument in science. Said Monsignor Juan Rubén Martínez to his congregation, "biology convincingly manifests, through DNA analysis and the sequencing of the human genome, that from the moment of conception there exists a new life

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experiencias de maternidad en la Argentina 62 (2011) (translated by the author: "Los especialistas, médicos, y abogados que fueron a dar sus recomendaciones a la Comisión de Salud, pertenecían a distintos grupos dentro del catolicísimo y se presentaban en publico aludiendo a su identidad profesional y no religiosa").

105: Emilio Ruchansky, *Un cruzado para todo servicio*, Página 12 (Oct. 13, 2012), online at http://www.pagina12.com.ar/diario/elpais/1-205518-2012-10-13.html (translated by the author: *"Andereggen, un militante todo terreno contra el matrimonio igualitario y otras iniciativas que 'ofenden' las convicciones de la cúpula de la Iglesia, empezó su carrera protagonizando una operación del Ejército para anular la causa Camps…"*).

106: *Id.* (translated by the author: *"'No tengo ideología, solo soy un defensor de los derechos naturales humanos…Y no intercedo porque soy católico. Hay muchos ateos, agnósticos y personas de otras religiones que piensan los mismo,' insistió Andereggen*").

which must be legally protected." Msgr. Martínez continued that, because life begins at conception, "when a woman is pregnant, we are not talking about one life, but two—that of the mother and that of the unborn child. Both must be preserved and protected."[107] Msgr. Martínez's homily reflects absolutists' adoption of human rights rhetoric based on scientific data to legitimate their defense of the rights of unborn children—a tactic referred to by Irrazábal as the *matriz jurídica-biológica* [the legal-biological matrix].[108] Yet it is significant that he leaves no room in his homily for an examination of the theological, absolutist reasoning behind "life at conception," perhaps reflecting the perceived enhanced credibility of technical, scientific rhetoric over any theological underpinnings—a conscious shift away from religion-based arguments. This is a concept to which I return below.

Andereggen, too, demonstrates absolutists' new technical human rights-oriented tactics. When commenting in October 2012 on his role in challenging a court's approval of a non-punishable abortion requested by a victim of a prostitution trafficking ring, Andereggen asked, "'How can [the courts] give permission to this woman to kill another person [the unborn child]?"[109] In the article reporting on the matter, the journalist engages a second lawyer, Débora Plager, in dialogue with Andereggen's claim. Challenges Plager, "What child are you speaking of? You know that even the scientific community has not arrived at a consensus about *when* the life of a child begins, and you are already speaking about homicide.'"[110] The article nods to the murkiness surrounding the question of *when* the life of an unborn child should be

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107: Juan Rubén Martínez, *Maternidad y vida*, Agencia Informativa Católica Argentina (2011), online at http://www.aica.org/print.php?guia=26 (translated by the author: "Queremos afirmar con claridad: cuando una mujer está embarazada, no hablamos de una vida sino de dos, la de la madre y la de su hijo o hija en gestación. Ambas deben ser preservadas y respetadas. La biología manifiesta de modo contundente a través del ADN, con la secuenciación del genoma humano, que desde el momento de la concepción existe una nueva vida humana que ha de ser tutelada jurídicamente").

108: Irrazábal, *'El útero abraza y hamaca al cigoto en su interior*' at 65 (cited in note 104).

109: Ruchansky, *Un cruzado para todo servicio,* Página 12 (cited in note 105) (translated by the author: *"'¿Cómo va a tener esa mujer libertad de matar a otra persona?'"*).

110: *Id.* (translated by the author: *"'¿De qué niño está hablando, doctor? Usted sabe que ni siquiera la ciencia tiene una posición uniforme respecto de que las primeras semanas de gestación eso se pueda considerar un niño y usted ya habló de homicidio.'"*)

legally recognized, and the contention surrounding the consequences of this question—the difference between whether or not abortion can be framed as murder. By sourcing the idea that human life begins at conception as a *scientific fact*, as Msgr. Martínez does above, absolutists argue that abortion is a serious affront to human rights standards—a technical claim—yet also that it is murder—a traditionally absolutist claim "demonizing" abortion. In effect, this argument is both technical *and* absolutist—technical in its new framework, yet absolutist in content.

The complexity of this technical re-framing of absolutist content cannot be overemphasized. I note above in my analysis of Msgr. Martínez's homily that he points to science in his argument that life begins at conception, rather than also acknowledging the theological and absolutist underpinnings of the claim. Yet absolutists' technical argument for life at conception—and therefore the entire argument in defense of the lives of unborn children—is inextricably tied to the Church's theological and moral foundations and interests. In *Humanae Vitae*, Pope Paul VI asserts that, "the question of human procreation… involves more than the limited aspects specific to…biology, psychology, demography or sociology." Instead, he continues, it encapsulates both "natural, earthly aspects and…supernatural, eternal aspects."[111] Because, according to the Church and absolutists who espouse its moral teachings, procreation "points to a collaboration of parents with God as the ultimate source of this new life," the acts of procreation, reproduction, and conception carry intertwined meanings, whereby life *must* exist upon conception for absolutists, given the "supernatural, eternal" elements that are at play in the process of procreation.[112] Moreover, as I discuss above when pointing to the symbiotic alliance between the Church and Argentine authoritarian political regimes, Paul VI makes explicit the Church's teaching that sexual intercourse should only be carried out with the intention to procreate—thereby once more confirming absolutism's equating of reproduction with conception. Thus what is presented as a scientific argument in Msgr. Martínez's homily is additionally reflective of a concept—procreation's inviolable ties with the "supernatural" in Church teachings—that is firmly rooted in theology. Despite absolutists' mimicry of technical human rights discourse—referred to Irrazábal as "a type of mimesis"—the shift toward a more technical framework is still fundamen-

111: Paul VI, Humanae Vitae at § 7 (cited in note 31).

112: *Frequently Asked Questions: What is the Difference Between Procreation and Reproduction?*, CBCP for Life (2013), online at http://cbcpforlife.com/?p=1848/.

tally absolutist in content and in purpose.[113]

Furthermore, as argued by Irrazábal, the presentation of conception and fetal development by absolutists, while an attempt to frame the "life at conception" argument scientifically, simultaneously highlights the theological and absolutist content of their arguments. For example, Irrazábal notes that, in some Argentine biology textbooks, "the biological processes of fertilization and conception are narrated as if the description were a Bible passage." She argues that the description of the biological process, when overlaid with the Biblical narrative, "serves as an example to illustrate the level of complexity that the 'life at conception' argument acquires" when supported by absolutists.[114] Finally, this complexity is evident in the protesting techniques of absolutists. Protesters, aligning with the trend discussed above to re-frame traditionally absolutist arguments within a technical discourse, seek to add credibility to their claims by alluding to scientific processes. They carry signs of developing fetuses in their arms, yet they coddle them as if they were real babies, and distribute hypothetical letters from unborn children entitled, *Mamá: ¡Quiero Vivir!* [Mom, I want to live!].[115] Irrazábal notes that, despite protesters' allusions to their *scientific* claims that life begins at conception in these campaigns, the 'emotionalization' of the images also evokes traditional, absolutist responses, and appeals to audiences' senses of sympathy, humanity, and compassion—a traditionally absolutist technique. The 'emotionalization' of the protests points to the complexity of the new trend to frame absolutist content within a technical shell.

Much like the tensions noted above evoked by the Partido Socialista's acknowledgement of both women's right to autonomy over their reproductive capacities *and* of children's right to life and development, absolutists' human rights-oriented arguments generate friction between the rights of the mother and those of the child. Absolutists extend existing human rights doctrine to the case of the unborn child and believe that "all of the international human rights treaties can be used to defend…embryos since they, too, are consid-

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113: Irrazábal, *'El útero abraza y hamaca al cigoto en su interior'* at 60 (cited in note 104).

114: *Id.* at 64 (translated by the author: "*El proceso biológico de la fecundación o concepción es narrado por las docentes como una parábola de la Biblia…Este extracto de un libro de biología básica, sirve como ejemplo para ilustrar el nivel de complejidad que adquiere el postulado religioso tradicional de 'la vida inicia con concepción'*").

115: *Id.* at 57.

ered human beings under the protection of international law."[116] Indeed, such arguments, re-fitted into a technical framework, have succeeded in gaining clout in the courtroom. One such example is from the Argentine province of Santa Fe, where a judge in October 2012 suspended a medical protocol that permits the provision of non-punishable abortions to women who have been raped. The reason for the suspension—that the protocol goes "'against human life'"—demonstrates the additional credibility and efficacy realized by the currently hegemonic technical framework.[117] Yet importantly, the Santa Fe decision also demonstrates the fact that we cannot assume that the hegemony of a new framework—a *technical* one discussed in the above sections, and especially one rooted in human rights claims—can consistently help to progress the liberalization of abortion policy in Argentina. As evidenced by the complexity behind the form and content of absolutists' adoption of a technical human rights framework, the new dominant framework is no guarantor of objectivity, free from absolutists' moral intercession. This is because despite being *framed* in a technical way, the arguments set forth in the Santa Fe decision—and the rest of the absolutist claims that have adapted to a technical hegemony such as those cited above by Msgr. Martínez and Andereggen—are still fundamentally rooted in theology and ideology, and demonstrate the impossibility of being led to an absolutist conclusion by technical evidence alone. In short, as I demonstrate above, their *content* is still rooted in absolutism.

Although in the Santa Fe case the decision was made to suspend the protocol, Santa Fe's Minister of Health responded to the decision by publicizing his intentions to repeal the original decision, asserting that "he respects 'everyone's beliefs and ideologies, [but] nevertheless we shall practice the law.'"[118] He implies that a technical *framework*—specifically one that is centered upon human rights rhetoric—does not necessarily promote a progression toward the liberalization of abortion policy as long as the *content* of the absolutist messages—based upon "beliefs and ideologies"—remains unchanged. Inter-

116: *Id.* at 65 (translated by the author: *"...desde su perspectiva todos los tratados de derechos humanos a nivel internacional pueden ser utilizados para defender a los… embriones porque son considerados como 'personas, seres humanos,' que cuenten con la protección de todo el bagaje del derecho internacional."*)

117: Aigul Safiullina, *Santa Fe Judge Suspends Protocol For Legal Abortions*, Argentina Independent (2012), online at http://www.argentinaindependent.com/currentaffairs/santa-fe-judge-suspends-protocol-for-legal-abortions/.

118: *Id.*

estingly, the "law" about which the Minister of Health speaks is reflective of the same conception of the democratic principle of law held by the observer I quote above, who views the violent, polarizing clashes over abortion as "'neither democratic, nor pluralistic, nor tolerable.'"[119] The 'hybridization' of absolutist arguments to conform to a more technical framework does little to break the conflation between morality and law, but rather reinforces a discourse in which the debate surrounding the legality of abortion still rests upon the extent to which it is considered moral. As long as absolutist beliefs and ideologies, regardless of how they are framed, are present in the negotiation of abortion-related policies, human rights arguments made from both the technical and absolutist sides of the spectrum will continue to have a polarizing effect. How, then, are we to "practice the law" in the Minister of Health's sense of the phrase—to enhance the political visibility of abortion-related policies, and to negotiate such policies within a neutral context? This is the question to which I turn in the following section.

VII. Abortion & Political Visibility: Concluding Thoughts

The evolution of the rhetorical framework surrounding abortion in Argentina is complex and multidimensional, reflective of the nuance inherent in the Argentine population's attitudes toward abortion. As I have demonstrated, a new technical framework does not necessarily translate into progressivism. Despite the growing hegemony of a more technical discourse rooted in public health, human rights and humanitarian arguments, an additional dimension within this shift exists that re-situates traditional absolutist arguments within a technical, human rights-oriented framework. This additional dimension demonstrates that while a more technical discourse certainly presents the possibility for a more credible and neutralized context in which to discuss abortion-related policies, this is not necessarily the case. As demonstrated by the Santa Fe court's decision, this shift can even be used to justify the influence of traditional moral views—albeit more subtly—within the legal realm. Htun confirms this. While she asserts that "framing abortion as a question of health is less polarizing" and that, under this framework, "abortion may cease to be seen as a threat to traditional family values and more as a necessary measure to avert a public health crisis," she also acknowledges the limitations of a human rights-oriented rhetoric, through which traditional absolutist content is

119: *Catholic Women in Argentina Target of Attacks at National Encounter of Women*, Catholic News Agency (cited in note 70).

voiced through an adjusted rhetorical framework.[120]

Legacies of Argentina's historical absolutist framework—including high political costs of advocating for sexual and reproductive rights, highly emotionalized and "undemocratic" clashes among polarized activist groups, and inconsistent implementation of existing reproductive health policies—have increased the pressure for abortion policy to be addressed politically. As evidence highlighting the public health and humanitarian risk factors associated with unsafe, illegal abortions continues to bolster technically-situated arguments, the pressure to break the silence in Argentina's "silent revolution" has increasingly manifested itself in public discourse, where experts and observers alike are realizing that the situation "has to be handled in Congress.'"[121] Although a new technical framework certainly represents a more neutralized, navigable context in which to negotiate abortion and reproductive health policy, it has become clear that a new rhetorical framework is not enough to *consistently* ensure the liberalization of abortion policy and the practice, and progression toward a more equitable healthcare environment for women of all socioeconomic strata. Rather, additional forces are needed in order to bring this shift about.

As I note above, Htun alludes to the potential efficacy of an alliance across the political spectrum—an alliance such as the short-lived ACyS, which had the potential, if it were to have been extended to social policies, to strengthen appeals for the liberalization of abortion policy and mitigate the high political costs associated with advocating for reproductive health rights. The repression and stagnation resulting from politicians' silence on abortion policy underscores the immense influence of political parties in helping to generate—or, as is currently the case, to restrain—greater political visibility for abortion policy in Argentina. Such visibility can only be achieved when political actors become more willing to engage in more effective, stable alliances and react as a bloc to changing public sentiment and the mounting pressure to address social pathologies brought about by absolutist legacies. Furthermore, more active intervention by, and more consistent cooperation among, politicians—and especially greater support from representatives of the multifarious Peronism movement, whose supporters span across multiple factions—may, in turn, lend the necessary support to feminist networks. This would allow various leaders seeking to liberalize abortion policy to leverage a broader, more

120: Htun, *Sex and the State* at 42 (cited in note 10).

121: Hugh Davies, *Pro-Life and Pro-Choice Protestors Clash in Plaza de Mayo*, Argentina Independent (cited in note 67).

cohesive platform as they mobilize resources in their quest to bring abortion policy to the forefront of political and parliamentary discussions.

The progression of the discourse surrounding abortion in Argentina has shifted considerably over the last decade, in response to the modernization of values and growing visibility of technical evidence pointing to the humanitarian and public health-related impacts of restrictive abortion policies. Yet, as I have demonstrated, a new hegemonic technical framework—utilized by *both* sides of the abortion debate—does not imply an easy translation of this discourse into parliamentary discussions, political debates, and ultimately policy initiatives. Argentina's absolutist legacy remains a salient factor firmly engrained in the country's historical memory, grid-locking absolutist and more liberal forces in alternating rounds of antagonism and synergism. Such a nuanced dynamic among the evolving frameworks and the disparity between public policy and private practice does not lend itself to a simple solution. Rather, the nuance inherent in such an issue, and the multiplicity of political and societal forces that contribute to such conditions as the "silent revolution" and the "double discourse," are what make this subject such a contemporary, significant, and pressing issue.

Interestingly, in Argentina today, experts have found that the maternal mortality rate is abnormally high when "compared with other national indicators [such as its] low birth rate, high coverage of prenatal care, and high percentage of institutional [hospital] deliveries."[122] Such strong national indicators reflect Argentina's increasingly developed infrastructure and strong macroeconomic performance since its 2001–2002 economic crisis, a signal of the nation's commitment, as one of the five largest economies in South America, to increasing its participation in an increasingly global, "westernized" world.[123] According to Inglehart's theory on culture change, as societies grow in economic prosperity—most discernible through indicators such as per capita income and education levels, both of which, despite its tumultuous economic and political history, are increasing in Argentina[124]—their values shift to reflect more liberal, "post-materialist" ideals, such as autono-

122: Silvia Ramos, et al., *A Comprehensive Assessment of Maternal Deaths in Argentina: Translating Multicentre Collaborative Research into Action*, 85 Bul. of World Health Org. 615 (2007).

123: *Argentina Overview*, World Bank (2013), online at http://www.worldbank.org/en/country/argentina/overview.

124: *Statistics*, UNICEF (2013), online at http://www.unicef.org/infobycountry/argentina_statistics.html.

my, belonging, and personal fulfillment.[125] Indeed, as evidenced by opinion polls and individual citizens' private abortion practices, Argentines' values specifically with respect to abortion—while not yet reflected in policy—are becoming more liberalized in Argentina. Inglehart explains that such value changes are often only translated into policy gradually, after a considerable "time lag."[126] In light of Inglehart's concept of the "time lag" and the increasing modernization of Argentine values, it will be interesting to trace the future progression of abortion and reproductive policy, and to see whether and when it will grow to accommodate citizens' changing values. Thus, in much the same way that the evolution of the discourse surrounding abortion in Argentina is at an inflection point between an absolutist and a technical framework, the relationship between changing values and their translation into more liberal reproductive health policy may be at its very own point of inflection as well.

Such a translation, however, is not guaranteed. On March 13, 2013, Jorge Mario Bergoglio, the archbishop of Buenos Aires, was chosen as the new pope. It is expected that Bergoglio's appointment will prove to be a major barrier to the passing of legislation to liberalize abortion, as it sends "a powerful message that the future of the church lies in the global south, home to the bulk of the world's Catholics"—a reminder that despite a new technical discourse, absolutist influences in Argentina are still very much alive and well, and unwilling to loosen their grip over the nation's absolutist historical memory.[127]

125: Ronald F. Inglehart, *Changing Values among Publics from 1970 to 2006,* 31 West European Pol. 131–32 (2008).

126: *Id.* at 132.

127: Rachel Donadio, *Cardinals Pick Bergoglio, Who Will Be Pope Francis*, NY Times (Mar. 13, 2013), online at http://nyti.ms/1fv2Qa2.

In *Shelby's* Wake: Confronting the Third Generation of Voting Barriers

Meghan Kestner†

In June 2013, the United States Supreme Court in *Shelby County v. Holder*[1] struck down Section 4 of the Voting Rights Act of 1965 (VRA), rendering the landmark civil rights law largely impotent. The VRA prohibits state and local governments from imposing any "voting qualification or prerequisite to voting, or standard, practice, or procedure . . . to deny or abridge the right of any citizen of the US to vote on account of race or color."[2] Section 4 establishes the coverage formula designating that certain states and counties with a history of voting discrimination are subject to Section 5 preclearance requirements. Under Section 5, the jurisdictions identified in Section 4 must appeal to a panel of judges on the DC federal court ("judicial preclearance") or to the U.S. Department of Justice ("administrative preclearance") before making any changes to election procedures. Section 4 is therefore the mechanism by which the Section 5 preclearance requirements function; without Section 4, now invalidated by the Supreme Court, those jurisdictions are no longer covered by Section 5 protections. Observers claim that the *Shelby* ruling will potentially disenfranchise citizens whose right to vote was previously protected by Section 5 of the VRA.[3]

By August 2013, conspicuously only two months after the *Shelby* decision, the North Carolina state legislature passed an omnibus election law that opponents claim will restrict access to the ballot.[4] The Voter Information Verifi-

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1: 133 S. Ct. 2612 (2013).

2: 42 U.S.C. §§ 1973-1973aa-6 (2012). The VRA also protects language minorities.

3: Editorial, *An Assault on the Voting Rights Act,* NY Times (Jun. 25, 2013), online at http://nyti.ms/1hbTHlS.

4: Jamelle Bouie, *North Carolina's Attack on Voting Rights*, The Daily Beast (Aug. 13, 2013), online at http://thebea.st/1hv24ao.

cation Act (VIVA)[5] implements unprecedented changes to election practices;[6] it is a uniquely bold measure in its wide-ranging provisions that transform established election procedures. Particularly controversial provisions of the law require photo identification for voters, shorten the early in-person (EIP) voting period, and eliminate same day registration (SDR). This article will use the North Carolina law as a framework to evaluate the recent changes to the VRA. Specifically, would VIVA survive pre-*Shelby* preclearance requirements under Section 5? Would VIVA violate the VRA as it stands in the wake of the *Shelby* decision?

A preliminary answer to the second question should be noted. Specifically, the law may still violate the VRA under Section 2, a provision untouched by the *Shelby* decision. Unlike Section 5, Section 2 applies nationwide. Section 2 establishes a cause of action for individual plaintiffs to initiate lawsuits against changes to voting procedures that, "in the totality of the circumstances," may cause minority voters to have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[7] In fact, the Department of Justice (DOJ) has recently signaled that it will move forward with this tool to challenge VIVA, alleging that certain provisions of the law illegally obstruct voting rights even in the wake of *Shelby.*[8]

Part I of this article examines the differences between Sections 2 and 5, how they operated in tandem in the pre-*Shelby* legal landscape, and how Section 2 may operate alone post-*Shelby*. Part II offers a brief background on the features of the three controversial provisions of VIVA, and evaluates how similar provisions have previously fared with Section 2 challenges and Section 5 applications for preclearance before *Shelby*. Part III introduces the concept of third generation barriers to the franchise to explain why the civil rights community should not focus its attention on re-establishing a Section 4 preclearance formula to re-activate Section 5. This article concludes with a proposal to transform the voting rights framework from one of legal protection from discrimination for race and language minorities to an affirmative,

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5: Voter Information Verification Act, 2013 N.C. Sess. Laws 589.

6: *Monster Law: More Money, Less Voting*, Democracy North Carolina, online at http://www.democracy-nc.org/downloads/MonsterLaw-IDAug2013.pdf.

7: *Id*.

8: Josh Gerstein, *Justice Department Challenges North Carolina Voter ID Law*, Politico (Sept 30, 2013), online at http://www.politico.com/story/2013/09/justice-department-north-carolina-voter-id-law-97542.html; Section 2 suits are also being brought by the NAACP, the Advancement Project, the ACLU, the ACLU of North Carolina Legal Foundation, the League of Women Voters of North Carolina, and the Southern Coalition for Social Justice.

substantive right to vote for all American citizens.

I. Section 2 Minus Section 5[9]

How did Sections 2 and 5 operate in tandem, and how might Section 2 operate alone? How effective is Section 2 at protecting minorities' voting rights compared with Section 5?[10] In the past, Sections 2 and 5 have functioned very differently. Here I seek to analyze, using examples of previous applications of Sections 2 and 5, how Section 2 by itself might operate in lawsuits like those against VIVA.

Little research exists on the relative effectiveness of and interactions between Sections 2 and 5. According to Nicholas O. Stephanopoulos, who very recently undertook this subject, "When academics have [previously] explicitly addressed the space between Section 2 and Section 5, they have tended to conclude (without much elaboration) that it is not very large."[11] Even Justice Anthony Kennedy remarked during the *Shelby* oral arguments in February 2013, "it's not clear to me that there's that much difference in a Section 2 suit now and preclearance."[12]

Litigation under Sections 2 and 5 differs in procedure. First, the bodies invoking the protections of the VRA are usually different.[13] Private parties typically initiate Section 2 suits, and the Department of Justice or the federal district court in Washington, D.C. operate Section 5 preclearance.[14] Thus while the federal government is responsible for the relatively low costs of preclearance procedures, private plaintiffs must bear the relatively greater costs of Section 2 litigation themselves.[15]

Second, under Section 2, the burden of proof is on the plaintiff to demon-

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9: The title for this section was inspired by an earlier working title of a particularly illuminating article from Professor Stephanopoulos. See Nicholas Stephanopoulos, *The South After Shelby County,* 2013 Sup. Ct. Rev. (forthcoming 2014), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336749.

10: Nicholas Stephanopoulos, *The Future of the Voting Rights Act,* Slate (Oct. 23, 2013), online at http://slate.me/1nAjYud.

11: Stephanopoulos, 2013 Sup. Ct. Rev. at *2 (cited in note 9).

12: Transcript of Oral Argument, *Shelby County v. Holder*, 133 S. Ct. 2612, No. 12-96 at 37 (Feb. 27, 2013), online at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-96_7648.pdf.

13: The Section 2 suit brought by the Department of Justice against VIVA is indeed unusual. Several independent groups are also challenging the law.

14: Stephanopoulos, 2013 Sup. Ct. Rev. at *3 (cited in note 9).

15: *Id*. at *8. However, judicial preclearance is more expensive than administrative preclearance.

strate that the voting policy in question violates the VRA. Under Section 5, the burden of proof is on the jurisdiction to demonstrate that the voting policy it proposes does not violate the VRA; the jurisdiction must establish that its change to voting practices "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color."[16] Often, the lawfulness of a challenged policy is clear enough that the Section 2 plaintiff would meet its burden of proof and the Section 5 jurisdiction would likewise not obtain preclearance, or, vice versa, the Section 2 plaintiff would not meet its burden of proof and the Section 5 jurisdiction would likewise obtain preclearance. However, "there necessarily exist circumstances" in close cases in which a Section 2 plaintiff would be unable to demonstrate that the VRA has been violated but in which a Section 5 jurisdiction, on the same facts, would have its proposed electoral changes blocked by the courts or the DOJ.[17] In these situations post-*Shelby*, a challenged policy that would have been blocked by Section 5 would still go into effect because the Section 2 suit proved unsuccessful.

Ultimately these two differences in procedure mean it is likely that a number of voting policies will fall into a procedural gap between Sections 2 and 5. Some policies that would have been blocked by Section 5 will not be challenged at all; some policies will be challenged under Section 2 but will be upheld; and fewer policies will actually be struck down in a Section 2 suit.[18]

Sections 2 and 5 also differ in substance. Looking again to the burden of proof, Section 5 preclearance for a proposed voting procedure is typically denied when there is a simple showing of statistically significant disparate impact on racial or language minorities. The courts have repeatedly confirmed that this interpretation of the Section 5 burden of proof is correct.[19] However, Section 2 plaintiffs have had to demonstrate "something more than disproportionate impact to establish a Section 2 violation."[20] Despite that Section 2 was amended upon the VRA's reauthorization in 1982 to clarify that plaintiffs could bring a complaint under a simple intent or results standard, the courts have consistently misapplied the legislative objective and have demanded "something more."[21] Judicial interpretations of what this "something

16: 42 USC § 1973c(a) (emphasis added).

17: Stephanopoulos, 2013 Sup. Ct. Rev. at *7 (cited in note 9).

18: *Id*. at *6.

19: *Florida v. United States,* 885 F. Supp. 2d 299, 312 (D.D.C. 2012); *Texas v. Holder*, 888 F. Supp. 2d 113, 126, 138 (D.D.C. 2012); *South Carolina v. United States*, 898 F. Supp. 2d 30, 39 (D.D.C. 2012).

20: *Brown v. Detzner,* 895 F. Supp. 2d 1236, 1249 (M.D. Fla. 2012).

21: *Voting Rights Extension, Report of the S. Comm. On the Judiciary on S. 1992*, 97th Cong. 2d Sess., S. Rep. 97-417 at 27 (1982); see generally Bernice Bird,

more" standard actually requires are inconsistent; some rely on vague "Senate Factors" articulated in the Senate Judiciary Committee's Report on the reauthorization, and others require an interaction with social and historical conditions to cause the disparate impact.[22] Section 2 plaintiffs therefore face a heightened yet ambiguous standard of proof, making their demonstration of a violation of the VRA more difficult.

This substantive difference, like the procedural differences, indicates that it is likely that a number of voting policies will fall into a substance gap between Sections 2 and 5. Some policies that would have been blocked by Section 5 may not result in a Section 2 violation if the plaintiff cannot establish the necessary "something more" in addition to the disparate impact on racial or language minorities.[23]

Plainly, given these procedural and substantive gaps, "It is difficult to determine from historical data how many policies that were blocked by Section 5 would have gone into effect had only Section 2 been available to challenge them."[24] It is also difficult to quantify the deterrent effect of Section 5; undoubtedly some voting policies were never proposed in the first place because Section 5 existed as a substantial obstacle to implementation. Additionally, the DOJ occasionally requests "more information" from jurisdictions applying for preclearance, which can prompt the jurisdiction to withdraw its application or revise its proposed voting policy.[25] In these cases it is impossible to know whether the original proposals would have violated Section 5, or Section 2.

How will Section 2 suits fare against North Carolina's new omnibus election law (VIVA)? Before *Shelby*, 40 counties in North Carolina were covered by the Section 5 preclearance requirement. It was in August, only two months after *Shelby* invalidated the VRA's mandated oversight of North Carolina, that the state's legislature passed VIVA. This article will next evaluate how VIVA's three most controversial provisions may have fared under pre-*Shelby* Section 5 preclearance protections and how they are likely to fare in the face of the upcoming Section 2 challenges.

Section 2 as An 'Adequate Substitute' for Section 5: Proposing an 'Effects-Only' Test as an Amendment to Section 2 of the Voting Rights Act of 1965 (September 2013) (unpublished manuscript on file with author).

22: Stephanopoulos, 2013 Sup. Ct. Rev. *40 (cited in note 9).

23: *Id*. at 41.

24: *Id*. at 9.

25: Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 How. L.J. 741, 756 n. 66 (2006).

II. Restrictive Provisions of VIVA

Among many controversial measures, critics claim that three particular provisions of VIVA have the potential to restrict minority access to the ballot: a strict photo voter ID requirement, a shortening of the early in-person (EIP) voting period, and an elimination of same day registration (SDR).

IIa. Strict Photo Voter ID

The concept of a voter ID is nothing new. According to experts, "what is new, however, is the degree to which the voter ID bills that were proposed and passed the 2012 [and other recent] session[s] were restrictive," prohibiting common forms of photo and non-photo IDs and offering no alternative mechanisms for eligible citizens without the required IDs to cast regular ballots.[26] Voter ID rules can vary considerably, and the last few years have witnessed proposals for the strictest laws to date. Only in 2006 did certain states begin to require voters to show government-issued photo ID at the polls in order to cast their ballots.[27] As of 2013, eight states have strict voter ID rules in effect,[28] and seven more will implement similar laws within the next year.[29]

Proponents of photo voter ID rules explain that strict laws are necessary to protect elections from voter fraud. But the type of voter fraud that does exist is on the absentee ballot level; it is not committed by individuals voting in person at the ballot box.[30] Abundant research conclusively demonstrates that in person voter fraud is exceedingly rare and statistically insignificant.[31] Recent research also indicates that three specific factors contribute to the like-

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26: Wendy R. Weiser & Lawrence Norden, *Voting Law Changes in 2012* at 4, Brennan Ctr. for Justice (2012), online at https://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Brennan_Voting_Law_V10.pdf.

27: *Id*. There, the authors identify Indiana as an example of one such state.

28: Voter Identification Requirements, Nat'l Conference of State Legislatures (visited Dec. 14, 2013), online at http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx. The states that currently have strict voter identification rules in effect are Georgia, Indiana, Kansas, Tennessee, Texas, Arizona, Ohio, and Virginia.

29: *Id*. The states that are due soon to implement strict voter identification measures are Alabama, Arkansas, Mississippi, North Carolina, Pennsylvania, Virginia, and Wisconsin.

30: Lorraine Minnite, *Voter Identification Laws: the Controversy over Voter Fraud*, in Matthew Streb, ed., *Law & Election Politics* 88, 95-102 (Routledge 2013).

31: Richard Hasen, *The Voting Wars: From Florida 2000 to the Next Election Meltdown* 41-73 (Yale 2012).

lihood that states will propose or adopt strict photo ID laws: Republican control of the state legislature, a traditionalist state political culture, and greater levels of racial diversity.[32]

Critics argue that strict photo voter ID rules may discourage some otherwise eligible voters from casting ballots at all because the burden of obtaining an acceptable ID falls more heavily on vulnerable populations.[33] But the research on the impact of voter ID laws on overall election turnout is inconclusive.[34] Scholars explain that this is because the strictest photo ID laws have been implemented only in very few and very recent elections.[35] The necessary data simply does not yet exist. In the interim, experts suggest that the best approach to measure the effect of strict photo voter ID requirements, particularly in their potential to have a disparate impact on racial minorities subject to VRA protections, is to analyze the population of eligible voters who are least likely to possess an acceptable ID.[36]

In North Carolina, 5% of registered voters have no acceptable photo ID. Black Americans compose 23% of North Carolina's registered voters, but are 34% of those without the photo IDs required under the new law.[37] As a result, the law places the burden of obtaining the required photo ID on more black North Carolinians than on white North Carolinians. This provision of VIVA will therefore apply disproportionately to black Americans.

Neither of the two Section 2 suits litigated thus far against photo voter ID requirements proved successful.[38] However, it is important to note that the courts in each Section 2 case determined that the plaintiffs failed to provide

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32: See generally Kathleen Hale & Ramona McNeal, *Election Administration Reform and State Choice: Voter Identification Requirements and HAVA*, 38 Pol. Stud. J. 281 (2010).

33: Richard Sobel & Robert Ellis Smith, *Voter-ID Laws Discourage Participation, Particularly Among Minorities, and Trigger a Constitutional Remedy in Lost Representation*, 42 PS: Pol. Sci. & Pol. 107, 110 (2009); E. Earl Parson & Monique McLaughlin, *The Persistence of Racial Bias in Voting: Voter ID, The New Battleground for Pretextual Race Neutrality,* 8 J.L. Soc'y, 75, 89 (2007); John Lewis, *A Poll Tax by Any Other Name,* NY Times (Aug. 26, 2011), online at http://nyti.ms/1fRr0qm.

34: See generally Robert S. Erikson & Lorraine C. Minnite, *Modeling Problems in the Voter Identification – Voter Turnout Debate,* 8 Elec. L.J. 85 (2009).

35: Minnite, *Voter Identification Laws* at 102 (cited in note 30).

36: *Id*.

37: Nick Byrne, *North Carolina Restricts Voting Access in the Name of Reform*, Jurist-Dateline (Aug. 27, 2013), online at http://jurist.org/dateline/2013/08/nick-byrne-voter-ID.php.

38: *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1375 (N.D. Ga. 2005); *Gonzalez v. Arizona,* 677 F .3d 383, 407 (9th Cir. 2012) (en banc).

sufficient evidence that minorities were less likely than white Americans to possess the required identification; neither case even reached the question of satisfying the "something more" standard.[39] Meanwhile, Section 5 preclearance, prior to *Shelby*, successfully blocked three voter ID policies in Louisiana, Texas, and South Carolina.[40]

IIb. Shortened EIP Voting Period

Early in person (EIP) voting is a particular type of early voting that does not account for the use of no-fault absentee ballots. EIP voters cast their ballots at specified early voting stations in locations similar to traditional polling places,[41] with the available period ranging from four to forty-five days before Election Day depending on the state.[42] EIP voting has become increasingly popular in recent years; while in 1972, only five states offered EIP voting, by 2010, thirty states and Washington, DC had an EIP policy in place.[43] And while only 4% of the voting population cast ballots at early voting sites in 2000, the rate more than quadruped in eight years: 18% used EIP voting in 2008.[44] Despite this widespread popularity, the last two years have witnessed proposed cutbacks to early voting.[45] In 2012 alone, at least nine states considered bills to reduce their respective EIP voting periods.[46]

39: Stephanopoulos, 2013 Sup. Ct. Rev at *42 (cited in note 9).

40: Department of Justice, *Section 5 Recommendation Memorandum* 45 (Aug. 25, 2005); *Texas v. Holder*, 888 F. Supp. 2d 113, 138 (D.D.C. 2012), *vac'd*, 133 S. Ct. 2886 (2013). The DOJ also objected to the law prior to the judicial proceeding. See *Texas v. Holder*, 888 F. Supp. 2d at 117-118; See *South Carolina v. United States*, 898 F. Supp. 2d 30, 48-51 (D.D.C. 2012). South Carolina's law was blocked only temporarily.

41: Paul Gronke, *Early Voting: The Quiet Revolution in American Elections*, in Matthew Streb, ed., *Law & Election Politics* 134, 139 (Routledge 2013).

42: *Absentee and Early Voting*, Nat'l Conference of State Legislatures (visited Dec. 14, 2013), online at http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx.

43: Jan E. Leighley & Jonathan Nagler, *The Effects of Non-Precinct Voting Reforms on Turnout, 1972 -2008* at 22 tbl. 1, Pew Center on the States (2009), online at http://pewcenteronthestates.org/uploadedFiles/wwwpewcenter-onthestatesorg/Initiatives/MVW/Leighley_Nagler.pdf?n=8970; *Absentee and Early Voting* (cited in note 42).

44: R. Michael Alvarez, et al, *2008 Survey of the Performance of American Elections* (2009), online at http://www.vote.caltech.edu/drupal/files/report/Final%20report20090218.pdf.

45: Gronke, *Early Voting* at 135, n. 37 (cited in note 41).

46: Weiser & Norden, *Voting Law Changes in 2012* at 29 (cited in note 26). These

Proponents praise the convenience of EIP voting for populations that work long hours or lack reliable transportation, and claim that early voting is a tool for increasing voter turnout overall.[47] Those in favor of shortening the EIP voting period cite cost reduction and easing administrative burdens as justifications for the cutbacks.[48] But evidence is beginning to show that such policies in fact do not accomplish those goals.[49] Moreover, as with the strict photo voter ID rules, almost all of the states that have proposed or passed bills curtailing EIP voting have Republican-majority legislatures, with support being sharply divided on partisan lines. Opponents, overwhelmingly Democrats, have argued that "the real motivation for reducing early voting was the success of the Obama campaign in using early voting in 2008."[50] According to a New York Times editorial, "Early voting skyrocketed to a third of the vote in 2008, rising particularly in the South and among black voters supporting Barack Obama, and that, of course, is why Republican lawmakers in the South are trying desperately to cut it back."[51]

In North Carolina, VIVA will eliminate the first full week of the previously allotted 17 days of the early voting period. In the 2012 election, more than half of all North Carolina voters cast their ballots through EIP voting.[52] Black Americans voted early at higher rates, and, even then, voted earlier in the early voting period than white Americans.[53] While it is impossible to determine who would be less likely to vote because of the fewer available days, limiting the number of days of the early voting period displaces the votes cast during the first days of the period. And black votes will be displaced more than white votes. This provision, like the voter photo identification require-

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states are Florida, Georgia, Maryland, Nevada, New Mexico, North Carolina, Ohio, Tennessee, West Virginia.

47: *Id*. at 32.

48: *Id*.

49: See generally Joseph D. Giammo & Brian J. Brox, *Reducing the Costs of Participation: Are States Getting a Return on Early Voting?*, 63 Pol. Res. Q. 295 (2010); Editorial, *Only the Foolish Shorten Early Voting*, News & Record (May 18, 2011), online at http://www.news-record.com/content/2011/05/17/article/editorial_only_the_foolish_limit_early_voting.

50: Weiser & Norden, *Voting Law Changes in 2012* at 32 (cited in note 26).

51: Editorial, *They Want to Make Voting Harder?*, NY Times at A20 (Jun. 6, 2011), online at http://nyti.ms/Ms6u7D.

52: *2012 Election Snapshot – North Carolina*, Pew State & Consumer Initiatives (Sep. 5, 2013), online at http://www.pewstates.org/research/analysis/2012-election-snapshotnorth-carolina-85899502663.

53: Paul Gronke, *Proposed Changes to Early Voting in NC Could Affect Over 30% of Electorate* (Apr. 4, 2013), online at http://earlyvoting.net/author/gronkep/page/3/.

ment, would seem to burden disproportionately black Americans as opposed to white Americans.

Litigation over the Florida House Bill 1355's (HB 1355)[54] cutback of EIP voting is particularly illuminating for examining this provision of VIVA. Specifically, Florida's 2011 bill was subject to both Section 5 preclearance and a Section 2 suit. Pre-*Shelby*, only five counties in Florida were covered by the Section 5 regime, and HB 1355 was blocked from going into effect in those counties when the courts denied preclearance.[55] But the statewide Section 2 challenge to the law failed, and the cutback from 14 to eight days of early voting was implemented in the remaining 62 Florida counties.[56] Notably, the court in the Section 2 case "unsubtly hinted" that it would have in fact invalidated HB 1355 had it been evaluated instead under Section 5.[57] The trial court judge explicitly noted that the "important distinction between a Section 5 and a Section 2 claim plays a significant role in the Court's decision in this case."[58] This does not bode well for the Section 2 suit against the provision of VIVA that shortens EIP voting in North Carolina.

IIc. Eliminated SDR

Same Day Registration (SDR) allows citizens to register and vote in a single act during a specified period prior to Election Day. SDR is different from Election Day Registration (EDR); with SDR, the option to register and vote together is offered only during the early voting period while EDR is offered only on Election Day itself. SDR was implemented in North Carolina in 2007 to offer the convenience of 'one stop shopping.' Because North Carolina remains the only state in the US that offers SDR only and not SDR in addition to EDR,[59] there is little data on the effects of a policy that implements SDR exclusively. Presuming that SDR alone reflects similar outcomes

54: HB 1355 amended the Florida Election Code (Chapters 97-106, Florida Statutes) and became law (Chapter 2011-40, Laws of Florida) on May 19, 2011; see generally Michael C. Herron & Daniel A. Smith, *Souls to the Polls: Early Voting in Florida in the Shadow of House Bill 1355*, 11 Elec. L.J. 331 (2012).

55: *Florida v. United States*, 885 F. Supp. 2d at 320.

56: *Brown*, 895 F. Supp. 2d at 1250-51 (D.D.C. 2012).

57: Stephanopoulos, 2013 Sup. Ct. Rev. at *42 (cited in note 9).

58: *Brown*, 895 F. Supp. 2d at 1251.

59: However, from 2008 to 2010 Ohio offered a policy similar to SDR alone because the first week of early voting overlapped with the final week before the voter registration deadline. See Weiser & Norden, *Voting Law Changes in 2012* at 26 (cited in note 26).

as SDR plus EDR, evidence shows that such policies increase overall turnout and especially increase turnout among young voters.[60]

Evidence from North Carolina indicates that eliminating SDR will also have a racial disparate impact. Again, black Americans compose 23% of North Carolina's registered voters, but were a full 36% of those who in 2012 registered and voted on the same day during the early voting period.[61] The black population of North Carolina was disproportionately more likely than the white population to take advantage of SDR. Eliminating SDR will disproportionately impact a racial minority.

The elimination of SDR has not been the subject of any Section 2 or Section 5 activity to date. There is no data regarding how such a provision would fare under Section 5 preclearance or a Section 2 suit.

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Thus far Section 2 has not been effective in protecting voting rights from the types of restrictions imposed by VIVA, whereas Section 5 has proven effective. The data suggests that the provisions for a strict photo voter ID requirement and shortening the EIP voting period would not have satisfied Section 5 preclearance before *Shelby* when much of North Carolina was covered by the Section 4 formula. Given the evidence from previous Section 2 litigation regarding these types of election policies, there is no indication that any of the three VIVA provisions will succumb to a Section 2 suit.

III. A Third Generation

This does not look good. The data from North Carolina reveal that VIVA will restrict access to the ballot to a greater degree for minorities than for white Americans, and it appears that the *Shelby* decision is allowing this to happen. Absent the *Shelby* decision, these minorities may have been protected by the Section 5 preclearance requirement. However, the voting rights community should not simply rush to restore Section 5 with a new Section 4 preclearance formula. The following section will reveal that, despite its successes, Section 5 before *Shelby* was not actually adequately protecting the right to vote.

The VRA as it existed before *Shelby*, with Sections 2 and 5 operating in tandem, ended the racial discrimination in voting of the Jim Crow era. It was

60: Roger Larocca & John S. Klemanski, *U.S. State Election Reform and Turnout in Presidential Elections*, 11 St. Pols. & Pol'y Q. 76 (2011).

61: *Demos Fact Sheet: Same Day Registration*, Demos (visited Feb. 25, 2014), online at http://www.demos.org/sites/default/files/publications/EDR_factsheet.pdf.

very effective at fighting what have been termed "first generation barriers" to the right to vote.[62] First generation barriers were direct obstacles to the ballot: "tests and devices" of voter elimination such as poll taxes and literacy tests.[63] And the VRA as it existed before *Shelby* was very effective at fighting 'second generation barriers' to the right to vote. These second generation barriers were indirect obstacles: mechanisms of vote dilution such as redistricting, suburban annexation, and at-large voting.[64] Congress acknowledged the VRA's continued effectiveness with second generation barriers during the 2006 re-authorization process, determining that "eliminating preclearance would risk loss of the gains that had been made."[65]

But the VRA Section 5's undeniable successes notwithstanding, the section has not been very effective at fighting what I identify as third generation barriers to the right to vote. Third generation barriers, such as the three provisions of VIVA examined above, are these more modern policies that restrict access to exercising the right to vote but are not a means of pure voter elimination (as first generation barriers were) nor a means of vote dilution (second generation barriers).

Third generation obstacles are also a relatively recent phenomenon.[66] From the 1970s until the end of the first decade of the twenty-first century, widespread efforts to ease access to the franchise were expanding, including implementing EIP voting and SDR/EDR; restrictive measures have become common only within the last few years.[67] The first photo voter ID rule, again, was introduced in 2006, and the issue has exploded in the years since. These third generation barriers are indeed novel, and are confounding the courts. While VRA litigation has generated "a well-established standard for vote dilution, a satisfactory test for [third generation] vote denial cases under Section 2 [or Section 5, for that matter] has yet to emerge."[68] And of the recent measures of vote restriction surrounding the 2012 elections that were thwarted, "few [were] by the operation of traditional civil rights–based voting laws"–i.e., the

62: Bruce E. Cain, *Moving Past Section 5: More Fingers or a New Dike?*, 12 Elec. L.J. 338, 339 (2013).

63: *Shelby County,* 133 S. Ct. at 2651 (Ginsburg, J., dissenting).

64: *Id*.

65: *Id*. at 2612 (Ginsburg, J., dissenting) (reviewing Congressional records).

66: See generally Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 Harv. L. Rev. 95 (2013); See generally Weiser & Norden, *Voting Law Changes in 2012* (cited in 26).

67: See generally Pildes, 49 How. L.J. at 741 (cited in note 25), as well as Weiser & Norden, *Voting Law Changes in 2012* (cited in note 26).

68: Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. Rev. 709 (2006).

Voting Rights Act.[69] The VRA is not the comprehensive stalwart of protecting the ballot that it once was.

Section 5 has not been well suited to fighting these third generation barriers because of a major shortcoming identified in Richard Pildes's scholarship: it too narrowly targets who receives its protection, in two significant ways.[70] First, Section 5 is too limited by geography. Only those nine whole states and individual counties in five others were covered by preclearance before *Shelby*. But third generation obstacles are restricting access to the ballot all over the country, not just in those jurisdictions under the preclearance requirement. Strict voter ID laws have passed in seven states not covered by the old Section 4 formula, and have been at least debated in the legislatures of almost every single state in the country.[71] Proposals for shortening the EIP voting period have faced litigation in Florida–which, as detailed above, was largely uncovered–and Ohio, Nevada, and New Mexico–which are 100% free of Section 5 oversight.[72] While SDR was in effect only in North Carolina, the similar Election Day Registration (EDR) has been challenged by Republican legislatures in Wisconsin, Montana, Iowa, and Maine–which are also free of oversight.[73] Experts are pointing out that these voting restrictions are showing up in so-called "battleground states" or states where there are close elections–not just in primarily southern states with a history of racial discrimination.[74]

Second, Section 5 (and in fact the entire VRA) is too limited by demography. The VRA as a whole protects the right to vote only of racial and language minorities. This suitably responded to the needs of the country in previous decades. But third generation obstacles are restricting access to the ballot for vulnerable populations that are not racial or language minorities: the poor, young people, the elderly, and women.[75] While it is impossible to measure

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69: Issacharoff, 127 Harv. L. Rev. at 107 (cited in note 66); *Obama for America v. Husted,* 697 F.3d 423 (6th Cir. 2012).

70: Richard H. Pildes, *Voting Rights: the Next Generation*, in Guy-Uriel E. Charles, et al, ed, *Race, Reform, and Regulation of the Electoral Process: Recurring Puzzles in American Democracy* 17 (Cambridge 2011); see generally Pildes, 49 How. L.J. at 741 (cited in note 25).

71: *Voter Identification Requirements,* Nat'l Conference of State Legislatures (visited Dec. 14, 2013), online at http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx#State_Reqs.

72: Wendy & Norden, *Voting Law Changes in 2012* at 29 (cited in note 26).

73: *Voter Registration: FAQs*, Nat'l Conference of State Legislatures (visited Dec. 14, 2013), online at http://www.ncsl.org/research/elections-and-campaigns/the-canvass-may-2013.aspx.

74: Pildes, *Voting Rights: the Next Generation* (cited in note 70).

75: Sobel & Smith, 42 PS: Pol. Sci. & Pol. at 107 (cited in note 33); R. Michael

to what extent these obstacles would suppress turnout, or how many voters would simply be deterred because of confusion, we can examine which voters will be burdened disproportionately because of these restrictive policies.

Low-income citizens are significantly less likely to have government-issued photo identification.[76] Those earning less than $35,000 per year are only half as likely as those who earn more than $35,000 per year to have an acceptable photo ID.[77] Even when the ID itself is free, the costs of obtaining it can be high. Citizens are required to provide supporting documentation in order to apply for an ID suitable for voting, and these supporting documents themselves often carry a price tag. An official copy of a birth certificate can cost $10 to $30 depending on the state, and the act of requesting the records often incurs additional processing or transaction fees.[78] Aside from the financial burden, obtaining an acceptable photo ID also imposes substantial logistical hurdles for those least able to surmount them. Low-income voters are less likely to have access to reliable transportation to get to an often far-away government office. Then, government offices are unlikely to be open in the evening or on weekends, forcing many hourly wage employees to sacrifice pay just to take the steps necessary to be able to vote.[79]

These limitations in mobility and workplace flexibility also explain why shortening the EIP voting period and eliminating SDR disproportionately affect low-income voters. Research confirms that those who use EIP voting on average have considerably lower incomes than those who vote on election

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Alvarez et al., *The Effect of Voter Identification Laws on Turnout* (California Institute of Technology Social Science Working Paper No. 1267R, Jan. 2008), online at http://ssrn.com/abstract=1084598 (visited Dec. 14, 2013); Teresa James, *Early In-Person Voting: Effects on Underrepresented Voters, Voting Turnout, and Election Administration*, Project Vote (Aug. 2010), online at http://projectvote.org/component/content/article/236-Early%20Voting/527-policy-paper-early-in-person-voting-effects-on-underrepresented-voters-voting-turnout-and-election-administration.html.

76: See generally Matt A. Barreto, et al., *The Disproportionate Impact of Voter-ID Requirements on the Electorate – New Evidence from Indiana*, 42 PS: Pol. Sci. & Pol. 111 (2009); Sobel & Smith, 42 PS: Pol. Sci. & Pol. at 107 (cited in note 33); R. Michael Alvarez et al., *An Empirical Bayes Approach to Estimating Ordinal Treatment Effects*, 19 Pol. Analysis 20, 26-30 (2010).

77: *Citizens Without Proof* at 3, Brennan Ctr. for Justice (2006), online at http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf.

78: Keesha Gaskins & Sundeep Iyer, *The Challenge of Obtaining Voter Identification* at 16-17, Brennan Ctr. for Justice (2012), online at https://www.brennancenter.org/publication/challenge-obtaining-voter-identification.

79: *Id.*

day or by mail.[80] Another study notes that SDR is almost twice as likely to increase turnout among poor voters as it is to increase turnout among wealthy voters.[81] Restricting these types of "convenience voting" does not simply "inconvenience" low-income voters; it can extinguish the opportunity to register or vote at all.

Third generation obstacles can further restrict access to the ballot according to age. Young voters, for example, are significantly more likely to benefit from same day registration than older voters simply because they are more likely to not yet be registered. SDR is believed to boost voter turnout among voters aged 18-25 at twice the rate it boosts voter turnout overall.[82] College students, in particular, are said to be "one of the groups most affected" by recent restrictive voting measures.[83] They are especially vulnerable to strict photo ID requirements, which may prohibit out-of-state driver's licenses or even government-issued university IDs.[84]

The very oldest along with the very youngest voters are the least likely on the age spectrum to have acceptable photo identification.[85] 20% of seniors do not have a current government-issued photo ID, according to the AARP.[86] Many seniors no longer drive or have the other documentation necessary to obtain a proper photo ID. Some seniors were born in rural areas or private

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80: See generally Mark Salling and Norman Robbins, *Do White, African American, and Hispanic/Latino EIP Voters Differ from Election Day and Vote by Mail Voters in Income?* (Aug 27, 2012), online at http://urban.csuohio.edu/publications/center/northern_ohio_data_and_information_service/Analysis_of_Median_Household_Income_Differences_between_Election_Day-VBM_and_EIP_Voters_8-27-12.pdf.

81: See generally R. Michael Alvarez and Jonathan Nagler, *Same Day Voter Registration in North Carolina*, Demos (2007), online at http://www.demos.org/sites/default/files/publications/updated%20NC.pdf.

82: *Id*.; See generally R. Michael Alvarez and Jonathan Nagler, *Same Day Voter Registration in Maryland*, Demos (2010), online at http://www.demos.org/sites/default/files/publications/SameDayRegistration_Maryland_Demos.pdf.

83: Emily Schultheis, *Students Hit by Voter ID restrictions*, Politico (Nov. 30, 2011), online at http://www.politico.com/news/stories/1111/69465.html.

84: *Id*.; Weiser and Norden, *Voting Law Changes in 2012* at 8 (cited in note 26). Students attending college away from their home state typically have the option to vote from either state.

85: Barreto, 42 PS: Pol. Sci. & Pol. at 114 (cited in note 76).

86: Reid Wilson, *Five Reasons Voter Identification Bills Disproportionately Impact Women*, Wash. Post (Nov. 5, 2013), online at http://www.washingtonpost.com/blogs/govbeat/wp/2013/11/05/five-reasons-voter-identification-bills-disproportionately-impact-women/.

homes rather than hospitals, and may have never had a birth certificate.[87] Older or disabled voters also face considerable mobility limitations, and understandably would be disproportionately affected by laws that shorten the EIP voting period.

Women face unique challenges under strict photo voter ID rules. Approximately 90% of married American women change their legal names upon marriage,[88] leading to inconsistencies among their existing identification documents, supporting personal records, and the government voter rolls. Even a minor mismatch can cause trouble at the polls. In one widely reported story, female Judge Sandra Watts was forced to cast only a provisional ballot in the 2013 Texas election just months after the state's strict photo ID regime was reinstated in the wake of *Shelby*.[89] Watts's driver's license showed her maiden name as her middle name, but the state voter rolls listed her given middle name. "What I have used for voter registration and for identification for the last 52 years was not sufficient yesterday when I went to vote . . . This is the first time I've ever had a problem voting," she told local reporters.[90] In order to obtain an acceptable ID, female voters may be required to present their marriage licenses. Depending on the state, an official copy of a marriage license can cost up to $40.[91]

But the protections of the Voting Rights Act do not extend to these groups; the legal remedies the law offers are only available to racial and language minorities. Capturing this concern for the inadequacy of the VRA in the face of third generation barriers, Samuel Issacharoff explains, "Unfortunately, in the absence of broader protections for the right to vote, claims of improper conduct [have] to be channeled into the 'suffocating category of race.'"[92] Unless plaintiffs can prove that a voting procedure impacts racial or language minorities specifically, along with the Section 2 "something more," the VRA offers no legal protection. The poor, young people, the elderly, and women

87: Sobel & Smith, 42 Pol. Sci. & Pol. at 107 (cited in note 33).

88: Wilson, *Five Reasons Voter Identification Bills Disproportionately Impact Women,* Wash. Post (cited in note 86).

89: *Texas' Voter ID Law Creates a Problem for Some Women*, Nat'l Public Radio, All Things Considered (Oct. 30, 2013), online at http://www.npr.org/2013/10/30/241891800/texas-voter-id-law-creates-a-problem-for-some-women.

90: *Id.*

91: Gaskins & Iyer, *The Challenge of Obtaining Voter Identification* at 16 (cited in note 78).

92: Issacharoff, 127 Harv. L. Rev. at 117 (cited in note 66), citing Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 592, 630-31 (2002).

have no legal recourse when they are disproportionately restricted from the ballot.

The politically liberal inclinations of some of these affected groups, as well as the fact that these voting restrictions are proposed almost exclusively by Republican legislatures, suggest that third generation barriers are being used more out of partisan interest than racial discrimination. According to Pildes:

> The VRA model of selectively focusing on racially discriminatory voting practices requires courts to determine whether race or partisan politics is the cause . . . So long as Black voters remain overwhelmingly Democratic, race and partisanship will remain intertwined . . . The more difficult it is for courts to separate racial from partisan or other considerations, the greater the risk that courts will reject voting-rights challenges on the ground that partisan considerations, not racial ones, account for the practice at issue.[93]

Indeed, the Fifth Circuit in *LULAC v. Clements* declared that the VRA is "implicated only where Democrats lose because they are black, not where blacks lose because they are Democrats."[94] Courts today must examine the claim that party, rather than race, causes minority disenfranchisement.[95]

In 2006, Pildes argued that the VRA re-authorization process offered an opportunity to re-evaluate what is the best model for federal voting rights protection.[96] Was the selective-targeting approach still appropriate?[97] He explained, "Voting-rights policy should not remain so embedded within the model of the past as to preclude looking beyond that model."[98] And the changes in the voting rights landscape in the years since 2006 certainly demand such a reexamination. In the few months since the *Shelby* ruling, Issacharoff has also aptly pondered "how much of the terrain the civil rights model still captures."[99]

93: Pildes, 49 How. L.J. at 761 (cited in note 25).

94: *LULAC v. Clements*, 999 F. 2d 831, 854 (5th Cir. 1993) (referring to Section 2 specifically).

95: Ellen Katz, et al, *Documenting Discrimination in Voting: Judicial Findings under Section 2 of the Voting Rights Act Since 1982–Final Report of the Voting Rights Initiative, University of Michigan Law School*, 39 U. Mich. J.L. Reform 643, 659 (2006).

96: See generally Pildes, 49 How. L.J. at 741 (cited in note 25).

97: *Id*. at 747.

98: *Id*. at 762.

99: Issacharoff, 127 Harv. L. Rev. at 104 (cited in note 66).

Part II of this article established that Section 2 of the VRA has thus far proven to be weak in dealing with third generation barriers. Here, Part III establishes that, upon closer inspection, even Section 5 is weak in addressing third generation barriers. Issacharoff is correct: "Different times call for different measures and the Court's [*Shelby*] decision, however wrenching, should compel taking stock of what has changed since 1965."[100]

IV. Conclusion

North Carolina's new election law is a regrettable repudiation of voting rights of the variety Section 5 of the Voting Rights Act was designed to protect. And *Shelby County v. Holder* was a regrettable ruling that will have tangible consequences for racial minorities and other vulnerable populations seeking equal access to the ballot. But to go back to the pre-*Shelby* framework would not offer the solutions needed today to protect the right to vote. *Shelby* and the onslaught of third generation obstacles to the ballot have instead brought an opportunity for the civil rights community to re-frame the legal paradigm in protecting voting rights.

The fundamental philosophy of the Voting Rights Act of 1965 was that federal oversight is justified to protect against racially discriminatory manipulation of the vote – but the VRA remains silent on the responsibility to protect the right to vote as such.[101] That times have changed is undeniable, and the current environment more than justifies Richard Pildes's suggestion to shift from an emphasis on anti-discrimination to an affirmative, substantive right to vote.[102] "Perhaps paradoxically," Pildes posits, "the more general the form of voting-rights protection, the more minority voting rights will be effectively protected."[103]

Pildes's colleagues Pamela Karlan and Samuel Issacharoff agree.[104] According to Karlan, scholars must develop "a more affirmative vision of the right to vote," and government must take "an active responsibility for ensuring that all citizens have full access to the political process, instead of one where constitutional and legal constraints operate primarily to set bounds on the permissible reasons for excluding people from the franchise."[105]

100: *Id*. at 97.

101: Pildes, 49 How. L.J. at 743 (cited in note 25).

102: *Id*. at 762.

103: *Id*. at 761.

104: Issacharoff, 127 Harv. L. Rev. at 113: "In the aftermath of *Shelby* County...it is time to rethink the basic model of federal supervision of improper state electoral practices in federal elections."

105: Karlan, *The Reconstruction of Voting Rights,* in Guy-Uriel E. Charles, ed, *Race,*

A recent proposal from Issacharoff is promising and deserves consideration.[106] Particularly compelling is his argument to derive federal regulatory authority over elections from the Elections Clause of the Constitution rather than from the Reconstruction Amendments. The Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations."[107] This article joins Issacharoff in turning to the Elections Clause in order to create a federal elections oversight organization that, through a disclosure apparatus and liability standard, requires nonpartisan federal endorsement of all election procedures.

However, Issacharoff does not go far enough. The current political environment demands what US citizens have long deserved: a Constitutional Amendment guaranteeing the right to vote as such. The qualifications of the Reconstruction Amendments limit protection of the franchise to consideration of race alone. As discussed above, this is no longer adequate. Restrictions on voting should no longer be barred only when they disproportionately impact racial or language minorities. Rather, they should be barred when they interfere with the right to vote as such, in all circumstances. Given today's political climate, such a proposal that would require unprecedented Congressional activity might be seen as idealistic and naïve. Perhaps it is so.[108] But anything short of a similarly comprehensive universal rights paradigm would be inadequate in protecting the franchise, that most sacred democratic right.

Reform, and Regulation of the Electoral Process: Recurring Puzzles in American Democracy 34, 35 (Cambridge 2011) (emphasis added).

106: See generally Issacharoff, 127 Harv. L. Rev. at 95 (cited in note 65).

107: U.S. Const. art. I, § 4, cl. 1.

108: It is not the purpose of this article to engage the likelihood of such action under present political conditions.

Competing Motivations for Originalism: Formalism vs. Rights

Hector Quesada†

I. Introduction

In the never-ending debate over constitutional interpretation, there has remained one constant theme: the persistence of originalism. Yet, originalism has only been a dominant interpretive theory in the past several decades. Many consider the late Robert H. Bork to have brought it out of the shadows and into the national spotlight with his book The Tempting of America,[1] encouraging closet originalists throughout the country to express their views. The originalism of today, however, is not exactly the one he promoted. The focus has shifted from original intent to original meaning. Driving this shift have been many of the theory's leading advocates, who are not all drawn to originalism for the same reasons. Some view originalism as the best interpretive method to supplement formalist theories of law. Others, though much less numerous, believe that originalism ensures that protections of natural rights written into the Constitution remain in effect. While both groups support a faulty interpretive theory, subjective in its true nature and providing no sure guard against judicial activism, this essay will attempt to answer the question whether originalism is actually compatible with their motivations. In this article, it will be shown that both motivations are ill-vindicated by originalism, but that originalism is more consistent with and better supported by the doctrine of natural rights.

II. A Brief History of Originalism

Bork's originalism stresses the original intent of the drafters of the Constitution. To him, they intended certain words of the document to have certain consequences, and we are bound by those original intentions. While simple and somewhat appealing, the theory suffers from issues of feasibility and subjectivity.

First, there is no singular intention of the Constitution's drafters. The doc-

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1: Robert Bork, *The Tempting of America: The Political Seduction of the Law* (Free 1990).

ument was born out of compromise, and there is no way of figuring out whose intention should be given priority. Intents were conflicting, and there is no consensus on what *the* original intent was. Daniel A. Farber and Suzanna Sherry note: "different framers expressed different views, and many, including Madison, changed their views over time . . . And to make matters worse, some of the evidence suggests that Americans in both the 1780s and the 1860s did not expect their own understanding of the meaning of the constitution to govern future interpretation!"[2]

Second, historical accounts are often skewed by personal agendas. Besides misinterpreting history on particular legal issues,[3] Bork also misrepresents historical views on the role of judges. From the late 18th century, Americans endorsed the role of "judges as guardians of the rights of people."[4] Even Madison expected judges to freely enforce the Bill of Rights.[5] These steps away from reality are not accidental but rather necessary to justify Bork's, and other originalists', policy preferences.[6] It is clear why scholars might seem hesitant to adopt Bork's original intent theory. For some, though, historical considerations are too alluring to abandon, and these scholars refuse to throw the baby out with the bath water.

Original meaning originalism is the theory that many scholars have now adopted to avoid original intent's flaws. Justices Antonin Scalia and Clarence Thomas are perhaps this theory's most well-known supporters, and their position on the Supreme Court means their jurisprudence has a powerful effect on the lives of Americans. What they advocate is interpretation of law based on the original meaning of words, as understood by the public at the time of the law's adoption. This shift from original intent to original meaning reflects the search for objectivity in constitutional interpretation, since the original understanding of words to the public is ostensibly a matter of fact and not of opinion. Formalism can be seen as driving most original meaning originalists, but it will be shown that originalism can often undermine formalistic desiderata.

2: Daniel A. Farber & Suzanna Sherry, *Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations* 16 (Chicago 2002)

3: *Id. at* 17 ("When it comes to doing the actual historical work of determining the intent of the framers, Bork is too often sloppy, superficial, and sometimes inaccurate.").

4: *Id*.

5: *Id.* at 18-19.

6: *Id.* at 25-28.

III. The Formalist Motivation

At its core, formalism is a jurisprudential doctrine advocating as optimal the interpretation of laws as they are written, without resorting to external judgments about, for example, fairness and intent. Formalism is inextricably tied to analyses of the meanings of words in legal text; to know what a written law says, one must know what its words mean. This does not necessarily lead to an originalist approach to interpretation, as one can utilize current meanings (how we understand the words of the law today) or original meanings (how people from the past—presumably those who lived during the time of the law's initial creation—understood the words of the law in their day). Yet, some of the most prominent formalists, like Justices Felix Frankfurter and Antonin Scalia,[7] have been drawn to originalism.[8] To them, only this interpretive method helps them follow the two guiding principles of formalism: judicial restraint and objectivity. But does originalism in fact help them achieve their twin objectives?

IIIa. Judicial Restraint

One of formalism's primary objectives is judicial restraint. Justice Scalia writes: "All I urge is that . . . the Rule of Law, the law of rules, be extended as far as the nature of the question allows . . . ."[9] For him, legal disputes necessarily involve relevant legal questions, and judges should restrain themselves from deciding on issues not properly before them. According to Margaret L. Moses, judges also overstep their boundaries by reversing acts of Congress or state legislatures, undermining the legislative authority of elected institutions: "When members of the Court act like 'politicians in robes,' who overstep

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7: David A. Strauss, *The Death of Judicial Conservatism*, 4 Duke J. Const. L. & Pub. Pol. 1, 7 (2009) (describing Frankfurter as "the most vigorous proponent" of limiting judicial action to cases where laws are obviously unconstitutional); Farber and Sherry, *Seeking Certainty* at 37 (cited in note 2) ("Although far more sophisticated than the classical formalists, Scalia shares their passion for order and logic.").

8: Felix Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. L. Rev. 527, 536 (1947) (expressing originalist notions when he remarked, "And so we assume that Congress uses common words in their popular meaning, as used in the common speech of men."); Antonin Scalia, *Originalism: The Lesser Evil,* 57 U. Cin. L. Rev. 849, 862 (1989) (clarifying to the reader that, despite its flaws, he prefers originalism to nonoriginalism).

9: Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1187 (1989).

their proper boundaries of the constitutional structure regarding the role of the judiciary . . . they need to be called to account."[10] Along with deciding issues not before them, judges also overstep their boundaries by reversing acts of Congress or state legislatures, undermining the legislative authority of elected institutions.[11]

Normatively, formalists believe such behavior should be kept to a minimum, if allowed to occur at all. In their view, judges should act merely as expositors of the law to settle specific legal disputes, not legislate their policy preferences. Thus, Justice Frankfurter exercised ultimate restraint in his dissenting opinion in *West Virginia State Board of Education v Barnette*.[12] He sympathized with respondents–Jehovah's Witnesses punished for obeying the tenets of their faith and not saluting the American flag during the Pledge of Allegiance–but believed the Court had no business interfering with the West Virginia law at hand.[13] At first glance, this seems honorable. We have an example of a justice selflessly disregarding his personal convictions to bar himself from overstepping his judicial authority by invalidating the rationally justified state law. Isn't that the attitude under which all judges should operate?

As admirable as this type of restrained judging may seem, originalism in practice does not lend itself so neatly thereto. Originalism is often embraced as a way to enforce formalism, but the reality is that originalist interpretation has led the Court to overturn many local, state, and federal statutes, or to reverse longstanding precedent, or both. An especially illustrative example of the latter option is Justice Scalia's majority opinion in *District of Columbia v Heller.*[14] Not only did the Justice and his colleagues strike down certain provisions of a local statute, DC's Firearms Control Regulations Act of 1975,[15] but he also reversed the Second Amendment precedent set by *Miller v United States*[16] in 1939. It is revealing that arguably the most influential originalist in the country acted so blatantly contrary to formalism's goal of restraint.

10: Margaret L. Moses, *Beyond Judicial Activism: When the Supreme Court is No Longer a Court,* 14 U. Pa. J. Const. L. 161, 214 (2011).

11: *Id.* at 163.

12: 319 US 624 (1943) (Frankfurter, J., dissenting).

13: *Id.* at 647 ("I cannot bring my mind to believe that the 'liberty' secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen.").

14: 554 US 570 (2008).

15: See Firearms Control Regulations Act of 1975, DC Code §§ 7-2501.01(12), -2502.01(a), -2502.02(a)(4), and -2507.02 (1975).

16: 307 US 174 (1939).

The gun control ordinance was not obviously unconstitutional, as Justice Frankfurter would have it be in order to invalidate it,[17] and, as previously mentioned, the precedent abandoned had been in place for almost 70 years.

The Court has also struck down major provisions of the Bipartisan Campaign Reform Act of 2002[18] in several recent cases, including *Citizens United v Federal Election Commission*.[19] According to former senator Russ Feingold, "Presented with a relatively narrow legal issue, the Supreme Court chose to roll back laws that have limited the role of corporate money in federal elections since Teddy Roosevelt was president."[20] Justice Scalia's concurring opinion in *Citizens United* certainly utilized an originalist methodology, but Feingold was not unwarranted in believing the Justice's side of the Court had overstepped its judicial bounds. Certainly Frankfurter's "clear mistake" judicial restraint may be an extreme—and, as David Strauss notes, "nobody on the Court today holds this view of the Court's role"[21]—but it is indisputable that original meaning originalism can and has led to the invalidation of major laws and precedents.

IIIb. Objective Adjudication

Another main goal of formalism is achieving objectivity when adjudicating. Judges are subjective when they cast value judgments on policy and interpret the Constitution to fit those judgments.[22]

Both of the prominent varieties of originalism are liable to the subjectivity that formalism scorns. Original intent originalism can lead a judge to such subjectivity. Tara Smith has aptly noted that "When a judge looks for what a law 'meant' rather than what it said, he will tend to ask '[w]hat should it have meant?' and will conclude that it meant something that he deems best."[23]

17: Strauss, 4 Duke J. Const. L. & Pub. Pol. at 7 (cited in note 7).

18: Bipartisan Campaign Reform Act of 2002, Pub L No 107-155, 116 Stat 81.

19: 558 US 310 (2010). And see *Davis v. Federal Election Commission*, 554 US 724 (2008); *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 US 449 (2007).

20: Kasie Hunt, *John McCain, Russ Feingold Diverge on Court Ruling*, Politico (Jan. 21, 2010), available at http://www.politico.com/news/stories/0110/31810.html.

21: Strauss, 4 Duke J. Const. L. & Pub. Pol. at 8 (cited in note 7).

22: See Tara Smith, *Why Originalism Won't Die: Common Mistakes in Competing Theories of Judicial Interpretation*, 2 Duke J. Const. L. & Pub. Pol. 159, 164 (2007).

23: *Id.* (footnote omitted), quoting Antonin Scalia, "Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting

Original understanding originalism, which has become more common, is claimed to prevent subjectivity and encourage objectivity, since judges merely look at the historical evidence to decipher text and decide cases. However, the latter originalists can still succumb to subjectivity in the form of imposing their own value judgments—as would be expected from any human being. More novel is the idea that objectivity is misunderstood by both originalists and their detractors.[24]

IIIb.1. Imposing Extra-Textual Values

The values of a judge, whether judicial or moral, can override the ostensibly restraining effects of originalist analysis, directly undermining the aims of formalism. For example, Justice Scalia admits that the doctrine of *stare decisis* should be followed in cases where longstanding, entrenched precedent contradicts an outcome expected from an originalist interpretation of the Constitution.[25] The philosophy that *stare decisis* is paramount is uncontroversial, and reflects the views of most judges. Yet, *stare decisis*, which may serve the ends of formalism and judicial restraint, is a judicial value neither mentioned nor directly supported anywhere in the constitutional text. While the doctrine of *stare decisis* may have been advocated by Framers like Alexander Hamilton,[26] their views are not binding on any judge, especially one like Justice Scalia who opposes the use of original intent.[27] What is frustrating is the ease with which he talks of "diluting" and "adulterating" originalism with *stare decisis*, while providing no justification—that is consistent with originalism— for doing so.[28] One could conceivably dilute originalism with many things, including principles of popular sovereignty and liberty rights, but justifying them using "tradition" is not a logically sufficient argument.[29] The problem is not that Justice Scalia's originalism encourages such dilution—it does not—but rather that it is seemingly neither strong enough nor practical enough to prevent

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the Constitution and Laws," in Amy Gutmann, ed., *A Matter of Interpretation: Federal Courts and the Law* 3, 18 (Princeton 1997).

24: Smith, 2 Duke J. Const. L. & Pub. Pol at 161 (cited in note 22).

25: Scalia, 57 U. Cin. L. Rev. at 861 (cited in note 8).

26: See Moses, 14 U. Pa. J. Const. L. at 169, n. 27 (cited in note 10).

27: See, for example, Smith, 2 Duke J. Const. L. & Pub. Pol at 163 (cited in note 22) ("Of the two—what lawmakers intended and what they actually wrote down and ratified—only the latter counts as law, Scalia insists.").

28: Scalia, 57 U. Cin. L. Rev. at 861 (cited in note 8) ("[I]n its undiluted form, at least, [originalism] is medicine that seems too strong to swallow. Thus, almost every originalist would adulterate it with the doctrine of *stare decisis* . . . .").

29: See Farber and Sherry, *Seeking Certainty* at 49-50 (cited in note 2).

dilution.

While the doctrine of *stare decisis* advocates the decidedly judicial value of following legal precedent, originalists can also embed moral and/or political values into their rulings in spite of their interpretive approach. Justice Scalia has declared, for example, that legally sanctioned public flogging or hand-branding would not be sustained by courts, even if such punishments were shown to be acceptable during the times of the Framers.[30] Though Justice Scalia seems to accept this as a matter of moral conviction, again, no part of the Constitution explicitly invites judges to impose their morality on the outcome of cases.

Similarly, Justice Scalia unexplainably ascribes special importance to tradition:

> [W]hen a "practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, [the Supreme Court has] no proper basis for striking it down."[31]

Following tradition is indeed a pragmatic way to prevent court decisions from overturning well-established practices in government, but tradition is nowhere invoked in the Constitution and may, in any given instance, stand opposed to it. Justice Scalia would temporarily reject originalism, for example, if it were used to declare current libel laws unconstitutional because this would dramatically change how reporters or bloggers portray public figures.[32]

30: Scalia, 57 U. Cin. L. Rev at 861 (cited in note 8) ("[I] am confident that public flogging and handbranding would not be sustained by our courts, and any espousal of originalism as a practical theory of exegesis must somehow come to terms with that reality."). Since 1989, Justice Scalia has doubled down on his originalism, recently admitting that "[I]f a state enacted a law permitting flogging, it is immensely stupid, but it is not unconstitutional." Jennifer Senior, *In Conversation: Antonin Scalia*, New York Magazine (Oct 6, 2013), available at http://nymag.com/news/features/antonin-scalia-2013-10/.

31: Farber and Sherry, *Seeking Certainty* at 51 (cited in note 2) (citing *Rutan v. Republican Party of Illinois*, 497 US 62, 95 (1990) (Scalia, J., dissenting) (cited in *Board of County Commissioners v. Umbehr*, 518 US 668, 687 (1996) (Scalia, J., dissenting))).

32: The example of libel laws is taken from *Umbehr*, 518 US at 688 (Scalia, J., dissenting). Striking down libel laws is not unheard of, however: the United Nations Human Rights Committee declared in 2011 that a Philippine law defining libel—and used to convict one Alexander Adonis—violated the

Without originalism this would seem like a sensible approach; the effects of shifting jurisprudence on major issues would lead to legal chaos. With originalism, however, sticking to tradition despite conflicts with interpretation is baseless, or at least based on something outside the constitutional text. In this respect, the Justice seems a faint-hearted originalist indeed.[33]

The preceding analysis of extra-textual values and their relationship to originalism shows that the latter is simply not enough for formalists. While declaring that text is their main guide to law, prominent formalists still make use of subjective judgments when interpreting and, especially, when adjudicating.

IIIb.2. Misunderstanding Objectivity

Tara Smith suggests that genuine jurisprudential objectivity exists when, among other things, judges consider "the open-ended nature of concepts" when interpreting the law's words.[34] On her account, Justice Scalia's textualism—her term for his formalist originalism—considers the words in the Constitution to refer to broad concepts, and these concepts "refer to what [the law's authors] meant by the concepts in question . . . rightly or wrongly."[35] The authors or framers had in mind criteria for what certain concepts meant, so that concepts today refer to the specific items the framers associated with concepts and any other such items as meet the criteria.

Smith's problem is that this view does not allow or take seriously the possibility that the Framers may have associated concepts with certain items that did not meet the required criteria but that were simply assumed to meet the criteria. For example, she points to "cruel and unusual punishment," suggesting the possibility that those who drafted the Eighth Amendment may not

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right to freedom of expression under the International Covenant on Civil and Political Rights. Rev Penal Code art 353 (Phil); International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), art. 19, UN Doc A/6546 (Dec 16, 1966); UN Human Rights Committee, Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol of the International Covenant on Civil and Political Rights (103rd session) concerning Communication No. 1815/2008, CCPR/C/103/D/1815/2008/Rev.1 (April 26, 2011), available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/422/05/PDF/G1242205.pdf?OpenElement (visited Oct 10, 2013).

33: Scalia, 57 U. Cin. L. Rev. at 864 (cited in note 8) ("Having made that endorsement [of originalism], I hasten to confess that in a crunch I may prove a faint-hearted originalist.").

34: Smith, 2 Duke J. Const. L. & Pub. Pol. at 209 (cited in note 22).

35: *Id.* at 190.

have recognized the innate cruelty of punishments they thought permissible.[36] The issue is that, to originalists, the list of items that are considered constitutional depends entirely on the views, and often faulty value judgments, of our agenda-driven forefathers. Thus, Justice Scalia's originalism is superficially objective and loses formalism's war against subjectivity because it claims to faithfully apply "certain individuals' beliefs about actions" to modern cases, without critically evaluating the correctness of those beliefs.[37]

Smith claims that objectivity is actually attained when one uses timeless, correct criteria to determine the meaning of text.[38] The correct criteria for interpretation are, on her view, based in reality, not one group of people's beliefs about reality.[39] In her words, there must be a fidelity "to the concepts expressed in the written law rather to a set of lawmakers' or a society's time-frozen beliefs about those concepts' referents."[40] Smith's plan is actually objective because it recommends real criteria, not ones thought of as correct, be applied to current laws and governmental practices. The correct criteria for the concept "cruelty" can differ from what the original authors of the Constitution thought, but that should not concern judges. Insofar as formalists want true objectivity in the practice of legal interpretation, they must obey the objective meaning of words, not the subjective meanings ascribed to words by other people. A truly objective observer must 'call it like it is,' unabashedly calling balls and strikes even if the rule-makers intended different interpretations of their rules.

IV. 'Writtenness' and Natural Rights

Justice Scalia's formalism is not the only motivation for originalism as an interpretive theory. Rather than build from formalism, Randy E. Barnett emphasizes the protection of natural rights as the source of constitutional legitimacy.[41] His efforts are directed at finding an interpretive theory that acknowledges their existence and affirms their protection by the Constitution and the courts. He argues that to preserve the original legitimacy of a constitution, we need an interpretive theory—originalism—that will constrain gov-

36: *Id.*

37: *Id.* at 192.

38: Smith, 2 Duke J. Const. L. & Pub. Pol. at 192 (cited in note 22).

39: *Id.* at 195 (espousing a form of scientific realism, that is, the idea that there are things in and facts about the world that exist independent of my knowledge of them).

40: *Id.* at 211.

41: See Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 32-52 (Princeton 2004).

ernment officials to the prescriptions of that legitimate document.[42] Barnett's defense of originalism is, in some ways, more nuanced and creative than that of Justice Scalia, combining a formalistic premise regarding the normative jurisprudential significance of 'writtenness' with an overarching concern for natural rights. While this valiant effort works better than the one motivated by formalism, there remain similar objections.

IVa. Writtenness

One of Barnett's arguments for originalism centers on the fact that our Constitution is a written document. While this writtenness provides formality in the everyday sense of the word—e.g., a "formal agreement"—Barnett identifies certain functions which underlie this formality: providing evidence, allowing caution, channeling intentions, and clarifying.[43] A written document provides physical evidence of its content to the signatories and any other interested parties, and it clarifies terms in unchanging textual language[44]; all these functions relate to the concept of having a concrete object to refer to when rules must be accessed. Of course, the rules to be accessed in the Constitution primarily concern limits on the government. On Barnett's view, these limits were expressed in a written constitution in order that they would bind government officials in no uncertain terms.[45]

The functions of writtenness are preserved when the constitutional text is interpreted in the context of its original understanding. If the Constitution was written to express certain ideas agreed upon by the delegates to the ratifying conventions, and no language exists in the document to clearly note that shifts in meaning can occur, then the document's text must be interpreted based on the original understanding of the delegates to the Constitutional Convention of 1787. As Barnett notes, "[If] either a constitution or a contract is reduced to writing and executed, where it speaks it establishes or 'locks in' a rule of law from that moment forward."[46] Interpretations of the text that significantly change its meaning, or assign to words concepts inconsistent with those of the ratifiers, undermine the functions of a written constitution

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42: *Id.* at 109-13.

43: *Id.* at 101 (discussing the views of Lon L. Fuller, *Consideration and Form*, 41 Colum L. Rev. 799 (1941) and John Calamari & Joseph Perillo, *Contracts* (West 3d ed. 1987)).

44: The meaning of the language may change for some people, but the actual words (text) are meant to be immutable.

45: Barnett, *Restoring the Lost Constitution* at 104 (cited in note 41).

46: *Id.* at 105-106.

such as ours.[47] Barnett's originalism, then, is not motivated by a Scalia-type formalist desire for judicial restraint or objectivity. Rather, originalist interpretation is inherent in and demanded by all written laws: "[Barnett's writtenness argument] contends that the Originalist interpretive method is the natural, logical corollary of having a written constitution."[48]

IVb. Natural Rights and Legitimacy

A respect for constitutional protections of natural rights also motivates Barnett's originalism. For him, it is imperative that a legitimate constitution, one that is to receive *prima facie* obedience, "provid[e] adequate procedural assurances that enacted laws properly respect the rights of those on whom they are imposed and are necessary to protect the rights of others."[49] If our Constitution is found to be legitimate by providing these assurances, then only originalism can preserve them. As the discussion of writtenness above suggests, the writtenness of the Constitution implies that the meaning of its provisions are immutable from the time they were legally adopted. Whether the Constitution is illegitimate, as it may be, must be ascertained by interpreting its text using the unchanging original meaning to the contemporaneous public at large. Otherwise, judges could contradict Congress without formal amendment to either expand rights or limit them. Anything would be possible once a settled, authoritative interpretation of the law was abandoned.

Promoting original meaning originalism, however, does not preclude the use of extra-textual sources to determine the specific meaning of certain provisions. In fact, Barnett argues that certain amendments to the Constitution—including the Ninth and Fourteenth—specifically provide for "supplementation of [their] express terms" based on an originalist reading.[50] As one might expect from someone so focused on liberty rights, this constitutional "construction," which fills in gaps purposefully created, is supposed to be conducted in order to identify and protect rights left unnamed in the Constitution itself.[51] But Barnett emphasizes that the act of filling in constitutional gaps must come as a directive from the language of the Constitution, gleaned through originalist interpretation, not from someone's subjective desire to impart her morality onto the document.[52] For example, Amendment X may

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47: *Id.*

48: Tara Smith, *Originalism's Misplaced Fidelity: "Original" Meaning Is Not Objective,* 26 Const. Comment. 1, 8 (2009).

49: Barnett, *Restoring the Lost Constitution* at 85-86 (cited in note 41)

50: *Id.* at 108.

51: *Id.*

52: *Id.* at 122-24. Constitutional construction can also occur when language is

have been interpreted by the public at the time of its adoption to refer to natural rights nowhere listed in the Constitution. In that case, one may refer to the original meaning of the terms "natural rights" or "liberty rights" to give content to the Amendment. Whatever method one uses to construct meaning from gaps, the meaning must supplement the text and preserve legitimacy, i.e., protect natural rights retained by the people.[53]

IVc. Objectivity Revisited

Tara Smith's criticisms of the supposed objectivity of Justice Scalia's originalism likewise apply to Barnett's originalism. Like Justice Scalia, Barnett relies on the conceptual criteria of meaning imagined by the general public. As we have seen, Smith argues that the objective meaning of concepts must actually be determined by reality-based criteria. A cat is a "cat" not because it fits the criteria for cat-ness of an 18th-century politician but because it fits the criteria for the kinds of things cats actually are, independent of our beliefs about them. Interestingly, Smith dedicates a separate article to talk about Barnett's writtenness defense of originalism; in Originalism's Misplaced Fidelity[54] she criticizes Barnett's insistence that we implement the beliefs of our political predecessors because "they spoke first" and wrote down their ideas first.[55] She sees this as unfair because they may have been wrong about their conception of terms. Further, this 'finders, keepers' doctrine, which gives constitutional authority to those groups of politicians who happened to create the first constitution, admits of no cooperation and dialogue between the legal academy and the population at large. Barnett would prefer that the will and semantic understanding of an increasingly dynamic American society be trumped by that of a long-dead generation of white, male aristocrats.

Nevertheless, one must note that Barnett is not interested in the objectivity of formalists like Justice Scalia.[56] His motivation for originalism is not formalist; it is based on a desire to establish the constitutional protection of rights.[57] If provisions of the Constitution do this, then they must be interpreted with their original meanings to preserve or establish their proper functioning. In other words, Barnett sees originalism as valuable insofar as it "preserve[s] or

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vague enough that originalism might yield two or more differing interpretations.

53: Barnett, *Restoring the Lost Constitution* at 126-27 (cited in note 41).

54: Tara Smith, 26 Const. Comment. 1 (2009).

55: *Id.* at 36-37.

56: Along with other reasons, I would argue that his rather arbitrary "presumption of liberty" is proof enough that Barnett does not mind subjectivity.

57: See generally Barnett, *Restoring the Lost Constitution* (cited in note 41)

'lock[s] in' an initially legitimate lawmaking scheme,"[58] one that "provides adequate procedural assurances that enacted laws properly respect the rights of those on whom they are imposed and are necessary to protect the rights of others."[59] This is the function intended by the drafters of the provisions and understood by the general public of the time, whose delegates voted for the Constitution at its state ratifying conventions.

IVd. The Best Constitution?

Leaving aside objectivity, one might also question how well natural rights are protected by submitting to the original meaning of our particular Constitution, as amended. Barnett's interpretation of the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment is key to his argument that the Constitution does procedurally assure the protection of our retained rights, and is thus legitimate. Yet, it is hard to imagine that he thinks our Constitution is the best document to protect natural rights and "privileges or immunities." In fact, neither of these constitutional provisions are actively enforced by federal courts. The Privileges or Immunities Clause of the Fourteenth Amendment, for example, has mostly rested dormant as a protection of natural rights.[60] Similarly, the Ninth Amendment has been used only a few times to defend unenumerated rights retained by individuals.[61] While Barnett may argue that weak or unfaithful interpretations of these provisions have had a role to play in their underutilization, these are faults with the vague language of the Constitution that even originalism cannot solve. He cannot claim that constitutional construction faithful to originalism truly makes the Constitution "the best it can be" if it does not protect natural rights the best it can.[62]

While he declares that problems with the Constitution itself do not under-

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58: *Id.* at 89.

59: *Id.* at 85-86.

60: *Sáenz v. Roe*, 526 US 489, 521 (1999) (Thomas, J., dissenting) ("[T]he Court all but read the Privileges or Immunities Clause out of the Constitution in the Slaughter-House Cases . . . .").

61: See, for example, *Griswold v. Connecticut,* 381 US 479 (1965) (Goldberg, J., concurring); *Gibson v. Matthews*, 926 F2d 532 (6th Cir 1991).

62: Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 128 (Princeton rev. ed. 2014) ("One can call this making the Constitution 'the best it can be,' as Ronald Dworkin might, but this method of construction—as distinct from interpretation—is appropriate only when terms are genuinely vague, when the original level of generality can be satisfied by more than one rule of law, or when the Constitution authorizes supplementation.").

mine the need for originalism in order to respect writtenness,[63] Barnett must admit that a commitment to writtenness could and has stifled the vigorous protection of rights. For example, Chief Justice Roger B. Taney's opinion in *Dred Scott v Sandford*[64] declared that American blacks could not be considered, barring some profound change to the constitutional structure,[65] federal citizens, even for the purpose of suing in court. Chief Justice Taney focused on the common governmental definitions of who was a citizen at the time of the Constitution's adoption,[66] applying an originalist interpretation of citizenship law within the context of a founding generation mostly approving of institutional slavery.[67] Clearly, then, a respect for writtenness by embracing originalism in the *Dred Scott* case led to the withholding of basic citizenship rights from American blacks. This is something Barnett would find detestable, since he takes rights as preceding any interpretive method like originalism.[68] Such contradiction could be avoided, however, if Barnett adopted another interpretive method, one more amenable to the protection of rights. He is right to note that a nonoriginalist interpretation can be used to increase or decrease rights, but certainly there must be one such method which can

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63: See Barnett, *Restoring the Lost Constitution* at 111 (cited in note 41) ("To repeat, if the original meaning of the constitution is not 'good enough,' then originalism is not warranted because the Constitution is itself defective and illegitimate. This represents a rejection of the Constitution, not a rejection of originalism per se. . . . Once again, to claim that [judges] are not bound [by the Constitution] is to reject the Constitution, not originalism.").

64: 60 US 396 (1854).

65: Such a change occurred in 1868 upon the adoption of the Fourteenth Amendment, US Const. Amend. XIV, § 1.

66: *Dred Scott,* 60 US at 407 ("We must inquire who, at that time, were recognised [sic] as the people or citizens of a State . . . .").

67: Given Barnett's claim that only a "legitimate" constitution's writtenness should be respected, a critic of my *Dred Scott* example might claim that Taney's use of originalism was misguided because that pre-Fourteenth Amendment Constitution was illegitimate. However, nowhere in *Restoring the Lost Constitution* does Barnett go as far as to say that our Constitution is or has been illegitimate. I also find it difficult to argue that that pre-1868 Constitution was illegitimate solely on the basis of allowing a racist system to exist, since the text of that document did not affirmatively deny citizenship rights to people of color (though the text of the document is obviously problematic if applied according to its original meaning).

68: Barnett, *Restoring the Lost Constitution* at 4 (cited in note 41) ("With this analysis of constitutional legitimacy and natural rights, we will then be in a position to understand why the words of the Constitution should be interpreted according to their original meaning . . . ." (emphasis added)).

focus solely on increasing all the natural rights of people.

V. Formalism or Rights?

This discussion of the formalist and natural rights motivations for originalism paints a mixed picture of the highly controversial theory. Originalism remains heavily criticized despite its shift from intentions to original meanings, but it refuses to go away for good.[69] Insofar as originalism remains alive and popular among some scholars—and even a few Supreme Court justices—it is winning an enduring battle against non-originalism. Still, it survives by the skin of its teeth.

Va. Originalism at Odds with Formalism

Originalism does not reliably further the formalist goals of judicial restraint and objectivity. Formalists who value judicial restraint continue to overturn key legislation after engaging in originalist interpretation.[70] In that way, originalism may, in practice, encourage the very judicial activism formalists would like to eliminate.[71] Neither does originalism help formalists attain true objectivity, as described by Smith. Originalism implicitly asserts that unbiased interpretation of the constitutional text based on the original meanings of words is the epitome of objectivity. Yet, while this alleged objectivity of originalism is, perhaps, its most alluring quality,[72] the term is misunderstood by originalists and non-originalists alike.[73] It is interesting to

69: See, for example, Smith, 2 Duke J. Const. L. & Pub. Pol. at 160-61 (cited in note 22); Barnett, *Restoring the Lost Constitution* at 89-92 (cited in note 41). Barnett admits, "The received wisdom among law professors is that originalism in any form is dead, having been defeated in intellectual combat sometime in the 1980s. *Id.* at 89-90.

70: See Part IIIa.

71: The liberal activities of the Warren Court and the passage of laws conforming to nonoriginalist interpretations of the Constitution may be the reason that originalist judges increasingly turn to activism. Judicial activism in this sense can be considered a logical reaction to what they would call the atrocious jurisprudence of the last few decades. It would be interesting to test whether and to what extent antecedent nonoriginalism has been a cause of judicial activism by so-called originalists.

72: See Smith, 2 Duke J. Const. L. & Pub. Pol. at 161 (cited in note 22) ("The deeper reason that Originalism will not die, I think, is that it has staked out the moral high ground, championing the objectivity of interpretation that is essential to the ideal of the rule of law.").

73: *Id.* ("What I will suggest is that the very objectivity which explains Originalism's

consider that they might be mistaking the subjective intent of the drafters for the objective original meaning of the constitutional text.[74]

Vb. Barnett and Originalism

Barnett stands on slightly firmer ground than the formalists. His logical progression is:

1) Establishing the legitimacy of the Constitution requires the protection of natural rights, which leads to:
2) A respect for the writtenness of the Constitution, which necessarily leads to:
3) The adoption of original meaning originalism.

He can make the argument that "a written constitution requires originalist interpretation" because of the way he understands writtenness.[75] If true, this makes his case more compelling than that of the formalists, who are motivated to originalism because of their personal desire for order and restraint. Barnett's motivation is constitutional legitimacy, which is absolutely necessary for it to be authoritative and binding in the first place. The objectivity criticism from Smith, while valid, is irrelevant to Barnett because objectivity was never his primary concern.

VI. Conclusion

A complete review of the merits of originalism is not conducted here. Rather, I have described inconsistencies between some motivations for originalism and the actual outcomes of originalist jurisprudence. Justice Scalia's formalism dooms him to an almost unattainable goal: achieving true objectivity while doing so in a restrained fashion. Indeed, true objectivity would require judges to reverse many prior decisions to fit constitutional meaning from objective sources, not the public of the late 18th century. Also, Justice

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appeal is misunderstood by Originalists themselves. And part of the reason that criticisms have not inflicted more crippling damage is that the leading alternatives also suffer from confusions about appropriate standards of objectivity in the legal domain . . . .").

74: Smith, 26 Const. Comment. at 55 (cited in note 48) ("If we take the meaning of law's words to be merely what certain people's words meant to them—those individuals' conceptions, no more and no less—we revert to the mind-reading games and invariability that sank the Original Intent school.").

75: *Id.* at 9.

Scalia's faint-hearted originalism lacks vigor and logical consistency at the extremes. Why wouldn't he allow originally acceptable public floggings? I argue that the best kind of interpretive methodology would be comprehensive and accommodating enough that no "diluting" exceptions would be needed. Barnett, on the other hand, does not strictly adhere to judicial restraint, so radical structural changes that he advocates given his originalism are unproblematic. At the very least, such changes are motivated by an originalism logically following from his conception of natural rights and the writtenness of our constitutional document. He doesn't need to hold formalist values. In fact, no outside values, other than the normative insistence on the legitimacy of the Constitution, must be held for him to advocate originalism.

A discussion of the motivations for originalism is particularly timely given the composition of the Supreme Court bench and the trajectory of its jurisprudence. If it is determined that originalism does not serve important formalist goals of judicial restraint and objectivity, why are formalists like Justices Scalia and Thomas still faithful to the theory? One cynical possibility is that originalism has been used merely as a means to achieve conservative policy ends. In light of this possibility, it is illuminating to consider that the other members of the Court's formalist bloc, Chief Justice John Roberts and Justice Samuel Alito, have not clung to originalism in any meaningful way.[76] They have found ways to maintain judicial restraint and move the Court in a decidedly conservative direction without resorting to backwards-looking historical and legal analyses.[77] From the perspective of accountability and transparency, these formalists are much clearer about what they want to accomplish as judges and are direct about how to get there. But there is a third way: a commitment to natural rights *a la* Barnett. Insofar as it seems inevitable for a modern Court to house originalist jurists, it is better for them to

76: Matt Lewis, *Matt Lewis Show: Stephen B. Presser,* Matt Lewis Show (Jun 28, 2012), available at http://www.mattklewis.com/?p=6471 (interviewing Northwestern University law professor Stephen B. Presser, who expressed disbelief at Chief Justice John Robert's majority opinion in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), which placed judicial restraint over originalist analysis). See Garrett Epps, *As Scalia Falters, Will Alito Fill the Void on the Right?*, The Atlantic (Oct 1, 2012), available at http://www.theatlantic.com/national/archive/2012/10/as-scalia-falters-will-alito-fill-the-void-on-the-right/263049/ ("But Alito has become a kind of un-Scalia . . . . "Scalito" is not only not Mini-me [to Justice Scalia], he's not an originalist at all.").

77: Epps, *Will Alito Fill Void?* (cited in note 76) ("Both justices [Scalia and Alito] are very conservative. But Scalia's conservatism looks back, invoking the spirits of the Framers. Alito's is forward-looking.").

arrive at originalism from a commitment to natural rights and constitutional legitimacy. Modern legal issues addressed in the courts, such as GPS surveillance of vehicular movement[78] or warrantless aerial observation of a home,[79] are best solved by such considerations of natural rights, not by examinations of centuries-old political thought.

78: See *United States v. Jones*, 132 S Ct 949 (2012).

79: See *Florida v. Riley,* 488 US 445 (1989); *California v. Ciraolo*, 476 US 207 (1986) (dealing with warrantless aerial observation of a private backyard).

Justice When Applied: Aquinas' Justice and its Relationship with *Jus Cogens*

Charles Rodriguez†

In the law, there is no concept more important than justice. For the purpose of this article, when I mention justice I do not intend to conjure its meaning abstractly and ambiguously. Rather, I intend to rely upon a determinate sense of the term: using reason to analyze facts in order to proscribe a virtuous remedy that will provide for the common good. For this is Thomas Aquinas' conception of justice, which has provided the foundation for many of the conventions exercised in various legal systems today. In his works, Aquinas suggested that justice provides an outline for legal thinking and that from it we derive duty, right, and proportional equality. To demonstrate the importance of justice, in his works he used *jus* and *lex* interchangeably to mean law, suggesting he believed they were one in the same.

In the current era of almost purely positive law, arguably nothing is more akin to Aquinas' sense of justice than the international legal principle of *jus cogens*. The peremptory norms inspired by this principle have the power to nullify treaties or domestic laws that are inconsistent with *jus cogens* norms and are explained, much like Aquinas' principle of justice, through practical reasoning. While these concepts enjoy many similarities with one another, there are differences in the practical application of *jus cogens* in courts and the subject matters they cover.

In this article I intend to explain Aquinas' theory of justice as interpreted by John Finnis, illustrate the principles behind *jus cogens*, and finally compare both principles. While *jus cogens* principles coincide with Aquinas' conception of justice, issues of sovereign immunity, requirements of standing, and the manner in which states are recognized on the international stage prevent *jus cogens* from being applied in many instances. These hurdles therefore frequently preclude the enforcement of *jus cogens* norms, obstructing the justice they are designed to provide. By pointing out these discrepancies between the theoretical and practical capacities for *jus cogens* to maximize justice on a global scale, I seek to promote dialogue about how *jus cogens* can be revived and how the doctrine might be given the teeth it deserves.

I. Thomas Aquinas' Conception of Justice

Justice is briefly discussed in Thomas Aquinas's *Treatise on Law* when he questions whether or not there is a single divine law.[1] Aquinas states that "law has to do with directing human acts in accord with the order of justice [and]…unless your justice exceeds that of [the] Scribes and Pharisees, you will not enter into the kingdom of heaven."[2] Although he is describing personal justice, Aquinas' response reveals that he sees justice as the yardstick to which mankind will be judged when deciding whether or not an individual is accepted into God's kingdom. In Aquinas' view, natural law guides positive law, or "just" positive law. Justice is thereby the concept from which the morality–and, thus, validity–of positive law should be judged.[3]

John Finnis claims that Aquinas' conception of justice is explained in his arrangement and classification of virtues in his *Summa Theologiae*.[4] Finnis states that the essence of justice is "treating other people in the way they are entitled" to be treated and acting in a way commensurate to the preservation of "proportionate equality" between the actor and the parties whom his actions affect.[5] Although Aquinas made categorical distinctions in classifying justice, the effects of justice transcend any category and are, in the end, defined by the rights and duties one owes to other individuals.

These rights that arise are most amply exemplified in personal property rights, which necessarily involve our relationship with others.[6] The right to acquire objects is based on a tacit societal agreement that the management , distribution, and consumption of these objects by private individuals is for the good of the community.[7] Finnis offers three reasons why individual ownership is commensurate with justice: individual ownership incentivizes the private individual to take care of the property better than it would be taken care of if owned by everyone as a whole, the individual manages property more efficiently than the masses, and private undisputed ownership prevents

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1: Thomas Aquinas, *Treatise on Law* 16 (St. Augustine's Press 2009) (Alfred J. Freddoso, trans.).

2: *Id.*

3: *Id.* at 234.

4: John Finnis, *Aquinas: Moral, Political, and Legal Theory* 187 (Oxford 1998).

5: *Id.* at 187-188.

6: *Id.* at 189.

7: *Id.* at 190.

discord.[8] Since the end of allowing personal property is social benefit, these three principles, promoted by private property, reasonably promote the common good and are just. However, the common good–and practical reason–dictates that everything an individual owns is held in common "in the sense that it is morally available, as a matter of right and justice, to anyone who needs it to survive."[9] Accordingly, left over resources not necessary for the owner's survival (*superflua*) are held in common in that the owner has a "duty of justice to dispose of them for the benefit of the poor."[10] Therefore, a person in dire need of food for nutrition has a right to the *superflua* of another individual because Aquinas considers property to be held in common and only privatized for the good of the community.

Naturally, ambiguity surrounds the point at which a party is in extreme need such that his right to the property supersedes that of his property-owning neighbor. This, Aquinas says, can be measured by practical reasonableness, which encompasses "general justice and love of neighbor as oneself."[11] Aquinas interprets *superflua* relatively narrowly, suggesting that the property owner is entitled to the maintenance of his lifestyle, to adequate capital reserves to run his business, to save reasonably to prevent against future financial crisis, and to fulfill his financial responsibilities owed to other individuals.[12] This narrow interpretation implies that an individual's right to peace of mind and to enjoy his prosperity is considered in determining what is just. Beyond *superflua*, this duty may be extended through contract, introducing the concept of *fides* (or reliance, belief, trust) for which both parties must agree to perform certain actions in good faith.[13] This extension of justice beyond that which is necessary for survival operates as a foundation of modern society and contract law today.

Tied to an individual right to justice, Aquinas believes that everyone has an inherent duty to act justly and reasonably. This duty is implied by the example cited above regarding property's commonality amongst those in society, specifically in that the individual essentially is to take care of that which belongs to all if extreme necessity warrants.[14] Simply living in a community therefore creates an affirmative duty to act justly toward others in addition to

8: *Id.* at 190.
9: *Id.* at 191.
10: *Id*.
11: *Id.* at 194.
12: *Id.* at 195.
13: *Id*. at 199.
14: *Id.* at 190.

one's concurrent right to be treated justly.

Finally, Professor Finnis states that Aquinas' concept of justice encompasses the element of equality, or proportionality.[15] He explains this concept through an example of rationing food between a large man and a small child. If they were each given the same amount of food the child would have an abundance while the man would be left wanting. However, if the food is proportionally distributed it can satiate both the large man and the small child, creating an equilibrium and balance between the two.[16] In this way justice is what is fitting given specific circumstances, rather than a principle of strict equal distribution. Regarding distribution, "all members of a community equally have the right to respectful consideration when the problem of distribution arises."[17] Therefore, while distribution of resources may be proportionate to the amount necessary given the individual's need, each individual in the community must receive equal consideration in determining how the resource should be allocated.

Together, these three concepts of right, duty and proportionality make up justice, which is the tool by which Aquinas believes mankind can apply practical reasonableness in various scenarios. Justice is driven by the desire to promote the common good and is "the theory of what in outline is required for that common good."[18] Necessarily, justice is defined by our relationship to, and the needs of, others. The end cause, providing for the common good, is maximizing the good of individuals in one's community by promoting "inner integrity of character and outer authenticity of action…[free] from the automatism of habit and from subjection to unintegrated impulses."[19] From these principles Aquinas establishes requisite considerations that should guide individuals when making rational decisions and when designing the code by which mankind should live.

In applying his theory in the legal context, Aquinas sought to explore which laws are unjust. According to Professor Finnis, Aquinas suggests that laws should be promulgated from the principles underlying justice, but he demonstrates what is just by enumerating that which is unjust.[20] These types of injustice include laws established for private gain and public harm, *ultra*

15: John Finnis, *Natural Law and Natural Rights* 163 (Oxford 1980).
16: *Id.*
17: *Id.* at 173.
18: Finnis, *Natural Law* 165 (cited in note 15).
19: *Id*. at 169.
20: *Id.* at 351.

vires acts, non-conformity to laws, and disproportionate distribution.[21] Regardless, Professor Finnis concludes that, on Aquinas' view, an unjust positive law is still legally–and morally–obligatory, if only for the end of preserving the overarching common good promoted through other statutes or ordinances that are just.[22] In essence, in a morally-infused legal analysis, following an unjust law is more desirable than introducing systemic instability to a legal system that generally promotes the common good.[23]

II. The International Legal Principle of *Jus Cogens*

Having established Thomas Aquinas' main principles of justice and how they are applied, our discussion now turns to what can arguably be considered the best example of natural law's conception of justice today: *jus cogens* norms. These norms condemn certain violations of international law and, in the process, supersede and silence any conflicting positive laws of sovereign states or treaties between sovereigns. The *jus cogens* norms are thus supreme and peremptory. Moreover, since the crimes enumerated under *jus cogens* are so egregious, suit can be brought against the violator by any state. The norms thus apply and can be enforced universally. In sum, the peremptory nature and universal application of the *jus cogens* norms are necessary in order to promote the global justice envisioned by the *jus cogens* principle itself.[24]

The concept of *jus cogens* grew out of the basic and inherent proposition that it is "impossible to undertake by treaty a valid obligation to perform acts which would violate the rights of third parties."[25] This was enumerated for the first time in the 1969 Vienna Convention, which states that treaties must conform with peremptory norms.[26] A peremptory norm must meet four criteria: it must be a norm of general international law (a vital interest

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21: *Id.* at 351, n. 26.

22: *Id*. at 357.

23: Finnis, *Aquinas* at 273 (cited in note 4).

24: For a broader discussion of these issues, see, e.g., Mary O'Connell, Richard Scott, & Naomi Roht-Arriaza, *The International Legal System* (Foundation 6th ed. 2010).

25: Egon Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 Am. J. Int'l L. 946, 949 (1967) (emphasizing the duty owed to third party states).

26: Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 Am. J. Int'l. L. 495, 535 (1970) (an attempt to enumerate the factors that have influenced the development of *jus cogens*).

of states), accepted by every state in the community of states (all territorial sovereign states), cannot be derogated (cannot be minimized) and may only be modified by new *jus cogens* (only another concern important enough to have peremptory norm status may modify the principle).[27] Additionally, the norms represented by *jus cogens* are viewed as ""ethical minimum[s]' that bind states regardless of whether or not they consent and comply."[28] States need not consent to be bound by *jus cogens*; simply belonging to the international community requires obedience to *jus cogens* norms. It is important as well to note that the Vienna Convention on the Law of Treaties did not create the principle of *jus cogens* but sought to enumerate the qualifications of principles that have always intrinsically been a part of international consideration. Accordingly, since these norms have existed perpetually, the *jus cogens* principle needs not be defined strictly in adherence to the Convention. It simply serves as a guideline for more concretely determining *jus cogens* and the norms the principle generates.

Although the areas covered by *jus cogens* have never been comprehensively defined, a number of issues have been resolved by and unquestionably fall under *jus cogens* considerations. While a single process does not exist that determines what becomes a peremptory norm, there are various ways in which a principle may attain this elevated status. For instance, slavery began its journey to becoming a peremptory norm when Britain refused to aid in the recapture of slaves for states where slavery was legal.[29] Soon after, slavery was outlawed in Latin America and then generally prohibited under the Brussels Conference Act of 1890, which prohibited the slave trade but not slavery itself. Slavery was not considered illegal until countries individually outlawed slavery and asserted a universal jurisdiction to free enslaved peoples.[30] In other words slavery, which had been legal, developed into a *jus cogen* only after sovereigns finally collectively denounced it as a plague on human rights.

The development of the *jus cogen* of torture, however, was very different. It arose initially out of the post-World War II sentiment that the crimes against humanity should be prosecuted to the fullest extent, inspired by the Nuremburg Trials and United Nations General Assembly resolutions.[31] Since torture

27: *Id.* at 3.

28: Lisa Yarwood, *State Accountability Under International Law* 65 (Routledge 2011).

29: *Id.* at 78.

30: *Id.* at 85.

31: *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others ex parte Pinochet*, [1999] UKHL 17.

was an element of a war crime it already had a stigma attached to it. But then treatises and international law tribunals began treating it as a crime in peace, separate from the war venue in which it had previously arisen. As a result, it eventually became its own *jus cogen* as declared by Torture Convention of 1984. But even then some courts have stated that torture was a *jus cogens* violation long before 1984.[32] Regardless, both slavery and torture contain the four elements mentioned in the Vienna Convention and are similar in that the illegality of both were affirmed in treaties. Yet the criteria that seems to be most convincing in establishing their *jus cogens* status is their classification as crimes against humanity and the widespread, multilateral declaration of their illegality.

When *jus cogens* norms are declared, certain rights are created for and duties imposed upon individuals and states alike. The rights that have arisen through the development of certain *jus cogens* norms include: the right to suppress all piracy on the high seas, the right not to be enslaved, the right not to have force used against a state, the right of people not to be tortured, and the right to prosecute those who have performed acts of genocide.[33] These rights look to guard against behavior that, in many cases, affects the international community as a whole, which is why universal application is necessary.

Likewise, *jus cogens* norms create duties, which are twofold. First, there is the negative duty not to make a treaty that conflicts with a peremptory norm. What follows is the positive duty to disclose and act upon a violation which has occurred so sanctions may be enforced against the guilty party.[34] This second, positive duty suggests that states be required to "prosecute or extradite, to provide legal assistance, to eliminate statutes of limitations, and to eliminate immunities of superiors up to and including heads of states."[35] Only if states fulfill their *jus cogens* duties will the rights afforded by those

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32: *Id.*

33: Lauri Hannikainen, *Peremptory Norms (*Jus Cogens*) in International Law: Historical Development, Criteria, Present Status* 54 (Finish Lawyers' Pub. 1988).

34: Cherif Bassiouni, *International Crimes:* Jus Cogens *and* Obligatio Erga Omnes, 59 Law & Contemp. Probs. 63, 65 (1996) (Bassiouni expounds upon the obligations that arise *erga omnes*, which includes the duties to prosecute, extradite, circumvent statutes of limitations, and allow universality of jurisdiction).

35: Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 Law & Contemp. Probs. 9, 17 (1996) (analyzing the repercussions of violating *jus cogens* and the need for more accountability and enforceability).

norms actually and continually be respected on an international scale.

Lastly, one of the most important aspects of *jus cogens* norms is that their violation creates universal jurisdiction, allowing for states to sue or prosecute even if they were not individually injured by the particular conduct. The seminal case regarding this principle of universality is *Regina v. Bartle*, which uses strong language to communicate the unambiguousness of its application.[36] *Bartle* was a case regarding former General Pinochet, who organized a coup d'état of his own government in Chile. After gaining power, he committed genocide, torturing and killing his own people as well as those of other countries, many of whom were subjected to punishment outside of Chilean jurisdiction. These allegations necessarily implicate the *jus cogens* norms of torture and genocide, which have been considered separate and distinct since the International Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment in 1984 and the resolution of World War II in 1945, respectively.[37]

Pinochet was arrested in the United Kingdom and charged with these crimes and the question of concern for the *Bartle* court was whether the United Kingdom, which was not directly injured by Pinochet's actions, had standing to prosecute General Pinochet. The *Bartle* court stated that "[t]he *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed…because the offenders are 'common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution.'"[38] This reasoning suggests that torture and genocide derive their universal jurisdiction by virtue of their *jus cogens* classification, which necessarily implies that all *jus cogens* violations trigger universal jurisdiction regardless of the usual standing considerations.

36: [1999] UKHL 17.

37: The genocide charges were dropped, so the court focused on the torture allegations. *Id.*

38: [1999] UKHL 17, ¶ 34.

IIIa. Reconciling Aquinas' Justice with *Jus Cogens* Norms: Theoretical Congruence

In many ways *jus cogens* norms are the embodiment of Aquinas' theory of justice. Both are based on promoting the common good, both have rights and duties that arise from their application, and both value equality and proportionality. Because of these similarities, I believe that *jus cogens* are derived from the same justice enumerated by Aquinas in his works. However, from a procedural standpoint, the implementation of justice on the international scale has numerous roadblocks that prevent justice from being served. These snags arise in the form of sovereign immunity and standing problems that are inserted into judicial *jus cogens* analyses, even though the universality of *jus cogens* norms may only be mitigated by other *jus cogens* norms themselves. This fact destabilizes any notion that the *jus cogens* principle coincides with Aquinas' concept of justice not just in theory but in application as well.

Jus cogens and Aquinas' justice clearly intersect in theory. Justice seeks a proportionate equality in which others are treated fairly and correctly. It provides for the downtrodden with fewer resources, saying that those with more resources than are necessary for survival should give of their own *superflua* for the common good. Aquinas recognizes that society is established for the benefit of all individuals and, because of this, those who have benefitted most from conventions such as personal property, which were established for the common good, have a duty to give back to others. This duty extends beyond the scope of *superflua* to a duty to fulfill one's contract, whether the consent upon which it is based is express or tacit. Justice provides for the common good by recognizing everyone as equals in a community and, therefore, their right, based on context, to ensure the performance of or the abstention from a particular course of action.

Similarly, *jus cogens* has the same principles of right, duty and equality established in Aquinas' justice. *Jus cogens* are a set of principles necessary to protect human rights in the name of justice. They are founded upon the basic premise that two states cannot have a contract that infringes on the right of a third state, which eventually grew into an affirmative iteration of human rights and duties based on the principle of universal equality. This first conception of *jus cogens* epitomized the considerations embodied in justice, which is a duty not to infringe upon the rights of others unless they either have given up some freedom of choice for something of value in return or have harmed the common good in some way. Admittedly a simple yet powerful concept, this has transformed to envelop basic human rights, the criteria

for determining which is partially stated in the Vienna Convention. As justice uses practical reason as its method of discovering what is just in order to provide for the common good, *jus cogens* provides principles that the international community has decided, regardless of any conceivable fact pattern, are always just and their violation always unjust.

In accordance with justice, *jus cogens* have given rise to state rights that follow the framework enumerated in Aquinas by promoting the common good. Aquinas' conception of justice is exemplified in the context of personal property, but the principles underlying his reasoning of distributive justice are the exact same as those underlying *jus cogens*. Aquinas states that the development of allowing people to acquire personal property is purely practical: it incentivizes better care of the property, more efficient management of the property, and prevents discord. This implies, however, that if these three standards were not met, then, individuals owning property may not be just.

The same is true of the international establishment of *jus cogens*. They operate under the assumption that preempting treaties that fail to conform to the norms incentivizes a better and more humane international community, promotes better lifestyles for individuals and comity amongst states and creates transcendent parameters that prevent international discord. Aquinas also provides that property, even though personally owned, is really held in common by the community. The same can be said of rights in the international community, of which every state is a member. *Jus cogens* promote the rights to suppress piracy, prevent torture, block coercive force, bar slavery, and obstruct genocide. These rights are held by every state for the common good of not only its own people but of the international community as a whole. In this way, these rights are equally held by every state to promote justice on a global scale.

Additionally, both Aquinas' justice and *jus cogens* recognize duties that arise from these rights. Justice, in the distributive sense, creates a duty to put a resource to productive use and another duty to give *superflua* when someone more needy requires a resource of which the owner has an abundance. These two duties also imply a correlative duty not to interfere with a third party using its resources productively. All three of these duties fall within the parameters of the common good and aid in determining what the most advantageous course of action is that maximizes the common good. These duties correspond with the rights mentioned above, and in this light, can be either negative or positive.

Likewise, *jus cogens* create both positive and negative duties amongst states to promote the common good. The *jus cogens* peremptory norms create nega-

tive duties of abstaining from conduct that the norms prohibit, such as creating treaties that violate *jus cogens* standards or even states' unilateral conduct within their borders like torture or genocide. *Jus cogens* also create positive duties like preventing a country or individual who has broken a *jus cogens* norm from further infraction by either filing suit against them, informing other nations of the infraction so they may take action, or otherwise putting pressure on the violating party to change its wrongful conduct.[39] By performing these duties, states exercise variations of the three duties of justice enumerated above.

In establishing these duties, *jus cogens* norms set minimum standards that protect basic human rights, just as Aquinas' distributive justice sets a minimum standard for productive use of one's property. Justice and *jus cogens* both represent rights necessary to ensure productive and peaceful relations amongst citizens. While states don't have a *superflua* of rights like an individual many have an abundance of resources, states may have monetary, judicial, or enforcement resources. These resources may be used to provide for the implementation of policies or tribunals in other countries that conform with *jus cogens* standards: prosecuting individuals in other states to prevent further *jus cogens* infractions from occurring or establishing adjudicative structures consistent with the common good of the global population. Like justice prevents interference with an individual's right to the productive use of his property, *jus cogens* create an affirmative duty to abstain from interfering with a state, group, or individual's entitlement to enjoy the basic rights protected under peremptory principles. Therefore, through their conformity with the practical reasoning exemplified in Aquinas' justice and the mirrored duties created, the rights and duties established by *jus cogens* are modern examples of justice.

39: Paul Stephan, *The Political Economy of* Jus Cogens, 44 Vand. J. Transnat'l. L. 1073, 1096-1103 (2011) (suggesting how *jus cogens* may be used as either a sword or a shield).

IIIb. Reconciling Aquinas' Justice with *Jus Cogens* Norms: Practical Divergence

While *jus cogens* norms exemplify Aquinas' justice in theory, there are numerous doctrinal and procedural hurdles that often prevent courts from ruling that there has been a *jus cogens* violation. These barriers to the application of justice include the sovereign immunity doctrine and various types of standing requirements. In effect, both of these examples undermine the principle of universal application upon which *jus cogens* was founded. As a result, injustice, not justice, is secured, as there exists a fundamental breakdown of the rights and duties derived from justice that the norms attempt to establish.

Commonly, due to the doctrine of sovereign immunity, courts may refuse to apply *jus cogens* despite ample evidence of a norm's infraction. An example of the reasoning behind this theory is provided in the *Regina v. Bartle* case, partially explained earlier. The facts involved former General Pinochet, who had organized a military coup d'état and proceeded to torture and kill his own citizens and people of other countries in mass numbers. In this case, the court stated that while an individual is acting as the head of state he enjoys complete immunity from "all actions or prosecutions" for actions pursued in his official capacity.[40] However, crimes committed in his personal capacity while head of state are not immune from prosecution, so long as he is sued after he leaves office.[41] The court, in following this logic, stated that the torture Pinochet sanctioned could not be considered official action as it constituted a *jus cogens* violation; as a result, it must have been committed in his personal capacity.[42] The court thereby determined that Pinochet was not immune from prosecution for torture. But in doing so, the court confirmed the principle that a head of state is immune from prosecution for *jus cogens* violations so long as he remains in power.

This principle of sovereign immunity also applies to diplomats and top government officials. This extension of the principle was confirmed and applied in the case of a Minister of Foreign Affairs for the Democratic Republic of Congo who violated *jus cogens* war rules. Belgium sought to prosecute Mr. Ndombasi for his war crimes on the basis of universal jurisdiction provided by *jus cogens*.[43] However, due to his high-ranking office, the court found that

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40: [1999] UKHL 17, ¶ 44.
41: *Id.*
42: *Id.* at ¶ 58.
43: *Case Concerning the Arrest Warrant of 11 April 2000*, [2002] ICJ Rep 3.

diplomatic immunity was still in effect, which immunized him from prosecution.[44] The court reasoned that this immunity is permissible because states may choose to waive an ambassador's diplomatic immunity, which would allow international criminal courts to have jurisdiction at a later time.[45] However, the court failed to assess the likelihood these waivers would actually occur, which constitute the exception to the norm.

Allowing states to invoke sovereign immunity despite their egregious infractions against the international community undermines the very nature of *jus cogens* norms and their universal application. Principally, it is problematic to hold that sovereign immunity may only be pierced once a head of state or diplomat leaves office. If lawsuits cannot be filed until after such leaders step down, then, as evidenced in *Bartle*, their reign of terror will have already come to completion. The genocide, torture, or other crime will have already taken place, with distinct and shameful human consequences. By allowing sovereign immunity exceptions to the application of *jus cogens* norms, the principles of justice upon which they are founded are unjustifiably weakened.

Another common example of courts refusing to punish *jus cogens* violations occurs when jurisdictional complications foreclose a court's exercise of adjudicative authority. A prime example of this dilemma is evidenced in *Siderman v. Republic of Argentina*.[46] In *Siderman* the plaintiff had lived with his family in Argentina, was very prominent, and had a successful business. However, there was a military coup that established an anti-Semitic regime, which concerned the plaintiff because he was Jewish. The night the new regime took power, masked men with machine guns entered the plaintiff's home and kidnapped the plaintiff, proceeding to torture him for the next few days until they finally returned him to his home and told him to leave the country.[47] Siderman and his family then left for the United States, where he sued for the torture he experienced, which surely violated *jus cogens* norms. Since Siderman's suit was filed in the United States, he sued under the Foreign Sovereign Immunities Act (FSIA).

Even though the *Siderman* court openly admitted that the Argentinian government committed a *jus cogens* violation, it still refused to grant jurisdiction to Mr. Siderman. The court went into detail about how the fundamental difference between *jus cogens* norms and customary international law is that

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44: *Id.* at ¶ 78.
45: *Id.* at ¶ 52, 61.
46: 965 F.2d 699 (9th Cir. 1992).
47: *Id.* at 703.

jus cogens norms do not derive their power from the consent of the majority of nations but from the nature of the crimes committed themselves.[48] The court even affirmed that torture has attained *jus cogens* status.[49] Despite this reasoning in support of charging Argentina in its sovereign capacity for the crimes that were indisputably performed by its government, the court concluded that Argentina's sovereign immunity protection should be respected because "if violations of *jus cogens* committed outside the United States are to be exceptions to immunity Congress must make them so…under the FSIA."[50]

While *Siderman* may seem to turn on a question of sovereign immunity, the issue is not that Argentina has inalienable sovereign immunity; rather, it concerns whether the FSIA gave U.S. courts jurisdiction over suits concerning activities in other sovereign states. The court answered negatively, saying that in order for jurisdiction to be granted the foreign state had to be explicitly mentioned in the statute.[51] So the real question was whether the statute under which Mr. Siderman sued permitted the U.S. to hear the case at bar. The court's refusal to authorize Siderman's suit represents its view that the statute did not authorize the case and that Siderman consequently did not have the requisite standing to sue.

Weren't *jus cogens* norms supposed to confer universal jurisdiction for individuals and states to sue those who violate the norms? Isn't the universality of *jus cogens* norms supposed to transcend all other laws that conflict with their principles? The result of refusing to apply one of the most basic and fundamental *jus cogens* principles, universality, is a miscarriage of justice, both in the modern and Aquinas' sense of the term.

Finally, another weakness of *jus cogens* norms is enumerated in the Vienna Convention on the Law of Treaties, which asserts that "a peremptory norm of general international law is a norm accepted and recognized by the international community of States."[52] Although the Convention does not define all *jus cogens*, it is generally accepted that the principles proscribed within it must be met in order to constitute a peremptory norm. It follows logically from this text that these norms are defined by and obligatory for "states." The elements defining statehood are listed in the Vienna Convention on the Rights and Duties of States as: a permanent population, a defined territory,

48: *Id.* at 705.
49: *Id.* at 714.
50: *Id.* at 719.
51: *Id.*
52: Vienna Convention on the Law of Treaties, art. 53, May, 23, 1969.

a government, and the ability to interact with other states.[53] These requirements are objectively reasonable and may be deemed descriptive of the organizational and physical structures that must be present in order for a state to function and exist. However, this list overlooks one element that today has become centrally important to existing states in the eyes of the international community: recognition itself.

International recognition as a prerequisite to statehood is a requirement enforced by the United Nations, membership in which is arguably the most affirmative proof that a community does in fact constitute a state. The UN says that membership is open to all peaceful "states" that will carry out agreed-upon obligations, but that membership will only be conferred "by a decision of the General Assembly upon the recommendation of the Security Council."[54] The Security Council, which is made up of 15 elite states, decides first whom it deems a state and then allows the General Council to vote upon admittance of the community into the UN. Likewise, the International Court of Justice only allows states to be parties in its court and uses admission into the UN as the measuring stick by which it determines a community's statehood.[55] Accordingly, a community or group that is not recognized by the UN as a state cannot successfully pursue any sort of legal action within the International Court of Justice.

An excellent example of recognition of statehood and the rights and duties that arise is in the Declaration on Yugoslavia. This was a ministerial ruling in the early 1990's in which Yugoslavia sought to be recognized as a state separate from the Soviet Union.[56] The European community agreed to recognize it as a state but only if it consented to certain political specifications. These included an agreement to continue to participate in the Conference of Yugoslavia, to recognize the UN's power, and to agree not to claim interest in any land that could arguably belong to a neighboring state.[57] After consenting to these requirements, Yugoslavia would be recognized.[58] Here, the international community condoned politically coercive and self-benefitting behavior on the part of powerful states as a pre-condition for an unrecognized community

53: Montevideo Convention on the Rights and Duties of States, art. 1, Dec. 26, 1933.

54: U.N. Charter, art. 4 ¶ 2.

55: Statute of the International Court of Justice, art. 34, ¶ 1.

56: *European Community: Declaration on Yugoslavia and on the Guidelines on the Recognition of New States*, 31 I.L.M. 1485 (1992).

57: *Id.* at 1486-87.

58: *Id.* at 1485.

to be granted entry to the international political structure and the justice it secures and protects.

This sort of behavior presents serious issues for international communities not classified as states. If non-recognized communities objected to such potentially coercive pre-requisites, they could be foreclosed from bringing *jus cogens* claims in international courts and obtaining justice. From Aquinas' perspective, the necessity of recognition as a precondition to statehood is invalid because justice requires equal consideration of all members of a community and cannot be withheld or used for personal gain. His position contrasts with the behavior allowed in the Declaration on Yugoslavia. The UN's power to recognize in the *jus cogens* context is the power also to withhold adjudicative remedies and to promote favor through coercion. But it is advancement of the common good, not individual gain that justice prescribes. Weaponizing recognition prevents oppressed or newly formed communities, which are more susceptible to tyrannical rule, from being able to enforce their *jus cogens* rights.

For instance, what if the territory known as Yugoslavia was part of the U.S.S.R. and a dictator took control of the U.S.S.R., after which he exterminated the people in Yugoslavia? International law would not offer a remedy for this situation even though it constitutes a *jus cogens* violation, simply because the territory of Yugoslavia would not itself be recognized as a state. There also would be problems of sovereign immunity and jurisdiction, making it even less likely that relief could be granted for infringement of a *jus cogens* norm. Short of going to war, there would be no international remedy for Yugoslavia. The issue is that consideration of statehood has the effect of obstructing the application of the supposedly peremptory and universal *jus cogens* norms.

How is this justice when Yugoslavia, state or not, is denied redress in the very international community of which it is a participant? That the International Court of Justice only allows parties represented in the United Nations in its court speaks volumes: the one court that has undisputed jurisdiction to hear civil *jus cogens* claims is barred from hearing any non-UN affiliated cases. Why are these crimes against humanity allowed? Because the countries that are on the Security Council, the fifteen elite countries, do not agree with a non-state's politics. These political disagreements can have the powerful and earth-shattering effect of denying *jus cogens*, denying justice for the people of a particularly disempowered and unrecognized community.

IV. Looking Forward

To recapitulate, then, Thomas Aquinas' conception of justice is, in theory, perfectly aligned with the international legal principles embodied in *jus cogens*. In practice, however, the justice provided by *jus cogens* norms is sometimes prevented by numerous factors–concerns of sovereign immunity, standing, and recognition–which are unjustifiably regarded as persuasive and controlling within the international context.

Professor Finnis asserts that Aquinas' justice has three particular qualities: right, duty and equality. Rights are incumbent upon individuals who belong to a community and can be either inherent or contractual. Practical reason dictates that everyone has a right to basic human freedoms and what is necessary to survive if others have a superabundance of resources. Naturally, the right to certain treatment and to basic resources imposes a duty upon society and individuals to provide these for others in order to promote the common good. The third element of justice is equality, which is of particular import considering that it requires that individuals in the community must be given equal consideration when determining their rights. Together, these principles create a sound system of justice that provides for the good of mankind.

After careful analysis, it is clear that the international *jus cogens* norms conform to the elements and theories prescribed in Aquinas' justice. These norms effectively state international principles that transcend and supersede positive and customary law. The topics covered by *jus cogens* ensure the protection of fundamental and inalienable human rights that are universally considered just to protect. Necessarily, *jus cogens* norms create rights that every state has and universal duties that every state owes to one another. These rights are, like Aquinas' justice, based on the premise that everyone in the international community is entitled to basic rights that promote the common good. Therefore, there are corresponding duties of states to respect the rights of other states and to act when it is clear another state is violating a *jus cogens* norm. Lastly, since every state in the international community is considered to have the same rights and duties under *jus cogens*, Aquinas' principle of equality is upheld in the application of these norms. *Jus cogens* are thereby a modern-day example of Aquinas' justice.

While in theory the *jus cogens* norms perfectly embody the principles of justice, problems arise in their application. Sovereign immunity protects heads of state and diplomats who have committed *jus cogens* violations from being prosecuted while they are in power. The second bar to exercising justice under *jus cogens* is the issue of standing. Although states have an interest in

protecting their citizens when they are injured, courts have refused to decide some of these cases when they believe domestic, not international law should apply, and when a particular statute does not explicitly attach jurisdiction to a particular defendant. Such reasoning has effectually nullified the universal jurisdiction that should apply in *jus cogens* cases. The justice that *jus cogens* was meant to discharge by prioritizing the enforcement of basic human rights over questions of lesser law and of jurisdiction has been dishonored. Likewise, the peremptory and universal nature of the norms is frustrated when states and courts are allowed to foreclose application of *jus cogens* to communities that are not internationally recognized. As a result of these three factors, the justice that the *jus cogens* doctrine is able to effect is surely diminished.

By pointing out these discrepancies between justice and the application of *jus cogens*, I seek to promote dialogue about how *jus cogens* might be revived. Using Aquinas' justice as a guide, the international community should improve upon a doctrine that rarely has teeth. It should require immediate divestment of sovereign immunity for heads of state that have committed criminal acts violating *jus cogens* norms. Universal jurisdiction should mean exactly that: any state should be able to bring an action on behalf of a victim and *jus cogens* should be a cause of action in and of itself. Lastly, statehood should not hinge upon recognition since *jus cogens* rights and obligations are at stake. Their application to all people should be guarded against states seeking to control statehood decisions for their own benefit. Victims, whatever their origin, deserve a venue for their cases to be heard. Somewhere between enumeration and application justice was taken out of *jus cogens*. Only a drastic change in international policy and practice could allow *jus cogens* doctrine's theoretical aspirations to be realized in practice. Only such a drastic change in course could allow the international community to more effectively pursue justice and the common good.

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