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REGENT UNIVERSITY LAW REVIEW

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EXPOSING THE UNDERGROUND ESTABLISHMENT CLAUSE IN THE SUPREME COURT'S ABORTION CASES

*Justin Murray**

ABSTRACT

In *Roe v. Wade*, the Supreme Court held that women have a right to abortion under the Due Process Clause of the Fourteenth Amendment. The Court reasoned toward this conclusion by importing concepts and concerns that are ordinarily associated with the Establishment Clause. This Article is the first attempt to systematically describe, and critically evaluate, the Court's use of Establishment Clause ideas in *Roe* and later abortion cases.

Some brief background is essential in order to see how the Court wove Establishment Clause themes into the structure of its Due Process analysis. The Due Process Clause prohibits the government from restricting fundamental constitutional liberties (such as abortion) unless it has a compelling reason for doing so. States have defended their abortion laws by arguing that protecting unborn human life against homicide is a compelling reason to restrict abortion. This argument, advanced in *Roe*, directly presented the Supreme Court with the question of whether fetuses are human beings entitled to protection against homicide.

The Court, however, refused to answer the question and provided an ambiguous explanation for its refusal. Careful interpretation of these hazy passages reveals the Court's underlying concern that neither the judiciary nor the legislature may decide the question of fetal humanity because the question is religious in nature and divides people along religious lines. When the ambiguities are unraveled and the Court's

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rationale is plainly stated in this way, it becomes clear that *Roe*'s method of analysis incorporates the Establishment Clause requirement that legislation must be based on a secular purpose and the (now-outdated) Establishment Clause goal of alleviating political divisiveness along religious lines.

The Court's analysis is misguided, however, because Establishment Clause principles permit governmental protection of fetal life. The humanity of the fetus can be plausibly based, not only on religious grounds, but also on the secular grounds of philosophical, historical, and experiential reasoning. To be clear, I do not argue that these secular grounds prove beyond dispute that fetuses are human beings. Instead, I defend the more modest proposition that a debatable secular case can be made for viewing fetuses as human beings. This conclusion is not sufficient to justify legal restrictions on abortion (which is not the point of this Article), but it does show that such restrictions do not violate the Establishment Clause, that the Court's implicit reliance on Establishment Clause themes is misplaced, and that we should reopen social and judicial dialogue about the ethical status of fetal life and the constitutional status of abortion.

INTRODUCTION

In America's fierce debate about the morality and legality of abortion, abortion-rights opponents are frequently criticized for seeking to impose their religious views on others and for breaching the separation between church and state. During the 2008 election campaign, then-Senator Joe Biden indicated that although he considers abortion morally wrong as a "matter of faith," he also finds it inappropriate to "impose that judgment on everyone else" through legal restrictions.[1] More recently, the efforts of Bart Stupak, Ben Nelson, and other pro-life democrats to exclude abortion from health-care-reform legislation have been widely characterized as "a brazen and frank attempt to impose a minority's religious worldview on the entirety of American healthcare."[2] Nor has the Supreme Court been left unscathed: some critics attributed its 2007 decision upholding Congress's ban on

[1] *Meet the Press* (NBC television broadcast Sept. 7, 2008), *available at* http://www.msnbc.msn.com/id/26590488/page/4/.

[2] Marci A. Hamilton, *Why the Stupak Amendment to the Healthcare Reform Bill Is Unconstitutional*, FINDLAW'S WRIT (Nov. 12, 2009), http://writ.news.findlaw.com/hamilton/20091112.html.

partial-birth abortion[3] to the "telling" fact that five out of the nine justices were Catholic.[4]

Concerns such as these have shaped not only popular discourse about abortion, but constitutional discourse as well. Many critics of anti-abortion laws have grounded their position in the Establishment Clause of the First Amendment, which states that "Congress shall make no law respecting an establishment of religion."[5] The late Justice Stevens,[6] pro-choice litigants,[7] and many scholars argue that abortion restrictions "lack a secular purpose" and "place the state on one side of a political issue which is divided along religious lines, thus violating the [E]stablishment [C]lause."[8]

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3 Gonzales v. Carhart, 550 U.S. 124, 168 (2007).

4 Geoffrey R. Stone, *Our Faith-Based Justices*, HUFFINGTON POST (Apr. 20, 2007, 2:45 PM), http://www.huffingtonpost.com/geoffrey-r-stone/our-faithbased-justices_b_46398.html.

5 U.S. CONST. amend. I.

6 Justice Stevens's Establishment Clause argument against abortion laws, as he has articulated it in his judicial opinions, is discussed at greater length below. *See infra* Parts I.B.3, II.C.3, and III.C. On at least one occasion, Justice Stevens advanced this sort of argument outside of the context of a judicial opinion. *See* John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13, 30–33 (1992).

7 In many of the Supreme Court's leading abortion cases, one or more pro-choice amici (and occasionally the pro-choice party) advanced an Establishment Clause challenge. *See, e.g.*, Brief Amicus Curiae on Behalf of New Women Lawyers et al. at 47–55, Roe v. Wade, 410 U.S. 113 (1973) (Nos. 70-18 & 70-40); Brief of Appellees at 92, Harris v. McCrae, 448 U.S. 297 (1980) (No. 79-1268); Brief of Ams. United for Separation of Church and State as Amicus Curiae in Support of Appellees, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88-605) (focusing entirely on the Establishment Clause); Brief of Amici Curiae Religious Coal. for Reprod. Choice et al. at 6, Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830).

8 John Morton Cummings, Jr., Comment, *The State, the Stork, and the Wall: The Establishment Clause and Statutory Abortion Regulation*, 39 CATH. U. L. REV. 1191, 1193 (1990); *see also* RONALD DWORKIN, LIFE'S DOMINION 24–28 (1993); JOEL FEINBERG, *Abortion*, *in* FREEDOM AND FULFILLMENT: PHILOSOPHICAL ESSAYS 37, 75 (1992); U.S. COMM'N ON CIVIL RIGHTS, CONSTITUTIONAL ASPECTS OF THE RIGHT TO LIMIT CHILDBEARING 35–36 (1975); PETER S. WENZ, ABORTION RIGHTS AS RELIGIOUS FREEDOM 170–81 (1992); Joel R. Cornwell, *The Concept of Brain Life: Shifting the Abortion Standard Without Imposing Religious Values*, 25 DUQ. L. REV. 471, 473 (1987); David R. Dow, *The Establishment Clause Argument for Choice*, 20 GOLDEN GATE U. L. REV. 479, 479–80 (1990); Robert L. Maddox & Blaine Bortnick, Webster v. Reproductive Health Services*: Do Legislative Declarations that Life Begins at Conception Violate the Establishment Clause?*, 12 CAMPBELL L. REV. 1, 2–3 (1989); Joseph S. Oteri et al., *Abortion and the Religious Liberty Clauses*, 7 HARV. C.R.-C.L. L. REV. 559, 588–91 (1972); Larry J. Pittman, *Embryonic Stem Cell Research and Religion: The Ban on Federal Funding as a Violation of the Establishment Clause*, 68 U. PITT. L. REV. 131, 135 (2006); Stuart Rosenbaum, *Abortion, the Constitution, and Metaphysics*, 43 J. CHURCH & STATE 707, 713–14 (2001); Edward L. Rubin, *Sex, Politics, and Morality*, 47 WM. & MARY L. REV. 1, 40–46 (2005); Paul D. Simmons, *Religious Liberty and Abortion Policy:* Casey *as "Catch-22"*, 42 J. CHURCH & STATE 69, 69 (2000); Paul D. Simmons, *Religious Liberty and the Abortion Debate*, 32 J. CHURCH & STATE 567, 568 (1990); Gila Stopler, *"A Rank Usurpation of Power"—The Role of*

The Supreme Court has never openly endorsed these efforts to base abortion rights on the First Amendment.[9] Nonetheless, I show that Establishment Clause concepts play a central, albeit veiled (and therefore largely unnoticed), role in the Court's understanding of the constitutional right to abortion.[10] This Article provides a new way of interpreting *Roe v. Wade* and subsequent abortion cases: the Court implicitly relies upon First Amendment-type arguments to justify abortion rights, but without ever explicitly referring to the First Amendment. Because the Court's reliance on the Establishment Clause is never directly acknowledged in the text of its abortion-rights opinions, I call this dynamic the "underground Establishment Clause," or, for convenience, the "UEC."

This reinterpretation of abortion-rights jurisprudence is particularly timely in light of the new membership on the Court and Justice Kennedy's uncertain and evolving views about abortion rights. In 1992, Kennedy surprised many observers by authoring part of the plurality opinion that reaffirmed *Roe* by a narrow margin.[11] His portion of the opinion heavily emphasized (what I will show to be) UEC themes: that

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Patriarchal Religion and Culture in the Subordination of Women, 15 DUKE J. GENDER L. & POL'Y 365, 391–93 (2008); Elizabeth Symonds, *The Denial of Medi-Cal Funds for Abortion: An Establishment of Religion*, 9 GOLDEN GATE U. L. REV. 421, 430–33 (1979); Karen F.B. Gray, Comment, *An Establishment Clause Analysis of* Webster v. Reproductive Health Services, 24 GA. L. REV. 399, 402 (1990); Sherryl E. Michaelson, Note, *Religion and Morality Legislation: A Reexamination of Establishment Clause Analysis*, 59 N.Y.U. L. REV. 301, 401–07 (1984); Note, *New Jersey's Abortion Law: An Establishment of Religion?*, 25 RUTGERS L. REV. 452, 453 (1971). Professor Laurence Tribe used to take this position, *see* Laurence H. Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 19–24 (1973), but he has since abandoned it, *see* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 116 (1990).

[9] The Court has only addressed an Establishment Clause objection in the abortion context on one occasion. There, it held that the Hyde Amendment does not violate the Establishment Clause. Harris v. McRae, 448 U.S. 297, 319–20 (1980). In Part II.B below, I explain why this holding clarifies, rather than contradicts, my thesis about the underground Establishment Clause.

[10] Some aspects of the connection between abortion-rights jurisprudence and the Establishment Clause have been identified, and other aspects misidentified, in previous scholarship. *See* Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 994–96 (1991). Professor McConnell argued that *Roe* is to abortion what the Establishment Clause is to religion, because *Roe* demands that the government remain neutral about abortion. *Id.* at 996. His analysis is on the right track, but it is incomplete and, at points, inaccurate. As I will show, the Court does not require complete governmental neutrality about abortion. It requires neutrality about one important aspect of abortion: whether a pre-viable fetus is a human being. Nonetheless, the Court permits most governmental restrictions on abortion short of those that treat pre-viable fetuses like full-fledged human beings. This Article is an effort to explain that discrepancy. *See* discussion *infra* Part II.

[11] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 845–46 (1992) (plurality opinion).

pregnancy and abortion deeply implicate our most basic ethical and religious ideas about "existence, of meaning, of the universe, and of the mystery of human life," and therefore that the government must not "mandate" its own moral view on the subject.[12] More recently, however, his opinions in *Stenberg v. Carhart* and *Gonzales v. Carhart*, the partial-birth-abortion cases, sharply turned against the UEC by emphasizing the humanity of fetal life and by permitting the government to "take sides in the abortion debate and come down on the side of life, even life in the unborn."[13] This Article will show how Kennedy's shifting views about abortion rights relate to the UEC, and why his *Carhart* opinions threaten the inner logic and future of *Roe* and the Court's other abortion-rights decisions.[14]

The following provides a brief description of what the UEC is and why it is problematic. The Court has located the constitutional right to abortion in the Due Process Clause of the Fourteenth Amendment.[15] My task, therefore, is to identify where Establishment Clause themes enter into and influence the Court's Due Process reasoning.

One of the general principles of Due Process is that the government may not infringe upon fundamental rights unless it can provide a compelling reason for doing so.[16] Once the *Roe* Court held that abortion is a fundamental right,[17] the only remaining option for Texas (the respondent in *Roe*) to vindicate its abortion statute was to provide a compelling justification for restricting abortion. To that end, Texas offered the following rationale for its law: "the fetus is a human being and the state has an interest in the arbitrary and unjustified destruction of this being."[18]

The Court rebuffed Texas's asserted justification, but, interestingly, it did *not* say that Texas erred in viewing fetuses as human beings deserving of protection. The Court simply refused to answer the question

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[12] *Id.* at 850–51; *see also* discussion *infra* Part II.D.2.

[13] Stenberg v. Carhart, 530 U.S. 914, 961 (2000) (Kennedy, J., dissenting); *see* Gonzales v. Carhart, 550 U.S. 124, 144–45 (2007) ("[T]he government has a legitimate and substantial interest in preserving and promoting fetal life . . . ."); *see also* discussion *infra* Part II.E.

[14] *See infra* Part II.E. I also argue that Kennedy's usual method of Establishment Clause interpretation—the coercion test—would readily find anti-abortion laws permissible under the First Amendment, which suggests that he would probably abandon the UEC if litigants and scholars manage to convince him of the underlying links between Establishment Clause case law and abortion-rights jurisprudence. *See infra* Part I.A.3.

[15] Roe v. Wade, 410 U.S. 113, 153 (1973); *see* U.S. CONST. amend. XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

[16] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 767 (2d ed. 2002).

[17] *Roe*, 410 U.S. at 152–53.

[18] Brief for Appellee at 9, *Roe*, 410 U.S. 113 (No. 70-18).

of "when [human] life begins," explaining, in part, that the question is morally and religiously divisive and therefore cannot be appropriately resolved by the judiciary.[19] The Court concluded that the legislature, too, must not seek to answer the question in a way that precludes women from answering it for themselves.[20]

This line of reasoning closely parallels two of the central themes in Establishment Clause case law: the requirement that all government action must have a "secular legislative purpose,"[21] and the idea (in vogue at the time of *Roe*, but no longer) that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."[22] *Roe* did not condemn the government's purpose of protecting the lives of unborn children for being false, but for being quasi-religious and for dividing society along religious and ethical fault lines. Although these Establishment Clause considerations were decisive for the outcome in *Roe*, the Court kept the analysis underground by omitting direct citation to or engagement with precedents and limiting principles that might have led to a different outcome.

Justice Stevens and several commentators, by lifting the Establishment Clause issue above ground, have provided a more responsible and elaborate First Amendment objection to abortion restrictions than the one suggested by the UEC. Many of these analyses deliberately distinguish secular purposes from religious ones and explain why the governmental interest in protecting pre-viable fetuses as human persons falls in the latter category. They generally contend (controversially) that religion is based on faith and authority, whereas secular reasoning primarily employs three criteria: "logic," "history," and "shared experiences."[23]

I argue, however, that protecting fetuses as human persons can be plausibly supported by all three of these criteria, and that a sufficiently strong secular case can be made for restricting abortion to satisfy the Establishment Clause. This does not necessarily mean that legislatures should restrict abortion, or even that abortion rights should not receive constitutional protection in some other form—both of these propositions lie beyond the scope of this Article. Yet my conclusion does indicate that the Supreme Court should revisit the foundations of abortion-rights jurisprudence and provide a more thoughtful analysis of the ethical status of fetal life.

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[19] *Roe*, 410 U.S. at 159–60.

[20] *See* discussion *infra* Part II.A.4–5.

[21] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[22] *Id.* at 622 (citing Paul A. Freund, Comment, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969)).

[23] *E.g.*, Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 779 (1986) (Stevens, J., concurring); *see also* discussion *infra* Parts I.B.3, II.C.3, and III.C.

Part I provides necessary background on current Establishment Clause doctrine and discusses various ways that this doctrine has been applied to challenge abortion restrictions. Part II shows that the arguments introduced in Part I also feature prominently in the Supreme Court's abortion cases. Part III contends that protecting fetal personhood does not violate the Establishment Clause, and that the Court should put an end to the UEC. Part IV concludes.

I. ESTABLISHMENT CLAUSE OBJECTIONS TO ABORTION RESTRICTIONS

The Establishment Clause says that "Congress shall make no law respecting an establishment of religion."[24] This concise text is profoundly difficult to interpret, due to the ambiguity of the words "establishment" and "religion." In this Part, I briefly describe the three primary methods that various Supreme Court justices use to interpret the Establishment Clause. I then introduce three ways that pro-choice commentators have applied these interpretive methods to argue that abortion restrictions violate the First Amendment.[25]

A. Three Tests for Detecting Establishments of Religion

The three primary legal tests that courts and scholars use to figure out whether governmental actions establish religion are commonly known as the *Lemon* test, the symbolic-endorsement test, and the coercion test. This Section briefly describes how each test works. One of the three tests (coercion) does not supply any plausible objection to abortion restrictions, so I will examine it in this Section and lay it aside for the remainder of the Article. However, the other two tests (*Lemon* and symbolic endorsement) provide initially-plausible pro-choice arguments, so I will leave it to the next Section to spell out those objections in detail.

1. The *Lemon* Test

The *Lemon* test has been the Supreme Court's leading approach to the Establishment Clause for nearly four decades. In *Lemon v. Kurtzman*, the Court held that a law is unconstitutional if any one of

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24 U.S. CONST. amend. I.

25 In other words, this Article focuses on Establishment Clause arguments about abortion that are based on currently-existing First Amendment doctrine, as well as the leading minority views proposed by Supreme Court justices. In doing so, I do not mean to imply that these are the only possible interpretations of the First Amendment, or even the best interpretations. It is possible that future commentators will come up with a new method of interpreting the Establishment Clause that differs from the approaches addressed in this Article. If such an attempt is made, it may well require a different kind of rebuttal than the ones that I provide to existing pro-choice Establishment Clause analyses in Part III, *infra*.

three circumstances is met: (1) if the law lacks a "secular legislative purpose," (2) if its "primary effect" is to advance or inhibit religion, or (3) if it creates an "'excessive government entanglement with religion.'"[26] *Lemon* has been the subject of fierce debate and criticism, even among Supreme Court justices,[27] and the Court has resolved many cases without applying *Lemon*.[28] Yet despite these controversies, *Lemon* has not been overruled and it remains the leading judicial test for determining whether governmental actions violate the Establishment Clause.[29]

The first part of the *Lemon* analysis condemns laws that are motivated exclusively by religious purposes instead of secular ones.[30] The Court has only declared laws unconstitutional under the secular-purpose standard in three contexts: governmental promotion of Creation Science over evolution in public schools,[31] placing the Ten Commandments on public property,[32] and providing a moment of silence for prayer in public schools.[33] In the vast majority of cases, the Court has classified the government's purpose as secular, including arguably borderline purposes such as religious accommodation,[34] solemnizing public events,[35]

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[26] 403 U.S. at 612–13 (citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968), and quoting Walz v. Tax Comm'n of New York, 397 U.S. 664, 674 (1970)).

[27] *See, e.g.*, McCreary County v. ACLU, 545 U.S. 844, 890 (2005) (Scalia, J., dissenting) (collecting criticisms of *Lemon* by himself and other justices).

[28] *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 795 (1983) (upholding legislative prayer due to its historical longevity, without applying *Lemon*). Just two years after *Lemon*, the Court suggested that the *Lemon* "'tests'" are "no more than helpful signposts." Hunt v. McNair, 413 U.S. 734, 741 (1973).

[29] The Court recently reaffirmed the *Lemon* test, as interpreted by the symbolic-endorsement test, and applied it to strike down a courthouse display of the Ten Commandments. *See McCreary County*, 545 U.S. at 858, 861–63.

[30] *See* Lynch v. Donnelly, 465 U.S. 668, 681 n.6 (1984) (clarifying that *Lemon* only requires that laws be partially motivated by a "secular purpose," not that the government must have "'exclusively secular' objectives").

[31] *See* Edwards v. Aguillard, 482 U.S. 578, 596–97 (1987); Epperson v. Arkansas, 393 U.S. 97, 107–09 (1968).

[32] *See McCreary County*, 545 U.S. at 881; Stone v. Graham, 449 U.S. 39, 42–43 (1980) (per curiam). *But cf.* Van Orden v. Perry, 545 U.S. 677, 681 (2005) (upholding government-sponsored Ten Commandments display).

[33] *See* Wallace v. Jaffree, 472 U.S. 38, 59–61 (1985).

[34] *See, e.g.*, Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334 (1987) (recognizing legitimate state interest in religious accommodation).

[35] *See, e.g.*, *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring) ("[G]overnment acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.").

promoting sexual abstinence for teenagers,[36] and providing a "uniform day of rest" through mandatory Sunday closing laws.[37]

Most Establishment Clause cases arise under the other two parts of the *Lemon* test: the "primary effect" and "entanglement requirements." Primary effect and entanglement cases generally deal with governmental aid to religious institutions: parochial schools,[38] religiously-affiliated service organizations,[39] employers,[40] and similar entities. Even if such aid is provided for an indisputably secular purpose,[41] it is often constitutionally suspect for two reasons. First, when aid is offered to a religious organization to further a secular goal, the organization might divert the aid toward religious activities, so that the ultimate effect of the law is to advance religion. This is the primary effect problem.[42] Second, in order to avoid the primary effect problem, the government might attach conditions and monitoring to ensure the proper use of aid, giving rise to collaborative and supervisory relationships that blur church-state boundaries and lead to inappropriate mutual influence. This is the entanglement problem.[43]

2. The Symbolic-Endorsement Test

This sub-section introduces a close relative of *Lemon* called the "symbolic endorsement" test.[44] Symbolic endorsement does not abandon the *Lemon* framework, but instead reinterprets its secular-purpose and

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[36] *See* Bowen v. Kendrick, 487 U.S. 589, 602 (1988) ("AFLA was motivated primarily, if not entirely, by a legitimate secular purpose—the elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy, and parenthood." (citations omitted)); *id.* at 634 (Blackmun, J., dissenting) ("I have no meaningful disagreement with the majority's discussion of the AFLA's essentially secular purpose....").

[37] McGowan v. Maryland, 366 U.S. 420, 445 (1961).

[38] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 643–45 (2002) (addressing a voucher program that includes religious schools).

[39] *See, e.g.*, *Kendrick*, 487 U.S. at 593 (addressing an abstinence-education grant program that includes religious organizations).

[40] *See, e.g.*, Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 329–30 (1987) (addressing the applicability of Title VII religion exemptions to the secular, nonprofit activities of a Mormon employer).

[41] In most of these cases, the secular purpose of the law is not in doubt. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 613 (1971) (recognizing legitimate state interest in educational quality, including religious schools); *Corp. of the Presiding Bishop*, 483 U.S. at 334 (recognizing legitimate interest in accommodating religion).

[42] *See Lemon*, 403 U.S. at 612.

[43] *See id.* at 619 ("A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that [aid conditions] are obeyed and the First Amendment otherwise respected.").

[44] CHEMERINSKY, *supra* note 16, at 1151. The symbolic-endorsement test originated in *Lynch v. Donnelly*, 465 U.S. 668, 687–94 (1984) (O'Connor, J., concurring), and the Court has used it in numerous majority opinions, most recently in *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005).

primary-effect requirements. The secular-purpose requirement remains largely the same as it was under *Lemon*: it condemns government policies that intentionally favor some religions and disfavor others. The reinterpreted primary-effect requirement is more novel and significant: it condemns government actions if a reasonable person would *perceive* those actions as favoring religion, even if the actions are not *actually* motivated by religious favoritism.[45]

Typical examples of symbolic-endorsement problems involve governmental promotion of prayer in public schools,[46] crosses on government property,[47] or government-sponsored Christmas displays that celebrate Christ's birth.[48] In cases like these, the government is arguably motivated solely by the secular purpose of celebrating America's history and heritage.[49] Yet despite secular intentions, proponents of the endorsement test would deem the government's actions unconstitutional as long as a reasonable person would perceive the government's actions as favoring religion.[50]

3. The Coercion Test

Although *Lemon* and its symbolic-endorsement offshoot have long been the leading methods for Establishment Clause inquiry, they remain highly controversial.[51] Many critics urge the Court to replace *Lemon* with

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[45] *E.g.*, *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring). Proponents of the endorsement test agree on this much. They disagree, however, about how reasonable the reasonable person must be. *Compare* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780–81 (1995) (O'Connor, J., concurring in the judgment) (arguing that the reasonable observer "must be deemed aware of the history and context of the community and forum in which the religious display appears"), *with id.* at 799–800 n.5 (Stevens, J., dissenting) (arguing that the reasonable observer is a passerby who notices the government's display, not Justice O'Connor's "well-schooled jurist"). A majority of the Court embraced Justice O'Connor's formulation in *McCreary County*, 545 U.S. at 866.

[46] *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309–10 (2000) (applying endorsement test to hold that public schools allowing student-initiated prayer at school football games violates the First Amendment).

[47] *See Pinette*, 515 U.S. at 798–99 (Stevens, J., dissenting) (applying endorsement test to invalidate governmental permission for the KKK to place a Latin cross on government property). *But cf. id.* at 772 (O'Connor, J., concurring in part and concurring in the judgment) (applying endorsement test to reach the opposite result).

[48] *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 598–601 (1989) (applying endorsement test to hold that government-sponsored Christmas crèche violates the First Amendment). *But cf. Lynch*, 465 U.S. at 687 (upholding a different crèche display).

[49] For one of the Court's many recognitions of the legitimacy of this purpose, see *Lynch*, 465 U.S. at 680–81.

[50] *See* text accompanying *supra* note 45.

[51] *See supra* notes 27–28 and accompanying text.

a coercion-oriented standard.[52] This sub-section addresses the coercion-based alternative to *Lemon.*

Unlike the other Establishment Clause frameworks, the coercion test generally allows the government to promote religious ideas and goals, as long as it does not force people to participate in religious exercises.[53] This view has three known advocates on the current Court: Justices Scalia, Thomas and Kennedy.[54] Chief Justice Roberts, and Justices Alito, Sotomayor and Kagan, have not yet revealed their views on the subject. When such a case comes before the Court, it is probable that Alito and Roberts will adopt the coercion test, creating a slim majority on the Court to overrule or seriously modify *Lemon.*[55] (Very little is known about the views of Justices Sotomayor and Kagan, but there are no indications that they would abandon *Lemon* in favor of a coercion standard.[56]) Thus, although the coercion test represents a

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52 *See, e.g.*, Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 940 (1986).

53 *See County of Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in the judgment in part and dissenting in part) ("Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion . . . ." (citation omitted)); *see also* Lee v. Weisman, 505 U.S. 577, 586 (1992) ("These dominant facts mark and control the confines of our decision: State officials direct the performance of a *formal religious exercise* . . . for secondary schools." (emphasis added)); Bd. of Educ. v. Mergens, 496 U.S. 226, 261 (1990) (Kennedy, J., concurring in part and concurring in the judgment) ("The inquiry with respect to coercion must be whether the government imposes pressure upon a student to participate in a religious activity."). Justices Scalia, Thomas, and Kennedy agree on this much, but they sometimes disagree about what counts as "coercion." *Compare Lee*, 505 U.S. at 594 (Kennedy, J., opinion of the Court) ("[G]overnment may no more use social pressure to enforce orthodoxy than it may use more direct means."), *with id.* at 632 (Scalia, J., dissenting) ("[T]he Court invents a boundless, and boundlessly manipulable, test of psychological coercion . . . .").

54 The Court unanimously agrees that coerced religious exercise is *sufficient* to prove an Establishment Clause violation, but previous Court majorities have rejected the Scalia-Thomas-Kennedy view that coercion is a *necessary* element. *Compare Lee*, 505 U.S. at 587 (Kennedy, J., opinion of the Court) ("[A]t a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise...."), *with id.* at 604 (Blackmun, J., concurring) ("Although our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient.").

55 *See* Julie F. Mead, Preston C. Green & Joseph O. Oluwole, *Re-examining the Constitutionality of Prayer in School in Light of the Resignation of Justice O'Connor*, 36 J. L. & EDUC. 381, 394–98, 406 (2007).

56 *See* David M. Estes, *Justice Sotomayor and Establishment Clause Jurisprudence: Which Antiestablishment Standard Will Justice Sotomayor Endorse?*, 11 RUTGERS J.L. & REL. 525, 539 (2010) ("[T]he depth of analysis and space she has devoted to the Endorsement test suggests that Justice Sotomayor prefers the neutrality theory of the antiestablishment principle."); ALLIANCE FOR JUSTICE, REPORT ON ELENA KAGAN 9–13 (2010) (summarizing the few available clues regarding Justice Kagan's interpretation of the Establishment Clause).

minority position in the Court's existing jurisprudence, it could soon become the majority position.

For that reason, it is worth examining whether a plausible objection could be made to anti-abortion laws within the parameters of the coercion test. No commentator has yet invoked the coercion test to argue against abortion laws. The closest argument—and a common one—is that abortion restrictions graft religiously-motivated ideas into the law and "coerce[] into conformity" people from other religions who disagree.[57] Some commentators have used a similar coercion based argument to show that abortion restrictions violate the Free Exercise Clause.[58]

This argument does focus on coercion, but not in the way that the Establishment Clause coercion test calls for. The test does not ask whether religiously-motivated laws coerce unwilled conduct (which would effectively smuggle the *Lemon* secular-purpose inquiry into the coercion test), but whether the act coerced by the government is a "religious exercise."[59] Even if opposition to abortion is based on religious motivations, the act of carrying a pregnancy to term is not plausibly characterized as a religious exercise: pregnancy, wanted or unwanted, is an ordinary human experience that does not uniquely belong to any religion at the exclusion of others.[60] However coercive anti-abortion laws might be, they do not coerce religious exercise and therefore do not run afoul of the coercion test.

Thus, the remainder of the Article will focus on the more plausible pro-choice arguments that are based on *Lemon* and the symbolic-endorsement test. Nonetheless, the conclusion of this sub-section—that the coercion test leaves no room for a pro-choice Establishment Clause challenge—has independent practical significance. Justice Kennedy, the fence-sitter in abortion cases, is one of the judicial architects and proponents of the coercion test. If my UEC interpretation of the Supreme

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57 Cummings, *supra* note 8, at 1230 n.73.

58 *See, e.g.*, Oteri et al., *supra* note 8, at 592–96.

59 *See* cases cited *supra* note 53. This feature of the coercion test makes it vulnerable to the criticism that it makes the Establishment Clause redundant with the Free Exercise Clause. *See* Suzanna Sherry, Lee v. Weisman*: Paradox Redux*, 1992 SUP. CT. REV. 123, 134. It is not my purpose here to defend (or criticize) the coercion test, but only to clarify how it is applied by those who adhere to it.

60 *Cf.* Lee v. Weisman, 505 U.S. 577, 586–87 (1992) (holding that prayer at a public school graduation is a "state-directed religious exercise," but that severe facts like these "mark and control the confines of our decision"); *id.* at 640–41 (Scalia, J., dissenting) (describing coercion understood through historical examples or religious establishment as "coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*. Typically, attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities.").

Court's abortion precedents is correct,[61] then pro-life litigants and amici should, in an appropriate case, try to persuade Kennedy to reject *Roe*'s implicit *Lemon* flavored analysis and apply his usual, coercion-oriented inquiry instead. The predictable outcome of that inquiry, if Kennedy were to undertake it, would be that abortion restrictions are constitutionally permissible for purposes of the Establishment Clause.[62] This conclusion would provide him with an opening to re-examine the foundations of abortion-rights jurisprudence.

B. Three Establishment Clause Objections to Restrictive Abortion Laws

Within the general framework of *Lemon* and the symbolic-endorsement test, pro-choice commentators have articulated three objections to restrictive abortion laws. First, abortion sharply divides people of different religious persuasions, and the primary political support for restrictive abortion laws comes from religious believers; therefore, such laws are unconstitutional.[63] For convenience, I call this the "political divisiveness" argument.[64]

Second, the morality of abortion involves a variety of fundamental questions about human existence and ethics, such as: what is man; why do we value him; and, when does developing human life become morally valuable? Political resolution of ultimate human concerns such as these is inappropriate, because such issues lie within the domain of religion, not government.[65] This is the "ultimate concerns" argument.[66]

Third, opposition to abortion is based on faith and obedience to religious precepts, not secular forms of reasoning and justification. The Constitution requires laws to be based on secular ways of thinking about

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[61] *See infra* Part II.

[62] I will later argue, in Part III, *infra*, that abortion restrictions are constitutionally permissible even under a *Lemon* or symbolic-endorsement approach to the Establishment Clause. My only point for the time being is that the constitutional validity of anti-abortion laws is more obvious under the coercion test than it is under *Lemon*, and therefore that proponents of the coercion test—such as Kennedy—may be quicker than other justices to reject the UEC.

[63] *See infra* Part I.B.1.

[64] The phrase is not my own. It has been used extensively in Supreme Court decisions and scholarly commentary. For an elaborate discussion of the political-divisiveness concept in the Establishment Clause context, see Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667 (2006).

[65] *See infra* Part I.B.2.

[66] Like political divisiveness, "ultimate concerns" is a well-established judicial and scholarly position on the definition of religion, based on the Supreme Court's conscientious-objector cases. *See* Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 267–72 (1989).

the world, not religious ones.[67] This is the "faith-versus-reason" argument.

These three arguments require careful exposition in this Section, because the central theses of this Article—that the Supreme Court's abortion-rights opinions use much the same arguments, and that these arguments are misguided—revolve around them.

1. Political Divisiveness

The first and most common argument for why restrictive abortion laws violate the Establishment Clause is the political-divisiveness argument. The doctrinal foundation for the divisiveness argument lies in Supreme Court decisions from the 1970s, most notably *Lemon*. In *Lemon*, Chief Justice Burger argued that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."[68] Although ordinary political debate is "normal and healthy" in a democracy, he argued that political issues where people's "votes aligned with their faith" are "a threat to the normal political process."[69] Consequently, he argued that the "divisive political potential" of a law is evidence that it unconstitutionally entangles church and state.[70]

More recently, a bare majority of the Supreme Court has completely rejected these earlier concerns about the political divisiveness of religion.[71] Furthermore, the Court has unanimously agreed that divisiveness alone is not sufficient to prove an Establishment Clause violation: something more must be shown.[72] Nonetheless, a minority of

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[67] *See infra* Part I.B.3.

[68] Lemon v. Kurtzman, 403 U.S. 602, 622 (1971) (citing Freund, *supra* note 22, at 1692). *But see* Garnett, *supra* note 64, at 1670 ("It is both misguided and quixotic, then, to employ the First Amendment to smooth out the bumps and divisions that are an unavoidable part of the political life of a diverse and free people and, perhaps, best regarded as an indication that society is functioning well.").

[69] *Lemon*, 403 U.S. at 622. For Burger, religion-related political division threatens to replicate the troubled "history" of persecution that results when religion and government converge, and it also "divert[s] attention from the myriad issues and problems" that Americans of all religions can rationally debate and potentially agree upon. *Id.* at 623.

[70] *Id.* at 622.

[71] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 662 n.7 (2002) (Rehnquist, C.J., delivering the opinion of the Court, joined by O'Connor, Scalia, Kennedy, and Thomas, JJ.) ("'The dissent resurrects the concern for political divisiveness that once occupied the Court but that post-*Aguilar* cases have rightly disregarded.'" (quoting Mitchell v. Helms, 530 U.S. 793, 825 (2000) (plurality opinion))).

[72] *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 684 (1984) ("[T]his Court has not held that political divisiveness alone can serve to invalidate otherwise permissible conduct."); *id.* at 689 (O'Connor, J., concurring) ("[P]olitical divisiveness along religious lines should not be an independent test of constitutionality."); *id.* at 703 (Brennan, J., dissenting) ("Of

the justices continues to view divisiveness as a significant factor in Establishment Clause analysis,[73] and unease about religion-related conflict is widespread in contemporary American political discourse generally,[74] and in the abortion debate specifically.

When applied to abortion, the basic form of the political-divisiveness argument is that the "major force behind the antiabortion movement is a large and well organized group of religious organizations"; therefore, anti-abortion laws violate the Establishment Clause.[75] Three variations of the argument all fit within this core template. The first variation grounds political-divisiveness concerns in the entanglement part of the *Lemon* test, as Chief Justice Burger had done in his *Lemon* opinion.[76] The entanglement variation argues that due to the "pervasive" involvement of "organized religious groups" in the abortion controversy, governmental anti-abortion efforts result in "'a union of government and religion [that] tends to destroy government and to degrade religion.'"[77]

The second variation relies on the symbolic-endorsement framework instead.[78] This argument states that, in light of the religious divisions surrounding the abortion issue, a reasonable observer would "perceive" anti-abortion laws as reflecting governmental favoritism toward "theologically conservative view[s] on abortion."[79] As a result, such laws enable "Roman Catholics and fundamentalist Christians" to view themselves as "political 'insiders,'" whereas they make other religious and nonreligious groups feel "alienated" and "condemned" as "political 'outsiders.'"[80]

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course, the Court is correct to note that we have never held that the potential for divisiveness alone is sufficient to invalidate a challenged governmental practice . . . .").

[73] *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 709 (2005) (Stevens, J., dissenting, joined by Ginsburg, J.) ("Government's obligation to avoid divisiveness and exclusion in the religious sphere is compelled by the Establishment and Free Exercise Clauses . . . ."); *Zelman*, 536 U.S. at 717–18 (Breyer, J., dissenting) (writing separately to emphasize that "protecting the Nation's social fabric from religious conflict" is a fundamental purpose of the First Amendment).

[74] *See* Garnett, *supra* note 64, at 1675–76.

[75] *See, e.g.*, Cummings, *supra* note 8, at 1231–32.

[76] *See supra* notes 69–70 and accompanying text.

[77] Tribe, *The Supreme Court, 1972 Term*, *supra* note 8, at 22, 23 (quoting Engel v. Vitale, 370 U.S. 421, 431 (1962)).

[78] This should be no surprise, because the endorsement test relies on many of the "same premises and concerns" as *Lemon*'s political-divisiveness analysis: "asking whether a reasonable observer would regard herself as having been cast by state action as an outsider in the political community seems consonant with, if not equivalent to, asking whether that same state action does or could cause political divisiveness." Garnett, *supra* note 64, at 1699–1700.

[79] Gray, *supra* note 8, at 415–16.

[80] *Id.* at 416 (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

A third variation sees the intense religious divisions regarding abortion as circumstantial evidence that anti-abortion laws are motivated by religion, in violation of the *Lemon* secular-purpose requirement. This inference appears to lurk as an inchoate suspicion in the background of many, perhaps even most, Establishment Clause objections to abortion laws.[81] Several pro-choice commentators have made the point more directly by arguing, for instance, that "religious values [such as anti-abortion sentiment] can be recognized," and distinguished from secular "cultural values," by "the presence of truly radical divisiveness surrounding them."[82]

2. Ultimate Concerns

The ultimate-concerns argument is based on the secular-purpose requirement of the *Lemon* test. Secular-purpose arguments about abortion are complicated by a crucial gap in existing case law: the Supreme Court's Establishment Clause decisions, including those involving the secular-purpose requirement, have never explained how to distinguish a religious purpose from a secular one. In the few situations where the Court has struck down a law for lack of a secular purpose,[83] the Court never had to confront the thorny question of how to define and differentiate secular and religious purposes.

In each of those cases, one party accused the government of having a clearly religious purpose (for example, teaching Creationism in order to advance the Bible's creation story), and the government defended by claiming that its *real* purpose is a different, clearly secular one (for example, teaching Creationism to promote the findings of objective biological science, or to promote diversity of ideas).[84] The Court's only task was to figure out, largely by looking to legislative history, whether the government's stated (secular) purpose was its actual purpose, or whether the stated purpose was a "sham" to disguise its true, religious purpose.[85]

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[81] A shocking number of pro-choice commentators emphasize, as their primary or exclusive evidence that abortion restrictions are based on religious purposes rather than secular ones, the fact that most people who strongly oppose abortion are Christian. *See, e.g.*, Gray, *supra* note 8, at 417–18.

[82] Dow, *supra* note 8, at 497.

[83] As I discussed previously, the only programs that the Supreme Court has struck down on secular-purpose grounds are: governmental support for Creationism in public schools, providing a moment of silence for prayer in public schools, and posting the Ten Commandments. *See supra* notes 31–33 and accompanying text.

[84] These were the conflicting claims about the government's purposes in *Aguillard*, 482 U.S. at 585–94.

[85] *E.g.*, *id.* at 586–87 ("While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham.").

Abortion restrictions present a different kind of problem. The relevant dispute over abortion is not about whether the government's stated secular purpose is a sham to conceal its true, religious purpose. There is general agreement that the government's purpose is to protect fetal life, based on the belief that fetuses are human beings.[86] Instead, the problem is figuring out whether this goal is best understood as secular or religious. Thus, pro-choice commentators must look beyond Supreme Court secular-purpose case law to other legal (and non-legal) sources to distinguish between religious and secular purposes. The ultimate-concerns argument provides one way to fill in this gap; the faith-versus-reason argument examined in the next sub-section is another.

The legal roots of the ultimate-concerns approach lie in the Supreme Court's conscientious-objector cases, which held that religious belief includes any belief that "is sincere and meaningful" and "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God."[87] These cases involved statutory interpretation, not constitutional interpretation, and the central issues more closely resembled Free Exercise Clause problems than Establishment Clause ones.[88] Nonetheless, most federal courts of appeals have applied the holdings of those cases in both Free Exercise Clause and Establishment

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[86] There are some scholars who dispute the government's real purpose, arguing that nobody really believes that fetuses are persons or full-fledged human beings. According to Professor Dworkin, the proposition that the fetus is a person with rights is neither secular nor religious; rather, it is obviously false, and it is not the government's real purpose. His complex argument, briefly summarized, is that virtually nobody, even religious pro-lifers, actually believes that a pre-viable fetus is a person or has any rights of its own. The real issue motivating the abortion debate is competing ideas about the intrinsic value, meaning, and sacredness of human life; yet the intrinsic value of human life is a religious question. Therefore, the government violates the Establishment Clause when it restricts abortion based on one sectarian understanding of why human life is valuable. *See* DWORKIN, *supra* note 8, at 24–28. There are many ways to respond to this argument, and this Article provides one way: the personhood of a pre-viable fetus can be defended plausibly even using only secular modes of reasoning. *See* discussion *infra* Part III.B.

[87] United States v. Seeger, 380 U.S. 163, 165–66 (1965); *see also* Welsh v. United States, 398 U.S. 333, 340 (1970) (holding that even a "purely ethical or moral" belief is religious if it imposes upon the individual a "duty of conscience" that parallels the "strength of traditional religious convictions"). *But cf.* Gillette v. United States, 401 U.S. 437, 441, 443, 455 (1971) (holding that the conscientious-objector exemption does not apply to a Catholic who objects to some wars (Vietnam) but not all wars).

[88] The question presented for the Court in the conscientious-objector cases was the statutory definition of religion under the Selective Service Act, 50 U.S.C. § 456(j) (1958), not the First Amendment. Nonetheless, most commentators agree that the outcome in these cases is strained as a matter of statutory interpretation, and that an evolving constitutional conception of religion is what actually produced the Court's conclusions. *See, e.g.*, Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1064 (1978) (citing *Seeger*, 380 U.S. at 174, 188).

Clause contexts. These lower courts define religion to mean a "comprehensive" worldview that provides answers to "fundamental" questions about human life, communicated through hierarchical institutions, sacred texts, ritual practices, and other indicia.[89]

Some scholars have referred to this approach as the "ultimate concerns" definition of religion, because it identifies "religious" beliefs as whichever beliefs involve the most fundamental and all-encompassing (*i.e.*, ultimate) concerns of the believer.[90] This development in Establishment Clause doctrine closely parallels an influential trend within contemporary liberal political theory, which holds that "comprehensive" theories of morals and metaphysics (the paradigm of which is religion) are illegitimate grounds for political argument and governmental action.[91] According to many prominent liberal theorists, the "constitutive political morality" of liberalism is "that political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life."[92] The fundamental principle of the liberal state is that individuals should be allowed "to make the sense they can of their place in the universe" and, therefore, that the government must not attempt to "solve the final mysteries of life."[93]

Numerous pro-choice commentators have applied the ultimate-concerns definition of religion and/or the closely related framework of liberal political theory to the abortion context. The most common

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[89] The leading judicial approaches, which share much in common, originated in Malnak v. Yogi, 592 F.2d 197, 207–10 (3d Cir. 1979) (Adams, J., concurring in the judgment), and United States v. Meyers, 906 F. Supp. 1494, 1502–04 (D. Wyo. 1995), *aff'd*, 95 F.3d 1475, 1482–84 (10th Cir. 1996) (adopting the district court's method for defining religion); *see also* Jeffrey Omar Usman, *Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology*, 83 N.D. L. REV. 123, 173–76 (2007) (summarizing the various ways federal circuit courts have defined religion).

[90] *E.g.*, Ingber, *supra* note 66, at 268 (quoting *Toward a Constitutional Definition of Religion*, *supra* note 88, at 1077 n. 113).

[91] Among contemporary liberal theorists, John Rawls argued that civic debate about justice should not resort to "comprehensive doctrines" about which reasonable citizens disagree. Instead, we should ground political deliberation in an "overlapping consensus" that reasonable citizens can agree upon without reference to their different comprehensive worldviews. JOHN RAWLS, POLITICAL LIBERALISM xx–xxi (1993). Although Rawls's idea has been vastly influential, many critics have argued that his version of political liberalism is not only undesirable, but also incoherent. *See, e.g.*, John M. Breen, *Neutrality in Liberal Legal Theory and Catholic Social Thought*, 32 HARV. J.L. & PUB. POL'Y 513, 552 (2009) ("Even liberal regimes inevitably make use of some theory of the good in the formulation of law, thus exposing the liberal exclusion of alternative conceptions of the good as arbitrary and unprincipled.").

[92] *E.g.*, RONALD DWORKIN, A MATTER OF PRINCIPLE 191–92 (1985).

[93] BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 347–48 (1980).

argument along these lines is that concern for fetal life (and particularly the view that the fetus is a human person) is based on "[a]bstract metaphysical speculation" that is appropriate for "theology" but inappropriate in the context of democratic politics.[94] Professor Ronald Dworkin sounded a variation on this theme, claiming that anti-abortion laws are unconstitutional because they require the government to take sides on several different "fundamentally" "religious" issues: "the ultimate point and value of human life," "why life has intrinsic importance," and "how that value is respected or dishonored in different circumstances."[95]

3. Faith Versus Reason

Justice Stevens and other commentators propose a different way to fill the gap in secular-purpose case law and to bring that case law to bear against abortion restrictions. Their concern is very different from that of the ultimate-concerns commentators: they do not focus on the type of question (fundamental questions) abortion restrictions seek to answer, or the scope of the worldview (comprehensive worldviews) from which citizens derive their views about abortion. In fact, these commentators seek to provide secular answers to the exact same question that abortion opponents seek to answer: when does the fetus become a human being?[96]

Instead, their objection is that the pro-life answer to that question relies upon religious modes of thinking rather than rational, secular modes.[97] They argue that religious beliefs derive from faith and obedience to doctrinal authority, whereas secular beliefs are the product of secular forms of reasoning, such as "logic," "history," and "shared experiences."[98] They contend that protecting pre-viable fetuses cannot be plausibly defended on the basis of secular reasoning, so governmental actions to advance that goal violate the Establishment Clause.[99]

4. A Clarification

For the sake of simplicity, this Article has referred generically to Establishment Clause objections to restrictive abortion laws. The precise

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[94] *E.g.*, Simmons, *Religious Liberty and Abortion Policy*, *supra* note 8.

[95] DWORKIN, *supra* note 8, at 164–65.

[96] *See, e.g.*, WENZ, *supra* note 8, at 180 ("After twenty-eight weeks . . . there are grounds in secular values for attributing personhood to the fetus . . . .").

[97] *See, e.g.*, Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 778 (1986) (Stevens, J., concurring) ("I recognize that a powerful theological argument can be made for [protecting fetal life throughout pregnancy], but I believe our jurisdiction is limited to the evaluation of secular state interests.").

[98] *Id.* at 779.

[99] *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 569 (1989) (Stevens, J., concurring in part and dissenting in part).

objection is narrower and more complicated, and I will clarify it in this sub-section. The primary complaint of commentators and the Supreme Court is about *unduly burdensome* abortion laws that protect *pre-viable* fetuses.[100] *Roe* generally permits governmental restriction of abortion after viability,[101] and *Planned Parenthood of Southeastern Pennsylvania v. Casey* even allows for the regulation of abortion prior to viability, as long as the regulations do not create an "undue burden" on the abortion right.[102] Thus, the Court distinguishes between pre-viability and post-viability abortion regulation, and again between burdensome and non-burdensome pre-viability regulations.

The Establishment Clause objections reviewed in this Part draw similar distinctions. According to most of the commentators making these objections, secular goals might justify protecting fetuses once they reach approximately viability, but not before that point. The commentators differ in the reasons they give for why viability is morally significant from a secular point of view, and some believe that viability itself is less important than other fetal developments (such as sentience), which approximately coincide with viability.[103] In spite of this squabble, they generally agree that the morally significant point in fetal development occurs at or about viability, and that protecting fetuses after viability, but not before, can be supported with secular justifications.

Because the Supreme Court's abortion cases also take this shape—condemning intrusive pre-viability regulations, but not regulations that protect viable fetuses—the structure of the Court's UEC, if it exists at all, should be expected to share this structural complexity. It will not categorically dismiss opposition to all abortions as religious. Instead, it will be targeted at particular reasons (state interests) for regulating abortion, recognizing some governmental purposes as legitimate and secular, but others as impermissible. With these expectations in mind, we now turn to Part II and the UEC.

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[100] *See, e.g.*, *id.* (acknowledging a powerful state interest in viable, fully sentient fetuses, but denying a comparable secular interest for embryos). This is not uniformly true: some pro-choice commentators reject the significance of viability. *See, e.g.*, WENZ, *supra* note 8, at 181.

[101] Roe v. Wade, 410 U.S. 113, 163 (1973).

[102] 505 U.S. 833, 876–77 (1992) (plurality opinion).

[103] *Compare* Tribe, *The Supreme Court, 1972 Term*, *supra* note 8, at 27 (arguing that viability is intrinsically important because once a fetus can live on its own outside the womb, abortion unnecessarily kills a fetus that could just as easily be delivered and survive), *with* DWORKIN, *supra* note 8, at 17 (arguing that approximately viability is important because the fetus develops sentience around that point in its development).

II. THE UNDERGROUND ESTABLISHMENT CLAUSE

The previous Part introduced a variety of arguments that commentators have advanced to show that restrictive abortion laws violate the Establishment Clause. This Part reveals that the Supreme Court invoked strikingly similar arguments to justify the constitutional right to abortion. These arguments constitute an underground Establishment Clause, in the sense that the Court never openly relied on the Establishment Clause as the source of its analysis. Instead, the Court purported to rely entirely on the Due Process Clause.[104]

Therefore, the task of this Part is to dig beneath the surface of the text and to reveal how the Court wove Establishment Clause themes into the fabric of its Due Process analysis. I trace this phenomenon from its beginnings in *Roe v. Wade* and show how the idea evolved in later cases. The Part concludes by showing how the Court's most recent abortion decision, *Gonzales v. Carhart,*[105] represents a substantial retreat from the UEC approach to abortion rights.

A. Roe v. Wade

1. Background

In *Roe v. Wade*, the Court held that the choice to obtain an abortion is a fundamental liberty protected by the Fourteenth Amendment.[106] Most commentary about *Roe* focuses on that part of the Court's holding.[107] However, finding that a particular activity is a "fundamental liberty" does not end the constitutional inquiry. Even when the Court finds that a fundamental right is at stake, the government may intrude on that right if it has a "compelling" justification for doing so.[108] Justice Blackmun, writing for the Court in *Roe*, acknowledged that this general principle holds true in the abortion context.[109] The focus of this Section, and the place where the *Roe* UEC reveals itself most clearly, is the second part of the Court's Due Process inquiry: whether the government has a "compelling interest" for regulating abortion that is sufficient to override the "fundamental liberty" of women to acquire an abortion.

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[104] *See Roe*, 410 U.S. at 153.

[105] 550 U.S. 124 (2007).

[106] *See Roe*, 410 U.S. at 153.

[107] For a collection of numerous criticisms of *Roe*, most of which focus on the privacy/liberty holding, see Teresa Stanton Collett, *Judicial Modesty and Abortion*, 59 S.C. L. REV. 701, 702 n.3 (2008).

[108] CHEMERINSKY, *supra* note 16 at 767.

[109] *See Roe*, 410 U.S. at 155 ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' . . . ." (citations omitted)).

The Texas government's appellate brief in *Roe* vigorously argued that prohibiting abortion has a compelling justification: "the fetus is a human being," and therefore the state must protect it against "arbitrary and unjustified destruction."[110] The government also advanced an even more ambitious argument: not only do legislatures have a compelling interest in protecting fetuses (which gives them constitutional permission to do so), but they also are constitutionally *required* by the Equal Protection Clause[111] to protect unborn human lives the same as they protect other citizens.[112] Blackmun acknowledged that if unborn children are "persons" for purposes of the Equal Protection Clause, the case for abortion rights "collapses."[113]

2. The State's Argument that Fetuses Are "Persons" Under the Fourteenth Amendment

Blackmun replied to these two arguments separately and distinctly. He directly rejected the Texas government's Equal Protection argument, holding that a fetus is not a "person" under the Fourteenth Amendment.[114] He argued that the Amendment's framers did not intend for it to apply to unborn persons, and that in other places where the Constitution speaks of "persons," the term is expressly limited to (or only makes sense in application to) born persons.[115] No Supreme Court justice has ever disagreed with this part of the holding in *Roe*,[116] although several scholars have done so powerfully.[117]

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[110] Brief for Appellee, *supra* note 18, at 9.

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

[112] *See* Brief for Appellee, *supra* note 18, at 56. Several amici advanced this point in greater detail. *See, e.g.*, Brief of Ams. United for Life, Amicus Curiae, In Support of Appellee at 4–10, *Roe*, 410 U.S. 113 (No. 70-18).

[113] *Roe*, 410 U.S. at 156.

[114] *Id.* at 157.

[115] *Id.* at 157–58.

[116] *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 913 (1992) (Stevens, J., concurring in part and dissenting in part).

[117] *See, e.g.*, James S. Witherspoon, *Reexamining* Roe*: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY'S L.J. 29, 31 (1985) (arguing for fetal personhood under the Fourteenth Amendment on historical grounds); Charles I. Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 22 ISSUES L. & MED. 119, 119–22 (2006) (arguing for fetal personhood primarily based on egalitarian political theory). However, most scholars support Blackmun's conclusion that fetuses are not "persons" under the Fourteenth Amendment. *See* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 338 (2007).

3. The State's Scientific/Philosophical Argument That Fetuses Are Persons

Blackmun's refusal to recognize fetuses as "persons" under the Fourteenth Amendment was based entirely on technical considerations, such as the text, structure, and (to a lesser extent) history of that constitutional provision.[118] He did not argue that fetuses are *actually* non-persons, nor did he apply the scientific, philosophical, or intuition-based reasoning that would be necessary for determining whether fetuses are actually persons.

Thus, Blackmun rightly acknowledged that his resolution of the Equal Protection issue "does not of itself fully answer" the State's other argument[119]: that scientific and philosophical reasoning proves the humanity and personhood of fetuses, and therefore that the State has a compelling justification for protecting them against abortion.[120] The humanity of fetal life, if it were established as a fact, would supply the State with constitutional *permission* to restrict abortion,[121] even if the Equal Protection Clause does not require that it do so.

How, then, did Blackmun answer the State's scientific and philosophical arguments that fetuses are human beings? As it turns out, he refused to give an answer: "We need not resolve the difficult question of when life begins."[122] It is here, in his refusal to answer the State's most pressing defense, that the UEC comes into play.

However, it will take some work to prove my claim, because the surrounding text, where Blackmun attempts to justify his approach, is riddled with ambiguity. The next sub-section will propose and defend my UEC interpretation of the text; afterwards, I will address other, non-UEC explanations for Blackmun's method, ultimately concluding that the UEC is an essential part of the explanation (but not the entire explanation) for why Blackmun rejects the State's compelling interest in protecting fetal life.

4. Establishment Clause Themes in *Roe*

The core justification that Blackmun provided for refusing to say when life begins is, implicitly, an Establishment Clause argument that blends together the three objections introduced in Part I. He emphasized the religion-related divisions surrounding the issue of fetal personhood (a political-divisiveness argument), the profound ethical and

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[118] *Roe*, 410 U.S. at 157.

[119] *Id.* at 159.

[120] *See* Brief for Appellee, *supra* note 18, at 29–57.

[121] *Compare* CHEMERINSKY, *supra* note 16, at 767, *with Roe*, 410 U.S. at 155 ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' . . . ." (citations omitted)).

[122] *Roe*, 410 U.S. at 159.

anthropological content of that issue (an ultimate-concerns argument) and, to a lesser extent, the impossibility of resolving it with secular methods of reasoning (a faith-versus-reason argument).[123]

Immediately after declaring that he "need not resolve" the question, Blackmun explained that "[w]hen those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."[124] He further contended that the "wide divergence of thinking" and the "sensitive and difficult" nature of the question were "sufficient" to justify his refusal to give an answer.[125]

Blackmun did not spell out precisely why he found these divisions sufficient to reject the State's assertion that fetuses are human beings. The fact that he discussed divisions within the discipline of medicine, and not only in those of theology and philosophy, tends to support a non-UEC reading of the text (which I will explore below). However, his references to the sensitive nature of the fetal-personhood question and the impossibility of addressing it with knowledge rather than speculation are central rhetorical and conceptual themes in the ultimate-concerns and faith-versus-reason arguments about abortion.[126] These themes are less plausibly explained by the non-UEC interpretation that I will discuss later on.

More importantly, although Blackmun did briefly discuss divisions of opinion among scientists, he devoted the bulk of the section to cataloguing divisions among religions or quasi-religious philosophical systems. He described the view of the ancient Stoics, most Jews, and many Protestant groups that life begins at live birth; the Aristotelian and medieval Catholic view that ensoulment occurs at some point during pregnancy; the modern Catholic view that life begins at conception; and the varied opinions of scientists, some saying that life begins at conception, others at viability, and still others at birth.[127]

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[123] *See generally supra* Part I.B (describing the political divisiveness, ultimate concerns, and faith versus reason arguments against abortion restrictions).

[124] *Roe*, 410 U.S. at 159.

[125] *Id.* at 160.

[126] *Id.* at 159, 160 (citing Motion of American Ethical Union et al. for Leave to file a Brief as Amici Curiae in Support of the Appellant's Position, Doe v. Bolton, 410 U.S. 179 (1973) (No. 70-40), and Roe, 410 U.S. 113 (No. 70-18) [hereinafter Motion of American Ethical Union et al.]; LUDWIG EDELSTEIN, THE HIPPOCRATIC OATH: TEXT, TRANSLATION, AND INTERPRETATION 16 (1943); DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1689 (24th ed. 1965); LAWRENCE LADER, ABORTION, 97–99 (1966); DAVID M. FELDMAN, BIRTH CONTROL IN JEWISH LAW 251–94 (1968); L. M. HELLMAN & J. A. PRITCHARD, WILLIAMS OBSTETRICS 493 (14th ed. 1971)).

[127] *See id.* at 160–61.

Several of the historical sources that Blackmun cited in this paragraph provide further insight into why he found the divergence of opinion among religions to be significant. To begin with, consider Lawrence Lader. In a 1966 book entitled *Abortion*, Lader argued that "abortion forces us to face absolutes that intrude on religious dogma," and that "dogma becomes political where it has the power to make its votes felt."[128] The chapter of the book that Blackmun relied upon in this section of *Roe* sought to describe (and critically evaluate) Catholic, Jewish, and Protestant views about abortion.[129] According to Lader, the "conflicting positions of our three major faiths on the beginnings of life" enable us to see how "U.S. abortion laws" are "linked inextricably" with the "religious" question of when a fetus "become[s] a human being, infused with a rational soul."[130] Specifically, he concluded that the Catholic view about fetal life has "maintained an inexplicable influence" over the development of Protestant moral theology and American abortion law.[131]

Furthermore, to support his observation that "organized [Protestant] groups that have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family," Blackmun cited an amicus brief written by a variety of religious and humanist organizations.[132] The central contention of the brief is that abortion is a "matter of individual conscience to be exercised within the context of one's own faith," "free of unwarranted governmental interference."[133] These amici saw the intrusion of abortion restrictions upon "'freedom of conscience'" not only as a Free Exercise Clause violation, but also as a breach of the Establishment Clause.[134] The Establishment Clause problem consists in "the fact that religious beliefs [underlie] the retention of abortion laws," because such laws "in effect codif[y] 'the official Roman Catholic view' that assigns an undefined value to foetal life from the moment of conception."[135]

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[128] LAWRENCE LADER, ABORTION 2 (1966).

[129] Blackmun cited Lader twice in the paragraph of *Roe* on which I am currently focusing, *see Roe*, 410 U.S. at 160 n. 57–58, and numerous times elsewhere in the opinion, *see id.* at 130 n.9, 132 n.17, n.21, 135 n.26, 139 n.33, 149 n.44.

[130] LADER, *supra* note 128, at 94.

[131] *Id.* at 101–02.

[132] *Roe*, 410 U.S. at 160 (citing Motion of American Ethical Union et al. *supra* note 126)..

[133] Motion of American Ethical Union et al. *supra* note 126 at 4–5.

[134] *Id.* at 34 (quoting Paul J. Mishkin, *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 56, 162, 165 (1965)).

[135] *Id.* at 32–33 (quoting Rosen v. Louisiana Bd. of Med. Exam'rs, 318 F. Supp. 1217, 1223 & n.2, 1231 n.18 (E.D. La. 1970), *vacated*, 412 U.S. 902 (1973)).

To be clear, Blackmun did not directly quote these passages from the amicus brief or Lader's book. He cited those sources for the purpose of showing the wide divergence of religious opinion about fetal life, without explaining why he saw that divergence as significant. His sources are more forthright about the moral and legal significance of the wide divergence of opinion on abortion: for them, the divergence reveals that American abortion laws are "linked inextricably" to religious views about the fetus[136] and therefore violate the Establishment Clause.[137] These passages provide clues as to Blackmun's serious, yet undisclosed, reason for emphasizing religious divisions about fetal life.

Finally, *Roe*'s refusal to say when life begins should be read in conjunction with the introduction to the opinion, which reveals Blackmun's deep concern about the religion-related political divisions and the ultimate ethical/religious considerations associated with abortion.[138] After briefly stating the procedural posture of the case, Blackmun opened the opinion by expressing his "awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, . . . and of the deep and seemingly absolute convictions that the subject inspires."[139] Moreover, he observed that a person's "philosophy," "experiences," "religious training," and "moral standards" all shape our views about abortion.[140]

He contrasted these problematic and divisive dimensions of the abortion debate from what the Court must do: "Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection."[141] He elaborated on this aspect of the judicial role by quoting one of the famous passages from Justice Oliver Wendell Holmes's dissent in *Lochner v. New York*.[142] In the quoted passage, Holmes argued that "[the Constitution] is made for people of fundamentally differing views," and therefore that justices should bracket their personal views about morality and politics when making judgments about the meaning of the Constitution.[143]

This introduction communicates two ideas with clarity and urgency. First, Blackmun was deeply worried about the deep and sensitive

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136 LADER, *supra* note 128, at 94.

137 *See* Motion of American Ethical Union et al., *supra* note 126, at 31–34.

138 Roe v. Wade, 410 U.S. 113, 116 (1973).

139 *Id.*

140 *Id.*

141 *Id.*

142 198 U.S. 45 (1905).

143 *See Roe,* 410 U.S. at 117 (quoting Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)). For a discussion of the extraordinary influence that the story of *Lochner* and its demise have had for future generations of lawyers and judges, see Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 873–74 (1987).

religious and ethical divisions about abortion in American society. Consequently, he sought to ameliorate those divisions by exiling them from the domain of constitutional law and politics, which must be "free of emotion and of predilection."[144] This feature of Blackmun's argument parallels the political divisiveness argument from the Establishment Clause context.

Second, he emphasized that people's views about abortion are formed by our most fundamental concerns in life: "One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe."[145] These conceptual concerns and rhetorical emphases directly parallel those of the ultimate concerns argument against abortion restrictions.

5. An Alternative Interpretation of *Roe*

This sub-section presents and evaluates another potential interpretation—a non-UEC reading—of the texts from *Roe* discussed above. For the non-UEC interpretation, the divisions and controversy surrounding the question of when life begins has little to do with the Establishment Clause, and everything to do with the government's burden of proof. Under the Court's normal method in Due Process cases, whenever the government intrudes on fundamental liberties (recall that *Roe* had already held that the abortion right is a fundamental one[146]), it bears the difficult burden of providing a compelling justification for depriving that liberty.[147] Widespread disagreement about when life begins tends to show that the State's interest is not entirely convincing and therefore not compelling. Thus, the non-UEC interpretation would suggest that Blackmun was doing precisely what he purported to do: applying the Court's usual substantive due process methodology to the problem of abortion.

There is considerable textual support for this burden-of-proof interpretation, and it does appear to be one of the underlying reasons why Blackmun considered divisions of opinion to be so important. In particular, the burden of proof interpretation helps to explain why Blackmun discussed scientific disagreements about when life begins and, in the following paragraph, the variety of legal approaches to the status

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[144] *Roe*, 410 U.S. at 116.

[145] *Id.*

[146] *See id.* at 153.

[147] *See, e.g.*, James F. Blumstein, *Racial Gerrymandering and Vote Dilution:* Shaw v. Reno *in Doctrinal Context*, 26 RUTGERS L.J. 517, 590–91 (1995).

of fetal life.[148] These scientific and legal disagreements tend to show that the interest claimed by the State is not yet firmly established within relevant domains of knowledge.

However, taken alone, this reading of *Roe* leaves too much unexplained. In the relevant textual passages, Blackmun did not focus his attention solely on disagreements about when life begins within the secular disciplines. On the contrary, he primarily stressed the contents of, and disagreements among, religious viewpoints about fetal life. Unlike scientific and philosophical disagreement about when life begins, the fact that religions disagree about that question has little relevance to the State's burden of proving a compelling (secular) interest in protecting fetal life. Blackmun's emphasis on religious disagreements, therefore, is best understood as suggesting that religious purposes, and not secular ones, lie underneath anti-abortion laws.

Furthermore, Blackmun's references to (among other things) the "sensitive" nature of the question when life begins and the "vigorous opposing views" and "seemingly absolute convictions" that people hold about abortion reveal his anxiety about the corrosive social and political effects of the divisions surrounding abortion.[149] By revolving the introductory section of his opinion around these themes, Blackmun indicated that the management and amelioration of religiously charged political disagreement was one of the central challenges presented by the case and a primary goal that he sought to achieve in resolving it the way he did. These concerns have little to do with the State's burden of proof, and are much better explained by the UEC interpretation of *Roe*.

6. The Beginnings of a Contradiction

The previous discussion explains why the Court refused to say when life begins and, by doing so, rejected the government's interest in protecting fetal life against homicide. Yet Blackmun did not reject all governmental reasons for restricting abortion: he recognized the "less rigid claim" that the state may protect the "*potential* life" of the fetus.[150] This sub-section explores Blackmun's potential-life concept and shows how it relates to the UEC.

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[148] *See Roe*, 410 U.S. at 160–62 (citing Motion of American Ethical Union et al. *supra* note 126; LUDWIG EDELSTEIN, THE HIPPOCRATIC OATH: TEXT, TRANSLATION, AND INTERPRETATION 16 (1943); FOWLER V. HARPER & FLEMINGS JAMES, JR., THE LAW OF TORTS 1028–31 (1956); DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1689 (24th ed. 1965); LAWRENCE LADER, ABORTION, 97–99 (1966); DAVID M. FELDMAN, BIRTH CONTROL IN JEWISH LAW 251–94 (1968); L. M. HELLMAN & J. A. PRITCHARD, WILLIAMS OBSTETRICS 493 (14th ed. 1971); WILLIAM PROSSER, THE LAW OF TORTS 335–38 (4th ed. 1971)).

[149] *Id.* at 116.

[150] *Id.* at 150.

Potential life—unlike *actual* life—is not a strong enough reason to ban abortion throughout all nine months of pregnancy. Nonetheless, according to Blackmun, the government's interest in potential life grows stronger as the fetus develops, and at the point of viability (approximately the third trimester), the interest in potential life becomes "compelling." From that point on, *Roe* allows the government to prohibit abortion, except to protect the mother's life or health.[151]

At first glance, recognizing an interest in potential life seems to avoid the problems Blackmun found with the State's asserted interest in *actual* life. Unlike the disputed question of when life begins, everyone can agree, at the very least, that potential life is present throughout all of pregnancy: the embryo or fetus, whatever it might be currently ("person" or not), it will indisputably *become* what we all recognize as human life unless it dies. The potential-life concept, therefore, enabled Blackmun to recognize some sort of state interest in the fetus without appearing to engage in controversial metaphysical or religious speculation about when life begins.

However, this first appearance is deceiving. Although everyone agrees that potential life exists throughout pregnancy, people do not agree about why, how much, or when we should value potential life. In fact, if the potential life is not already, in some sense, an actual life, it is not clear why we should value it at all. Given the ambiguous, and probably empty, value of potential life, we should expect that people who believe the fetus is an actual human life will place a high value on its so-called potential life, and people who think otherwise will place little or no value on the fetus's potential.[152]

For Blackmun, the potential life of the developing fetus becomes valuable enough for the government to protect it at the point of viability.[153] He provided no justification for selecting viability as the crucial moment in fetal development, apart from a brief explanation that is nothing more than a tautology.[154] Nor could he provide a substantive

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[151] *Id.* at 162–64.

[152] *See* Jed Rubenfeld, *On the Legal Status of the Proposition that "Life Begins at Conception,"* 43 STAN. L. REV. 599, 600 (1991) ("If the fetus is considered solely as a 'potential' person, no case for a compelling state interest can be made without covertly treating this supposed 'potentiality' as an actuality . . . .").

[153] *See Roe*, 410 U.S. at 163.

[154] The sole justification Blackmun provided for selecting viability is the following: "[T]he 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications." *Id.* This argument tautologically defends viability by defining it; other than providing a definition of fetal viability (*i.e.*, the point where the fetus has 'capability of meaningful life outside the mother's womb'), Blackmun makes no effort to show why viability, defined in this way, is morally significant. *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v.

justification for selecting viability, because any such justification would make it obvious that Blackmun was effectively answering the forbidden question of when life begins, or, at least, when life becomes valuable. It is no coincidence that (approximately) viability is the point where most liberal commentators say that the fetus becomes an *actual* human being, or, more precisely, when it becomes a morally significant entity possessing rights apart from its mother.[155] This non-coincidence strongly suggests that Blackmun was using potential life as a cover for his judgment that the fetus's humanity becomes actual or morally relevant at viability.

Thus, despite Blackmun's effort to tell us that he "need not resolve the difficult question of when life begins,"[156] and to justify that claim by using the UEC, he effectively did make a decision about when human life begins. This decision, like the UEC itself, happened underground: under the façade of the potential-life concept.

Thus, two features of Blackmun's argument—the UEC and potential life—are essential to the holding and scope of *Roe*, yet they are in severe tension with each other. In the 1980s, this tension would be exploited by abortion opponents on the Court, who embraced and expanded the potential-life concept as a way to turn *Roe* against itself. Before I address those arguments (in Part II.C), I must address a case that the Court decided in the period between *Roe* and the jurisprudential counterattack that began in the mid-1980s. That case, which further defines the contours of the UEC, is the subject of the next Section.

B. Harris v. McCrae *and the Complex Structure of the Underground Establishment Clause*

Harris v. McCrae is crucial for understanding the *Roe* UEC, because the Court was presented with—and rejected—a direct Establishment Clause challenge to a routinely re-enacted abortion restriction called the Hyde Amendment.[157] This sub-section demonstrates that *Harris* does not contradict the *Roe* UEC, but instead clarifies some of its complex features.

The Hyde Amendment generally prohibits the use of federal Medicaid funds to reimburse abortions.[158] The challengers argued (among other things) that the legislation violates the Establishment

Wade, 82 YALE L.J. 920, 924 (1973) ("[T]he Court's defense seems to mistake a definition for a syllogism.").

[155] *See supra* note 103 and accompanying text.

[156] *Roe*, 410 U.S. at 159.

[157] 448 U.S. 297, 300–03 (1980) (describing the "various versions of the Hyde Amendment" that were at issue in the litigation).

[158] *See id.* at 302 (citing Pub. L. 96-123, § 109, 93 Stat. 926 (1979)).

Clause because it privileges certain religious views over others,[159] lacks a secular purpose,[160] and sharpens religious divisions[161] that threaten the "fabric of our society."[162] The district court had given these arguments extensive treatment in an unusually lengthy opinion,[163] ultimately rejecting them.[164]

The Supreme Court rejected the Establishment Clause challenge in a single paragraph.[165] A majority of the Court apparently considered the issue an easy one, and none of the dissenters openly challenged this part of the majority opinion.[166] The Court recognized that disfavoring abortion is consistent with the views of some religious groups and not others (the factual basis for the political-divisiveness argument), but emphasized that this alone does not make the legislation unconstitutional.[167] According to the Court, abortion restrictions reflect not only religious values, but also secular ones: "The Hyde Amendment . . . is as much a reflection of 'traditionalist' values towards abortion, as it is an embodiment of the views of any particular religion."[168]

The Court's cursory treatment of the issue is rife with ambiguity: what are the traditionalist values the Court refers to, and why are they secular rather than religious? In context, the Court appears to mean two things. First, the Court's reference to traditionalist values is drawn directly from the district court's opinion, and the district court meant this: anti-abortion values are not necessarily religious because they are

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159 *See* Brief of Appellees, *supra* note 7, at 68.

160 *Id.* at 96.

161 *Id.* at 111.

162 *Id.* at 100.

163 *See* McRae v. Califano, 491 F. Supp. 630, 690–728 (E.D.N.Y. 1980).

164 *Id.* at 742.

165 *See* Harris v. McCrae, 448 U.S. 297, 319–20 (1980).

166 They did not say whether they agree with the majority's Establishment Clause holding; they did not openly reject it. However, they do use strong UEC language in the course of their Due Process and Equal Protection analyses. *See id.* at 332 (Brennan, J., dissenting) ("[T]he Hyde Amendment is a transparent attempt by the Legislative Branch to impose the political majority's judgment of the morally acceptable and socially desirable preference on a sensitive and intimate decision that the Constitution entrusts to the individual."); *id.* (lamenting the "encroachments of state-mandated morality"); *id.* at 348 (Blackmun, J., dissenting) ("[T]he Government 'punitively impresses upon a needy minority its own concepts of the socially desirable, the publicly acceptable, and the morally sound.'" (citation omitted)).

167 *Id.* at 319 ("[I]t does not follow that a statute violates the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions.'" (quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961))); *id.* at 319–20 ("[T]he fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause.").

168 *Id.* at 319 (citing *Califano*, 491 F. Supp. at 741; Roe v. Wade, 410 U.S. 113, 138–41 (1973)).

not held exclusively by one particular religious group, but cut across many different group boundaries.[169]

Second, in other parts of the *Harris* opinion, the Court emphasized that *Roe* only forbids the government from criminalizing or otherwise penalizing the abortion choice; *Roe* does not say that the government has to treat abortion just like any other choice.[170] The government is allowed to make "'a value judgment favoring childbirth over abortion,'" and it may "implement[] that judgment" by using its funds to support birth and not abortion.[171] According to *Harris*, *Roe* allows the government to embrace traditionalist values that favor childbirth, as long as it does not intrude on liberty by forcing women not to get abortions.[172]

If the Establishment Clause categorically forbade the government from making any value judgments about abortion, the Court's analysis would be obviously wrong. Any governmental action expressing a preference for childbirth over abortion—not just coercive measures, like criminal penalties—would be unconstitutional. Does this mean that *Harris* signals a retreat from the UEC framework of *Roe*?

This conclusion is not necessary, because the *Roe* UEC can be reconciled with *Harris*. As the previous Section demonstrated, the *Roe* UEC took aim at situations where the government effectively declares when life begins by protecting fetuses against abortion to the same extent that it protects born human beings against homicide. *Roe* did not, however, condemn all governmental interventions on behalf of fetuses: it recognized the government's legitimate and secular interest ("legitimate," but not "compelling" until the point of viability) in protecting potential human life.[173]

Likewise, when the *Harris* Court approved what it calls traditionalist values, it was not referring to a governmental determination of when life begins. In *Harris* (unlike in *Roe*), the government did not need to provide a compelling interest, but only a legitimate one. *Harris* held that the Hyde Amendment—which refuses to pay for abortion with government money, but also refrains from

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[169] *See Califano*, 491 F. Supp. at 741 ("While *Roe v. Wade* argues for the measures' invalidity under the Fifth Amendment at least, it does not make the enactments any less secular in their legislative purpose. On its face such legislation, marking explicit disapproval of abortion in most cases, reflects a general and long held social view . . . ."). The Supreme Court's majority opinion also hints in this direction by citing *Roe*, 410 U.S. at 138–41, which describes America's strong historical opposition to abortion in the nineteenth and early twentieth centuries. *See Harris*, 448 U.S. at 319.

[170] *Harris*, 448 U.S. at 314–15 (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)).

[171] *Id.* at 314 (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)).

[172] *See supra* notes 167–168– and accompanying text.

[173] *See supra* Part II.A.6.

penalizing abortion—does not violate the right to abortion.[174] By not violating a fundamental right, the government never faced the burden of providing a compelling justification. Thus, the government never needed to take a position on the religiously divisive question of when life begins; it could justify itself on the basis of the less compelling, but also less controversial, preference for childbirth over abortion.[175]

Thus, much like the Establishment Clause arguments about abortion reviewed in Part I,[176] the *Roe* UEC, as clarified in *Harris*, is structurally complex. It does not reflexively condemn every possible method the government might use, or rationale it might have, for objecting to abortion. Instead, the UEC targets clear attempts by the government to answer the question of when life begins by protecting non-viable fetuses against abortion as though they were already full-fledged human persons. *Harris*, by permitting the government to favor childbirth over abortion in ways that fall short of protecting fetuses like full human beings, clarifies rather than contradicts the *Roe* UEC.

C. *The Potential-Life Dilemma*

After *Harris*, the next chronological step in the evolution of the Supreme Court's abortion-rights UEC came in the mid-to-late-1980s, when the conservative justices on the Court reclaimed the potential-life concept from *Roe* and expanded it in ways that threatened to undermine the UEC. This Section traces the attempt by anti-abortion members of the Court to destroy the *Roe* UEC from within, and how Justice Stevens developed his explicit Establishment Clause case for abortion rights in response to the conservative critique. I conclude by documenting the approving reaction that Stevens's argument received from several major proponents of the *Roe* UEC, including Blackmun himself.

1. Recap of the Tension Between "Potential Life" and the *Roe* UEC

As I explained previously, *Roe*'s UEC suffered from a central contradiction from the beginning. *Roe* held that the government could not answer the question of when life begins, declare fetuses to be human lives, and protect them accordingly by banning abortion. Instead, the Court recognized the validity of a lesser state interest: the interest in promoting potential life. This alternative appeared to avoid the controversy surrounding the question of when life begins, because everyone can agree that an embryo or a fetus is, at the very least, potentially a human life.[177]

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[174] *See Harris*, 448 U.S. at 314–15.

[175] *See id.* at 314 (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)).

[176] *See supra* Part I.B.

[177] *See supra* Part II.A.6.

Yet the problem resurfaces when we try to define why, to what extent, and when potential life is valuable. Blackmun said that viability marks the point where potential life becomes valuable enough to constitute a compelling state interest. Without saying so explicitly, Blackmun effectively joined the chorus of liberal scholars who argue that viability (or approximately viability) marks the beginning of human personhood. Thus, his (underground) pronouncement that fetuses become valuable members of the human community at the point of viability is in direct tension with the *Roe* UEC.[178]

2. The Collapse of the Potential-Life Framework

The contradictions within Blackmun's potential-life framework left *Roe* vulnerable to attack from multiple angles. One possible line of attack was to agree with Blackmun that potential life is a compelling state interest, but stretch the meaning of potential life to include all fetal and embryonic life. Potential life is an inherently expansive concept: even if *actual* human personhood does not begin until approximately viability (as Blackmun implied), the newly conceived embryo (and probably even sperm and eggs before conception) undoubtedly qualifies as a *potential* human life.[179] Thus, a small and logical adjustment to *Roe*—extending the post-viability compelling interest in potential life to cover all post-conception potential lives—would justify comprehensive prohibition of abortion, completely erasing the right recognized in *Roe*.[180]

This simple but devastating modification to *Roe* was first proposed by a member of the Court during the early 1980s, and it quickly gained momentum and became one of the most important threats to the constitutional right to abortion. In *Akron v. Akron Center for Reproductive Health*, Justice O'Connor argued in dissent that "*potential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward. At any stage in pregnancy, there is the *potential* for human life."[181] O'Connor embraced and extended the concept of potential life, arguing that the state has a "compelling" interest in protecting potential human life "throughout the pregnancy."[182]

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178 *See id.*

179 *See, e.g.*, Rubenfeld, *supra* note 152, at 613 ("'[P]otential life' does not begin at conception any more than it begins at viability. Accordingly, if the state has a compelling interest in protecting 'potential life,' profound consequences follow. A state could forbid not only abortion, but contraception as well.").

180 *See id.* at 600 ("By *Roe*'s own logic, to hold that the state's interest in protecting 'potential life' exists equally *throughout pregnancy* is to hold that states may bar abortion completely.").

181 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting).

182 *Id.*

Justices White and Rehnquist picked up her argument three years later,[183] and in 1989, Justice Kennedy signed on by joining Rehnquist's plurality opinion in *Webster v. Reproductive Health Services*.[184] If five justices had embraced the argument in *Webster*, then the Court would have given state legislatures a compelling justification for prohibiting abortion both pre- and post-viability. That would have signaled the end of *Roe*.[185]

Proponents of the *Roe* UEC could not respond to this line of reasoning. In fact, the UEC necessarily disarmed them of any weapons they might otherwise have used to defend themselves. Any serious effort to distinguish some potential lives (pre-viable ones) from others (post-viable ones) would not truly be about potential life. Rather, such efforts reflect judgments about how much the *potential* life resembles an *actual* life. But resolving what constitutes *actual* life (when life begins) is the very thing that *Roe*'s UEC forbids.

3. Justice Stevens's Solution

Justice Stevens developed one solution to the dilemma, but, as this sub-section shows, his proposal abandons important elements of *Roe*'s UEC. In *Thornburgh v. American College of Obstetricians and Gynecologists*,[186] he began to develop his above-ground Establishment Clause argument as a response to the conservative justices' expansion of the potential-life concept. Specifically, he was responding to Justice White, who reasoned that because an embryo is just as much a

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[183] Thornburgh v. American Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 785, 794–95 (1986) (White, J., dissenting).

[184] 492 U.S. 490, 498–99, 519 (1989) (opinion of Rehnquist, J., joined by Justices White and Kennedy) ("[W]e do not see why the State's interest in protecting potential human life should come into existence only at the point of viability . . . ."); *see id.* at 532 (Scalia, J., concurring in part and concurring in the judgment) (arguing that Chief Justice Rehnquist's opinion "effectively would overrule *Roe v. Wade*," and that he agrees this "should be done, but . . . more explicitly"). Justice O'Connor, who had first introduced the argument in *Akron*, did not advance—or deny—it in *Webster* because she believed the case could be resolved on other grounds. *See id.* at 522, 525 (O'Connor, J., concurring in part and concurring in the judgment) ("I do not understand these viability testing requirements to conflict with any of the Court's past decisions concerning state regulation of abortion. Therefore, there is no necessity to accept the State's invitation to reexamine the constitutional validity of *Roe v. Wade*."). If she had reiterated her *Akron* view, then the *Webster* Court would have had a five-justice majority for the view that the state interest in potential life is compelling throughout pregnancy.

[185] *See, e.g.*, *id.* at 532 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 555 (Blackmun, J., dissenting) (arguing that the plurality opinion would effectively overrule *Roe* because if "the State's interest in potential life is compelling as of the moment of conception," then "every hindrance to a woman's ability to obtain an abortion must be 'permissible'").

[186] *Thornburgh*, 476 U.S. at 778 (Stevens, J., concurring).

"potential" life as a viable fetus, the government's interest is just as compelling at conception as it is in late pregnancy.[187]

Stevens replied that there may be a "powerful *theological* argument" for the religious view that embryonic life and fetal life are equally valuable.[188] Yet, according to Stevens, when we set aside these impermissible "theological" considerations, it is "obvious" that the interest in protecting unborn life "increases progressively and dramatically as the organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day."[189] Judged only by secular standards, "there is a fundamental and well-recognized difference between a fetus and a human being."[190] This distinction is supported "not only by logic, but also by history and by our shared experiences."[191]

Three features of Stevens's argument are important for our purposes. First, he made a much sharper and more explicit distinction between the religious and the secular than *Roe* had done. He brought the Establishment Clause argument above ground. This feature was to become even clearer three years later in *Webster*, where he explicitly used the Establishment Clause to strike down a legislative declaration that human life begins at conception.[192]

Second, he circumnavigated the potential-life dilemma posed by Justice White, but only by abandoning *Roe*'s agnosticism about when human life begins. According to *Roe*'s political-divisiveness and ultimate-concerns UEC, the Court (and the legislature) must avoid answering the controversial, quasi-religious question of when human life begins.[193] By contrast, Stevens gave a direct, secular answer to the question: "there is a fundamental and well-recognized difference between a fetus and a human being."[194]

Third, Stevens used a faith-versus-reason type of Establishment Clause argument, which played a role, but not a prominent one, in *Roe*.[195] For him, the question of when life begins is not an inherently religious question; some ways of answering it are religious, but other ways are secular. Secular reasoning—"logic," "history," and "shared

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187 *Id.* at 775–76.

188 *Id.* at 778 (emphasis added).

189 *Id.* at 778–79.

190 *Id.* at 779.

191 *Id.*; *see* Roe v. Wade, 410 U.S. 113, 130–33 (1973).

192 *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 560, 571–72 (1989) (Stevens, J., concurring in part and dissenting in part).

193 *See infra* Part III.A.

194 *See Thornburgh*, 476 U.S. at 779 (Stevens, J., concurring).

195 For a more extensive discussion of the faith-versus-reason Establishment Clause argument against abortion restrictions, see generally *supra* Part II.C.3, and *infra* Part IV.

experiences"—tells us that post-viable fetuses are persons, and pre-viable ones are not.[196]

4. Reactions from the Other Liberal Justices

The other liberal justices on the Court have taken a cautiously approving stance toward Stevens's argument. None of them formally signed on to the three opinions in which he articulated his Establishment Clause position.[197]

However, three liberal justices (Blackmun, Brennan, and Marshall), in an opinion written by Blackmun, quoted and embraced Stevens's argument from *Thornburgh*. Confronted with the expansion of potential life to cover all nine months of pregnancy by the conservative *Webster* plurality, Blackmun said that "I cannot improve upon what JUSTICE STEVENS has written," and he proceeded to quote, in full, the relevant parts of Stevens's analysis.[198] Immediately following the quote, Blackmun provided a "see also" citation to *Roe*, suggesting that he viewed *Roe* as complementary with and similar to Stevens's Establishment Clause analysis.[199]

In his *Webster* opinion, Blackmun did not specifically cite the Establishment Clause, just as Stevens had not in *Thornburgh*. Yet three years later, in his partial concurring opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Blackmun again cited the relevant part of Stevens's *Thornburgh* opinion. On that occasion, he openly invoked the Establishment Clause against the government's claim that its interest in fetal life is compelling before viability: "[A] State's interest in protecting fetal life is not grounded in the Constitution. Nor, consistent with our Establishment Clause, can it be a theological or sectarian interest."[200]

None of the justices who signed those opinions (Blackmun, Brennan, and Marshall) remain on the Court today. Still, it is revealing that three justices who signed the original *Roe* opinion, including its author, incorporated Justice Stevens's above-ground Establishment Clause argument into their later defenses and elaborations of *Roe*.

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[196] *See Thornburgh*, 476 U.S. at 779 (Stevens, J., concurring).

[197] *See id.* at 772, 778–79 (Stevens, J., concurring); Webster v. Reprod. Health Servs., 492 U.S. 490, 560–72 (1989) (Stevens, J., concurring in part and dissenting in part); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 914–17 (1992) (Stevens, J., concurring in part and dissenting in part).

[198] *Webster*, 492 U.S. at 552–53 (Blackmun, J., concurring in part and dissenting in part) (quoting *Thornburgh*, 476 U.S. at 778–79 (Stevens, J., concurring).

[199] *Id.*

[200] *Casey*, 505 U.S. at 932 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (citing *Thornburgh*, 476 U.S. at 778 (Stevens, J., concurring)).

D. Planned Parenthood of Southeastern Pennsylvania v. Casey

This Section discusses *Casey*, the Supreme Court's landmark 1992 abortion decision.[201] Despite major revisions to *Roe*'s understanding of abortion rights, the Court left *Roe*'s UEC fundamentally intact, and it also added a new, distinct UEC argument. The opening section of the plurality opinion strongly suggested that the goal of prohibiting abortion is more about entrenching traditional sexual mores and gender roles than about protecting fetal life. By re-characterizing the interests of abortion opponents in this way, *Casey* dismissed those interests on the grounds that they involve ultimate concerns that belong to the domains of religion and the conscience of the individual, not politics.

1. The "Essential Holding of *Roe*"

In *Casey*, the justices split into several groups: two justices for reaffirming *Roe* in unmodified form,[202] four for overruling it,[203] and three (O'Connor, Kennedy and Souter) signing onto a middle-of-the-road plurality opinion,[204] which is now the authoritative legal text defining the scope of the constitutional right to abortion. The plurality justices defended what they vaguely referred to as the "essential holding of *Roe*."[205]

This so-called "essential holding of *Roe*" departs from *Roe* in some very important ways. Although *Roe* acknowledged the state's legitimate interest in potential life, it did not allow the state to advance that interest until viability.[206] *Casey*, by contrast, emphasized that the state's interest is legitimate throughout pregnancy and allowed the state to advance that interest (up to a point) before fetal viability.[207]

This change, however, does not undermine *Roe*'s UEC. The *Casey* plurality never questioned, reconsidered, or offered a rationale for *Roe*'s refusal to answer when human life begins. It adopted the potential-life description of the government's interest without comment,[208] which, as previous Sections of the Article have shown, is an important

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[201] *See Casey,* 505 U.S. at 833.

[202] *Id.* at 912–13 (Stevens, J., concurring in part and dissenting in part); *id.* at 923–24 (Blackmun, J., concurring in part and dissenting in part).

[203] *Id.* at 944 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *id.* at 983, 999 (Scalia, J., concurring in the judgment in part and dissenting in part).

[204] *Id.* at 846 (plurality opinion).

[205] *Id.*

[206] *See* Roe v. Wade, 410 U.S. 113, 163 (1973).

[207] *Casey*, 505 U.S. at 846, 876.

[208] *Id.* at 870–71.

accompaniment of the *Roe* UEC, which refuses to say when actual life begins.[209]

Although *Casey* did strengthen the potential-life interest by allowing the government to regulate abortion before viability, the plurality joined *Roe* in saying that the interest is not compelling (only "legitimate") before viability.[210] As a result, states are only allowed to regulate before viability in non-intrusive ways: they may not create an "undue burden" until after viability.[211] Thus, *Casey* left the central result of *Roe*'s UEC—the refusal to recognize a compelling interest in *actual* fetal life or pre-viable potential life—undisturbed and unexamined.[212]

2. *Casey*'s Additions to the Underground Establishment Clause

Although the *Casey* plurality left the *Roe* UEC intact, it also expanded upon and modified the UEC in several ways. These expansions are the subject of this sub-section.

The first modification that *Casey* made to the UEC relates to the structure of Due Process doctrine. As I discussed previously in Section II.A, substantive due process analysis proceeds in two steps. The first question is whether a fundamental right is at stake; if so, the second is whether the government has a compelling interest that justifies violating the right.[213] *Roe* used non-UEC arguments to establish that abortion is a constitutionally protected liberty,[214] and it only resorted to the UEC to refute the government's claim that it had a compelling interest in protecting fetal life.[215]

By contrast, the portion of the *Casey* opinion authored by Justice Kennedy[216] frequently blurred these two analytical steps and treated them as one. He did so by framing most of the ethical dynamics of the abortion decision—the reasons why abortion is a fundamental right, as well as the reasons why abortion might be immoral—as quasi-religious, ultimate concerns about the meaning of human life.

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209 *See supra* Part II.A.6.

210 *Casey*, 505 U.S. at 870, 879.

211 *Id.* at 876.

212 This refusal to re-evaluate the core claims of *Roe* is unsurprising in light of *Casey*'s overall approach to the case: *stare decisis*, respect for precedent. *See id.* at 853–55 (arguing that *stare decisis* favors reaffirming *Roe*).

213 *See supra* Part II.A.1.

214 The Court primarily relied on recent Due-Process precedent and the "detriment" that unwanted pregnancies impose upon women. Roe v. Wade, 410 U.S. 113, 152–53 (1973).

215 *See supra* Part II.A.

216 For a discussion of who authored what in the *Casey* joint opinion, see JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 54 (2007).

In the course of explaining why abortion is a constitutional liberty, Kennedy repeatedly alluded to the deep philosophical and spiritual roots of the controversies surrounding abortion. He indicated that the key question in the case (the "underlying constitutional issue") is "whether the State can resolve these *philosophic questions* in such a definitive way that a woman lacks all choice in the matter."[217] In a well-known passage, Kennedy proclaimed: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[218] He further argued that people of "good conscience" disagree about "the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage."[219]

Kennedy even implicitly identified himself with those who, for spiritual and moral reasons, oppose abortion: "Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code."[220]

Kennedy's sympathy with the moral opponents of abortion was unsurprising at the time, given that he is a practicing Catholic who had once called *Roe* the "*Dred Scott* of our time," and who just a few years before *Casey* seemed prepared to overturn *Roe*.[221] In fact, after hearing oral argument in *Casey*, Kennedy initially indicated that he was prepared to join the four anti-abortion justices to create a majority against *Roe*.[222]

What is surprising, though, is the way that he framed opposition to abortion (including his own) as a moral and spiritual concern that cannot legitimately be "mandate[d]" by the government.[223] The vocabulary he used to describe the nature of the abortion controversy—as involving "basic principles of morality," "profound moral and spiritual implications," our "concept of existence, of meaning, of the universe," and "philosophic[al] questions" that government may not legitimately resolve[224]—directly matches that of the ultimate-concerns Establishment Clause objection to restrictive abortion laws.[225] Like Justice Blackmun did in *Roe*, Justice Kennedy used ultimate concerns-themes as a way of mitigating the force of the State's interest in regulating abortion; but

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[217] *Casey*, 505 U.S. at 850 (emphasis added).

[218] *Id.* at 851.

[219] *See id.* at 850.

[220] *Id.*

[221] TOOBIN, *supra* note 216, at 53.

[222] *See id.*

[223] *Casey*, 505 U.S. at 850.

[224] *Id.* at 850–51.

[225] *See generally supra* Part I.B.2 (introducing the ultimate-concerns objection as a response against anti-abortion laws).

unlike *Roe*, Kennedy also (and primarily) employed ultimate concerns-themes as a way of showing why women have a fundamental liberty to seek an abortion in the first place.

Kennedy's argument expands the *Roe* UEC in another respect, as well. The *Roe* UEC targeted the government's interest in protecting fetal life, holding that it must not seek to definitively answer the question of when life begins.[226] By contrast, the bulk of Kennedy's discussion of the "profound moral and spiritual" issues involved in abortion is not about the fetus, but about sexual morality and gender roles.[227] For example, he analogized restrictive abortion laws to anti-contraception laws, suggesting that objections to both are "based on such reverence for the wonder of creation that any pregnancy ought to be welcomed and carried to full term."[228] Similarly, he indicated that when a government enforces anti-abortion laws, it insists "upon its own vision of the woman's role," which is inappropriate in light of how "intimate and personal" pregnancy and questions of gender role are for women.[229]

Thus, *Casey* left the *Roe* UEC intact and added new dimensions to it. *Roe* used the UEC to emphasize the importance of agnosticism about when life begins, which enabled the Court to reject the government's interest in protecting fetal life. *Casey* did not question, or even comment upon, this crucial component of the *Roe* UEC. Instead, the *Casey* plurality fashioned an additional UEC-type reason to reject abortion laws: such laws implicate ultimate moral and spiritual questions regarding gender roles and sexuality, which the government must not interfere with in our constitutional system.

E. A Retreat: The Partial Birth Abortion Cases

After *Casey*, the Court did not have to revisit the UEC until it decided two partial-birth abortion cases in 2000 and 2007. Confronted with and deeply disturbed by the phenomenon of partial-birth abortion, Kennedy substantially backtracked from the UEC that he had helped

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[226] *See supra* Parts II.A.4–5.

[227] This is not to say that his argument has nothing to do with the fetal-life dimension of the abortion issue. He refers to it at one point in his summary of the moral complexity of abortion:

> Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's belief, for the life or potential life that is aborted.

See Casey, 505 U.S. at 852.

[228] *Id.* at 853.

[229] *Id.* at 852.

develop in *Casey*, and even used language that, if taken to its logical conclusion, would lead to a rejection of the *Roe-Casey* UEC. This Section discusses the partial-birth abortion cases and explains how Kennedy's shifting views threaten the UEC.

1. Background

As the previous Section discussed, Kennedy was never entirely comfortable with *Roe*.[230] Despite his misgivings, he ultimately found the decision palatable enough to join the *Casey* plurality and uphold *Roe*. For the traditional abortion procedures at issue in *Roe* and *Casey*, the fetus is located inside the womb and is generally invisible to the outside world. The invisibility of the fetus within the womb makes it easier to speak about the morality of abortion in abstract terms, as Kennedy did in *Casey*: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[231]

The partial-birth-abortion issue shattered the abstraction that helped make abortion rights acceptable to Kennedy. By the year 2000, when *Stenberg v. Carhart* came before the Supreme Court, approximately thirty states had banned the dilation-and-extraction (D&X) abortion method.[232] Unlike traditional abortion techniques, D&X involves delivering a live fetus into the birth canal, leaving only the head undelivered. The abortionist then punctures the fetus's head and vacuums out its contents before finishing the delivery of the dead fetus.[233]

Whether this gruesome technique is morally different from traditional abortion is a controversial question in both pro-life and pro-choice circles.[234] Whatever the true answer to that question, the

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230 *See supra* Part II.D.2.

231 *See Casey*, 505 U.S. at 851.

232 *See* Stenberg v. Carhart, 530 U.S. 914, 978–79 (2000) (Kennedy, J., dissenting).

233 Professor Cynthia Gorvey summarizes the procedure in the following way:

> [T]he abortionist uses forceps to pull a living baby feet-first through the birth canal until the baby's body is exposed, leaving only the head just within the uterus. The abortionist then forces surgical scissors into the base of the baby's skull creating an incision through which he inserts a suction tube to evacuate the brain tissue from the baby's skull. The evacuation of this tissue causes the skull to collapse, allowing the baby's head to be pulled from the birth canal.

Cynthia Gorney, *Gambling with Abortion: Why Both Sides Think They Have Everything to Lose*, HARPER'S, Nov. 2004, at 33, 34.

234 Many pro-choice citizens join pro-lifers to condemn partial birth abortion because it is too "'close to infanticide.'" *See, e.g.*, Barbara Vobejda & David Brown, *Harsh Details Shift Tenor of Abortion Fight: Both Sides Bend Facts On Late-Term Procedure*, WASH. POST, Sept. 17, 1996, at A1, A8 (quoting pro-choice Senator Patrick Moynihan). On the other hand, many on the pro-life side say that partial-birth abortion is no more terrible

procedure certainly *looks* different: we can *see* a part of the fetus, in our world and outside of the world of the womb, at the time that its life is ended.[235] When the fetus's life is being terminated outside of the seemingly foreign space of the womb, the question of fetal life becomes more dramatic, more urgent, and less abstract. If traditional abortion does not already look like infanticide, partial-birth abortion certainly does.

This does not mean, as a philosophical matter, that it actually *is* infanticide: I am speaking only of aesthetics here. Nonetheless, aesthetics often influence our ethical judgments, and the distinction between traditional and partial-birth abortion, whether purely aesthetic or morally relevant, is a vastly important one for Justice Kennedy.

2. *Stenberg v. Carhart*

When the Court struck down Nebraska's partial birth abortion ban in *Stenberg*, Justice Kennedy vigorously dissented. There was no trace of his lofty account of liberty in *Casey*, or his previous characterization of the abortion debate as centering on controversial issues about gender roles and sexual morality. Furthermore, he made the important rhetorical choice to speak of the fetus as a human life rather than the preferred UEC term: potential life.[236]

He repeatedly referred to the fetus as "unborn" "life" and as "human life."[237] Whereas in *Casey* he spoke of how the Court must not "mandate [its] own moral code," and the legislature must not resolve "philosophic[al] questions" reserved to individual conscience,[238] here he approved the "moral judgment" of Nebraska that "all life, including the life of the unborn, is to be respected."[239]

He declared that legislatures must be allowed to "promote the life of the unborn and to ensure respect for all human life and its potential."[240] He described the D&X procedure as one that "many decent and civilized people find so abhorrent" as to be one of the "most serious of crimes

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than traditional abortion: both procedures kill the fetus; the only difference is the fetus's location at the time it is killed. *See, e.g.*, Richard Stith, *Location and Life: How* Stenberg v. Carhart *Undercut* Roe v. Wade, 9 WM. & MARY J. WOMEN & L. 255, 267–68 (2003).

235 Stith, *supra* note 234, at 267.

236 *See generally* Helen M. Alvaré, Gonzales v. Carhart*: Bringing Abortion Law Back into the Family Law Fold*, 69 MONT. L. REV. 409, 409–10 (2008) ("[T]he Court's pre-*Gonzales* abortion opinions were distinctly uncomfortable with language explicitly including fetal life within the category of human life. The opinions lack both internal consistency and consistency with each other in their use of language about fetuses.").

237 *See Stenberg*, 530 U.S. at 957 (Kennedy, J., dissenting).

238 Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 850 (1992) (plurality opinion); *see also supra* Part II.D.2.

239 *Stenberg*, 530 U.S. at 964 (Kennedy, J., dissenting).

240 *See id.* at 957 (citing *Casey*, 505 U.S. at 871 (plurality opinion)).

against human life."[241] Furthermore, he chastised the Court for viewing D&X "from the perspective of the abortionist, rather than from the perspective of a society shocked when confronted with a new method of ending human life."[242]

3. *Gonzales v. Carhart*

Seven years later, the Court heard *Gonzales v. Carhart*, which dealt with the 2003 federal partial-birth-abortion ban.[243] By then, Justice Alito had taken over Justice O'Connor's seat, and the five-justice *Stenberg* majority for striking down Nebraska's partial-birth-abortion ban yielded to the five-justice *Gonzales* majority for upholding the federal ban. Justice Kennedy wrote the majority opinion. Even though he had dissented in *Stenberg*, his *Gonzales* opinion claimed to respect and distinguish, not overrule, *Stenberg*.[244]

Whether Kennedy's distinctions between the Nebraska D&X ban in *Stenberg* and the federal ban in *Gonzales* make sense is hotly debated,[245] and it is not crucial for my point here. What is crucial is that the anti-UEC rhetoric of his *Stenberg* dissent did make it into his *Gonzales* opinion. He approvingly recited the congressional findings that accompanied the legislation that the procedure will "'coarsen society'" to "'all vulnerable and innocent human life.'"[246] In a particularly controversial passage,[247] he dramatically humanized the fetus, even to the point of calling it an "infant life" and a "child":

> Respect for human life finds an ultimate expression in the bond of love the mother has for her child. . . . [S]ome women come to regret their choice to abort the infant life they once created and sustained. . . . [S]he allowed a doctor to pierce the skull and vacuum the fast-

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[241] *Id.* at 979.

[242] *Id.* at 957.

[243] Gonzales v. Carhart, 550 U.S. 124, 132 (2007).

[244] *See id.* at 154 (citing Almendarez-Torres v. United States, 523 U.S. 224, 238 (1998)).

[245] *Compare* Martha C. Nussbaum, *The Supreme Court, 2006 Term – Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 84 (2007) (criticizing the Court's "bizarrely narrow" reading of *Stenberg*), *with* Christopher Mirakian, Comment, *Gonzales v. Carhart: A New Paradigm for Abortion Legislation*, 77 UMKC L. REV. 197, 208–09 (2008) (defending *Gonzales*'s distinctions).

[246] *Gonzales*, 550 U.S. at 157 (quoting 18 U.S.C. § 1531, Congressional Findings (14)(N) (2000 ed., Supp. V)).

[247] *Compare* Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1690–91 (2008) (criticizing Kennedy's language for reflecting gender-based stereotypes and undermining *Roe* and *Casey*), *with* Alvaré, *supra* note 236, at 410–11 (praising *Gonzales* for recognizing the emerging parental bond between pregnant mother and fetus, thereby making abortion law more like family law).

developing brain of her unborn child, a child assuming the human form.[248]

Finally, *Gonzales* referenced and reinvented the crucial UEC passages from Kennedy's portion of the *Casey* plurality opinion. As I previously explained, *Casey* elaborately described the "anxieties," "pain," and "constraints" of pregnancy, and the deep "spiritual" implications of the decision of whether or not to procure an abortion, in order to show why the woman, and not the government, should make that choice based on her own moral view about the fetus and her gender role.[249]

On two occasions, *Gonzales* cited and summarized this section of *Casey* as standing for the proposition that "[w]hether to have an abortion requires a difficult and painful moral decision."[250] Whereas the *Casey* UEC saw the difficult and painful nature of the abortion decision (and pregnancy) as a reason to minimize the government's role,[251] *Gonzales* used the same underlying fact for the opposite end: as a justification for governmental intervention. According to Kennedy, banning partial-birth abortion protects women from making a "painful" decision "fraught with emotional consequence" and thereby risking "[s]evere depression and loss of esteem."[252] The reason that Kennedy found it obvious and "unexceptional" that many women would regret procuring a (partial-birth) abortion is that, unlike in *Casey*, he now conceptualized the fetus as an "infant life," and the pregnant woman as a "mother" who would, naturally and predictably, lament the death of her child.[253] Whether Kennedy intended to do so or not, his *Gonzales* opinion substantially eroded the UEC foundations of *Roe* and *Casey* by affirming the right of the State to recognize and protect the humanity of fetal life.

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This Part has traced the origins of the UEC in *Roe*'s rejection of the government interest in fetal life, its reaffirmation and expansion in *Casey*, and the powerful retreat from the UEC in *Gonzales*. The *Roe-Casey* UEC depends on judicial agnosticism about when human life begins, whereas Kennedy's *Stenberg* dissent and *Gonzales* majority opinion unequivocally recognize the reality and value of fetal humanity. At present, the UEC hangs on by a thread.

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[248] *Gonzales*, 550 U.S. at 159–60.

[249] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 852 (1992).

[250] *Gonzales*, 550 U.S. at 128–29, 159 (citing *Casey*, 505 U.S. at 852–53).

[251] *See supra* Part II.D.2.

[252] *Gonzales*, 550 U.S. at 159.

[253] *Id.*

III. EVALUATING THE ESTABLISHMENT CLAUSE OBJECTIONS TO ABORTION RESTRICTIONS

Parts I and II documented the Establishment Clause arguments against abortion laws advanced by Justice Stevens, a number of commentators, and, in the veiled form of the UEC, the Court. Up to this point, the Article has been descriptive. This Part moves from the descriptive to the prescriptive by rebutting the political-divisiveness, ultimate-concerns, and faith-versus-reason arguments. I conclude that the Court should bring the UEC into plain view, reject it, and revisit the foundations of the constitutional right to abortion.

A. The Paradox of the Political-Divisiveness Argument

Although political divisiveness is the most common type of Establishment Clause objection to abortion restrictions, it is the least convincing. The initial attractiveness of the political-divisiveness argument lies in the strength of its factual premise: polling data and casual observation unequivocally reveal that abortion divides Americans along religious lines.[254] There are exceptions to these demographic patterns: some religious people and groups are pro-choice,[255] and some atheists pro-life.[256] Nonetheless, the overall tendency is clear.

However, the argument fails because it attaches undeserved political and constitutional significance to these religion-related differences of opinion. The appeal to political divisiveness by courts to identify Establishment Clause violations has been persuasively criticized on numerous grounds, including that: (1) far from being a problem that demands intervention, disagreements are an "unavoidable part of the political life of a diverse and free people" and a sign that America is "functioning well";[257] (2) religion-related divisions and discourse are "not necessarily more sectarian" or more troubling than ordinary secular divisions;[258] (3) invalidating legislation on political-divisiveness grounds

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[254] A recent Pew survey found that in April 2009, 52% of Protestants, 42% of Catholics, and only 20% of unaffiliated persons said that abortion should be illegal. Among white Protestants, 70% of white Evangelicals said abortion should be illegal, whereas only 34% of white mainline Protestants said so. PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, AMERICANS NOW DIVIDED OVER BOTH ISSUES: PUBLIC TAKES CONSERVATIVE TURN ON GUN CONTROL, ABORTION 6 (Apr. 30, 2009), http://people-press.org/reports/pdf/513.pdf.

[255] *See, e.g.*, *Catholics for Choice*, CATHOLICSFORCHOICE.ORG, http://catholicsforchoice.org/about/default.asp (last visited Aug. 26, 2010).

[256] *See, e.g.*, James Matthew Wallace, *Atheist and Agnostic Pro-Life League Homepage*, GODLESSPROLIFERS.ORG (Jan. 1, 2007) http://www.godlessprolifers.org/home.html.

[257] Garnett, *supra* note 64, at 1670.

[258] MICHAEL J. PERRY, UNDER GOD? RELIGIOUS FAITH AND LIBERAL DEMOCRACY 40–41 (2003).

"chills the exercise" of political speech and participation by religious citizens;[259] and (4) judicial intervention to alleviate political divisiveness often ends up stoking the flames of division because "deciding a dispute on the basis of some abstract legal principle rather than on the give-and-take of legislative compromise" tends to "increas[e] the bitterness" of the losing party.[260]

The fourth objection is particularly telling in the context of abortion. Many commentators have observed that "[l]egislative battles over the issue of legalized abortion seem to have become *more* bitter and divisive since the Supreme Court attempted to preempt the issue in *Roe v. Wade*."[261] As Mary Ann Glendon has convincingly shown, abortion never became as divisive in Western Europe as it is in America, in large part because the issue was handled primarily through public debate and legislative compromise rather than judicially crafted constitutional law.[262] The contemporary state of affairs in America is frustrating not only to pro-life citizens, who feel impotent to effect change through ordinary political means,[263] but also to pro-choice individuals who are "worried about *Roe*'s demonstrated propensity to create backlash against the Democratic Party and progressivism more generally."[264] Thus, judicial invalidation of restrictive abortion laws on political-divisiveness grounds presents a paradox: constitutional intervention has increased, not decreased, the religion-related political division surrounding the issue.

Finally, political divisiveness no longer plays a major role in judicial interpretation of the Establishment Clause. For a brief period during the 1970s, the Court deemed "political division along religious lines" to be "one of the principal evils against which the First Amendment was intended to protect."[265] It is probably no coincidence that only two years after authoring that opinion, the Court in *Roe* emphasized and revealed its anxiety about the "vigorous opposing views" involved in the "abortion

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259 Edward McGlynn Gaffney, Jr., *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U. L.J. 205, 209 (1980).

260 Philip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 830 (1984).

261 *E.g.*, *id.*

262 *See* MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 46–47 (1987).

263 Johnson, *supra* note 264, at 830.

264 Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1397 (2009); *see generally* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008) (advancing a general argument that court-driven social change in favor of progressive social policy is ultimately ineffective).

265 Lemon v. Kurtzman, 403 U.S. 602, 622 (1971) (citing Freund, *supra* note 22).

controversy."[266] Yet as I explained in Part I, the law has changed on this point: a majority of the Supreme Court has decisively rejected the relevance of political divisiveness to Establishment Clause inquiry, and the Court has unanimously agreed that religion-related political divisiveness, by itself, is not enough to prove an Establishment Clause violation.[267] These developments help to refocus the First Amendment on "legislative outcomes rather than political inputs, so that a statute's constitutionality is not impugned by the mere fact that some people supported it for religious reasons."[268]

B. Fetal Personhood and Human Dignity: An "Ultimate Concern" with Diverse Ideological Roots

The ultimate-concerns objection to restricting abortion laws is stronger than the political-divisiveness argument, but it, too, is inadequate. Its central flaw is that, although abortion poses ultimate questions about why we value human life, liberty, and personhood, a pro-life answer to those questions can derive from many different ethical and religious (and non-religious) worldviews. When lower courts utilize an ultimate-concerns approach to defining religion, they consider three different factors: (1) do the beliefs at issue try to answer ultimate questions; (2) do those beliefs amount to a comprehensive belief system; and (3) does the system of belief accompany external forms of religion, such as ceremonies, hierarchy, and holidays?[269]

To begin with the obvious, the ultimate-concerns argument about abortion flunks the third factor of the test. No specific religious hierarchy, ceremonies, holidays, or other external "accoutrements" of religion are directly associated with pregnancy, abortion, or restrictive abortion laws.[270] Pregnancy and abortion do, of course, have deep ethical significance to many religions, but that is different from saying that pregnancy or abortion are an exclusive part of the hierarchy, ritual life, or other external features of a narrow range of religious groups. The fact that abortion fails the third factor is not necessarily fatal to the ultimate-concerns argument, because it is only one factor among three. Nonetheless, it is important to keep in mind as we examine the other factors.

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[266] Roe v. Wade, 410 U.S. 113, 116 (1973); *see also supra* Part II.A.4.

[267] *See supra* notes 71–73 and accompanying text.

[268] Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 89 (2002).

[269] *See generally supra* Part I.B.2 (discussing the ultimate-concerns definition of religion).

[270] *Cf.* United States v. Meyers, 906 F. Supp. 1494, 1502–03 (D. Wyo. 1995) (providing an extensive list of the external features of religion), *aff'd*, 95 F.3d 1475, 1482–84 (10th Cir. 1996) (adopting the district court's method for defining religion).

Most of the commentators who openly advance ultimate-concerns objections to abortion restrictions, and the Supreme Court justices who have done so under the guise of Due Process, strongly rely on the first factor (fundamental concerns) and, to a lesser extent, the second (comprehensiveness). *Roe* spoke of the "deep and seemingly absolute convictions" people hold about abortion, and traced these convictions to people's comprehensive belief systems: "One's philosophy, one's experiences, . . . one's religious training, one's attitudes toward life and family and their values," and so on.[271] *Casey* likewise spoke of the "profound moral and spiritual implications of terminating a pregnancy," and connected the competing views about abortion to "our most basic principles of morality."[272] *Roe*, *Casey*, and commentators are correct that for any particular individual, his or her views about abortion are likely to be connected with his or her comprehensive belief systems about morality and religion (or irreligion).

However, the belief that fetuses should be protected as persons is not limited to any single comprehensive belief system, or even a narrow subset of related belief systems. That belief can be understood and accepted within the framework of Roman Catholicism[273] and various Protestant faiths,[274] but also within Judaism,[275] Islam,[276] libertarianism,[277] feminism,[278] and even, as I will demonstrate in detail later on, a quintessentially secular, post-Enlightenment philosophical approach that elevates scientific reasoning and logic above

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[271] *Roe*, 410 U.S. at 116 (1973); *see also supra* Part II.A.4.

[272] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 850 (1992) (plurality opinion); *see also supra* Part II.D.2.

[273] *See, e.g.*, *Congregation for the Doctrine of the Faith, Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation: Replies to Certain Questions of the Day*, VATICAN.VA/PHOME_EN.HTM (Feb. 22, 1987), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html.

[274] *See, e.g.*, THINKING THEOLOGICALLY ABOUT ABORTION (Paul T. Stallsworth ed., 2000) (collection of presentations by pastors from an ecumenical conference about abortion).

[275] *See, e.g.*, DAVID NOVAK, COVENANTAL RIGHTS: A STUDY IN JEWISH POLITICAL THEORY 129 (2000).

[276] *See, e.g.*, ABUL FADL MOHSIN EBRAHIM, BIOMEDICAL ISSUES: ISLAMIC PERSPECTIVE 135–37 (rev. ed. 1993).

[277] *See, e.g.*, Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 170–71 (1973) (arguing that abortion violates John Stuart Mill's harm principle and therefore can be legally prohibited by a libertarian government); *see also Libertarians for Life, The Libertarian Case Against Abortion*, L4L, http://www.l4l.org/ (last visited Sept. 10, 2010).

[278] *See, e.g.*, Paulette Joyer, *Pro-Life and Feminism: No Opposition*, *in* PRO-LIFE FEMINISM: DIFFERENT VOICES 1 (Gail Grenier Sweet ed., 1985); *see generally Feminists for Life of America*, FEMINISTSFORLIFE.ORG, http://www.feministsforlife.org/who/joinus.htm (last visited Sept. 19, 2010).

metaphysics.[279] My point is not that the premises of any or all of these systems lead ineluctably to pro-life conclusions; that is clearly not the case, as there are many sensible pro-choice adherents to these various worldviews. Rather, the point is that pro-life views (like pro-choice ones) can find plausible expression within a wide variety of comprehensive systems and should not be seen as the necessary or exclusive property of any particular system.

The fact that belief in fetal humanity can cut across the boundaries of many different comprehensive systems severely undermines the ultimate-concerns objection to abortion laws, because the first factor—whether the belief system addresses fundamental questions—is generally not enough to invalidate a law. As the leading judicial opinion on the ultimate-concerns approach explained, "[c]ertain isolated answers to 'ultimate' questions . . . are not necessarily 'religious' answers, because they lack the element of comprehensiveness. . . . A religion is not generally confined to one question or one moral teaching."[280]

This principle ought to be strictly maintained. Individual views about many central political goals, including how (and whether) to alleviate poverty, protect the environment, and safeguard human rights, frequently derive from our deepest convictions and beliefs about the nature and value of human life. Despite the fact that these issues implicate fundamental questions—and, for any given individual, are often answered on the basis of his or her comprehensive ethical-religious belief system—any particular governmental solution to these problems is likely to be consistent with many, though not all, comprehensive worldviews. For example, using the welfare state to fight poverty arguably fits well within Catholic,[281] egalitarian,[282] or utilitarian worldviews,[283] and it probably contradicts other comprehensive ethical systems in which the first principles are self-reliance, freedom of action,

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[279] *See infra* Part III.C.

[280] Malnak v. Yogi, 592 F.2d 197, 208–09 (3d Cir. 1979) (Adams, J., concurring in the judgment).

[281] *See* United States Conference of Catholic Bishops, *Welfare Policy: TANF Reauthorization*, USCCB.ORG (Feb. 24, 2006), http://www.usccb.org/sdwp/national/tanf206.shtml; *see also* CATHOLIC CAMPAIGN FOR HUMAN DEVELOPMENT, U.S. CONFERENCE OF CATHOLIC BISHOPS, PREFERENTIAL OPTION FOR AND WITH THE POOR (1996) (explaining society's duty to the poor according to catholic social teaching).

[282] *See, e.g.*, Elizabeth Anderson, *How Should Egalitarians Cope with Market Risks?*, 9 THEORETICAL INQUIRIES L. 239, 263 (2008) ("Egalitarians support distributive constraints that prevent the conversion of wealth inequality into an unjust social hierarchy, and ensure that everyone in society has enough to stand in relations of equality to others.").

[283] *See, e.g.*, Amartya Sen, *Utilitarianism and Welfarism*, 76 J. PHIL. 463, 468 (1979).

or other libertarian ideals.[284] Even though the question of welfare relates to fundamental questions and intersects with various comprehensive systems, it cannot be said to establish any one of those systems.

Therefore, because regulating abortion, like promoting the welfare state, is consistent with numerous comprehensive belief systems, the ultimate-concerns UEC fails. By remaining underground, the Court's abortion cases were able to frame the morality of abortion as a religious issue implicating ultimate concerns, while avoiding the need to back up its claim by proving that objections to abortion only make sense within a narrow range of comprehensive belief systems, at the exclusion of other systems.

C. Faith Versus Reason

1. Introduction: Evaluating the Objection Based on Its Own Methodological Premises

Although the Court's UEC consists primarily of political-divisiveness and ultimate-concerns themes, and only marginal faith-versus-reason themes, the latter is the most formidable of the various arguments. To briefly recap, the faith-versus-reason argument allows the government (and potentially courts) to answer the question of when a fetus becomes a human being. The important caveat is that the government's answer must be a secular one. Secular answers are those that can be rationally justified by using only secular methods of reasoning. According to the faith-versus-reason argument, secular reasoning supplies no basis for believing that fetuses are persons until approximately viability; therefore substantial protections for pre-viable fetuses have no secular purpose.[285]

Numerous aspects of the faith-versus-reason argument are debatable; this sub-section brackets several areas of controversy, not because they are unimportant, but in order to focus the discussion. First, the argument necessarily relies on the idea that even when the government is trying to further an indisputably secular purpose (here, preventing homicide against human persons), it may not use religious knowledge concerning facts about our world that are relevant to furthering that secular purpose. Applying this method to the case of abortion, if the source of the knowledge/belief that a fetus is a human person comes from religion, then that (religious) belief cannot justify restricting abortion. Excluding religious knowledge claims that are used in the service of secular purposes (here, the purpose of preventing

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[284] *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 152 (1974) (analogizing redistributive taxation to slavery).

[285] *See supra* Part II.C.3.

homicide) is debatable, among other reasons, because it forces religious persons to divide up the religious and secular parts of their mental life as a condition for political participation.[286]

If we were to accept that religious knowledge may legitimately be used in politics to further secular purposes, the faith-versus-reason objection would be defeated. After all, there is no dispute about whether preventing the killing of human beings is a valid secular goal; the only question is whether killing fetuses qualifies as killing human beings, or, put differently, whether fetuses are human beings. If it does not violate the Establishment Clause to base political judgments on religious knowledge claims (here, the claim that a fetus is a human being), then the inquiry is at an end. In order to focus my criticism on a different aspect of the faith-versus-reason argument, I will assume *arguendo* that religious knowledge claims, even those that are relevant to furthering secular purposes, should be excluded from political deliberation.

Even once the faith-versus-reason argument overcomes that hurdle, the objector is still left with the task of distinguishing religious from secular reasoning. Some religious believers, and postmodern non-religious thinkers, believe that this task is impossible. They contend that the Enlightenment's separation of faith and reason is a fiction, and that ethical and even scientific knowledge is ultimately based on faith commitments and non-rational worldviews.[287]

This objection, too, would defeat the faith-versus-reason argument by depriving it of any criterion for distinguishing "secular" modes of analysis from "religious" ones. Again, instead of resolving this complex objection, I will grant the elusive distinction between faith and reason,

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[286] *See, e.g.*, Kent Greenawalt, *Religiously Based Judgments and Discourse in Political Life*, 22 ST. JOHN'S J. LEGAL COMMENT. 445, 480–81 (2007).

> Were citizens and officials permitted to rely on nonreligious intuitions but not to rely on religious convictions, that would constitute a form of implicit discrimination against religious perspectives. Moreover, any religious individual would have a hard time saying where his religious convictions left off and what his intuitions would tell him apart from these convictions.

Id. But see Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, 30 SAN DIEGO L. REV. 677, 701 (1993) ("If you are fully rational and I cannot convince you of my view by arguments framed in the [non-religious] concepts we share as rational beings, then even if mine is the majority view I should not coerce you.").

[287] *See, e.g.*, THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 170 (3d ed. 1996) (arguing that scientific progress reflects "changes of paradigm" rather than objective progress toward truth).

> What *compels* one to [science] . . . is the belief in a *metaphysical* value, a value *in itself of truth* . . . . [W]e knowers today, we godless ones and anti-metaphysicians, we too still take *our* fire from that great fire that was ignited by a thousand-year old belief, that belief of Christians, which was also Plato's belief, that God is truth, that truth is *divine* . . . .

FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALITY 109–10 (Maudemarie Clark & Alan J. Swensen trans., 1998).

for the sake of argument, in order to evaluate the faith versus reason argument on the basis of its own core premises. According to Justice Stevens and other proponents of the faith-versus-reason argument, the distinction between religious and secular reasoning is this: religion relies on faith and intuition, whereas secular reasoning relies on "history," "logic," and "shared experiences."[288] I will address each of these three modes of secular reasoning to show how, individually and together, they provide a cogent secular case for fetal personhood.

It is not my goal here to prove that the fetus is a human person, or that fetal personhood is the only conclusion that can logically be deduced from logic, history, and experience. Instead, I aim to show that there is a debatable, secular case for fetal personhood. If I accomplish this limited goal, it is not enough to justify criminalizing or severely restricting abortion, but it is enough to prove that abortion laws have a secular purpose and do not violate the Establishment Clause.[289] With this clarification in mind, I turn to the three major modes of secular reasoning identified by Justice Stevens: "history," "logic," and "shared experiences."

2. History

One mode of reasoning that faith-versus-reason advocates identify as secular is historical reasoning.[290] This sub-section demonstrates that

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[288] Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 779 (1986) (Stevens, J., concurring); *see also* discussion *supra* Part I.B.3.

[289] Politics is pervasively debatable and debated, and many "secular" ideas compete against one another in the marketplace of ideas. Some of these secular ideas are right; others are wrong. Thus, an idea need not be proven beyond a reasonable doubt in order to count as secular. It only needs to have some plausible secular basis. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 586 (1987) (observing that "the Court is normally deferential to a State's articulation of a secular purpose").

[290] In some ways, it is odd to treat the historical longevity of a practice as a mark of its secularity; many outside of legal circles claim that precisely the opposite is true. According to the gripping secular and progressive narrative of the Enlightenment, human history is shrouded in darkness, religion, and superstition, which we are gradually moving beyond thanks to the interrelated pillars of science, tolerance, and secularism. The historical and traditional marks the unenlightened and non-secular, and the contemporary generally marks the rational. *See, e.g.*, AUGUSTE COMTE, THE POSITIVE PHILOSOPHY OF AUGUSTE COMTE 25 (AMS Press, Inc. 1974) (1855) (dividing the historical development of humanity into three "progressive" stages, with one supplanting the other: "the [t]heological, or fictitious; the [m]etaphysical, or abstract; and the [s]cientific, or positive").

Nonetheless, courts generally value history for a variety of reasons that are not plausibly characterized as "religious." First, it is useful for constitutional interpretation: to the extent that the goal is to discover what the Constitution's framers meant (which, of course, is controversial), history helps us discover the original meaning of, or original intentions behind, the text. Second, a nation's history unites it. Even if the roots of a nation's historical practice were religious, respecting those longstanding traditions today might further the secular goal of unifying society around shared symbols. And finally,

history supplies plausible (though not indisputable) arguments in favor of fetal personhood.

There are two ways that history might be used to create a secular case for fetal personhood: a direct way and an indirect way. The direct way is to show that for much of Anglo-American history, law and society frequently treated fetuses like human persons and condemned abortion. There is a strong case to be made for this view, but it is a hotly disputed claim, with a vast amount of scholarly commentary on both sides.[291] In fact, most of Justice Blackmun's opinion in *Roe* was devoted to arguing his side of that issue.[292] The dispute is too large to resolve in this Article. Nonetheless, the robustness of the debate tends to show that concern for fetal personhood (and the opposing position) has some historical (ergo secular) foundation.

Furthermore, history can assist the case for fetal personhood through a more indirect route. Many skeptics and religious persons contend (for different reasons, but their central claim is similar) that the core ideals of American political theory—rights, equality, dignity, personhood, and others—are metaphysical and/or religious concepts that cannot be justified by secular reasoning alone.[293] Much of the secular case that the pro-life (and, interestingly, pro-choice) side puts forward depends crucially on these contested concepts.

This is where history offers decisive assistance. I do not need to prove that those concepts (equality, liberty, personhood, and dignity) can be supported by secular philosophical logic alone, because history places them at the heart of American political theory. Protecting the equality

every generation cannot reinvent the entirety of human knowledge. History is useful as a repository of human experience and of the mistakes and lessons of past ages. *See, e.g.*, Oliver Wendell Holmes, *The Path of the Law*, *in* THE MIND AND FAITH OF JUSTICE HOLMES 71, 83 (Max Lerner ed., 1943) (arguing that history is "the first step toward an enlightened skepticism, that is, towards a deliberate reconsideration of the worth of [existing laws]").

[291] For an illustration of several of these views, see *supra* note 117.

[292] *See* Roe v. Wade, 410 U.S. 113, 129–52 (1973).

[293] *See, e.g.*, 2 JEREMY BENTHAM, *Anarchical Fallacies*, *in* THE WORKS OF JEREMY BENTHAM 489, 501 (1843) ("*Natural rights* is simple nonsense: natural and imprescriptible rights, rhetorical nonsense,—nonsense upon stilts."); ROBERT P. KRAYNAK, CHRISTIAN FAITH AND MODERN DEMOCRACY: GOD AND POLITICS IN THE FALLEN WORLD 11 (2001) ("[T]he distinctive feature of modern liberal democracy is a notion of justice whose fundamental assumptions are the intrinsic worth and dignity of every human being and the preeminence of the human species in the natural universe. . . . [L]iberal democracy is unable to vindicate these lofty claims about human dignity . . . . Hence, . . . liberal democracy cannot stand on its own and needs support from the biblical claim that human beings are made in the image and likeness of God."); John T. Noonan, Jr., *A Catholic Law School*, 67 NOTRE DAME L. REV. 1037, 1042 (1992) (arguing that the legal concept of a "person . . . can be philosophically defended, but which historically developed under theological auspices, with human beings understood by analogy to the divine persons" of the Holy Trinity); Steven Pinker, *The Stupidity of Dignity*, THE NEW REPUBLIC (May 28, 2008, 12:00 AM), http://www.tnr.com/article/thestupidity-dignity.

and rights of rational persons is one of the central animating ideas in America's political theory and in its founding documents, such as the Constitution and the Declaration of Independence.[294] Those commitments have shaped how Americans understand their identity as a people.

Needless to say, there are grave contradictions in America's historical self-understanding as a nation of liberty and equality,[295] including (among many other things) the institution of slavery and the protections bestowed upon that institution in the Constitution.[296] Despite these stains and inconsistencies, America's historical and constitutional commitment to the equality of all persons is substantial enough to show that such notions are indisputably "secular" for Establishment Clause purposes. This conclusion does not directly refute the faith-versus-reason objection to abortion laws, but it does show that equality and personhood are valid secular concepts that abortion opponents may use as starting points for moral and political analysis. The next two sub-sections do precisely this, demonstrating how logic and experience can be plausibly used to include fetuses within the category of human persons who are entitled to rights and equal protection.

3. Logic

This sub-section discusses how secular logic can support the proposition that fetuses are human persons. Pro-life scholars have advanced elaborate logical arguments to show that fetuses are human beings. These arguments are part of the complex, ongoing debate in

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[294] *See, e.g.*, U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.").

[295] *See* H. MARK ROELOFS, IDEOLOGY AND MYTH IN AMERICAN POLITICS: A CRITIQUE OF A NATIONAL POLITICAL MIND 148 (1976) ("[T]he American people have no realistic intention of turning the dream [of egalitarianism] into reality. In pragmatic terms, Americans have only the most ambiguous commitment to egalitarianism at the operative level, either in specific terms of the race issue or on general principles. At the operative level, Americans are libertarians and are therefore not just tolerant but encouraging of inequalities of every kind.").

[296] The most prominent traces of slavery in the Constitution are the Fugitive Slave Clause, U.S. CONST. art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour . . . ."), and the Three Fifths Clause, U.S. CONST. art. I, § 2, cl. 3 (designating those who are not "free Persons" as "three fifths of all other Persons" for purposes of apportioning votes among the states).

philosophy circles about the morality of abortion.[297] For the sake of brevity, this sub-section focuses on one part of the larger philosophical debate.

The argument I examine here reverses the usual battle lines in the abortion debate by embracing a scientifically accepted definition of when human life begins, linking "personhood" to the scientific definition of human "life," and accusing the pro-choice side of engaging in metaphysical speculation unhinged from science by defining "personhood" distinctly from scientific "life."[298] This contention is highly relevant for the Establishment Clause dimension of the abortion debate, because the tendency to privilege scientific reasoning over metaphysics is one of the central dynamics of Enlightenment secularism.[299] If the case for fetal humanity can find a plausible home within the scientific, anti-metaphysical tradition of the Enlightenment, then it has an airtight case for secularity, and the Establishment Clause objection to abortion laws decisively fails.[300]

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297 For two examples, see Patrick Lee & Robert P. George, *The Wrong of Abortion, in* CONTEMPORARY DEBATES IN APPLIED ETHICS 13, 13 (Andrew I. Cohen & Christopher Heath Wellman eds., 2005) (arguing that human life is present beginning at conception, and that personhood, too, is present because all human life has a natural capacity for "development toward human maturity"); Don Marquis, *Why Abortion is Immoral*, 86 J. PHIL. 183 (1989) (arguing that abortion wastes the value of the fetus's human future). These arguments are the subject of ongoing and extensive debate. *See, e.g.*, Dean Stretton, *Essential Properties and the Right to Life: A Response to Lee*, 18 BIOETHICS 264, 264 (2004).

298 In a sense, pro-life anti-metaphysical arguments turn the Establishment Clause objection on its head. Insofar as non-scientific, metaphysical beliefs are "religious" beliefs and inappropriate for politics (as some of the liberal Establishment Clause arguments suggest), it is the pro-choice position that would come under scrutiny.

299 David Hume colorfully expressed the anti-metaphysical spirit of modernity in the following way:

> If we take in our hand any volume; of divinity or school metaphysics, for instance; let us ask, *Does it contain any abstract reasoning concerning quantity or number?* No. *Does it contain any experimental reasoning concerning matter of fact and existence?* No. Commit it then to the flames: for it can contain nothing but sophistry and illusion.

DAVID HUME, ENQUIRIES CONCERNING HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS 165 (L.A. Selby-Bigge ed., 3d ed. 1975). *See generally* PHILIP WALSH, SKEPTICISM, MODERNITY AND CRITICAL THEORY 4 (2005) ("Hume's skeptical empiricism is generally acknowledged as materialist and progressive, *in tune with the overall thrust of Enlightenment values* and of liberalism as a political and moral philosophy. It is hard-nosed, opposed to metaphysical system-building and directs attention to the empirical limits and constraints on knowledge." (emphasis added)).

300 This does not mean that the pro-life position is ultimately correct. There are good reasons to embrace metaphysical reasoning. *See, e.g.*, YUVAL STEINITZ, IN DEFENSE OF METAPHYSICS 2 (Noah J. Efron trans., 1996). My point is merely that anti-metaphysical skepticism has good secular credentials, that the pro-life position regarding fetal life can be powerfully supported by this sort of method, and therefore that the pro-life view of fetal personhood can qualify as "secular."

Justice White's opinion in *Thornburgh v. American College of Obstetricians and Gynecologists* contains the seeds of an anti-metaphysical pro-life argument, and his dialogue with Justice Stevens illustrates what such an argument would look like. In a surprising sentence, White effectively agrees with one of Stevens's central premises by saying that the question of fetal humanity is a "metaphysical or theological question."[301] Yet rather than condemning abortion restrictions on that basis, he turns that fact against *Roe*, against Stevens, and in favor of fetal protection.

He begins with the scientific observation that a fetus of any age is a human being in the narrow sense that it is a "member of the species *homo sapiens*."[302] There is no serious disagreement on this point: it is a bare scientific fact that embryology textbooks confirm[303] and abortion-rights supporters concede.[304] The real dispute is over whether these human organisms are human *persons*—that is, do they have the types of characteristics that we value in born human beings?

White goes on to say that any deviation from this scientific baseline—any attempt to define the origin of human personhood at a moment other than the scientific origin of life—is non-scientific and therefore is a metaphysical claim. He argues that metaphysical line-drawing in this area is doomed to fail because "there is no [non-arbitrary] line separating a fetus from a child or, indeed, an adult human being."[305] White's reasoning places the burden of proof on the pro-choice side to provide a clear metaphysical definition of personhood that includes born humans but excludes (some or all) fetuses.

White does not systematically apply his anti-metaphysical framework to deconstruct the numerous pro-choice attempts to define human personhood, but many other pro-life scholars have energetically done so.[306] Because Stevens is a leading proponent of the faith-versus-reason argument, I will illustrate how these metaphysically-skeptical

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[301] Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 792 (1986) (White, J., dissenting).

[302] *Id.*

[303] *See, e.g.*, RONAN O'RAHILLY & FABIOLA MULLER, HUMAN EMBRYOLOGY & TERATOLOGY 8 (3d ed. 2001) ("Although life is a continuous process, fertilization . . . is a critical landmark because, under ordinary circumstances, a new, genetically distinct human organism is formed when the chromosomes of the male and female pronuclei blend in the oocyte.").

[304] For instance, Mary Anne Warren's classic pro-choice essay acknowledges that embryos are, biologically speaking, human organisms. She goes on to argue that the personhood of the embryo does not follow from its biological classification as a human life, because embryos and young fetuses lack the properties that define personhood. Mary Anne Warren, *On the Moral and Legal Status of Abortion*, 57 MONIST 43, 55–56 (1973).

[305] *Thornburgh*, 476 U.S. at 792 (White, J., dissenting).

[306] *See, e.g.*, Lee & George, *supra* note 297, at 15–19.

pro-life arguments work by analyzing Stevens's proposed criteria for human personhood.

Stevens asserts that it is "obvious" that the interest in protecting embryonic life "increases progressively and dramatically as the organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day."[307] Based on these criteria, Stevens concludes that there is "a fundamental and well-recognized difference between a fetus and a human being."[308]

However, each of Stevens's proposed criteria for defining personhood is problematic: if accepted as a metaphysical truth and taken to its logical conclusion, each criterion would result in unacceptable conclusions. To begin with, consider Stevens's reference to the "capacity . . . to survive."[309] Although Stevens only mentions this criterion in passing, many pro-choice scholars who draw the personhood line at fetal viability heavily emphasize the moral significance of independence and survivability.[310] Measuring personhood by viability, however, implies that our worth as humans is measured by our lack of dependency, our self-reliance, and our strength. Valuing human beings for those reasons, taken to its logical conclusion, culminates in a brutal Social Darwinist ethos in which the weak and non-viable, who are dependent and cannot survive on their own, are dehumanized and discarded. This inhumane result is unacceptable, particularly within the egalitarian and welfarist worldviews that many liberal, pro-choice persons generally embrace. In any event, it is difficult to imagine what moral or metaphysical significance the technical capacity to survive on one's own carries with it. Unless viability is being used as an approximate marker for some other morally significant development (such as the fetus's development of psychological consciousness,[311] which I discuss further below), it does not identify a morally significant characteristic that justifies a firm metaphysical basis for defining personhood.

Similarly, Stevens's reference to the fetus's "capacity to feel pain" and "experience pleasure" cannot be decisive or even particularly

[307] *Thornburgh*, 476 U.S. at 778 (Stevens, J., concurring).

[308] *Id.* at 779.

[309] *Id.* at 778.

[310] *See, e.g.*, Tribe, *The Supreme Court, 1972 Term*, *supra* note 8, at 27 (arguing that once a fetus can live on its own outside the womb, abortion unnecessarily kills a fetus that could just as easily be delivered and survive).

[311] Viability and consciousness do not coincide precisely, but many commentators support drawing the line at viability on the grounds that it is a decent, if non-exact, approximation of when fetuses become conscious. *See supra* note 103 and accompanying text.

important.[312] Causing pain or depriving pleasure from another person is usually unjust and regrettable, but much less so than killing another person.[313]

If fetuses are human beings, then their inability to feel pain does not justify ending their lives any more than the physical insensitivity of adult lepers gives us license to end theirs. The basis for depriving fetuses of their lives must rely on some criterion other than capacity for pleasure and pain.

An alternative interpretation of Stevens's analysis is that he is not emphasizing pain and pleasure as decisive in and of themselves, but instead for what they tell us about whether the fetus is "sentient."[314] Identifying personhood with sentience or other forms of advanced psychological development is the leading approach in pro-choice philosophical thought.[315] Yet this criterion, too, results in disturbing and dubious conclusions. When a person goes to sleep, or falls into a temporary coma, we do not say that she is no longer a person, despite her temporary lack of sentient awareness.[316] Much less do we say that such a person is no longer morally equal to others, or that she has temporarily forfeited her right to life such that we may kill her without committing a grave injustice. Thus, a human organism need not have

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[312] *Thornburgh*, 476 U.S. at 778 (Stevens, J., concurring).

[313] The strongest counter-argument to this point comes from the type of utilitarianism advanced by Jeremy Bentham, in which the only relevant criterion for valuing human beings (or other organisms) is their capacity for pleasure and pain. *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 310 n.1 (Hafner Publ'g Co. 1948) (1789) ("The day *may* come, when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. . . . What . . . should trace the insuperable line? Is it the faculty of reason, or, perhaps, the faculty of discourse? . . . [T]he question is not, Can they *reason?* nor, Can they *talk?* but, Can they *suffer?*"). However, instead of vindicating constitutional principles (as Stevens seeks to do), endorsing Bentham's form of utilitarianism would radically contradict the egalitarian and rights-protective orientation of American politics. It would entail distinguishing the value of different human beings based on the intensity of their sensory faculties and their level of happiness or depression. This is a result that few would accept.

[314] *Thornburgh*, 476 U.S. at 779 (Stevens, J., concurring).

[315] Pro-choice philosophers generally agree that consciousness or some other advanced psychological feature is crucial. They sometimes differ on which psychological attribute is most important. *Compare* MICHAEL TOOLEY, ABORTION AND INFANTICIDE 419–20 (1983) (emphasizing "the possession, either now or at some time in the past, of a sense of time, of a concept of a continuing subject of mental states, and of a capacity for thought episodes"), *with* JEFF MCMAHAN, THE ETHICS OF KILLING 260 (2002) (emphasizing the possession of "certain higher psychological capacities" including "autonomy").

[316] *E.g.*, Marquis, *supra* note 297, at 197.

present conscious awareness in order to have rights or to count as a person.[317]

An additional reason to reject the advanced-psychological-development criterion for personhood is that it would justify infanticide. If we define human personhood in terms of the functional capabilities of developed persons—self-consciousness, rationality, and so on—then we are almost certain to eliminate the humanity of born infants as well. Humans develop neither meaningful rationality nor a robust concept of self until well after birth, so the pro-choice functional definitions of personhood would justify "aborting" young infants.[318] A small but growing minority of pro-choice academics are willing to accept this conclusion and to recognize infanticide as morally permissible under some circumstances,[319] but most still unequivocally reject the killing of newborns. The refusal of mainstream pro-choice scholars to accept infanticide, although highly commendable, creates inconsistencies within the pro-choice metaphysical account of human personhood and gives powerful ammunition to those on the pro-life side who seek to deconstruct it.

The anti-metaphysical pro-life argument is not irrefutable, but it is formidable. It reverses the burden of proof and makes it appear as though the pro-choice side is the one engaged in the task of non-scientific, metaphysical, and arbitrary line-drawing. Thus, a major part of the pro-life case can plausibly situate itself within the anti-metaphysical tradition of secular reasoning.

4. Experience

Proponents of the faith-versus-reason argument also identify "shared experiences" as another legitimate element of secular reasoning. The usefulness of looking to "shared experiences" for determining whether beliefs are religious or secular is ambiguous at best. For a majority of Americans, religion forms one part of their overall life experience,[320] and this experience is often shared through communities

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[317] The counter to my argument is that the *capacity* for consciousness, not actual present consciousness, is the defining characteristic of personhood. But this counter plays directly into the pro-life philosophers' trap. Their argument is that the fetus is a person, because, even though it does not presently possess consciousness (like the sleeping person), it has a root "capacity" to develop consciousness if it is allowed to continue its life and growth. *See, e.g.*, Lee & George, *supra* note 297, at 15–18.

[318] *See, e.g.*, *id* at 18.

[319] *See, e.g.*, TOOLEY, *supra* note 315 at 421.

[320] For instance, a February 2008 Pew survey found that 78.4% of Americans identified themselves as Christians, 4.7% identified with non-Christian religions, and only 1.6% are atheists. PEW FORUM ON RELIGIOUS & PUB. LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY 5 (2008), *available at* http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf.

of worship and through aspects of religious experience that are common to many different religions and cultures.[321] Despite these problems with using "shared experiences" as a proxy for secularity, I will set aside the objection, *arguendo*, in order to focus on two core dimensions of human experience that faith-versus-reason proponents would accept as secular: sensory experience and relational experience.

Sensory experience, by itself, cannot directly say whether fetuses are persons. Personhood is not a thing that we see, smell, taste, or touch; it is a moral and philosophical concept. Still, sensation does provide important data that we use as part of our overall judgments about personhood. Traditionally, quickening (when the pregnant mother first feels the baby moving inside of her) marked the moment when "a child came into the family," resulting in "commitment" and "responsibility" for that child.[322]

During the past few decades, technology has enabled us to visualize the developing fetus while it remains in the womb; as a result, the traditional significance of quickening has been replaced with visual sensation.[323] Both pro-choice and pro-life advocates appeal to visual imagery to draw inferences about fetal personhood. For instance, many pro-choice advocates appeal to visual imagery as a way to diminish fetal personhood by referring to unborn life (especially embryos or early fetuses) as a mere clump of cells or a "'tiny little spot of blood.'"[324] The pro-life movement contests these descriptions of the fetus through a variety of visually oriented methods. Pro-life literature and media is replete with clips from ultrasound videos and graphically enhanced pictures of fetuses at various stages of development.[325] Abortion-rights supporters often criticize the visual emphasis of the pro-life movement

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[321] *See generally* MIRCEA ELIADE, PATTERNS IN COMPARATIVE RELIGION (1976).

[322] Kathryn Pyne Addelson, *The Emergence of the Fetus*, *in* FETAL SUBJECTS, FEMINIST POSITIONS 26, 29 (Lynn M. Morgan & Meredith W. Michaels eds., 1999).

[323] *See, e.g.*, Barbara Duden, *Quick with Child: An Experience that Has Lost Its Status*, 14 TECH. SOC'Y 335, 341, 343 (1992).

[324] Camille S. Williams, *Feminism and Imaging the Unborn*, *in* THE SILENT SUBJECT: REFLECTIONS ON THE UNBORN IN AMERICAN CULTURE 61, 69 (Brad Stetson ed., 1996).

[325] *See, e.g.*, Rosalind Pollack Petchesky, *Foetal Images: The Power of Visual Culture in the Politics of Reproduction*, *in* REPRODUCTIVE TECHNOLOGIES: GENDER, MOTHERHOOD AND MEDICINE 57, 57–58 (Michelle Stanworth ed., 1987) (explaining that in the 1980s, pro-life strategists set out "to make foetal personhood a self-fulfilling prophecy by making the foetus a public presence [in] a visually oriented culture"). The strategy has largely succeeded: "the curled-up profile, with its enlarged head and finlike arms . . . has become so familiar that not even most feminists question its authenticity (as opposed to its relevance)." ROSALIND POLLACK PETCHESKY, ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM xiv (rev. ed. 1990).

for showing inaccurate (or accurate but misleading) images,[326] and pro-lifers respond by defending the meaningfulness and relevance of the displays.[327]

Thus, both sides appear to agree that our visual interpretation of fetal life is relevant to making judgments about fetal personhood. They disagree about which ways of visually presenting and understanding the fetus are the most accurate and revealing. My goal is not to say who is correct, but simply to say that the disagreement is about shared experience, not religion. It is about whether the pro-life visual understanding of the fetus is true to physical reality or mere propaganda.

Furthermore, the increasing availability of detailed ultrasound technology enables pregnant women to visually encounter the unborn child within her in a way that reveals its developing human form. For many women (by no means all), this encounter changes their assessment of the life growing within them and results in a change of heart about abortion.[328] Many abortion-rights supporters cast doubt on the inferences about fetal personhood that many women and families draw from seeing an ultrasound of their unborn child.[329] Here, too, I do not seek to resolve the dispute, but simply to point out that the disagreement concerns the proper interpretation of ordinary visual experience, not religion.

Moving from visual sensation to relational experience,[330] the bonds that pregnant women form—or do not form—with their unborn children

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[326] *See, e.g.*, Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 367–73 (2008) (arguing that ultrasound and visual imagery about the fetus is not exclusively a visual experience; our visual perception is shaped by political and social context, including the role of the sonographer as interpreter of the visual display).

[327] For instance, the Alabama legislature justified its legislation requiring that women seeking abortions first receive the opportunity to see an ultrasound on the grounds that ultrasound provides valuable information (part of the "informed consent" for the procedure) that abortion doctors are unlikely to provide: "In most instances, the woman's only actual contact with the physician occurs simultaneously with the abortion procedure, with little opportunity to receive counseling concerning her decision." Woman's Right to Know Act, ALA. CODE § 26-23A-2 (LexisNexis Supp. 2007).

[328] *See, e.g.*, John C. Fletcher & Mark I. Evans, *Maternal Bonding in Early Fetal Ultrasound Examinations*, 308 NEW ENG. J. MED. 392, 392 (1983) (describing the responses of several women who were considering abortion to their ultrasounds. One woman said, "I feel that it is human. It belongs to me. I couldn't have an abortion now.").

[329] *See, e.g.*, Sanger, *supra* note 326, at 367–70, 372–73.

[330] Relational experience is especially relevant for the abortion debate, because one of the primary contributions that feminism has made to ethics is to emphasize the centrality of relationships and connectedness with others as a source of moral knowledge. *See, e.g.*, ELISABETH PORTER, FEMINIST PERSPECTIVES ON ETHICS 7 (1999) (explaining that in many strands of feminist theory, the experience of relationships is "fundamental to ethics"). The major objection to using relational experience as a basis for moral knowledge is that relationships tend to bias and prejudice moral reasoning, rather than enhance it.

can be a powerful influence on their views of fetal personhood. Women come away from pregnancy (and abortion) with dramatically different experiences of and relationships to their developing child. The texture of this experience can dramatically influence women's understanding of the value of fetal life. Furthermore, these experiences shape the broader society's conception and valuation of the fetus, because "[w]e see the unborn through their mothers, if we see them at all."[331]

For instance, in the case of an unwanted pregnancy, some women (not all) view the fetus as an "intruder" and a threat to their physical integrity and future.[332] These ways of experiencing pregnancy and relating to the fetus tend to dehumanize it; or, insofar as the fetus is seen as having a human identity at all, its humanity is viewed as hostile and foreign. By contrast, many other pregnant women experience a deep personal bond with an unborn child whom they have already named and already view as a full member of their family. As one woman expressed it, "I became his mother long before that moment when I heard his first cry," and "from the moment I knew I was pregnant, I was different—a mother. I was aware of sheltering a developing life within my body."[333] This experience profoundly humanizes and personalizes the fetus.

Nor are these experiences limited to the pregnant woman carrying the unborn child. The father of the child, new grandparents, friends, and others may have similar experiences. Pregnancy and new life have dramatic consequences—both joyful and daunting—for individuals, families, and communities.

Ultrasound videos, fetal pictures, and a woman's sense of relationship with her unborn child do not prove (or disprove) fetal personhood in a philosophical sense. Nonetheless, for many people, both pro-life and pro-choice, these dimensions of sensory and relational

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Feminists have persuasively replied that skepticism of relational ethics reflects a problematic, gender-biased account of moral reasoning, and that moral reasoning based on relationships is not a "bias," but simply reflects a "different social and moral understanding." Carol Gilligan, *In a Different Voice: Women's Conceptions of Self and of Morality*, 47 HARV. EDUC. REV. 481, 482 (1977).

[331] Williams, *supra* note 324, at 61.

[332] EILEEN L. MCDONAGH, BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT 188 (1996). Similarly, fetal life has also been likened to a rapist, Donald H. Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569, 1616 (1979); a dying violinist artificially attached to the woman's body, Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 48–49 (1971); and other images that suggest the alien and hostile nature of the fetus. For a collection of non-academic articulations of the experience of pregnancy and abortion by pro-choice women, see Brief for the Amici Curiae Women Who Have Had Abortions and Friends of Amici Curiae in Support of Appellees at 1–2, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88-605).

[333] Maria McFadden, *Motherhood in the 90's: To Have or Have Not*, *in* THE SILENT SUBJECT: REFLECTIONS ON THE UNBORN IN AMERICAN CULTURE 115, 115 (Brad Stetson ed., 1996).

experience play an important part in forming our judgments about fetal personhood. Because the faith-versus-reason commentators acknowledge these types of experiences as secular and legitimate grounds for political judgment, it follows that pro-life conclusions about fetal personhood (and the contrary pro-choice ones, which are also rooted in experience) have a secular foundation. Thus, "history," "logic," and "shared experiences"—the three paradigmatic types of secular reasoning—can all support a cogent secular case for viewing fetuses as human persons and protecting them against abortion through political means.

IV. CONCLUSION

This Article brings to the surface, describes, and refutes a crucial and virtually unnoticed dynamic in the Supreme Court's abortion cases: a phenomenon that I have referred to as the underground Establishment Clause, or UEC. The UEC is a complex collection of arguments and rhetoric that originated in *Roe* and evolved over time in response to new criticisms and challenges. Despite its variations and development, the central feature of the UEC articulated in *Roe* has remained intact: the government cannot prohibit abortion based on the idea that fetuses are human beings, because that proposition is divisive, closely associated with religion, and therefore inappropriate for political bodies to decide. The UEC, as understood in this way, plays a central role in justifying the holding of *Roe* and later cases, because it ruled out the government's only hope for articulating a compelling interest for infringing the right to abortion: the interest in protecting fetal human persons against abortion in the same way that it protects born human persons against homicide.

However, I have shown that none of the Establishment Clause arguments against abortion restrictions are convincing, and that the government has rational and secular grounds for viewing fetuses as human persons and protecting them accordingly. Thus, the Court should bring the Establishment Clause dynamic of its abortion cases out from the underground, and openly consider whether protecting fetal persons against abortion is a "religious" goal that violates the First Amendment. If it were to draw the proper conclusion—that protecting fetal persons is a valid "secular" goal for government to pursue—then the foundations would be laid for the Court to re-evaluate the essential question that *Roe* refused to address: whether a fetus is a human being, such that the government has a compelling justification for protecting it against abortion.

MONOPOLISTIC GATEKEEPERS' VICARIOUS LIABILITY FOR COPYRIGHT INFRINGEMENT

Ke Steven Wan[*]

ABSTRACT

Recent cases have reignited debate on vicarious liability for gatekeepers providing essential services such as electronic payment processing services. Generally speaking, gatekeeper liability is undesirable when a gatekeeper lacks the right and ability to control infringement. A monopolistic gatekeeper of an essential service, however, is able to exclude infringers from its service network, which may act as an effective deterrence. Thus, although a monopolistic gatekeeper is not able to control infringement directly, it can deter infringers by threat of exclusion. This Article sets forth different prongs for vicarious liability based on three types of relationships: that of employers to their employees, that of premises providers to their tenants, and that of monopolistic providers of essential services to their users. Taking Baidu, *Tiffany v. eBay*, and *Perfect 10 v. Visa* as examples, this Article discusses the desirability of monopolistic gatekeepers' vicarious liability for copyright infringement and explores the rationales for it, such as deterrence and corrective justice. This Article also proposes a liability regime for monopolistic gatekeepers to balance their risk with the need to prevent infringement.

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I. INTRODUCTION

The Internet has provided new opportunities for wrongdoers and has consequently introduced new challenges for law enforcement. Frustrated by the relative anonymity of subscribers, plaintiffs and law enforcers have increasingly sought to hold internet service providers ("ISPs") liable for the misconduct of their subscribers. In 1998, the Digital Millennium Copyright Act ("DMCA") incorporated a series of affirmative defenses, or "safe harbors," for ISPs that might otherwise be found vicariously liable for subscriber infringements.[1]

Baidu, the largest search engine in China, uses an auction-based, pay-for-performance ("P4P") system, which allows its customers to bid for the best placement of their links among Baidu's search results.[2] Under Chinese law, Baidu is eligible for "safe harbors" as long as it complies with a notice-and-takedown procedure.[3] In *Perfect 10 v. Visa*,

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[1] Digital Millennium Copyright Act, Pub. L. No. 105-304, §§ 1, 201–03, 112 Stat. 2860, 2877–81 (1998) (codified at 17 U.S.C. § 512 (2006)).

[2] *Baidu, Inc. (BIDU.O) Company Profile*, REUTERS.COM, http://www.reuters.com/finance/stocks/companyProfile?rpc=66&symbol=BIDU.O (last visited Nov. 2, 2010).

[3] Xìnxī Wǎngluò Chuánbò Quán Bǎohù Tiáolì (信息网络传播权保护条例) [Regulation on Protection of the Right to Network Dissemination of Information]

credit card companies that charged website fees for processing the websites' sales of infringing materials were not held vicariously liable.[4] The dissent, however, argued that the plaintiffs had stated a valid claim of vicarious infringement.[5] In *Tiffany v. eBay*,[6] although eBay derived a direct financial benefit from the sale of counterfeit goods by charging sellers fees, eBay was not found vicariously liable.[7]

Recent cases have reignited debate on vicarious liability for gatekeepers providing essential services such as electronic payment processing.[8] Gatekeeper liability is generally desirable when gatekeepers can deter infringement at acceptable costs. In all other cases, efforts to expand gatekeeper liability should weigh gatekeeping costs against the effectiveness of preventing misconduct. Generally speaking, gatekeeper liability should not attach when a gatekeeper lacks the right and ability to control infringement. A monopolistic gatekeeper of an essential service, however, is able to exclude infringers from its service network, which may act as an effective deterrece. Thus, although a monopolistic gatekeeper is not able to control infringement directly, it can deter infringers by threat of exclusion. Taking Baidu, *Tiffany v. eBay*,[9] and *Perfect 10 v. Visa*[10] as examples, this Article discusses the desirability of holding monopolistic gatekeepers vicariously liable for copyright infringement and explores the rationales for doing so.

This Article aims to add three contributions to the analysis of gatekeeper liability. First, this Article argues that a monopolistic gatekeeper can deter infringers by threat of exclusion despite its limited ability to monitor infringers' activity. Unlike a dance hall proprietor,[11] a monopolistic provider of an essential service lacks the ability to exercise physical control over infringers' activity, as the activity does not occur on

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(promulgated by the St. Council, May 18, 2006, effective July 1, 2006), arts. 22–23 (China), *translated in* China Internet Project, *Order No. 468 of the State Council, PRC*, CHINA IT LAW, http://www.chinaitlaw.org/?p1=regulations&p2=060717003346 (last visited Nov. 3, 2010) [hereinafter *Chinese Regulation*].

4 Perfect 10, Inc. v. Visa Int'l Serv., Assoc., 494 F.3d 788, 792–93, 802 (9th Cir. 2007).

5 *Id.* at 810 (Kozinski, J., dissenting).

6 Tiffany (NJ), Inc. v. eBay, Inc., 576 F. Supp. 2d 463 (S.D.N.Y. 2008)

7 *Id.* at 494–95, 501.

8 *See, e.g.*, Bryan V. Swatt et al., Comment, Perfect 10 v. Visa, Mastercard, et al: *A Full Frontal Assault on Copyright Enforcement in Digital Media or a Slippery Slope Diverted?*, 8 CHI.-KENT J. INTELL. PROP. 85, 92, 94–95 (2008), *available at* http://jip.kentlaw.edu/art/volume%208/8%20Chi-Kent%20J%20Intell%20Prop%2085.pdf.

9 576 F. Supp. 2d 463.

10 494 F.3d 788.

11 *E.g.*, Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co., 36 F.2d 354, 355 (7th Cir. 1929) (holding a dance hall proprietor vicariously liable for copyright infringement by its orchestra, even though the orchestra was an independent contractor).

its premises. If it has market power in the relevant market, however, it can exclude infringers from its service network. Because the monopolistic gatekeeper lacks the ability to supervise, the rationale for vicarious liability cannot be deterrence but corrective justice, which requires the direct financial benefit prong to be interpreted narrowly.

Second, this Article develops Jules Coleman's theory of corrective justice[12] and applies it to cases in which the third party derives no tangible gains from infringement. Coleman's theory only covers tangible gains and provides no justification for applying vicarious liability in routine negligence cases in which the defendant derived no tangible gains.[13] Nevertheless, when the third party knowingly contributes to the infringement with intent to infringe, it gains a sense of superiority, which renders it unjustly enriched morally. Thus, this Article argues that the "intent to infringe" requirement justifies corrective justice although the third party derives no tangible gains.

Finally, this Article proposes a liability regime for monopolistic gatekeepers to balance their risk with the need to prevent infringement. Under the proposed regime, the monopolistic gatekeeper may be allowed to pay nominal damages at an infringer's first offense. If the same infringer commits the infringement a second time, the monopolistic gatekeeper can be ordered to pay full damages. The adverse effects of vicarious liability may be mitigated in this way.

This Article proceeds in five parts. Part II reviews vicarious liability cases in general and discusses the justifications for vicarious liability. Part III analyzes the two prongs of vicarious liability: control and direct financial benefit. Part IV sets forth different prongs for vicarious liability, based on three types of relationships: that of employers to their employees, that of premises providers to their tenants, and that of monopolistic providers of essential services to their users. This Part also discusses the rationales of deterrence and corrective justice present in each of these relationships. Part V explores the desirability of vicarious liability for monopolistic gatekeepers, taking Baidu as an example. Part VI proposes a liability regime for such gatekeepers, using credit card companies as an example.

II. EXAMINATION OF VICARIOUS LIABILITY CASES

Before discussing the different interpretations of vicarious liability, it is necessary to determine the justification for it. Commentators

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[12] Jules Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421, 423 (1982).

[13] *See id.*; *see also* Jules L. Coleman, *Moral Theories of Torts: Their Scope and Limits. Part II*, 2 LAW & PHIL. 5, 12 (1983) (noting that some tort claims are rooted in principles other than corrective justice).

provide several rationales for vicarious liability, including enterprise liability, loss spreading, and deterrence.[14] Vicarious liability is justified in an employment context because an employer can control what is done on the job and how it is done.[15] Alfred Yen notes that "[m]odern decisions, when explaining policy justifications for vicarious liability[,] . . . commonly refer to risk allocation."[16] He opposes vicarious liability for ISPs because it may force them to monitor their subscribers too closely and create social losses by suppressing non-infringing activities.[17] Yen argues:

> In the vast majority of cases, the existence of liability depends on a showing that the defendant is at fault. This means that contributory liability and inducement will govern most third-party copyright liability cases, with vicarious liability limited to those cases [in which] agency principles such as respondeat superior would impose strict liability on defendants.[18]

Such a limited application of vicarious liability is unwarranted, however. Professor Yen's arguments may be true for courts adopting the legal control test. Courts adopting an actual control test, however, do not necessarily base their decisions on risk allocation. Rather, they are more likely to be guided by deterrence, which refers to deterring infringement.[19]

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[14] *See, e.g.*, Andrew Beckerman-Rodau, *A Jurisprudential Approach to Common Law Legal Analysis*, 52 RUTGERS L. REV. 269, 295–96 (1999); Steven P. Croley, *Vicarious Liability in Tort: On the Sources and Limits of Employee Reasonableness,* 69 S. CAL. L. REV. 1705, 1707–08 (1996); Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1756 n.91 (1996); Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1246–47 (1984); Robert B. Thompson, *Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise*, 47 VAND. L. REV. 1, 3–4 (1994).

[15] *E.g.*, Zimprich v. Broekel, 519 N.W.2d 588, 590–91 (N.D. 1994).

[16] Alfred C. Yen, *Third-Party Copyright Liability After* Grokster, 91 MINN. L. REV. 184, 219 (2006) (quoting *Polygram Int'l Publ'g, Inc. v. Nev./TIG, Inc.*, 855 F. Supp. 1314, 1325 (D. Mass. 1994)).

[17] *Id.* at 213–14.

[18] *Id.* at 239.

[19] *Cf.* Beckerman-Rodau, *supra* note 14, at 295–96 (arguing in the context of employer-employee vicarious liability that the reason behind the control requirement is vicarious liability will only deter those defendants who have control over the direct tortfeasors); Schwartz, *supra* note 14, at 1756 (arguing that the deterrence rationale only applies to employer-employee vicarious liability if the employer has the actual ability to penalize the employee); Sykes, *supra* note 14, at 1246–47 (arguing that vicarious liability causes principals to internalize costs inflicted by insolvent agents, thereby deterring them from making inefficient decisions); Thompson, *supra* note 14, at 14 (arguing that deterrence-based rationales for piercing the corporate veil are stronger when applied to officers or to shareholders with managerial functions than when applied to shareholders with less control over the corporation).

In *Shapiro, Bernstein & Co. v. H. L. Green Co.*,[20] the court laid out the modern prongs of copyright vicarious liability, holding that "[w]hen the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials[,] . . . the purposes of copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation."[21] The decision was unlikely to have been based on deterrence because the court held that the case at hand "lie[s] closer on the spectrum to the employer-employee model than to the landlord-tenant model."[22]

Gershwin Publishing Corp. v. Columbia Artists Management, Inc.[23] is an early example of a copyright case that found vicarious liability based on deterrence in an actual control context.[24] Copyrighted music was performed without authorization at a concert promoted by Columbia Artists Management, Inc. ("CAMI").[25] CAMI had "act[ed] as manager for [the] concert artists" and created local organizations that promoted the artists in smaller communities.[26] Once the concert arrangement was made, CAMI received the titles of the music to be performed and printed the concert programs.[27] The court noted that in past cases, "a person who ha[d] promoted or induced the infringing acts of the performer ha[d] been held jointly and severally liable as a 'vicarious' infringer, even though he ha[d] no actual knowledge that copyright monopoly [was] being impaired."[28] The court assumed that CAMI was able to deter infringement at low costs because of its promotion of the infringement:

> Although CAMI had no formal power to control either the local association or the artists for whom it served as agent, it is clear that the local association depended upon CAMI for direction in matters such as this, that CAMI was in a position to police the infringing conduct of its artists, and that it derived substantial financial benefit from the actions of the primary infringers.[29]

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20 316 F.2d 304 (2d Cir. 1963).

21 *Id.* at 307.

22 *Id.* at 308.

23 443 F.2d 1159 (2d Cir. 1971)

24 *See id.* at 1162–63. *But see* Charles S. Wright, *Actual Versus Legal Control: Reading Vicarious Liability for Copyright Infringement into the Digital Millennium Copyright Act of 1998*, 75 WASH. L. REV. 1005, 1017 (2000) (arguing that *Gershwin* is a case adopting legal control).

25 *Gershwin*, 443 F.2d at 1160.

26 *Id.*

27 *Id.* at 1161.

28 *Id.* at 1162 (citing Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304, 307 (2d Cir. 1963); Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co., 36 F.2d 354, 355 (7th Cir. 1929)).

29 *Id.* at 1163.

Thus although the relationship between CAMI and the direct infringers did not resemble the employer-employee model, the court held CAMI vicariously liable.[30] In so holding, the court noted that in the past it had "found [that] the policies of the copyright law *would be best effectuated*" by holding premises providers liable for infringement that they had the power to police and from which they financially benefitted, indicating that its decision was based on deterrence.[31]

In *Artists Music Inc. v. Reed Publishing (USA) Inc.*,[32] Reed rented trade-show booth space to 134 exhibitors for a flat rental.[33] Reed also collected admission fees from attendees at the trade show.[34] During the show, some exhibitors used music as part of their show without obtaining copyright owners' permission.[35] The copyright owner claimed that Reed should be held vicariously liable for the exhibitors' infringement.[36] The court found "that the relationship between trade show sponsors and trade show exhibitors is the legal and functional equivalent of the relationship between landlords and tenants."[37] As for the issue of supervision, the court believed that Reed "had no right and ability to supervise and control the actions of the exhibitors."[38] Although the plaintiffs argued that Reed could have policed the exhibitors, the court rejected the plaintiffs' argument because Reed was not in a good position to prevent the 134 exhibitors' copyright infringement.[39] The court noted that "Reed would have had to hire several investigators with the expertise to identify music, to determine whether it was copyrighted, to determine whether the use was licensed, and finally to determine whether the use was a 'fair use.'"[40]

By contrast, the court in *Polygram International Publishing Inc. v. Nevada/TIG, Inc.*[41] indicated that it would have held the trade show operator liable but for a defect in the plaintiffs' pleadings.[42] In *Polygram*,

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30 *Id.*

31 *Id.* at 1162 (emphasis added) (citing *Shapiro, Bernstein & Co.*, 316 F.2d 304, 307 (2d. Cir. 1963)).

32 31 U.S.P.Q.2d 1623 (S.D.N.Y. 1994).

33 *Id.* at 1624.

34 *Id.*

35 *Id.*

36 *See id.* at 1625.

37 *Id.* at 1626.

38 *Id.*

39 *Id.* at 1627; Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833, 1849–50 (2000).

40 *Artists Music*, 31 U.S.P.Q.2d at 1627.

41 855 F. Supp. 1314 (D. Mass. 1994).

42 *Id.* at 1325, 1329, 1333. The court held that the copyright infringement claim failed because the plaintiffs failed to allege that the exhibitors directly infringed the

Interface rented booth space to over 2,000 trade show exhibitors for rental fees.[43] Interface stated in its rules and regulations for the trade show that it was the exhibitors' responsibility to obtain copyright license for any music played at the event.[44] The plaintiffs sued Interface, alleging that it was vicariously liable for unauthorized use of their music by the exhibitors.[45]

The difference between *Artists Music*[46] and *Polygram*[47] is that Interface exercised actual control over the trade show exhibitors by providing the rules and regulations and arranging for employees to ensure its compliance. For example, the employees were available to address issues such as exhibitors encroaching on each others' space or blocking the aisle at the show.[48] The court in *Polygram* stated that it would have held Interface vicariously liable because the actual control made Interface well positioned to prevent the unauthorized use of music.[49]

Fonovisa, Inc. v. Cherry Auction, Inc.,[50] however, is a seminal case of expansive interpretation of vicarious liability rather than a case adopting deterrence.[51] Cherry Auction operated a swap meet where customers purchased merchandise from individual vendors.[52] It rented booth space to vendors for a daily rental fee, supplied parking and advertising for the swap meet, and reserved the right to exclude any vendor for any reason.[53] The plaintiffs claimed that Cherry Auction should be held vicariously liable for sale of counterfeit recordings by independent vendors.[54] The court found that Fonovisa had stated a claim for vicarious liability based on Cherry Auction's right to terminate vendors for any reason.[55]

Fonovisa is distinguished from *Polygram*, in which the trade show operator was required to monitor a limited amount of music played by

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plaintiffs' copyrights—a necessary element for holding the tradeshow vicariously liable. *Id.* at 1318, 1323.

43 *Id.* at 1319.

44 *Id.*

45 *Id.* at 1320.

46 31 U.S.P.Q.2d 1623 (S.D.N.Y. 1994).

47 855 F. Supp. 1314.

48 *Id.* at 1328–29.

49 *Id.* at 1329.

50 76 F.3d 259 (9th Cir. 1996).

51 *See id.* at 263.

52 *Id.* at 261.

53 *Id.*

54 *Id.*

55 *Id.* at 263-64.

exhibitors.[56] Although Cherry Auction conducted general advertising and promoted the swap meet,[57] this case is also different from *Gershwin*, in which the defendant CAMI obtained the titles of the music to be performed and printed the concert programs.[58] While CAMI could police the music to be performed at low costs,[59] Cherry Auction's general advertising did not enable it to deter copyright infringement, because Cherry Auction had a larger number of vendors and merchandise to monitor.[60] The ability to control materials on the Internet may become stronger with the development of information technology. For example, the online music peer-to-peer file sharing service Napster also has a huge number of music files to monitor, but it has been held to be able to detect infringing files cost effectively because of its technology.[61]

Perfect 10, Inc. v. Cybernet Ventures, Inc.,[62] is another case in which expansive interpretation of vicarious liability is applied.[63] Cybernet "ran an age[-]verification service called 'Adult Check' through which it permitted access to and collected payments for pornographic websites."[64] The plaintiff sought a preliminary injunction, claiming that Cybernet was vicariously liable for the unlicensed use of celebrity images on the websites of the service's subscribers.[65] The court found that Cybernet monitored the participating websites for image quality and compliance with Cybernet's policies.[66] The court held that Perfect 10 had a strong likelihood of success for its vicarious copyright infringement claims against Cybernet because Cybernet was able to exclude infringers from its service and used passwords to control customer access.[67] Despite its monitoring program to ensure image quality, however, Cybernet did not have the ability to remove or block access to infringing materials because

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56 *See Polygram*, 855 F. Supp. 1314, 1317 (D. Mass. 1994).

57 *See Fonovisa*, 76 F.3d 259, 261 (9th Cir. 1996).

58 Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1161 (2d Cir. 1971).

59 *Id.* at 1163.

60 *Fonovisa*, 76 F.3d at 261 (noting that the "Sheriff's Department [had] raided the Cherry Auction swap meet and seized more than 38,000 counterfeit recordings" in 1991). Although the court found that Cherry Auction had control over its vendors, it did so on the basis of legal control. *Id.* at 263.

61 A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011, 1020 n.5, 1023 (9th Cir. 2001).

62 213 F. Supp. 2d 1146 (C.D. Cal. 2002).

63 Yen, *supra* note 16, at 207–08.

64 Jennifer Bretan, *Harboring Doubts About the Efficacy of § 512 Immunity Under the DMCA*, 18 BERKELEY TECH. L.J. 43, 61 (2003) (citing *Cybernet*, 213 F. Supp. 2d at 1158).

65 *Cybernet*, 213 F. Supp. 2d at 1152–53, 1162.

66 *Id.* at 1173.

67 *Id.* at 1157, 1171, 1173–74.

each underlying website was responsible for its own content.[68] The court held that Cybernet's mere ability to deny its age-verification services to offending websites would likely be considered enough control to satisfy the control prong of vicarious liability.[69] Thus, the *Cybernet* decision may generate an incredible chilling effect.

Religious Technology Center v. Netcom On-Line Communication Services, Inc.[70] may be the first case to consider ISP vicarious liability for copyright infringement. In *Religious Technology Center*, a subscriber submitted numerous infringing postings to a bulletin-board service, which accessed the Internet through the ISP Netcom.[71] The plaintiffs made allegations against Netcom of vicarious liability for unauthorized use of their works by the subscriber.[72] The court accepted the plaintiffs' evidence that Netcom was able to delete specific postings as well as suspend the accounts of subscribers who engaged in commercial advertising, posted obscene materials, and made off-topic postings.[73] The court found that Netcom might have the ability to control infringements because Netcom's sanction over the abusive conduct allowed it to deter copyright infringement cost effectively.[74] The court, however, found no vicarious liability because Netcom did not receive a direct financial benefit by charging a flat monthly fee.[75]

A&M Records, Inc. v. Napster, Inc.[76] is another important case. The court held in this case that Napster was likely to be found vicariously liable for copyright infringement.[77] Napster used a process called "peer-to-peer" file sharing to enable its users to transmit MP3 files among themselves.[78] It maintained a "collective directory" of files on its server, although the contents of the MP3 files were kept in the computers of the users who submitted them.[79] The court held that Napster was likely to be found vicariously liable because it had the ability to monitor the names of "infringing material[s] listed on its search indices."[80] Unlike CAMI, which promoted the infringement, Napster did not explicitly

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68 *Id.* at 1158.
69 *Id.* at 1173–74.
70 907 F. Supp. 1361 (N.D. Cal. 1995).
71 *Id.* at 1365–66.
72 *Id.* at 1367.
73 *Id.* at 1376.
74 *See id.*
75 *Id.* at 1377.
76 239 F.3d 1004 (9th Cir. 2001).
77 *Id.* at 1024.
78 *Id.* at 1011.
79 *Id.* at 1012.
80 *Id.* at 1024.

participate in any guidance of direct infringers.[81] But the court held that Napster could be liable because of its ability to monitor file names and deter copyright infringement at low costs.[82]

III. THE TWO PRONGS OF VICARIOUS LIABILITY

A. The Control Prong

The deterrence rationale makes it possible to impose vicarious liability on gatekeepers in the absence of an employer-employee relationship, but it does not instruct courts as to when they should impose such liability on gatekeepers. As noted above, vicarious liability arises when a third party (1) has the right and ability to supervise the direct infringement and (2) receives "direct financial interests" in the infringement.[83]

Courts have developed two competing standards regarding the control prong: actual control and legal control. Actual control "requires third parties to be practically able to distinguish between infringing and non-infringing conduct."[84] This approach "requires more than the potential right to cease all activities undifferentiated from the infringement, the right to terminate other activities, or the effective ability to terminate only after infringement is evident."[85] Legal control, however, requires no more than the contractual ability to restrict all activities.[86] Assaf Hamdani explains the legal control approach:

> Under one approach, this "control" element merely requires that the third party possess the technical ability to control the infringement. This approach, therefore, finds control in any relationship in which the third party has technical control (by facilitating access to a product or activity, for example), even when effectively exercising such control (distinguishing between infringing and non[-]infringing conduct and preventing only the former) is impractical.[87]

Under the deterrence rationale, the control prong should be interpreted narrowly as control at acceptable costs, which is the middle

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[81] *See id.* at 1011–12.

[82] *See id.* at 1023–24.

[83] Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304, 306–07 (2d Cir. 1963) (holding that a company leasing space is vicariously liable for a record department selling bootleg records). One court noted the differences between contributory liability and vicarious liability: "[J]ust as benefit and control are the signposts of vicarious liability, so are knowledge and participation the touchstones of contributory infringement." Demetriades v. Kaufmann, 690 F. Supp. 289, 293 (S.D.N.Y. 1988).

[84] Assaf Hamdani, *Gatekeeper Liability*, 77 S. CAL. L. REV. 53, 101 (2003).

[85] Wright, *supra* note 24, at 1013; *see* Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 263 (9th Cir. 1996).

[86] *See, e.g., Shapiro, Bernstein & Co.*, 316 F.2d at 306–07.

[87] Hamdani, *supra* note 84, at 101.

ground between actual control and legal control.[88] This should not require evidence of ongoing or prior control; instead, a position of potential prevention at low costs should be adequate to satisfy the control prong.[89] In the case of ISP liability, it would require the ability to distinguish between infringing subscribers or materials and non-infringing ones at low costs. If an ISP is able to deter misconduct at low costs, it will not act overzealously in preventing infringement even if it derives no direct financial benefit from additional items posted online. Over-deterrence harms the ISP's reputation, whereas deterring infringement often reasonably improves its status and produces indirect financial benefits such as a larger user base, as more materials on an ISP's network generally attract more end users.[90] Conversely, because of the severe sanctions for copyright infringement,[91] ISPs would not under-deter infringement to satisfy those who prefer to have access to illegal materials.

B. The Direct Financial Benefit Prong

The second prong, financial benefit, is interpreted narrowly by some courts. In *Artists Music*, for example, the court found that "Reed leased space to the exhibitors in exchange for a fixed fee based on the size of the booth. Reed's revenues from the [s]how did not in any way depend on whether . . . the exhibitors played any music whatsoever."[92] The court rejected the plaintiffs' claim "that the music created an ambiance necessary to the success of the [s]how," and held that the plaintiffs had not shown that the defendant had received any financial benefit from the infringing performances.[93]

In contrast, some courts do not set a high hurdle for the financial benefit requirement. In *Polygram*, the court found that music may be used "'to communicate with attendees' at the show," and that "when music assists in this communication, it provides a financial benefit to the show of a kind that satisfies the financial benefit prong of the test for

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[88] *See generally* Wright, *supra* note 24, at 1013–18 (discussing the difference between legal and actual control).

[89] *See* Demetriades v. Kaufmann, 690 F. Supp. 289, 292–93 (S.D.N.Y. 1988) (noting that meaningful evidence of control is needed to find vicarious liability); Wright, *supra* note 24, at 1013–14 (discussing *Demetriades*, 690 F. Supp. at 291–92).

[90] *See* Alex Veiga, *Anti-Piracy Technology Could Hurt YouTube's Rebel Reputation*, USA TODAY (Oct. 12, 2006, 10:36 PM), http://www.usatoday.com/tech/news/2006-10-12-antipiracy-video_x.htm?csp=34.

[91] *See* 17 U.S.C. §§ 502–06, 509 (2006).

[92] Artists Music Inc. v. Reed Publ'g (USA) Inc., 31 U.S.P.Q.2d 1623, 1627 (S.D.N.Y. 1994).

[93] *Id.*

vicarious liability."[94] The *Polygram* court accepted the argument that was rejected in *Artists Music,* that is, that the music enhanced the success of the show.[95]

Assaf Hamdani argues that the over-deterrence effect of vicarious liability can be mitigated if courts interpret the direct financial benefit prong narrowly.[96] He notes that "ISPs [that] capture a benefit for any additional item posted on their network are better positioned to self-assess the cost and the benefits of monitoring than other third parties," and that these ISPs "will not engage in excessive monitoring."[97]

His argument holds true in the dance hall scenario, in which the dance hall proprietor only needs to verify a limited number of songs.[98] On the Internet, however, ISPs continually receive a large number of notices from copyright owners and cannot easily distinguish infringing uses from non-infringing ones.[99] They are not able to verify each copyright notice given that they have to act expeditiously to remove a large amount of infringing materials.[100] Thus, even if they capture a benefit for any additional items posted on their networks, they are likely to sacrifice direct financial benefits to avoid severe liability for copyright infringement. For example, suppose an ISP receives $1 for any additional item posted online, but may face $750 in statutory damages for any infringing item.[101] The ISP would probably rather remove legitimate items without verification because it has to remove a large number of infringing items expeditiously to maintain its safe harbors. A direct financial benefit only provides ISPs with an incentive to deter infringement reasonably, but does not offer any guarantee against over-deterrence. Because over-deterrence is caused by high monitoring costs, it can be prevented only when courts interpret the control prong as

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94 Polygram Int'l Publ'g, Inc. v. Nev./TIG, Inc., 855 F. Supp. 1314, 1332 (D. Mass. 1994).

95 *Id.* at 1332; *accord* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1023 (9th Cir. 2001); Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 263 (9th Cir. 1996); Yen, *supra* note 39, at 1851.

96 Assaf Hamdani, *Who's Liable for Cyberwrongs?*, 87 CORNELL L. REV. 901, 947 (2002) ("[T]he financial gain requirement seeks to ensure that third parties, though positioned to monitor against infringements, will not engage in excessive monitoring because they do not internalize the social cost of their monitoring activities.").

97 *Id.*

98 *See, e.g.*, Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co., 36 F.2d 354, 355 (7th Cir. 1929).

99 David Abrams, *More Chilling than the DMCA—Automated Takedowns*, CHILLING EFFECTS (Mar. 17, 2010), http://www.chillingeffects.org/weather.cgi?WeatherID=634.

100 17 U.S.C. § 512(c) (2006).

101 *See* 17 U.S.C. § 504(c)(1) (2006) (allowing copyright holders the option of collecting statutory damages of $750 to $30,000 per infringement).

limiting vicarious liability to cases in which the defendant can control infringement at low costs.

IV. MONOPOLISTIC GATEKEEPERS' VICARIOUS LIABILITY

A. Baidu

The Internet is developing rapidly in China. China has the largest population of Internet users in the world,[102] and the high rate of online copyright infringement in China has become a global problem. One commentator has noted that "[p]iracy went from being a small local enterprise to a major export industry[,] with Chinese-made pirated copies of U.S. films, recordings, and computer programs showing up as far afield as Canada and Eastern Europe."[103] As more and more lawsuits were brought against ISPs for secondary copyright infringement,[104] the Chinese government adopted legislation that provides ISPs with "safe harbors" from damages for the misconduct of their subscribers.[105] This legislation incorporates a "Notice and Take Down" procedure, which is similar to that of the DMCA.[106] Prior to the adoption of "safe harbors," ISPs in China may have been jointly liable for the misconduct of subscribers, including copyright infringement and defamation, under general tort principles.[107] The new legislation adds a series of affirmative defenses without changing the substantive standards of tort law with respect to ISPs.[108]

There are three major statutes or regulations concerning ISP liability in China: Interpretations of the Supreme People's Court on Several Issues Concerning the Application of Laws (amended in 2006)

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[102] Guy Dixon, *China Becomes World's Biggest Internet Population*, V3.CO.UK (Mar. 14, 2008), http://www.vnunet.com/vnunet/news/2212086/chinese-become-internet.

[103] Greg Mastel, *China and the World Trade Organization: Moving Forward Without Sliding Backward*, 31 LAW & POL'Y INT'L BUS. 981, 989 (2000).

[104] *See* Yiman Zhang, Comment, *Establishing Secondary Liability with a Higher Degree of Culpability: Redefining Chinese Internet Copyright Law to Encourage Technology Development*, 16 PAC. RIM L. & POL'Y J. 257, 281 (2007) (arguing for a safe-harbor provision in Chinese law because of exposure of ISPs to expansive liability; regulations were adopted before this comment was published).

[105] Zuìgāo Rénmín Fǎyuàn Guānyú Shěnlǐ Shèjí Jìsuànjī Wǎngluò Zhùzuòquán Jiūfēn Ànjiàn Shìyòng Fǎlǜ Ruògān Wèntí De Jiěshì (**最高人民法院关于审理涉及计算机网络 著作权纠纷案件适用法律若干问题的解释**) [Interpretations of the Supreme People's Court on Several Issues Concerning the Application of Laws] (promulgated by the Sup. People's Ct., Dec. 22, 2003, effective Dec. 22, 2003, amended Dec. 8, 2006) (China), *translated in* China Internet Project, CHINA IT LAW, http://www.chinaitlaw.org/?p1=print&p2=060115231838 (last visited Nov. 13, 2010) [hereinafter *Chinese Interpretations*].

[106] *Id.*; *cf.* 17 U.S.C. § 512(c) (2006).

[107] *See Chinese Interpretations*, *supra* note 105.

[108] *See id.*

("Interpretations"),[109] the Measures on Administrative Protection of Internet Copyright,[110] and the Regulation on Protection of the Right to Network Dissemination of Information.[111] Chinese law regarding ISP liability mirrors Section 512 of the DMCA.

The Regulations provide four safe harbors for ISPs, similar to those in Section 512 of the DMCA: (1) transitory digital network communications, (2) system caching, (3) information storage, and (4) search or linkage service.[112] The conditions for those safe harbors, however, are a little different from those under Section 512. For example, to be eligible for the information storage safe harbor, the Regulations require ISPs to receive no economic interests directly from the work.[113] To qualify for the search or linkage service safe harbor, however, there is no such requirement.[114] In other words, vicarious liability seems to apply to the information storage service rather than the search or linkage service. Under Section 512 of the DMCA, the conditions for the two safe harbors are essentially the same, as both require an ISP to receive no direct financial benefit from infringement.[115]

One possible reason for the difference between the two safe harbors in China is that Baidu, the largest search engine in China, uses an auction-based, P4P services system, which "enable[s] its customers to bid for priority placement of their links in keyword search results."[116] At the end of 2009, Baidu had over 223,000 customers advertising with it.[117] It

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[109] *Id.*

[110] Hù Lián Wǎng Zhù Zuò Quán Xíng Zhèng Bǎo Hù Bàn Fǎ (互联网著作权行政保护办法) [Measures on Administrative Protection of Internet Copyright] (jointly released by the Nat'l Copyright Admin. of China and the Ministry of Info. Indus. on Apr. 30, 2005) (China), *translated in* China Internet Project, CHINA IT LAW, http://www.chinaitlaw.org/?p1=print&p2=051006180113 (last visited Nov. 3, 2010).

[111] *Chinese Regulation*, *supra* note 3, at art. 1.

[112] *Id.* at arts. 20–23.

[113] *Id.* at art. 22.

[114] *See id.* at art. 23.

[115] 17 U.S.C. § 512(c), (d) (2006).

[116] *Baidu, Inc. (BIDU.O) Company Profile*, *supra* note 2.

> Baidu focuses on providing customers with targeted marketing solutions. It generates revenues from online marketing services. The Company's P4P platform enables its customers to reach users who search for information related to their products or services. Customers may use automated online tools to create text-based descriptions of their Web pages and bid on keywords that trigger the display of their Web page information and link. Baidu's P4P platform features an automated online sign-up process that allows customers to activate their accounts at any time. The P4P platform is an online marketplace that introduces Internet search users to customers who bid for priority placement in the search results.

Id.

[117] *Id.*

is reported that over 80 percent of Baidu's revenue derives from the P4P service.[118]

Under Baidu's pay-per-click model, it can earn more revenue if more infringing websites bid for priority placement in the keyword search results and if they receive more clicks as a result. If one condition for the search service safe harbor is receiving no direct financial benefit from infringement, this condition may have an adverse effect on Baidu and deprive it of the safe harbor. One commentator argues that Baidu should not be protected by the safe harbor if it uses P4P, because Baidu monitors advertisers' web pages and stores those in its database.[119] It is doubtful that is the reason to hold Baidu liable, however; although Baidu verifies its advertisers' qualifications,[120] it does not *constantly* monitor their web pages or store them on its server.[121] Nevertheless, even if Baidu does not store the web pages, it can be held vicariously liable if it exercises control over advertisers' websites.[122]

Baidu's ability to control the infringement of advertisers' websites can be demonstrated by its control over the placement and the presentation of the advertising hyperlinks. It places sponsored links at the top with a pale grey background, the P4P hyperlinks above the organic search results, and all other advertising hyperlinks to the right side of the organic results.[123] The P4P hyperlinks usually appear in the same color and font as organic search results, with a small notice containing the word "promotion" at the end of the result.[124] Before

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[118] Wang Xing, *Baidu Says Sorry for False Search Results*, CHINA DAILY (Nov. 19, 2008, 09:45 AM), http://www.chinadaily.com.cn/bizchina/2008-11/19/content_7219057.htm. Baidu's business model, however, has been undergoing a crisis recently after China Central Television exposed Baidu as having displayed sites promoting false medical information among its paid sites. *Id.*

[119] Huang Wushuang (黄武双), Lun Shou Suo Yin Xing Fu Wu Ti Gong Shang Qin Quan Ze Ren de Cheng Dan—Dui Xian Xing Zhu Liu Guan Dian de Zhi Yi (论搜索引擎网络服务提供商侵权责任的承担—对现行主流观点的质疑) [Internet Search Engine Service Providers' Burden of Tort Liability—Questioning Current Norms], 5 ZHI SHI CHAN QUÁN 16, 22 (2007) (China).

[120] Zhang Liming, *Baidu Advertisers Will Conduct a Comprehensive Review of Qualifications*, SINA.COM (Nov. 21, 2008, 3:33 AM), http://tech.sina.com.cn/i/2008-1121/03 332593617.shtml.

[121] *See Baidu, Inc. (BIDU.O) Company Profile*, *supra* note 2.

[122] *See* Regina Nelson Eng, *A Likelihood of Infringement: The Purchase and Sale of Trademarks as AdWords*, 18 ALB. L.J. SCI. & TECH. 493, 527–29 (2008) (arguing that Google should be held vicariously liable for advertisers' trademark infringement because it "exercises joint control over the advertisement").

[123] *Paid Search—Where Your Ad Is Displayed and What It Looks Like*, BAIDU.COM, http://is.baidu.com/ad_displayed.html (last visited Nov. 4, 2010); *see also* C. Custer, *Censorship and Search: Baidu and the Chinese Dilemma*, CHINAGEEKS.ORG (July 1, 2010), http://chinageeks.org/2010/07/censorship-and-search-baidu-and-the-chinese-dilemma.

[124] Custer, *supra* note 123; BAIDU.COM, *supra* note 123.

placing advertising hyperlinks online, Baidu reviews the advertisements to ensure that they comply with relevant Chinese laws and regulations.[125] Although Baidu is unable to take down infringing materials from advertisers' websites, it can remove websites from search results.

While it can be argued that Baidu's relationship to its advertisers is similar to that between television stations and their advertisers, the search engine-advertiser relationship more closely resembles the flea market owner-vendor relationship than the television station-advertiser relationship. For one, television stations usually broadcast the same commercial for a certain period of time. If there is any change to the content of the commercial, advertisers need to notify the television station about it. On the Internet, however, advertisers are able to change the content of their websites without the consent of the search engine. Unlike the centralized television station, what the search engine provides is the space to host advertisers' hyperlinks. Renting online space to advertisers as part of the keyword service constitutes a "hosting service" or a "service provider."[126] Vicarious liability might apply to such a service under both Section 512 of the DMCA and the Chinese law.[127]

Government Employees Insurance Co. v. Google, Inc.[128] ("GEICO") is among the few cases discussing a search engine's vicarious liability for advertisers' trademark infringement. In this case, Google and codefendant Overture sold advertising that appeared in response to predetermined search terms.[129] Advertisers paid for keywords, and their advertising links were listed as sponsored links in addition to the organic search results.[130] Although GEICO did not claim that Overture had a principal-agent relationship with the advertisers as is required for typical vicarious liability, the court found that GEICO had stated a claim against Overture because Overture and the advertisers "'exercise[d] joint

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[125] Christian Arno, *Eight Tips for Understanding Baidu SEO*, ECONSULTANCY.COM (Sept. 2, 2010, 1:09 PM), http://econsultancy.com/us/blog/6497-eight-tips-to-understanding-baidu-seo; Surojit Chatterjee, *Google, China Govt. Censorship Spat Seen Benefiting Baidu*, INTERNATIONAL BUSINESS TIMES (July 1, 2010, 11:04 AM), http://www.ibtimes.com/articles/32058/20100701/google-china-govt-censorship-spat-seen-benefiting-baidu.htm.

[126] *Cf.* Noam Shemtov, *Mission Impossible? Search Engines' Ongoing Search for a Viable Global Keyword Policy*, J. INTERNET L., Sept. 2009, at 3, 11 (noting that sites that use sponsored advertisements constitute "hosting service[s]" under the law of the European Union, but also noting that the law in the United States is different). *But cf.* 17 U.S.C. § 512(k)(1)(B) (2006) (defining "service provider," a term equivalent to the European definition of "hosting service," as "a provider of online services or network access, or the operator of facilities therefor").

[127] 17 U.S.C. § 512(a)(2) (2006); *Chinese Regulation*, *supra* note 3, at arts. 15, 18.

[128] 330 F. Supp. 2d 700 (E.D. Va. 2004).

[129] *Id.* at 702.

[130] *Id.*

ownership and control over the infringing product.'"[131] The court also held that advertisers were permitted to purchase the trademark "GEICO" from Google as a keyword, but that they were not allowed to use "GEICO" in their ad heading or text.[132]

B. Tiffany v. eBay

In addition to the keyword cases, courts have also considered the secondary liability of online auction sites. In *Tiffany (NJ) Inc. v. eBay, Inc.*,[133] Tiffany alleged that eBay had displayed a large number of counterfeit silver jewelry items for sale on its website.[134] Although it was individual sellers, not eBay, who had listed and sold the counterfeit Tiffany items, Tiffany argued that eBay was aware of the problem and had an obligation to monitor and control the illegal activities of its sellers.[135] eBay claimed that it was Tiffany's duty to monitor such sales and that it had expeditiously removed such listings whenever it was notified of their existence.[136] The court held that eBay was not contributorily liable for sellers' trademark infringement.[137]

How can *GEICO*[138] be reconciled with *Tiffany*?[139] One possible answer may be that it is easier to monitor advertising than the sale of counterfeit goods. While a search engine can verify advertising by examining advertisers' identities or their license agreements with the trademark owner, an online auction site may have difficulty in distinguishing counterfeit goods from authentic ones. It is also impractical to require sellers to provide sales receipts because many items have been sold on the second-hand market. Thus, it is more desirable to impose vicarious liability on Google than on eBay.

C. Perfect 10 v. Amazon *and* Perfect 10 v. Visa

This section discusses two related cases, *Perfect 10, Inc. v. Amazon.com, Inc.*[140] (*"Perfect 10 v. Amazon"*) and *Perfect 10, Inc. v. Visa International Service, Ass'n.*[141] (*"Perfect 10 v. Visa"*). In the former case,

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[131] *Id.* at 705 (quoting Hard Rock Caf[é] Licensing Corp. v. Concession Servs., Inc., 955 F.2d 1143, 1150 (7th Cir. 1992)).

[132] *Judge Clarifies Google AdWords Ruling in the US*, OUT-LAW.COM (Dec. 8, 2005), http://www.out-law.com/page-6003.

[133] 576 F. Supp. 2d 463 (S.D.N.Y. 2008).

[134] *Id.* at 469.

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Gov't Emps. Ins. Co. v. Google, Inc.*, 330 F. Supp. 2d 700, 705 (E.D. Va. 2004).

[139] *Tiffany*, 576 F. Supp. 2d at 469.

[140] 487 F.3d 701 (9th Cir. 2007).

[141] 494 F.3d 788 (9th Cir. 2007).

the adult entertainment company Perfect 10 sued both Amazon and Google for contributory infringement relating to third-party websites that infringed upon its pornographic images.[142] In the latter case, Perfect 10 sued the credit card company Visa on similar grounds.[143]

Perfect 10 v. Amazon[144] is another one of the few cases discussing a search engine's vicarious liability for copyright infringement. Perfect 10 owns copyrighted images of nude models.[145] Subscribers must pay a membership fee to log into the system and view the images.[146] Some websites published Perfect 10's images on the Internet without authorization, and these sites were automatically indexed by Google.[147] Perfect 10 thus brought a copyright infringement suit against Google.[148] Ultimately holding Google not liable, the court found that the "control" element of vicarious liability consisted of two prongs: (1) whether the defendant had "the legal right to stop or limit the direct infringement" and (2) whether the defendant had the practical ability to stop the direct infringement.[149] A contract with a third-party website would have given Google the legal right to prevent infringement by the third-party websites.[150] Because "Perfect 10 ha[d] not shown that Google ha[d] contracts with third-party websites that empower[ed] Google to stop or limit them from reproducing, displaying, and distributing infringing copies of Perfect 10's images on the Internet," the court held that the control element was not satisfied.[151] The dissent in *Perfect 10 v. Visa* also noted that to be held vicariously liable, the "defendant must have a formal contractual or principal-agent relationship with the infringer. It is that contract or relationship that forms the predicate for vicarious liability."[152]

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[142] *Amazon*, 487 F.3d at 710.

[143] *Visa*, 494 F.3d at 792.

[144] *Amazon*, 487 F.3d at 710.

[145] *Id.* at 713.

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id.* at 730 (citing Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005)).

[150] *Id.* The mere existence of a contractual relationship, however, does not always warrant a finding of control. *See* Banff Ltd. v. Ltd., Inc., 869 F. Supp. 1103, 1109 (S.D.N.Y. 1994) (citing Shapiro, Bernstein & Co., Inc. v. H. L. Green Co., 316 F.2d 304, 308 (2d Cir. 1963)); Wright, *supra* note 24, at 1014.

[151] *Amazon*, 487 F.3d at 730–31.

[152] Perfect 10, Inc. v. Visa Int'l Serv., Ass'n, 494 F.3d 788, 822 n.23 (9th Cir. 2007) (Kozinski, J., dissenting).

Although Google's AdSense agreement[153] states that "Google reserves 'the right to monitor and terminate partnerships with entities that violate others' copyright[s],'"[154] the court held that "Google's right to terminate an AdSense partnership does not give Google the right to stop direct infringement by third-party websites."[155] The dissent in *Perfect 10 v. Visa* further explained that exclusion from AdSense would reduce the infringing sites' incomes, but would not affect the operation of the sites themselves.[156] Thus, the AdSense agreement does not give Google a right to control infringement on merchants' websites.

But can the legal right to control infringement be found only in a contract? Although respondeat superior requires a contractual relationship (in the form of an employee-employer relationship) in an employment context,[157] such a requirement may be unreasonable in other contexts. Suppose that content-identification technology is sophisticated enough to detect copyright infringement on third-party websites. Can lawmakers require search engines to filter infringing websites in the absence of contracts between search engines and third-party websites? If deterrence is the rationale for vicarious liability, a contractual relationship would not be an essential requirement.[158]

Because "Google cannot stop any of the third-party websites from reproducing, displaying, and distributing unauthorized copies of Perfect 10's images," the *Perfect 10 v. Amazon* court did not find Google to be vicariously liable.[159] The dissent in *Perfect 10 v. Visa*, however, argued that the court has "never required an 'absolute right to stop [the infringing] activity' as a predicate for vicarious liability; it's enough if defendants have the 'practical ability' to do so."[160] In other words, one

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[153] The current Google AdSense agreement is available at https://www.google.com/adsense/static/en_US/Terms.html

[154] *Amazon*, 487 F.3d 701, 730 (quoting Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828, 858 (C.D. Cal. 2006)).

[155] *Id.* AdSense is an advertising system, whereby "Google pays participating merchants to host third-party ads on their websites." *Visa*, 494 F.3d at 820 (Kozinski, J., dissenting).

[156] *Visa*, 494 F.3d at 820 (Kozinski, J., dissenting).

[157] RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. b, § 7.07 cmt. f (2005) (noting that an employer is liable for the actions of an employee, which entails a contractual relationship).

[158] *See* Frederic Reynold, Note, *Negligent Agency Workers: Can There Be Vicarious Liability?*, 34 INDUS. L.J. 270, 272 (2005) ("[W]he[n] one is concerned with the question of vicarious liability in tort, the contractual relationship between the parties is not a crucial consideration.").

[159] *Amazon*, 487 F.3d at 731.

[160] *Visa*, 494 F.3d at 818 (Kozinski, J., dissenting) (quoting *id.* at 804; *Amazon*, 487 F.3d at 729, 731). The dissent notes that "'[p]ractical ability,' the standard announced in *Amazon*, is a capacious concept, far broader than 'absolute right to stop,'" which is the

prong of vicarious liability should be the ability to reduce infringement significantly rather than the right to eliminate infringement altogether. As Google is able to remove infringing websites from search results, it can significantly decrease their exposure and thus reduce copyright infringement.

In *Perfect 10, Inc. v. Visa*, various unrelated websites had stolen Perfect 10's images and illegally sold them online.[161] The sale of infringing content was usually carried out using credit cards processed by companies such as Visa, which then charged merchants fees in these transactions.[162] Perfect 10 then brought a copyright infringement action against Visa.[163] The court found that Perfect 10 had not stated a claim of vicarious liability upon which relief could be granted,[164] but Judge Kozinski delivered an insightful dissenting opinion.[165]

The majority recognized that Visa's refusal to process credit card payments for those images would reduce the number of infringing sales, but held that this effect would be "the result of indirect economic pressure rather than an affirmative exercise of contractual rights."[166]

Deterrence, however, refers to deterring the actual infringement either directly or indirectly. Indirect economic pressure can also serve as a powerful deterrence. As the dissent pointed out, "[p]hysical control over the infringing activity is one way to stop infringers, but it's certainly not the only way. Withdrawing crucial services, such as financial support, can be just as effective, and sometimes more effective, than technical measures that can often be circumvented."[167]

The majority may have feared that a ruling against Visa would result in too many parties being swept into vicarious infringement suits.[168] Even though many providers of essential services, such as "software operators, network technicians, or even utility companies,"[169] could limit infringement, not all of them derive a direct financial benefit from infringement. For example, because a software operator's revenue does not grow with the increasing use of the software, it does not derive a direct financial benefit from infringement. Thus, even if all

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standard adopted by the majority in *Visa*. *Id.* at 818 n.15; *see also* Noel D. Humphreys, *Are Landlords Liable for Online Infringement by Tenants?*, N.J. LAW., Dec. 2008, at 37–38.

161 Visa, 494 F.3d at 793.

162 *Id.*

163 *Id.*

164 *Id.* at 792–93, 810.

165 *Id.* at 810, 824–25 (Kozinski, J., dissenting).

166 *Id.* at 805.

167 *Id.* at 821 (Kozinski, J., dissenting).

168 *See id.* at 805 n.17.

169 *Id.*

monopolistic provider of an essential service could be held vicariously liable, it would not be fair to do so.

The majority also held that Perfect 10 "conflate[d] the power to stop profiteering with the right and ability to control infringement."[170] Again, the aim of vicarious liability is not to eliminate infringement, but to reduce it significantly. Without the power to make a profit, the number of infringing websites would greatly diminish. Thus, the power to stop profiteering from infringement is consistent with the right and ability to control infringement.

The dissent noted that the availability of alternative ways of doing business does not matter, as alternatives were also available in *Fonovisa*[171] or *Napster*[172] in which vicarious liability was found.[173] This may not be the complete picture, however. *Perfect 10 v. Visa* is different from *Fonovisa*[174] or *Napster*[175] because in those cases, the infringement occurred on the third party's premises or networks and could have been deterred by the third party.[176] Visa cannot be held liable on that basis. Instead, Visa should be held vicariously liable not because of its ability to control third-party conduct, but because of its market power and the impracticability of alternative payment methods such as check or cash. As the *Perfect 10 v. Visa* dissent noted, "[H]ow many consumers would be willing to send a check or money order to a far-off jurisdiction in the hope that days or weeks later they will be allowed to download some saucy pictures?"[177]

The tests for vicarious liability may be different, depending on three distinct types of relationships: the employer-employee relationship, the relationship of premises providers (such as swap-meet operators) to their tenants, and the relationship of monopolistic providers of essential services (such as credit card processing) to their users. The following table illustrates this point:

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[170] *Id.* at 805–06.

[171] Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259 (9th Cir. 1996).

[172] A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

[173] *Visa*, 494 F.3d at 817 (Kozinski, J., dissenting).

[174] *Fonovisa*, 76 F.3d at 259.

[175] *Napster*, 239 F.3d at 1004.

[176] *Visa*, 494 F.3d at 817 (Kozinski, J., dissenting) (arguing that the defendants in *Fonovisa*, *Napster*, and *Grokster* had the ability to deter infringement by barring infringers from their premises or networks).

[177] *Id.* at 818.

Relationship	Test	Rationale
Employer-employee	Right and ability to supervise employees + Direct financial benefit from infringement	Dominant justification: deterrence Supplemental justification: corrective justice
Premises provider	Right and ability to deter infringement + Direct or indirect financial benefit from infringement	Deterrence
Monopolistic provider of an essential service	Right and ability to exclude infringers + Market power + Direct financial benefit from infringement	Corrective justice

Vicarious liability is traditionally applied in the employer-employee relationship when the employee is either following the employer's instructions or otherwise acting within the employee's job description.[178] Employers can control what is done and how it is done, and they are expected to take cost-justified precautions as well as to train and supervise their employees.[179] When discussing vicarious liability, commentators typically focus on causation rather than financial benefits.[180] Ernest Weinrib notes:

> [Because] corrective justice is the normative relationship of sufferer and doer, respondeat superior fits into corrective justice only if the employer can, in some sense, be regarded as a doer of the harm. Corrective justice requires us to think that the employee at fault is so closely associated with the employer that responsibility for the former's acts can be imputed to the latter.[181]

Weinrib's theory of corrective justice focuses on correlativity, emphasizing causation,[182] whereas Jules Coleman's theory concentrates

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178 RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. b (2005).

179 *Id.*

180 ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 186 (1995); Catharine Pierce Wells, *Corrective Justice and Corporate Tort Liability*, 69 S. CAL. L. REV. 1769, 1774 (1996).

181 WEINRIB, *supra* note 180, at 186.

182 *See* Jules L. Coleman, *The Practice of Corrective Justice*, 37 ARIZ. L. REV. 15, 26 (1995) (noting that correlativity may emphasize causation, responsibility, or the position of the cheapest cost-avoider); Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 350–51 (2002) ("The idea that correlativity informs the injustice, as well as its rectification, is a central insight of the corrective justice approach to the theory of liability.").

on wrongful gains and losses.[183] Coleman notes that "[o]ne way in which Ernie Weinrib's theory differs from mine is that in his account the object of rectification is the 'wrong,' whereas in my account it is the 'wrongful loss.'"[184] Combining these theories provides two separate justifications for vicarious liability in the employer-employee context: the employer should be held liable because (1) it could have deterred the "wrong," or (2) it benefits financially from the "wrongful loss" of another.

Generally, vicarious liability in the employer-employee context can be justified by deterrence because most wrongs can be prevented through more careful hiring and training.[185] Even if the employer is unable to control the risk fully, however, courts can nonetheless find vicarious liability based on corrective justice if the employer derives a direct financial benefit from infringement.

In the premises provider scenario, although the premises provider cannot control direct infringers, it can exercise physical control over the activity on its premises either by surveillance or by architecture, the latter of which refers to a physical feature or to code in cyberspace in a human-built environment.[186] For example, speed bumps act as an architectural constraint on speeding.[187] Similarly, an ISP can use content-identification technology to filter copyright-infringing materials on its network.[188] Architecture is "automated, immediate, and plastic."[189] It is self-enforcing and curtails the discretion afforded by law.[190] Unless people can circumvent the architecture, they are unlikely to commit infringement.[191] Architecture, then, may be more cost effective means on policing and enforcing than the law.[192] Therefore, premises providers may have both the right and the ability to deter infringement, even if they are unable to control infringers directly.

Unlike a premises provider, a provider of an essential service lacks the ability to exercise physical control over direct infringers' activity because the activity does not occur on its premises. If it has market

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[183] Coleman, *supra* note 13, at 10–14; Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349, 350 (1992).

[184] Coleman, *supra* note 182, at 26.

[185] RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. b (2005).

[186] Ke Steven Wan, *Gatekeeper Liability Versus Regulation of Wrongdoers*, 34 OHIO N.U. L. REV. 483, 486 (2008).

[187] LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 92 (1999).

[188] Sunil Vyas, *Google Intro[duce]s YouTube Video Identification*, EARTHTIMES (Oct. 16, 2007), http://www.earthtimes.org/articles/show/124974.html.

[189] James Grimmelmann, Note, *Regulation by Software*, 114 YALE L.J. 1719, 1729 (2005) (describing the three characteristics of software).

[190] *Id.* at 1729–30.

[191] *See id.* at 1730.

[192] *Id.* at 1729.

power in the relevant market, however, it can exclude infringers from its service network, which may be an effective deterrence. Thus, a monopolistic provider of an essential service has the right and ability to deter direct infringers, even though it lacks the ability to deter infringement directly. Market power is the monopolistic "power to control prices or exclude competition."[193] Commentators have discussed the market power of credit card joint ventures.[194] Despite the competition between credit card companies, they can exercise market power by making collective decisions, including the decision to exclude a single producer.[195] Thus, they have monopolistic status in the relevant market.

As for the financial benefit prong of vicarious liability when the third party is a premises provider, even indirect financial benefit may result in a finding of vicarious liability.[196] If the infringement occurs on the third party's premises, the third party arguably has a duty to monitor.[197] Based on the deterrence rationale, the test should weigh the costs and benefits associated with vicarious liability. For example, if content-identification technology significantly reduces the monitoring cost, ISP vicarious liability would not result in serious over-deterrence. The financial benefit prong can be interpreted broadly such that the benefit does not have to be directly derived from infringement or "financial" in nature. It will be satisfied whenever the infringing material acts as a draw for customers.

When the third party is a monopolistic gatekeeper lacking the ability to control infringement, the rationale for vicarious liability should be corrective justice rather than deterrence. Vicarious liability should be found only in the presence of direct financial benefit. One commentator argues that vicarious liability "is consistent with deterrence and compensation, but inconsistent with corrective justice."[198] According to

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[193] Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. REV. 1321, 1399 (2008) (quoting United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956) (discussing monopoly power)).

[194] *See* Dennis W. Carlton & Alan S. Frankel, *The Antitrust Economics of Credit Card Networks*, 63 ANTITRUST L.J. 643, 645 (1995); Levitin, *supra* note 193, at 1399.

[195] Carlton & Frankel, *supra* note 194, at 653–55. In 2003, the Second Circuit found sufficient evidence to conclude that Visa and MasterCard possessed market power in the payment card network services market because they controlled forty-seven percent and twenty-six percent of payment card network market share, respectively. United States v. Visa U.S.A., Inc., 344 F.3d 229, 240 (2d Cir. 2003).

[196] *E.g.*, Polygram Int'l Publ'g, Inc. v. Nev./TIG, Inc., 855 F. Supp. 1314, 1331 (D. Mass. 1994).

[197] *See* Hamdani, *supra* note 96, at 947.

[198] Christopher J. Robinette, *Torts Rationales, Pluralism, and Isaiah Berlin*, 14 GEO. MASON L. REV. 329, 351 (2007) (referring to the respondeat superior form of vicarious liability). *But see* Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625,

Aristotle, corrective justice applies when one party receives more (or less) than his rightful share because the other party is causing him injury.[199] It corrects moral imbalances between parties,[200] but applying it in this context is problematic because there are no moral imbalances between the plaintiff and the third party.[201]

There are, however, two kinds of corrective justice: correcting fault and correcting wrongful gains.[202] If the third party derives a direct financial benefit from infringement, the third party should be held liable for the direct infringer's wrongdoing. It should not matter whether the third party is at fault or has intent to infringe. The purpose of the direct financial benefit prong is probably to justify corrective justice.[203]

Under Coleman's theory of corrective justice, wrongful gains and losses are limited to financial gains and losses.[204] Because the defendant may not necessarily derive financial gains as a result of the plaintiff's financial losses in a negligence case, Coleman's theory does not provide justification for routine negligence cases.[205] "Corrective justice requires that one who is unjustly enriched at the expense of another is morally

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674 n.219 (1992) ("[T]he employer's vicarious liability is based on the employer's own corrective justice responsibility for injuries that are tortiously inflicted in pursuance of the employer's objectives.").

199 *See* ARISTOTLE, THE NICOMACHEAN ETHICS, Book V at 85–86 (David Ross trans., Oxford Univ. Press 2009) (n.d.); *see also* Kathryn R. Heidt, *Corrective Justice from Aristotle to Second Order Liability: Who Should Pay When the Culpable Cannot?*, 47 WASH. & LEE L. REV. 347, 362 (1990).

200 *See* Joseph H. King, Jr., *Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees*, 62 WASH. & LEE L. REV. 417, 476–77 (2005); Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163, 193 (2004) (arguing that some scholars view tort liability as "a vehicle for reestablishing the moral balance between the parties").

201 *See* Robinette, *supra* note 198, at 351.

202 *See* Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2370 (1990).

203 *See id.* at 2358–59 ("The central issue in a tort case is not whether the defendant is at fault but whether the defendant can fairly be held financially responsible for the plaintiff's injuries."). If the liability test were based on deterrence, as in the scenario of the premises provider, the financial benefit would not have to come directly from the infringement.

204 Coleman, *supra* note 13, at 6 ("[C]orrective . . . justice is concerned with wrongful gains and losses. Rectification is, on this view, a matter of justice when it is necessary to protect a distribution of holdings (or entitlements) from distortions [that] arise from unjust enrichments or wrongful losses."); Wells *supra* note 202, at 2358–59, 2370–71 ("The central issue in a tort case is not whether the defendant is at fault but whether the defendant can fairly be held financially responsible for the plaintiff's injuries.").

205 Coleman, *supra* note 13, at 10–11 ("Negligent motoring may or may not result in an accident. Whether it does or not, individuals who drive negligently often secure a wrongful gain in doing so . . . . This . . . wrongful gain is not, *ex hypothesi*, the result of anyone else's wrongful loss."); Wells, *supra* note 202, at 2370.

obligated to restore the victim to his former position."[206] It is for this reason that the corrective justice theory is appropriate in the premises-provider context.

Corrective justice should not be confused with unjust enrichment. Direct financial benefit renders one unjustly enriched economically, whereas intent to infringe renders one unjustly enriched socially. Unjust enrichment, or wrongful gains, can be tangible or intangible.[207] When one exercises his freedom excessively, he may intrude upon others' liberty and demean it.[208] Such intangible gains are more prevalent than tangible ones and exist in almost all infringements.[209] If Coleman's theory covers intangible gains, it can justify vicarious liability in traditional negligence cases in which the defendant derives no financial gains from infringement, because when the defendant gains a sense of superiority as a result of the plaintiff's loss of a sense of equality, liability should be imposed on the defendant to restore this imbalance.

Notably, both the direct infringer and the third party may derive intangible gains from the infringement. When the third party contributes to the infringement with intent to infringe, it gains a sense of superiority.[210] Without intent to infringe, the third party does not gain

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[206] Richard Ausness, *Conspiracy Theories: Is There a Place for Civil Conspiracy in Products Liability Litigation?*, 74 TENN. L. REV. 383, 412 (2007); *accord* ARISTOTLE, THE NICOMACHEAN ETHICS, Book V at 154–55 (J.E.C. Welldon trans., Prometheus Books 1987) (n.d.); Alan L. Calnan, *Distributive and Corrective Justice Issues in Contemporary Tobacco Litigation*, 27 SW. U. L. REV. 577, 602–05 (1998) ("Gains and losses may be tangible or intangible. . . . An intangible gain may arise from any unauthorized or excessive exercise of freedom."); Coleman, *supra* note 12, at 423 ("The principle of corrective justice requires the annulments of both wrongful gains and losses."); Donald G. Gifford, *The Challenge to the Individual Causation Requirement in Mass Products Torts*, 62 WASH. & LEE L. REV. 873, 886 (2005) ("Once the injurer has caused unjust harm to the victim, the injurer must compensate the victim . . . to restore him to the pre-existing state. The injurer has realized a corresponding gain in normative, but usually not factual, terms; her gain is a gain in comparison to what she is due or entitled. Under this view, 'because the plaintiff has lost what the defendant has gained, a single liability links the particular person who gained to the particular person who lost.'") (quoting WEINRIB, *supra* note 180, at 63.).

[207] Calnan, *supra* note 206, at 603; *see also* WEINRIB, *supra* note 180, at 116 (distinguishing between factual and normative gains and losses).

[208] *See* WEINRIB, *supra* note 180, at 115–16.

[209] *See id.* at 116.

[210] *See id.* at 118. Weinrib argues that there is an unjust gain by a defendant who makes a temporary unauthorized use of the plaintiff's property, even though he returns it unimpaired. Even though the use is non-consumptive (that is, it does not damage the plaintiff's interest), the defendant unjustly gains by saving the cost of renting the property; in a sense giving him a sense of superiority over the plaintiff whose property he appropriated. *Id.* By extension, the same principal applies to unauthorized use of intellectual property, which is inherently non-consumptive (that is, use by one does not deprive another), but by engaging in unauthorized use, the defendant benefits by saving the cost of paying for it. If a third party intentionally contributes to the unauthorized use,

a sense of superiority even if it contributes to the infringement. The "intent to infringe" requirement is thus necessary to justify corrective justice. Coleman notes that "[a]nnulling moral wrongs is a matter of retributive justice, not corrective justice."[211] The proposed rule would be consistent with this statement because the third party would not be held vicariously liable unless the plaintiff suffers losses; liability would not be created by the mere existence of a moral wrong, but only by a moral or financial loss.

Knowledge of infringement, however, may be insufficient to establish intangible third-party gain. If the third party has actual knowledge of the infringement and contributes to it, intent to infringe may be inferred from its contribution, but if the third party only has constructive knowledge of the infringement, courts should not find intent to infringe without further evidence of its inducement. The inducement rule set forth in *Grokster* is justified by corrective justice.[212]

V. THE DESIRABILITY OF MONOPOLISTIC GATEKEEPERS' VICARIOUS LIABILITY

Having discussed Google's vicarious liability for trademark infringement in *GEICO*,[213] this Part uses Baidu as an example to assess the desirability of holding monopolistic gatekeepers vicariously liable for copyright infringement. While some think that dynamic and robust competition exists in the search engine industry,[214] Oren Bracha and Frank Pasquale argue that search engines resemble a natural monopoly.[215] Bracha and Pasquale consider several factors, including the search engine algorithm, which is similar to high-cost infrastructure; the network effects that enable the search engine to improve with each additional user; the licensing costs for a database of searchable materials, which newcomers may not be able to afford; and consumer habits that make users reluctant to switch to alternative search engines.[216]

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it has a similar unjust gain, even if it is merely an intangible sense of superiority over the plaintiff.

211 Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427, 442 (1992).

212 *See* Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 936–37 (2005) (adopting the rule that "one who distributes a device with the object of promoting its use to infringe copyright . . . is liable for the resulting acts of infringement by third parties").

213 *See supra* Part IV.

214 *See, e.g.*, Amit Singhal, Op-Ed., *Competition in an Instant*, WALL ST. J., Sept. 17, 2010, at A19.

215 Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1180 (2008).

216 *Id.* at 1181–82.

Gatekeeper liability is generally desirable if a gatekeeper can deter infringement at low costs. Baidu verifies advertisers' identities and the content of their advertisements.[217] It charges advertisers for ads, so if it has to pay for violations by advertisers, it can raise its prices, seek indemnity from the advertisers, or exclude them from its advertising system accordingly.[218] Because of Baidu's market power, excluded advertisers may not be able to find a suitable alternative. Thus, Baidu is able to deter infringing advertisers through the threat of exclusion.

The Baidu-advertiser relationship does not resemble the ISP-subscriber relationship, however. In the ISP-subscriber relationship, subscribers are usually anonymous and judgment-proof,[219] such that an ISP can hardly impose effective sanctions on them. The resulting under-deterrence of subscribers makes it undesirable to impose vicarious liability on the ISP given that it is not yet well positioned to monitor copyright infringement.

Just as an accounting firm is not in a good position to prevent corporate fraud, Baidu may not be well positioned to monitor copyright infringement on advertisers' websites at present. The Baidu-advertiser relationship, however, should be distinguished from the accounting firm-corporation relationship. Although the Big Four accounting firms have significant market share,[220] a fraudulent corporation should have little difficulty in finding a smaller accounting firm after being excluded from the Big Four system. Thus, it is unappealing to expand vicarious liability to the accounting firm or its equivalence in the online gatekeeping world.

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[217] Liming, *supra* note 120.

[218] One commentator notes that it is difficult or even impossible to pursue infringement claims against the individual advertiser because many advertisers are privately registered or are located in foreign countries. *See* Eng, *supra* note 122, at 531–32.

[219] *See Joel Tenenbaum to Appeal 90% Reduced File-Sharing Penalty*, TORRENTFREAK (Aug. 26, 2010), http://torrentfreak.com/joel-tenenbaum-to-appeal-90-reduced-file-sharing-penalty-100826/. Joel Tenenbaum was one of the few file-sharing defendants sued by the recording industry whose case resulted in a judgment. Even though the judge reduced the jury's original award of $675,000 to only $67,500, Tenenbaum stated he did not have the resources to pay even the lower amount, which would still force him into bankruptcy. *Id.*

[220] Baidu's share in the Chinese search market was sixty-four percent, compared to Google's approximately thirty-one percent in the first quarter of 2010. Chris Oliver, *Baidu's China Market Share Up, as Google's Sinks*, MARKETWATCH (Apr. 27, 2010, 12:39 AM), http://www.marketwatch.com/story/baidus-china-market-share-up-as-googlessinks2010-04-27. In contrast, as of 2005 the Big Four accounting firms (Deloitte & Touche, Ernst & Young, KPMG, and PricewaterhouseCoopers) combined audited more than seventy-eight percent of U.S. public companies, a combined market share that is only fourteen percent larger than that of Baidu alone. Robert Bloom & David C. Schirm, *Consolidation and Competition in Public Accounting: An Analysis of the GAO Report*, CPA J., June 2005, at 22.

In addition, imposing vicarious liability on Baidu's P4P system will not have a chilling effect on its organic search service. Despite some loss of revenue, Baidu can continue its organic search service, which still qualifies for safe-harbor protection.[221]

VI. PROPOSED LIABILITY REGIME FOR MONOPOLISTIC GATEKEEPERS

This Part discusses the proposed liability regime for monopolistic gatekeepers using credit card companies as an example. One commentator has proposed a conditioned immunity regime for credit card companies, which is similar to the notice-and-takedown procedure for ISPs:[222]

> One solution would be to require the credit card companies to forward an infringement notice to an accused member along with a warning that their payment service would be terminated unless they reply with a counter notice. If a counter notice is not forthcoming, service would be terminated. If the credit card company receives a counter notice, however, the copyright owner would then have to sue the direct infringer. The credit card companies would only terminate service once the material is ruled infringing by a court of law. If the copyright owner is unable to serve process or enforce a judgment because the alleged infringer is located abroad, they could then inform the credit card company, who would then terminate the service.[223]

An even better solution, however, would be to hold credit card companies vicariously liable. To mitigate the adverse effects of imposing such liability on credit card companies, the company should be allowed to pay nominal damages at a merchant's first offense. If the same merchant commits copyright infringement a second time, the credit card company can be ordered to pay full damages. One possible consequence of the proposed regime is that credit card companies would adopt a policy whereby a merchant would be excluded from the credit card processing network once it commits copyright infringement. The proposed regime properly balances the credit card company's risk with the need to prevent copyright infringement.

VII. CONCLUSION

A provider of an essential service is generally considered to be an unsuitable candidate for vicarious liability because it lacks the ability to supervise its users. Taking Baidu, *Tiffany v. eBay*,[224] and *Perfect 10 v.*

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[221] *Chinese Regulation*, *supra* note 3, at art. 23; *see also* 17 U.S.C. § 512(d) (2006).

[222] 17 U.S.C. § 512(c) (2006).

[223] *David Haskel, A Good Value Chain Gone Bad: Indirect Copyright Liability in* Perfect 10 v. Visa, 23 BERKELEY TECH. L.J. 405, 435 (2008).

[224] 576 F. Supp. 2d 463 (S.D.N.Y. 2008).

Visa[225] as examples,[226] this conclusion may change, however, if the provider has gained monopolistic status in the relevant market.

Monopolistic gatekeepers should be held vicariously liable because they can deter infringers by threat of exclusion.[227] The direct financial benefit prong of the test for vicarious liability should be interpreted narrowly, however, because the rationale for vicarious liability is corrective justice, not unjust enrichment. Finally, any possible adverse effects of vicarious liability may be mitigated by imposing only nominal penalties with regard to first-time infringers.[228]

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225 494 F.3d 788 (9th Cir. 2007).

226 *See supra* Part IV.

227 *See supra* Part V.

228 *See supra* Part VI.

THE DEFENSE OF MARRIAGE ACT (DOMA) AND CALIFORNIA'S STRUGGLE WITH SAME-SEX MARRIAGE

*John Rogers**

This Article sets out a legal framework to examine same-sex marriage rights. As a result of the federal Defense of Marriage Act (DOMA), which puts marriage in the realm of the states, proponents of same-sex marriage were forced to pursue marriage equality state by state. Likewise, opponents of same-sex marriage focused their efforts, even more than they had prior to the passage of DOMA, on legislation and constitutional amendments at the state level. In California, for example, groups both for and against redefining traditional marriage have spent exorbitant sums of money on voter initiatives and judicial challenges to those initiatives trying to resolve the issue. As a result, the state currently has a constitutional amendment banning same-sex marriage—and a judicial challenge to that amendment pending. California, however, is just a microcosm of the entire country. Many states now have constitutional bans on same-sex marriage, while a few others permit it. In the years following the passage of DOMA, the issue has been debated heavily at the state level, but as criticism of the federal law has increased, legal strategies regarding same-sex marriage in the United States have entered a state of flux as the focus shifts from the states back to the federal government. Immediately after California passed its constitutional prohibition of same-sex marriage, proponents of same-sex marriage brought a federal equal protection challenge. After the district court judge issued an opinion declaring the state constitutional amendment to be invalid on federal equal protection and due process grounds, the Proposition 8 Campaign filed an appeal in the Ninth Circuit. With the issue currently moving through the federal courts, it is vital that the courts defer to the political branches of government in order to minimize strife and maintain healthy equal protection jurisprudence.

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I. INTRODUCTION

On May 15, 2008, the California Supreme Court issued a ruling that was sure to have its detractors no matter the result.[1] On that day, the court handed down its ruling for a collection of same-sex marriage cases which had reached the high court. The court's central holding was that the legal distinction state law had drawn between marriage and domestic partnerships violated the equal protection clause of the California Constitution.[2] The reaction on both sides was immediate and emotional. Same-sex couples were ecstatic to be granted the right to marry, while those in opposition immediately began the process to overturn the court.

The legal challenges to the prohibition on same-sex marriage neither began nor ended on that fateful day. In February 2004, the mayor of San Francisco had decided to begin marrying same-sex couples in contravention of state law.[3] In a state challenge to those marriages, the court overturned the validity of the marriages performed at that time, holding that the mayor did not have the power to issue marriage

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[1] *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008).

[2] *Id.* at 400–01.

[3] *See* Lockyer v. City & Cnty. of San Francisco, 95 P.3d 459, 464 (Cal. 2004).

licenses in spite of state law.[4] This was not the end of the litigation on the matter. After this ruling, the couples that were denied the ability to marry mounted a direct challenge to California's same-sex marriage laws that resulted in the momentous ruling outlined above.[5]

One would think that the California Supreme Court's ruling permitting same-sex couples to marry would have put an end to the issue and all litigation on the matter, but that is only where the story began. In response to the holding of the California Supreme Court, California citizens put on the ballot a constitutional amendment that would restore California's previous definition of marriage as being only between a man and a woman. Despite overwhelming odds,[6] the constitutional amendment passed in November 2008 with a vote of approximately 52%–48%.[7]

In response to the passage of Proposition 8, which produced Article 1, Section 7.5 of the California Constitution,[8] same-sex couples sued the state on the ground that the ballot measure was not really an amendment but actually an invalid constitutional revision.[9] The crux of the argument was that the marriage amendment violated equal protection rights, which is a fundamental part of the Constitution, and

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4 *Id.* at 463.

5 *In re Marriage Cases*, 183 P.3d at 398.

6 It is quite surprising that Proposition 8 passed when one considers the position of the California state government on the issue. When the California Supreme Court validated same-sex unions, the government leaders of the state of California backed the California Supreme Court decision. Michael Rothfeld & Tony Barboza, *Governor Backs Gay Marriage*, L.A. TIMES (Nov. 10, 2008), http://articles.latimes.com/2008/nov/10/local/me-protest10. The state government, many prominent politicians, and other public figures positioned themselves in opposition to Proposition 8, while those supporting the proposition feared being branded as bigots. *See* Jessica Garrison et al., *Voters Approve Proposition 8 Banning Same-Sex Marriages*, L.A. TIMES (Nov. 5, 2008), http://www.latimes.com/news/local/la-me-gaymarriage5-2008nov05,0,1545381.story?page =1. The language on the ballot, which can swing an election, was not favorable to the Proposition 8 side. CALIFORNIA GENERAL ELECTION TUESDAY, NOVEMBER 4, 2008: OFFICIAL VOTER INFORMATION GUIDE 9 (Sec'y of State, Debra Bowen ed., 2008). A portion of the guide written by the attorney general of California declared that Proposition 8 was eliminating rights and that the state could lose revenue over the next couple of years if it passed. *Id.* at 54–55. In spite of these factors, the voters approved Proposition 8, just like they had Proposition 22 a few years before. *See* CALIFORNIA VOTER INFORMATION GUIDE, MARCH 7, 2000: PRIMARY ELECTION 50–51 (Sec'y of State, Bill Jones ed., 2008); *see also infra* note 117.

7 Jessica Garrison & Maura Dolan, *Brown Asks Justices to Toss Prop. 8; The Attorney General Tells the State High Court that the Measure Barring Gay Marriage Removes Basic Rights*, L.A. TIMES, Dec. 20, 2008, at A1.

8 CAL. CONST. art. 1, § 7.5 ("Only marriage between a man and a woman is valid or recognized in California.").

9 Amended Petition for Extraordinary Relief, Including Writ of Mandate and Request for Immediate Injunctive Relief; Memorandum of Points and Authorities at 14, Strauss v. Horton, 207 P.3d 48 (Cal. 2009) (No. S168047).

therefore was a constitutional "revision."[10] Although the court heard oral arguments on the issue, it seemed unlikely that the court would overturn this newest ban on same-sex marriage.[11] As suspected, the court upheld the constitutional amendment passed by California voters.[12]

Although California is currently the only state to have overturned the initial ruling by its supreme court, California's struggle to decide the same-sex marriage issue is not unique. The Defense of Marriage Act (DOMA),[13] passed in 1996, effectively took the federal government out of the debate and left the issue in the hands of the individual states. As part of DOMA, Congress not only granted to the states the right to decide who could marry, but also granted the right to decide which marriages were recognized, regardless of where they were performed.[14]

Meanwhile, the people of Canada have also been engaged in the same-sex marriage debate but have charted a different course than the course that led to the United States' DOMA. In 2003, the highest courts of two separate Canadian provinces each reached the conclusion that same-sex couples could not be denied the right to marry.[15] The Canadian Supreme Court, in clarifying the law in this area in 2004, held that it was not within the power of the provinces to change the definition of marriage.[16] That power, according to the court, was vested in the national government.[17] Interestingly, the court did not decide whether same-sex couples should be granted the right to marry, but left that

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[10] *Id.* at 23.

[11] *See* Maura Dolan, *Ruling on Proposition 8: Activists Rally; Justices Hear Arguments; Court Looks Unlikely to Kill Prop. 8*, L.A. TIMES, Mar. 6, 2009, at A1, *available at* http://www.latimes.com/news/local/la-me-prop8-supreme-court6-2009mar06,0,798075.story.

[12] The court published a decision on Proposition 8 in May 2009, *Strauss v. Horton*, 207 P.3d 48, 122 (Cal. 2009), that upheld the validity of Proposition 8 limiting marriage between a man and a woman and found valid the marriages of same-sex couples that had wed prior to the passage of Proposition 8 relying on past Supreme Court precedent.

[13] 1 U.S.C. § 7 (2006) (defining "marriage" to mean "a legal union between one man and one woman as husband and wife" and "spouse" to mean "a person of the opposite sex who is a husband or a wife").

[14] *Id.*; 28 U.S.C. § 1738C (2006).

[15] *See* Barbeau v. B.C., 2003 BCCA 406, paras. 7–8 (Can.); Halpern v. Toronto, [2003] 65 O.R. 3d 161, paras. 154–56 (Can. Ont. C.A.) ("We would reformulate the common law definition of marriage as 'the voluntary union for life of two persons to the exclusion of all others.").

[16] *Re* Same-Sex Marriage, 2004 SCC 79, paras. 18–19, 73, [2004] 3 S.C.R. 698 (Can.).

[17] *Id.*

issue exclusively to the legislature.[18] In 2005, the Canadian Parliament responded, granting the privilege of marriage to same-sex couples.[19]

This Article examines the divergent paths that the United States and Canada have each taken in their attempts to resolve the issue of same-sex marriage. Part II of this Article examines the history and current state of the law concerning marriage in the United States. Because most challenges to same-sex marriage bans rely on the Equal Protection Clause, this section necessarily considers same-sex marriage rights in light of that constitutional ideal. Part III then briefly reviews the Canadian resolution to the issue of marriage. Parts IV through VI explore the benefits and possible pitfalls inherent in comparing the two nations' distinct approaches to marriage legislation. Finally, in examining the two, this Article suggests that the United States should follow the example of its neighbor to the north. This conclusion is predicated upon belief that current equal protection jurisprudence in the United States is being stretched beyond its proper function. The solution is not found in the courts, but, as Canada demonstrates, the solution is found in the national legislature. As long as Congress defaults to DOMA, however, the conflict seen in California and in other states is not likely to end any time soon.

II. THE STORY IN THE UNITED STATES

A. Traditional Marriage and DOMA

Despite present dispute, "marriage" has been traditionally restricted to the union of a heterosexual couple.[20] This is true even as far back as the Roman Empire, which actually had more than one type of marriage, each with varying legal consequences.[21] Interestingly, each of these marriage structures still consisted of a man and a woman,[22] although restrictions remained on who could marry based on the structure of Roman society.[23]

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[18] *Id.*

[19] Civil Marriage Act, S.C. 2005, c. 33 (Can.), *available at* http://laws-lois.justice.gc.ca/PDF/Statute/C/C-31.5.pdf.

[20] *See* GÖRAN LIND, COMMON LAW MARRIAGE: A LEGAL INSTITUTION FOR COHABITATION 32–48 (2008). Roman law recognized marital relationships as requiring a man and a woman. *Id.* Laws referred constantly to "husbands" and "wives." *See id.* at 33–34. In addition, the laws of the United States have traditionally only recognized the union of a man and a woman. *See* Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971) (finding no support in past U.S. Supreme Court decisions for the contention that "restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory."). Hence, litigation surrounding same-sex marriage today is meant to establish, not affirm, that right for those couples.

[21] LIND, *supra* note 20, at 33–34.

[22] *Id.*

[23] *Id.* at 35–36.

Pursuant to its English heritage, the United States has adhered to common law marriage, which can be traced back to Roman times.[24] Throughout the history of common law marriage, marriage was always understood to be the union of a "husband and wife."[25] Although the strictures of how to enter into marriage has changed, such as whether it was to be governed by contractual arrangement or whether some kind of solemnization ceremony was needed,[26] the requirement that marriage consist of a man and a woman has remained constant. Modern debates would therefore be remiss not to acknowledge the historical context in which contemporary efforts to redefine marriage exist.

In the late 1990s, proponents of same-sex marriage became more vocal, and in response to a ruling by the Hawaiian Supreme Court,[27] Congress passed DOMA, a federal statute allowing the states to define marriage. In essence, DOMA did two things: first, it established that, for federal purposes, only marriage between a man and a woman would be recognized;[28] second, it let the states decide for themselves what marriages they would perform and recognize.[29] Since that time the marriage debate has gone from state to state where large amounts of resources have been expended each time the issue has been raised. Meanwhile, the underlying incongruence in federal and state recognition remains unresolved.

The problems confronting each state under the regime created by DOMA are generally the same. First, each state must resolve whether the prohibition on same-sex marriage violates constitutional equal protection principles. Second, courts have yet to resolve whether the Full Faith and Credit Clause of the Constitution requires that same-sex marriages performed in a state where the institution is legal be recognized in states where the institution is banned. Third, there is the discrepancy between federally recognized marriage and the sometimes broader definition of marriage employed by the states.

DOMA is currently under attack in federal courts as same-sex couples seek assurances that their civil unions, held to be valid

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[24] *Id.* at 131. "Common law marriage," according to Lind, is actually a misnomer. Marriage in England was originally administered by ecclesiastical courts who applied canon marital law, which was based on the Roman conception of marriage. *Id.* Nonetheless, this can be said to have become part of the common law heritage.

[25] *Id.* at 32–48, 131.

[26] *Id.* at 139, 149.

[27] David W. Dunlap, *Fearing a Toehold for Gay Marriages, Conservatives Rush to Bar the Door*, N.Y. TIMES, Mar. 6, 1996, at A13. The actual case in Hawaii that raised the alarm of Congress was *Baehr v. Lewin*, 852 P.2d 44, 57 (Haw. 1993) (holding that same-sex couples do not have a fundamental right to marry, but, if properly raised, they might have an equal protection claim).

[28] 1 U.S.C. § 7 (2000).

[29] 28 U.S.C. § 1738C (2000).

marriages in some states, will be recognized as marriage in all.[30] DOMA defines marriage, as it relates to federal benefits or acts, as the union of one man and one woman.[31] Couples from Massachusetts who were married under that state's same-sex marriage laws have consequently begun a legal challenge to DOMA.[32] They allege that DOMA unfairly denies them benefits.[33] It seems the litigation on this point is far from over.

There is also a potential problem when couples are married in one state and then move to another. It is foreseeable that same-sex couples might be asked to move for work purposes from a state that recognizes same-sex marriage to a state that does not. Will this affect the distribution of benefits to that couple? If that couple were to attempt to divorce, would the new state recognize the marriage in order to facilitate the divorce?[34] This issue raises questions regarding the Full Faith and Credit Clause of the Constitution. Only one thing is certain under DOMA: lawyers who work on these issues should have excellent job security for years to come.

B. Constitutional Interpretation

Since the judicial revolution of the Warren Court,[35] the United States has been deeply affected by the dispute as to the proper role of the judiciary in interpreting constitutional rights.[36] Those who admire the Warren Court herald its accomplishments as a large step forward for

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[30] *See, e.g.*, Bishop v. Oklahoma, 333 F. App'x. 361, 362 (10th Cir. 2009); Smelt v. County of Orange, 447 F.3d 673, 676–77 (9th Cir. 2006); Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010).

[31] 1 U.S.C. § 7 (2000). The Ninth Circuit recently declared this law to be unconstitutional. *In re* Levenson, 560 F.3d 1145, 1151 (9th Cir. 2009). Even so, it is clear that the law is still in a state of flux. DOMA created a non-uniform law that absent Congressional action, currently must be resolved in the courts. The orders of the 9th Circuit have been rejected because of DOMA. *See* Carol J. Williams, *Legally Married Same-sex Spouses File Federal Suit; 12 Couples Claim the Defense of Marriage Act Deprives Them of a Range of Benefits Granted to Others*, L.A. TIMES, Mar. 4, 2009, at A4, *available at* http://www.latimes.com/news/local/la-na-defense-of-marriage-act42009mar04,0,1017651.story

[32] Williams, *supra* note 31, at A4.

[33] *Id.*

[34] *See, e.g.*, Chambers v. Ormiston, 935 A.2d 956 (R.I. 2007).

[35] *See The Law: The Legacy of the Warren Court*, TIME, July 4, 1969, at 62, *available at* http://www.time.com/time/magazine/article/0,9171,840195-1,00.html. Fair or not, Chief Justice Warren has since been associated with the liberal judicial philosophy that conservatives oppose.

[36] Ronald J. Krotoszynski, Jr., *A Remembrance of Things Past?: Reflections on the Warren Court and the Struggle for Civil Rights*, 59 WASH. & LEE L. REV. 1055, 1055–56 (2002). Krotoszynski writes about the great achievements of the Warren Court, but also suggests that the Warren Court sometimes made the ends of judicial decisions more important than the means by which they were accomplished. *Id.*

individual rights guaranteed in the Constitution.[37] Those who view the Warren Court less favorably see Chief Justice Warren's rulings as a judicial usurpation of power, describing his actions as so-called "legislating from the bench."[38] The deep divide between conservative and liberal factions in the United States seems to grow wider as the Warren Court decisions are discussed. The truth, however, may lie somewhere in between, wherein both liberals and conservatives make legitimate points.

The latter half of the 20th century saw substantive due process figure prominently in judicial interpretation of constitutional rights.[39] The essence of substantive due process is that due process guarantees are not only procedural safeguards but also are rights that provide protection against arbitrary governmental action "regardless of the fairness of the procedures used to implement them."[40] Hence, the right to privacy, for example, was found by Supreme Court justices who read between the lines of the constitutional text and arrived at the conclusion that an individual's privacy, or liberty, was really what the Founders were trying to protect, in addition to the rights recognized explicitly in the text. In essence, the Court[41] was given the power to decide whether government intrusion into the privacy of an individual was arbitrary or simply wrong.[42] Because privacy was now deemed to be a right, the

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[37] *Id.* at 1056–57.

[38] *See* Catherine Cook, *Legislating from the Bench*, HARVARD POLITICAL REVIEW (Mar. 3, 2009, 6:45 PM), http://hpronline.org/america-and-the-courts/legislating-from-the-bench/.

[39] *See, e.g.*, Krotoszynski, *supra* note 36, at 1057. Krotoszynski cites *Griswold v. Connecticut*, 381 U.S. 476, 481, 484 (1965) and *Roe v. Wade*, 410 U.S. 113, 152–54, 164 (1973) to illustrate the development of the doctrine of substantive due process.

[40] Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 521 (2008) (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)).

[41] The Court, under the theory of substantive due process, thus becomes the last and supreme arbiter of what rights are important and can therefore limit what Congress can do without any express constitutional provision granting that power. *See, e.g.*, Kevin W. Saunders, *Privacy and Social Contract: A Defense of Judicial Activism in Privacy Cases*, 33 ARIZ. L. REV. 811, 852–53 (1991).

[42] George Carey maintains that the ideas of separation of powers and pluralistic democracy served different purposes. George W. Carey, *Separation of Powers and the Madisonian Model: A Reply to the Critics*, 72 AM. POL. SCI. REV. 151, 154–155 (1978). Separation of powers was meant to prevent the accumulation of powers into one person or branch that would lead to an arbitrary exercise of power, or in other words, a government of men. *Id.* A pluralistic democracy was Madison's idea for protecting against the "tyranny" of the minority by the majority. *Id.* It is the multiplicity of factions that prevents a majority from depriving a minority of fundamental rights, and it is the separation of powers that protects a "government of laws" against a government of "men." *See id.* at 154 (quoting MASS. ANN. LAWS art. XXX, § 31 (LexisNexis 2004)). It is therefore hard to imagine that

government was further limited in its ability to interfere with certain activities that people did in private. By making privacy a constitutional right, the Court became the ultimate decision-maker in deciding whether the government has legitimate interests in taking any action that might impinge on the personal rights to liberty and privacy.[43]

Meanwhile, judicial conservatives adhered to an "originalist" reading of the Constitution.[44] The originalists' argument was that the text of the Constitution was supreme, that the original intent of the document must be discerned,[45] and that judges are capable of unnecessarily reading their own views into the Constitution.[46] For example, some judicial conservatives would say that there is no independent constitutional right to privacy because it would have been included in the Bill of Rights.[47]

In determining what interpretive technique is most beneficial to use, it is necessary to examine the circumstances surrounding the drafting of both the U.S. Constitution and the Bill of Rights. Constitutional "progressives" may object to an interpretive approach that looks backwards rather than forwards in determining the nature and scope of fundamental rights in a modern context. After all, circumstances and technologies have changed dramatically, even in this last century. While this criticism is therefore not entirely without merit, it neglects to consider the tremendous value that a backward-looking interpretive methodology offers, especially in light of the peculiar circumstances in which the Constitution's drafters found themselves.

Madison would have envisioned a court successfully performing the role that he only believed a pluralistic society was equipped to do.

43 It appears that this is neither more nor less than the judiciary substituting its own view for the majority view. It is arguable that the Court discovers some rights, not through constitutional principle, but rather through the individual Justices' own moral views. For an example of a case that, perhaps, features the discovery of rights through extra-legal means, see *Lawrence v. Texas*, 539 U.S. 558, 562, 573–74 (2003) ("Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.").

44 *See* Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 624–29 (1994) (describing modern conservative jurisprudence); *see also*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37–38 (Amy Gutmann ed., 1997) [hereinafter A MATTER OF INTERPRETATION].

45 *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989).

46 *Id.* at 863; *see also* Roe v. Wade, 410 U.S. 113, 171–74 (1973) (Rehnquist, J. dissenting) ("To reach its result, the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment.").

47 *See* Mark C. Rahdert, *In Search of a Conservative Vision of Constitutional Privacy: Two Case Studies From the Rehnquist Court*, 51 VILL. L. REV. 859, 879 (2006) (stating that there is no "freestanding" right to privacy in the U.S. Constitution).

The Constitution of the United States can be divided into two very different but very important parts. The first part, that part originally ratified as the Constitution, set up a system of government.[48] It essentially dealt with the distribution of power among various government branches and attempted to determine how those branches should interact with one another. The second part actually came after the ratification of the Constitution in the form of the Bill of Rights.[49] Rather than define the relationships among the organs of government, these rights were concerned with defining the proper relationship between the government and the governed. It essentially served to limit government action directed towards its citizens.

In establishing the federal government, the Founders had no real precedent or experience to guide their actions. The United States Constitution established a unique form of government.[50] Each of the thirteen original colonies had become independent states after the Revolutionary War. The Founders attempted to establish a sovereign government over the states while still maintaining the sovereignty of the states.[51] They did this by delegating powers to the federal or national government and reserving all other powers to the states.[52] Empires had risen before to govern wide territories, but never had a republican government based on popular sovereignty survived very long to govern large portions of the earth.[53] What made the Founders' exercise more complicated was that not only was power separated between the national government and state governments, but the Constitution also divided the powers of the national government into three branches, which previously had only theoretical underpinnings. Considering the uniqueness of the separated powers, combined with the representative

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[48] THE FEDERALIST NO. 51, at 285 (Alexander Hamilton) (E.H. Scott ed., 1898); *see also A More Perfect Union: The Creation of the U.S. Constitution*, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, http://www.archives.gov/exhibits/charters/constitution_history.html.

[49] THE FEDERALIST NO. 84, at 466 (Alexander Hamilton) (E.H. Scott ed., 1898) (responding to objections that the amended Constitution contained no bill of rights but was merely descriptive of the structure and limitations of the federal government); William J. Brennan, *Why Have a Bill of Rights?*, 9 OXFORD J. OF LEGAL STUD. 425, 428 (1989).

[50] JOSEPH J. ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 6–11 (2000) [hereinafter FOUNDING BROTHERS].

[51] JOSEPH J. ELLIS, AMERICAN CREATION: TRIUMPHS AND TRAGEDIES AT THE FOUNDING OF THE REPUBLIC 8–9 (2007) [hereinafter AMERICAN CREATION].

[52] U.S. CONST. amend. X; *see also* William A. Aniskovich, Note, *In Defense of the Framers' Intent: Civic Virtue, the Bill of Rights, and the Framers' Science of Politics*, 75 VA. L. REV. 1311, 1326 (1989) (citing a speech by James Wilson in 1787 that defends the Constitution as one of enumerated powers only).

[53] *See* FOUNDING BROTHERS, *supra* note 50, at 6 ("[No representative government] had ever been tried over a landmass as large as the thirteen colonies. (There was one exception, but it proved the rule: the short-lived Roman Republic of Cicero . . . .).").

nature of the democracy that for the first time in history was governed by a single founding document, one begins to see the enormity of the task that was undertaken by the Founders of the American republic.[54]

The Founders' task was largely theoretical.[55] As a theory, then, implementation of the new government would be tested and necessarily improved as time went on. Because such a government had never existed before, there would need to be an arbiter of last resort that would decide the inevitable disputes that would arise between the multiple power centers in the new republic.[56] That arbiter, pursuant to the Constitution, according to *Marbury*, would be the United States Supreme Court, whose loyalty was to the preservation of the constitutional form of government.[57] By examining the theoretical nature of the formation of our system of government, one can arguably see why the Supreme Court might need greater liberty, perhaps even so far as to read between the lines of the text of the Constitution, in order to preserve the structure of the constitutional, federal, and democratic government that the Founders had created.

The addition of a Bill of Rights, however, was not a theoretical venture into what a government thus created might be able to do.[58] At

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[54] *Id.* at 8–9 (noting the logical "impossibility" of implementing a system of national government that effectively coerced obedience from citizens who themselves possessed an "instinctive aversion" to "coercive political power of any sort"); *see also* AMERICAN CREATION *supra* note 51, at 8–9.

[55] *See* AMERICAN CREATION, *supra* note 51, at 18 (describing the founding of the American republic as an improvisational affair in which the Founders were "making it up" as they went along).

[56] A fledgling Supreme Court squarely addressed this issue in the landmark decision of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Therein it held that

> [i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
>
> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law . . . or conformably to the constitution . . . ; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

Id. at 177–78.

[57] *Id. But cf.* Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706, 2707–08, 2711 (2003) (arguing that despite ensuing interpretations of the case, "the power of judicial review was never understood by proponents and defenders of the Constitution as a power of judicial *supremacy* over the other branches . . . . *[n]othing* in the text of the Constitution supports a claim of judicial supremacy").

[58] *See, e.g.,* THE DECLARATION OF RIGHTS (Eng. 1689); Brennan, *supra* note 49 at 425 (stating that the need for a bill of rights arises from the unique history and problems of a particular community). The Thirteenth and Fourteenth Amendments to the U.S. Constitution, for example, were not passed until after the Civil War and more than a century of time in which the evils of slavery had become fully apparent and caused great

very worst, the new government could turn into a tyranny governed by a despot. The Founders of the republic were not naive about what this would mean for their individual freedoms. They had personal experience and the experience of history to see what unlimited governments could do to their citizens.[59] The Bill of Rights, then, became a practical document that was clearly understood on the basis of experience. Because of the Founders' knowledge of and experience with tyrannical governments, they put in the Constitution only those rights that they deemed most endangered by an overreaching government.[60] Accordingly, when the Supreme Court became an arbiter of last resort[61] for governmental disputes, it also became the arbiter of last resort for disputes regarding the government's abuse of its citizens. Because the Founders were not acting on theory but experience, the interpretation of rights clauses in the Constitution should require close adherence to the text of the Constitution, because the text reflects better than anything else what the Founders ultimately concluded were rights that warranted explicit protection.[62] Therefore, when a court adds substantive constitutional rights in judicial rulings, it usurps the legislative prerogative.

It is important to note that constitutional rights are not the only type of rights that are available to individuals. Making a right constitutionally protected does not create it in the first instance. The right to enter into a contract,[63] for example, although fundamental[64] to

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suffering to those who had been oppressed. *See* John P. Frank and Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131, 133 (1950) (describing the end of slavery and the passage of the Civil War amendments).

[59] In the Declaration of Independence, the colonists cited numerous grievances ranging from the suspension of representation in the Legislature to the corruption of the judiciary. THE DECLARATION OF INDEPENDENCE paras. 5, 7, 11 (U.S. 1776).

[60] For example, see the DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776), in which the Continental Congress outlines many of the grievances that the Colonies had against the British Crown, which included the quartering of troops among the populace, the deprivation of a jury trial, and transportation to foreign shores for trial. Rights protecting against such injustices were thereafter protected in the Third and Sixth Amendments of the U.S. Constitution, respectively.

[61] This is true only barring a constitutional amendment, of course.

[62] *See* A MATTER OF INTERPRETATION, *supra* note 44, at 38.

[63] *See* Lochner v. New York, 198 U.S. 45, 64 (1905) (declaring freedom of contract a constitutional right), *abrogated by* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 394–95 (1937).

[64] There is a theory of rights called "fundamental rights theory." David B. Anders, *Justices Harlan and Black Revisited: The Emerging Dispute Between Justice O'Connor and Justice Scalia Over Unenumerated Fundamental Rights*, 61 FORDHAM L. REV. 895, 895, 899–900 (1993) ("[T]here are certain rights that are so fundamental to liberty and equality that they must constrain the legislative process."). This theory formed the underpinnings of the argument made by the California Attorney General in his argument against the implementation of California's Proposition 8. It basically meant that some rights, such as

our system, should not be considered a constitutional right.[65] To do so would be to take out of the hands of the legislature the ultimate decision of who can contract and what constitutes a contract.[66] Such final decisions are necessarily policy decisions that are better decided through legislative debates. This does not mean that a court, through stare decisis, cannot fashion the body of contract law; it merely means that the ultimate authority to fashion that body of law rests with the elected representatives of the people. This is an important distinction to make. What is explicitly addressed in the Constitution ultimately made it into the document by a supermajority, demonstrating both a common value and a concern about government abuse, and comes within the final purview of the Court to interpret its meaning.[67] What is not stated in the Constitution has not yet obtained a supermajority status, either because it has not become a widely shared value or because Americans feel comfortable that the government will not be tempted to abuse its power relating to that issue, and thus comes within the final review of the legislature elected by the people.[68]

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life, liberty, or property, are so fundamental that the people cannot alter them. The Attorney General argued that marriage was one such right. *See* Nicholas Goldberg, *Gay Marriage on Trial*, L.A. TIMES, Mar. 1, 2009, at A27, *available at* http://www.latimes.com/news/opinion/commentary/la-oe-goldberg1-2009mar01,0,2867679.story?page=1. The difficulties of adherence to such a theory are innumerable, but perhaps the most important difficulty is the question of who decides, and by what criteria, the definition of a fundamental right. Another is that the model rights for the fundamental rights argument—life, liberty, property—can be and are restricted in every government, but subject to due process and equal protection in our own system according to our Constitution. The difficulty in articulating and defending this argument was readily apparent in the oral arguments before the California Supreme Court. Oral Argument, Strauss v. Horton, 207 P.3d 48 (No. S168047), *available at* http://www.calchannel.com/images/sc_030509.html (note the segments at 19:13–23:50 and 33:31–37:30).

[65] U.S. CONST. art. I, § 10 does have a contracts clause. It prohibits the states from "impairing the Obligations of Contracts." The idea of contract is also fundamental to Locke's theory on political government. *See* Brett W. King, *Wild Political Dreaming: Historical Context, Popular Sovereignty, and Supermajority Rules*, U. PA. J. CONST. L. 609, 616–23 (2000) (discussing how individuals initially possess all rights but cede power to a government that is formed by a social contract).

[66] *West Coast Hotel Co.* signaled the demise of substantive due process right to contract expounded in *Lochner*. *West Coast Hotel Co.*, 300 U.S. at 394–95 (quoting Holden v. Hardy, 169 U.S. 366, 397 (1898) and Muller v. Oregon, 208 U.S. 412, 422 (1908)).

[67] This is true unless there is a constitutional amendment, of course.

[68] It is important to note that James Madison, the father of the United States Constitution, did not initially believe that a bill of rights was necessary or effective to protect the rights of minorities under the system that he had created. Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 308–12 (1990). It was his belief that the diffusion of power among people having different ideologies would do more to protect the rights of individuals than any court was capable of doing. *Id.* at 312. As an example, one can look to the *Dred Scott* decision of the United States Supreme Court. Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1856). In that case, the Supreme Court decided that slaves were non-citizens and not subject to the same

Judicial restraint in interpreting constitutional rights thus becomes a vital component of democratic government. Governments are not created, at least in the democratic theory, for their own sakes; they are created to govern and enforce the realm of individual interactions among their citizenry. When the judiciary begins to expand the realm of constitutional rights, it necessarily aggrandizes its own power at the expense of those who are supposed to govern and regulate the affairs of the citizens: the people and their representatives. The people are the ultimate judge of what is acceptable or not acceptable in a representative democracy. The power given to the judge, therefore, is not to decide what is ultimately moral or immoral, acceptable or unacceptable; rather, it is to decide disputes based on what the people have told the judiciary is acceptable. It is therefore ultimately the people, and not the judiciary, that decide how they will be governed and regulated.[69] How this applies to equal protection analysis will be examined later in this Article.[70]

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protections as citizens. *Id.* at 421. Approximately a century later, the Court issued a new ruling in *Brown v. Board of Education*, 347 U.S. 483, 495 (1954), that said the government could no longer discriminate against non-white students by segregating them. The drastic change was not because the court had suddenly become enlightened and was choosing to protect the downtrodden individual. The Court was not granting a new right, but enforcing a constitutional amendment passed by the people decades before, an amendment that mandated equal protection under the laws of the United States for all individuals. U.S. CONST. amend. XIII, § 1 The Court finally saw segregation for what it was: a system of unlawful discrimination that had effectively created second-class citizens.

In addition, Franklin Roosevelt's court-packing scheme is a representation of what a determined majority can do. Many of President Roosevelt's New Deal proposals were being overturned by the Supreme Court as unconstitutional. Roosevelt's solution was to appoint more justices to the Court that would be amenable to his policies. *See* Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court-packing Plan*, 81 AM. POL. SCI. REV. 1139, 1140–42 (1987). This threat seemed to make the Supreme Court more compliant with Roosevelt's policies and the addition of Justices to the Court was unnecessary. *Id.* The point of that story is to demonstrate that a determined majority can eventually have what it wants even when the Supreme Court initially resists. Thus, the greatest protection for individual rights is not a court, but a pluralistic society as James Madison envisioned.

[69] It is interesting to note on this point that the common law system of stare decisis which the United States inherited from England functions fundamentally different from our own system. The British parliamentary system is not governed by one constitutional document as the United States is. Many of the individual rights enjoyed by its citizens, which are substantial, were created through the common law decisions of its judges. For example, the protection against double jeopardy, a constitutional right in the United States, was a common law right in England. Therefore, in the United States the protection against double jeopardy has largely become the realm of lawyers and judges interpreting the Constitution. In England, however, the legislature still retains the ultimate authority to define the protection even after the judges have had their say. The British have recently exercised that prerogative in adopting two reforms to double jeopardy protections during the 1990s, which provide for a second prosecution of an acquitted defendant if his previous acquittal was tainted or if new and compelling evidence of guilt is obtained after the first prosecution. *See* Criminal Justice Act, (2003), §§ 75–79 (Eng.). The people of England can thus overturn a common law decision of the court by an act of the legislature, but when the

C. Marriage Today and Privacy

It is important to state clearly what the issue that underlies the debate concerning same-sex marriage truly is. What same-sex couples are arguing is not that their relationships are being criminalized or that they are being deprived of their liberty to associate and maintain a relationship with someone of their choosing;[71] rather, the issue is whether the government must recognize that relationship as equally valuable to society as traditionally-defined marriage.[72] The fundamental issue in the current marriage debate is whether the marriage of a homosexual couple and the marriage of a heterosexual couple are institutions of equal value to society, such that government must recognize them as equal.

Therefore, the argument that there is a right to privacy or substantive due process right to same-sex marriage cannot be successful because the debate is not about the government entering the home and regulating the affairs therein. The government need not enter the home to recognize a marriage. Rather, people ask that the state provide certain benefits and protections based on their relationship status. The state, if it so desires, can get out of the marriage business entirely without denying any person substantive due process. The issue, then, is whether the government, which has officially sanctioned heterosexual marriage by granting legally enforceable rights and privileges specific to the institution, must also do so for homosexual relations. This is essentially an equal protection issue.

The Supreme Court, in regard to marriage, has also perhaps erred in stating that marriage is a fundamental *constitutional* right.[73] Marriage is a fundamental component of society, which is a reason why the debate concerning marriage is such a contentious issue. Some argue that because marriage is so fundamental, it must be protected from influences that weaken or change it.[74] Others argue that because

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United States courts decide a constitutional issue, it requires a supermajority to change. Such lopsided power should be wielded sparingly and conservatively.

[70] *See infra* Part II.D.

[71] *Loving v. Virginia*, 388 U.S. 1, 12 (1967), the Supreme Court case that declared interracial restrictions on marriage to be unconstitutional focused on due process and equal protection. It is important to distinguish the issues at stake in that case from the present controversy. The couple in *Loving* was not simply denied government recognition, but their relationship was criminalized. For this reason, the court expounded a substantive due process rationale in addition to its substantial equal protection analysis to support the couple's right to marry.

[72] Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871, 1877–78 (1997).

[73] *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 384 (1978).

[74] Lynn D. Wardle, *The Attack on Marriage as the Union of a Man and a Woman*, 83 N.D. L. REV. 1365, 1371–72 (2007); *see also The Divine Institution of Marriage*, THE

marriage is fundamental it should be granted to every person.[75] While both arguments can be persuasive, that still does not make marriage a constitutional right. The fact that marriage is never once mentioned in the Constitution supports the notion that it cannot be considered a constitutional right.[76]

Perhaps, the only constitutional right that possibly *is* implicated in the marriage debate is liberty.[77] People have the liberty right to associate with other people of their choosing. They have the liberty right to form relationships of their choosing. They have the right not to be impeded in the exercise of the liberty right, subject only to due process and equal protection. Because the current debate is not focused on outlawing same-sex relationships, no due process analysis is needed. There is, however, an equal protection analysis that may be required when the government has taken affirmative steps to protect one institution or class while leaving others out in the cold.

D. Equal Protection

The Equal Protection Clause of the United States Constitution is, textually, quite simple.[78] It says that no state may "deny to any person within its jurisdiction the equal protection of the laws."[79] The fundamental assumption in that statement is that every *individual* is of equal value in the eyes of the law. As a nation, the United States has

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CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS NEWSROOM (Aug. 13, 2008), http://beta-newsroom.lds.org/article/the-divine-institution-of-marriage.

[75] *See, e.g.*, Matthew S. Pinix, *The Unconstitutionality of DOMA + INA: How Immigration Law Provides a Forum for Attacking DOMA*, 18 GEO. MASON U. C.R. L.J. 455, 473 (2008); *The Conservative Case for Gay Marriage*, NEWSWEEK (Jan. 9, 2010), http://www.newsweek.com/2010/01/08/the-conservative-case-for-gay-marriage.html [hereinafter *Conservative Case*].

[76] *But cf. Zablocki*, 434 U.S. at 384 ("the right to marry is of fundamental importance for all individuals").

[77] In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court centered the debate on a determination of "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty . . . ." *Id.* at 564. In this case, the Court held that a homosexual couple does have a liberty right to engage in private and consensual intercourse. *Id.* at 578. Interestingly, in this case, Justice O'Connor joined in the judgment but wrote her own concurring opinion. *Id.* at 579 (O'Connor, J., concurring). She believed that the liberty interest that Court used to validate the conduct was not the proper foundation for the ruling, instead relying on equal protection principles. *Id.* She believed that the Texas statute violated equal protection because it first described the illegal sexual conduct, but only made it criminal if two persons of the same sex engaged in the act and found that to be a violation of equal protection. *Id.* at 579, 581.

[78] This Article examines equal protection from a federal point of view, i.e. using the 14th Amendment as a guide, because most state constitutions simply mirror this clause in their own constitutions. As such, the analysis should essentially be the same whether it is applied by federal courts applying federal law or state courts applying state law.

[79] U.S. CONST. amend. XIV, § 1.

declared that each person, each individual, has inherent worth and that the government must treat each person equally. The Equal Protection Clause does not state that every action or ability of every individual is of equal worth, but it implies that simply *being* puts humans on an equal footing.[80] The fundamental unit of analysis for equal protection purposes, then, becomes the individual.[81]

One can argue that equal protection should be applied to protect minorities wherever they may be. There is always a danger that an overreaching majority will seek to secure its own interests at the expense of those that lack the political voice to protect themselves.[82] James Madison himself proposed a structural solution to this problem. He wanted a national legislature of a broad republic to have veto power over state laws that infringed on minority rights.[83] Although Madison's proposed view of a broad republic was accepted, his national veto of state laws was not.[84]

When the Equal Protection Clause was later passed after the Civil War, it still did not reach every minority class that Madison might have envisioned. Often called the United States' Second Constitution,[85] the Reconstruction Amendments (the Thirteenth, Fourteenth, and Fifteenth) put an end to slavery and promoted the equal protection of the laws. Although largely understood to protect freed African Americans, they were more broadly construed to protect anyone from being legally discriminated against based on race (and, as an extension, descent).[86] The Reconstruction Amendments were not construed to protect any possible minority classification.

Interpreting the Equal Protection Clause broadly will cause many conflicts with the legislature, because the act of legislating necessarily

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[80] *Cf.* Universal Declaration of Human Rights, G.A. Res. 217 A (III) , U.N. Doc. A/RES/217(III) (Dec. 10, 1948), *available at* http://www.un-documents.net/a3r217.htm. Article 1 of the Universal Declaration of Human Rights states: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." The focus on birth is an important point. Arbitrary distinctions lacking any rational basis are extremely suspect. Distinctions based on parentage, for example, are suspect because they do not even focus on the individual; therefore, a distinction drawn on that ground stands on very loose footing.

[81] *See* Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). A class of one person can bring an equal protection challenge. *Id.* The Court stated that there must be a rational basis for any distinction. *Id.* at 564–65.

[82] James S. Liebman & Brandon L. Garrett, *Madisonian Equal Protection*, 104 COLUM. L. REV. 837, 842–43 (2004).

[83] *Id.* at 844.

[84] *Id.*

[85] *See, e.g.*, *id.* at 919; Frank & Munro, *supra* note 58, at 134.

[86] *See* Frank & Munro, *supra* note 58, at 143.

involves line-drawing and distinction-making. Congress, for example, has drawn distinctions on political expenditures for various corporations and individuals.[87] It has drawn distinctions based on age and sex,[88] inter alia.[89] One cannot speak of congressional action without acknowledging that Congress's primary purpose is to draw distinctions.

The Supreme Court has struggled to define exactly what equal protection requires. For example, the right to appellate counsel is one area in which an equality rationale has been used to justify the use of appointed counsel for indigent defendants.[90] The Court acknowledged

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[87] *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010). Although not explicitly stating so, the Supreme Court overruled certain restrictions on speech using some equal protection language. Justice Kennedy wrote for the majority:

> Media corporations are now exempt from § 441b's ban on corporate expenditures. . . . Yet media corporations accumulate wealth with the help of the corporate form, the largest media corporations have "immense aggregations of wealth," and the views expressed by media corporations often "have little or no correlation to the public's support" for those views. . . . Thus, under the Government's reasoning, wealthy media corporations could have their voices diminished to put them on par with other media entities. There is no precedent for permitting this under the First Amendment.

Id. at 905 (citations omitted).

From that passage, it is clear that Congress tried to distinguish between media corporations, which perhaps could be considered free from regulation under a freedom-of-the-press rationale, from those corporations that were not media corporations. Among other things, the Court did not like this distinction drawn by Congress and precluded it from drawing such lines in the future.

[88] When analyzing equal protection, courts often look at the immutability of a trait to determine the level of scrutiny that should be applied. *See, e.g.*, Watkins v. U.S. Army, 875 F.2d 699 (9th Cir. 1989). Following cues from the Supreme Court, the Ninth Circuit examined three factors in their totality for determining when to invoke strict scrutiny: a history of discrimination against the group, whether the discrimination embodies gross unfairness, and trait immutability. *Id.* at 724–26.

[89] As an example, all males eighteen years of age and older must register with the selective service. Women, however, are not required to register with the selective service. This is a distinction that is not seriously challenged in mainstream society, even though the relevant statute discriminates both on the basis of age and sex:

> Except as otherwise provided in this title [sections 451 to 471a of this Appendix] it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder. The provisions of this section shall not be applicable to any alien lawfully admitted to the United States as a nonimmigrant under section 101(a)(15) of the Immigration and Nationality Act, as amended (66 Stat. 163; 8 U.S.C. 1101), for so long as he continues to maintain a lawful nonimmigrant status in the United States.

50 U.S.C. app. § 453(a) (2006).

[90] Douglas v. California, 372 U.S. 353, 355–57 (1963). Even in this case strongly supporting the equality principle, Justice Douglas discussed fairness of procedure. That

that because the states are under no obligation to provide an appeal, they have struggled to identify the specific justification for requiring the appointment of counsel.[91] Initially, the Court relied on the principles of equality and equal protection. Later decisions, although overtly relying on equal protection, actually use language more appropriate for discussing due process.[92]

The purpose of the Fourteenth Amendment was to eliminate distinctions based on race, ethnicity, descent, and other similar factors.[93] The Fourteenth Amendment is much easier to apply when applying equal protection to those classes. The amendment was meant to prevent society from separating into classes based upon the vagary of birth.[94]

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language is due process language, not equality language. Justice Harlan's dissent argues that the case should have been decided under a due process rationale. *Id.* at 361 (Harlan, J., dissenting).

[91] *See id.* at 360–61 (Harlan, J., dissenting) ("In holding that an indigent has an absolute right to appointed counsel on appeal . . . the Court appears to rely both on the Equal Protection Clause and on the guarantees of fair procedure . . . ."). *See also* Griffin v. Illinois, 351 U.S. 12, 18 (1956).

[92] *See, e.g.*, Ross v. Moffitt, 417 U.S. 600, 612 (1974). The Court, per Justice Rehnquist, declared that equal protection "does not require absolute equality or precisely equal advantages." *Id.* (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 24 (1973)). The obligation of the state is to give a defendant "an adequate opportunity to present their claims fairly." *Id.*; *accord* Yale Kamisar, *Poverty, Equality, and Criminal Procedure: From* Griffin v. Illinois *and* Douglas v. California *to* Ross v. Moffitt, *in* National College of District Attorneys, *Constitutional Law Deskbook* 1-101, 1-101 to 1-108 (1978). The difficulty the court encountered here is trying to decide exactly what equality is required for equal protection analysis. It is no easy task for a court to engage in, especially the farther it moves from the amendment's original purpose. It has had to rely more on due process fairness principles rather than equal protection.

[93] The Supreme Court has discussed the connection between discrimination based on race and ancestry. In *Rice v. Cayetano*, 528 U.S. 495 (2000), Justice Kennedy explained why race is a forbidden classification:

> The ancestral inquiry mandated by the State implicates the same grave concerns as a classification specifying a particular race by name. One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens.

Id. at 517.

[94] *See, e.g.*, The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 95 (1873) (The Fourteenth Amendment "recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their birth . . . and not upon . . . *the condition of their ancestry*.") (emphasis added); *see also* Gerald D. Berreman, *Caste in India and the United States*, 66 AM. J. OF SOC. 120, 120–21 (1960) (stating that the segregation laws prevalent in the United States were easily defined as a caste system). As Justice Kennedy stated in *Rice v. Cayetano*, racial discrimination is discrimination that implicates distinctions based on ancestry and not based on one's own merit or qualities. *Rice*, 528 U.S. at 517; *see also* Frank & Munro, *supra* note 58, at 133–34

After all, racial discrimination was nothing more than an easy way to classify someone based upon ancestry and birth.[95] That is why equal protection is so vital to a democratic society. It was meant to prevent the invidious discrimination that led to the formation of hereditary classes, or castes.[96]

In order to draw distinctions based on race or ancestry, the legislature must have a compelling justification, subject to strict scrutiny.[97] Unfortunately, in a democratic society, strict scrutiny analysis gives the judicial branch greater power than the political branches. This means that it should only be used sparingly and applied to those classifications—such as race and ancestry—that can lead to the formation of hereditary classes. The trend, as in California however, has been to extend strict scrutiny analysis to any class of people that the court believes has been historically discriminated against or to persons who are discriminated against based on an immutable characteristic.[98]

Difficulties arise when courts try to stretch equal protection beyond hereditary classifications. The current debate over sexual orientation and same-sex marriage is a good example of these problems. Many

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(stating that the Thirteenth Amendment only freed the slaves, but did not secure for them rights that put them in the same class as whites).

[95] The French Revolutionary Constitution stated: "Men are *born* and continue free and equal in their rights." Frank & Munro, *supra* note 58, at 137 (emphasis added). Equality was meant to strike at the heart of hereditary privilege, not every law a legislature might ever make.

[96] In using the term "hereditary," it is not meant as a bar to any discrimination based upon a trait inherited from a parent. Rather, it is meant to distinguish those discriminations or distinctions that limit the descendents based on the station or trait of the ancestor. For example, racial segregation laws in the United States created an inherited caste system in many parts of the United States, in which a black person's class was determined by the parents to whom she was born. The civil rights movement, therefore, was a direct attack upon the inherited caste/class system that had developed in the United States through segregation laws. For more on this topic, see Berreman, *supra* note 94, at 120, in which Berreman defines caste as a "hierarchy of endogamous divisions in which membership is hereditary and permanent."

[97] Johnson v. California, 543 U.S. 499, 505 (2005); Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . . [C]ourts must subject them to the most rigid scrutiny. Pressing public necessity [i.e., compelling governmental interests] may sometimes justify the existence of such restrictions . . . .").

[98] *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008). California's test for a suspect classification is that the discriminating characteristic must be 1) based on an immutable trait, 2) bear no relation to a person's ability to perform or contribute to society, and 3) be associated with a stigma of inferiority and second class citizenship. *Id.* at 442. For a gay rights activist's response to the immutability argument in sexual orientation issues, see generally Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994) (arguing for pro-gay legal strategists to avoid what she perceives to be an unnecessary and divisive immutability argument).

courts have examined the issue, with different courts reaching drastically different conclusions, partly because scientific evidence to prove that sexual orientation is an immutable trait like race is inconclusive.[99] What makes traits such as race so distinctive is that they require no scientific evidence to prove their immutability. Even if a scientist were come into court and say that he could turn off a race gene so that it is not an immutable trait, it would not change the invidious nature of the discrimination. Race is a suspect distinction because it judges and limits children based upon their parents. It is more difficult to argue that sexual orientation is an immutable trait inherited at birth.

Due to the much more controversial and difficult nature of extending equal protection beyond those hereditary classifications of which race is representative, the level of judicial scrutiny applied should be lower. The principles of democracy are needed just as much when the issue to be decided upon is controversial, if not more so. The United States Supreme Court still can apply equal protection scrutiny, however, because it uses multiple levels of scrutiny in applying the Equal Protection Clause.[100] This means that because discriminating on the basis of sexual orientation does not lead to the formation of a hereditary class, an intermediate or rational basis level of scrutiny should be applied.[101] But regardless of the level of scrutiny applied, the restriction

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[99] *Cf. Conservative Case*, *supra* note 75 ("Science has taught us, even if history has not, that gays and lesbians do not choose to be homosexual any more than the rest of us choose to be heterosexual."). See Maura Dolan, *Federal Judge Who Ruled Prop. 8 Unconstitutional Plans to Step Down*, L.A. TIMES, Sept. 29, 2010, http://latimesblogs.latimes.com/lanow/2010/09/federal-judge-who-ruled-proposition-8-was-unconstitutional-announces-he-will-step-down.html, in which the author discusses the trial and how the question regarding immutability was raised. See also the findings of fact in Perry v. Schwarzenegger, no. C09-2292VRW, 74–75 (2010), *available at* https://ecf.cand.uscourts.gov/cand/09cv2292/files/09cv2292-ORDER.pdf. It would be immaterial to have findings of fact regarding the ability to change sexual orientation if it were not meant to argue that sexual orientation were immutable.

[100] *See, e.g.*, Clark v. Jeter, 486 U.S. 456, 461 (1988) (applying an intermediate level of scrutiny to statutes of limitations in paternity actions in Pennsylvania).

[101] The current test for strict scrutiny, for example, could still be an effective test for invoking intermediate scrutiny. Under intermediate scrutiny, a legislative distinction must bear a substantial relation to the important government interest. *See id.* Changing the test for equal protection would undoubtedly call into question the legal authority examining discrimination based on religion, and perhaps even alienage. State discrimination based on religion, however, would run afoul of the Free Exercise Clause, and maybe even the Establishment Clause. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49 (2004) (Thomas, J., concurring). State discrimination against aliens runs afoul of the Supremacy Clause and Congress's ability to regulate aliens and their admission to the United States. *See* Graham v. Richardson, 403 U.S. 365, 376–80 (1971). Although the Court went into a lengthy equal protection analysis to decide *Graham*, it acknowledged that the same result could have been reached under the Supremacy Clause and the requirement of uniformity in the treatment of aliens. *Id.*

on same-sex marriage does not violate the Equal Protection Clause, as the following sections of this Article will establish.

1. Purpose for Which Marriage Was Recognized

In *Loving v. Virginia*, the Court made sweeping statements about the value of marriage and its fundamental nature to our society:

> Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classification embodied in these statutes . . . is surely to deprive all the State's citizens of liberty without due process of law.[102]

The issue in *Loving* was not simply state recognition, but state *criminalization* of interracial marriage.[103] On that issue, the courts must engage in a due process analysis, an issue not addressed by this Article.

Loving stated perfectly why marriage had been afforded such a prominent role in our society: it is "fundamental to our very existence and survival."[104] Marriage was recognized as a special institution because it was deemed most appropriate to propagate the human race and nurture the rising generation.[105] Such is the essential and fundamental role that marriage occupies in our society. Society has said that traditional heterosexual marriage is the ideal that works the best at accomplishing these goals and therefore has given it special recognition.[106] Although this has been emphasized less at various times

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[102] Loving v. Virginia, 388 U.S. 1, 12 (1967) (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

[103] The married couple in *Loving* actually wed in the District of Columbia and returned to Virginia to live. While there, they were charged with violating the ban on interracial marriage and sentenced to one year in prison. The judge then commuted the sentence on condition that the individuals involved agreed to leave the state and not return together for a period of twenty-five years. *Id.* at 2–3.

[104] *Id.* at 12.

[105] This language used by the court is also found in many religions. For example, the Canon of the Catholic Church on marriage states:

> The matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole of life and which is ordered by its nature to the good of the spouses and the procreation and education of offspring, has been raised by Christ the Lord to the dignity of a sacrament between the baptized.

1983 CODE c.1055, § 1, *available at* http://www.vatican.va/archive/ENG1104/_P3V.HTM.

The Muslim faith also has similar concerns with regard to marriage. Islam finds especially important "the primacy of the heterosexual relationship; and the importance to the children of life within a stable family setting." In Islam, and indeed in most civilizations, the family is seen as the fundamental unit for social stability and well-being. Mohammad Al-Moqatei, *The Philosophy of Marriage in Islam*, 7 WARWICK LAW WORKING PAPERS 5 (1985).

[106] *See* Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 29–32 (1996) (reviewing the status of marriage in U.S. history).

throughout history, it remains part of the essential nature of marriage to promote the survival and well-being of the human race. This connection between marriage and children was understood as far back as Roman times.[107] Although it was not always a point of emphasis, it took on a greater emphasis at times when Roman birthrates began to dwindle.[108]

This emphasis on the reproduction potential is also present in the law's traditional distinction between annulment and divorce. Traditionally, a marriage could be annulled for failure to consummate.[109] California's family code, although not explicitly granting the right of annulment based on failure to consummate,[110] presupposes consent and consummation in order for a marriage to be valid.[111] Additionally, when the California Supreme Court in *In re Marriage Cases* declared same-sex marriage legal in California, it quoted previous precedent by the court declaring that marriage was a fundamental right of man.[112] What the court in did not quote, however, was that marriage was fundamental because "[m]arriage and procreation are fundamental to the very existence and survival of the race."[113] This necessarily implies an emphasis on heterosexual reproduction.

Opponents sometimes argue that children have nothing to do with marriage for various reasons. First, perhaps, is that the government does not ask whether people seeking to marry are able to have children. Others choose simply not to have children, while others have children without being married. The criticisms may be many, but they all neglect to see that the government is permitted to promote an ideal. For example, the economy of the United States is based on an ideal market model, and the government tries to encourage market economics.[114] Unfortunately, the market is not always perfect or ideal in real life, and

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[107] LIND, *supra* note 20, at 32–33.

[108] *Id.*

[109] Consummation has to do with the act of sexual coupling between a man and woman. Recognizing the potential discrepancy in the law as it relates to same-sex marriage, which would allow annulment of a marriage that had not been consummated, the Canadian Parliament deemed it important to clarify that a marriage was "not void or voidable by reason only that the spouses are of the same sex." Civil Marriage Act, S.C. 2005, c. 33, art. 4 (Can.), *available at* http://laws-lois.justice.gc.ca/PDF/Statute/C/C-31.5.pdf. Such a legislative re-definition of an institution is on much firmer ground than a constitutional re-definition engaged in by various state supreme courts.

[110] CAL. FAM. CODE § 2210 (West 2004).

[111] *Id.* § 301.

[112] *In re* Marriage Cases, 183 P.3d 384, 399 (Cal. 2008).

[113] Perez v. Lippold, 198 P.2d 17, 19 (Cal. 1948).

[114] *U.S. Market Economy*, ECONOMYWATCH, http://www.economywatch.com/market-economy/us-market-economy.html (last visited Nov. 1, 2010). *See also* Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911) (applying anti-trust laws that were designed to restrict restraints of trade and monopolies that hinder the functioning of a competitive market).

the government must then step in and deal with what are called "market failures." This action, however, does not mean that government must cease having as a societal goal a perfectly functioning market economy. Similarly, the possible "failures" of a traditional marriage should not be interpreted as a reason to abandon the ideal.

The California Supreme Court in *In re Marriage Cases* appears to have used the "failures" of traditional marriage as justification for declaring that same-sex marriage is equal to traditional marriage, but that was not its only innovation. The truly great innovation was not that it allowed same-sex relationships, but that it declared that *official recognition* of any such relationship was a fundamental right.[115] In doing so, the court fundamentally altered what marriage had been defined as by both legislative and judicial precedent. And in using the legislatively created domestic partnership laws to force recognition of same-sex marriage,[116] the court declared legislative enactments supreme to voter referenda, in that it ignored the greater than sixty percent of the California population that had voted to retain the traditional distinctions of marriage fewer than ten years before.[117]

2. Lawful vs. Unlawful Discrimination

Having briefly examined why marriage was distinguished as a fundamental institution, it is now possible to proceed to the second part of the analysis to determine what kind of discriminations are lawful or unlawful. It is important to emphasize that discrimination is not per se illegal. There are legitimate uses of discrimination to further societal ends. Look, for instance, at the limited liability partnership. In many states, the ability to enter into such a partnership is limited to certain professional classes. The government appears to have created this entity because it thought that it would further certain societal goals. The

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[115] *In re Marriage Cases*, 183 P.3d at 399. What makes this even more troubling was the line of questioning that the California Supreme Court engaged in during the oral arguments over the validity of Proposition 8, now CAL. CONST. art. I, § 7.5. The Court asked if the legal right to marry were denied to gay couples, whether heterosexual couples should be permitted to marry. In essence, it asked if it should create a separate institution not called "marriage" in which all people could engage regardless of whether the relation was homosexual or heterosexual, not permitting anyone to use the moniker of marriage. Such a line of questioning, however, seems to fly in the face of the court's rhetoric in its own Opinion declaring state recognition of marriage to be a fundamental right of the individual.

[116] *In re Marriage Cases*, 183 P.3d at 397–98.

[117] Evelyn Nieves, *Those Opposed to 2 Initiatives Had Little Chance from Start*, N.Y. TIMES, Mar. 9, 2000, at A27, *available at* http://www.nytimes.com/2000/03/09/us/2000-campaign-california-those-opposed-2-initiatives-had-little-chance-start.html (reporting that California's Proposition 22 passed by a margin of 61.4 percent to 38.6 percent).

ability to form such a partnership, however, is limited to certain individuals named by statute.[118]

Limiting marriage to opposite-sex couples does not violate the Equal Protection Clause because it is both rationally and substantially related to "the very existence and survival of the race."[119] The Equal Protection Clause does not determine whether same-sex couples can love each other and is silent as to whether they will remain faithful to each other.[120] The distinction is based on encouraging the continuing survival and well-being of the human race. Heterosexual relations are the only way to perpetuate the human race, and encouraging lasting unions between the biological parents of children so that they might effectively raise those children is a compelling justification for governmental action.

Discrimination based on *ability* is permitted by law, while discrimination based on *being* is not. The California Supreme Court in *Perez v. Lippold* understood this as it examined the prohibition on interracial marriage then in effect.[121] Justice Traynor wrote, "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. . . . [T]he state clearly cannot base a law impairing fundamental rights of individuals on general assumptions as to traits of racial groups."[122] In declaring interracial marriage bans unconstitutional, the court was saying that the discrimination was unlawful because it was based on ancestry and being, rather than ability.[123]

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[118] *See, e.g.*, CAL. CORP. CODE § 16101(8).

[119] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[120] *In re Marriage Cases*, 183 P.3d at 400. The Supreme Court of California defined marriage as a lasting union between two people who loved each other. But marriage had traditionally required the ability to consummate and procreate. *See supra* Part II.D.1. In actuality, the domestic partnership laws of California acknowledged the ability of homosexual couples to love each other and unite in a lasting relationship—why else would the institution have been created in the first instance? It appears that the voters of California, however, wanted to retain the traditional aspect of marriage that not only required love and ability to form a lasting union, but also consummation and child bearing.

[121] Perez v. Lippold, 198 P.2d 17, 21 (Cal. 1948).

[122] *Id.* at 19–20. In addition, Justice Traynor astutely observed that the right of equal protection was not the right of any group, racial or otherwise, but belonged to the *individual*. He wrote, "The right to marry is the right of individuals, not of racial groups. The equal protection clause of the United States Constitution does not refer to rights of the Negro race, the Caucasian race, or any other race, but to the rights of individuals."

It would appear from that statement that the heightened scrutiny that the court affords to some *groups* over others when examining equal protection claims is both unnecessary and unconstitutional.

[123] *See id.* at 19–21. The court uses race and ancestry almost interchangeably in this passage regarding discrimination.

The court later reasoned that the government could discriminate in marriage based on ability. For example, the ability to transmit infectious disease to spouse or offspring was declared in dicta as a possibly valid prohibition to marriage.[124] The ability to marry has been at the core of most judicial decisions upholding traditional marriage.[125] When the California Supreme Court declared the prohibition on same-sex marriage unconstitutional, it focused on whether those individuals had been given the opportunity to enter into a recognized lasting relationship, and not on whether they could fulfill the obligations of marriage as they were defined.[126] Unlike the ban on interracial marriage, in which interracial couples were fully capable of fulfilling all obligations relating to marriage as it had been defined,[127] the court in *In re Marriage Cases* simply redefined marriage so that homosexual couples could be included.[128]

Comparing the restriction on same-sex marriage to former restrictions on interracial marriage is actually a red herring. The restriction on interracial marriage was so invidious because it was based strictly on a person's ancestry and appearance.[129] In this way, racial

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[124] *Id.* at 21.

[125] *In re Marriage Cases*, 183 P.3d 384, 385 (Cal. 2008), *rev'd*, 49 Cal. Rptr. 3d 675, 746 (Cal. App. 1 Dist. 2006). The court cites other cases supporting its reasoning, which was perhaps most clearly stated by a Kentucky appellate court in *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. Ct. App. 1973) ("[A]ppellants are prevented from marrying, not by the statutes of Kentucky or the refusal of the County Court Clerk . . . to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined.").

[126] *Compare In re Marriage Cases*, 183 P.3d at 400 (rejecting the traditional notion that one's legal right to marry may be restricted by sexual orientation and the ability to reproduce), *with Perez*, 198 P.2d at 18–19 (reasoning that the state may reasonably regulate marriage to accomplish important social objectives, such as procreation).

[127] *Perez*, 198 P.2d at 21 (citing Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886)). The arguments in *Perez* as to why the state should limit marriage to the same race did not have to do with a capacity to enter marriage. Instead, counsel for the state argued that the underlying concern was the public health. Under the court's reasoning, non-white people were more susceptible to disease and risked spreading contagious disease to their white spouse and possibly children. Their argument never complained that other races lacked capacity to enter marriage, but only that the public health would be jeopardized. The court in California saw that making generalized assumptions about a particular racial class is an especially invidious form of discrimination. The court determined that if the state wanted to discriminate towards marriage in that manner, it would have to individualize and not base the discrimination on generalized assumptions. *Id.*

[128] The court essentially re-defined marriage as the ability to "establish a loving and long-term committed relationship with another person and responsibly to care for and raise children." The special concern that marriage was essential to the very survival and perpetuation of the race never entered into the reworking of the marriage definition. *In re Marriage Cases*, 183 P.3d at 400.

[129] *Perez*, 198 P.2d at 19 (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

discrimination laws were a type of bill of attainder[130] in which a person's ancestry had effected a "corruption of blood."[131] This denial of rights or discrimination based on ancestry struck at the heart of a free and democratic society.[132] Thus, the restriction on interracial marriage directly violated the Equal Protection Clause. As explained above, the purpose of the amendment was to prevent discrimination based on race and descent that served to perpetuate hereditary classes. It cannot logically be argued that racial segregation and discriminatory laws did anything other than produce a class of persons that were singled out for denial of rights based only on their place of birth.

The restriction on same-sex marriage, on the other hand, has nothing to do with a person's ancestry but focuses rather on the consenting parties and their capacity to fulfill the purposes for which marriage was recognized. A homosexual union is fundamentally different than a heterosexual union in its capacity to perpetuate the race; a homosexual union has no innate ability to perpetuate the race without the assistance of technology and at least one member of the opposite sex.

Proponents of same-sex marriage argue that the denial of the legal right to marry does the exact same thing that racial discrimination did: it creates a category of second-class citizens.[133] This is a legitimate concern. The government has offered benefits to some persons and denied those benefits to others based on sexual orientation. There is no doubt that the voters have stated that they value one institution more than the other. This line drawing, however, is a proper function of the

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[130] JACK STARK, PROHIBITED GOVERNMENT ACTS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 54–56 (2002). It is true that these laws are not necessarily easily classified as bills of attainder, but what makes these laws even worse than bills of attainder is that they discriminated based on ancestry, even though the ancestors were innocent of any wrongdoing.

[131] *Id.* at 55. Additionally, bills of attainder "offend the notion of fundamental fairness held by many citizens of this country." *Id.* at 53. It is interesting that many of the Founders spoke about equality when, under the British system, they were locked out of certain circles because of their status at birth. Alexander Hamilton was illegitimate, for instance, and would have never attained the status that he did under the British system that valued birth so heavily. George Washington also could have never reached the heights that he did under the British system. Ironically, the Founding Fathers would establish a hybrid system that awarded merit for some individuals but perpetuated the distinctions based on birth that they themselves were adamantly opposed to.

[132] William Baker, *William Wilberforce on the Idea of Negro Inferiority*, 31 J. HIST. OF IDEAS 433, 433 (1970) (describing how Englishmen in the sixteenth century believed that the dark color of Negroes and their lower station in society could be traced back to Noah's curse on Ham).

[133] *See In re Marriage Cases*, 183 P.3d at 436–37; Sherri L. Toussaint, Comment, *Defense of Marriage Act: Isn't It Ironic . . . Don't You Think? A Little Too Ironic?*, 76 NEB. L. REV. 924, 935 (1997); *Conservative Case*, *supra* note 75.

legislative process. But the question remains whether this particular line that was drawn violates the Equal Protection Clause.

The distinctions between heterosexual and homosexual marriage do not violate the Equal Protection Clause because they do not discriminate based on race or other hereditary classifications. The law does not perpetuate a hereditary class. A heterosexual couple can give birth to someone that later declares herself to be homosexual, and a homosexual couple, if they are assisted in having children, can give birth to heterosexual children. There is no hereditary privilege or discrimination that is being passed down from generation to generation. Unlike racial segregation laws, a homosexual's standing in society is not determined by the standing of his or her parent. The distinction in marriage is actually a distinction based on the individual's ability to perform the same requirements that marriage has traditionally been held to require.

Same-sex marriage is not an equal institution with traditional marriage because same-sex couples do not have the same ability to procreate as heterosexual couples do.[134] Having previously established that the ability to procreate was part of the fundamental understanding of what marriage entailed, it is surprising that courts validating same-sex marriage gloss over this requirement by saying that every individual has a right to form a "marriage with the person of one's choice."[135] The ability to form a family with children requires heterosexual reproduction. That some people adopt or otherwise decide not to have children does not negate the fact that society may want to encourage children to be born to their biological parents who are committed to each other and to raising those children. For a court to get involved in policy-making and to decide that same-sex marriage is just as moral, healthy, and efficient for society as traditional marriage is irresponsible at best. Because of the benefits that traditional marriage brought to society, society in turn recognized and incentivized the traditional marital union. Such discrimination is lawful, reasonable, and necessarily outside the competence of a court to overrule.

The argument that the Supreme Court has already held that conduct cannot significantly alter the right to marry is disingenuous.[136] A prison inmate's right to marry could not be infringed based on his

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[134] This is different than saying that someone cannot marry because of their sexual orientation. A homosexual still has the ability to procreate—it just requires another person of the opposite sex. The difference arises in that homosexual unions will never be able to naturally produce offspring. The ability of two individuals of the same-sex to produce offspring is impossible and not just an assumption.

[135] *In re Marriage Cases*, 183 P.3d at 420.

[136] Toussaint, *supra* note 133, at 959.

criminal conduct, according to the Court in *Turner v. Safley*.[137] The convict's conduct in that case, however, had nothing to do with his ability to fulfill the marital obligations as legally defined. The convict was still able to form a lasting and loving relationship, creating offspring with the opposite-sex spouse, and caring for the offspring. In contrast, the conduct of a homosexual relationship stands in direct conflict with the reasons for which marriage was initially recognized by government: to promote "the very existence and survival of the race."[138]

Additionally, using the definitional argument to support traditional marriage is not an unlawful discrimination based on sex,[139] but a reflection of a societal value that is "fundamental to our very existence and survival."[140] It is true that looking at statutes that describe marriage to be between only one man and one woman appear on their face to be discriminating on the basis of sex. But this lawful "discrimination" reflects the reason that marriage was recognized by government in the first place. The survival of the human race depends on heterosexual reproduction, and no argument for changing the definition of marriage to include same-sex marriage will do anything to change that fact. Such legislative discrimination, or line-drawing, is commonplace. How a court could fault the government for wanting to encourage and incentivize the union of man and woman to perpetuate the human race and to provide for rearing of the next generation is almost beyond belief.

Even those states that have equal rights amendments for the sexes have not interpreted them to mandate recognition of same-sex marriage. The Supreme Court of Illinois has held that its equal rights amendment was meant to secure rights for females equal to males.[141] With that understanding, a restriction equally applicable to both sexes, such as a restriction against marrying someone of the same sex, would pass constitutional muster. The Colorado Supreme Court likewise has held that equal rights amendments do not prohibit treatment that is "reasonably and genuinely based on physical characteristics unique to just one sex."[142] Colorado courts later declared that a decision to change

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[137] Turner v. Safley, 482 U.S. 78, 95–96 (1987). The Court found that the inmates were capable of forming a lasting relationship and that eventually, upon release, they would be able to consummate the marriage. The Court left in place the legality of marriage bans for inmates of lifetime sentences. *Id.* at 96.

[138] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[139] *See* Toussaint, *supra* note 133, at 941 ("[A] definitional justification to an equal protection or due process challenge offers no support for denying same-gender marriages because the definition of marriage itself is being challenged.").

[140] Loving v. Virginia, 388 U.S. 1, 12 (1967) (citing *Skinner*, 316 U.S. at 541).

[141] *See* Paul Benjamin Linton, *Same-Sex "Marriage" Under State Equal Rights Amendments*, 46 ST. LOUIS U. L.J. 909, 918 (2002) (citing People v. Ellis, 311 N.E.2d 98, 100 (Ill. 1974)).

[142] People v. Salinas, 551 P.2d 703, 706 (Colo. 1976).

the state's marriage laws was a matter for the legislature and not the courts.[143]

The argument that the government is unlawfully discriminating against homosexuals because of their sexual orientation also lacks merit. Some critics claim that it is not fair to discriminate against the wants and desires of homosexuals because they are acting on the same feelings and drives that heterosexual individuals have towards others of the opposite sex.[144] This argument, however, does nothing more than force the government to recognize all physical appetites as equal. Using physical appetite as a condition that invokes the Equal Protection Clause is a misapplication of the clause. Most human actions can be traced back to some form of physical appetite. Declaring that all actions must be equally protected based upon personal appetite or desire conflicts with the rule of law.[145] Carried to its fullest extent, the government would be left virtually powerless to regulate the affairs of its citizens or to encourage certain behavior because of a newly enshrined physical appetite exception.

Critics of limiting marriage to its traditional meaning also argue that the majority is simply imposing its morality on the rest of society. The argument that many have proposed, even some on the Supreme Court, is that moral disapproval does not validate a legislature prohibiting certain activities.[146] What those espousing this view fail to see are that many laws that have been written have contained the moral values of the majority. Law is a collection of moral judgments. Because laws in a representative democracy are passed by a majority, the law is a reflection of the majoritarian morality.[147] A judge who declares that moral approval or disapproval is an insufficient ground for the legislature to act does not understand what law-making is. An obvious example of the majoritarian morality prohibiting an act is the prohibition on murder. The moral impetus for the restriction is easy to see here because murder harms others in a very real way. On the other

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[143] Ross v. Denver Dep't of Health & Hosps., 883 P.2d 516, 520 (Colo. App. 1994).

[144] Toussaint, *supra* note 133, at 942.

[145] *See, e.g.*, The Queen v. Dudley & Stephens, [1884] 14 Q.B.D. 273 at 287–88 (Eng.). This is the famous case involving shipmates who were stranded at sea. On the verge of death, they cannibalized the weakest among them so that they would not die on the open sea. No instinct could be stronger than the will to survive as manifested in that case. It was, in the sailors' estimation, a surety that they would die if they did not have something to eat. In rejecting their defense, the court responded famously that the temptation to kill could not be held a defense. As Lord Coleridge put it, "[T]he absolute divorce of law from morality would be of fatal consequence . . . ." *Id.* at 287. If mercy were warranted, it would have to be meted out by the sovereign. *Id.* at 288.

[146] Lawrence v. Texas, 539 U.S. 558, 577–78 (2003) (citing Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

[147] *See id.* at 589–90 (Scalia, J., dissenting).

hand, many laws are not so clear cut, especially those that concern consensual acts.

The majority has the ability under the American system to regulate consensual acts of individuals. Never was this more apparent than when Congress and the states prohibited the practice of polygamy. In the 19th century, members of the Church of Jesus Christ of Latter-day Saints engaged in the consensual practice of polygamy as a part of their faith. With the rising Republican Party declaring polygamy to be one of the "relics of barbarism,"[148] the federal government enacted heavy-handed statutes to end the practice in the territories of the United States. At the height of this legislation, Congress criminalized polygamy and disenfranchised both polygamists and their sympathizers.[149] In addition, the church corporation was dissolved and much of its property confiscated.[150] In *Reynolds v. United States*, the Supreme Court, in upholding anti-polygamy laws, declared that the Constitution does not protect religious practices that are deemed by society to be immoral.[151] If

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[148] Laura Elizabeth Brown, Comment, *Regulating the Marrying Kind: The Constitutionality of Federal Regulation of Polygamy Under the Mann Act*, 39 MCGEORGE L. REV. 267, 273 (2008).

[149] *Id.* at 273–74 (discussing The Morrill Act, ch. 126, § 1, 12 Stat. 501 (1862) (repealed 1910)).

[150] *Id.* at 275–76.

[151] 98 U.S. 145 (1878). In circumscribing the freedom of religion, the Court declared, "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order. Polygamy has always been odious . . . ." *Id.* at 164. The court did not care if the social ills that were believed to spring from polygamy were actually existing at the time, as it quoted Chancellor Kent:

> An exceptional colony of polygamists under an exceptional leadership may sometimes exist for a time without appearing to disturb the social condition of the people who surround it; but there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.

Id. at 166. Later, the Court asks:

> Can a man excuse his practices . . . because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto *himself. Government could exist only in name under such circumstances.*

Id. at 166–67 (emphasis added). Whether the belief in effect is religious or otherwise, it cannot become an excuse for actions that society has deemed inappropriate. Footnote 52 of the California Supreme Court's decision in *In re Marriage Cases*, 183 P.3d 384, 434 (Cal. 2008), tries to distinguish polygamy from same-sex marriage based on the ills that polygamy would cause to the institution of marriage itself. There are two problems with this reasoning by the court. First, to say that same-sex marriage does not diminish the traditional form of marriage is simply a moral judgment of the court overruling a moral judgment of the people. The *Reynolds* case, on the other hand, deferred to the moral judgment of the people. *Reynolds*, 98 U.S. at 166. Second, the Court in *Reynolds* did not care if polygamy was currently bringing the ills upon society that some people thought it

Congress has the ability to *criminalize* certain acts based on moral judgment, then it can decide which marriages will be *recognized* solely on the morality of the majority. Law simply cannot be separated from moral judgments.

III. CANADA'S RESOLUTION

A. The Provincial Courts

Canada's Charter of Rights and Freedoms contains an equal protection provision somewhat similar to that of the United States, although it goes into more detail.[152] It was this equal protection provision that led the provinces of British Columbia[153] and Ontario[154] to declare the restriction on same-sex marriage to be unconstitutional. In announcing that marriage should be extended to same-sex couples, the Ontario high court recognized a belief of those in favor of legalizing same-sex marriage: "Denying same-sex couples the right to marry perpetuates the . . . view . . . that same-sex couples are not capable of forming loving and lasting relationships . . . ."[155] While two provinces had granted the right of same-sex couples to wed, the province of Quebec had created an institution similar to domestic partnerships in California.[156] The legal institution of marriage in Canada in early 2005 was therefore largely in the same predicament as it is currently in the United States.[157]

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would. *Id.* The Court acknowledged that there could be situations when polygamy would not disturb the social condition of the people. *Id.* Nevertheless, it held that it was within the authority of Congress to decide that issue. *Reynolds* has not been overturned.

[152] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, sec. 15, 1982, *being* Schedule B to the Canada Act, 1982, c.11 (U.K.).

[153] Barbeau v. British Columbia, 2003 BCCA 406, paras. 7–8 (Can. B.C.).

[154] Halpern v. Toronto (2003), 65 O.R. 3d 161, 170 (Can. Ont. C.A.).

[155] *Id.* at para. 94. This is, interestingly, the same rationale that the California Supreme Court used when legalizing same-sex unions in California, where Chief Justice George recognized that "an individual's capacity to establish a loving and long-term committed relationship with another person and responsibly to care for and raise children does not depend upon the individual's sexual orientation . . . ." *In re Marriage Cases*, 183 P.3d at 400. What each of these statements demonstrates is that the courts were either not sure what the definition of marriage was in its entirety or that they were seeking to change the definition. Marriage, as stated previously in this Article, recognized three things: a loving, lasting, and consensual relationship that was capable of procreation and the raising and caring for the fruits of the marital union, i.e., children.

[156] *Marriage and Legal Recognition of Same-Sex Unions: A Discussion Paper*, CAN. DEP'T OF JUSTICE (Nov. 2002), http://www.justice.gc.ca/eng/dept-min/pub/mar/3.html.

[157] By 2005, at least two provinces had declared that same-sex marriage was required by their constitution in Barbeau v. British Columbia, 2003 BCCA 406 (Can. B.C.) and Halpern v. Toronto (2003), 65 O.R. 3d 161 (Can. Ont. C.A.). Similarly, courts in various states of the United States have declared same-sex marriage constitutionally required. On the other hand, there is no federal legislation pending on marriage as was the case in Canada in 2005. *See Re* Same-Sex Marriage, 2004 SCC 79, para. 1, [2004] 3 S.C.R. 698 (Can.).

B. The Canadian Supreme Court

In 2003, the Supreme Court of Canada was asked to give its opinion on the Canadian Parliament's proposed legislation concerning same-sex marriage.[158] The first question was whether the Canadian Parliament had the authority to define the institution of marriage; the second was whether extending marriage to same-sex couples would violate the Canadian Charter of Rights and Freedoms; the third was whether religious clergy could be compelled to perform such unions; and the fourth was whether the opposite-sex requirement for traditional marriage was consistent with the Charter of Rights and Freedoms.[159] The second and third questions asked of the court were subsidiary to the more important first and fourth questions. The first question was whether the national legislature had the authority to legislate with respect to marriage, and the fourth question was essentially an equal protection question that courts in the United States are currently struggling to answer.

Deciding whether the Canadian Parliament had exclusive authority to legislate in regard to marriage required a different analysis than what would be required in the United States. The Canadian Constitution (Constitution Act, 1867) contains a detailed list of powers for both the national and provincial governments.[160] In the case of marriage, the national legislature was given authority over marriage and divorce, while the provinces were granted authority over solemnization of marriage at the local level.[161] The Canadian Supreme Court went through a two-part analysis to determine, first, the "substance" of the law, and second, which government had authority over that substantive law.[162]

In *Re Same-Sex Marriage*, the court concluded that the power to define the capacity to marry was vested in the national legislature.[163] The high court first determined that allowing same-sex individuals the right to marry pertained to the legal capacity to enter into marriage.[164] Second, the court found that legal precedent in Canada had traditionally recognized the power of Parliament to define the capacity to marry while

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[158] *Re* Same-Sex Marriage, 2004 SCC 79, para. 1, [2004] 3 S.C.R. 698 (Can.).

[159] *Id.* at paras. 2–3. (The fourth question was added to the request in January of 2004.)

[160] *See, e.g., id.* at para. 17. The United States Constitution, by contrast, only lists delegated powers to the national government (or by contrast, those forbidden to the states), while reserving to the states all other powers not delegated to the federal government. U.S. CONST. amend. X. The powers reserved to the states are never actually enumerated.

[161] *Re Same-Sex Marriage*, 2004 SCC 79 at para. 17.

[162] *Id.* at para. 13.

[163] *Id.* at para. 18.

[164] *Id.* at para. 16.

leaving to the provinces the performance of such marriages once that capacity had been recognized.[165] Thus, the Canadian Supreme Court held that Parliament had exclusive authority to define the capacity to marry to include same-sex couples.[166]

The court ultimately declined to answer the question whether denying same-sex couples the right to marry violated the Constitution's guarantee of equal protection.[167] In the court's view, it would be unwise to delve into this inquiry because the government had already taken a positive, affirmative stance on same-sex marriage and because so many individuals were already relying on lower court decisions endorsing same-sex marriage.[168] Regardless of those reasons, the court had already declared that Parliament had the authority to determine the capacity to marry. In light of that ruling, the court declined to insert itself into an issue that the legislature was committed to act upon. A decision on this point, the court feared, could needlessly put into question the uniformity of law that the Parliament was attempting to address.[169] Not long after the court's decision in *Re Same-Sex Marriage*, the Canadian Parliament passed a bill legalizing same-sex marriage throughout Canada.[170]

IV. THE DIFFICULTIES AND ADVANTAGES OF A COMPARISON

Comparing legal regimes to form recommendations for reform in one of them is never an easy task. Each nation undoubtedly has its own legal history and precedents to follow. Each country's structure of government is different, and the political factions also cater to different concerns in each country. Nevertheless, if comparative analysis were ever appropriate in the context of United States law, then it is most fitting to compare it with Canada. Canada is similarly situated, both politically and economically, to the United States, and has a similar federal structure. As such, it is perhaps the most useful comparison to make.

A. Difference in the Federal Structure

Although both Canada and the United States are federal systems, there are fundamental differences between the two. The Canadian Constitution sought clarity in defining the roles of the federal government vis-à-vis the provincial governments. The Constitution Act

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165 *Id.* at para. 18.

166 *Id.*

167 *Id.* at para. 64.

168 *Id.* at paras. 65–66.

169 *Id.* at para. 69.

170 Civil Marriage Act, S.C. 2005, c. 33 (Can.), *available at* http://laws-lois.justice.gc.ca/PDF/Statute/C/C-31.5.pdf.

of 1867 actually lists powers given to both the federal government and the provincial governments.[171] With these clearly delineated powers, the Supreme Court of Canada is forced to examine, whenever an issue of federalism arises, whether the act in question most resembles a power given to the federal or provincial governments. The provinces exercise broad authority. This is most aptly demonstrated by a provision of the Canadian Charter of Rights and Freedoms that permits a province to opt out of application of a federal law if a strong social consensus to the contrary exists in the province.[172] Canada, to say the least, is a strong federal system.[173]

The United States, on the other hand, has a weaker federal system. The Constitution of the United States only lists powers delegated to the federal government; all other powers are reserved to the states.[174] The Supreme Court of the United States is not forced by the Constitution to ask the question whether an act is more like a power given to the federal government or the states, but rather, it is forced only to consider whether the act relates to a power given to the federal government. In this way, the federal government can wield immense power in comparison with the states. This is not to say that the states have no role; it simply means that the national government of the United States has broad authority to regulate the affairs of its citizens.

The differences in the federal structures would suggest that the United States Congress could define marriage with less concern about judicial and state interference than in Canada.[175] In interpreting the Canadian Constitution, the Supreme Court of Canada has to decide whether an act of Parliament is more like a power delegated to the states or to the national government.[176] The United States would not face such an obstacle. The United States Congress would simply have to

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[171] Constitution Act, 1867, 30 & 31 Vict., c. 3, §§ 91-92 (U.K.).

[172] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 33 (U.K.).

[173] "Strong federal system" is used here to denote a system in which the states/provinces are able to exercise greater power in relation to the national government. In contrast, a weaker federal system would be one in which the national government would be able to exercise greater power than the local governments. *See, e.g.*, Katherine C. Healy, *Reading First, Federalism Second? How a Billion Dollar NCLB Program Disrupts Federalism*, 41 COLUM. J.L. & SOC. PROBS. 147, 164 (2007) (describing a "strong federal system" as a system of governance in which states are given great latitude in developing policy).

[174] *Compare* U.S. CONST. art. I, § 8, *with* U.S. CONST. amend. X.

[175] Despite the U.S. federal structure, U.S. Supreme Court precedent seems to hold sacred the states' ability to regulate in that area. *See* United States v. Lopez, 514 U.S. 549, 564 (1995) (rejection of the federal government's theory of the commerce power that would give federal government power akin to the states' police power).

[176] *Re* Same-Sex Marriage, 2004 SCC 79, para. 13, [2004] 3 S.C.R. 698 (Can.).

prove that its exercise of power was "necessary and proper"[177] to carrying out one of its delegated functions. Not only can the United States legislate what is necessary and proper, but those acts then become the supreme law of the land under the Supremacy Clause of the Constitution.[178]

When it chooses not to act, Congress essentially allows a few states to legislate for the entire country. It is possible that the Supreme Court would eventually find DOMA unconstitutional because the Act attempts to circumvent the Full Faith and Credit Clause of the Constitution.[179] States have to deal constantly with the various property laws of married couples that move across state lines, but to disregard an established legal entity altogether is something different. By failing to act, Congress's fear in passing DOMA will be realized: one state could effectively legislate for all other states.[180] By forcing a state that has not yet legalized same-sex marriage (or perhaps even declared it unconstitutional) to recognize it would effectively establish a national same-sex marriage law. This would run contrary to our ideal of representative democracy.

A possible hurdle for Congress in defining the capacity to marry is posed by some Supreme Court decisions that have suggested that family law is strictly a matter for the states.[181] The Full Faith and Credit Clause of the United States Constitution, however, is not a one-edged sword. After declaring that each state should recognize the acts of another, the clause continues: "and the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, *and the Effect thereof*."[182] In effect, does DOMA declare that same-sex marriages performed in some states are void or voidable in states that do not recognize them? DOMA appears to give states the authority to declare void same-sex marriages performed in other states.[183] That could have very undesirable effects on long-established, legally-recognized relationships formed in other states.

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[177] U.S. CONST. art. I, § 8, cl. 18.

[178] U.S. CONST. art. VI, § 1, cl. 2.

[179] U.S. CONST. art. IV, § 1.

[180] *See* David W. Dunlap, *Fearing a Toehold for Gay Marriages, Conservatives Rush to Bar the Door*, N.Y. TIMES, Mar. 6, 1996, at A13.

[181] *See e.g.*, United States v. Lopez, 514 U.S. 549, 564 (1995).

[182] U.S. CONST. art. IV, §1 (emphasis added).

[183] DOMA's provisions are codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C. *See In re* Gregorson's Estate, 116 P. 60, 61–62 (Cal. 1911), for a discussion on the difference between void and voidable marriage. Void marriages can be attacked in any proceeding and declared a nullity from the beginning. A voidable marriage can only be deemed a nullity in specific proceedings for annulment, but is otherwise valid to parties outside the marriage.

Congress should exercise power over the capacity for marriage under the Commerce Clause.[184] Congress' power under the Commerce Clause, however, is not terribly clear following *Gonzales v. Raich*.[185] Marital status presently confers considerable economic benefits to the couple involved. Most, if not all, rights conferred upon married individuals are economic in nature and have substantial property ramifications. Federal, state, and employment benefits are affected by marital status, as are property rights. Not only are benefits like social security payments affected by marriage laws, but so are the employment benefits of thousands upon thousands of federal employees spread throughout the nation. Currently, a heterosexual couple can be married in practically any state of their choosing, and it is not uncommon for a couple to travel to wed in their ideal spot. When that couple returns to their home state, legal and economic benefits are recognized fairly easily. One economic transaction (the wedding or contract signing) in one state can end up having economic ramifications across multiple states in which the couple may have property or may be incurring benefits. Congressional regulation therefore would be a direct regulation of interstate commerce.[186] It also would substantially affect interstate commerce because numerous benefits conferred by employers, the federal government, and state governments would be affected. Such benefits are economic in nature and can include health benefits, retirement benefits, sick leave, etc. Failure to provide for those benefits under DOMA has been a significant catalyst for federal lawsuits being instituted across the nation.[187]

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[184] U.S. CONST. art. I, § 8, cl. 3.

[185] Gonzales v. Raich, 545 U.S. 1 (2005). At issue in *Gonzales* was the regulation of marijuana in California after the state passed the Compassionate Use Act of 1996. *Id.* at 5. Federal law still prohibited the cultivation and possession of marijuana, and Congress was granted the authority to regulate matters substantially affecting interstate commerce. *Id.* at 9. Recent Supreme Court case law had tried to limit such regulation of matters substantially affecting interstate commerce to those only economic in nature. *Id.* at 36. Therefore, matters that were not in their very nature economic, even if they qualified under the "substantially affecting interstate commerce" line of commerce clause jurisprudence, could not be regulated by the federal government. *Id.* Justice Scalia, in his concurrence, tried to salvage the "economic or non-economic" line of reasoning supporting Congress's power to regulate interstate commerce. *Id.* at 33–36 (Scalia, J., concurring). It is not entirely clear, as the dissent points out, that such a distinction can be amply maintained. *Id.* at 42–43 (O'Connor, J., dissenting).

[186] *See, e.g.*, Caminetti v. United States, 242 U.S. 470, 491 (1917) (holding that "[t]he transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress, under the commerce clause of the Constitution . . .").

[187] *See, e.g.*, Abby Goodnough, *State Suit Challenges U.S. Defense of Marriage Act*, N.Y. TIMES, July 9, 2009, at A20 (stating that thousands of couples have been married in states like Massachusetts but are subsequently denied benefits).

B. Political Differences

The political debate in Canada over same-sex marriage had reached its zenith when the Supreme Court of Canada handed down its decision defining the capacity for marriage under the authority of the Canadian Parliament. The Canadian Parliament had already expressed its intentions to proceed with legalizing same-sex marriage regardless of the court's decision.[188] With the majority of Parliament having declared its intentions to legalize same-sex marriage, the court did not deem it necessary to decide the equal protection argument that had been placed before it.

On the other hand, the issue has not yet become ripe on the national level in the United States, partly because of DOMA. There is no consensus in Congress on how to resolve the same-sex marriage issue, or whether they should act at all. In addition, the Constitution of the United States does not give Congress an explicit role in marriage in the same way the Canadian Constitution gives Parliament an explicit role. These differences all raise the question as to whether the courts in the United States should leave the issue to the legislatures and, specifically, the United States Congress.

V. RECOMMENDATIONS

Governments are instituted to regulate the affairs of their private citizens. With that understanding, the democratic ideal is best suited to the task. Democratic societies are based on the idea that giving more people a voice produces better results for the society as a whole. Putting power in the hands of the few often leads to non-optimal results. On the other hand, will the people as a whole always make the correct choice? No. But democratic theory is based on the principle that the people as a whole are correct more often than a few self-interested people who have been entrusted with great power.

Courts in the United States should leave the issue to the Congress regardless of how far in the political process recognition of same-sex marriage may be. Some may argue that the Canadian Supreme Court did not rule on the equal protection issue because it was moot based on Parliament's declared intentions. But the Canadian Court did acknowledge that defining the capacity for marriage was the province of the national Parliament. Those who argue that the Court did not rule on the equal protection issue chiefly because Parliament was already going to act no matter what the Court would have decided, make a mockery of

[188] *Re* Same-Sex Marriage, 2004 SCC 79, para. 65, [2004] 3 S.C.R. 698 (Can.).

democratic ideals.[189] The courts in the United States should abstain from making any constitutional rulings on same-sex marriage and let the democratic process work to define marriage.

Today, some argue that the courts should protect minorities from the tyranny of the majority. As the argument goes, the majority will continue to suppress minorities because they can. Majoritarian government is inherently dangerous to minority groups that hold no power. Unless the courts intercede, minority groups will never be treated fairly or get a proper hearing of their viewpoint. This argument ignores the fact that courts have traditionally been poorly suited to this goal. The same Court that produced *Brown v. Board of Education*[190] and *Loving v. Virginia*[191] also produced the *Dred Scott*[192] decision and *Plessy v. Ferguson*.[193] The real driver of social change has always been the people—not the courts. The English slave trade was not ended by judicial decree.[194] Slavery was not ended in the United States by the courts.[195] Equal protection became a constitutional principle because of constitutional amendment, not constitutional decision.[196] The right to vote was given to minorities by recourse to the political process.[197] Those

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[189] *Id.* at paras. 61–71. The Canadian Supreme Court itself stated that this was not the only reason that it declined to answer the question, but that a number of considerations led to its silence on the issue.

[190] 347 U.S. 483, 493–95 (1954). This case overruled *Plessy v. Ferguson*, 163 U.S. 537, 548–52 (1896) and all separate-but-equal statutes applying to race.

[191] 388 U.S. 1, 12 (1967). This decision struck down state laws that prevented interracial marriages as a violation of the U.S. Constitution.

[192] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). This notorious decision denied slaves the ability to bring a suit for a violation of their constitutional rights because the Court reasoned that they were not citizens and thus not protected by the Constitution. *Id.* at 421–22.

[193] *Plessy*, 163 U.S. at 548–52. This is the infamous case that upheld the "separate but equal" statutes that permitted discrimination against individuals based on race. The case involved a man of mixed descent (7/8 Caucasian and 1/8 African-American) who was denied passage in the white compartment of a passenger railcar. *Id.* at 538. It is perhaps easy to see in *Plessy* what Justice Traynor decried as discrimination based on ancestry in *Perez v. Lippold*, 198 P.2d 17, 19 (Cal. 1948). The man involved appeared to be white but his black ancestry prevented him from enjoying the same rights as other white people. *Id.* at 18. There is a clear difference between the discrimination in *Plessy* and the current marriage laws in the United States. The author is unaware of any discrimination today based on ancestry.

[194] Louis Taylor Merrill, *The English Campaign for Abolition of the Slave Trade*, 30 J. NEGRO HIST. 382 (1945).

[195] The Civil War, Lincoln's Emancipation Proclamation, and the Thirteenth Amendment to the Constitution accomplished that.

[196] U.S. CONST. amend. XIV, § 1. This amendment was passed in 1868. *See* The Library of Congress, *Reconstruction (1866–1877)*, http://www.americaslibrary.gov/jb/recon/jb_recon_subj.html (last visited Sept. 6, 2010).

[197] U.S. CONST. amend. XV, § 1; *see also* U.S. CONST. amend. XIX (women's suffrage).

who cried that they must be protected from the majority were assured of their political voice by the majority.[198]

When courts view themselves as the protectors of minorities, they necessarily impede the democratic function, becoming governors themselves. Courts exist to enforce the rule of law, not to protect minorities. The view that courts must intercede to recognize same-sex marriage because they otherwise would not be recognized is an affront to democratic government. Those of homosexual orientation are free to express their ideas and frustrations. Such expression is protected by the Constitution;[199] it is protected so that the democratic process can work more efficiently and so that minorities will always have a chance to be heard in order to challenge the status quo of the majority.

The courts are ill-equipped to deal with the issue of same-sex marriage because legislatures have already acted on the issue, and there is no constitutional issue to decide. Most states have enacted either constitutional or statutory bans on same-sex marriage.[200] In the presence of affirmative legislative action, the courts cannot overturn such action unless it is a violation of a constitutional mandate. The issue of same-sex marriage, as discussed above, does not implicate the Equal Protection Clause of the Constitution, nor does recognition of marriage involve a due process issue. The only recourse, then, lies in the legislative process. The only truly legitimate form of same-sex marriage thus far has occurred in those states in which the legislative process has approved the union.[201]

Of the political branches in the United States, the Congress is best situated to deal with the issue of same-sex marriage. Like the Canadian Parliament, the United States Congress should define the capacity to marry. If Congress were to define the capacity to marry, it would prevent problems with the Full Faith and Credit Clause of the United States Constitution. It would also ensure that all U.S. citizens would be represented in the resolution of the issue, rather than allowing one state to legislate new social policy for the rest of the country.

The role of the states would be preserved because they would retain the power to solemnize marriage and to affix property rights. The Canadian system recognizes that this distinction is both logical and

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[198] Such was the manifestation of the genius of Madison's plan creating multiple power centers in a pluralistic society.

[199] U.S. CONST. amend. I.

[200] NATIONAL CONFERENCE OF STATE LEGISLATURES, SAME SEX MARRIAGE, CIVIL UNIONS AND DOMESTIC PARTNERSHIPS, DEFENSE OF MARRIAGE ACTS (DOMA), http://www.ncsl.org/default.aspx?tabid=16430 (last updated Apr. 2010). As of April 2010, forty-one states have enacted Defense of Marriage Acts.

[201] *See, e.g.*, VT. STAT. ANN. tit. 15, § 8 (2010); N.H. REV. STAT. ANN. § 457:1-a (2010).

feasible.[202] If the United States Congress were to define the capacity to marry in the United States, each state would retain its own set of rights and obligations that attach to the marital union and when such a union became valid. This practice would ensure the proper role of the states in regulating the institution of marriage in their respective jurisdictions.

Not only would the states retain control over the incidents of marriage, but they would also retain exclusive control over all other conjugal but non-marital relations.[203] Nothing would prevent the states from creating civil unions or domestic partnerships as they now exist; this power would extend to both same-sex and opposite-sex couples.

A Congressional attempt to define marriage would not be entirely without precedent because Congress has already constructively done so in regard to polygamy. When Congress banned polygamy in the territories of the United States, the United States was only half its current size. By making monogamous marriage a prerequisite to admission to the Union, Congress had effectively legislated a national definition of marriage. Any attempt to legalize polygamy within a state after admission to the Union would have been met with stiff federal opposition. With the current understanding of federal power and past Congressional action, congressional power to act in this realm is not unimaginable.

Nonetheless, even if the Congress does not act, the resolution must still lie in the *political* branches of government, at whatever level. California's attempted judicial resolution did nothing more than force a very strained election contest that was essentially a referendum on the state's own popular decision. Judicial overreach, especially in constitutional decision-making, does not lead to passive acceptance; rather, it appears to cause more strife in the long run. *Roe v. Wade* is an example of such a case, and that decision, from more than thirty years ago, is still just as hotly debated today, especially in Supreme Court nominations. In effect, such overreach circumvents the genius of the republic the Founding Father's created. It removes certain issues from debate, when debate is critical to the very survival of our governmental institutions.[204] Removing issues from the debate of the political branches

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[202] *See Re* Same-Sex Marriage, 2004 SCC 79, paras. 32–33, [2004] 3 S.C.R. 698 (Can.).

[203] The Canadian Supreme Court points out that, even with Parliament having exclusive authority over defining the capacity for marriage, the provinces retained their power over other non-marital, but still conjugal, relations. *Id.* at para. 33.

[204] FOUNDING BROTHERS, *supra* note 50, at 15–16. Professor Ellis states that the genius of the revolutionary generation is that one side never completely won in interpreting the meaning of the revolution. In other words, the revolutionary generation found a way to contain the debate that raged amongst themselves by creating institutions that could perpetuate the debate in an ongoing and safe manner.

serves only to anger and alienate those who lost the debate. The increasing tension of Supreme Court nominations is an example of that anger.

VI. CONCLUSION

Deciding whether same-sex couples have the legal right to marry is properly a decision for the legislature, not the courts. Equal protection analysis does not mandate recognition of same-sex marriage, and current decisions to the contrary manifest judicial overreaching into the legislative prerogative. Courts should therefore refrain from recognizing same-sex marriage when to do so would require a constitutional decision overturning a legislative enactment.

Congress currently stands in the best position to resolve the current debate over same-sex marriage. The Commerce Clause would permit a Congressional definition of marriage. Congress has done this in the past as it concerns polygamy and it could do it again as it relates to same-sex marriage. The Canadian experience shows that this would be a reasonable act for Congress to undertake without upsetting the balance of federalism in the United States. But even if Congressional action is not forthcoming, the courts should not decide the issue. The answer must come from the political branches—at the state or federal level.

A CRISIS IN INDIAN COUNTRY: AN ANALYSIS OF THE TRIBAL LAW AND ORDER ACT OF 2010

*Gideon M. Hart**

ABSTRACT

Crime and violence have long been a serious problem in Indian Country. In recent years, though, the extraordinary levels of gang activity and high rates of sexual violence against Native American women have received a large amount of media attention. Responding to this problem, Congress passed the Tribal Law and Order Act of 2010 ("TLOA" or "the Act"). Through this legislation, Congress seeks to lower the rates of crime in Indian Country, particularly with regard to crimes committed against Native American women; the Act significantly increases the resources and authority of federal prosecutors and agencies in Indian Country and increases the sentencing authority of tribal courts.

This Article considers the major provisions of this landmark Act and concludes that it is an important piece of legislation that could potentially have profound effects in many parts of Indian Country. Although the Act was widely supported, however, this Article argues it does not do enough and is instead only a short-term remedy to the problems facing Indian Country. The Article proposes several pieces of legislation that would provide long-term solutions, including increasing the sentencing authority of tribal courts and legislatively overturning the jurisdictional limitations imposed on tribal courts by the United States Supreme Court in *Oliphant v. Suquamish Indian Tribe*. Both of these major reforms could be used as tools to increase the status and skill of tribal courts, eventually making them a much more equal third sovereign.

INTRODUCTION

Twenty-four-year-old Richard Wilson has been a pallbearer at the funerals of five of his fellow members of the North Side Tre Tre Gangster Crips. Most of the gang members were only teenagers when they died, often victims of senseless violence.[1] Richard Wilson, though, is not a

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[1] Erik Eckholm, *Gang Violence Grows on an Indian Reservation*, N.Y. TIMES, Dec. 14, 2009, at A14.

gang member in the Nickerson Gardens neighborhood of Los Angeles or on the south side of Chicago; instead, he is one of an estimated 5,000 Native American[2] gang members living on Pine Ridge Indian Reservation in rural South Dakota, home to the Oglala Sioux tribe.[3] The Pine Ridge Reservation is not alone in struggling to deal with rising gang violence. Unfortunately, gangs are becoming increasingly common throughout the largely rural landscapes of "Indian Country."[4]

The high levels of gang and domestic violence in Indian Country[5] are topics receiving an unusually large amount of attention recently, both in Washington and in the mass media.[6] For example, Attorney General Eric Holder recently stated that "in many parts of the Indian country, the situation is dire. Violent crime has reached crisis proportions on many reservations."[7] In response to the current epidemic of violence in Indian Country, the Tribal Law and Order Act of 2010 was recently passed by both Houses of Congress and signed into law by President Obama.[8] A previous version of the bill was introduced in both

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2 This Article uses the term "Indian" and "Native American" interchangeably and no particular distinction is intended.

3 Eckholm, *supra* note 1.

4 Mary Annette Pember, *Gangs in Indian Country*, DAILY YONDER (Sept. 17, 2009), http://www.dailyyonder.com/gangs-indian-country/2009/09/17/2350.

5 "Indian country" is defined in 18 U.S.C. § 1151 as including (1) land within Indian reservations, (2) dependent Indian communities, and (3) Indian allotments. 18 U.S.C. § 1151 (2006).

6 Gavin Clarkson, Op-Ed., *Beyond the Law*, L.A. TIMES, Aug. 3, 2007, at A27; Eckholm, *supra* note 1; Michael Riley, *Principles, Politics Collide*, DENV. POST, Nov. 13, 2007, at A01; Carson Walker, *Feds See 'Proliferation' of Indian Gang Activities*, INDIAN COUNTRY TODAY, July 17, 2009, *available at* http://www.indiancountrytoday.com/national/plains/51025707.html; Memorandum from David W. Ogden, Deputy Attorney Gen., U.S. Dep't of Justice, to United States Attorneys with Districts Containing Indian Country (Jan. 11, 2010), *available at* http://www.justice.gov/dag/dag-memo-indian-country.html; *All Things Considered: Rape Cases on Indian Land Go Uninvestigated* (NPR radio broadcast July 25, 2007), *available at* http://www.npr.org/templates/transcript/transcript.php?storyId=12203114; *Gangland: The Wild Boyz* (History Channel television broadcast June 4, 2010) (a documentary about the Wild Boyz gang, a gang that is comprised primarily of Oglala Sioux); *Tell Me More: Gang Violence on the Rise on Indian Reservations* (NPR radio broadcast Aug. 25, 2009), *available at* http://www.npr.org/templates/story/story.php?storyId=112200614; *Weekend Edition: Lawmakers Move to Curb Rape on Native Lands* (NPR radio broadcast May 3, 2009), *available at* http://www.npr.org/templates/transcript/transcript.php?storyId=103717296.

7 *Oversight of the [U.S.] Dep't of Justice: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 16 (2009) [hereinafter *Oversight of the U.S. Dep't of Justice*] (statement of Eric H. Holder, Jr., Att'y Gen. of the United States).

8 Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261 (codified as amended in scattered sections of 18 U.S.C., 21 U.S.C., 25 U.S.C., 28 U.S.C., and 42 U.S.C.); *see also* Gale Courey Toensing, *Obama Signs 'Historic' Tribal Law and Order Act*, INDIAN COUNTRY TODAY, July 30, 2010, *available at* http://www.indiancountrytoday.com/home/content/Obama-signs-historic-Tribal-Law-and-Order-Act-99620099.html.

houses of Congress in 2008, but it expired upon the ending of the 110th Congress.[9] The TLOA received strong bipartisan support, and the Act addresses a number of different issues related to crime in Indian Country.[10] Its primary goals include strengthening tribal law enforcement agencies, increasing the coordination between tribal and federal law enforcement efforts, and increasing federal accountability in Indian Country.[11] Of particular note, the TLOA amends the Indian Civil Rights Act ("ICRA") to increase the sentencing authority of tribal courts to three years' imprisonment,[12] provides for concurrent federal jurisdiction in Public Law-280 states upon tribal consent,[13] and begins to address the unbelievably large number of crimes committed against Native American women.[14]

Even though the TLOA has the potential to significantly increase the level of law enforcement in Indian Country, it is not a perfect solution. Rather, as much of the Act focuses on increasing federal involvement in Indian Country, it is only a short-term fix. In this regard, the TLOA does not entirely retool criminal law in Indian Country; instead, it addresses particular areas of concern and attempts to develop short-term solutions to them. The TLOA places a federal band-aid over the current crime crisis, but it currently does not do enough to foster long-term solutions to the problems. If the level of crime in Indian Country is to be reduced permanently, Congress will need to use the TLOA as a building block for future legislation that will more fundamentally overhaul criminal law in Indian Country. Ideally, future legislation would ensure that tribal law enforcement agencies and courts are adequately funded, further increase the sentencing authority of tribal courts beyond the proposed three-year limit, and legislatively overturn *Oliphant*[15] to provide for tribal jurisdiction over non-Indians who commit crimes in Indian Country.

Section I of this Article discusses the current crime crisis in Indian Country, particularly gang-related and domestic violence; it also discusses some of the causes of the high rates of crime, focusing on the patchwork of criminal jurisdiction and the insufficient funding of tribal

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[9] S. 3320, 110th Cong. (2008); H.R. 6583, 110th Cong. (2008); Rob Capriccioso, *Major Legislation Introduced to Combat Crime*, INDIAN COUNTRY TODAY, Apr. 15, 2009, *available at* http://www.indiancountrytoday.com/home/content/42801187.html.

[10] Capriccioso, *supra* note 9.

[11] Press Release, Senate Comm. on Indian Affairs, Legislation Gives Boost to Law and Order in Indian Country (July 23, 2008), *available at* http://indian.senate.gov/news/pressreleases/2008-07-23.cfm?renderforprint=1&.

[12] Tribal Law and Order Act § 234(a)(3).

[13] *Id.* § 221.

[14] *Id.* §§ 261–266.

[15] 435 U.S. 191 (1978).

law enforcement. Section II discusses the TLOA in detail, analyzing and considering the major provisions of the Act. Finally, Section III considers some of the shortcomings of the TLOA and proposes future legislation that would build upon and correct portions of the TLOA.

I. VIOLENCE ON INDIAN RESERVATIONS

A. The Crime Problem in Indian Country

Although media outlets, Congress, and the Department of Justice ("DOJ") have recently focused attention on the epidemic of gang and domestic violence, high levels of crime, particularly domestic violence and sexual assault,[16] are nothing new in Indian Country. For example, in 1975 a "Task Force on Indian Matters" was formed in the DOJ to respond to high levels of crime among Native Americans.[17] The Task Force's report concluded that "[l]aw enforcement on most Indian reservations is in serious trouble."[18] The report noted that inadequate funding and training of law enforcement, confusing overlapping jurisdictional provisions, and a lack of centralized control in the Bureau of Indian Affairs ("BIA") were partially to blame for a crime rate that was fifty percent higher on Indian reservations than in other rural parts of America.[19] In 1997, a Report of the Executive Committee for Indian Country Law Enforcement Improvements opened by stating that "[t]here is a public safety crisis in Indian Country" and proceeded to detail the extraordinarily high crime rate in Indian Country.[20] Similarly, although generally considered a failed policy,[21] Public Law 280 was enacted in

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[16] *See, e.g.*, Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 SUFFOLK U. L. REV. 455, 457–59 (2005) (describing the history of rape of Native American women).

[17] *See generally* DORIS MEISSNER, U.S. DEP'T OF JUSTICE, REPORT OF THE TASK FORCE ON INDIAN MATTERS (1975).

[18] *Id.* at 77.

[19] *Id.* at 24–26.

[20] CRIMINAL DIV., U.S. DEP'T OF JUSTICE, REPORT OF THE EXECUTIVE COMMITTEE FOR INDIAN COUNTRY LAW ENFORCEMENT IMPROVEMENTS (1997), *available at* http://www.justice.gov/otj/icredact.htm.

[21] *See* Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535, 538 (1975); Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1441 (1997). In fact, Congress amended Public Law 280 just fifteen years later, making tribal consent via referendum mandatory before states could assume jurisdiction. *See* 25 U.S.C. § 1326 (2006). No tribe has consented to state jurisdiction since the amendment in 1968. Goldberg-Ambrose, *supra*, at 1408.

1953 by Congress[22] in an attempt to help remedy a perceived breakdown in law enforcement and public order in Indian Country.[23]

The violent crime rates in Indian Country are most troubling when compared to the rates nationwide, which have fallen over the past decade.[24] It has been estimated that since the 1990s,[25] Native Americans have been victims of violent crime at a rate at least double that of any other demographic in the United States.[26] Even more startling is the fact that approximately one-third of Native American women will be the victim of rape in their lifetime.[27] Recent statistics also show that in at least eighty-six percent of cases of rape or sexual assault, the offender is non-Indian,[28] and in approximately two-thirds of violent crimes generally, the offender is described as non-Indian.[29] These statistics suggest that not only are Native Americans the victims of a disproportionately high number of crimes, but that many non-Indians

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22 Pub. L. No. 280, 67 Stat. 588 (1953) (codified as amended in scattered sections of 18 U.S.C., 25 U.S.C., and 28 U.S.C.).

23 Goldberg-Ambrose, *supra* note 21, at 1406 (quoting Bryan v. Itasca Cnty., 426 U.S. 373, 379 (1976)); Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1632 (1998).

24 *See* MICHAEL R. RAND, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NCJ 227777, CRIMINAL VICTIMIZATION, 2008 2 (2009); CALLIE RENNISON, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T. OF JUSTICE, NCJ 194610, CRIMINAL VICTIMIZATION 2001 1, 2 (2002).

25 STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NCJ 203097, AMERICAN INDIANS AND CRIME 4–5 (2004); CALLIE RENNISON, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NCJ 176354, VIOLENT VICTIMIZATION AND RACE, 1993–1998 1 (2001); *see generally* STEWART WAKELING ET AL., NAT'L INST. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NCJ 188095, POLICING ON AMERICAN INDIAN RESERVATIONS (2001) (describing the elevated crime rate in Indian Country).

26 MATTHEW J. HICKMAN, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NCJ 197936, TRIBAL LAW ENFORCEMENT, 2000 3 (2003) ("In particular, the rate of aggravated assault among American Indians and Alaska Natives in 2000 was roughly twice that of the country as a whole (600.2 per 100,000 versus 323.6 per 100,000).").

27 PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NCJ 183781, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 22 (2000). By comparison, these rates are approximately double the rates for African-American and white women (18.8% and 17.7%, respectively). *Id.*

28 Amnesty Int'l, *Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the U.S.A.* 4 (2007) (citing PERRY, *supra* note 25, at 9), *available at* http://www.amnestyusa.org/women/maze/report.pdf.

29 PERRY, *supra* note 25, at 9 ("When asked the race of their offender, American Indian victims of violent crime primarily said the offender was white (57%), followed by other race (34%) and black (9%).").

are taking advantage of the lack of law enforcement in Indian Country to commit acts of violence, such as assault or rape, against Indians.

1. Gang Violence in Indian Country

One type of crime that has garnered a great deal of attention recently is the wave of gang violence that has engulfed much of Indian Country. Although the exact increase and scale of gang activity is impossible to determine, it is a growing problem.[30] The Navajo Nation, for example, recently reported that there are over 225 gangs in its territory alone, up from 75 in 1997.[31] Christopher Grant, the former head of an anti-gang unit in Rapid City, South Dakota, and current consultant on gang prevention, stated that there has been a "'marked increase in gang activity, particularly on reservations in the Midwest, the Northwest and the Southwest over the last five to seven years."[32] DOJ studies also suggest that the presence of gangs has increased markedly in Indian Country, especially since the second half of the 1990s.[33] The gangs have proven to be a serious and destructive force in many parts of Indian Country. For example, the previously mentioned Pine Ridge Reservation, home to the Oglala Sioux, reported thousands of gang-related thefts, assaults, property crimes, and several murders from 2006 to 2009.[34]

Most of the members of these gangs are Native American teenagers.[35] The gangs tend to be an extension of many of the underlying problems plaguing Indian communities,[36] which include rampant alcoholism,[37] drug abuse,[38] domestic violence,[39] and high levels of suicide

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[30] ALINE K. MAJOR ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NCJ 202714, YOUTH GANGS IN INDIAN COUNTRY 1 (2004).

[31] Eckholm, *supra* note 1; *Tell Me More*, *supra* note 6.

[32] Eckholm, *supra* note 1.

[33] *See* MAJOR ET AL., *supra* note 30, at 5, 7. By comparison, national samples in the same survey show an increase in gang activity nationally starting in the late 1980s. The explosion of gangs in Indian country seems to be a more recent phenomenon. *Id.* at 7.

[34] Eckholm, *supra* note 1.

[35] *See* MAJOR ET AL., *supra* note 30, at 6; ALINE K. MAJOR & ARLEN EGLEY, JR., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, OFFICE OF JUSTICE PROGRAMS, U.S. DEPT. OF JUSTICE, 2000 SURVEY OF YOUTH GANGS IN INDIAN COUNTRY (2002).

[36] *See* MAJOR ET AL., *supra* note 30, at 9, 11, 14.

[37] *See* LAWRENCE A. GREENFELD, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, NCJ 168632, ALCOHOL AND CRIME: AN ANALYSIS OF NATIONAL DATA ON THE PREVALENCE OF ALCOHOL INVOLVEMENT IN CRIME (1998); WAKELING ET AL., *supra* note 25, at 19–20 (noting that many crimes in Indian Country are related to alcohol); INDIAN HEALTH SERV., DEP'T OF HEALTH AND HUMAN SERVS., TRENDS IN INDIAN HEALTH, 1998–1999 108 [hereinafter INDIAN HEALTH SERVICE] (finding that the alcoholism death rate among Native Americans from 1994 to 1996 is over seven times the national average for 1995).

and depression.[40] Additionally, other commonly cited factors for the sudden increase in gangs in Indian communities include the influence of urban gangs from popular culture and the importation of gangs from residents who have moved between jails or cities and Indian Country.[41]

These gangs are undoubtedly damaging to life in Indian Country and currently threaten to undermine the health of many tribes. For example, among the Navajo Nation, plummeting rates of affiliation with the Tribe and decreased use of the Navajo language have been connected with gang membership.[42] Additionally, as gang cultures displace the unique cultures of the various tribes among Indian youth,[43] the very existence of some tribes may be threatened in the future decades. Indeed, the "recent surge in gang activity [already] reflects . . . a growing loss of culture and community" among Native American youth.[44] It is not too late, however; because many of the gangs are a relatively recent phenomenon, it may be easier for law enforcement and other support services to eradicate them before they take permanent root than it is to combat the well-established gangs that exist in many urban areas.[45]

In addition to the crippling effect of domestic gangs, populated mainly by Native American youth, Indian Country has become a target for Mexican gangs who traffick, produce, and sell drugs in the United

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38 NAT'L DRUG INTELLIGENCE CTR., U.S. DEP'T OF JUSTICE, INDIAN COUNTRY DRUG THREAT ASSESSMENT 8–9 (2008) [hereinafter DRUG THREAT ASSESSMENT 2008].

39 LAWRENCE A. GREENFELD & STEVEN K. SMITH, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, DEP'T OF JUSTICE, NCJ 173386, AMERICAN INDIANS AND CRIME 8 (1999); *see also* Stéphanie Wahab & Lenora Olson, *Intimate Partner Violence and Sexual Assault in Native American Communities*, 5 TRAUMA, VIOLENCE & ABUSE 353, 354 (2004) (collecting statistics about the rates of intimate partner violence in various tribes).

40 INDIAN HEALTH SERVICE, *supra* note 37, at 66–68 (finding that the suicide rate among Native Americans aged 5 to 44 from 1994 to 1996 was over twice the national average in 1995).

41 MAJOR ET AL., *supra* note 30, at 8, 9.

42 BARBARA MENDENHALL & TROY ARMSTRONG, CTR. FOR DELINQUENCY & CRIME POLICY STUDIES, NATIVE AMERICAN YOUTH IN GANGS: ACCULTURATION AND IDENTITY 8–9, *available at* http://www.helpinggangyouth.com/paper_on_indian_gangs-mendenhall.pdf.

43 *See* Eckholm, *supra* note 1; *see also Examining the Increase of Gang Activity in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 111th Cong. 44 (2009) [hereinafter *Oversight Hearings*] (statement of Brian Nissen, Council Member of the Confederated Tribes of the Colville Reservation) (describing the displacement of tribal culture with gang culture among the youth in the Colville Tribe).

44 ARTURO HERNANDEZ, EDUC. RES. INFO. CTR., CAN EDUCATION PLAY A ROLE IN THE PREVENTION OF YOUTH GANGS IN INDIAN COUNTRY? ONE TRIBE'S APPROACH 3 (2002), *available at* http://www.eric.ed.gov/PDFS/ED471717.pdf.

45 *See* MAJOR ET AL., *supra* note 30, at 10 (citing JAMES C. HOWELL ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, MODERN-DAY YOUTH GANGS 7 (2002)).

States.[46] For example, on the Warm Springs Reservation in central Oregon in 2008, state police seized 12,000 adult marijuana plants worth an estimated $10 million.[47] Although a large seizure of marijuana is not particularly surprising today, the discovery became startling when it was found that the drugs had been grown and harvested by a Mexican gang that had infiltrated and taken over parts of the reservation.[48] The Warm Springs Reservation is not alone; rather, illicit marijuana farms controlled by Mexican gangs have been found all across the nation, often operated on reservations.[49]

The infiltration of Mexican gangs into Indian Country has not been limited to drug trafficking. Indian Country has also become home to the highly dangerous gun trafficking trade.[50] At the Yakama homeland in Washington State, for example, a Mexican gang planted hundreds of acres of marijuana and imported guns into Mexico for use by Los Zetas,[51] a Mexican paramilitary group.[52] Quite frighteningly, it is believed that Los Zetas are already establishing a presence in Washington Indian Country to protect their marijuana crops.[53] Aside from being a threat to the well-being of the Native Americans living in these areas, the penetration of the United States by violent Mexican drug cartels is a serious threat to national security.

An example of a tribe struggling to combat gang violence—both domestic and foreign—is the Confederated Tribes of the Colville Reservation in Washington State. The Colville Tribe has over 9,300 members, making it one of the largest in the Northwest.[54] The reservation spans approximately 2,300 square miles, stretching the three available police officers beyond the breaking point for even routine law enforcement.[55] The lack of law enforcement resources and manpower

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[46] *See* NAT'L DRUG INTELLIGENCE CTR., U.S. DEP'T OF JUSTICE, NATIONAL DRUG THREAT ASSESSMENT at 41 (2009); DRUG THREAT ASSESSMENT 2008, *supra* note 38, at 4–7.

[47] Joel Millman, *Mexican Pot Gangs Infiltrate Indian Reservations in U.S.*, WALL ST. J., Nov. 5, 2009, at A1.

[48] *See id.*

[49] *Id.*; *see also* DRUG THREAT ASSESSMENT 2008, *supra* note 38, at 4–6, 17; *Raid Yields 40,000 Pot Plants on Reservation*, SEATTLE TIMES, Aug. 11, 2007, at B2, *available at* http://seattletimes.nwsource.com/html/localnews/2003831497_potraid11m.html.

[50] Millman, *supra* note 47.

[51] *See id.*; *see also, e.g.*, COLLEEN W. COOK, CONG. RESEARCH SERV., RL 34215, MEXICO'S DRUG CARTELS 7–8 (2007); Michael Ware, *Los Zetas Called Mexico's Most Dangerous Drug Cartel*, CNN, (Aug. 6, 2009), http://www.cnn.com/2009/WORLD/americas/08/06/mexico.drug.cartels/index.html.

[52] *See* Millman, *supra* note 47.

[53] *Id.*

[54] *Oversight Hearings*, *supra* note 43, at 41.

[55] *Id.* at 41–42. For example, the response time on a call can exceed two hours in even the best of circumstances. *Id.* at 42, 44.

has made it impossible for the Tribe to respond to the increased presence of at least six different warring gangs.[56] The gangs on the Colville Reservation are both domestic—composed of Colville Tribe members—and imported—composed generally of Mexicans.[57] Like other reservations in the Pacific Northwest, the gang conflict on the Colville Reservation is centered on the distribution of illegal narcotics.[58]

For many of the Colville Tribe gang members, gang affiliation is beginning to trump tribal affiliation, with many of the youth ignoring tribal values.[59] Over the past few years, the Colville Tribal Police Department has identified at least 19 narcotics cultivation operations and has seized more than 45,000 marijuana plants, most of which were connected to Mexican gangs.[60] Furthermore, violent crimes, previously unusual in the small communities of the Colville Reservation, are becoming much more common. In one incident, a Hispanic gang member was shot in a battle where at least eighteen rounds were fired.[61]

For the Colville Tribe, the gang problem is impossible to combat without outside assistance or a great influx of resources; unfortunately, as the reservation turns into a war zone, the cultural threads that tie the Tribe together threaten to unravel.

2. Domestic and Sexual Violence in Indian Country

Also generating significant amounts of attention over the past several years are the shockingly high rates of domestic and sexual violence committed against Native American women.[62] Unlike gang activity, however, which seems to be a relatively recent phenomenon, domestic and sexual violence against women have long been a problem

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[56] *See id.* at 41, 43–44.

[57] *Id.* at 41, 43.

[58] *Id.* at 43.

[59] *Id.* at 44.

[60] *Examining Drug Smuggling and Gang Activity in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 111th Cong. 17, 18 (2009) [hereinafter *Examining Drug Smuggling*] (statement of Matt Haney, Chief of Police, Colville Tribes).

[61] *Oversight Hearings*, *supra* note 43, at 43.

[62] Amnesty Int'l, *supra* note 28, at 1–2; Deer, *supra* note 16, at 456 (citing TJADEN & THOENNES, *supra* note 27, at 22); Marie Quasius, Note, *Native American Rape Victims: Desperately Seeking an* Oliphant-*Fix*, 93 MINN. L. REV. 1902, 1903 (2009) (citing LAWRENCE A. GREENFELD, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 24 (1997)); Clarkson, *supra* note 6 (citing TJADEN & THOENNES, *supra* note 27, at 22); *Weekend Edition*, *supra* note 6 (citing TJADEN & THOENNES, *supra* note 27, at 22).

for Native American women.[63] Increased reporting and attention, though, have brought the magnitude of the problem into focus.[64]

Although difficult to measure and likely seriously under-reported,[65] recent studies suggest that over one-third of Indian women will be raped in their lifetime and almost two-thirds will be physically assaulted.[66] Incredibly, the annual rate of rape and sexual assault among Native Americans is over twice as high as in the population at large.[67] Furthermore, over fifteen percent of Indian women are raped by an intimate partner—a rate that is much higher nationally than for women of other backgrounds.[68] Compounding the severity of these problems, the rates at which perpetrators of domestic violence and sexual assault in Indian Country are prosecuted is significantly lower than elsewhere in the country.[69] Current studies suggest that in some areas approximately three-quarters of sexual crimes against women and children in Indian Country were declined for prosecution between 2004 and 2007.[70]

The serious problem of domestic and sexual violence among Native Americans has not gone entirely unnoticed in Washington. For example, Title IX of the Violence Against Women Act of 2005 required the Attorney General to establish a Task Force to help the National Institute of Justice design and implement programs to research violence against Indian women.[71] The Task Force convened for the first time in August 2008,[72] and it has met again since then to discuss possible solutions to

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[63] *See* Amnesty Int'l, *supra* note 28, at 1–2; Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POL'Y 121, 129–34 (2004) (describing the long history of sexual abuse and rape of Native American women).

[64] *See, e.g.*, Amnesty Int'l, *supra* note 28, at 2.

[65] *Id.* at 2 (citing NAT'L INST. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 8 (2006)).

[66] *E.g.*, TJADEN & THOENNES, *supra* note 27, at 22.

[67] The rate of rape and sexual assault against Native Americans in 1992 to 2001 was 5 per 1,000 persons age 12 or older, whereas for all races it is 2 per 1,000 persons age 12 or older. PERRY, *supra* note 25, at 5.

[68] PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NCJ 181867, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE 26 (2000).

[69] Quasius, *supra* note 62, at 1904; *see also* Amnesty Int'l, *supra* note 28, at 2.

[70] Riley, *supra* note 6.

[71] Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 904(a), 119 Stat. 3077–79 (2006).

[72] Minutes of the Section 904 Violence Against Women in Indian Country Task Force Meeting, Dep't of Justice (Aug. 20–21, 2008), *available at* http://www.ovw.usdoj.gov/docs/meeting-aug-08.pdf.

the problem of crimes committed against women in Indian Country.[73] Efforts such as these, however, are merely a first step at combating one of the most serious issues facing the residents of Indian Country.[74] Indeed, domestic and sexual violence currently remains a serious issue facing many Native American women.

B. The Complex Patchwork of Criminal Jurisdiction in Indian Country

One of the primary culprits of the high rates of crime in Indian Country is the "complex patchwork of federal, state, and tribal law"[75] and criminal jurisdiction that allows many perpetrators—particularly non-Indians—to go unprosecuted.[76] Many Native Americans must rely upon federal prosecutors, who are often hundreds of miles away, to prosecute even minor crimes.[77] Not surprisingly, this leaves many offenses, even very serious ones, unprosecuted.[78] The confusing

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[73] Minutes of the Section 904 Violence Against Women in Indian Country Task Force Meeting, Dep't of Justice (Dec. 8–9, 2008), *available at* http://www.ovw.usdoj.gov/docs/dec2008-meeting.pdf.

[74] In one particularly heart-wrenching case, a Caucasian man who was married to an Indian woman sexually abused his entire family—repeatedly raping and molesting his wife and teenage daughters. Despite death threats, his wife reported him to an Eastern Cherokee prosecutor. The Indian prosecutor, however, was unable to prosecute due to the jurisdictional holding of *Oliphant* (since the husband was a non-Indian); state and local authorities were also unable to prosecute the husband. Clarkson, *supra* note 6.

[75] Duro v. Reina, 495 U.S. 676, 680 n.1 (1990). *See also* Tim Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict,* 22 U. KAN. L. REV. 387, 387 (1974) (calling law enforcement in Indian Country a "jurisdictional crazy-quilt"). For a very detailed account of the many complexities of criminal jurisdiction in Indian Country, see Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze,* 18 ARIZ. L. REV. 503, 504 (1976).

[76] *See, e.g., Tribal Courts and the Administration of Justice in Indian Country: Hearing Before the S. Comm. on Indian Affairs,* 110th Cong. 2 (2008) [hereinafter *Tribal Courts*] (statement of Sen. Byron L. Dorgan, Chairman, S. Comm. on Indian Affairs) (describing the low rate of prosecution of reported crimes in Indian Country); *see also* S. REP. No. 111-93, at 9 (2009) (discussing jurisdictional gaps leading to under-prosecution in Indian Country, particularly for misdemeanor crimes such as domestic violence, child abuse, disorderly conduct, traffic violations, petty drug possession, and property crimes).

[77] *See* Kevin K. Washburn, *American Indians, Crime, and the Law,* 104 MICH. L. REV. 709, 717 (2006).

[78] According to Department of Justice research statistics, there is a shocking disconnect between crimes reported or investigated in Indian Country and those actually prosecuted. For example, there were 6,036 suspects investigated for violent crimes in 2000. About twenty-five percent of these crimes were in Indian Country, but only about eighteen percent of charges filed in federal court for violent crimes were in Indian Country. PERRY, *supra* note 25, at 18, 20. Similarly, statistics also show that between 2004 and 2007, federal prosecutors declined to prosecute sixty-two percent of reservation crimes generally, about fifty percent of homicides, almost sixty percent of aggravated assaults, over seventy percent of child sex crimes, and over seventy-five percent of adult sex crimes. *Tribal Courts, supra* note 76, at 2.

arrangement of criminal jurisdiction in Indian Country is the product of a number of Congressional statutes and several Supreme Court decisions that have created a mismatched and mismanaged system in dire need of a complete overhaul.

Soon after the ratification of the Constitution, the federal government began asserting limited criminal jurisdiction over criminal matters in Indian Country when non-Indians committed crimes against Indians.[79] In 1817, this jurisdiction was statutorily expanded in the General Crimes Act (or Indian Country Crimes Act), which provided for federal criminal jurisdiction over matters in Indian Country, except in cases where the crime was committed by one Indian against another Indian.[80] Ultimately, this provision was codified as 18 U.S.C. § 1152.[81] Under the General Crimes Act, the federal government has authority to try crimes committed by and against Indians, except when (1) one Indian committed a crime against another Indian, (2) an Indian had already been punished according to local tribal law, or (3) a treaty reserved criminal jurisdiction to the tribe.[82] Giving additional teeth to the General Crimes Act is the Assimilative Crimes Act, which was passed in 1825.[83]

There are signs, however, that the culture in Washington may be changing. Just months ago, Deputy Attorney General David W. Ogden issued a memorandum to all United States Attorney's Offices on the issue of violence in Indian country. Emphasizing the high crime rate in Indian Country, Deputy Attorney General Ogden instructed each United States Attorney's Office that contains Indian Country to engage the local tribes and coordinate a unified response to address the crime problem. Additionally, the memorandum directed each office to develop an operational plan "addressing public safety in Indian Country" in coordination with other federal law enforcement partners, tribal law enforcement, and, in Public Law 280 districts, state authorities. To coordinate the application of these plans, the Department of Justice created a new position dedicated to Indian Country prosecution and investigations. Memorandum from David W. Ogden, *supra* note 6, at 2–4. Such action is in marked contrast with the attitude of the Bush Administration regarding the prosecution of crime in Indian Country. Most famously, in late 2006, five United States Attorneys who were vocal supporters of increased prosecutions in Indian Country were fired. Riley, *supra* note 6.

[79] *See, e.g.*, An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33, sec. 5, 1 Stat. 137–38 (1790) ("[I]f any citizen . . . shall go into any town . . . belonging to any nation or tribe of Indians, and shall there commit any crime upon . . . which, if committed within the jurisdiction . . . would be punishable by the laws of such state or district, such offender . . . shall be subject to the same punishment."); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 731 n.6 (Neil Jessup Newton et al. eds., 2005).

[80] An Act to Provide for the Punishment of Crimes and Offences Committed Within the Indian Boundaries, ch. 92, secs. 1–2, 3 Stat. 383 (1817).

[81] The General Crimes Act, 18 U.S.C. § 1152 (2006).

[82] *Id.*

[83] An Act More Effectually to Provide for the Punishment of Certain Crimes Against the United States, and for Other Purposes, ch. 65, 4 Stat. 115 (1825); *see also* United States v. Billadeau, 275 F.3d 692, 694 (8th Cir. 2001) ("The General Crimes Act, 18 U.S.C. § 1152, creates federal jurisdiction over crimes committed by non-Indians against

The Assimilative Crimes Act, now codified at 18 U.S.C. § 13, provides that whoever is "guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District . . . shall be guilty of a like offense and subject to a like punishment."[84] When combined, the two statutes provide federal jurisdiction over almost any conceivable offense in Indian Country, except when the previously described jurisdictional carve-outs[85] are applicable.[86]

Prior to the passage of the Major Crimes Act,[87] the federal government did not have the authority to try crimes committed by Indians against other Indians in Indian country.[88] In response to the unpopular *Crow Dog* decision,[89] which enforced this limitation on jurisdiction, however, Congress passed the Major Crimes Act in 1885.[90] The Major Crimes Act granted the federal government jurisdiction over certain serious felonies committed in Indian Country, even when

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Indians in Indian country. It incorporates the Assimilative Crimes Act (ACA), 18 U.S.C § 13 . . . .").

[84] 18 U.S.C. § 13 (2006). Thus, under the Assimilative Crimes Act, when there is no federal statute on point governing behavior—as is often the case—the offender may be prosecuted for violating the laws of the state in which the land is located. *E.g.*, United States v. Wood, 386 F.3d 961, 963 (10th Cir. 2004) ("[T]he Assimilative Crimes Act . . . 'requires courts to impose sentences for assimilative crimes that fall within the maximum and minimum terms established by state law.'") (quoting United States v. Garcia, 893 F.2d 250, 254 (10th Cir. 1989)); United States v. Errol D., 292 F.3d 1159, 1164 (9th Cir. 2002); *Billadeau*, 275 F.3d at 694.

[85] *See supra* note 82 and accompanying text. On grounds of federalism, the Act has been interpreted not to apply when a non-Indian commits a crime against another non-Indian in Indian Country. *See* United States v. McBratney, 104 U.S. 621, 624 (1881).

[86] Although the Assimilative Crimes Act does not specifically state that it applies to Indian tribes, it has been interpreted by the Supreme Court to apply to Indian Country. *See* Williams v. United States, 327 U.S. 711, 713–14 (1946); COHEN'S, *supra* note 79, at 733 (citing 18 U.S.C. § 13).

[87] Major Crimes Act, ch. 341, sec. 9, 23 Stat. 362, 385 (1885).

[88] *See Ex Parte* Crow Dog, 109 U.S. 556, 568–69, 572 (1883). Crow Dog, a member of the Brûlé Sioux Tribe, murdered Spotted Tail, a Sioux chief, who had used his influence in the tribe to stave off hostilities between the Sioux and the U.S. Government. Crow Dog was tried according to tribal custom, and his family agreed to make a peace payment to Spotted Tail's family. Unhappy with the result under traditional tribal law, however, a federal Indian agent had Crow Dog arrested and tried for murder the following year. Despite the lack of jurisdiction under the General Crimes Act, Crow Dog was convicted of murder and sentenced to death. In 1883, the United States Supreme Court reversed the conviction on tribal sovereignty grounds. For an account of the Crow Dog case, see SIDNEY L. HARRING, CROW DOG' S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 100–41 (1994).

[89] HARRING, *supra* note 88, at 101. *See supra* note 88 and accompanying text.

[90] Major Crimes Act sec. 9.

committed by Indians against other Indians.[91] The constitutionality of this Act was upheld soon afterward by the Supreme Court in *United States v. Kagama*,[92] and it remains a mainstay of federal jurisdiction in Indian Country.[93] The Major Crimes Act specifically provides that there is federal jurisdiction over Indians for the enumerated felonies, such as murder, kidnapping, and robbery.[94] Although the Major Crimes Act clearly divests the states of criminal jurisdiction in Indian Country, by its plain language the Major Crimes Act does not divest Indian tribes of concurrent jurisdiction over these offenses.[95] The statute instead

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[91] 18 U.S.C. § 1153 (2006).

> Offenses committed within Indian country:
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> (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> (b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

Id.

[92] 118 U.S. 375, 385 (1886).

[93] *See* United States v. Antelope, 430 U.S. 641, 646, 649–50 (1977) (rejecting a challenge to the constitutionality of the Major Crimes Act under Equal Protection grounds for the prosecution of Indians in federal court for offenses that would be punishable in state court if committed by a non-Indian because the Major Crimes Act "is rooted in the unique status of Indians as 'a separate people' with their own political institutions" and not a racial classification).

[94] *See supra* note 91 and accompanying text. The Act has also been interpreted by the Supreme Court to include lesser offenses not enumerated in that section if the defendant is charged with a greater enumerated offense. *See* Keeble v. United States, 412 U.S. 205, 214 (1973). Additionally, the Act has also been interpreted to extend to firearms offenses. Jon M. Sands, *Indian Crimes and Federal Courts*, 11 FED. SENT'G REP. 153, 154 (1998).

[95] COHEN'S, *supra* note 79, at 758 (describing the jurisdiction over major crimes as concurrent); Matthew L. M. Fletcher, United States v. Lara*: Affirmation of Tribal Criminal Jurisdiction over Nonmember American Indians*, 83 MICH. B.J. 24, 25 (2004) (same, citing 18 U.S.C. § 1153); Sands, *supra* note 94, at 154 (same). Although there is no clear answer, the legislative history of the statute suggests that Congress considered, and rejected, exclusive federal jurisdiction. *See* 16 CONG. REC. 934–35 (1885); *see also* Duro v. Reina, 495 U.S. 676, 680 n.1 (1990) (noting that concurrent tribal jurisdiction over crimes under the Major Crimes Act is an open question). *But compare* Wetsit v. Stafne, 44 F.3d 823, 825 (9th Cir. 1995) (holding that a tribal court is competent to try a tribal member for a crime covered by the Major Crimes Act), *with* United States v. Cavanaugh, 680 F. Supp. 2d 1062, 1068 (D.N.D. 2009) ("The Indian Major Crimes Act provides the federal courts with

stretches a layer of federal jurisdiction over specific offenses, and when paired with the General and Assimilative Crimes Acts, federal jurisdiction exists over a wide variety of felonies and misdemeanors committed in Indian Country.[96]

The previously described system is arguably one of concurrent jurisdiction for all offenses committed in Indian Country (and surely so for those crimes not enumerated in the Major Crimes Act).[97] It has been complicated by two additional factors, however: (1) the Supreme Court and Congress have severely limited tribal jurisdiction and authority,[98] and (2) Public Law 280 allocated criminal jurisdiction to nine state governments.[99] First, although tribes arguably have jurisdiction to try all offenses, Congress severely constrained their ability to provide adequate and proportional punishments through the Indian Civil Rights Act, which was passed in 1968.[100] The primary purpose of ICRA was to impose the provisions of the Bill of Rights against tribal governments to cure alleged due process abuses by tribal courts.[101] In addition to guaranteeing substantive personal rights, ICRA also placed a serious constraint on tribal power by limiting the authority of tribal courts to impose for "any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both."[102] This provision places a severe limitation on the ability of tribal governments to punish and deter crime adequately, as punishments in excess of one year can only be levied if an individual commits multiple separate offenses.[103] Accordingly, ICRA served to increase the reliance of tribes on federal prosecutors drastically.[104]

Supreme Court decisions further limited the power of tribal courts to enforce criminal law in Indian Country. In 1978, the Supreme Court

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exclusive jurisdiction over certain enumerated crimes committed in Indian country. It does not contain an exception for Indians punished under tribal law."), *and* Iron Crow v. Ogallala Sioux Tribe, 129 F. Supp. 15, 20 (D.S.D. 1955) (describing the Major Crimes Act as divesting tribes of authority over those offenses).

[96] 18 U.S.C. §§ 13, 1152, 1153 (2006).

[97] *See supra* note 95 and accompanying text.

[98] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

[99] Act of Aug. 15, 1953, Pub. L. No. 280, ch. 505, 67 Stat. 588.

[100] Indian Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 201–203, 82 Stat. 77–78 (codified at 25 U.S.C. §§ 1301–03 (2006)).

[101] Clinton, *supra* note 75, at 561 (citing 25 U.S.C §§ 1301–03 (1970)).

[102] 25 U.S.C. § 1302(7) (2006). Although the text of the statute suggests that consecutive sentences of one year for multiple offenses arising from the same incident would be within the power of a tribal court, this point is less than clear.

[103] These types of strategies have occasionally run into due process issues. *See, e.g.*, Spears v. Red Lake Band of Chippewa Indians, 363 F. Supp. 2d 1176, 1180–82 (D. Minn. 2005) (holding that different crimes committed during a single incident were only one offense under the ICRA and could not be punished by more than one year in prison).

[104] Washburn, *supra* note 77, at 717.

held in *Oliphant v. Suquamish Indian Tribe* that Indian tribes do not have the authority to try non-Indians in tribal courts.[105] At the time of the decision, of the 127 reservations that exercised criminal jurisdiction in their tribal court systems, thirty-three extended jurisdiction to non-Indian defendants.[106] In *Oliphant*, the Supreme Court entertained a writ of *habeas corpus* from the petitioner, who had been arrested and tried in a tribal court for assaulting a tribal police officer.[107] In granting the *habeas* petition,[108] the Supreme Court ruled that the tribal courts had been divested of their criminal jurisdiction over non-Indians "[b]y submitting to the overriding sovereignty of the United States."[109] This historical submission was a surrender of the "power to try non-Indian citizens of the United States except in a manner acceptable by Congress."[110] Thus the Supreme Court seriously limited the jurisdiction of tribal courts, and it left the prosecution of non-Indians who commit crimes on reservations solely to state or federal prosecutors. This fact is even more damaging as recent statistics suggest that a large percentage of the crimes committed in Indian country are committed by non-Indians.[111] The *Oliphant* decision was a major blow to the tribal court system, leaving many residents of Indian Country unprosecutable without independent federal or state action.

The Supreme Court limited the jurisdiction of tribal courts even further in 1990 in *Duro v. Reina*.[112] In that decision, the Supreme Court considered whether the Salt River Pima-Maricopa Indian Community could exercise criminal jurisdiction over Albert Duro, an enrolled member of the Torres-Martinez Band of Cahuilla Mission Indians.[113] Duro had "allegedly shot and killed a 14-year-old boy within the Salt River Reservation boundaries."[114] Under *Oliphant*, the Supreme Court held that the tribe had surrendered sovereign authority to Congress, and

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[105] 435 U.S. 191, 211–12 (1978).

[106] *Id.* at 196.

[107] *Id.* at 194–95. Oliphant was arraigned and charged under tribal code. He then filed a writ of *habeas corpus* to the Western District of Washington. This writ was denied; the decision was appealed to the Ninth Circuit, but was upheld. Upon denial, the United States Supreme Court granted certiorari. *Id.*

[108] *See id.* at 212.

[109] *Id.* at 210.

[110] *Id.*

[111] PERRY, *supra* note 25, at 9.

[112] 495 U.S. 676 (1990).

[113] *Id.* at 679.

[114] *Id.* The Court also relied on *United States v. Wheeler*, 435 U.S. 313, 326 (1978) (holding that divestiture of sovereignty has occurred in relations between an Indian tribe and nonmembers of the tribe). *Duro*, 495 U.S. at 685.

therefore had been divested of it jurisdictional authority to try all non-members in tribal court.[115]

Upon the heels of the decision, however, came an organized outcry from Indian Country.[116] Responding to this pressure, Congress legislatively overturned *Duro* just six months later in an appropriations bill[117] and permanently enacted the now-famous "*Duro*-Fix" in 1991.[118] The "*Duro*-Fix" amended ICRA to clarify that Indian tribes had authority to try "all Indians," rather than just those who were members of the specific tribe.[119] The Supreme Court upheld the "*Duro*-Fix" as constitutional in 2004 in *United States v. Lara*, preserving tribal jurisdiction over all Indians.[120]

The final, but significant, patch in the confusing jurisdictional quilt is Public Law 280 ("PL-280"), which fundamentally altered the justice system in many parts of Indian Country in 1953.[121] PL-280 withdrew federal criminal jurisdiction in six states and authorized state prosecutions in those areas.[122] PL-280 also provided for the potential assumption of criminal and civil jurisdiction in additional states without Indian consent in the future[123] (ten of which assumed jurisdiction before PL-280 was amended in 1968).[124] Although it was an attempt to remedy crime problems in Indian Country,[125] PL-280 has largely been a failure. From the start, PL-280 left both the Indians and the states involved "dissatisfied"—the states because they were saddled with additional responsibilities without additional funding, and the tribes because state jurisdiction was imposed on them without their consent.[126] In response to

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[115] *Duro*, 495 U.S. at 684–85.

[116] Bethany R. Berger, United States v. Lara *as a Story of Native Agency*, 40 TULSA L. REV. 5, 11 (2004).

[117] *Id.* at 12 (citing Pub. L. No. 101-511, § 8077(b)–(d), 104 Stat. 1856, 1892–93 (1990)).

[118] *Id.* at 17.

[119] 25 U.S.C. § 1301(2), (4) (2006).

[120] 541 U.S. 193, 210 (2004).

[121] Act of Aug. 15, 1953, Pub. L. No. 280, ch. 505, 67 Stat. 588; *see also* Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545.

[122] Act of Aug. 15, 1953, Pub. L. No. 280 § 2(a). The original "mandatory" states are Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. *Id.*; Clinton, *supra* note 75, at 565–66.

[123] Act of Aug. 15, 1953, Pub. L. No. 280, secs. 6, 7.

[124] Goldberg-Ambrose, *supra* note 21, at 1407. The states that assumed at least partial jurisdiction prior to 1968 were Nevada, South Dakota, Washington, Florida, Idaho, Montana, North Dakota, Arizona, Iowa, and Utah. CAROLE GOLDBERG-AMBROSE, PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280, 244 (1997).

[125] Goldberg-Ambrose, *supra* note 21, at 1406 (quoting Bryan v. Itasca Cnty. 426 U.S. 373, 379 (1976).

[126] Goldberg, *supra* note 21, at 538.

pitched criticisms, the law was amended fifteen years later as part of ICRA,[127] making further state assumptions of jurisdiction dependent upon tribal consent.[128] Not surprisingly, since the amendment passed, no tribe has consented to state jurisdiction.[129] Despite the Act's unpopularity, however, the amendments did not apply to the tribes that were already under state jurisdiction.[130] The tribes in these jurisdictions remain largely dependent upon state prosecutions today.[131] Even though the goal of PL-280 was to increase criminal enforcement in Indian Country, the law actually served to create an even wider gap by allocating responsibility to states that had neither the means nor the interest in strenuously prosecuting crimes on behalf of Indians.[132] Furthermore, the law engendered confusion over whether tribal courts even retained concurrent jurisdiction to try violations of criminal law themselves.[133]

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[127] Goldberg-Ambrose, *supra* note 21, at 1407.

[128] *See* 25 U.S.C. § 1326 (2006).

[129] Goldberg-Ambrose, *supra* note 21, at 1408.

[130] *Id.*

[131] The limitations in ICRA on the maximum punishments and jurisdictional limitations from *Oliphant* apply in full to PL-280 reservations as well, leaving the prosecution of all non-Indians and serious crimes to the states. *See* Ada Pecos Melton & Jerry Gardner, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, AMERICAN INDIAN DEVELOPMENT ASSOCIATES, http://www.aidainc.net/Publications/pl280.htm (last visited Nov. 8, 2010).

[132] *See Examining S. 797, the Tribal Law and Order Act of 2009: Hearing Before the S. Comm. on Indian Affairs*, 111th Cong. 50 (2009) [hereinafter *S. Tribal Law and Order Act of 2009*] (statement of Hon. Anthony J. Brandenburg, C.J., Intertribal Court of Southern California) (describing the negative effects of PL-280 on law enforcement in Indian Country in the state of California); Goldberg, *supra* note 21, at 552. For example, the Omaha and Winnebago reservations in Nebraska were disastrously left with no law enforcement upon the withdrawal of federal officers. Goldberg, *supra* note 21, at 552 (citing JOHN A. HANNAH ET AL., JUSTICE: UNITED STATES COMMISSION ON CIVIL RIGHTS REPORT 148 (1961)); *see also* Goldberg-Ambrose, *supra* note 21, at 1418 ("[J]urisdictional vacuums or gaps have been created, often precipitating the use of self-help remedies that border on or erupt into violence. . . . Sometimes they arise because the government(s) that may have authority in theory has no institutional support or incentive for the exercise of that authority.").

[133] *See* Jiménez & Song, *supra* note 23, at 1667 (arguing that PL-280 is not a divesture statute); *see also* COHEN'S, *supra* note 79, at 759 ("Certainly the language of the statute is not sufficiently explicit to deprive tribes of their retained concurrent jurisdiction."). The position that PL-280 did not divest the tribes of criminal jurisdiction seems to be the best argument. The Eighth Circuit addressed this issue and held that PL-280 did not divest the tribes of the sovereign power to punish their own members. *See* Walker v. Rushing, 898 F.2d 672, 675 (8th Cir. 1990) ("Public Law 280 did not itself divest Indian tribes of their sovereign power to punish their own members for violations of tribal law."); *see also* TTEA v. Ysleta del Sur Pueblo, 181 F.3d 676, 685 (5th Cir. 1999) (PL-280 did not divest tribal courts of concurrent civil jurisdiction); Native Vill. of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 559–62 (9th Cir. 1991) (holding that PL-280 did not divest tribes of jurisdiction over child custody proceedings); Cabazon Band of Mission Indians v.

The end result of this array of statutes, Supreme Court decisions, and jurisdiction based on tribal sovereignty is, indeed, a "jurisdictional crazy-quilt."[134] In some parts of Indian Country, the federal government is straddled with prosecuting the bulk of reported crimes.[135] In other parts of Indian Country, it is the state governments that prosecute these crimes.[136] This quilt can be made even more confusing when complex crimes span several jurisdictions, or when victims are unable to identify exactly where a crime took place.[137] Beyond simple confusion over who is responsible for prosecuting certain offenses, this patchwork of jurisdiction can also create difficulties investigating crimes and making arrests.[138] Most problematically, the individuals who are most affected by the inefficient and ineffective prosecution of criminals in Indian Country—Native American residents—are unable to prosecute many potential defendants due to *Oliphant*[139] and are unable to deter most crimes adequately due to the severe sentencing limitations in the ICRA.[140] With this arrangement in place, it should not be surprising that prosecution rates are significantly lower and crimes rates significantly higher in Indian Country than elsewhere in the country.[141]

Smith, 34 F. Supp. 2d 1195, 1199 (C.D. Cal. 1998) (P.L. 280 does not divest tribes of their criminal jurisdiction); State v. Schmuck, 850 P.2d 1332, 1343 (Wash. 1993) (same).

[134] Vollman, *supra* note 75, at 387.

[135] *See supra* Part I.B.

[136] *See supra* Part I.B.

[137] *See* COHEN'S, *supra* note 79, at 762.

[138] *Id.* at 763–65 (describing confusion over whether tribal law enforcement has authority to make arrests in different situations).

[139] *See supra* Part I.B.

[140] *See supra* Part I.B.

[141] Simply to display the great complexity of criminal jurisdiction in Indian Country, a chart from the United States Attorneys' manual is reprinted below. This chart, meant to be a guide, outlines jurisdiction in three different situations in Indian Country (first, where jurisdiction has not been conferred on the states; second, where jurisdiction has been conferred on the states pursuant to PL-280; and finally, where jurisdiction has been conferred on the state under other statutes). Within each of these situations, determining jurisdiction requires considering the tribal status of the offender and the victim as well as where the crime was committed. *See* U.S. DEP'T. OF JUSTICE, JURISDICTIONAL SUMMARY 689 (1997), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00689.htm.

Where jurisdiction has not been conferred on the state:

Offender	Victim	Jurisdiction
Non-Indian	Non-Indian	State jurisdiction is exclusive of federal and tribal jurisdiction.
Non-Indian	Indian	Federal jurisdiction under 18 U.S.C. § 1152 is exclusive of state and tribal jurisdiction.

Indian	Non-Indian	If listed in 18 U.S.C. § 1153, there is federal jurisdiction, exclusive of the state, but probably not of the tribe. If the listed offense is not otherwise defined and punished by federal law applicable in the special maritime and territorial jurisdiction of the United States, state law is assimilated. If not listed in 18 U.S.C. § 1153, there is federal jurisdiction, exclusive of the state, but not of the tribe, under 18 U.S.C. § 1152. If the offense is not defined and punished by a statute applicable within the special maritime and territorial jurisdiction of the United States, state law is assimilated under 18 U.S.C. § 13.
Indian	Indian	If the offense is listed in 18 U.S.C. § 1153, there is federal jurisdiction, exclusive of the state, but probably not of the tribe. If the listed offense is not otherwise defined and punished by federal law applicable in the special maritime and territorial jurisdiction of the United States, state law is assimilated. See section 1153(b). If not listed in 18 U.S.C. § 1153, tribal jurisdiction is exclusive.
Non-Indian	Victimless	State jurisdiction is exclusive, although federal jurisdiction may attach if an impact on individual Indian or tribal interest is clear.
Indian	Victimless	There may be both federal and tribal jurisdiction. Under the Indian Gaming Regulatory Act, all state gaming laws, regulatory as well as criminal, are assimilated into federal law and exclusive jurisdiction is vested in the United States.

Where jurisdiction has been conferred by Public Law 280, 18 U.S.C. § 1162:

Offender	Victim	Jurisdiction
Non-Indian	Non-Indian	State jurisdiction is exclusive of federal and tribal jurisdiction.
Non-Indian	Indian	"Mandatory" state has jurisdiction exclusive of federal and tribal jurisdiction. "Option" state and federal government have jurisdiction. There is no tribal jurisdiction.
Indian	Non-Indian	"Mandatory" state has jurisdiction exclusive of federal government but not necessarily of the tribe. "Option" state has concurrent jurisdiction with the federal courts.

C. *Lack of Funding for Tribal Law Enforcement*

One additional factor that significantly contributes to the high rates of crime and low rates of prosecution in Indian Country is the lack of

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Indian	Indian	"Mandatory" state has jurisdiction exclusive of federal government but not necessarily of the tribe. "Option" state has concurrent jurisdiction with tribal courts for all offenses, and concurrent jurisdiction with the federal courts for those listed in 18 U.S.C. § 1153.
Non-Indian	Victimless	State jurisdiction is exclusive, although federal jurisdiction may attach in an option state if impact on individual Indian or tribal interest is clear.
Indian	Victimless	There may be concurrent state, tribal, and in an option state, federal jurisdiction. There is no state regulatory jurisdiction.

Where jurisdiction has been conferred by another statute:

Offender	Victim	Jurisdiction
Non-Indian	Non-Indian	State jurisdiction is exclusive of federal and tribal jurisdiction.
Non-Indian	Indian	Unless otherwise expressly provided, there is concurrent federal and state jurisdiction exclusive of tribal jurisdiction.
Indian	Non-Indian	Unless otherwise expressly provided, state has concurrent jurisdiction with federal and tribal courts.
Indian	Indian	State has concurrent jurisdiction with tribal courts for all offenses, and concurrent jurisdiction with the federal courts for those listed in 18 U.S.C. § 1153.
Non-Indian	Victimless	State jurisdiction is exclusive, although federal jurisdiction may attach if impact on individual Indian or tribal interest is clear.
Indian	Victimless	There may be concurrent state, federal and tribal jurisdiction. There is no state regulatory jurisdiction.

Id. Under DOJ standards, an "Indian" is an individual who has Indian ancestry and who belongs to a federally recognized Indian tribe. *About Native Americans*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/otj/nafaqs.htm (last visited Oct. 29, 2010).

funding for tribal law enforcement agencies.[142] As of June 2000, American Indian tribes operated 171 law enforcement agencies and the BIA operated another thirty-seven.[143] Although these agencies are responsible for the lion's share of direct law enforcement in Indian Country, most do not have the manpower, training, or financial resources needed to police adequately the often-enormous areas for which they are responsible.[144]

An extensive report on tribal law enforcement published in 2001 by the DOJ concluded:

> The typical [tribal police] department serves an area the size of Delaware, but with a population of only 10,000, that is patrolled by no more than three police officers and as few as one officer at any one time . . . . In other words, the typical setting is a large area with a relatively small population patrolled by a small number of police officers; the superficial description is of a rural environment with rural-style policing. In fact, many reservation residents live in fairly dense communities, which share attributes of suburban and urban areas.[145]

For example, the Colville Reservation generally has three full-time officers on duty at any given time, responsible for almost 2,300 square miles with around 9,350 residents.[146] Similarly, the Confederated Salish and Kootenai Tribes in Montana employ seventeen officers, who patrol a 1.2 million-acre area with a population of about 24,000 residents.[147] One of the largest and most developed departments is the Navajo Nation's, with 321 police officers.[148] The department is still stretched thin, however, as these officers are responsible for an area of over 22,000 square miles,[149] home to approximately 180,000 residents.[150] Overall, Indian Country is patrolled by approximately 1.3 officers per 1,000

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[142] *See* S. REP. NO. 111-93, at 6 (2009).

[143] HICKMAN, *supra* note 26, at 1.

[144] For example, the 2008 Bureau of Indian Affairs Crime Report concluded that there were at least thirty Indian reservations where the violent crime rates exceeded national averages. S. REP. NO. 111-93, at 6–7. The Wind River Indian Reservation in Wyoming has a violent crime rate of over 3.58 times higher than national rates, but it only has 6–7 officers patrolling the entire 2.2 million-acre reservation. *Id.*

[145] WAKELING ET AL., *supra* note 25, at vi.

[146] *Examining Drug Smuggling*, *supra* note 60, at 17–18, 20; *Oversight Hearings*, *supra* note 43, at 41.

[147] WAKELING ET AL., *supra* note 25, at 33–34.

[148] DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 482 (5th ed. 2005).

[149] *Id.*

[150] Washburn, *supra* note 77, at 711. By comparison, the Reno, Nevada police department is also responsible for approximately 180,000 residents. Although the Reno police force has about 320 officers, it is only responsible for 57.5 square miles. HICKMAN, *supra* note 26, at 2.

residents, whereas the national average is approximately 2.3 officers per 1,000 residents.[151]

If the sheer size and understaffing of the departments were not enough, inadequate funding and resources further hinder them. Tribal law enforcement agencies generally only have between fifty-five and seventy-five percent of the resources available to non-Indian communities.[152] About $83 is spent per resident in Indian Country on law enforcement, while the national average is closer to $130 per resident.[153] Additionally, given that the crime rate in much of Indian Country is very high, many tribal law enforcement agencies require funding in excess of the national average to deal with the crime already occurring in their communities.[154] Moreover, many of the physical resources used by Indian police departments are sorely inadequate. For example, many buildings and facilities are outdated or too small, computer systems are old or absent, and many vehicles are in poor condition.[155] Likewise, the jail facilities in Indian Country are notoriously overcrowded and inadequate for current needs.[156]

Due to the state of most tribal police departments, crimes in many parts of Indian Country are under-reported and under-enforced. For example, in 1996, one tribe reported no major crimes to federal authorities for a period of several months—a "precipitous and unlikely" drop.[157] The problems caused by under-reporting of crimes are exacerbated by the high rates of prosecution declination by many United States Attorney's Offices.[158] Although important tribal interests are served by local control over law enforcement,[159] the federal government's

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[151] WAKELING ET AL., *supra* note 25, at 27.

[152] *Id.* at vii. According to a Senate Report accompanying the TLOA, fewer than 3,000 Bureau of Indian Affairs and tribal law enforcement officers patrol more than 56 million acres of Indian Country in 35 states. This figure amounts to an approximate unmet staffing need of forty percent when compared to similar rural communities. S. REP. NO. 111-93, at 6 (2009).

[153] WAKELING ET AL., *supra* note 25, at 27.

[154] *See id.* at vii.

[155] *Id.* at 26.

[156] *Id.*; *see also* TODD D. MINTON, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 228271, JAILS IN INDIAN COUNTRY, 2008 5 (2009).

[157] WAKELING ET AL., *supra* note 25, at 14.

[158] *See supra* note 69.

[159] Beginning in the 1960s and particularly since the 1970s, federal Indian policy has been dominated by self-determination. This policy focuses on reinvigorating tribal self-governance and recognizes tribal sovereignty. *See, e.g.*, Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450(b) (2006); Native American Housing Assistance and Self-Determination Act, 25 U.S.C. §§ 4101–4243 (2006); Tribally Controlled College or University Assistance Act, 25 U.S.C. §§ 1801–52 (2006).

trust responsibility to the tribes also necessitates that greater federal funding and resources be allocated to tribal police forces.[160]

II. CONGRESS' SOLUTION: THE TRIBAL LAW AND ORDER ACT OF 2010

The current crime crisis in Indian Country has not gone unnoticed by Congress. Rather, Congress has long been aware of the high crime rates among Native Americans. Indeed, some of the causes of the problems were actually misguided attempts by Congress to decrease Indian Country crime.[161] Recently, President Obama signed legislation that has the potential to serve as an important short-term remedy to

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[160] The trust responsibility of the federal government to the Indian tribes has a long heritage and continues to exist even today during the era of self-determination. The doctrine has its origins in the Removal Era and has repeatedly reinforced a basis of unique federal power in Indian Country. *See, e.g.*, Menominee Tribe v. United States, 391 U.S. 404, 411–12 n.12 (1968) ("Wisconsin contends that any hunting or fishing privileges . . . did not survive the dissolution . . . of the trusteeship of the United States over the Menominees."); Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942) ("In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. . . . [I]t has charged itself with moral obligations of the highest responsibility and trust."); United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 354 (1941) ("[A]n extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards."); Lone Wolf v. Hitchcock, 187 U.S. 553, 567 (1903) ("'From their very weakness and helplessness . . . there arises the duty of protection . . . .'" (quoting United States v. Kagama, 118 U.S. 375, 384 (1886))); *Kagama*, 118 U.S. at 383–84 ("These Indians tribes *are* the wards of the nation. They are communities *dependent* on the United States."); Worcester v. Georgia, 31 U.S. 515, 587 (1832) ("By the first president of the United States, and by every succeeding one, a strong solicitude has been expressed for the civilization of the Indians."); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) ("[The Indians] look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father."); *see also* Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975) (explaining the federal trust responsibility).

Although the exact contours of the modern doctrine are not always clear, the federal government retains a trust duty to protect and care for the well-being of the Indian tribes in a number of areas. *E.g.*, United States v. Navajo Nation, 537 U.S. 488, 506 (2003) (stating that there is an "'undisputed existence of a general trust relationship between the United States and the Indian people'" (quoting United States v. Mitchell, 463 U.S. 206, 225 (1983))); United States v. White Mountain Apache Tribe, 537 U.S. 465, 474 (2003) ("[T]he Government is subject to duties as a trustee . . . ."); United States v. Mitchell, 463 U.S. 206, 226 (1983) ("Because the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained."); United States v. Mitchell, 445 U.S. 535, 548 (1980) (White, J., dissenting) ("When Congress established a 'trust' for the Indian allottees it is not sensible to assume an intent to depart from these well-known fiduciary principles."); H.R. Res. 1924, 111th Cong. § 2(a)(1) (2009) (stating that "the United States has distinct legal, treaty, and trust obligations to provide for the public safety of tribal communities").

[161] *See supra* Part I.B.

many of the crime problems in Indian Country.[162] Unlike many previous efforts by Congress, the Tribal Law and Order Act of 2010 is a coordinated and well-designed response. The Act is a crucial first step in making Indian Country a safer place. The Act does not completely overhaul the criminal justice system in Indian Country, however; it instead focuses attention on particular problem areas that most badly need attention in the near future.

The TLOA of 2008 was initially introduced in the Senate by Senator Byron Dorgan (D-ND), Chairman of the U.S. Senate Committee on Indian Affairs,[163] and by Representative Stephanie Herseth Sandlin (D-SD).[164] Upon its expiration at the end of the 110th Congress, the TLOA was reintroduced in both the House and Senate in April 2009 as the TLOA of 2009.[165] By January 2010, the TLOA of 2009 was referred to the Committee in the House;[166] it was approved in the Senate by the Committee and was recommended for full Senate consideration.[167] Despite widespread bipartisan support, however, the TLOA of 2009 languished during the spring and early summer months, and it seemed destined to expire like its 2008 predecessor. Fortunately, though, the Tribal Law and Order Act was voted on and passed by both Houses of Congress and subsequently signed into law by President Obama on July 29, 2010, amid stated support from a variety of sources and outlets.[168]

In the Senate, the TLOA of 2009 was appended as the TLOA of 2010, with slight modifications, to the Indian Arts and Crafts

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[162] Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261.

[163] Tribal Law and Order Act of 2008, S. 3320, 110th Cong. 1. The Senate Committee on Indian Affairs held hearings during the 110th Congress on various topics related to criminal justice in Indian Country. As a result of these hearings, Senator Dorgan released a concept paper recommending changes to the criminal justice system in Indian Country. On July 23, 2008, Senator Dorgan and twelve fellow sponsors, including Senators Baucus, Biden, Bingaman, Cantwell, Domenici, Johnson, Kyl, Lieberman, Murkowski, Smith, Tester, and Thune, introduced the Tribal Law and Order Act of 2008. The Committee on Indian Affairs did not report out the bill during the 110th Congress, however, and the bill expired. S. REP. NO. 111-93, at 4 (2009).

[164] Tribal Law and Order Act of 2008, H.R. 6583, 110th Cong. 1.

[165] Tribal Law and Order Act of 2009, H.R. 1924, 111th Cong.; Tribal Law and Order Act of 2009, S. 797, 111th Cong. (2009).

[166] *H.R. 1924: Tribal Law and Order Act of* 2009, GOVTRACK.US (July 21, 2010, 6:23 AM), http://www.govtrack.us/congress/bill.xpd?bill=h111-1924.

[167] *S. 797 Tribal Law and Order Act of* 2009, GOVTRACK.US (June 27, 2010, 9:12 PM), http://www.govtrack.us/congress/bill.xpd?bill=s111-797.

[168] Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261; Troy A. Eid, *Bringing Justice to Indian Country*, DENVERPOST.COM (Aug. 3, 2010, 06:04 AM), http://www.denverpost.com/opinion/ci_15661714; *Obama Signs Bill Targeting Crime on Indian Reservations*, CNN.COM (July 29, 2010, 5:40 PM), http://articles.cnn.com/2010-07-29/politics/obama.reservations.act_1_tribal-courts-tribal-law-lawenforcement?s=PM:POLITICS.

Amendments Act of 2010 ("IACAA").[169] The IACAA expands the ability of tribal authorities to prosecute sellers of misrepresented Indian goods or products and was previously passed by the House.[170] The 2010 version of the TLOA is substantially the same as the 2009 version that was considered by committee in both Houses of Congress.[171] The IACAA, containing the TLOA of 2010, passed the Senate on June 23, 2010, by unanimous consent.[172] Not unexpectedly, the House of Representatives passed the amended version of the IACAA on July 21, 2010, by a vote of 326 to 92.[173] The Act received a unanimous vote of Democrat Representatives, and it was narrowly rejected by Republican Representatives by a vote of 78 to 92.[174] Although a majority of Republicans voting in the House voted against the Act, much of the stated opposition stemmed not from the content of the TLOA, but from the manner by which the Senate amended the IACAA to include the TLOA, robbing the House of the opportunity to propose its own amendments.[175] Upon passage by the House, the IACAA and TLOA were signed into law by President Obama in a very moving ceremony, during which President Obama comforted Lisa Marie Iyotte, a Native American rape victim who openly wept as she described the crime committed against her in 1994 during her introduction of the TLOA.[176]

The TLOA is multi-faceted and addresses a number of issues related to crime in Indian Country. Its primary goals[177] are to improve

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[169] 111 CONG. REC. S5306, S5365–76 (daily ed. June 23, 2010).

[170] Indian Arts and Crafts Amendment of 2010, H.R. 725, 111th Cong. §§ 102–03 (2010).

[171] *Compare* H.R. 1924, 111th Cong. (2009), *and* S. 797, 111th Cong. (2009), *with* H.R. Res. 725, 111th Cong. (2010).

[172] *H.R. 725: Indian Arts and Crafts Amendments Act of 2010*, GOVTRACK.US (Oct. 13, 2010, 2:41 PM), http://www.govtrack.us/congress/bill.xpd?bill=h111-725.

[173] *Final Vote Results for Roll Call 455*, CLERK.HOUSE.GOV, http://clerk.house.gov/evs/2010/roll455.xml (last visited Oct. 30, 2010).

[174] *Id.*

[175] 111 CONG. REC. H5862–64 (daily ed. July 21, 2010) (statements of Rep. Hastings and Rep. Pastor).

[176] *Remarks by the President Before Signing the Tribal Law and Order Act*, WHITEHOUSE.GOV (July 29, 2010, 4:58 PM), http://www.whitehouse.gov/photos-and-video/video/signing-tribal-law-and-order-act. Lisa Marie Iyotte was raised as a Sicangu Lakota Sioux. She was attacked and raped in 1994, but as has been too often the case, the perpetrator was never convicted of the crimes he committed against her. *Id.*

[177] The stated goals of the TLOA include the following: "to clarify the responsibilities of Federal, State, tribal, and local governments with respect to crimes committed in Indian country;" "to increase coordination and communication among Federal, State, tribal, and local law enforcement agencies;" "to empower tribal governments with the authority, resources, and information necessary to safely and effectively provide public safety in Indian country;" "to reduce the prevalence of violent crime in Indian country and to combat sexual and domestic violence against American Indian and Alaska Native women;" "to prevent drug trafficking and reduce rates of alcohol and drug addiction in Indian country;"

the effectiveness of Indian law enforcement by providing tribal police and justice officials with additional tools and resources; improving the coordination between state, federal, and tribal law enforcement agencies; and increasing federal accountability for the safety of the residents of Indian Country.[178] Most notably, the TLOA increases the sentencing authority of tribal courts to three years' imprisonment,[179] provides for concurrent state and federal jurisdiction in PL-280 states upon tribal consent,[180] increases the resources available to tribal law enforcement agencies,[181] and includes a number of provisions designed to target domestic and sexual violence committed against Native American women.[182]

Generally, the TLOA alternates between providing additional resources to tribal law enforcement agencies and centralizing the enforcement of criminal law in Indian Country in the hands of the federal government. These strategies exist in tension with one another to some degree; however, they also recognize the competing interests of tribal sovereignty in the self-determination era and the long-standing responsibility of the federal government for the well-being of the tribes through the trust doctrine. As previously discussed, many—if not all—of the law enforcement problems can be directly traced to the actions of the federal government.[183] Although the federal trust responsibility is often offered as the legal justification for federal intrusion into Indian affairs,[184] in this case, the federal trust responsibility to the Native Americans can be viewed as mandating the passage of the TLOA (or other comparable legislation) as part of a federal duty to provide basic social services to tribal members.[185] Indeed, the very basis for the

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and "to increase and standardize the collection of criminal data and the sharing of criminal history information among Federal, State, and tribal officials responsible for responding to and investigating crimes in Indian country." Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(b), 124 Stat. 2261, 2263.

[178] Press Release, S. Comm. on Indian Affairs, Legislation Gives Boost to Law & Order in Indian Country (July 23, 2008), *available at* http://indian.senate.gov/news/press releases/2008-07-23.cfm.

[179] Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 234(b), 124 Stat. 2258, 2279.

[180] *Id.* § 221.

[181] Tribal Law and Order Act of 2010, Subtitles C–E, 124 Stat. 2258, 2272–99.

[182] Tribal Law and Order Act of 2010, Subtitle F, 124 Stat. 2258, 2299–2301.

[183] *See supra* Part I.B.

[184] Roger Florio, Note, *Water Rights: Enforcing the Federal-Indian Trust After* Nevada v. United States, 13 AM. INDIAN L. REV. 79, 87 (1987).

[185] *See* Chambers, *supra* note 160, at 1243–44 (discussing a fiduciary duty of the government to provide services to the Indian tribes); *see also* Friends Committee on National Legislation, *The Origins of Our Trust Responsibility Towards the Tribes*, FCNL.ORG (June 10, 2010), http://www.fcnl.org/issues/item.php?item_id=1300&issue_id=95

Supreme Court's decision in *Kagama* arose from the duty of Congress to protect Indians,[186] and now, when the residents of Indian Country live in danger with minimal protection from law enforcement, Congressional action is needed.[187] Although likely not a judicially enforceable duty, a strong argument can be made that failing to pass the TLOA would have been a dereliction of Congress' trust responsibility to the Native Americans.

A. Increased Coordination Between Federal and Tribal Law Enforcement and Greater Federal Accountability

An important focus of the TLOA is increasing the coordination and communication between federal and tribal law enforcement agencies. As part of this effort, one of the major changes in the Act is the creation, within the BIA,[188] of an office called the "Office of Justice Services." This new office will take on the responsibilities of the Division of Law Enforcement Services as enumerated in 25 U.S.C. §§ 2802(b)–(c).[189] The office is also tasked with a number of new responsibilities, focused primarily on coordinating federal and tribal law enforcement efforts.[190] Most notably, these new responsibilities include opening a meaningful dialogue with tribal leaders in developing coordinated policies in Indian Country;[191] providing assistance and training to tribal law enforcement in accessing and using the National Criminal Information Center ("NCIC") database;[192] collecting information on Indian Country crimes annually in coordination with the Attorney General;[193] and compiling detailed spending reports, including current expenses and a list of unmet staffing needs of law enforcement and court personnel in tribal and BIA

(discussing the various responsibilities of Congress to Indian tribes based upon the federal trust responsibility).

186 United States v. Kagama, 118 U.S. 375, 384 (1886) ("From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.").

187 The TLOA itself recognizes that the Act is an attempt to fulfill the federal trust responsibility. *See* Tribal Law and Order Act of 2010 § 202(a)(1) ("[T]he United States has distinct legal, treaty, and trust obligations to provide for the public safety of Indian country . . . .").

188 The BIA is the most important federal office in Indian Country because it is the primary arm by which federal policy is applied to Indian Country. The office is located within the Department of the Interior and was founded in 1824. *BIA: Who We Are*, BIA.GOV (Oct. 30, 2010), http://www.bia.gov/WhoWeAre/index.htm.

189 Tribal Law and Order Act of 2010 § 211; 25 U.S.C §§ 2801, 2802 (2006).

190 Tribal Law and Order Act of 2010 § 211; 25 U.S.C §§ 2801, 2802 (2006).

191 Tribal Law and Order Act of 2010 § 211(b)(12).

192 *Id.* § 211(b)(13).

193 *Id.* at § 211(b)(14)–(15).

agencies.[194] The TLOA also mandates that a joint plan be submitted to Congress by the DOJ and the BIA within one year of its enactment to arrange for the incarceration of criminals prosecuted in Indian Country.[195]

In addition to enhancing and mandating communication between the BIA Office of Justice Services and tribal law enforcement agencies, the bill also requires additional communication between the tribal law enforcement agencies and the DOJ.[196] As many areas of Indian Country rely almost solely upon federal prosecutions,[197] bridging the gap between many tribal law enforcement agencies and their respective United States Attorney's Office is a crucial goal.[198]

Responding to statistics that suggest that a troublingly high number of cases are declined by United States Attorney's Offices,[199] the TLOA now mandates a number of new responsibilities for federal prosecutors. Under the TLOA, if a United States Attorney's Office or other federal agency declines or terminates the prosecution of a violation of federal law in Indian Country, the officer must coordinate with the appropriate tribal law enforcement regarding the status of the case and available evidence so as to enable prosecution in an appropriate tribal court.[200] In further effort to improve the overall rates of prosecution, the TLOA also requires the Federal Bureau of Investigation to compile data on crimes committed in Indian Country that are not referred for prosecution.[201] The TLOA also requires that the United States Attorneys submit prosecution declination reports to the Native American Issues Coordinator.[202] The Attorney General then must submit the preceding data to Congress on an annual basis for centralized review.[203] As current statistics suggest that a relatively large number of cases are declined by federal prosecutors,[204] these provisions will at least make tribal justice officials aware of cases that are not being prosecuted. Additionally, the

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194 *Id.* § 211(b)(16).

195 *Id.* § 211(f).

196 *Id.* § 211(b)(14)–(15).

197 Washburn, *supra* note 77, at 712.

198 *See supra* note 177.

199 *See supra* note 69; *see also Examining Federal Declinations to Prosecute Crimes in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 3 (2008).

200 Tribal Law and Order Act of 2010 § 212(a)(1), (3).

201 *Id.* § 212(a)(2).

202 *Id.* § 212(a)(4).

203 *Id.* § 212(b).

204 Department of Justice Officials dispute the need for this provision, maintaining that the United States Attorneys are not declining cases that should be prosecuted in federal court. *See S. Tribal Law and Order Act of 2009*, *supra* note 132, at 6 (statement of Thomas J. Perrelli, Assoc. Att'y Gen. of the United States).

filing of declination reports will help the federal government better understand why prosecutions are declined, so that strategies can be developed to increase prosecutions.

The TLOA also requires the appointment of a tribal liaison in each United States Attorney's Office that includes Indian Country within its borders to help coordinate prosecutions and develop working relationships with local tribal law enforcement.[205] The TLOA charges these liaisons with the responsibility of helping train tribal justice officials in evidence-gathering so tribal law enforcement can better support federal prosecutions.[206] Section 213 of the TLOA encourages the appointment and training of attorneys to serve as Special Assistant United States Attorneys to aid in the prosecution of misdemeanors in federal court.[207] Moreover, the Act encourages United States Attorney's Offices to increase the number of prosecutions of minor crimes in areas with high levels of crime or high rates of prosecution declination.[208] To ensure that there is adequate docket space allocated to these increased prosecutions, the TLOA also charges the affected United States Attorney's Office to coordinate these prosecutions with local federal magistrate and district judges.[209]

The TLOA makes the Office of Tribal Justice ("OTJ") permanent within the DOJ[210] and creates a new position, the Native American Issues Coordinator, within the Criminal Division of the DOJ.[211] In addition to the existing responsibilities of the OTJ,[212] the OTJ is now specifically charged with coordinating tribal policy across all of the offices and divisions in the DOJ as well as serves as the primary point of contact for Indian tribes.[213] The Native American Issues Coordinator, on the other hand, is given specific responsibility for coordinating and developing the actual application of federal statutes in Indian Country.[214] Although this provision could have the effect of pulling some

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[205] Tribal Law and Order Act of 2010 § 213(b).

[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] *Id.* § 214(a).

[211] *See id.* § 214(b).

[212] According to the DOJ website, the current responsibilities of the OTJ include (1) providing a single point of contact for tribes within the DOJ; (2) promoting uniform DOJ polices; (3) advising department components litigating Native American issues; (4) ensuring communication with tribal leaders; maintaining liaisons with federally recognized tribes; and (5) coordinating with the Office of Legislative Affairs. *OTJ: Role and Responsibilities*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/otj/roleandresponse.htm (last visited Oct. 30, 2010).

[213] Tribal Law and Order Act of 2010 § 214(a).

[214] *Id.* § 214(b).

manpower out of local United States Attorney's Offices in the short term,[215] it will help the DOJ develop uniform policies and strategies for the nuts and bolts application of federal statutes in Indian Country in the long term. Overall, the reorganization of Indian affairs within the DOJ will hopefully have the effect of tightening and unifying Indian policy on a national level, while the creation of tribal liaisons and increased use of declination reports will help foster close relationships and cooperation between United States Attorney's Offices and tribes on a local level.

The TLOA largely focuses on the relationship between federal and tribal law enforcement agencies, and it makes little mention of states. There are two significant provisions dealing with the states, however, that could seriously alter the nature of law enforcement in the parts of Indian Country where PL-280 is applicable.[216]

First, to encourage coordination between state, local, and tribal law enforcement agencies, the United States Attorney General is given authority to provide technical and other assistance to those state and local governments that enter into cooperative agreements with tribes for the investigation and prosecution of crimes.[217] Because one of the major complaints of the states that hold jurisdiction in Indian Country through the operation of PL-280 is the lack of federal funding,[218] this program could help incentivize local law enforcement cooperation between states and tribes.

Second, the TLOA would serve to lessen the effects of PL-280 in those areas where states have criminal jurisdiction over Indian Country.[219] The TLOA would allow tribes under state jurisdiction to request to be placed back under federal jurisdiction.[220] Rather than flatly ending state jurisdiction in these areas, the TLOA provides that the state and federal governments would have concurrent jurisdiction over those areas. The DOJ supports this provision[221] and it could largely reverse the negative effects of PL-280 in those districts where there is

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215 *See S. Tribal Law and Order Act of 2009*, *supra* note 132 at 6, 11–12 (statement of Thomas Perrelli, Assoc. Att'y Gen. of the United States) (voicing opposition to the creation of the Office of Indian Country Crime because of the potential to divert needed resources away from the "ground"). In an earlier version of the TLOA, the responsibilities of Native American Issues Coordinator were assigned to an office called the Office of Indian Country Crime. H.R. 1924, 111th Cong. § 106 (2009); S. 797, 111th Cong. § 106 (2009).

216 *See* Tribal Law and Order Act of 2010 §§ 221, 222.

217 *Id.* § 222.

218 *See* Goldberg, *supra* note 21, at 538.

219 Tribal Law and Order Act of 2010 § 221.

220 *Id.*

221 *S. Tribal Law and Order Act of 2009*, *supra* note 132, at 12 (statement of Thomas Perrelli, Assoc. Att'y Gen. of the United States).

the least state activity.[222] By contrast, in those areas of Indian Country where state law enforcement and judicial mechanisms are adequately dealing with crime, there is no reason to return to federal jurisdiction. At least in the short term, this provision may prove to be one of the most important in the entire TLOA, as it could potentially place large areas of Indian Country back under federal protection for the first time since 1953.

B. Empowerment of Tribal Law Enforcement

In addition to containing provisions intended to increase coordination of the various law enforcement agencies responsible for safety in Indian Country, the TLOA also contains a host of other provisions designed to empower the justice system and tribal law enforcement agencies.

First, the TLOA focuses on improving the quality of tribal law enforcement agencies by expanding the resources and training opportunities available to them. The TLOA amends the Indian Law Enforcement Reform Act ("ILERA")[223] to expand training for tribal law enforcement, allow BIA and tribal officers to attend tribal community colleges or state and tribal police academies, and sets a sixty-day deadline on BIA tribal officer background checks.[224] This provision is potentially helpful in opening up bottlenecks in the training and hiring of tribal law enforcement officers.[225] The TLOA also includes provisions allowing tribal law enforcement agencies access to National Criminal Information Center databases.[226] This section allows Indian tribes to enter information into these databases.[227] The NCIC database provides an interface between the various law enforcement agencies and has been called "the single most important avenue of cooperation among law

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[222] *Id.* at 49 (discussing how PL-280 has likely increased crime in areas under state jurisdiction).

[223] Indian Law Enforcement Reform Act, Pub. L. No. 101-379, 104 Stat. 473 (1990).

[224] Tribal Law and Order Act of 2010 § 231.

[225] Although lack of funding is a major problem, tribal law enforcement agencies and the BIA also face difficulties training hired officers. The BIA, for example, requires that police officer candidates receive training at the Indian Police Academy, located in Artesia, New Mexico. The Indian Police Academy has a low retention rate that creates a bottleneck in the training of officers. As a result, tribal communities are left with considerable unmet needs for trained officers, even after funding for hiring is made available. *See* S. REP. NO. 111-93, at 7, 21–22 (2009).

[226] Tribal Law and Order Act of 2010 § 233. This section of the TLOA amends 28 U.S.C. § 534, placing tribal law enforcement agencies in essentially the same position as state law enforcement. Currently, as written, the TLOA seems to create an affirmative duty on the Attorney General to "ensure" that tribal law enforcement agencies who meet applicable standards have access to these databases. This provision could be read to require a federal investment in technology for tribal police departments. *See id.* § 233(b)(1).

[227] *Id.* § 233.

enforcement agencies."[228] This increase in access is crucial as many tribal police departments are severely impeded and marginalized by a lack of access to national crime information.[229] Further empowering tribes, the TLOA allows tribal governments to access, use, collect, and share data pursuant to the Violence Against Women and Department of Justice Reauthorization Act of 2005[230] and the Omnibus Crime Control and Safe Streets Act of 1968.[231]

The TLOA amends the Controlled Substances Act[232] to expand the power of tribal law enforcement officers, authorizing them to "make arrests without warrant for any [federal] offense . . . committed in his presence, or . . . for any felony . . . if he has probable cause to believe that the person to be arrested has committed or is committing a felony . . . ."[233] The TLOA also includes a provision that amends the ILERA, which allows the BIA to authorize Indian police to arrest individuals without a warrant for offenses committed in Indian Country if the offense is a federal crime and if the officer "has probable cause to believe that the person to be arrested has committed, or is committing" the crime.[234] Overall, the TLOA outlines a number of provisions that improve the training and quality of tribal law enforcement agencies, allow access to the NCIC, increase the authority of those departments to

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[228] *Tribal Law and Order Act of 2009: Oversight Hearing on H.R. 1924 Before the H. Comm. on the Judiciary*, 111th Cong. 6 (2009) [hereinafter *Oversight Hearing on H.R. 1924*] (statement of Marcus Levings, Great Plains Regional Vice President, National Congress of American Indians) (quoting 28 U.S.C. § 534).

[229] *Id.*; WAKELING ET AL., *supra* note 25, at 14, 57.

[230] Tribal Law and Order Act of 2010 § 251(a); *see* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006) (codified at 28 U.S.C. § 534 (2006)).

[231] Tribal Law and Order Act of 2010 § 251(b); *see* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968) (codified at 42 U.S.C. § 3732 (2006)).

[232] Tribal Law and Order Act of 2010 § 232(d); *see* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified at 21 U.S.C. § 878(a) (2006)).

[233] Tribal Law and Order Act of 2010 § 232(d); 21 U.S.C. § 878(a)(3) (2006).

[234] Tribal Law and Order Act of 2010 § 211(c); 25 U.S.C. § 2803 (2006). This expands the authority of BIA officers enormously, as they previously only had authority to arrest without a warrant if (1) the offense was committed in their presence, (2) the offense was a felony and the officer had reasonable grounds to believe the arrestee committed it, or (3) the offense was of a limited class of misdemeanors, including domestic and dating violence, stalking, or the violation of protective orders. 25 U.S.C. § 2803 (2006). Earlier versions of the TLOA repeated the "reasonable grounds" standard from the ILERA. *See* H.R. 1924, 111th Cong. § 101(c) (2009); S. 797, 111th Cong. § 101(c) (2009).

This "reasonable grounds" standard would likely have been unconstitutional for violating the "probable cause" standard for warrantless arrests under the Fourth Amendment as set forth by the Supreme Court in *Atwater v. City of Lago Vista*. *See* 532 U.S. 318, 354 (2001) ("[T]he standard of probable cause 'applie[s] to all arrests . . . .'" (quoting Dunaway v. New York, 442 U.S. 200, 208 (1979))).

make arrests, and more generally provide for the safety and well-being of those individuals living in Indian Country.

Additionally, the TLOA amends the Indian Self-Determination and Education Assistance Act[235] to create the Indian Law Enforcement Foundation, a charitable, federally chartered corporation.[236] The Foundation is charged with "encourag[ing], accept[ing], and administer[ing]" charitable gifts and donations for the benefit of public safety and justice services in American Indian or Alaska Native communities.[237] The Foundation is also responsible for helping the Office of Justice Services in the BIA and tribal governments in administering and applying funds as well as providing educational services to benefit public safety.[238]

In one of its most important and controversial provisions,[239] the TLOA significantly increases the sentencing authority of tribal courts.[240] The TLOA amends the ICRA to increase the maximum sentence that tribal courts may impose from one to three years, and it increases the maximum fine for each offense from $5,000 to $15,000.[241] This provision was enacted in direct response to the concerns that tribal courts were being severely hampered by the inability to punish crimes with proportionate sentences.[242] For example, then-U.S. Attorney General Janet Reno stated that "[t]he lack of a system of graduated sanctions through tribal court . . . directly contributes to the escalation of adult

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[235] Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified at 25 U.S.C. §§ 450–58 (2006)).

[236] Tribal Law and Order Act of 2010 § 231(c).

[237] *Id.*

[238] *Id.*

[239] *See, e.g.*, *S. Tribal Law and Order Act of 2009*, *supra* note 132, at 13 (statement of Thomas J. Perrelli, Assoc. Att'y Gen. of the United States) (discussing possible negative effects of this provision).

[240] Tribal Law and Order Act of 2010 § 234(a).

[241] *Compare id.*, *with* 25 U.S.C. § 1302(7) (2006).

[242] *See, e.g.*, *Oversight Hearing on H.R. 1924*, *supra* note 228, at 5 (statement of Marcus Levings, Great Plains Regional Vice President, National Congress of American Indians) (discussing how tribal courts are responsible for prosecuting many felonies but are hampered by the inability to sentence adequately); *Tribal Courts*, *supra* note 76, at 33 (statement of Theresa M. Pouley, J. of Tulalip Tribal Court and President of Northwest Tribal Court JJ. Association) (same); *see also* S. REP. NO. 111-93, at 16 (2009) ("Facts have changed dramatically in the past twenty years. Tribal courts are increasingly trying violent offenses and tribal jails are holding more violent offenders. In testimony before the Committee, one tribal prosecutor stated that 'I have a jury trial that is scheduled on a murder, a homicide case on the end of this month[]. . . . We just finished a trial on a juvenile who was convicted of homicide in our court.'") (citing *Tribal Courts*, *supra* note 76, at 82 (statement of Dorma L. Sahneyah, Chief Prosecutor, Hopi Tribe)).

and juvenile criminal activity."[243] To protect due process rights, however, the TLOA amends the ICRA further, requiring that if a tribal court sentences an individual to more than one year's imprisonment, the court may not deny the defendant the benefit of legal counsel, provided at the expense of the tribe,[244] and that the judge presiding over the proceeding be admitted to practice law.[245] In an act of caution, Congress added a long-term safeguard to the provision creating the increased sentencing authority: the effectiveness of the increased sentencing authority will be evaluated in four years and may then be "discontinued, enhanced, or maintained."[246] Also worth noting is the fact that the TLOA leaves unclear the ability of tribal courts to sentence defendants to multiple terms of imprisonment for separate offenses arising from the same criminal conduct.[247]

Giving the increased sentencing authority even more bite, tribal courts exercising this new authority under the TLOA may imprison defendants in tribal correction centers or take advantage of federal facilities as part of a Bureau of Prisons tribal prisoner pilot program that will last for four years.[248] The pilot program allows tribal courts to request confinement of individuals convicted of violent crimes whose term of imprisonment is one year or more; these inmates will be imprisoned at the expense of the federal government.[249] A cap of one hundred tribal offenders at any one time, however, is imposed on this

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[243] *Department of Justice/Department of the Interior Tribal Justice Initiatives: Hearing Before the S. Comm. on Indian Affairs*, 105th Cong. 55 (1998) (statement of Janet Reno, Att'y Gen. of the United States).

[244] Tribal Law and Order Act of 2010 § 234(a). It is currently unclear what percentage of tribes will be able to afford to provide legal counsel to criminal defendants. Potentially, the cost of counsel may inhibit the ability of tribes to fully exercise the new sentencing authority granted in Section 234 of the TLOA. *See* Rob Capriccioso, *Tribal Law and Order Act to Become Law at Cost to Tribes*, INDIAN COUNTRY TODAY (July 22, 2010), http://www.indiancountrytoday.com/home/content/Tribal-Law-and-Order-Act-to-become-law-at-cost-to-tribes-99016714.html. In the future, it may be necessary for the federal government either to subsidize or to pay for the cost of defense counsel for needy tribes.

[245] Tribal Law and Order Act of 2010 § 234(a).

[246] *Id.* § 234(b)(2). This long-term safeguard did not exist in earlier versions of the TLOA in either the House or the Senate. *See* H.R. 1924, 111th Cong. § 304 (2009); S. 797, 111th Cong. § 304 (2009).

[247] For example, in *Spears v. Red Lake Band of Chippewa Indians*, the court held that different crimes committed during a single incident constituted only one offense under the ICRA. 363 F. Supp. 2d 1176, 1180 (D. Minn. 2005) (citing U.S. SENTENCING COMMISSION GUIDELINES MANUAL § 3D, Introductory Commentary ¶¶ 3–4 (2004)). This interpretation of the ICRA seriously curtails the sentencing authority of tribal courts. The TLOA simply defines an offense as "a violation of a criminal law," leaving the issue unresolved. Tribal Law and Order Act of 2010 § 234(a).

[248] Tribal Law and Order Act of 2010 § 234(c)(6).

[249] *Id.* § 234(a)(1).

program.[250] Recent studies have shown that many tribal jails are severely overcrowded, understaffed, and incapable of handling the prisoners for whom they are already responsible.[251] Thus the TLOA helps to ensure that individuals convicted in tribal court are imprisoned and that inmates are housed in adequate facilities. On the same note, the TLOA makes provisions to amend the Violent Crime Control and Law Enforcement Act of 1994 to provide for the construction of additional detention facilities in Indian Country.[252]

In addition to these provisions, the TLOA includes the reauthorization of a host of various law enforcement or justice-related programs. The programs affected by the TLOA are wide ranging; they include programs for combating alcohol and substance abuse in Indian Country,[253] increased training of tribal law enforcement in the investigation and prosecution of narcotics-related offenses,[254] the reauthorization of the Indian Tribal Justice Act,[255] the reauthorization of the Indian Tribal Justice Technical and Legal Assistance Act of 2000,[256] and amendments to the Juvenile Justice and Delinquency Prevention Act of 1974 to provide for additional grants to Indian tribes.[257] The TLOA also reauthorizes the DOJ Tribal Community Oriented Policing Services program, which will provide long-term grants for hiring and training additional law enforcement officers as well as for purchasing

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[250] *Id.* § 234(c)(2)(D).

[251] WAKELING ET AL., *supra* note 25, at 26. Many tribal jails are overcrowded and in disrepair; jail operations also lack sufficient training, staffing, and funding. Due to these problems, judges may be forced to release offenders early, and the poor conditions place the safety of both officers and inmates at risk. S. REP. NO. 111-93, at 8 (2009).

[252] Tribal Law and Order Act of 2010 § 244(b)(3); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 1, 108 Stat. 1796, 1796 (codified at 42 U.S.C. § 13709(b) (2006)).

[253] Tribal Law and Order Act of 2010 § 241. This provision reauthorizes the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-137 (codified at 25 U.S.C. § 2401–03 (2006)).

[254] Tribal Law and Order Act of 2010 § 241(f).

[255] *Id.* § 242; *see* Indian Tribal Justice Act, Pub. L. No. 103-176, 107 Stat. 2004 (1993) (codified as amended in scattered sections of 25 U.S.C.). In general, the Indian Tribal Justice Act provides funding and financial assistance for expenses related to the operation of tribal court systems. Indian Tribal Justice Act § 101(c).

[256] Tribal Law and Order Act of 2010 § 242(b); *see* Indian Tribal Justice Technical and Legal Assistance Act of 2000, Pub. L. No. 106-559, 114 Stat. 2778 (2000) (codified as amended in scattered sections of 25 U.S.C.). This Act also provides for grants and financial assistance to the tribal justice system. Indian Tribal Justice Technical Assistance Act §§ 101–03.

[257] Tribal Law and Order Act of 2010 § 246. The Juvenile Justice and Delinquency Prevention Act of 1974 is codified at 42 U.S.C. § 5783 (2006).

equipments, such as computers and vehicles.[258] Finally, with an eye to the future, the TLOA creates an Indian Law and Order Commission, which is tasked with the responsibility of studying and making recommendations to the President and Congress on a host of issues related to criminal law in Indian Country.[259]

C. Special Provisions for Crimes Against Women

Importantly, the TLOA includes provisions specifically designed to help combat the much-publicized epidemic of violence against women in Indian Country.[260] The TLOA first provides that additional training programs be put in place to help tribal law enforcement deal with crimes of domestic and sexual violence.[261] The TLOA amends the ILERA[262] and provides that the newly created Office of Justice Services be responsible for providing training in interviewing victims of domestic and sexual violence, preserving evidence in cases of sexual violence, and presenting evidence to federal and tribal prosecutors to help increase conviction rates.[263] Additional training in these areas is sorely needed; current evidence suggests that tribal law enforcement agencies lack both the means and the expertise to preserve the physical evidence often needed to prosecute sexual violence cases adequately.[264] In a similar vein, the TLOA further amends the ILERA to provide for the creation of standardized sexual assault polices and protocols in Indian Country by the Director of Indian Health Services.[265] Additionally, the Act charges the Comptroller General of the United States with conducting a study of the health services facilities in Indian reservations and Alaska Native villages to determine their ability to "collect, maintain, and secure evidence of sexual assaults and domestic violence incidents required for criminal prosecution."[266] Upon collecting the data, the Comptroller must

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[258] Tribal Law and Order Act of 2010 § 243(3); U.S. DEP'T OF JUSTICE, FISCAL YEAR 2011 BUDGET REQUEST: INDIAN COUNTRY PUBLIC SAFETY INITIATIVES 1–2, *available at* http://www.justice.gov/jmd/2011factsheets/pdf/indian-country.pdf.

[259] Tribal Law and Order Act of 2010 § 235.

[260] *Id.* §§ 261–66.

[261] *Id.* § 262.

[262] 25 U.S.C. § 2802 (2006); Indian Law Enforcement Reform Act, Pub. L. No. 101-379, 104 Stat. 473 (1990).

[263] Tribal Law and Order Act of 2010 §§ 211(a)–(b), 262. The Office of Justice Services will be located in the Bureau of Indian Affairs. Tribal Law and Order Act § 211(b).

[264] Amnesty Int'l, *supra* note 28, at 9.

[265] Tribal Law and Order Act of 2010 § 265. "This section was adopted in response to findings that [thirty percent] of [Indian Health Services] facilities did not have protocols in place for emergency services in cases of sexual violence." S. REP. NO. 111-93, at 21 (2009).

[266] Tribal Law and Order Act of 2010 § 266(a).

also make a report to Congress with recommendations for improving these services.[267]

In an effort to coordinate prosecutions of defendants accused of committing rape or sexual assault, the TLOA amends the ILERA to provide that federal employees will testify upon subpoena or request in cases of rape or sexual assault in which they have gained knowledge of the assault within the scope of their official duties.[268] Although approval is not guaranteed for all requests, the TLOA provides that the request shall not be denied unless it violates the Department's policy of impartiality, and an automatic approval is provided if the request is not acted upon within thirty days.[269] This provision could be very important in the prosecution of many sex crimes, as prosecutors currently struggle to acquire reliable testimony.[270] With less reliance on Indian witnesses, who are often scared to testify in an intimidating courtroom several hours from home,[271] prosecutors will be able to secure additional convictions and may be willing to take on a higher volume of Indian rape cases, helping to reduce overall prosecution declination rates.

III. SHORTCOMINGS OF THE TLOA AND LEGISLATIVE PROPOSALS

Clearly, the TLOA is a major step in the right direction. The Act sets forth a whole host of related provisions designed to combat the epidemic of crime and violence in Indian Country. Among the most significant provisions are increases in funding for and support of tribal law enforcement and justice systems, increased sentencing authority of tribal courts, establishment of potential concurrent jurisdiction in PL-280 states, and reorganization and increase of funding within the Department of Justice—both in Washington and within individual United States Attorney's Offices.[272] Although the Act does not overhaul or even retool the highly dysfunctional Indian criminal justice system, it does focus immediate attention on some of the most defective and damaging problems. The TLOA also has important symbolic value: by gathering such a large number of provisions in one place, Congress is making a clear statement that the nation is finally serious about the safety of individuals living in Indian Country. Indeed, the Act has been

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[267] *Id.* § 266(b).

[268] *Id.* § 263; 25 U.S.C. §§ 2801–09 (2006).

[269] Tribal Law and Order Act of 2010 § 263.

[270] *See* Washburn, *supra* note 77, at 711–12, 736–38. This provision was adopted in response to reports that prosecutors have trouble obtaining testimony from BIA police or Indian Health Services in sexual violence prosecutions. S. REP. NO. 111-93, at 21 (2009).

[271] Washburn, *supra* note 77, at 710–13, 737.

[272] *See supra* Part II.

met with praise and support from a number of different sources from across the political, social, and religious spectra.[273]

Although a significant and potentially watershed act, the TLOA does have shortcomings that need to be addressed in future legislation. Congress will ideally use the TLOA as a springboard and will accordingly craft additional legislation that responds to the needs of tribal, state, and federal law enforcement agencies. The TLOA itself makes provisions for this additional future action by creating the Indian Law and Order Commission.[274] The Commission is charged with conducting a "comprehensive study of law enforcement and criminal justice in tribal communities" and "[n]ot later than 2 years after the date of enactment of this Act . . . submit[ting] to the President and Congress a report that contains . . . the recommendations of the Commission for

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[273] *See, e.g.*, Press Release, S. Comm. on Indian Affairs, Dorgan Welcomes Obama Endorsement of Tribal Law and Order Act (Nov. 2, 2009); *S. Tribal Law and Order Act of 2009*, *supra* note 132, at 9 (statement of Thomas J. Perrelli, Assoc. Att'y Gen. of the United States); *Oversight Hearing on H.R. 1924*, *supra* note 228, at 2 (statement of Marcus Levings, Great Plains Regional Vice President, National Congress of American Indians); *S. Tribal Law and Order Act of 2009*, *supra* note 132, at 49 (statement of Hon. Anthony J. Brandenburg, C.J., Intertribal Court of Southern California); Resolution to Support the Passage and Full Funding of "Tribal Law and Order Act," National Indian Gaming Association (Apr. 15, 2009), *available at* http://www.indiangaming.org/info/alerts/Tribal_Law-Order_Act.pdf.; Press Release, S. Comm. on Indian Affairs, Legislation Gives Boost to Law & Order in Indian Country, (July 23, 2008) (Senator Lisa Murkowski (R-AK) praising the TLOA); *Amnesty International Commends President Obama for Signing Tribal Law and Order Act, Addressing Rampant Violence Against Native Peoples*, AMNESTY INT'L USA (July 29, 2010), http://www.amnestyusa.org/document.php?id=ENGUSA20100729001.

The Senate Committee on Indian Affairs received letters of support from a number of different sources, including the National Congress of American Indians, the American Bar Association, Amnesty International U.S.A., the Friends Committee on National Legislation, the Family Violence Prevention Fund, Mending the Sacred Hoop, the New York State Coalition Against Sexual Assault, Strong Hearted Native Women's Coalition, and Qualla Women's Justice Alliance. *See* S. REP. NO. 111-93, at 5 (2009); *see also* Letter from the Coalition of Bar Associations of Color in Support for Tribal Law and Order Act (May 26, 2010) (includes signatures of support from the Presidents of the Hispanic National Bar Association, National Bar Association, National Asian Pacific American Bar Association, and National Native American Bar Association); Letter from the American Bar Association in Support for Tribal Law and Order Act of 2009 to Byron L. Dorgan, Chairman, S. Comm. on Indian Affairs and John Barraso, Ranking Member, S. Comm. on Indian Affairs (July 17, 2000); Letter from the Friends Committee on National Legislation in Support for the Tribal Law and Order Act (Apr. 26, 2010) (signed by religious groups and denominations, including the Episcopal Church, the Evangelical Lutheran Church in America, Franciscan Action Network, Friends Committee on National Legislation (Quaker), Islamic Society of North America, National Council of Churches of Christ in the USA, the Presbyterian Church (U.S.A.) Washington Office, the Unitarian Universalist Association of Congregations, National Ministries, American Baptist Churches USA, United Church of Christ, Justice and Witness Ministries, United Methodist Church, and General Board of Church and Society).

[274] Tribal Law and Order Act of 2010 § 235.

such legislative and administrative actions as the Commission considers to be appropriate."[275]

In particular, future legislation should begin allocating additional authority to tribal courts and police. The TLOA is largely focused on increasing the federal presence in Indian Country[276]—which will be vitally important in the short term—but in the long term, increased involvement of tribal authorities is necessary. Allocating significant authority to the Indian tribes through future legislation could potentially serve to rewrite the Indian criminal justice system entirely, which is the best solution to the problem if done responsibly. This two-step process would seize upon two of the most fundamental strands of federal Indian law: the long-standing federal trust responsibility and the more recent self-determination doctrine. The TLOA would in the near future primarily take advantage of the trust responsibility to fashion federal remedies to the crime problem,[277] while in the long term, legislation should shift responsibility to tribal authorities in accordance with the more modern self-determination doctrine.

In this vein, there are several areas that Congress most pressingly needs to address. They include the following: (1) a clear Congressional assertion of concurrent tribal jurisdiction over major crimes in PL-280 states, (2) increased sentencing authority for tribal courts, and (3) a legislative overturning of *Oliphant* to provide tribal jurisdiction over non-Indians committing crimes in Indian Country. Each of these proposals will be considered in turn, and will hopefully initiate further discourse on the future needs of law and justice in Indian Country. Finally, tribal courts and governments will never be true partners without adequate federal funding. Adequate funding of tribal law enforcement and court systems will be essential to the success of any provision, in the TLOA or elsewhere, intended to make Indian Country a safer place.

A. Increased Sentencing Authority of Tribal Courts

By increasing the sentencing authority of tribal courts,[278] the TLOA significantly expands the ability of tribal justice systems to provide proportional punishments and deterrence.[279] Importantly, the TLOA now allows for the adequate punishment of many crimes that would be

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[275] *Id.*

[276] *See supra* Part II.

[277] *See supra* Part II.

[278] *See supra* pp. 172–74.

[279] *See supra* pp. 151–53 (discussing the former sentencing limitation of one year's imprisonment and a $5,000 fine under the ICRA).

classified as felonies under federal guidelines.[280] Furthermore, as tribal and federal courts are separate sovereigns, individuals who commit crimes in Indian Country could now potentially face two significant prison sentences.[281]

A possible future legislative development would be the expansion of sentencing authority in tribal courts beyond the current three-year limit. Many of the major objections to tribal courts' increased sentencing authority currently center on due process concerns.[282] Although tribal courts will likely remain unique in the United States as they are often influenced by traditional tribal values,[283] the entire Bill of Rights, with the exception of the Sixth Amendment right to counsel, was applied against tribes through ICRA prior to the TLOA.[284] Additionally, under the TLOA, the Sixth Amendment right to counsel is applied in all cases in which sentences in excess of one year are imposed.[285] If sufficient funding is allocated to ensure indigent right to counsel, the

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[280] In general, federal law defines a felony as an offense that is not otherwise classified in which the maximum term of imprisonment is more than one year. *See* 18 U.S.C § 3559 (2006).

An important ambiguity in the TLOA is whether tribal courts are allowed to sentence defendants to multiple sentences for separate offenses arising from the same conduct. *See* Tribal Law and Order Act of 2010 § 234. Future legislation should also amend the TLOA to make clear that tribal courts are to not be inhibited by overly broad interpretations of the term "offense."

[281] In *United States v. Lara*, the Supreme Court held that tribal prosecutions derived from the tribe's separate sovereignty, not federal power, and therefore the Double Jeopardy Clause did not prohibit additional federal prosecution for discrete federal offenses arising from the same incident. 541 U.S. 193, 210 (2004) (citing Heath v. Alabama, 474 U.S. 82, 88 (1985)).

A topic that is not mentioned in the TLOA is whether defendants could potentially face three prosecutions in a PL-280 state where a tribe also consents to federal jurisdiction. In theory, the separate sovereignty rationale of *Lara* would allow for the three prosecutions.

[282] *See, e.g.*, Duro v. Reina, 495 U.S. 676, 709–10 (1990) (Brennan, J., dissenting); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 194 (1978) ("[D]efendants are entitled to many of the due process protections accorded to defendants in federal or state criminal proceedings. However, the guarantees are not identical."); Will Trachman, Comment, *Tribal Criminal Jurisdiction After* U.S. v. Lara*: Answering Constitutional Challenges to the* Duro *Fix*, 93 CALIF. L. REV. 847, 876–87 (2005); Peter W. Birkett, Note, *Indian Tribal Courts and Procedural Due Process: A Different Standard?*, 49 IND. L.J. 721 (1974); Ted Wills, Note, *De Novo Review: An Alternative to State and Federal Court Jurisdiction of Non-Indian Minor Crimes on Indian Land*, 17 AM. INDIAN L. REV. 309, 316–17 (1992); Gordon K. Wright, Note, *Recognition of Tribal Decisions in State Courts*, 37 STAN. L. REV. 1397, 1419 (1985) (describing due process concerns in tribal courts).

[283] *See* Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA. L.J. 1, 3 (1997).

[284] 25 U.S.C. § 1302 (2006); *see also* Larry Cunningham, Note, *Deputization of Indian Prosecutors: Protecting Indian Interests in Federal Court*, 88 GEO. L.J. 2187, 2199 (2000).

[285] Tribal Law and Order Act of 2010 § 234.

constitutional protections available in tribal courts will largely be identical to those in federal and state courts. As an additional safeguard, the TLOA requires that individuals who preside over sentencing in excess of one year be admitted to practice law, ensuring a level of familiarity with American legal norms.[286]

It is unlikely that tribal courts will be equipped (or even want) to handle the full panoply of criminal offenses that state courts currently must hear.[287] Willing tribes could, however, develop initiatives based on particular local concerns[288]—selecting crimes that are the most troublesome locally—and develop tribal legislation that would allow for the sentencing of individuals convicted of crimes in excess of three years where appropriate. To ensure that sufficient procedural safeguards are present in the courts that implement this program, a robust federal approval process could be created.

There are many different ways that this approval process could be structured. One possibility is a system in which the participating tribes would submit an application to a newly created federal agency, potentially within either the BIA or DOJ,[289] requesting permission to begin sentencing defendants in excess of three years for a particular offense or offenses. This agency would consider the need for additional punishments based on the local needs of the tribe and would also assess the ability of the tribe to prosecute these offenses adequately and fairly. Considerations could include the level of sophistication of the tribal court system, prior experience trying similar crimes, arrangements for the incarceration of defendants, and the general skill level of the tribal law enforcement agencies who would be investigating the crimes. If the tribe passes the review process, it could then begin sentencing in excess of three years for the approved offenses. This tribe-specific review process would allow those tribes with the most developed judiciaries to expand their justice systems considerably. The process would also be realistic, recognizing that many tribal courts are currently underdeveloped and are not prepared to exercise full enforcement powers. In the long term,

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[286] *Id.*

[287] *See* Cunningham, *supra* note 284, at 2205; Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697, 724–25 (2006) (noting that many tribes would be unwilling to exercise significant criminal jurisdiction due to a lack of resources or other concerns).

[288] *See* O'Connor, *supra* note 283, at 2–3 (describing a similar process for other issues, such as issues related to land, oil, timber, and fish).

[289] Both the BIA and DOJ already deal with a number of complex issues related to tribal courts and law, such as the Tribal Courts Assistance Program, which provides court-related support and assistance to Native American communities to help develop and enhance tribal judicial systems. BUREAU OF JUSTICE ASSISTANCE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T. OF JUSTICE, TRIBAL COURTS ASSISTANCE PROGRAM FACT SHEET 1 (2008).

however, this process would treat the tribes with respect as potential full partners, eventually turning over a great deal of local criminal enforcement to them.[290]

Additionally, as part of this expanded sentencing authority, Congress should also make clear that neither the Major Crimes Act[291] nor PL-280[292] is intended to divest tribal courts of concurrent jurisdiction over the crimes covered by these statutes. Although the best interpretations of both of these Acts currently reach that conclusion, enough confusion has been created in both instances to warrant a clear Congressional statement on point.[293] Importantly, the increased authority of tribal courts to impose sentences—both in the current proposal and the TLOA—would be gutted if courts interpreted either act as divesting tribal courts of significant subject matter jurisdiction.

B. Tribal Jurisdiction over Non-Indians Committing Crimes in Indian Country

A major limitation on tribal courts that still exists under the TLOA is the jurisdictional limitation of *Oliphant*.[294] The holding of this decision is one of the major reasons crimes are currently under-prosecuted in Indian Country.[295] If a long-term remedy is ever to be fashioned, the jurisdiction of tribal courts must be expanded to include non-Indians who commit crimes in Indian Country.[296]

The current arrangement creates some interesting—and unjust—anomalies. For example, if a Native American commits a crime in Indian Country, he or she can potentially face two significant prosecutions.[297] If,

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[290] *See* B. J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in the Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457, 478–79 (1998) (describing the increased respect and integration of tribal courts into the national judicial system).

[291] *See supra* pp. 151–53.

[292] *See supra* pp. 155–56.

[293] *See supra* pp. 151–57.

[294] *See supra* Part I.B (discussing jurisdiction limitation of tribal courts to try only Indians).

[295] *See supra* Part I.B (discussing the effects of *Oliphant* on criminal jurisdiction in Indian Country); *see also* Amnesty Int'l, *supra* note 28, at 27–28 (describing the jurisdictional complications created by *Oliphant* and PL-280).

[296] For a well-considered similar proposal made prior to the proposal of the TLOA, see Quasius, *supra* note 62, at 1924–35.

[297] The Indian could be charged and sentenced to a sentence of one year by the tribal court, and the Indian can also be charged and sentenced in state or federal court. *See* United States v. Lara, 541 U.S. 193, 210 (2004). Another unjust anomaly in jurisdiction was caused by the *Duro*-Fix. Under the *Duro*-Fix (an attempt to fix the ICRA), non-member Indians are potentially subjected to the jurisdiction of all tribal courts, whereas other individuals are not. *See* 25 U.S.C. § 1301 (2006). In reality, is it any more or less objectionable for a member of the Oneida Indian Nation in New York to be tried before a

however, the same crime was committed by a non-Indian in Indian Country, this individual can only be prosecuted in state or federal court once (depending upon the application of PL-280).[298] Not only is this double standard unfair, but it is also incredibly dangerous because current studies indicate that many of the crimes committed in Indian Country are committed by non-Indians.[299] In these situations, tribes must rely entirely on state and federal prosecutors, often hundreds of miles away, to enforce criminal law.[300] This is a significant gap in jurisdiction that, not surprisingly, leads to under-enforcement of criminal law in Indian Country.[301]

This arrangement also leaves the individuals most deeply affected by the rampant gang, drug, and sexual violence committed in Indian Country—the local residents—nearly powerless to prosecute, or even arrest, many of the individuals committing those crimes.[302] A rough analogy makes the problem very clear. Imagine if prosecutors in New Jersey were responsible for prosecuting all crimes committed in New York by non-New York residents. This arrangement would not work because it would likely result in non-New York residents committing crimes in New York with near impunity. Similarly, it should not be surprising that the level of crime in Indian Country "has reached crisis proportions."[303]

Thus if this troubling agency dilemma is ever going to be resolved, it will be necessary to allow tribal courts to try non-Indians who commit crimes in Indian Country. Congressional legislation in this area would need to overrule the 1978 Supreme Court decision of *Oliphant*, which stripped Indian tribes of criminal jurisdiction over non-Indians.[304] The precedent for this sort of measure is not difficult to find. In 1991 Congress amended the ICRA[305] in the now-famous "*Duro*-Fix" to

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Hualapai Tribal court in Arizona than it would be for any other citizen of the state of New York to be tried by a distant Hualapai court?

[298] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).

[299] *See supra* Part I.A.

[300] *See* Washburn, *supra* note 77, at 711–12 (describing the distance between many reservations and the nearest district court).

[301] *See supra* Part I.B.

[302] *See* Quasius, *supra* note 62, at 1903–04.

[303] *Oversight of the U.S. Dep't of Justice*, *supra* note 7, at 16.

[304] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).

[305] 25 U.S.C. § 1301 (2006).

> '[P]owers of self-government' means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians . . . .

Id. § 1301(2).

authorize tribes to try all Indians, including non-members, for violations of criminal law.[306] This "fix" was upheld as constitutional in *United States v. Lara* on the grounds that the tribe had the authority to prosecute non-member Indians because of its "inherent tribal authority."[307] The holding in *Lara*[308] suggests that similar legislative action amending the ICRA to read "all persons" would similarly be upheld as Constitutional by federal courts.[309]

Overturning the Supreme Court's decision in *Oliphant* would be a highly controversial measure. To many individuals, the idea of potentially being tried and sentenced in a tribal court is quite objectionable.[310] Most objections would not likely be based on racist notions of Indian inferiority, but rather on valid concerns that tribal courts are currently unable to provide sufficient constitutional and procedural safeguards, despite their best intentions to do so.[311] To ensure that proper procedure is given in tribal courts, a conditional approval process for jurisdiction over all non-members could be instituted—similar in form to that described in Part III.A. The approval could consider a wide variety of factors, but would be focused on the ability of the tribal court to adjudicate criminal cases fairly at a standard that meets federal constitutional norms. The areas of inquiry could include, but should not be limited to, full compliance with the ICRA;[312] compliance with Fourth Amendment search and seizure rules by tribal law enforcement; compliance with Fifth and Sixth Amendment procedural protections, including *Miranda*;[313] the inclusion of non-Indians in jury pools;[314] the competence and independence of judges; and the development of appellate review processes. It is possible that no

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306 This amendment to the ICRA overruled *Duro v. Reina*, 495 U.S. 676 (1990).

307 United States v. Lara, 541 U.S. 193, 210 (2004).

308 *Id.*

309 For example, the ICRA would read, upon amendment, that "'powers of self-government' means . . . the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all *persons*." *See* 25 U.S.C. § 1301 (2006) (italicized text representing proposed amendment).

310 Samuel E. Ennis, *Reaffirming Indian Tribal Court Criminal Jurisdiction over Non-Indians: An Argument for A Statutory Abrogation of* Oliphant, 57 UCLA L. REV. 553, 573–80 (2009) (raising potential objections); John T. Tutterow, Note, *Federal Review of Tribal Court Decisions: In Search of a Standard or a Solution for the Problem of Tribal Court Review by the Federal Courts*, 23 OKLA. CITY U. L. REV. 459, 484 (1998) (discussing potential points of objection to being tried in a tribal court as a non-Indian).

311 *See supra* pp. 179–80 (discussing Due Process and Sixth Amendment right to counsel concerns).

312 25 U.S.C. §§ 1301–41 (2006).

313 *See generally* Miranda v. Arizona, 384 U.S. 436 (1966).

314 The Supreme Court in *Oliphant* was concerned that non-Indians were not permitted to serve on the juries of the Suquamish court system. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 194 n.4 (1978).

tribal court would currently be approved to try non-members; however, an opt-in process would encourage the development of America's third sovereign, and hopefully, in the future, a large number of tribal courts will be able to prosecute those who commit crimes on their territory, regardless of the background of the defendant. Additionally, as tribal courts become less reliant on federal prosecutors, United States Attorney's Offices could focus on prosecuting the crimes occurring in Indian Country that are more within their expertise (such as organized crime, fraud, and corruption), rather than on the minor offenses that they currently must also prosecute.

An important point worth noting here is that tribal court systems, even after the administrative approval to try non-Indian defendants, would not exist entirely independent of federal courts. Rather, the basic framework of federalism will allow federal courts to serve as partners, continuing the learning and maturation process of tribal courts.[315] Indeed, federalism already serves a similar role between the federal and state systems, as the separate sovereigns learn from each other.[316] For example, under ICRA, defendants convicted in tribal court may file a *habeas corpus* petition to an appropriate federal district court.[317] Although standards of review for *habeas* petitions are not favorable, they serve as a backstop for tribal courts as they learn to apply criminal law fairly. Other safeguards could be put into place by Congress, granting jurisdiction to federal courts over tribal judgments. These could include an appellate review process for tribal decisions on issues of federal law, either by the federal Courts of Appeals or the United States Supreme Court.[318]

[315] For three engaging and thought-provoking discussions of federalism as it would be applied to tribal courts, see Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841 (1990); Jones, *supra* note 290; Frank Pommersheim, *"Our Federalism" in the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community*, 71 U. COLO. L. REV. 123 (2000).

[316] O'Connor, *supra* note 283, at 5–6.

[317] 25 U.S.C. § 1303 (2006).

[318] There is no accepted norm for when a federal court may exercise appellate jurisdiction over a decision of a tribal court. Currently, federal courts assume jurisdiction to review determinations by tribal courts of tribal jurisdiction. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15 (1987); Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856–57 (1985); *see also* Tutterow, *supra* note 310, at 459–60. As federal courts are courts of limited jurisdiction, however, this sort of appellate review of tribal court determinations may not be constitutional; if tribal courts began hearing larger numbers of cases, a clearer review process would need to be set forth by Congress to ensure constitutional compliance.

CONCLUSION

A number of recent studies and articles have made it painfully clear that there is a crime crisis in much of Indian Country.[319] Indian women are raped and abused at rates far exceeding the national rate,[320] and gangs are becoming an unfortunate staple of Indian life.[321] A lack of funding and the current confusing patchwork of criminal jurisdiction in Indian Country are hampering efforts to counter this significant threat to the well-being of many Native Americans.[322]

In a response that could serve to provide immediate support to the criminal justice system in Indian Country, Congress twice proposed, and finally passed, the Tribal Law and Order Act. The TLOA was signed into law by President Obama on July 29, 2010.[323] Among the most important reforms proposed in the TLOA are the increasing of tribal court authority to sentence criminal defendants to three years' imprisonment; concurrent federal and state jurisdiction in PL-280 states upon tribal consent; and substantial increases in the resources available for combating crime on federal, state, and tribal levels.[324]

Although an extremely important reform, the TLOA is merely a first step. It focuses attention on the most damaging and publicized problems, but does not fundamentally rewrite how crime will be fought in Indian Country. If a long-term solution is to be reached, Congress must seriously consider both further increasing the sentencing authority of tribal courts and legislatively overturning the jurisdictional limitations imposed on tribal courts by the Supreme Court in *Oliphant v. Suquamish Indian Tribe*.[325] Finally, Congress must also ensure that tribal law enforcement agencies and courts are adequately funded.[326] The current crime problem in Indian Country is very severe; solving it will require a sustained response that both increases federal involvement in the short term, as is proposed in the TLOA, and empowers tribal justice systems as well as law enforcement in the long term.[327]

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319 *See supra* Part I.A.

320 *See supra* Part I.A.2.

321 *See supra* Part I.A.1.

322 *See supra* Part I.B, I.C.

323 *See supra* note 168.

324 *See supra* Part II.

325 *See supra* Part III.A.

326 *See supra* p. 178.

327 *See supra* Part III.

IS AND OUGHT: HOW THE PROGRESSION OF *RICCI* TEACHES US TO ACCEPT THE CRITICISMS AND REJECT THE NORMS OF POLITICAL JURISPRUDENCE*

Man must not be allowed to believe that he is equal either to animals or to angels, nor to be unaware of either, but he must know both.[1]

Conflict in the law between Is and Ought is nothing new. In a famous exchange, Socrates argued with Thrasymachus about the existence of an absolute and objective law.[2] There was no clear winner in the debate, and Socrates could not easily dismiss his rival's deeply cynical views on the nature of justice.[3] Socrates' optimism and Thrasymachus's cynicism have assumed various forms through the ages and continue to clash with one another—profoundly affecting the development of the law. The current form of this ideological battle is on display in the decision-making of the U.S. Supreme Court, which features the competing theories of the legal and political models of jurisprudence.

The recent decision *Ricci v. DeStefano*[4] provides a striking example of the relevance of political jurisprudence—a school of thought that combines legal realism with the learning and methods of political science.[5] Relying on extensive empirical data, political jurisprudence challenges traditional ideas regarding legal interpretation and the fundamental nature of judicial decision-making. Political jurisprudence is a dangerous yet compelling vision of law; it is also captivating because it reveals aspects of human nature that are not normally associated with judicial behavior. An exploration of human nature is necessary for a proper analysis of judicial decision-making. Much has been written about the depth and intricacy of human beings, and yet no consensus on

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* Winner of the third annual Chief Justice Leroy Rountree Hassell, Sr. Writing Competition, hosted by the Regent University Law Review.

1 BLAISE PASCAL, PENSÉES 31 (A.J. Krailsheimer trans., Penguin Books rev. ed. 1995) (n.d.). "It is dangerous to explain too clearly to man how like he is to the animals without pointing out his greatness. It is also dangerous to make too much of his greatness without his vileness." *Id.*

2 *See* PLATO, REPUBLIC 12–31 (G.M.A. Grube trans., Hackett Publ'g Co. 1992) (c. 380 B.C.E.).

3 "I say that justice is nothing other than the advantage of the stronger." *Id.* at 14. The pervasiveness of self-interest is the heart of Thrasymachus's argument—influencing rulers to make decisions for their own benefit. Thrasymachus's view is essentially a savage realism regarding the nature of rulers. *See id.* at xiv–xv.

4 129 S. Ct. 2658 (2009).

5 *See* Martin Shapiro, *Political Jurisprudence*, 52 KY. L.J. 294, 295 (1963–1964) ("Political jurisprudence is, among other things, an extension of the findings of other areas of political science into the realm of law and courts . . . .").

our motivations and true disposition has emerged.[6] This much, however, is certain: humans are conflicted creatures and our contradictory nature is on full display in the process of judicial behavior. *Ricci* reveals the duel between the pessimism of political jurisprudence and the optimism of an objective theory of law, with the unpredictable currents of human nature flowing underneath.

Part I of this Note explores the development of political jurisprudence, focusing on the contributions of Harold Spaeth and how his school of thought is a strengthened form of legal realism. Part II examines key contradictions in human nature and how the human disposition is the culprit for judicial irrationality. Part III examines *Ricci* as a conflict between political jurisprudence and an objective theory of law, uses *Ricci* to warn against the corrosive norms of political jurisprudence, and proposes a measured skepticism.

I. POLITICAL JURISPRUDENCE—A FORMIDABLE ADAPTATION OF LEGAL REALISM

A. *The Perpetual Conflict*

Idealism and skepticism have profoundly shaped the development of law. In American jurisprudence, modern ideas on legal interpretation and judicial behavior have proceeded from the perpetual conflict between formalism and realism. Legal formalism is "[t]he theory that law is a set of rules and principles independent of other political and social institutions."[7] Legal realism is considered to be an uprising against formalism and judicial abstraction.[8] The father of American legal realism is widely considered to be Oliver Wendell Holmes,[9] who attacked the

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[6] "The heart is deceitful above all things, [a]nd desperately wicked; [w]ho can know it?" *Jeremiah* 17:9 (New King James).

[7] BLACK'S LAW DICTIONARY 977 (9th ed. 2009). *Compare* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 615–16 (1908) (arguing that a "mechanical" application of law is impractical and ultimately frustrates social progress), *with* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1186–87 (1989) (arguing that the establishment of generally applicable rules is essential for judicial process and promotes judicial accountability).

[8] *See* MICHAEL MARTIN, LEGAL REALISM: AMERICAN AND SCANDINAVIAN 10–11 (1997) (explaining that the development of American legal realism proceeded generally from the unique power of the American judiciary, the revolt against formalism, and the influence of pragmatism).

[9] *Id.* at 15; *see also* AMERICAN LEGAL REALISM 3 (William W. Fisher III et al. eds., 1993) ("Holmes heavily influenced American legal theorists of many stripes[, b]ut the Realists were especially indebted to him."); Francis E. Lucey, *Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society*, 30 GEO. L.J. 493, 494 (1942) ("Realism is only a further development and refinement of Holmes' Sociological Jurisprudence . . . .").

notion that law had the precision or logic of an objective discipline, such as mathematics.[10] In addition to Holmes's pragmatism, legal realism benefited from the ideas of the German free law movement, particularly its skepticism towards the traditional interpretations of legal rules.[11] Specifically, the German free law movement opposed legal positivism (the idea that law is simply the commands that issue from the State) and the historical school (the idea that law developed concurrently with culture).[12] Roscoe Pound is credited with introducing the ideas of the German free law movement into American jurisprudence.[13]

A certain group of legal scholars began to build on the skepticism of Holmes and Pound and developed the ideas of legal realism. The views of the realists diverged in many areas, but they typically shared several "common points of departure" from traditional legal theory.[14] While there were many different realist perspectives, Karl Llewellyn emerged as a leader of the new movement and was known as "one of the most articulate defenders of American legal realism."[15] Headed by legal scholars like Llewellyn and Jerome Frank, legal realism destabilized traditional ideas and argued that the nature of law is transitory, or in "flux," and that judicial decision-making is a key component to the development of law.[16] Concerned about the full implications of the jurisprudential ideas he helped to form, Roscoe Pound picked up his pen and urged this young band of skeptical thinkers to adopt some

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[10] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465 (1897). Why are we tempted to treat law as a purely logic-based system? "[T]he logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man." *Id.* at 466.

[11] MARTIN, *supra* note 8, at 20–21.

[12] *Id.* at 21 (noting that positivism and the historical school developed in opposition to the natural-law tradition). For an example of the German historical school of legal thought, see generally 1 CARL VON SAVIGNY, THE HISTORY OF THE ROMAN LAW DURING THE MIDDLE AGES (E. Cathcart trans., Hyperion Press, Inc. 1979) (1829) (tracing the development of the Roman law and its effects on Europe).

[13] MARTIN, *supra* note 8, at 22.

[14] Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1235–38 (1931). He describes the key characteristics of the movement as follows:

> The *temporary* divorce of Is and Ought for purposes of study[,] . . . distrust of the theory that traditional prescriptive rule-formulations are *the* heavily operative factor in producing court decisions[,] . . . belief in the worthwhileness of grouping cases and legal situations into narrower categories than has been the practice in the past[,] . . . insistence on evaluation of any part of law in terms of its effects[, and] . . . [i]nsistence on *sustained and programmatic attack* on the problems of law along any of these lines.

Id.

[15] MARTIN, *supra* note 8, at 29.

[16] Llewellyn, *supra* note 14, at 1236.

humility.[17] Pound argued that the realist's dismissal of the "pure fact of law" is silly because the realist relies on the "pure fact of fact"—both of which are susceptible to preconceived ideas and bias.[18]

Legal realism, however, continued to spread throughout the legal profession and profoundly influenced the development of American law.[19] Generations of legal professionals have been influenced by legal realism, but its influence has not stopped there.[20] Karl Llewellyn argued that a lawyer's job is to successfully predict the actions of a court upon his client[21] and emphasized the importance of developing "hunching power."[22] Llewellyn forecasted the growing tendency to use quantitative studies to enhance the lawyer's predictions and noted the value of studying the action of the appellate courts to reduce uncertainty.[23] To make the very best predictions for his clients, the information gathered through empirical research would be invaluable. The realist influence progressed to Critical Legal Studies ("CLS"), a school of jurisprudence that has been fairly characterized as an extreme form of legal realism.[24] Llewellyn's predictions about the direction of jurisprudence would prove to be correct, but it did not come into being from the CLS scholars.[25] Instead, Llewellyn's vision would be more fully realized by intellectual forces largely outside legal culture.

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17 Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 698 (1931) ("[T]here is nothing new in the assumption of those who are striking out new paths of juristic thought that those who have gone before them have been dealing with illusions, while they alone and for the first time are dealing with realities.").

18 *Id.* at 700; *see also* Walter B. Kennedy, *Principles or Facts?*, 4 FORDHAM L. REV. 53, 58–64 (1935) (criticizing the tendency of the legal realists' "fact-fetish"). For Llewellyn's famous response to Pound, see Llewellyn, *supra* note 14.

19 AMERICAN LEGAL REALISM, *supra* note 9, at xiii–xiv.

20 *Id.* at xiv.

21 KARL N. LLEWELLYN, THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL 14–17 (11th prtg. 2008) (1930).

22 *Id.* at 104.

23 Llewellyn, *supra* note 14, at 1244, 1250.

24 *See* Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 257 (1997). CLS took the indeterminacy arguments of legal realism and applied its own brand of cynicism to various critiques of legal application, ranging from criminal justice to sex and race issues. *See, e.g.*, David Kairys, *Introduction* to THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 1, 7–9 (David Kairys ed., Pantheon Books 2d ed. 1990) (1982). *But see* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 10–13 (1987) (distinguishing legal realism from CLS).

25 Cross, *supra* note 24, at 257 ("[T]endencies toward nihilism killed CLS.").

B. From Llewellyn to Spaeth

Enter political jurisprudence—a new and formidable legal realism[26] strengthened by empirical studies and advanced primarily by political scientists.[27] The essence of political jurisprudence is the notion "that judges *make* rather than simply discover law"[28] and the idea that courts are merely political institutions headed by judges who themselves are merely political actors.[29] Political jurisprudence removes any distinction between law and politics and attacks the notion that the judiciary is an independent branch of government.[30] Those familiar with the idea of the separation of powers in constitutional government would be understandably troubled by the ideas of political jurisprudence.[31] Quoting Montesquieu, James Madison reminded us that "there can be no liberty . . . if the power of judging be not separated from the legislative and executive powers."[32] Alexander Hamilton assured us that "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the [C]onstitution . . . . [And] may truly be said to have neither FORCE nor WILL, but merely judgment."[33]

Political jurisprudence would propose that Madison's and Hamilton's ideas of judicial independence are a myth and function merely as a support for a judge's policy choices.[34] With the increased use of empirical methods, scholars have advanced various theories on judicial behavior. Theories range from the legal model (measuring the influence of law), to the attitudinal model (measuring the influence of judicial ideology).[35] The legal model seeks to explain judicial behavior by conformity to legal principles,[36] while the attitudinal model seeks to explain judicial behavior through the individual values and attitudes of judges.[37]

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26 *See* Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 834 (2008) ("We believe that much of the emerging empirical work on judicial behavior is best understood as a new generation of legal realism.").

27 Shapiro, *supra* note 5, at 294.

28 *Id.* at 295 (emphasis added).

29 *Id.* at 296.

30 *Id.* at 302.

31 *See generally* U.S. CONST. arts. I–III.

32 THE FEDERALIST NO. 47, at 240 (James Madison) (Lawrence Goldman ed., 2008).

33 THE FEDERALIST NO. 78, at 291 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

34 Shapiro, *supra* note 5, at 297.

35 Miles & Sunstein, *supra* note 26, at 832–33.

36 JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 48 (2002).

37 *Id.* at 86.

The attitudinal model of judicial decision-making has chiefly been advanced by Harold Spaeth, a political science professor at Michigan State University.[38] Spaeth has compiled empirical information regarding Supreme Court decision-making[39] and has written several influential books about the attitudinal model.[40] Spaeth's attacks on the notion of judicial impartiality are intriguing for those who question decisions like *Marbury v. Madison*,[41] *Dred Scott v. Sanford*,[42] and *Roe v. Wade*,[43] but they reveal a deep cynicism.[44] To Spaeth, judges are policymakers who conceal their actions through sham legal reasoning and false objectivity.

The ideas of Spaeth and the political scientists should be deeply disturbing to those who adopt "the unsophisticated view" that judges should decide cases free from their own biases and policy preferences.[45] The norms associated with Spaeth's attitudinal model are corrosive to the rule of law. In fact, judges' adoption of the premises and values associated with political jurisprudence would cause them to openly violate ethical rules of conduct and sworn oaths.[46] Yet the arguments that Spaeth makes about judicial behavior deserve some attention, regardless of whether the results provoke discomfort or disbelief. Political jurisprudence goes too far and seems blind to its own bias, but it does provide some value toward a better understanding of the factors that contribute to judicial decision-making.[47] Can a school of thought that attacks judicial legitimacy and independence actually end up contributing to judicial integrity and promoting the rule of law?

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[38] *See* Wayne Batchis, *Constitutional Nihilism: Political Science and the Deconstruction of the Judiciary*, 6 RUTGERS J.L. & PUB. POL'Y 1, 10 (2008) ("Perhaps the most ambitious and influential conception of judicial behavior to emerge from the wealth of political science literature on the Supreme Court is Harold Spaeth's 'attitudinal model.'"); *see also* Howard Gillman, *What's Law Got to Do with It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465, 466–67 (2001).

[39] *See* Harold Spaeth et al., *The Genesis of the Database*, THE SUPREME COURT DATABASE, http://supremecourtdatabase.org/about.php (last visited Oct. 22, 2010).

[40] *See, e.g.*, DAVID W. ROHDE & HAROLD J. SPAETH, SUPREME COURT DECISION MAKING (1976); JEFFREY A. SEGAL, HAROLD J. SPAETH & SARA C. BENESH, THE SUPREME COURT IN THE AMERICAN LEGAL SYSTEM (2005); SEGAL & SPAETH, *supra* note 36; HAROLD J. SPAETH, SUPREME COURT POLICY MAKING: EXPLANATION AND PREDICTION (1979).

[41] 5 U.S. (1 Cranch) 137, 147–48 (1803) (articulating the power of judicial review).

[42] 60 U.S. (19 How.) 393, 421–22, 426–27 (1856) (affirming in a dubious and now-discarded decision, the constitutionality of slavery and regarded blacks as non-citizens).

[43] 410 U.S. 113, 153–54 (1973) (holding in a controversial decision a right to terminate pregnancy. This case is recognized as a case driven by a purely political result).

[44] For example, Spaeth attacks the trappings of the judiciary—black robes, courthouses, ritualized proceedings—as mythological devices to project objectivity and conceal the policy-making biases of the judges. SEGAL & SPAETH, *supra* note 36, at 26.

[45] *Id.* at 6.

[46] Batchis, *supra* note 38, at 1, 5–6.

[47] *See* sources cited *infra* note 54.

C. A Dangerous Remedy

The desire for judicial legitimacy could be better realized by understanding and appreciating certain aspects of political jurisprudence.[48] The attitudinal model serves most profitably as a tool for introspection and focused criticism. Legal realism was used by modern legal thinkers to check the excesses and arbitrariness of judicial formalism, and the information provided by the attitudinal model can check judges' bias and policy-making. The attitudinalists themselves recognize their connection to the realists.[49]

Fundamentally, the attitudinal model is used to argue that courts decide cases in a manner consistent with the ideological attitudes and values of the individual judges.[50] The attitudinal model has been primarily focused on Supreme Court decision-making; that is where the theory may truly be relevant. According to the attitudinal model, all Supreme Court Justices are judicial activists. The attitudinalists argue that the Justices are free to indulge their personal policy preferences for several reasons: their unlimited tenure makes them unresponsive to either public opinion or the other branches of the government, the Supreme Court is the court of last resort, and legal rules governing decision-making do not constrain the Court's discretion.[51] Attitudinalists arrive at their conclusions by assigning scores that correspond to a spectrum of ideological values.[52]

Recently, studies of judicial politics have grown considerably in legal scholarship,[53] but the empirical study upon which much of the scholarship is based is not without criticism.[54] Weaknesses aside, the

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[48] My arguments for and against political jurisprudence are mostly focused towards Harold Spaeth's attitudinal model. Political jurisprudence is a growing discipline with various points of emphasis and divergent schools of thought. Within the empirical study of the law, there is the legal model, attitudinal model, and rational-choice model.

[49] SEGAL & SPAETH, *supra* note 36, at 86–87 ("The attitudinal model represents a melding together of key concepts from legal realism, political science, psychology, and economics. . . . [It] has its genesis in the legal realist movement of the 1920s.").

[50] *Id.* at 86. "Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal." *Id.*

[51] *Id.* at 111.

[52] *See id.* at 312–26 (discussing the research method behind the attitudinal model). The authors explain: "While not everyone would agree that every score precisely measures the perceived ideology of each nominee, Fortas, Marshall, and Brennan are expectedly the most liberal, while Scalia and Rehnquist are the most conservative." *Id.* at 321.

[53] Bryan D. Lammon, *What We Talk About When We Talk About Ideology: Judicial Politics Scholarship and Naive Legal Realism*, 83 ST. JOHN'S L. REV. 231, 236–37 n.15 (2009).

[54] *See, e.g.*, Batchis, *supra* note 38, at 1 (criticizing the attitudinal model from the perspective of a political scientist who is formerly an attorney); Cross, *supra* note 24, at 252–54, 279, 321, 324, 326 (proposing legal recognition of the attitudinal model and

research of political jurisprudence can help to pinpoint areas of bias and subjectivity. The cataloguing of judicial voting tendencies may in fact provide further insight into how judges rule. In fact, Spaeth and a co-author Jeffrey Segal claim to have significant levels of success in predicting judicial attitudes and votes.[55] Prediction success rates that hover around ninety percent[56] should not be casually dismissed, especially when the authors posit the idea that the biases of the Justices are more predictable indicators of judicial behavior than the law that is supposed to constrain them.

This is precisely why the ideas behind political jurisprudence are a dangerous remedy to judicial activism. The resurgent emphasis on the dangers of mixing politics and law may have had some effect,[57] but empirical evidence of judicial policy-making could pinpoint particular areas where bias and self-interest tend to taint judicial reasoning. Judicial activism is not limited to a particular point of view or political ideology.[58] Matching judicial decisions with the stated ideology of judges and then comparing their analysis with the law (for example, the Constitution) can raise awareness to biased judgments and at least provide nominal deterrence through shame. Judges typically resent the label of "judicial activist," and they will emphatically proclaim their

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identifying its shortcomings); Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 LAW & SOC. INQUIRY 89, 124–129 (2005) (attempting to reconcile the differences between the legal and political science approaches to understanding judicial decision-making); Michael J. Gerhardt, *Attitudes About Attitudes*, 101 MICH. L. REV. 1733, 1739–48 (2003) (criticizing Segal and Spaeth's text; see SEGAL & SPAETH, *supra* note 36); Brian Z. Tamanaha, *The Distorting Slant in Quantitative Studies of Judging*, 50 B.C. L. REV. 685, 742–47 (2009) (discussing the view that the question of judicial policy-making is how much it occurs, not whether it occurs).

[55] SEGAL & SPAETH, *supra* note 36, at 324. Segal and Spaeth have achieved some measure of success with the attitudinal model:

> For example, Spaeth was able to predict accurately 88 percent (92 out of 105) of the Court's decisions between 1970 and 1976 and 85 percent of the justices' votes. In a looser test, we accurately predicted the majority and dissenting coalitions in 19 of 23 death penalty cases, and similar percentages of other civil liberties cases.

Id.

[56] *Id.*

[57] *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 15–18 (1990) (arguing that the temptation to engage in judicial activism is not confined to a particular political point of view).

[58] *See* David Halberstam, *Earl Warren and His America*, *in* THE WARREN COURT: A RETROSPECTIVE 12, 14–17 (Bernard Schwartz ed., 1996) (describing the "optimist and activist" Warren as receptive to the needs of ordinary people); Herman Schwartz, *Introduction* to THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT 13, 21 (Herman Schwartz ed., 2002) (describing the rulings of the Rehnquist era as mirroring Ronald Reagan's political agenda).

fidelity to the rule of law when they have an opportunity to ascend the ranks.[59]

Empirical studies may have limited but important use in tracking the decision-making of a prospective justice. Empirical research that reveals, for example, the tendency of an appellate judge to place great weight on a specific portion of a statute or to emphasize one aspect of the law at the exclusion of the whole, may reveal the extent to which the judge is injecting his or her own values into the decision-making process. The political process can adjust to that information accordingly.

Limiting the understanding of judicial decision-making solely on the current realities is focusing on the Is, while an understanding focused solely on the manner in which judges should behave is focusing on the Ought. The "temporary divorce" [60] of Is and Ought does not promote a clear understanding of the law. To compel judges to carry out their functions in accordance with the law, it is necessary to have a proper understanding of both Is and Ought. Political jurisprudence is most helpful as a descriptive tool for what Is. The danger lies in stopping at what Is and adopting the deep cynicism that leads to a disregard as to how judges Ought to act. Left without a normative principle for judicial behavior, the law begins to reflect Thrasymachus's cold vision of "justice."[61] Instead of applying to all, law becomes a tool for the strong to exert their will over the weak.

There is clearly a disconnect between the jurisprudential schools of thought that emphasize the Is (the attitudinal model) and those that emphasize the Ought (the legal model).[62] A combination of both approaches would be most effective in understanding judicial decision-making and holding judges accountable for their decisions. Although the ideas of the attitudinal model ought not to be taken lightly,[63] perhaps another consideration can check its excesses. Before examining a current example of political jurisprudence, it is useful to discuss the impact of human nature on judicial decision-making in general.

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[59] *See infra* p. 200 and notes 110–112.

[60] *See* Llewellyn, *supra* note 14, at 1236.

[61] PLATO, *supra* note 2, at 14.

[62] *See* Cross, *supra* note 24, at 326 (noting that incorporating the ideas of both the attitudinal and legal models could help bind judges to the rule of law).

[63] Frank Cross gives a sobering description:

> Legal scholars have good reason to be wary of the attitudinal model. This is the arbitrary or personal judicial lawmaking of which the defenders of the legal model warned: the rule of men, not of law. While opinions are written in terms of legal doctrine, the attitudinal model joins the tradition of legal realists and critical legal scholars in dismissing the language as merely a legitimating myth. . . . [The attitudinal model] is ultimately more significant and threatening than CLS or even legal realism.

Id. at 263–64.

II. CONTRADICTIONS IN HUMAN BEINGS, CONTRADICTIONS IN LAW

In his argument against blind faith in reason, Pascal states: "Reason's last step is the recognition that there are an infinite number of things [that] are beyond it. It is merely feeble if it does not go as far as to realize that."[64] An exploration of human nature underlies a sound understanding of judicial decision-making. What are human beings? What is our purpose? What motivates human behavior, self-interest or good will? Are humans fundamentally good, evil, or somewhere in between? The answers to these questions and countless related others inform our understanding of human nature. The wide array of opinions regarding human nature[65] should at least lead to the conclusion that humans are exceptionally complex and that ideas regarding human nature are wildly contradictory. Two failures of human nature directly contribute to the limited capabilities of law and to the divide between the attitudinal and legal model: the misplaced faith in the powers of human reason and the reality of fundamental human depravity.

Against the damning evidence mounting daily, human beings generally continue to think highly of themselves.[66] Our failure to understand the natural world and repeated inability to apply what we do know do little to shake the confidence we have in our own capabilities. The idea that reality can be fully comprehended by humans and used to control their own lives can be traced back to Plato, Aristotle, and Thomas Aquinas.[67] According to this view, truth unrealized is still knowable because of the human capability to access and use reason.[68] The sophist Protagoras sums up this humanistic view: "Man is the measure of all things, of the beings that . . . they are, and of the nonbeings that . . . they are not."[69] Variations of this inflated optimism in human nature are expressed in a myriad of ways ranging from John Locke[70] to William Ernest Henley.[71] The folly of placing full trust in our

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[64] PASCAL, *supra* note 1, at 56.

[65] For a small sample of the wide diversity of opinion on human nature, see generally THE NATURE OF MAN (Erich Fromm & Ramón Xirau eds., 3d ed. 1971).

[66] "Good sense is, of all things among men, the most equally distributed; for everyone thinks himself so abundantly provided with it, that those even who are the most difficult to satisfy in everything else, do not usually desire a larger measure of this quality than they already possess." RENÉ DESCARTES, DISCOURSE ON METHOD (John Veitch trans., E.P. Dutton & Co. 1953), *reprinted in* THE NATURE OF MAN, *supra* note 65, at 136.

[67] JOHN A. EISENBERG, THE LIMITS OF REASON: INDETERMINACY IN LAW, EDUCATION, AND MORALITY 2 (1992).

[68] *Id.*

[69] PLATO, THEAETETUS I.103 (Seth Benardete trans., Univ. of Chicago Press 1986) (n.d.).

[70] JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 5 (Thomas P. Peardon ed., Macmillan Publ'g Co. 1952) (1690) ("'The state of nature has a law of nature to govern it, which obliges every one; and reason, which is that law, *teaches all mankind who will but*

own capabilities is also revealed in the biblical account of the proud Babylonian king, Nebuchadnezzar, and his reduction to a mere beast.[72] Reason "returned" to Nebuchadnezzar after he was humbled and recognized that he was lower than the Most High.[73] A proper estimation of our capabilities and limitations would help us to use reason and logic appropriately. An understanding that there are limitations in human ability would allow reason to be more effectively applied.

The presence of bias and subjective belief within human consciousness should also be accounted for when examining the capabilities of human reason.[74] Various psychological studies have shown the extent to which personal beliefs affect mental processes, ranging from interpretation to the function of memory.[75] It is healthy to recognize the obvious limits of reason without requiring the complete embrace of irrationality. Detecting the limitations in reason presupposes a baseline level of competency.[76] Part of reason's failure is its "restless, domineering quality."[77] This domineering quality is expressed in the insistence that repeated human failures that result from using reason are not reflective of the supposed capabilities of reason to arrive at the

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consult it that, being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions . . . ." (emphasis added)).

[71] William Ernest Henley, *Invictus*, *in* JOSEPH M. FLORA, WILLIAM ERNEST HENLEY, 28, 28–29 (1970) ("Out of the night that covers me, / Black as the Pit from pole to pole, / I thank whatever gods may be / For my unconquerable soul. / In the fell clutch of circumstance / I have not winced nor cried aloud. / Under the bludgeonings of chance / My head is bloody, but unbowed. / . . . / It matters not how strait the gate, / How charged with punishments the scroll, / I am the master of my fate: / I am the captain of my soul.").

[72] *Daniel* 4:28–33 (English Standard) ("'Is not this great Babylon, which I have built by my mighty power as a royal residence and for the glory of my majesty?' While the words were still in the king's mouth, there fell a voice from heaven, 'O King Nebuchadnezzar, to you it is spoken: The kingdom has departed from you, and you shall be driven among men, and your dwelling shall be with the beasts of the field. And you shall be made to eat grass like an ox, and . . . time shall pass over you, until you know that the Most High rules the kingdom of men and gives it to whom he will.' Immediately the word was fulfilled . . . .").

[73] *Id.* at 4:37 ("Now I . . . praise and extol and honor the King of heaven, for all his works are right and his ways are just; and those who walk in pride he is able to humble.").

[74] DAVID G. MYERS, THE INFLATED SELF: HUMAN ILLUSIONS AND THE BIBLICAL CALL TO HOPE 53 (1980) ("In every arena of human thinking our prior beliefs bias our perceptions, interpretations, and memories. . . . [W]e fail to realize the impact of our prejudgments. Our tendency to perceive events in terms of our beliefs is one of the most significant facts concerning the workings of our minds.").

[75] *Id.* at 53–60.

[76] C. STEPHEN EVANS, FAITH BEYOND REASON: A KIERKEGAARDIAN ACCOUNT 14 (1998) ("For reason would have to possess a certain competence even to [recognize] where it is incompetent.").

[77] *Id.* at 96–97 (explaining Søren Kierkegaard's views on the deficiency of reason as follows: "Insofar as reason is confident that it will always be victorious in its continued quest, it will necessarily reject any claim that there is an *ultimate* mystery, anything that is in principle resistant to reason's domination and control.").

truth, but merely a veiled claim of omniscience.[78] Human reason also fails because of its "egoistic or selfish" tendencies and hides itself through claims of neutrality and objectivity.[79] Even though pure objectivity is very difficult, if not impossible, to obtain, it does not follow that striving for impartiality should be abandoned.[80] It is reasonable to expect judges to hear a dispute, read a statute, apply the law, or make a decision without being partial to the facts or doctrines that fit their values.

Political jurisprudence is helpful because it reveals the presence of human irrationality and bias in judicial decision-making. Frequently, however, the ideas of political jurisprudence are articulated without reference to another crucial aspect of human nature: fundamental human depravity. Sin has left humans in the position where we are unable to consistently use our mental or moral faculties correctly and are incapable of doing anything pleasing to God.[81] Fundamentally, sin is the delusion that humans, individually, are ultimately sovereign.[82] Thus, human corruption is woven into every part of human existence: soul, mind, and body.[83] Being afflicted with the same condition, scientists and philosophers are unable to diagnose humans correctly or to understand the extent of our corruption.[84] Fundamental human depravity has warped the use of the mind and polluted the process by which humans gather information.[85] The complete faith that early philosophers and scholars place in the capabilities of humans to access and use reason correctly is misplaced.[86]

The exclusion of human depravity from the calculus of judicial behavior seems to create a superiority complex in the new legal

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[78] *Id.* at 97 (explaining further Kierkegaard's view).

[79] *Id.*

[80] *Id.* at 98.

[81] A. W. PINK, GLEANINGS FROM THE SCRIPTURES: MAN'S TOTAL DEPRAVITY 83 (1969).

[82] EVANS, *supra* note 76, at 97.

[83] PINK, *supra* note 81, at 83–84 ("Depravity is all-pervading, extending to the whole man. . . . As found in the understanding, it consists of spiritual ignorance, blindness, darkness, foolishness. As found in the will, it is rebellion, perverseness, a spirit of disobedience. As found in the affections, it is hardness of heart, a total insensibility to and distaste for spiritual and divine things.").

[84] *Id.* at 119.

[85] *Id.* at 137.

[86] *Id.* ("It is not strange that blind reason should think it sees, for while it judges everything else it is least capable of estimating itself because of its very nearness to itself. Though a man's eye can see the deformity of his hands or feet, it cannot see the bloodshot that is in itself, unless it has a mirror in which to discern the same.").

realists.[87] The problem is that the realists are just as prone to irrationality and bias as those who hold to formalistic views of law. Political scientists and legal theorists who brush off the idea of complete human depravity must still contend with the notion that complete faith in empirical research is a mistake. The error lies in the assumption that the principles of the scientific method can be used to sufficiently explain phenomena in human social interaction.[88] The scientific method, with its great advances in contributing to our understanding of the material world (in fields such as physics, engineering, and chemistry), provided a glimmer of hope in the world of uncertainty present in human relationships.[89] Human behavior, however, does not have the precision of mathematical formulas, and human unpredictability is a significant barrier to achieving certainty, or near certainty, in social science research. The social sciences (including political science) are thus limited in their ability to understand political, much less legal, behavior.[90]

Thus observations about human bias should not be selectively applied only to judges and legal formalists. Understanding human limitation requires an appreciation of the full spectrum of human motivation—both the rational and irrational. Pascal counsels: "Let us then conceive that man's condition is dual. Let us conceive that man infinitely transcends man, . . . for who cannot see that unless we realize the duality of human nature we remain invincibly ignorant of the truth about ourselves?"[91] Jurisprudence reflects the duality present in man's nature. The best jurisprudential theories recognize the limited human capabilities to discern and exercise reason, and they take account of the capacity for human evil and error. Political jurisprudence functions best when juxtaposed to the legal model to help us understand judicial

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87 Notice the dismissive tone of the attitudinalists: "Those who wish to argue that the Court merely follows established legal principles in deciding cases (yes, such views exist, as we have documented in Chapters 2 and 7) certainly have their work cut out for them." SEGAL & SPAETH, *supra* note 36, at 432.

88 CHARLES A. BEARD, THE OPEN DOOR AT HOME: A TRIAL PHILOSOPHY OF NATIONAL INTEREST 6–7 (Greenwood 1972) (1934).

89 *Id.* at 7 ("Into the world of human affairs, torn by political and economic controversies, natural science came with a healing promise to mankind. . . . [I]t seemed perfectly reasonable to suppose that the method of natural science—observe facts and draw rules—would solve social 'problems' just as it had solved mechanical problems.").

90 *Id.* at 10–13 (explaining the development and limitations of the major social sciences, including insight into the growth and effectiveness of political science).

91 PASCAL, *supra* note 1, at 34–35 ("What sort of freak then is man! How novel, how monstrous, how chaotic, how paradoxical, how prodigious! Judge of all things, feeble earthworm, repository of truth, sink of doubt and error, glory and refuse of the universe! . . . Know then, proud man, what a paradox you are to yourself. Be humble, impotent reason! Be silent, feeble nature! Learn that man infinitely transcends man, hear from your master your true condition, which is unknown to you.").

behavior.[92] The effects of human nature and the battle between realism and formalism are revealed in dramatic fashion in the Supreme Court. A recent decision provides additional support for the measured usefulness of political jurisprudence.

III. A CURRENT EXAMPLE: *RICCI V. DESTEFANO*[93]

The fascination with the United States Supreme Court continues to grow, and with good reason—it remains the most powerful judicial body in the entire world. From the range of its rights and the reach of its jurisdiction, the Court exerts a powerful influence.[94] John Marshall's brilliance in *Marbury v. Madison*[95] secured the power of judicial review and raised the Court to a new position of power and influence.[96] The power of judicial review transformed "[t]he least dangerous branch" of our federal government into a court of law that wields extraordinary power.[97] Current constitutional law doctrine holds that the Court is the final arbiter on the meaning of the Constitution.[98] On this stage, we witness the duel between legal realism and legal formalism. Recently, this battle occurred when eighteen firefighters sued the city of New Haven, Connecticut, over its refusal to certify promotion-conferring test results.[99] The progression of this controversial case to the pinnacle of the federal judicial system occurred concurrently with the historic elevation of the first Hispanic Justice to the Supreme Court.

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[92] *See* Cross, *supra* note 24, at 309–11 (noting that "[t]he lack of integration of the attitudinal and legal models is most unfortunate.").

[93] 129 S. Ct. 2658 (2009).

[94] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 149 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1835).

[95] *See* 5 U.S. (1 Cranch) 137 (1803).

[96] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 1–14 (1962) ("Congress was created very nearly full blown by the Constitution itself. The vast possibilities of the presidency were relatively easy to perceive and soon, inevitably, materialized. But the institution of the judiciary needed to be summoned up out of the constitutional vapors, shaped, and maintained; and the Great Chief Justice, John Marshall—not singlehanded, but first and foremost—was there to do it and did.").

[97] *Id.* at 1.

[98] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 516 (1997) (stating that "judicial authority to determine the constitutionality of laws . . . is based on the premise that the 'powers of the legislature are defined and limited'" by the Constitution. (quoting *Marbury*, 5 U.S. (1 Cranch) at 176)).

[99] Ricci v. DeStefano, 554 F. Supp. 2d 142, 145–150 (D. Conn. 2006), *aff'd*, 530 F.3d 87, 87 (2d Cir. 2008), *rev'd*, 129 S. Ct. 2658, 2681 (2009).

A. *The Ascension of Justice Sotomayor*

As the newest Justice recognizes, personal values play a substantial role in judicial decision-making: "I . . . accept that our experiences as women and people of color affect our decisions. The aspiration to impartiality is just that—it's an aspiration because it denies the fact that we are by our experiences making different choices than others."[100] The rise of Sonia Sotomayor to the Court is a compelling story.[101] Justice Sotomayor came from humble beginnings and overcame significant childhood adversity to achieve significant academic and career success.[102] President Obama selected a well-qualified candidate who demonstrated work ethic and capabilities consistently throughout her career. Her nomination and eventual confirmation by the Senate are historic for several reasons, most notably for the fact that she sits as the first Hispanic, and only the third woman, on the Court.[103] Justice Sotomayor was a unique and inspired choice to serve on the Court, and her ascension to the top of the legal profession is an inspirational story of American social mobility.[104] Justice Sotomayor's nomination to the Court is significant for another reason: it marks the further inroads of the norms of legal realism into American jurisprudence.

In a 2001 lecture now famous for its candor, then-appellate judge Sonia Sotomayor explained how personal experience affects judicial behavior: "Personal experiences affect the facts that judges choose to see . . . . I simply do not know exactly what that difference will be in my judging. But I accept there will be some [differences] based on my gender and my Latina heritage."[105] Justice Sotomayor's comments indicate the powerful influence that legal realism has had on American

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[100] Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 91 (2002).

[101] *See* Sheryl Gay Stolberg, *A Trailblazer and a Dreamer*, N.Y. TIMES, May 27, 2009, at A1.

[102] *Id.* (noting the following: learned she was diabetic at eight; lost her father at nine; raised primarily by a hard-working mother; accepted into Princeton and became respected for her diligent work ethic—e.g., during summers she familiarized herself with the literary classics her elite peers had known already and took for granted; accepted into Yale Law School and later wrote on to the Law Review; became a prosecutor, then a commercial litigator; nominated by first President Bush and confirmed as a federal district judge in the Southern District of New York; nominated by President Clinton and confirmed as a judge on the Court of Appeals for the Second Circuit).

[103] *Id.*

[104] David Gonzalez, *For Puerto Ricans, Sotomayor Prompts Pride[] and Reflection*, N.Y. TIMES, Aug. 7, 2009, at A13.

[105] Sotomayor, *supra* note 100, at 92. The comments that received the bulk of the public's attention repeated the same themes: "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life." *Id.*

jurisprudence. The open recognition and defense of bias by a well-qualified, federal appellate judge indicates how the norms for judicial behavior continue to move away from the rule of law. Expecting judges to overcome their biases and apply the law without letting their personal experience interfere is now considered by many to be a quaint and simplistic view.[106] That is unfortunate, because it is possible to have a sophisticated view of jurisprudence that expects judges to adhere to a higher standard.[107]

Justice Sotomayor's candid discussion of bias in the law is to be commended in some respects, because she at least acknowledged what other judges refuse to address. Upon her nomination to the Supreme Court, however, the transparency was gone. To endure the heightened scrutiny that has recently accompanied Supreme Court nominees,[108] she proceeded carefully through the nomination process.[109] A heated public debate erupted over the candid comments she made on the expectations of judicial behavior while still an appellate judge.[110] She avoided any further controversy by responding carefully to questions about her judicial temperament.[111] Instead of explaining more about her philosophy, she told the Senate Judiciary Committee what most of us wanted to hear: "My personal and professional experiences help me to listen and understand . . . with the law always commanding the result in every case."[112] Justice Sotomayor's comments during confirmation proceedings are markedly different from her earlier admission to being influenced by sex and ethnicity.

Among other reasons, Justice Sotomayor is a significant figure because she is a contemporary example of the formidability of political jurisprudence. Justice Sotomayor's statements indicate that she shares the attitudinalists' idea that "the fairy tale of a discretionless judiciary

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[106] *See, e.g.*, Bruce Weber, *Umpires v. Judges*, N.Y. TIMES, July 12, 2009, at WK1.

[107] *See Leviticus* 19:15 (New King James) ("You shall do no injustice in judgment. You shall not be partial to the poor, nor honor the person of the mighty. But in righteousness you shall judge your neighbor.").

[108] The recent trend of contentious political battles over Court nominees can be traced to Reagan nominee Robert Bork. Judge Bork's candid answers regarding his judicial philosophy led to the defeat of his nomination. For his own account of the contentious nomination proceedings, see BORK, *supra* note 57, at 271–93. "This episode confirms, it must be feared, that none of the institutions of the law are free of the increasing politicization of our legal culture." *Id.* at 293.

[109] The Supreme Court nomination process itself has become an area of research for the attitudinalists. *See* SEGAL & SPAETH, *supra* note 36, at 206–22 (detailing past empirical results for nominations to the Supreme Court).

[110] Adam Liptak, *Path to Court: Speak Capably but Say Little*, N.Y. TIMES, July 12, 2009, at A1 (referencing Sotomayor, *supra* note 100, at 92).

[111] *Id.*

[112] Peter Baker & Neil A. Lewis, *Judge Focuses on Rule of Law at the Hearings*, N.Y. TIMES, July 14, 2009, at A1.

survives."[113] Does the level of public outrage at Sonia Sotomayor's earlier admitted judicial philosophy indicate a lack of sophistication on the part of the American public, or can judges rationally be expected to follow the law objectively?[114] The scrutiny behind Sotomayor's statements grew as knowledge spread of her involvement on the Second Circuit with *Ricci v. DeStefano*.

B. Thrust and Parry in Ricci

Affirmative action and race-based employment decision-making provoke strong feelings on both sides of the political aisle. The attitudinalists' claim that policy preferences govern judicial decision-making exists, at least in part, in cases that revolve around the problem of racism in the United States.[115] In *Ricci*, Frank Ricci and seventeen other firefighters filed a lawsuit against Mayor John DeStefano and other officials of the city of New Haven when the city refused to certify test results that would have resulted in the firefighters receiving promotions.[116] The promotions within the fire department enabled candidates to achieve the rank of lieutenant or captain and were predicated on the candidate's performance on an objective test; many firefighters invested a significant amount of time, effort, and material resources to prepare accordingly.[117] Frank Ricci, who suffers from dyslexia, spent over $1,000 on test materials and payment to his neighbor to read him the written materials on tape; Ricci then used the audio tapes while studying from eight to thirteen hours per day in preparation for the exam.[118]

The candidates took the promotion exam in November and December 2003.[119] The top ten candidates for the lieutenant position

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[113] SEGAL & SPAETH, *supra* note 36, at 8.

[114] *See* Sonia Sotomayor & Nicole A. Gordon, *Returning Majesty to the Law and Politics: A Modern Approach*, 30 SUFFOLK U. L. REV. 35, 35–36 (1996) ("The public expects the law to be static and predictable. The law, however, is uncertain and responds to changing circumstances. To the public, justice means that an obviously correct conclusion will be reached in every case. But what is 'correct' is often difficult to discern when the law is attempting to balance competing interests and principles . . . . A confused public, finding itself at odds with the results of particular judicial decisions, experiences increased cynicism about the law.").

[115] For the attitudinalist's treatment of affirmative action issues, see SEGAL & SPAETH, *supra* note 36, at 157.

[116] Ricci v. DeStefano, 129 S. Ct. 2658, 2671 (2009).

[117] *Id.* at 2664 (stating that test results would determine the order for consideration).

[118] *Id.* at 2667.

[119] *Id.* at 2666. For the lieutenant position, the top ten candidates were eligible for immediate promotion. Seventy-seven candidates completed the exam (forty-three whites, nineteen blacks, and fifteen Hispanics), and thirty-four of those passed (twenty-five whites,

were all white, and the top nine candidates for the captain position included seven whites and two Hispanics.[120] City officials on the Civil Service Board ("CSB") were concerned that the test results discriminated against minority candidates and through a series of meetings with the test developer, Industrial/Organizational Solutions ("IOS"), deliberated over whether to certify the results of the exam.[121] IOS repeatedly affirmed the objectivity of the test it had assembled and argued that there was no better alternative; city officials, however, continued to express reluctance to certify the results, arguing that there were other tests that could be administered that would not lead to the disparate results of the IOS test.[122]

Initially, the firefighters became aware of CSB's concern over the test results but were unaware of their individual scores.[123] After the city refused to certify the results, the firefighters filed suit, alleging that the city violated the prohibition against disparate treatment contained in Title VII of the 1964 Civil Rights Act and argued that they had a constitutional claim under the Equal Protection Clause of the Fourteenth Amendment.[124] Curiously, the district court granted

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six blacks, and three Hispanics). For the captain position, the top nine candidates were eligible for an immediate promotion. Forty-one candidates completed the exam (twenty-five whites, eight blacks, and eight Hispanics), and twenty-two of those passed (sixteen whites, three blacks, and three Hispanics). *Id.*

[120] *Id.*

[121] *Id.* at 2665–71. The CSB met with IOS five times and listened to several witnesses at the final two meetings. IOS charged the city $100,000 to create and administer the exam, which sought to test the candidates on the requisite skills, abilities, knowledge, and tasks essential for service as a firefighter lieutenant or captain. IOS surveyed a number of captains, lieutenants, and battalion chiefs to create the test material. All of the test assessors assembled by IOS were of a superior rank to those being tested and came from outside Connecticut. Sixty-six percent of the panelists were minorities, and two minority members were a part of each of the nine three-member assessment panels. *Id.* at 2665–66.

[122] *Id.* at 2669–70. The city's reluctance seems to have originated with City attorney Thomas Ude and City chief administrative officer Karen DuBois-Walton. The CSB relied on several witnesses to help it reach a decision—an industrial/organizational psychologist, a black fire program specialist for the Department of Homeland Security, and a Boston College professor who specialized in "race and culture" as applied to standardized tests. *Id.* at 2668–69. The industrial/organizational psychologist was a direct competitor of IOS, who had not studied the IOS test in detail and yet offered opinion to support the city's suspicion of the results. *Id.* at 2668; *see also id.* at 2685, 2687 n.2 (Alito, J., concurring) (noting the city's questionable decision to rely heavily on the testimony of a direct competitor of IOS and largely ignore the testimony of Fire Chief William Grant (who is white) and Fire Chief Ronald Dumas (who is African-American), both of whom approved the test).

[123] *Id.* at 2667. Even without knowing how they had performed, several firefighters, including Frank Ricci, argued that the test results should be certified. *Id.*

[124] *Id.* at 2671–72; *see also* 42 U.S.C. § 2000e-2(a) (2006) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his

summary judgment to the defendants, even though the court had conceded that a jury could rationally infer that New Haven city officials worked behind the scenes to sabotage the promotional exams.[125] The court also ruled that the city officials' motivation to "avoid making promotions based on a test with a racially disparate impact . . . does not, as a matter of law, constitute discriminatory intent" under Title VII.[126]

Frank Ricci and the firefighters appealed to the Second Circuit Court of Appeals. After full briefing and oral argument, the court of appeals curiously decided to devote a one-paragraph, unpublished summary order to affirm the district court.[127] Justice Sotomayor was a member of the panel that issued the per curiam opinion. The opinion is notable for its brevity and reveals the possibility of bias being masked through court procedure. The per curiam opinion admits the difficulties experienced by Frank Ricci and other New Haven firefighters but finds no merit in the Title VII claim.[128]

The decision by the Second Circuit to render a shockingly brief per curiam opinion in a case that features obvious constitutional issues should be scrutinized in light of Justice Sotomayor's past admissions regarding judicial behavior. Understanding the process of judicial decision-making requires moving past an analysis based solely on legal considerations.[129] Political jurisprudence is helpful in bringing

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compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .").

[125] Ricci v. DeStefano, 554 F. Supp. 2d 142, 162–63 (D. Conn. 2006) (stating that city officials knew that if the exams were certified, Mayor DeStefano would suffer politically at the hands of the local African-American community). The court characterized the firefighters' argument as asserting that if the city could not prove that the disparities on the exams were due to a specific flaw inherent in the exams, then the results should be certified. *Id.* at 156.

[126] *Id.* at 160. In rejecting the firefighters' equal protection claim, the district court concluded that the actions of city officials were not racially based because all of the applicants took the same test and that "the result was the same for all because the test results were discarded and nobody was promoted." *Id.* at 161.

[127] *Ricci*, 129 S. Ct. at 2672. At a later time, the court of appeals withdrew the unpublished summary order, and issued a similar, one-paragraph per curiam opinion that fully embraced the reasoning of the district court; three days later, with a vote of 7 to 6, the court of appeals denied rehearing en banc. *Id.* (rehearing en banc was denied over the written dissents by Chief Judge Jacobs and Judge Cabranes); *see also* Ricci v. DeStefano, 530 F.3d 87 (2d Cir. 2008) (per curiam); Ricci v. DeStefano, 530 F.3d 88, 88 (2d Cir. 2008) (order denying en banc hearing).

[128] *Ricci*, 530 F.3d at 87 (per curiam) ("We are not unsympathetic to the plaintiffs' expression of frustration. Mr. Ricci, for example, who is dyslexic, made intensive efforts that appear to have resulted in his scoring highly on one of the exams, only to have it invalidated. . . . To the contrary, because the Board, in refusing to validate the exams, was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact, its actions were protected.").

[129] *See* SEGAL & SPAETH, *supra* note 36, at 53. It isn't necessary, however, to take the equally false view that the law is only a camouflage for political will. The attitudinalists go

awareness to the factors that shape a judge's choices. Several years before *Ricci*, Justice Sotomayor revealed factors—race and sex—that influence her decision-making.[130]

A 7-to-6 vote, with Judge Sotomayor in the majority, resulted in a denial of rehearing en banc.[131] The per curiam opinion concealed the policy-making preferences of the appellate court. Judge Calabrasi in his concurring opinion determined that the firefighters presented a difficult issue that did not need to be decided because the district court had adequately supplied the reasons for granting summary judgment for the defendants.[132] How do we know that Justice Sotomayor's personal values and biases were not the deciding factor in her decision to cast her vote against rehearing en banc?[133] Did her experiences blunt her appreciation for the injustice experienced by Frank Ricci and the seventeen other firefighters because they largely belonged to a dominant racial majority? In light of her prior admission on how experience affects the decision-making of judges, it is reasonable to conclude that her experiences as a member of a racial minority had an effect on her ability to apply the law that would benefit members of a racial majority. Her vote would have made a difference in the appellate outcome, at least to some degree. How do we know that Justice Sotomayor interpreted Title VII correctly in light of the facts?[134] What effect did the fact that the majority of the aggrieved firefighters were white males have on the meager per curiam opinion?

The dissent from the order denying the rehearing framed the dispute very differently from the majority opinion: "This appeal raises important questions of first impression in our Circuit—and indeed, in the nation—regarding the application of the Fourteenth Amendment's Equal Protection Clause and Title VII's prohibition on discriminatory employment practices."[135] Instead of addressing the important questions raised by the New Haven firefighters, the court of appeals turned a blind eye.

too far when they claim that "the legal model and its components serve *only* to rationalize the Court's decisions and to cloak the reality of the Court's decision-making process." *Id.* (emphasis added).

[130] *See* Sotomayor, *supra* note 100 and accompanying text.

[131] *Ricci*, 530 F.3d at 88.

[132] *Id.* at 88–89.

[133] *See* Sotomayor, *supra* note 100, at 92.

[134] It is easier to criticize Judge Sotomayor's decision because she spoke publicly about the nature of judicial decision-making. Of course, the same questions apply to the other six appellate judges who voted against a rehearing en banc.

[135] *Ricci*, 530 F.3d at 93. The dissent argued that the questions presented by the New Haven firefighters were "indisputably complex and far from well-settled." *Id.* at 94 ("Presented with an opportunity to address *en banc* questions of such 'exceptional importance,' a majority of this Court voted to avoid doing so.") (citation omitted).

In a law review article written over ten years before *Ricci*, Justice Sotomayor tellingly stated: "A confused public, finding itself at odds with the results of particular judicial decisions, experiences increased cynicism about the law."[136] Justice Sotomayor, however, does not go far enough in criticizing judges' inability to apply the law consistently or interpret text reasonably.[137] The realism advocated by Justice Sotomayor is correct as far as it diagnoses why there are divergent results in legal decisions (external factors weigh heavily on the reasoning capacity of judges), but her appeal to realism is incorrect because it stops short of demanding more. Instead of using the knowledge of human bias and weakness to help curb the tendencies toward partiality, Justice Sotomayor recasts inconsistency in law as a virtue.[138] Perhaps due to their own biases in favor of a malleable legal culture, the realists give up the fight against partiality. The public's cynicism towards the legal profession is much more sophisticated than Justice Sotomayor or the new realists care to concede and is directed at judicial realists who use the convenient truth of human indeterminacy to exert their own will.

The Supreme Court reversed the decisions of the lower courts and held that the city officials of New Haven acted in violation of Title VII when they refused to certify the IOS exam.[139] The Court held that the firefighters suffered discrimination under Title VII, which forbids not only intentional discrimination ("disparate treatment"), but also, in some instances that present no discriminatory intent, a disproportionately adverse effect on minorities ("disparate impact").[140] Both sides used Title VII as a basis for their argument: the Court petitioners alleged that the city's refusal to certify the exam results was a violation of the disparate-treatment provision, while the city responded that its decision was appropriate because the tests "'appear[ed] to violate'" the disparate-impact provision.[141] The Court determined that the district court's error

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[136] *See* Sotomayor & Gordon, *supra* note 114, at 35–36.

[137] Instead, Justice Sotomayor chides critical lawyers who "join[] a chorus of critics of the system." *Id.* at 36.

[138] "'Much of the uncertainty of law is not an unfortunate accident: it is of immense social value.'" *Id.* at 37 (quoting JEROME FRANK, LAW AND THE MODERN MIND 7 (Anchor Books 1963) (1930)).

[139] Ricci v. DeStefano, 129 S. Ct. 2658, 2664 (2009).

[140] *Id.* at 2672–73. A plaintiff seeking relief from disparate-treatment discrimination must establish that an employer had a discriminatory intent for taking a job-related action. A plaintiff seeking relief from disparate-impact discrimination must establish that an employer uses "'a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.'" *Id.* (citing 42 U.S.C. 2000e-2(k)(1)(A)(i)).

[141] *Id.* at 2673 (quoting Brief for Respondents at 12 Ricci v. DeStefano, 129B S. Ct. 2658 (2009) (Nos. 07-1428 & 08-328)) (beginning its analysis with the premise that absent

was in thinking that a decision based on avoiding a disparate impact cannot, as a matter of law, constitute discriminatory intent, the necessary component for disparate treatment.[142]

In recognition of the inherent conflict between the desire to avoid racial preferences on the one hand and the reality of racially sensitive hiring practices on the other, the Court used the "strong basis in evidence" standard and held that once a promotion process has been selected by a municipality, with its selection criteria made clear, the test results may not be invalidated on the basis of race.[143] In light of the district court's grant of summary judgment and the Second Circuit's curt per curiam affirmation on behalf of New Haven, the Supreme Court's decision to grant summary judgment on the Title VII claim for Frank Ricci and the other firefighters is remarkable.[144]

The Court also explored the extent to which the Reverend Boise Kimber and other members of the African-American community exerted their influence on the city officials of New Haven.[145] As the controversy

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a valid defense, the city's refusal to certify the results would violate the disparate-treatment prohibition).

[142] *Id.* at 2673–74. The Court held that Title VII provides express protection of "bona fide promotional examinations" and noted the "legitimate expectation" generally fostered by municipal promotional exams. *Id.* at 2676 ("As is the case with any promotion exam, some of the firefighters here invested substantial time, money, and personal commitment in preparing for the tests. Employment tests can be an important part of a neutral selection system that safeguards against the very racial animosities Title VII was intended to prevent. Here, however, the firefighters saw their efforts invalidated by the City in sole reliance upon race-based statistics.").

[143] *See id.* at 2675–77 (stating the standard appropriate to resolve tension between disparate-treatment and disparate-impact by limiting employer's discretion to make decisions based on racial qualifications). The Court recognized that the invalidation would result in "upsetting an employee's legitimate expectation not to be judged on the basis of race." *Id.* at 2677.

[144] *Id.* at 2677, 2681. The Court arrived at this conclusion by considering whether the promotional examinations "were not job related and consistent with business necessity, or if there existed an equally valid, less-discriminatory alternative." *Id.* at 2678. The Court concluded: "[T]here is no strong basis in evidence to establish that the test was deficient in either of these respects." *Id.* at 2678–80 (finding that the city ignored evidence supporting the exam's validity, and finding that a change in the weighting formula, "banding" (rounding the scores and grouping into ranks) as well as using an assessment center for evaluation were not equally valid, less-discriminatory test alternatives). The Court also highlighted the tension between Title VII and the constitutional guarantee of equal protection. *Id.* at 2682 (Scalia, J., concurring) ("Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on . . . those racial outcomes.").

[145] *Id.* at 2684–85 (Alito, J., concurring) ("Reverend Kimber's personal ties with seven-term New Haven Mayor John DeStefano . . . stretch back more than a decade. . . . According to the Mayor's former campaign manager (who is currently his executive assistant), Rev. Kimber is an invaluable political asset . . . . Almost immediately after the test results were revealed . . . Rev. Kimber called the City's Chief Administrative Officer . . . because he wanted 'to express his opinion' about the test results and 'to have

surrounding the test results grew, there were clear indications that the Mayor and other city officials had made up their minds to disregard the exam scores, and that the officials sought to conceal their policy preferences from a public that was expecting honest deliberation.[146]

The dissent defended the Second Circuit's per curiam affirmation of the district court by arguing that the exam results were "sufficiently skewed to 'make out a prima facie case of discrimination' under Title VII's disparate-impact provision," and argued that New Haven's actions were "race-neutral."[147] It is hard to fathom how rejecting valid test scores by qualified applicants, who happen to be white, to placate a vocal minority constitutes race "neutrality." Qualified applicants were ignored because of the color of their skin. The dissent also had no problem with the secretive political maneuverings of New Haven city officials.[148] Thus the Court majority in *Ricci* recognized the discrimination on the part of the city of New Haven and found a Title VII violation on behalf of the firefighters. The lower courts and the dissent found that the city's decision to avoid a potential Title VII violation by refusing to certify the test results was appropriate and non-discriminatory.[149]

Ricci has much to say about race and the law, but it is also notable for its depiction of political jurisprudence. *Ricci* is important because it reveals the ease with which judges can use the law to fit their own preconceived notions and features a compelling conflict between the Is and Ought of law. Political considerations led officials of New Haven to discriminate on the basis of race, and a segment of "Is" judges sided with them by condoning the policy choice made by officials caught between the disparate-impact and disparate-treatment provisions of Title VII. The firefighters prevailed, however, as a result of the "Ought" judges who affirmed a more absolute stance against race-based hiring practices.

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some influence' over the City's response. . . . Rev. Kimber adamantly opposed certification of the test results—a fact that he or someone in the Mayor's office eventually conveyed to the Mayor.").

146 *Id.* at 2685–86.

147 *Id.* at 2696 (Ginsburg, J., dissenting) ("[City officials] were no doubt conscious of race during their decisionmaking process . . . but this did not mean they had engaged in racially disparate treatment."). The dissent found the plight of the white firefighters was enough to provoke the Court's sympathy, but contended that petitioners "had no vested right to promotion." *Id.* at 2690. The dissent considered the history of racial discrimination as germane to the required analysis, and argued that the majority "fail[ed] to acknowledge" that other cities have utilized better tests that yielded less racially influenced results. *Id.*

148 *See id.* at 2709 (Ginsburg, J., dissenting) (responding to Justice Alito's concurrence: "That political officials would have politics in mind is hardly extraordinary, and there are many ways in which a politician can attempt to win over a constituency—including a racial constituency—without engaging in unlawful discrimination. . . . The real issue, then, is not whether the mayor and his staff were politically motivated; it is whether their attempt to score political points was legitimate (*i.e.*, nondiscriminatory).").

149 *See id.* at 2709–10 (Ginsburg, J., dissenting).

The "Ought" judges rejected the city's policy choice to escape the tension of Title VII's dual provisions by recognizing that race-based discrimination can occur by disparate treatment, even though the city intended to avoid discrimination on the issue of disparate impact.

Biased decision-making by courts should be a cause for concern. Instead of widespread resignation to political decision-making, a healthy skepticism and focused criticism can help restore judicial legitimacy.

C. *How Measured Skepticism Promotes the Rule of Law*

The cynicism inherent in political jurisprudence is a strong response to the limitations of formalism, but it is an overcorrection. Overcorrection may be another unique aspect of human nature.[150] Rejecting the cynical nature of the attitudinal theory and adopting a measure of skepticism can be a healthy development in the rule of law. *Ricci* illustrates the extent to which personal bias influences federal judicial decision-making. Those who care about judicial fidelity to the law should appreciate the criticisms of the new legal realism. The new legal realists should also understand that they are just as prone to bias as the judges they examine. It is also important to note the limitations on the assertions of political jurisprudence.

One limitation is that attitudinalists have concentrated much of their research on the Supreme Court, thereby presenting a distorted picture of widespread judicial decision-making.[151] Only a small percentage of cases appealed to the Court are actually heard,[152] and these cases typically present unique problems.[153] Thus the theories of political jurisprudence have limited explanatory power—the significance of the attitudinal model decreases as analysis moves away from the Supreme Court.[154] In fact, research suggests that precedent significantly constrains appellate court judges from indulging their policy-making preferences.[155] Naturally, the claims of political jurisprudence are more

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[150] SIR WALTER RALEIGH, THE CABINET-COUNCIL (1658), *reprinted in* THE WORKS OF SIR WALTER RALEIGH, KT. 37, 89 (Oxford Univ. Press 1829) ("It is the nature of men, having escaped one extreme . . . to run headlong into the other extreme, forgetting that virtue doth always consist in the mean.").

[151] Cross, *supra* note 24, at 285.

[152] SEGAL & SPAETH, *supra* note 36, at 250 (only five percent of paid cases and one percent of *in forma pauperis* cases).

[153] Cross, *supra* note 24, at 285–86. It should not be surprising that personal values make a significant difference in deciding close cases. *Id.* at 286.

[154] *See id.* at 287–88 (suggesting that research supports legal model in lower courts).

[155] *See* Donald R. Songer, *The Circuit Courts of Appeals*, *in* THE AMERICAN COURTS: A CRITICAL ASSESSMENT 35, 42, 44–45 (John B. Gates & Charles A. Johnson eds., 1991) ("[T]he proportion of cases in which judges had an opportunity to fashion legal rules consistent with their personal preferences seldom exceeded 10 percent.").

significant in explaining the behavior of judges who retain the benefit of good-behavior tenure. The attitudinalists' reliance on political labels, moreover, can be simplistic.[156] "Conservative" and "liberal" labels are crude, prone to change over time, and do not take account of judges' changing their minds.[157] Reducing legal decisions to labels that are prone to change over time prevents a nuanced understanding of court decisions.[158]

A final criticism of political jurisprudence is its reluctance to understand the normative aspect of empirical research. The tendency to associate empirical research with objectivity is just as mythic as the formalists' concealment of bias beneath archaic legal principles. Buried within the attitudinalists research is a normative system that shapes the development of the law. Justice Sotomayor reminds us that "personal experiences affect the facts that judges choose to see."[159] The same logic extends to the researchers within political jurisprudence. Complete resignation to judicial partiality is the wrong course because it replaces the rule of law with a camouflaged political will. Legal realism is a reality in human experience, but the unabashed acceptance of realism in the adjudicative process is unacceptable. The tendency for judges to indulge in their own biases is a reality in human experience, but it should be resisted as much as possible. The judicial norms of legal realism should be fought with its own weapon of skepticism.

CONCLUSION

Ultimately, a measure of legal uncertainty and inconsistency is to be expected because of inherent contradictions and weaknesses in human nature. *Ricci* is important because it helps reveal the extent to

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[156] *See* Peter H. Schuck, Op-Ed., *Court Sense*, L.A. TIMES, July 15, 2009, at A25 ("Real people and real judges mix liberalism on some issues with conservatism on others.").

[157] *See* Andrew D. Martin & Kevin M. Quinn, *Assessing Preference Change on the U[.]S[.] Supreme Court*, 23 J.L. ECON. & ORG. 365, 365–67 (2007) ("[I]t is . . . possible that the worldviews, and thus the policy positions, of justices evolve through the course of their careers."). Compelling evidence has been amassed that indicates that justices change their policy preferences over time. *See id.* at 373–81. The implications of this current research threaten the claims of the attitudinalists. *See id.* at 381–82 ("This finding goes against much of the prevailing wisdom in judicial politics research and calls into question the results from a large body of research that explicitly assumes temporal stability of preferences.").

[158] How would the attitudinal model explain the difference between the respective approaches of Justices Scalia and Thomas, the arch-conservatives? *Compare* Gonzales v. Raich, 545 U.S. 1, 33–41 (2005) (Scalia, J., concurring) (applying a broad application of the Commerce Clause, upholding congressional regulation over noneconomic local activity as pertaining to medical marijuana), *with id.* at 57–74 (Thomas, J., dissenting) (arguing that the majority's interpretation of the Commerce Clause is overly broad and divorced from textual support).

[159] Sotomayor, *supra* note 100, at 92.

which personal bias is fused with human judgment and shows us that subjective feelings associated with race can and do affect judicial decision-making. *Ricci* takes on an added level of significance by taking account of Justice Sonia Sotomayor's role in the development of the dispute. Coupling Justice Sotomayor's candid admissions of bias in judicial decision-making with the wildly divergent results of the federal courts in *Ricci* shows us that the claims of the legal realists should be thoughtfully considered. Political jurisprudence reminds us that human bias can be found precisely where it is most harmful.

Not unlike Thrasymachus, however, the attitudinalists go too far in their cynicism and overstate their case.[160] There is ample evidence supporting the idea that many judges decide cases by inserting typical fact patterns into long-settled and rational legal machinery. Political jurisprudence seems to lose much of its force as the evaluation of judicial behavior descends into the lower levels of the judiciary. Additionally, proponents of political jurisprudence are not free from their own biases and tendencies to interpret reality according to their own personal values. The human propensity for self-interest and bias should inspire caution in all schools of jurisprudence.

Judicial partiality is harmful to the dispensing of true justice. The norms of political jurisprudence are corrosive to the distinction between law and politics—a distinction that is necessary to the preservation of justice. Ironically, the diagnostic power of political jurisprudence can be a valuable tool to restore or enhance judicial legitimacy. The empirical information gathered by the attitudinalists can provide an extra measure of accountability to federal judges who, owing to their good-behavior tenure and the infrequency of impeachment, may have little incentive to respect the law. Perhaps a greater degree of humility will take us even further:

> Let man now judge his own worth, let him love himself, for there is within him a nature capable of good . . . . Let him despise himself because this capacity remains unfilled . . . . Let him both hate and love himself; he has within him the capacity for knowing truth and being happy, but he possesses no truth which is either abiding or satisfactory.[161]

A proper jurisprudence does its best to capture both Is and Ought and requires a proper understanding of both human depravity and human dignity.

Robert F. Noote IV

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160 *See* PLATO, *supra* note 2, at 12–20.

161 PASCAL, *supra* note 1, at 30.

INTERFACING YOUR ACCUSER: COMPUTERIZED EVIDENCE AND THE CONFRONTATION CLAUSE FOLLOWING *MELENDEZ-DIAZ*

INTRODUCTION

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[1] As the U.S. Supreme Court has recognized, this right was enshrined in the Constitution to protect Americans against the sort of ex parte prosecutions that characterized previous abuses of power, such as the infamous Raleigh trial or the tyrannical reign of Queen Mary I, whose actions earned her the nickname "Bloody Mary."[2] Such practices were also one of the abuses complained of by the American colonists in the years leading up to the American Revolution.[3] Later, when the U.S. Constitution was ratified, Congress was obliged to include the Confrontation Clause in the Sixth Amendment to satisfy antifederalist concerns that the lack of such a provision might turn our constitutional regime into a tyranny.[4]

The Supreme Court has long held that the Confrontation Clause guarantees defendants a right to confront their accusers "face to face."[5] But what if that accuser has no face? Increasingly, computers have been recognized not merely as repositories of data, but also as sources of potentially incriminating "statements."[6] Several courts have held that

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1 U.S. CONST. amend. VI.

2 Crawford v. Washington, 541 U.S. 36, 43–44 (2004) (citing 1 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 326 (1883); An Act Appointing an Order to Justice of the Peace for the Bailment of Prisoners, 1 & 2 Phil. & M. c.13 (1554); An Act to Take the Examination of Prisoners Suspected of Manslaughter or Felonye, 2 & 3 Phil. & M. c.10 (1555); 1 DAVID JARDINE, CRIMINAL TRIALS 435, 520 (1832); Trial of Sir Walter Raleigh, *in* 2 T.B. HOWELL, STATE TRIALS 15–16 (1603)).

3 *Id.* at 47–48 (citing J. LIGHTFOOT ET AL., *A Memorial Concerning the Maladministrations of His Excellency Francis Nicholson*, *in* 9 ENGLISH HISTORICAL DOCUMENTS 253, 257 (David C. Douglas ed., 1955); John Adams, Draft of His Argument in *Sewell v. Hancock* (Oct. 1768–Mar. 1769), *in* 2 LEGAL PAPERS OF JOHN ADAMS 194, 207 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965)).

4 *Id.* at 48–49 (citing Objection of Abraham Holmes to Omission of Guaranteed Right of Confrontation (Jan. 30, 1787), *in* 2 DEBATES IN THE SEVERAL STATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 110–11 (Jonathan Elliot ed., 2d ed. 1836); R. LEE, LETTER IV BY THE FEDERAL FARMER (Oct. 15, 1787), *reprinted in* 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 469, 473 (B. Schwartz ed., 1971)).

5 *Id.* at 57 (quoting Mattox v. United States, 156 U.S. 237, 244 (1895)).

6 *E.g.*, United States v. Washington, 498 F.3d 225, 230 (4th Cir. 2007), *cert. denied*, 129 S. Ct. 2856 (2009) (holding that computer-run blood-alcohol analysis does not implicate the Confrontation Clause because the machine-generated data is not a "statement" of any person and therefore cannot be testimonial).

because machines are not "persons," nothing they "say" can truly constitute a testimonial "statement" for purposes of the Confrontation Clause.[7] Nonetheless, most computers' outputs are not wholly automatic. Often, what comes out of a computer is dependent upon what is fed into it by a technician.[8] The purported objectivity of the process does not exempt it from confrontation: the Supreme Court recently held that "neutral" lab reports implicate the Confrontation Clause.[9] The question thus becomes: When do statements by machines cease to be statements of the machines themselves, and instead become the statements of their operators? At what point does man overtake machine? And when the machines' statements do cease to be the machines' alone, who then must testify to the result? Such questions must be addressed carefully for they bring with them the danger of, on the one hand, greatly inflating the costs of law enforcement[10] or, on the other hand, failing to sufficiently protect one of the most ancient and fundamental human rights.[11] This Note argues that, when dealing with mechanized evidence, the Confrontation Clause requires testimony from the one whose intelligence and reasoning produced the conclusion, as long as this entity was an actual person and not merely a machine.

Part I of this Note provides an overview of the evolution of the Supreme Court's current test for determining what constitutes a "testimonial" statement, concluding with a brief analysis of the current state of the law following *Melendez-Diaz v. Massachusetts*.[12]

Part II of this Note addresses the question of when computerized evidence is testimonial by analyzing the threshold question of when such evidence is a "statement" at all, as any computerized evidence that does not constitute a "statement" cannot, by definition, implicate the

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7 *Id.* at 231 (citing 4 MUELLER & KIRKPATRICK, FEDERAL EVIDENCE § 380 (2d ed. 1994) (stating that because machines are not declarants, "nothing 'said' by a machine . . . is hearsay")) (collecting cases, and applying the hearsay concept of "statements" to the Confrontation Clause).

8 *E.g.*, *id.* at 232–33 (Michael, J., dissenting).

9 Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2532, 2536 (2009).

10 *See id.* at 2549–50 (Kennedy, J., dissenting); *see also* Brief for the State of Indiana, et al. as Amici Curiae Supporting Respondent at 6–11, Briscoe v. Virginia, 130 S. Ct. 1316 (2010) (No. 07-11191) (discussing the cost of implementing *Melendez-Diaz*); Tim McGlone, *High Court Ruling Throws Sand into Wheels of Justice*, VIRGINIAN-PILOT, Jan. 9, 2010 at 1, 10 (same).

11 *See* Crawford v. Washington, 541 U.S. 36, 43–50 (2004) (tracing the origins and history of the right of confrontation from Roman law to the founding of the United States); *see also Deuteronomy* 17:7, *Matthew* 18:15–16, *Acts* 25:16 (declaring a confrontation right under ancient Hebrew, Christian, and Roman law, respectively).

12 129 S. Ct. 2527 (2009).

Confrontation Clause.[13] For this discussion, it will be helpful to draw on existing analyses as to when computerized evidence constitutes a statement, although most such analyses have been done in the context of the hearsay rule.

When computerized data does implicate the Confrontation Clause, there is some debate as to who must testify to the computer's output. Part III of this Note addresses the question of who may testify to admit the results of computer-aided analysis in the wake of the Supreme Court's decision in *Melendez-Diaz*. This section discusses attempts to admit the final printout into evidence and attempts by experts to use the computerized data as a basis for their opinions. In the months following *Melendez-Diaz*, the lower courts adopted a variety of approaches in applying the holding of that case.[14] Part III discusses those approaches and proposes a coherent test for determining whose testimony is sufficient to meet the prosecution's Confrontation Clause obligations.

I. DEFINING "TESTIMONIAL": THE ROAD TO *MELENDEZ-DIAZ*

The current interpretation of the Confrontation Clause was first formulated in a concurrence by Justice Thomas in *White v. Illinois*.[15] In *White*, the majority held that the Confrontation Clause is not implicated by statements that "c[o]me within an established exception to the hearsay rule."[16] Though the Court made it clear that it was not rendering the Confrontation Clause redundant with the hearsay rule,[17] it did base its Confrontation Clause analysis on the notion that the Confrontation Clause and the hearsay rule "are generally designed to protect similar values."[18] In that case, the United States, as amicus curiae, had argued that the analysis of a statement under the

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[13] *See, e.g.*, Davis v. Washington, 547 U.S. 813, 821 (2006) ("Only [testimonial] *statements* . . . cause the declarant to be a 'witness' within the meaning of the Confrontation Clause." (emphasis added) (citing *Crawford*, 541 U.S. at 51)).

[14] *See* People v. Gutierrez, 99 Cal. Rptr. 3d 369, 376–377 n.3 (Ct. App. 2009) (discussing the various attempts by the California appellate courts to reassess state precedent in light of *Melendez-Diaz*), *review granted, depublished by* 220 P.3d 239 (Cal. 2009). *Compare* State v. Mobley, 684 S.E.2d 508, 511 (N.C. Ct. App. 2009) (permitting an expert to testify as to the results of tests performed by others as long as she provides her own criticisms of those results based on her own interpretation of the data), *review denied*, 692 S.E.2d 393 (N.C. 2010), *with* State v. Willis, 213 P.3d 1286, 1288–89 (Or. Ct. App. 2009) (holding that both the Oregon constitution and the U.S. Constitution require testimony by the report's author (citing State v. Birchfield, 157 P.3d 216, 220 (Or. 2007)), *rev'd on other grounds*, 236 P.3d 714 (Or. 2010), *and* Shiver v. State, 900 So. 2d 615, 618 (Fla. Dist. Ct. App. 2005) (holding that testimony by report's author did not satisfy the Confrontation Clause when the work the report was based on was done by another).

[15] 502 U.S. 346, 358 (1992) (Thomas, J., concurring).

[16] *Id.* at 353.

[17] *Id.* at 352 (quoting Idaho v. Wright, 497 U.S. 805, 814 (1990)).

[18] *Id.* at 352–53 (quoting California v. Green, 399 U.S. 149, 155 (1970)).

Confrontation Clause should be based upon its similarity to the *ex parte* affidavits that the Clause was intended to prevent, but the Court held that that argument came "too late in the day to warrant reexamination of th[e] [existing] approach."[19]

Justice Thomas, joined by Justice Scalia, argued that the Court should have accepted the United States' approach.[20] Lacking dispositive guidance from the text itself,[21] Justice Thomas examined the abuses that the Confrontation Clause was intended to prevent. Justice Thomas noted that in 16th-century England, interrogations were commonly held prior to trial, out of the presence of the defendant.[22] He further rejected the Court's then-established principle that the Confrontation Clause does not apply to hearsay that bears "particularized guarantees of trustworthiness[]" including, but not limited to, those falling under a "'firmly rooted'" hearsay exception.[23] Instead, Justice Thomas proposed that, in addition to witnesses "who actually testif[y] at trial," the Confrontation Clause applies to "extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions."[24] To Justice Thomas, this view would both prevent the abuses that the Confrontation Clause was designed to prevent and be consistent with the "vast majority" of Supreme Court precedent.[25]

Although Justice Thomas's opinion garnered only two votes, it was destined to become the law of the land. Twelve years later, in *Crawford v. Washington*, Justices Thomas and Scalia were able to convert three justices, and also persuade two new justices who had been appointed in the interim, to their view of the Confrontation Clause, reversing the majority in *White*.[26] In his majority opinion, Justice Scalia reprised and extended the historical discussion found in Justice Thomas's concurrence in *White*,[27] coupling it with his own textual analysis, as follows: The Confrontation Clause guarantees defendants a right to be confronted with the "witnesses" against them.[28] The term "witnesses" is defined as

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19 *Id.* at 353.

20 *Id.* at 358 (Thomas, J., concurring).

21 *Id.* at 359.

22 *Id.* at 361 (quoting 1 J. STEPHEN, *supra* note 2, at 221).

23 *Id.* at 363 (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980)).

24 *Id.* at 365.

25 *Id.*

26 *Compare White*, 502 U.S. 346, 352–53 (1992) (a 7-2 decision with Justices Scalia and Thomas dissenting) *with* Crawford v. Washington, 541 U.S. 36, 61 (2004) (a 7-2 decision with Justices Scalia and Thomas in the majority).

27 *Crawford*, 541 U.S. at 43–50.

28 *Id.* at 51.

"those who 'bear testimony.'"[29] Therefore, defendants have a right to be confronted with anyone who "bear[s] testimony" against them.[30]

Justice Scalia then determined that "testimony" refers to "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact,"[31] and proceeded to list three more detailed definitions of "testimony" that had come to the Court's attention:

(1) "'*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially'";[32]

(2) "'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions'";[33] and

(3) "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'"[34]

Justice Scalia declined to choose among these definitions, holding that the application of any of the three would result in the same outcome in the current case,[35] a decision that would cause quite a bit of confusion in the years to come.[36] His majority opinion also overturned the "indicia of reliability" exception, holding that the only exception to the general right of confrontation is when the witness is "unavailable to testify, and the defendant ha[s] had . . . a prior opportunity for cross-examination."[37]

Two years after their triumph in *Crawford*, the Scalia-Thomas alliance developed a small rift. That year, the Court granted certiorari in a pair of Confrontation Clause cases requiring a more precise definition of "testimonial."[38] These cases were consolidated by the Court as *Davis v.*

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29 *Id.* (citing 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 114 (1828)).

30 *See id.* at 53 (concluding that "even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object").

31 *Id.* at 51 (alteration in original) (citing 2 WEBSTER, *supra* note 29, at 91).

32 *Id.* (citing Brief for Petitioner at 23, *Crawford*, 541 U.S. 36 (No. 02-9410)).

33 *Id.* at 51–52 (omission in original) (citing White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring)).

34 *Id.* at 52 (citing Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae at 3, *Crawford*, 541 U.S. 36 (No. 02-9410)).

35 *Id.*

36 *See, e.g.*, Davis v. Washington, 547 U.S. 813, 822 (2006).

37 *Crawford*, 541 U.S. at 53–54. Justice Scalia also declined to overturn the dying declaration exception, although he indicated that it could not be justified on anything more than a *sui generis* historical basis. *Id.* at 56 n.6.

38 *Davis*, 547 U.S. at 817.

Washington.[39] In his majority opinion, Scalia made the following "non-exhaustive" distinction between "testimonial" and "nontestimonial" statements:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial *when the circumstances objectively indicate* that there is no such ongoing emergency, and *that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.*[40]

This rule has been interpreted as establishing a purpose-based approach to determine whether a statement is testimonial, specifically: Did the circumstances indicate that the statement would be used for prosecution?[41] Thus, the Court seems to have adopted the third of the three definitions proposed in *Crawford*, although the other two continue to be cited by the Court.[42]

Here, Justices Scalia and Thomas parted ways. In his partial concurrence, Justice Thomas maintained the same rule he had adhered to since *White*: The Confrontation Clause is implicated by "extrajudicial statements" only if they are "contained in formalized testimonial materials, such as affidavits," or otherwise "carry sufficient indicia of solemnity to constitute formalized statements."[43] Justice Thomas specifically rejected the "primary purpose" requirement as being too unpredictable.[44] Thus, Justice Thomas's definition of "testimonial" differs from the definition adopted by the majority in that it replaces the "primary purpose" requirement with a requirement of "solemnity."

The Court's Confrontation Clause jurisprudence reached its most recent stage of development in *Melendez-Diaz v. Massachusetts*. *Melendez-Diaz* dealt with three "certificates of analysis" submitted into evidence by forensic analysts to identify a substance found in the defendant's possession as cocaine.[45] In a 5-4 decision, the Court held that the certificates were testimonial.[46] Writing for the majority, Justice

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[39] *Id.* at 813.

[40] *Id.* at 822 (emphasis added).

[41] *E.g.*, Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2532 (2009) (quoting *Crawford*, 541 U.S. at 52).

[42] *Id.* at 2531 (quoting *Crawford*, 541 U.S. at 51–52).

[43] *Davis*, 547 U.S. at 836–37 (Thomas, J., concurring in part and dissenting in part) (quoting White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring)).

[44] *Id.* at 834.

[45] *Melendez-Diaz*, 129 S. Ct. at 2530–31.

[46] *Id.* at 2532. While two members of the narrow majority, Justices Stevens and Souter, have since left the Court, *Melendez-Diaz* was affirmed following Justice Souter's replacement by Justice Sotomayor in *Briscoe v. Virginia*, 130 S. Ct. 1316 (2010) (per

Scalia rejected several arguments as to why the Confrontation Clause did not apply to the certificates.

One argument rejected by the Court was that the analysts were not witnesses "against" the defendant because they did not directly accuse him.[47] The Court reasoned that all the prosecution's witnesses are witnesses "against" the defendant, just as all the defendant's witnesses are witnesses "in his favor," stating that "there is not a third category of witnesses."[48]

The Court also rejected the argument that the analysts were not "conventional" witnesses because they recorded "near-contemporaneous" observations rather than past events, because they "observe[d] neither the crime nor any human actions related to it[,]" and because "[the] statements were not provided in response to interrogation."[49] Justice Scalia argued that existing authority did not permit distinctions on the basis of contemporaneity or direct observation and that "[t]he Framers were no more willing to exempt from cross-examination volunteered testimony . . . than they were to exempt answers to detailed interrogation."[50]

The Court further rejected any arguments that the certificates constituted "neutral, scientific testing[,]" such that confrontation would not be terribly helpful because the analysts would be unlikely to change their opinions after seeing the defendant.[51] Rather, Justice Scalia noted that such tests are not always as neutral as they appear and that, at any rate, the Court "do[es] not have license to suspend the Confrontation Clause when a preferable trial strategy is available."[52]

Meanwhile, Justice Thomas concurred, reasserting his "formalization" standard from *White*, but casting his crucial fifth vote

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curiam). Justice Kagan's position on *Melendez-Diaz* is uncertain. *See Nomination of Elena Kagan to be an Associate Justice of the U.S. Supreme Court—Day Three: Before the S. Judiciary Comm.*, 111th Cong. 20–21 (2010) (LexisNexis Congressional CIS S 52-20100630-01) (answer by Justice Kagan noting that as Solicitor General she had filed an amicus brief in *Briscoe* arguing that *Melendez-Diaz* is impractical and should be overturned, but then praising Justice Scalia for ruling based on his interpretation of the law rather than on his alleged preference for prosecutors over defendants).

[47] *Melendez-Diaz,* 129 S. Ct. at 2533 (citing Brief for Respondent at 10, *Melendez-Diaz,* 129 S. Ct. 2527 (No. 07-591)).

[48] *Id.* at 2534.

[49] *Id.* at 2535 (quoting *id.* at 2551–52 (Kennedy, J., dissenting)).

[50] *Id.* (quoting Davis v. Washington, 547 U.S. 813, 822–23 n.1 (2006)).

[51] *Id.* at 2536 (citing Brief for Respondent at 29, 31, *Melendez-Diaz,* 129 S. Ct. 2527 (No. 07-591)).

[52] *Id.*

with the majority because the certificates in question constituted affidavits.[53]

Note that whereas in *Davis*, Justices Scalia and Thomas seemed to espouse different standards—Justice Scalia applying a "primary purpose" test and Justice Thomas preferring to look for solemnity—here, the majority opinion incorporates both.[54] Indeed, in the majority opinion, Justice Scalia specifically mentions that the certificates were "quite plainly affidavits" because they were "'declaration[s] of fact written down and sworn to by the declarant before an officer authorized to administer oaths,'"[55] and Justice Thomas cites this as his basis for joining the majority.[56] This raises an interesting wrinkle in current jurisprudence: while solemnity is not generally required for a statement that is testimonial, if the testimony is an allegedly "neutral" scientific report, it is uncertain whether it must be formalized to be testimonial, as there is no case in which a majority of justices have held that such reports can be testimonial without being formalized. Of course, if such a report is submitted directly, it is likely to be formalized, if only for authentication purposes.[57] Nevertheless, in situations in which the report is not actually entered into evidence, but rather forms the basis for an expert's testimony, this wrinkle in Confrontation Clause jurisprudence could affect a court's analysis.[58]

II. WHEN IS COMPUTERIZED EVIDENCE TESTIMONIAL?

A. Who is the Speaker?: Some Guidance from Hearsay Analysis

Before determining whether computerized evidence constitutes a testimonial statement, one must determine whether it constitutes a statement at all. Several courts have held that certain types of computerized evidence are "statements" of the machines, and therefore

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[53] *Id.* at 2543 (Thomas, J., concurring) (quoting White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring)).

[54] *Id.* at 2532 (noting that the certificates were "quite plainly affidavits" and that "the *sole purpose* of the affidavits was to provide" evidence for trial).

[55] *Id.* (alteration in original) (quoting BLACK'S LAW DICTIONARY 62 (8th ed. 2004)).

[56] *Id.* at 2543 (Thomas, J., concurring) (quoting *id.* at 2532).

[57] *See, e.g.*, *id.* at 2532 (noting that the certificates of analysis submitted in that case were sufficiently formalized to "quite plainly [be] affidavits").

[58] People v. Vargas, 100 Cal. Rptr. 3d 578, 587 (Ct. App. 2009), *review denied*, No. S178100, 2010 Cal. LEXIS 1451 (2010); *see* People v. Rutterschmidt, 98 Cal. Rptr. 3d 390, 412 (Ct. App. 2009) (holding that Justice Thomas's concurrence prevents *Melendez-Diaz* from being applied to nonformalized reports) (quoting *Melendez-Diaz*, 129 S. Ct. at 2543 (Thomas, J., concurring)), *review granted, depublished by* 220 P.3d 239 (Cal. 2009); *see also* People v. Dungo, 98 Cal. Rptr. 3d 702, 710–11 (Ct. App. 2009) (holding an autopsy report to be testimonial because it met both the formality test and the purpose test) (quoting *Melendez-Diaz*, 129 S. Ct. at 2532), *review granted, depublished by* 220 P.3d 240 (Cal. 2009).

are not true statements, as true statements can be made only by persons.[59] Indeed, if the "speaker" is a machine, the Confrontation Clause's remedy of confrontation and cross-examination becomes nonsensical; the notion of a machine itself taking the witness stand for cross-examination approaches the realm of science fiction.[60] For the guarantees of the Confrontation Clause to mean anything, there must be a human witness against whom they can attach. Thus, any analysis of whether computerized evidence is testimonial must begin by distinguishing between non-statements by machines and statements by their technicians.

Because much more work has been done on this subject in the realm of hearsay than in the realm of Confrontation Clause jurisprudence, it might be helpful to draw on the former in this analysis.[61] While the Supreme Court has warned against conflating hearsay principles with Confrontation Clause jurisprudence, it has also acknowledged their overlap.[62] Meanwhile, lower courts have argued that there is no indication that the standard as to who is the "speaker" behind computerized evidence should differ between the hearsay rule and the Confrontation Clause.[63] Unfortunately, this argument is undermined somewhat by the fact that the definition of "statement" under the hearsay rule has been altered in ways the Supreme Court might not tolerate for the Confrontation Clause.[64] Thus, one cannot say that the

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[59] *See, e.g.*, United States v. Washington, 498 F.3d 225, 230 (4th Cir. 2007), *cert. denied,* 129 S. Ct. 2856 (2009); People v. McNeeley, No. 283061, 2010 Mich. App. LEXIS 39, at *24–25 (Ct. App. Jan. 12, 2010) (unpublished; per curiam) ("[E]xplicit in the definition of 'testimonial evidence' is that it must come from a 'witness,' i.e., a natural person (who can be confronted and cross-examined)."). While the rule that a "statement" can be made only by a person is made explicit in hearsay analysis, FED. R. EVID. 801(a), the Confrontation Clause definition of what constitutes a testimonial statement is not so specific on the matter.

[60] United States v. Moon, 512 F.3d 359, 362 (7th Cir. 2008) ("[H]ow could one cross-examine a gas chromatograph? Producing spectrographs, ovens, and centrifuges in court would serve no one's interests."), *cert. denied,* 129 S. Ct. 40 (2008); *McNeeley*, 2010 Mich. App. LEXIS 39, at *25 n.1 (unpublished; per curiam) ("A computer database cannot possibly be confronted or cross-examined, as an affiant, deponent, or other type of witness can."). Presumably, the defendant could test the machine by having an expert analyze its processes or re-run the analysis, but this would seem to be more a question of discovery and authentication than of confrontation. *See Washington*, 498 F.3d at 231; FED. R. CIV. P. 34.

[61] *See* United States v. Lamons, 532 F.3d 1251, 1263 (11th Cir. 2008) (computer-generated phone records), *cert. denied,* 129 S. Ct. 524 (2008); *Washington*, 498 F.3d at 230 n.1 (machine-generated blood-alcohol analysis).

[62] Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2539 (2009).

[63] *See Lamons*, 532 F.3d at 1263; *Washington*, 498 F.3d at 230 n.1.

[64] *Compare* GLEN WEISSENBERGER & JAMES J. DUANE, FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY AND AUTHORITY § 801.3 (6th ed. 2009) (noting that the hearsay rule's definition of "statement" has been changed due to

definition of "statement" under the hearsay rule is dispositive in analyzing the Confrontation Clause. Nevertheless, such analyses do provide a useful starting place for a discussion of what constitutes a statement under the Confrontation Clause.

Many courts have not questioned the proper classification of computerized evidence, instead relying on standard hearsay analysis, on the apparent assumption that any computerized data was a statement of the operator.[65] Those that have addressed the issue tend to draw a distinction between computer-generated evidence and computer-stored evidence.[66] Computer-generated evidence is evidence automatically generated by the computer: this is deemed to be a "statement" only of the computer and therefore not hearsay.[67] In contrast, computer-stored evidence is entered by a human, and is therefore a statement of that human.[68] A third category, not mentioned in the preceding dichotomy but potentially relevant to the present discussion, is that of computer-enhanced evidence.[69]

Those courts that draw a distinction between computer-generated and computer-stored evidence do so on the basis of human intervention, or lack thereof.[70] Evidence is computer-generated, and therefore not hearsay, if it "involve[s] so little intervention by humans in [its] generation as to leave no doubt that [it is] wholly machine-generated for

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principles of reliability) (citing FED. R. EVID. 801(a) Advisory Committee's Note (indicating that nonverbal conduct constitutes a "statement" only when it was intended as a statement, because conduct not intended as a statement is not likely to involve fabrication); Wright v. Doe d'Tatham, (1837) 112 Eng. Rep. 488 (K.B.) 499–500; 7 AD. & E. 313, 341 (an earlier case applying the rule without intent analysis)), *with* Crawford v. Washington, 541 U.S. 36, 62 (2004) ("Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.").

[65] Adam Wolfson, Note, *"Electronic Fingerprints": Doing Away with the Conception of Computer-Generated Records as Hearsay*, 104 MICH. L. REV. 151, 157 (2005).

[66] For a good overview of the distinction between computer-generated and computer-stored data under the hearsay rule, and an argument as to why computer-generated evidence should not be considered hearsay, see *id.* at 157–158.

[67] *Lamons*, 532 F.3d 1251, 1261 (11th Cir. 2008) (phone records); *Washington*, 498 F.3d at 230–31 (blood-alcohol analysis); United States v. Hamilton, 413 F.3d 1138, 1142 (10th Cir. 2005) (internet header automatically generated by uploading child pornography); United States v. Khorozian, 333 F.3d 498, 506 (3d Cir. 2003) (automatically generated fax header); People v. Holowko, 486 N.E.2d 877, 879 (Ill. 1985) (call tracers); State v. Armstead, 432 So. 2d 837, 840 (La. 1983) (phone records); *see also* Wolfson, *supra* note 65, at 157 (collecting sources).

[68] Wolfson, *supra* note 65, at 158 (citing United States v. Duncan, 30 M.J. 1284, 1288–89 (N-M. Ct. Crim. App. 1990)).

[69] *E.g.*, State v. Swinton, 847 A.2d 921, 938 (Conn. 2004) (collecting cases distinguishing computer-enhanced evidence from computer-generated evidence); GREGORY P. JOSEPH, MODERN VISUAL EVIDENCE § 1.04[3][c] (Release 50 2010).

[70] *E.g.*, *Lamons*, 532 F.3d at 1263 n.23, 1264 n.24 (citations omitted).

all practical purposes."[71] Conversely, data that is entered by persons is merely computer-stored, and is therefore subject to all of the requirements of the hearsay rule.[72] This distinction is based more on the definition of the word "statement" than on any claims of particular reliability.[73] Indeed, even if computer-generated evidence is not directly subject to hearsay or Confrontation Clause restraints, it still requires authentication of the computer process, which could raise confrontation issues of its own.[74]

A third possible category of computerized evidence is computer-enhanced evidence.[75] For example, suppose there is a burglary at a convenience store. The burglar is captured on a security camera, but the footage is fuzzy, causing the burglar's appearance to be hard to discern. To rectify this problem, forensic analysts work to clarify the image of the burglar's face on the video.[76] Such analysis can be done, and has been admitted by the courts as simply enhancing, rather than simulating, the video evidence.[77] At first glance, this may seem to be a good analog for certain types of computerized evidence that similarly require the computer processing of existing data.[78] Unfortunately, computer-enhanced evidence is generally addressed in terms of reliability and

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[71] *Id.* at 1263 n.23 (citing *Khorozian*, 333 F.3d at 506; United States v. Vela, 673 F.2d 86, 90 (5th Cir. 1982); *Holowko*, 486 N.E.2d at 879); *accord Hamilton*, 413 F.3d at 1142; *Armstead*, 432 So.2d at 839–40.

[72] *E.g.*, *Lamons*, 532 F.3d at 1264 n.24; *Hamilton*, 413 F.3d at 1142 n.4.

[73] *Khorozian*, 333 F.3d at 506–07 (fax headers not hearsay even though they can be "easily fabricated by the sender"); United States v. Washington, 498 F.3d 225, 231 (4th Cir. 2007) ("[C]oncerns about the reliability of . . . machine-generated information [are] addressed through the process of authentication and not by hearsay or Confrontation Clause analysis." (emphasis omitted)), *cert. denied*, 129 S. Ct. 2856 (2009).

[74] *See, e.g.*, Grant v. Commonwealth, 682 S.E.2d 84, 87 n.2, 88–89 (Va. Ct. App. 2009) (noting that the results of a breath test are non-testimonial because they come from a machine, but holding that the attestation clause was similar to an affidavit and required testimony by the operator who signed it). *Compare* State v. Bergin, 217 P.3d 1087, 1089 (Or. Ct. App. 2009) (certificates of accuracy for Intoxilyzers not testimonial because, unlike the certificates in *Melendez-Diaz*, they are not under oath, do not directly prove an element of the crime, and are prepared with no guarantee that they will ever be used at trial), *with* United States v. Clark, No. 09-10067, 2009 U.S. Dist. LEXIS 100760, at *1–2 (C.D. Ill. Oct. 27, 2009) (certification of drug-sniffing dog requires testimony of his trainer under the Confrontation Clause).

[75] *E.g.*, State v. Swinton, 847 A.2d 921, 938 (Conn. 2004) (citations omitted); JOSEPH, *supra* note 69, § 1.04[3][c].

[76] *See* Commonwealth v. Auker, 681 A.2d 1305, 1313 (Pa. 1996), for a similar scenario.

[77] *E.g.*, *id.* at 1313 & n.2 ("The enhancement did not add or take way from the subject matter of the picture; rather it lightened or darkened the field of the picture.").

[78] For example, such simple data-processing was present in the blood-alcohol analysis in United States v. Washington, 498 F.3d 225, 228 (4th Cir. 2007), *cert. denied*, 129 S. Ct. 2856 (2009).

authentication rather than in terms of hearsay or the Confrontation Clause.[79] Indeed, since *Crawford*, there has been only one case that dealt with a hearsay or confrontation claim regarding computer-enhanced evidence, and that case addressed the issue via a pre-*Crawford* reliability analysis.[80] The reason for this lack of case law may be that authentication of computer-enhanced evidence itself requires testimony by a technician who performed the enhancement and is capable of describing the enhancement process in "specific detail[.]"[81] Indeed, the authentication of computer-enhanced evidence will generally require, at the very least, some form of detailed certification of the sort addressed in *Melendez-Diaz*.[82] Thus, any attempt to address the Confrontation Clause implications of machine-run tests by comparing the processing of such evidence to computer enhancement of a photograph would likely prove fruitless.

B. Confronting the Issue: Can "Things" Speak for Themselves?

Even though hearsay analysis is not applicable to the Confrontation Clause in its own right,[83] the Supreme Court has been willing to apply hearsay principles to the Confrontation Clause where such principles had a valid Confrontation Clause basis.[84] In this case, the arguments that computer-generated (and possibly computer-enhanced) data do not implicate the hearsay rule ring true for the Confrontation Clause as well.[85]

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79 *See* JOSEPH, *supra* note 69, § 8.04[2], [4].

80 *See Swinton*, 847 A.2d at 933 (citations omitted) (applying the pre-*Crawford* "requirement that evidence be reliable so as to satisfy the requirements of the [C]onfrontation [C]lause").

81 *See id.* at 941 (citing Nooner v. State, 907 S.W.2d 677 (Ark. 1995), Dolan v. State, 743 So. 2d 544 (Fla. Dist. Ct. App. 1999), English v. State, 422 S.E.2d 924 (Ga. Ct. App. 1992)).

82 *See* JOSEPH, *supra* note 69, § 8.04[4] ("[T]he enhancement process should be well-documented."). *But see* Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2539 (2009) ("[T]he general rule applicable to the present case[]" allows a clerk to "by affidavit *authenticate* or provide a copy of an otherwise admissible record, but . . . not . . . *create* a record for the sole purpose of providing evidence against a defendant.").

83 *E.g.*, Crawford v. Washington, 541 U.S. 36, 51 (2004).

84 Giles v. California, 128 S. Ct. 2678, 2682, 2688–89 (2008) (applying the hearsay definition of forfeiture by wrongdoing to the Confrontation Clause on the basis that the underlying principles were in place at the time of the Founding).

85 *E.g.*, United States v. Lamons, 532 F.3d 1251, 1263 (11th Cir. 2008) (holding machine-generated data to be nontestimonial), *cert. denied*, 129 S. Ct. 524 (2008); United States v. Moon, 512 F.3d 359, 362 (7th Cir. 2008) (same), *cert. denied*, 129 S. Ct. 40 (2008); United States v. Washington, 498 F.3d 225, 232 (4th Cir. 2007) (same), *cert. denied*, 129 S. Ct. 2856 (2009); People v. Brown, 918 N.E.2d 927, 931–32 (N.Y. 2009) (same, even after *Melendez-Diaz*); State v. Tindell, No. E2008-02635-CCA-R3-CD, 2010 Tenn. Crim. App. LEXIS 528, at *38 (June 22, 2010) (same).

It is unlikely that a computer could qualify under the Supreme Court's definition of "witness," a word which itself seems to imply personhood.[86] Computerized evidence does not seem to meet Justice Scalia's "primary purpose" standard as no observer would believe that a computer "intended" its output for prosecution because computers lack the capability of forming "intentions" of any sort.[87] Additionally, both Justice Scalia's and Justice Thomas's definitions of "testimonial" require at least some degree of solemnity.[88] Justice Scalia's majority definition seems to require the witness to be under oath[89] or otherwise subject to "severe consequences" in the event of a "deliberate falsehood."[90] It is unlikely that machines are ever placed under oath, nor can machines fear any sort of punishment, commit a falsehood, or do anything else "deliberately." Similarly, Justice Thomas's standard of solemnity—statements "contained in formalized testimonial materials" or otherwise "accompanied by . . . indicia of formality"[91]—does not seem to apply to computer printouts, unless certifications made for authentication purposes qualify as "indicia of formality."[92]

Finally, although the Court is averse to determining the requirements of the Confrontation Clause based on practical concerns,[93] the notion of placing an inanimate object on the witness stand seems to be sufficiently beyond the intentions of the Framers to place it outside the bounds of the Confrontation Clause.[94]

While the Supreme Court has not addressed the Confrontation Clause implications of computerized evidence, it seems that the

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[86] *Tindell*, 2010 Tenn. Crim. App. LEXIS, at *38; *see Crawford*, 541 U.S. at 51 (citing 2 WEBSTER, *supra* note 29, at 116) (witnesses are "those *who* 'bear testimony'" (emphasis added)).

[87] *See, e.g., Washington*, 498 F.3d at 232 (machines are incapable of comprehending the difference between output produced for legal purposes and output produced for nonlegal purposes).

[88] *E.g.*, Davis v. Washington, 547 U.S. 813, 826 (2006) (quoting *Crawford*, 541 U.S. at 51); *id.* at 836 (Thomas, J., concurring).

[89] *See* Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2532 (2009).

[90] *See Davis*, 547 U.S. at 826 (quoting *Crawford*, 541 U.S. at 51).

[91] *See Melendez-Diaz*, 129 S. Ct. at 2543 (Thomas, J., concurring) (citations omitted).

[92] Such certifications can include certificates of accuracy, *see, e.g.*, State v. Bergin, 217 P.3d 1087 (Or. Ct. App. 2009), or attestation clauses, *see, e.g.*, Grant v. Commonwealth, 682 S.E.2d 84, 87 (Va. Ct. App. 2009). Where such forms of authentication have been addressed in the context of the Confrontation Clause, they have been taken as potentially testimonial statements in their own right rather than as a basis for deeming the underlying computerized evidence to be testimonial. *E.g., Grant*, 682 S.E.2d at 87.

[93] *Melendez-Diaz*, 129 S. Ct. at 2536.

[94] United States v. Moon, 512 F.3d 359, 362 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 40 (2008) ("Producing spectrographs, ovens, and centrifuges in court would serve no one's interests.").

dichotomy of "computer's 'statement'" versus "programmer's statement" applied under the hearsay rule would work for the Confrontation Clause as well.[95] This dichotomy is not as novel as it appears: Fundamentally, computers are nothing more than inanimate objects from which people can infer information. Such objects have, of course, been entered into evidence from time immemorial, without any objection regarding the age-old right of confrontation.[96] Indeed, at a theoretical level, it is hard to distinguish most of the records deemed to be computer-generated from footprints left in the mud outside the scene of a crime.[97] There are, however, a couple of differences between computers and other evidence-producing inanimate objects that might be worth addressing.

The first, and most obvious, difference between computer-generated evidence and other evidence produced by inanimate objects is that the former is more likely to be in the form of text. This difference, though very visible, is likely a red herring. Of the various tests that the Supreme Court has set for determining whether evidence is testimonial, the only one that examines the form of the evidence is Justice Thomas's,[98] and it seems unlikely that a textual form alone would be enough to grant computer-generated data "similar indicia of formality."[99]

A more significant argument for distinguishing computer-generated evidence from other evidence generated by inanimate objects is the fact that computers are programmed by humans. Of course, such programming and maintenance would probably constitute business records, which generally do not fit the Supreme Court's definition of "testimonial."[100] An exception may exist where the machine is programmed for the precise purpose of prosecution (e.g., a

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[95] *See* United States v. Crockett, 586 F. Supp. 2d 877, 885 (E.D. Mich. 2008) (citing United States v. Washington, 498 F.3d 225, 231 (4th Cir. 2007)); State v. Bullcoming, 2010-NMCA-007, ¶ 19, 226 P.3d 1, 8–9 (citations omitted) (collecting cases and holding that where the analyst "was not required to interpret the results, exercise independent judgment, or employ any particular methodology in transcribing the results," that analyst "was a mere scrivener, and Defendant's true 'accuser' was the gas chromatograph machine" such that "the live, in-court testimony of a separate qualified analyst is sufficient to fulfill a defendant's right to confrontation"), *cert. granted*, 177 L. Ed. 2d 1152 (2010).

[96] *See, e.g.*, Crawford v. Washington, 541 U.S. 36, 51 (2004) (citing 2 WEBSTER, *supra* note 29, at 114) (holding that the Confrontation Clause only applies to those who "'bear testimony'"). Such exhibits may still create confrontation issues if they are authenticated through potentially testimonial hearsay. *See infra* note 102.

[97] *See* Wolfson, *supra* note 66, at 166, for a similar comparison of computer-generated data to fingerprints.

[98] *See supra* note 43–44 and accompanying text.

[99] *Melendez-Diaz*, 129 S. Ct. at 2543 (2009) (Thomas, J., concurring).

[100] *Crawford*, 541 U.S. at 56 (noting that business records by their nature are nontestimonial).

breathalyzer).[101] Even in those cases, however, the courts have tended to attach any confrontation issue to the documents authenticating the process rather than to output itself.[102] This seems to be the better approach, because any human input (and thus any potential "testimony") comes from the programming, maintenance, and operation of the device, and not from the final printout.

This still leaves open the possibility that the operators may need to testify as to the procedures they conducted. *United States v. Washington*[103] offers a good example of the competing rules in this regard. In *Washington*, the majority held that the raw data generated by a blood-alcohol machine was not a statement of the technicians who operated it.[104] The dissent responded that this would be true only if the data was generated "without the assistance or input of a person."[105] For this argument, Judge Michael cited the fact that the past cases dealing with machine-generated data specifically noted that the data was generated automatically, without human assistance.[106] At first glance, Judge Michael's position seems to be the sounder one: In light of the Supreme Court's broad view of the Confrontation Clause, it seems that the only way one could justify a lack of confrontation is if there was truly no testimonial human input involved. Still, under Justice Thomas's rule, the act of inputting the samples into the machines may not be solemn enough to be testimonial.[107] While one could argue that all official analysis of a crime is solemn, this would seem to conflict with Justice

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[101] *E.g.*, Shiver v. State, 900 So. 2d 615, 618 (Fla. Dist. Ct. App. 2005) (holding that a report of breathalyzer calibration required testimony by the calibrating officer); *see also Melendez-Diaz*, 129 S. Ct. at 2538 (stating that business records can be testimonial when "the regularly conducted business activity is the production of evidence for use at trial"). *Contra, e.g.*, State v. Fitzwater, 227 P.3d 520, 540 (Haw. 2010) (holding that the certification of a police car's speed-checking instruments, conducted "five months prior to the alleged speeding incident," was nontestimonial); *see Melendez-Diaz*, 129 S. Ct. at 2532 n.1 ("[D]ocuments prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.").

[102] *See, e.g.*, *Shiver*, 900 So. 2d at 618 (calibration records testimonial); Ramirez v. State, 928 N.E.2d 214, 219 (Ind. Ct. App. 2010) (certificates of accuracy nontestimonial); State v. Johnson, 233 P.3d 290, 299 (Kan. Ct. App. 2010) (same); State v. Bergin, 217 P.3d 1087, 1089–90 (Or. Ct. App. 2009) (same); State v. Norman, 125 P.3d 15, 19 (Or. Ct. App. 2005) (collecting cases). Such documents are typically deemed nontestimonial when prepared in the course of routine maintenance and testimonial when certified for a specific case. *See, e.g.*, United States v. Bacas, 662 F. Supp. 2d 481, 485 (E.D. Va. 2009).

[103] 498 F.3d 225 (4th Cir. 2007), *cert. denied*, 129 S. Ct. 2856 (2009).

[104] *Id.* at 230.

[105] *Id.* at 233 (Michael, J., dissenting) (quoting United States v. Hamilton, 413 F.3d 1138, 1142 (10th. Cir. 2005)).

[106] *Id.* (citing United States v. Khorozian, 333 F.3d 498, 506 (3d Cir. 2003)).

[107] *Melendez-Diaz*, 129 S. Ct. at 2543 (Thomas, J., concurring) (citations omitted) (arguing that extrajudicial statements are testimonial only if contained in "formalized testimonial materials," or otherwise "accompanied by . . . indicia of formality").

Thomas's statement that his vote in *Melendez-Diaz* was based on the fact that the certificates of analysis were "quite plainly affidavits."[108] Had the mere fact that they were done in a forensic lab been sufficient formalization, the determination that they were affidavits would have been unnecessary. Or perhaps the fact that they were affidavits was so clearly dispositive that Justice Thomas simply did not need to address the argument that all forensic analysis carries indicia of formality.[109] The proper resolution of the issue is uncertain, which may be why the Supreme Court declined to vacate *Washington* on the grounds of *Melendez-Diaz*,[110] unlike many other Confrontation Clause cases then pending.[111] For the time being, however, it seems that the actions of machine operators do not implicate the Confrontation Clause unless they are sufficiently formalized to be testimonial, and such formalization probably requires something more than the mere presence of the criminal justice system.[112]

While the current state of the law may not be entirely clear on this matter, it seems logical to propose that if all the technicians have done is merely input the data into the machine, no testimonial hearsay has occurred. Rather, the mere act of inputting evidence into a machine, where it is done without need for human judgment or analysis, seems to be a question of chain of custody more than it is an actual statement.[113] While the Court in *Melendez-Diaz* did mention concerns about "drylabbing,"[114] drylabbing primarily involves questions of how the evidence was handled, so it is best dealt with as an issue primarily of authentication, which was mentioned in the context of confrontation only to rebut the dissent's suggestion that the confrontation of "neutral" lab

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[108] *Id.* (citations omitted).

[109] *But see* Davis v. Washington, 547 U.S. 813, 837–38 (2006) (Thomas, J., concurring in part and dissenting in part) (citations omitted) (arguing that discussion with a police officer is not sufficiently solemn when not accompanied by Miranda warnings).

[110] *See* Washington v. United States, 129 S. Ct. 2856 (2009).

[111] *E.g.*, Morales v. Massachusetts, 129 S. Ct. 2858 (2009); Barba v. California, 129 S. Ct. 2857 (2009); Crager v. Ohio, 129 S. Ct. 2856 (2009).

[112] *See Davis*, 547 U.S. at 837–38 (Thomas, J., concurring in part and dissenting in part) (citations omitted) (arguing that discussion with a police officer is not sufficiently solemn when not accompanied by Miranda warnings); *see also* Grant v. Commonwealth, 682 S.E.2d 84, 87 (Va. Ct. App. 2009) (holding that the attestation clause of a breathalyzer report is testimonial).

[113] *See* Deeds v. State, 2008-KA-00146-SCT (¶ 23) (Miss. 2009) (stating that the mere handling of physical evidence does not constitute a statement for purposes of the Confrontation Clause), *cert. denied*, 178 L. Ed. 2d 37 (2010); *cf.* United States v. Boyd, 686 F. Supp. 2d 382, 383, 385–86 (S.D.N.Y. 2010) (allowing testimony regarding the result tests done by human analysts where those tests consisted of "routine procedures").

[114] *Melendez-Diaz*, 129 S. Ct. at 2536–37. Drylabbing is the fraudulent practice of reporting "results" from tests that were never performed. *Id.*

analysts must necessarily be fruitless.[115] Although one could argue that the entry of the computer's output into evidence contains an implicit assertion that the technicians inputted the proper sample, the introduction of any physical evidence contains similar implicit assertions as to that evidence's authenticity. But such implicit "assertions" certainly do not constitute "statements" for purposes of the Confrontation Clause; if they did, everyone who handled the evidence would be making such an "assertion" simply by handing it off to the next person, but the Supreme Court has made it clear that the mere handling of evidence does not implicate the Confrontation Clause.[116]

III. WHO MUST TESTIFY TO TESTIMONIAL COMPUTERIZED EVIDENCE?

A. Computers with Human Speakers

When computerized evidence does implicate the Confrontation Clause, whom does the Confrontation Clause require to testify regarding it? Although the Supreme Court in *Melendez-Diaz* stated that the "witnesses" in that case were "the analysts,"[117] it did not specify which of the analysts must testify (or whether they all must testify).[118] Thus, it remains unclear who must testify in order to admit such evidence.[119]

This ambiguity has provoked some disagreement among the courts. The majority of jurisdictions take the seemingly straightforward approach that the report's preparer is the ultimate witness behind the report, and therefore the one who must testify in court.[120]

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[115] *Id.*

[116] *Id.* at 2532 n.1 (rejecting the notion that everyone involved in chain of custody must testify to satisfy the Confrontation Clause).

[117] *Id.* at 2532.

[118] *Id.* at 2544 (Kennedy, J., dissenting).

[119] *See* United States v. Blazier, 68 M.J. 439, 444 (C.A.A.F. 2010) (noting disagreement). *Compare* People v. Lopez, 98 Cal. Rptr. 3d 825, 827, 829 (Cal. Ct. App. 2009) (holding that a supervisor could not testify as to results of test performed by another), *review granted, depublished by* 220 P.3d 240 (Cal. 2009), *with* Manzano v. Clay, No. CV 09-06817 JHN (AN), 2010 U.S. Dist. LEXIS 77335, at *25, 28 (C.D. Cal. June 11, 2010) (holding that a supervisor could testify to admit a report prepared by an analyst under his supervision).

[120] *See, e.g.*, United States v. Martinez-Rios, 595 F.3d 581, 586 (5th Cir. 2010); Sanders v. Dir. of CDC, No. CIV S-05-2250 FCD DAD P, 2009 U.S. Dist. LEXIS 63049, at *35 (E.D. Cal. July 14, 2009); Harrod v. State, 993 A.2d 1113, 1139 (Md. Ct. Spec. App. 2010) (holding that the issue was not preserved), *cert. granted*, 1 A.3d 467 (Md. 2010); State v. Mooney, 2009-OH-5886, at ¶ 37 (citations omitted) (implying that *Melendez-Diaz*, where it requires testimony, requires testimony by the author of the report); State v. Willis, 213 P.3d 1286, 1289 (Or. Ct. App. 2009) (citations omitted), *rev'd on other grounds*, 236 P.3d 714 (Or. 2010); *see also* United States v. Mouzin, 785 F.2d 682, 693 (9th Cir. 1986); People v. Rogers, 780 N.Y.S.2d 393, 397 (N.Y. App. Div. 2004).

Another common requirement is that the witness must have actually done the work upon which the report was based,[121] or otherwise have firsthand knowledge of the analysis.[122]

Other states are more lenient in their rules: Illinois and North Carolina have held that the testimony of an unrelated expert can satisfy the Confrontation Clause when the expert provides an independent analysis and criticism of the report.[123] Some jurisdictions allow experts to testify without firsthand knowledge of the tests, as long as they were "actively involved in the production of the report and had intimate knowledge of the analyses."[124]

Here, the majority approach is the most logical. If the report being entered into evidence by the prosecution is signed by a certain person, it follows that that report is the testimony of the signatory. This approach

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[121] Shiver v. State, 900 So. 2d 615, 618 (Fla. Dist. Ct. App. 2005) (holding that a report of breathalyzer calibration required testimony by the calibrating officer, not the officer who prepared the report); *see also* United States v. Rose, 587 F.3d 695, 701 (5th Cir. 2009) (declining to hold "that the prosecution may avoid confrontation issues through the in-court testimony of any witness who signed a lab report without regard to that witness's role in conducting tests or preparing the report"), *cert. denied*, 130 S. Ct. 1915 (2010); United States v. Clark, No. 09-10067, 2009 U.S. Dist. LEXIS 100760, at *1–2 (C.D. Ill. Oct. 27, 2009) (holding that the certification of cocaine-sniffing dog required testimony by trainer); Commonwealth v. King, 928 N.E.2d 1014, 1015 (Mass. App. Ct. 2010) (stating in passing that *Melendez-Diaz* requires "testimony from the analyst who performed the test"); Transcript of Oral Argument at 26–27, Briscoe v. Virginia, 130 S. Ct. 1316 (2010) (per curiam) (No. 07-11191) (attorney for defendant-petitioner promoting this rule).

[122] People v. Frey, No. 284647, 2009 Mich. App. LEXIS 1601, at *10–13 (July 28, 2009), *appeal denied*, 775 N.W.2d 788 (Mich. 2009).

The Supreme Court has recently granted certiorari to determine whether such a requirement is mandated by the Constitution. Bullcoming v. New Mexico, 177 L. Ed. 2d 1152 (2010). Specifically, the petition for certiorari in *Bullcoming* framed the issue as follows: "Whether the Confrontation Clause permits the prosecution to introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis described in the statements." Petition for a Writ of Certiorari at i, *Bullcoming*, 177 L. Ed. 2d 1152 (No. 09-10876), 2010 WL 3761875 at *i.

[123] People v. Williams, No. 107550, 2010 Ill. LEXIS 971, at *36 (July 15, 2010); State v. Davis, No. COA09-1552, 2010 N.C. App. LEXIS 1416, at *9–13, *16–17 (Aug. 3, 2010) (collecting North Carolina cases and noting that while in some cases an expert "who admitted to having no independent or personal knowledge of what happened during the autopsy [may] testify as to the opinions contained in the autopsy report prepared by a non-testifying pathologist," this does not apply where the expert's review "involved no retesting and instead relied on the accuracy" of the underlying report).

[124] McGowen v. State, 2002-KA-00676-SCT (¶ 68) (Miss. 2003); *accord* United States v. Boyd, 686 F. Supp. 2d 382, 386 (S.D.N.Y. 2010). Although this case precedes *Melendez-Diaz*, and even *Crawford*, the Court in *Melendez-Diaz* cited Mississippi as a jurisdiction that already followed its holding in that case. *Melendez-Diaz*, 129 S. Ct. at 2540–41 & n.11 (other citations omitted) (citing Barnette v. State, 481 So. 2d 788, 792 (Miss. 1985)). *But see Melendez-Diaz*, 129 S. Ct. at 2558 (Kennedy, J., dissenting) (citations omitted) ("It is possible that . . . Mississippi's practice . . . can[not] be reconciled with the Court's holding.").

preserves the defendant's right of confrontation while minimizing the burden on the prosecution, because the government is free to choose which of the analysts must sign the report and thereby bear the risk of having to testify. There are, however, a few ambiguities in this rule that need to be addressed.

The first ambiguity is the question of who may sign the report. Presumably, if the report could be signed by anyone, the requirements of *Melendez-Diaz* could be easily circumvented by simply having the report be signed by someone who was going to testify anyway, such as the arresting officer. This was the question that spawned *Shiver v. State.*[125] In *Shiver*, the government introduced into evidence a "breath test affidavit" that contained a record of the breathalyzer's calibration.[126] Unfortunately, the affidavit was signed by the arresting officer, who had no personal knowledge of the breathalyzer's maintenance.[127] On appeal, the state appellate court held that because "the trooper did not perform the required maintenance, he was not qualified to testify as to whether the instrument met the required statutory predicates."[128] Rather, "[t]he trooper was simply attesting to someone else's assertion," a practice which fit "the precise scenario the United States Supreme Court used to exemplify a Confrontation Clause violation."[129] This holding makes eminently good sense.[130] Indeed, the requirement that the witness be the one who prepared the report and the requirement that the witness have participated in the underlying tests are best viewed not as two alternative requirements, but as two prongs of a single standard: The witness must be one who signed the report, and the one who signed the report must be someone who participated in or supervised the tests.[131]

The second possible problem with requiring testimony from the report's signatory is the situation in which multiple people signed the report. In such a case, it seems that all of the signatories are witnesses,

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[125] 900 So. 2d 615, 618.

[126] *Id.* at 617.

[127] *Id.*

[128] *Id.* at 618.

[129] *Id.* at 618 & n.3.

[130] *Cf.* FED. R. CIV. P. 56(e)(1) ("A[n] . . . affidavit must be made on personal knowledge . . . and show that the affiant is competent to testify on the matters stated.").

[131] *Compare* Commonwealth v. King, 928 N.E.2d 1014, 1015 (Mass. App. Ct. 2010) (stating in passing that *Melendez-Diaz* requires "testimony from the analyst who performed the test"), *with* Commonwealth v. Morales, 925 N.E.2d 551, 553 (Mass. App. Ct. 2010) ("The introduction of the ballistics and drug certificates without accompanying testimony from the ballistician and lab analyst *who produced them* violated the defendant's Sixth Amendment right to confront and cross-examine the witnesses against him." (emphasis added)).

and thus all must appear.[132] Of course, such a rule would give the prosecution good strategic reason to have such reports signed by as few people as are necessary to establish the facts contained therein.[133] Moreover, as a practical matter, this question is probably not as important as it seems: In the unfortunate case in which more people sign a report than are necessary to attest to its content, but those who testify at trial have sufficient knowledge to confirm its content, there is a very good chance that any error will be deemed harmless because striking the signatures of the absent signatories (and thereby reducing the report to the testimony of only those who appeared for confrontation) would not be likely to affect on the outcome of the case.[134]

One final wrinkle is the scenario in which an expert witness testifies based on the contents of the report without the contents of that report being offered into evidence directly. Such a practice would certainly be appealing to the prosecution and merits thorough examination in its own right.

B. Getting a Second Opinion: May Experts Testify Regarding the Data or Conclusions of Others?

Expert testimony can provide an attractive alternative for prosecutors seeking to avoid the strict confrontation requirements of *Melendez-Diaz*. In general, expert witnesses are free to testify based on inadmissible data.[135] But just how far can prosecutors go in exploiting this gap in the defendant's confrontation protections? Courts have understandably set limits on experts' flexibility in this regard, some of them fairly strict.[136]

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[132] *Cf. Melendez-Diaz*, 129 S. Ct. at 2532 n.1 (citations omitted) (noting that it is for the prosecution to decide whose testimony is necessary to establish chain of custody, but those who do testify must be present for confrontation).

[133] It is worth noting that the mere fact that multiple analysts participated in the testing does not necessarily require that all such analysts be signatories to the report. *E.g.*, State v. Lopez, 186 Ohio App. 3d 328, 2010-Ohio-732, 927 N.E.2d 1147, at ¶ 61, *appeal accepted*, 126 Ohio St. 3d 1512, 2010-Ohio-3331, 930 N.E.2d 331 (Ohio); *see Melendez-Diaz*, 129 S. Ct. at 2532 n.1; *cf. infra* Part III-B.

[134] *See, e.g.*, *Melendez-Diaz*, 129 S. Ct. at 2542 n.14 (indicating that violations of the Confrontation Clause may be considered harmless error).

[135] *E.g.*, FED. R. EVID. 703. *But see* People v. Dungo, 98 Cal. Rptr. 3d 702, 713 n.14 (Cal. Ct. App. 2009) (noting that the Confrontation Clause supersedes the rules of evidence), *review granted, depublished by* 220 P.3d 240 (Cal. 2009).

[136] *See* State v. Dilboy, 999 A.2d 1092, 1104 (N.H. 2010) (collecting cases and discussing the various rules different courts have adopted to limit experts' ability to reveal the testimonial sources underlying their opinions). *But see* People v. Rutterschmidt, 98 Cal. Rptr. 3d 390, 413 (Cal. Ct. App. 2009) (citations omitted) (holding that no Confrontation Clause issue existed where "the report itself was not admitted" into evidence, because as long as the report merely provided a basis for the expert's opinion, it "was not admitted for its truth"), *review granted, depublished by* 220 P.3d 239 (Cal. 2009).

Many jurisdictions hold that expert opinions based on testimonial lab reports do not require the confrontation of anyone other than the experts themselves.[137] Some even allow experts to repeat the content of such reports in their testimony.[138] Of course, many states make the flexibility they grant experts in this regard contingent on the experts' involvement with the underlying tests,[139] or prohibit experts from basing their opinions solely on testimonial hearsay.[140]

For example, Texas allows experts to base their testimony on testimonial hearsay, but does not permit them to reveal any underlying information that does not come from personal knowledge.[141] North Carolina does not allow experts to base their opinions solely on testimonial hearsay unless they were personally involved in its creation,[142] or to repeat such hearsay in court unless they also provide their own criticisms and conclusions.[143] Meanwhile, experts in Michigan state courts are not permitted to testify based on testimonial hearsay at all unless they have firsthand knowledge of the data and reasoning behind them.[144]

In general, experts are given great leeway to testify based on variety of sources without these sources raising confrontation issues.[145]

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[137] *See, e.g.*, Rector v. State, 681 S.E.2d 157, 160 (Ga. 2009), *cert. denied*, 130 S. Ct. 807 (2009); State v. Mitchell, 2010 ME 73, ¶ 47, 4 A.3d 478, 489–90; Commonwealth v. Avila, 912 N.E.2d 1014, 1027, 1029 (Mass. 2009); *Dilboy*, 999 A.2d at 1104 (N.H. 2010) (collecting cases); Wood v. State, 299 S.W.3d 200, 213 (Tex. Crim. App. 2009); State v. Lui, 221 P.3d 948, 955 (Wash. Ct. App. 2009), *reh'g granted*, 228 P.3d 17 (Wash. 2010).

[138] *See* Pendergrass v. State, 913 N.E.2d 703, 707–08 (Ind. 2009) (lab supervisor testified in addition to expert), *cert. denied*, 130 S. Ct. 3409 (2010); State v. Mobley, 684 S.E.2d 508, 511 (N.C. Ct. App. 2009) (expert gave her own criticism of the tests, and the defendant did not challenge the testing procedures); *Lui*, 221 P.3d at 957 & n.18 (experts revealed testimonial hearsay in order to explain the bases for their opinions, and the defendant had a right to a limiting instruction).

[139] *See* People v. Frey, No. 284647, 2009 Mich. App. LEXIS 1601, at *11–13 (July 28, 2009), *appeal denied*, 775 N.W.2d 788 (Mich. 2009); State v. Galindo, 683 S.E.2d 785, 787–88 (N.C. Ct. App. 2009); Camacho v. State, Nos. 2-07-322-CR, 2-07-323-CR, 2009 Tex. App. LEXIS 5975, at *68 (Crim. App. July 30, 2009).

[140] *See Dungo*, 98 Cal. Rptr. 3d at 708, 714; *Galindo*, 683 S.E.2d at 787–88.

[141] Martinez v. State, 311 S.W.3d 104, 112 (Tex. Crim. App. 2010); *Wood*, 299 S.W.3d at 213.

[142] *Galindo*, 683 S.E.2d at 787–88.

[143] *Mobley*, 684 S.E.2d at 511.

[144] People v. Payne, 774 N.W.2d 714, 726 (Mich. Ct. App. 2009) (citing People v. Lonsby, 707 N.W.2d 610, 620–21 (Mich. Ct. App. 2005), *rev'd on other grounds*, 771 N.W.2d 754–55 (Mich. 2009)) (non-precedential), *appeal denied*, 781 N.W.2d 839 (Mich. 2010); *see* People v. Dendel, 2010 Mich. App. LEXIS 1602, *38–39 (Aug. 24, 2010) (holding that a lab supervisor may not testify concerning the results of tests in which he was not personally involved).

[145] *E.g.*, Ross Andrew Oliver, Note, *Testimonial Hearsay as the Basis for Expert Opinion: The Intersection of the Confrontation Clause and Federal Rule of Evidence 703 After* Crawford v. Washington, 55 HASTINGS L.J. 1539, 1555 (2004).

The mere fact that an expert relies on testimonial hearsay is generally not sufficient to create a Confrontation Clause violation.[146] Nonetheless, simply allowing any qualified expert to recite or rubber-stamp a testimonial report would render the holding in *Melendez-Diaz* of little practical significance.[147] Courts are loath to allow such abuse of the broad leeway given expert witnesses.[148] Rather, in order for such evidence to satisfy the Confrontation Clause, the opinion provided for confrontation must be the expert witness's own opinion, not that of the nontestifying analysts.[149] This fundamental principle has two implications.

First, this principle indicates that when the results of the tests are testimonial, an expert may testify as to those results only if the expert was actually involved in the tests such that any description of their results comes from the expert's own knowledge, and not just what he or she heard from others.[150] Permitting the expert to recite a testimonial report to which the expert was not a witness is little better than the notorious Marian examinations discussed by the Supreme Court, wherein the justices of the peace gathered information from the real witnesses and brought it into court[151]—the only difference is that here, the surrogate is not termed a "justice of the peace" but an "expert." Although some states seem to allow such practices so long as the experts

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[146] *E.g.*, United States v. Johnson, 587 F.3d 625, 635 (4th Cir. 2009), *cert. denied*, 130 S. Ct. 2128 (2010); Oliver, *supra* note 145, at 1560.

[147] *E.g.*, *Johnson*, 587 F.3d at 635 ("Allowing a witness simply to parrot 'out-of-court testimonial statements of cooperating witnesses and confidential informants directly to the jury in the guise of expert opinion would provide an end run around *Crawford*.'") (quoting United States v. Lombardozzi, 491 F.3d 61, 72 (2d Cir. 2007)).

[148] *E.g.*, *id.* at 635; United States v. Steed, 548 F.3d 961, 975 (11th Cir. 2008) (holding that experts' ability to rely on inadmissible evidence "'is not an open door to all inadmissible evidence disguised as expert opinion'" (quoting United States v. Scrima, 819 F.2d 996, 1002 (11th Cir. 1987))); *Lombardozzi*, 491 F.3d at 72.

[149] *E.g.*, *Johnson*, 587 F.3d at 635 ("The question is whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay. As long as he is applying his training and experience to the sources before him and reaching an independent judgment, there will typically be no *Crawford* problem."); State v. Dilboy, 999 A.2d 1092, 1104 (N.H. 2010) (collecting cases); Oliver, *supra* note 145, at 1560 ("[A] confrontation violation likely will not exist [where] the expert's opinion is truly original and a product of his special knowledge or experience, and the defendant can test its reliability by cross-examination of the expert.").

[150] *See* United States v. Turner, 591 F.3d 928, 933 (7th Cir. 2010); People v. Frey, No. 284647, 2009 Mich. App. LEXIS 1601, at *12–13 (July 28, 2009), *appeal denied*, 775 N.W.2d 788 (Mich. 2009); State v. Locklear, 681 S.E.2d 293, 304–05 (N.C. 2009); Hamilton v. State, 300 S.W.3d 14, 21 (Tex. Crim. App. 2009); Camacho v. State, Nos. 2–07–322–CR, 2–07–323–CR, 2009 Tex. App. LEXIS 5975, *6–8 (Crim. App. July 30, 2009).

[151] Crawford v. Washington, 541 U.S. 36, 44 (2004) (citations omitted) (discussing the infamous trials conducted by Queen Mary I as one of the reasons why the Founders decided to enshrine a right of confrontation in the Constitution).

give their own criticism of the report,[152] the fact that a justice of the peace critiqued the witnesses' testimony (as may well have happened in at least some of the Marian cases[153]) would hardly have softened the injustice of the Marian examinations. For such a report to be part of an expert's testimony, that report would have to be the expert's own analysis, not the work of a third party.[154] Additionally, the Federal Rules of Evidence will usually (but not always) prevent an expert from revealing such information.[155]

What about the less problematic case in which the expert does not read the report into evidence outright, but does rely solely on assessments made by other analysts?[156] On the one hand, simply allowing an expert to repeat the findings of absent analysts would seem to contradict the aims of *Melendez-Diaz*.[157] On the other hand, statements made by an analyst to an expert may not be sufficiently formalized to meet Justice Thomas's standard as to what is testimonial.[158] Fortunately, these two aims can be reconciled, as Justice Thomas has indicated that the introduction of even non-formalized statements would violate the Confrontation Clause "if the prosecution attempted to use out-of-court statements as a means of circumventing

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[152] *See supra* note 123 and accompanying text.

[153] *See Crawford*, 541 U.S. at 44 (citations omitted) (mentioning that justices of the peace "certified" the results of their examinations under the Marian statute).

[154] *E.g.*, *Johnson*, 587 F.3d at 635; Carolina v. State, 690 S.E.2d 435, 437 (Ga. Ct. App. 2010) (distinguishing between an expert who testifies to admit a report by a non-testifying analyst and an expert who testifies as to her own conclusions from the data); State v. Aragon, 225 P.3d 1280, 1288–89 (N.M. 2010) (holding that while an expert may "express[] his own opinion based upon the underlying data that contributed to the opinion announced in the report[,] . . . the admission into evidence of reports containing the opinions of non-testifying experts is prejudicial error[]"); Oliver, *supra* note 145, at 1560.

[155] FED. R. EVID. 703 (allowing experts to reveal inadmissible data only if "the court determines that [the data's] probative value . . . substantially outweighs [its] prejudicial effect").

[156] *See* Vega v. State, No. 53752, 2010 Nev. LEXIS 35, at *14 (Aug. 12, 2010) (holding that a report by a non-testifying analyst may not be admitted based on the testimony of an expert who was not involved in the original analysis, but that an expert may testify to admit the underlying data and provide her own opinion based on that data).

[157] *See Melendez-Diaz*, 129 S. Ct. at 2536–37 (treating the right of confrontation as applying to the ones whose deceit or incompetence could lead to inaccuracies in the testimony).

[158] People v. Vargas, 100 Cal. Rptr. 3d 578, 587 (Cal. Ct. App. 2009), *review denied*, No. S178100, 2010 Cal. LEXIS 1451 (Feb. 3, 2010); *see* People v. Rutterschmidt, 98 Cal. Rptr. 3d 390, 412 (Cal. Ct. App. 2009) (quoting *Melendez-Diaz*, 129 S. Ct. at 2543 (Thomas, J., concurring)) (holding that Justice Thomas's concurrence prevents *Melendez-Diaz* from being applied to non-formalized reports), *review granted, depublished by* 220 P.3d 239 (Cal. 2009); *see also* People v. Dungo, 98 Cal. Rptr. 3d 702, 710–11 (Cal. Ct. App. 2009) (quoting *Melendez-Diaz*, 129 S. Ct. at 2532) (determining an autopsy report to be testimonial because it met both the formality test and the purpose test), *review granted, depublished by* 220 P.3d 240 (Cal. 2009).

the literal right of confrontation."[159] To the extent to which the expert serves as a mere proxy for non-testifying analysts, even Justice Thomas would probably hold that that expert's testimony violates the Confrontation Clause.

Thus, it seems that the Confrontation Clause requires an expert witness to perform his or her own review of the work contained in the report and formulate his or her own opinion on the matter.[160] Ideally, the expert should either rely solely on nontestimonial raw data and not the nontestifying analysts' inferences from it,[161] or be one of the analysts who has firsthand knowledge of the work done on the data.[162] Ultimately, however, any conclusions reached by an expert must be the expert's own, *not* that of the previous analysts.[163]

CONCLUSION

Having reviewed the history of the Supreme Court's recent Confrontation Clause jurisprudence, one can begin to get a picture of its implications for computerized evidence.

In terms of whether the evidence is testimonial, the distinction between computer-generated and computer-stored evidence that some courts have applied to the hearsay rule seems to apply equally well to the Confrontation Clause.[164] Mechanical declarants do not seem to meet the majority's "primary purpose" standard as no observer would believe that a computer "intended" its output to be used for prosecution—the

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159 Davis v. Washington, 547 U.S. 813, 838 (2006) (Thomas, J., concurring in part and dissenting in part).

160 *E.g.*, United States v. Turner, 591 F.3d 928, 933 (7th Cir. 2010); United States v. Johnson, 587 F.3d 625, 635 (4th Cir. 2009), *cert. denied*, 130 S. Ct. 2128 (2010); United States v. Steed, 548 F.3d 961, 976 (11th Cir. 2008); United States v. Lombardozzi, 491 F.3d 61, 72 (2d Cir. 2007); Smith v. State, 28 So. 3d 838, 855 & n.12 (Fla. 2009); Neal v. Augusta-Richmond Cnty. Pers. Bd., 695 S.E.2d 318, 321–22 & nn.12–17 (Ga. Ct. App. 2010) (collecting Georgia cases); State v. Dilboy, 999 A.2d 1092, 1104 (N.H. 2010) (collecting cases); Oliver, *supra* note 145, at 1560. *But see* State v. Mobley, 684 S.E.2d 508, 511–12 (N.C. Ct. App. 2009) (holding that repetition of another scientist's analysis acceptable where the expert also provided her own analysis). This conclusion may also be required by the Federal Rules of Evidence. *See* FED. R. EVID. 702 (stating that an expert witness may give an opinion only if "*the witness* has applied the principles and methods reliably to the facts of the case" (emphasis added)).

161 *See* State v. Aragon, 225 P.3d 1280, 1290 (N.M. 2010); Hamilton v. State, 300 S.W.3d 14, 21 (Tex. Crim. App. 2009).

162 *See* People v. Payne, 774 N.W.2d 714, 725–26 (Mich. Ct. App. 2009) (citing People v. Lonsby, 707 N.W.2d 610, 620–21 (Mich. Ct. App. 2005), *rev'd on other grounds*, 771 N.W.2d 754, 755 (Mich. 2009)) (non-precedential), *appeal denied*, 781 N.W.2d 839 (Mich. 2009); *Aragon*, 225 P.3d at 1291; State v. Galindo, 683 S.E.2d 785, 787–88 (N.C. Ct. App. 2009).

163 *E.g.*, *Johnson*, 587 F.3d at 635; Vann v. State, 229 P.3d 197, 206 (Alaska Ct. App. 2010) (collecting cases and determining this to be the majority rule).

164 *See supra* Part II.

mere ascription of intent to a machine seems unlikely this side of androids—nor do machine-generated statements meet any of the Supreme Court's various definitions of "testimony."[165] Similarly, putting a mechanical "declarant" on the witness stand for confrontation does not seem to be a valid application of the Confrontation Clause.[166] At a more fundamental level, machine-generated evidence is physical evidence, and its best founding-era analog would be physical evidence, which need not require any witnesses (except as necessary for authentication).[167]

Where computerized evidence is testimonial, courts are divided as to whom the Supreme Court's recent Confrontation Clause cases, and *Melendez-Diaz* in particular, require to testify.[168] Arguably the best approach is that the signatory of a testimonial report is the witness who bears that testimony, and that that signatory must be someone who can attest to the analysis based on personal knowledge.[169] On occasion, this may require multiple signatories, in which case all must testify.[170]

A more attractive alternative for prosecutors might be simply to have an expert testify based on the results. While the courts are again divided on this issue, the best approach is that such testimony is permissible only if the reasoning involved is the expert's own, and not simply the work of the original analysts.[171] Additionally, an expert cannot testify as to the actual results or underlying data except based on firsthand knowledge of this analysis (which is the same sort of testimony normally required to admit those results).[172]

In short, when dealing with computerized evidence, or other scientific evidence, the best rule is that whoever applied the intelligence and reasoning necessary to reach the conclusion—be it an expert witness, the original analysts, or simply the machines themselves—is the defendant's "accuser" for purposes of the Confrontation Clause. If these accusers are human, the Confrontation Clause must be satisfied, but in cases where the only such witnesses are mere machine, it is quite absurd to propose a constitutional right to *inter*face your accuser.

Erick J. Poorbaugh

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[165] *See supra* text accompanying notes 85–92.

[166] *See supra* text accompanying notes 93–94.

[167] *See supra* text accompanying notes 95–116.

[168] *See supra* Part III-A.

[169] *See supra* Part III-A.

[170] *See supra* Part III-B.

[171] *See supra* Part III-B.

[172] *See supra* Part III-B.

A FLY IN THE OINTMENT: WHY FEDERAL PREEMPTION DOCTRINE AND 42 U.S.C. § 7431 DO NOT PRECLUDE LOCAL LAND USE REGULATIONS RELATED TO GLOBAL WARMING

I. INTRODUCTION

Global warming. Climate change. Greenhouse gas ("GHG") emissions.[1] Polar ice cap melt. Sea level change. Regardless of how it is described, global climate change is a compelling issue with numerous responses from federal, state, local, and private entities.[2] This Note discusses the intersection between global climate change and local land use policies, such as local zoning and planning ordinances, developed by local governments in response to this global issue. Land use decision-making in the United States is a quintessential function of local government, usually under the delegation of the police power by the controlling state.[3] Responses to global climate change at the local level, by definition, however, involve global issues and thus raise potential conflicts between federal powers to regulate national and international (global) issues and state police powers as exercised by local governments on local issues. Global climate change challenges this traditional division of powers because local governments are affected by global climate change and, perhaps uniquely, are simultaneously affecting global climate change through cumulative local policy decisions.

State and local governments are leading in developing programs to limit GHG emissions. Programs can include state-level policies on GHG emissions, local ordinances that mandate the use of "green" products in city departments,[4] and local land use policies intended to address GHG

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1 Greenhouse gases include carbon dioxide, methane, and nitrous oxide. U.S. ENERGY INFO. ADMIN., EMISSIONS OF GREENHOUSE GASES IN THE UNITED STATES 2008 1 (2009), *available at* http://www.eia.doe.gov/oiaf/1605/ggrpt/.

2 The Obama Administration is specifically addressing GHGs and, for example, is calling for a 28% reduction in GHGs by 2020. *Energy & Environment*, THE WHITE HOUSE, http://www.whitehouse.gov/agenda/energy_and_environment/ (last visited Nov. 7, 2010). The Administration also has an Office of Energy and Climate Change Policy to address climate policy. *Executive Office of the President*, THE WHITE HOUSE, http://www.white house.gov/administration/eop/ (last visited Nov. 7, 2010).

3 The delegation of the state police power to local municipal corporations, thus creating a derivative power in the local governments, is termed "Dillon's Rule." BLACK'S LAW DICTIONARY 523 (9th ed. 2009) (citing 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 89, at 115–16 (3d ed. 1881)); *see also* City of Clinton v. Cedar Rapids & Mo. River R.R., 24 Iowa 455, 475 (1868) ("Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist.").

4 *E.g.*, Racquel Palmese, *Buying Green: Cities and Counties Find Their Way*, GREEN TECH. MAGAZINE, http://www.greentechnology.org/green_technology_

emissions. As a recent article summarizes, however, legal challenges to these programs are emerging: from industry groups opposing locally mandated energy-efficiency requirements that increase energy efficiency, to individuals suing over failed green building certifications, to opposition to zoning variances intended to limit local GHG emissions.[5]

This Note argues that the Federal Clean Air Act ("CAA"),[6] currently the presumptive means of regulating GHGs,[7] does not necessarily preempt local land use policies that local governments justify as reducing or mitigating GHGs in an effort to limit the effects of global warming. Somewhat ironically, it is precisely because the federal government has elected to use the CAA regulatory structure rather than an issue-specific structure that the preemptive power of the CAA as related to local land use is limited. Specifically, the CAA in 42 U.S.C. § 7431 (2006) apparently limits its own application to certain local land use decisions. The discussion in this Note is purposefully narrowed to local land use decisions involving zoning, planning, and subdivision policy—traditional functions of local governments.[8]

Under the current statutory and regulatory structures, not only is there a compelling issue of federalism supporting local land use decision-making regarding GHG emissions, but Congress has already spoken on the issue of preemption related to air pollutants by limiting the application of the CAA in the context of local land use decisions.[9] Thus, because the CAA appears to be the presumptive means for regulating GHGs,[10] the CAA statutory structure itself necessarily restricts the CAA from preempting local land use decision-making—both directly (by statute) and indirectly (by recognizing a fundamental tenant of

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magazine/buyingg.htm (last visited Nov. 7, 2010) (recounting the California experience with purchasing "green" items that have a reduced adverse effect on human health and the environment for municipal facilities).

5 Wendy N. Davis, *Green Grow the Lawsuits: Real Estate Industry Braces for Green-Inspired Litigation*, A.B.A. J., Feb. 2009, at 20–21.

6 42 U.S.C. §§ 7401–71 (2006).

7 *See* Massachusetts v. EPA, 549 U.S. 497, 532 (2007) (holding the EPA may regulate CO_2, a GHG, as an air pollutant under the CAA). Note that federal climate legislation is not new. The federal National Climate Program, enacted in 1978, provides federal research and monitoring assistance on climate issues but is not a regulatory structure. *See* 15 U.S.C. §§ 2901–02, 2904 (2006).

8 A related area involving local law not discussed here, beyond distinguishing the issues at stake, is local ordinances that require energy efficiency standards, local green-building methods, and related standards as applied to construction. *See, e.g.*, Michael Wilmeth, *Albuquerque Lawsuit Threatens Green Building Codes*, BUILDINGGREEN.COM (Dec. 1, 2008), http://www.buildinggreen.com/auth/article.cfm/ID/4081/ (summarizing a case challenging new green building codes in Albuquerque, New Mexico).

9 42 U.S.C. § 7431 (2006).

10 *See* 549 U.S. at 532 (holding the EPA may regulate CO_2, a GHG, as an air pollutant under the CAA).

federalism holding that land use decision-making is primarily a state or local government function).

This Note analyzes the issue of climate change and global warming theory as background material in Section II. Section III describes the long-settled doctrine that local authorities are best situated to make land use decisions. Section IV analyzes the emerging research linking land use decision-making and greenhouse gas emissions mitigation. Section V analyzes recent issues arising from *Massachusetts v. EPA*.[11] Finally, in Sections VI and VII, the intersection between the local land use powers and potential CAA preemption are analyzed with particular emphasis on a little-mentioned provision of the CAA that apparently limits the application of the CAA to land use decision-making.[12]

II. GLOBAL WARMING OVERVIEW

In simple terms, global warming theory posits that human actions and human-related actions that release GHGs contribute to climate change. Such change is evident by increases in average global temperatures, termed "global warming."[13] Increased emissions of GHGs from human activity ascend into the earth's atmosphere and trap heat there; that trapped heat leads to higher overall global temperatures.[14] Among the GHGs are carbon dioxide ("CO_2"), methane ("CH_4"), nitrous oxide ("N_2O"), and various hydrofluorocarbons.[15] Commonly cited human sources of GHGs include emissions from the burning of fossil fuels for transportation, electricity generation, industrial activity, residential heating, and commercial heating;[16] methane emissions from agricultural

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[11] *Id.* at 505 (recent U.S. Supreme Court decision related to GHG regulation).

[12] 42 U.S.C. § 7431 (the "land use authority" limitation).

[13] EPA, FREQUENTLY ASKED QUESTIONS ABOUT GLOBAL WARMING AND CLIMATE CHANGE: BACK TO BASICS 2–4 (Apr. 2009), *available at* http://www.epa.gov/climatechange/downloads/Climate_Basics.pdf. Global warming theory, of course, is not without controversy. *Compare Global Warming: Consensus vs. Certainty*, UNION OF CONCERNED SCIENTISTS, http://www.ucsusa.org/global_warming/science_and_impacts/science/global-warming-consensus-vs.html (last updated June 9, 2003) (positing global warming has scientific consensus), *with Key Issues*, SEPP.ORG, http://www.sepp.org/key%20issues/keyissue.html (last updated July 2006) (positing that climate models are inaccurate and that climate change has become a global political issue rather than a scientific issue).

[14] EPA, *supra* note 13, at 2–3. *See generally* AN INCONVENIENT TRUTH (Paramount Pictures 2006) (summarizing global warming theory); THE GREAT WARMING (Stonehaven Productions 2006) (summarizing climate change effects on communities).

[15] U.S. ENERGY INFO. ADMIN., *supra* note 1, at 1.

[16] EPA, *supra* note 13, at 3; *see, e.g.*, *In re* Otter Tail Power Co. *ex rel.* Big Stone II, 744 N.W.2d 594, 599–600 (S.D. 2008) (challenging the building of a new power plant on greenhouse gas emissions grounds); Michael B. Gerrard, *Introduction and Overview* to GLOBAL CLIMATE CHANGE AND U.S. LAW 7–10 (Michael B. Gerrard ed., 2007) (noting sources of GHGs).

production such as feedlots and the burning of crop residue;[17] emissions from waste management activities, including landfills and waste-water treatment facilities;[18] and the release of hydrofluorocarbons used in refrigeration, air conditioning, and manufacturing processes.[19] Thus, the theory of global warming argues that human actions are contributing materially to global climate change.[20]

Studies indicate that global warming may have a significant effect on human health and communities. This includes significant adverse human health effects such as the spread of new diseases, death from catastrophic weather events, and health problems arising from extreme heat waves.[21] While scientists had already predicted such effects, the EPA published a new finding on December 7, 2009 under the authority of Section 202(a) of the CAA, formally stating that global warming threatens the "public health and welfare."[22] The publication is a precursor to regulating CO_2 as a criterion pollutant under the CAA and providing formal federal recognition of the threats.[23] Additionally, global warming may also result in property damage and adverse effects on

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[17] U.S. ENERGY INFO. ADMIN., *supra* note 1, at 6.

[18] *Id.*

[19] *Id.* at 4.

[20] Global warming is a developing theory—albeit with significant support and consensus in the scientific community. As of this writing, however, new information indicates that the most definitive report on global warming issues to date, from the 2007 International Panel on Climate Change (IPCC), may already be outdated as subsequent analysis indicates rising GHG emissions in excess of earlier projections. *Compare* INTERGOV'TAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT (2008), *available at* http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_synthesis_report.htm (the most recent, definitive report on global warming), *with* AP, *Warming Gases Rising Faster than Expected: Humans Adding Carbon to the Atmosphere Even Quicker than in the 1990s*, MSNBC.COM (Feb. 14, 2009, 8:02 PM), http://www.msnbc.msn.com/id/29199545 (indicating the 2007 IPCC report may have underestimated the effects of GHGs emissions), *and* Michael D. Lemonick, *As Effects of Warming Grow, UN Report Is Quickly Dated*, YALE ENV'T 360 (Feb. 12, 2009), http://www.e360.yale.edu/content/feature.msp?id=2120 (indicating the 2007 IPCC report may have been outdated even at the time of its release in 2007 as newer computer models indicate even more rapid increases in GHGs).

[21] *Health and Environmental Effects*, EPA, http://www.epa.gov/climatechange/effects/health.html (last updated Apr. 27, 2010).

[22] *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, EPA, http://www.epa.gov/climatechange/endangerment.html (last updated July 29, 2010).

[23] *See* Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18886 (Apr. 24, 2009), *available at* http://www.epa.gov/climatechange/endangerment/downloads/EPA-HQ-OAR-2009-0171-0001.pdf.

communities, such as land loss due to rising sea levels from melting polar ice.[24]

These projected health and public welfare effects are essential to understanding the link between GHG emissions and development of local land use policies. Local governments exercise police powers when developing local land use policies, that is, policies protecting public health, safety, and welfare.[25] Thus, as global warming theory posits, GHGs pose measureable health and welfare challenges for communities both in health effects as well as in property damage and losses.[26] According to global warming theory, because GHGs arise in part from human activities, reducing the incidence of such activities, or the quantity of the emissions arising from the activities, may help reduce or mitigate the global warming trends.[27] Therefore local governments arguably have compelling support for claiming that the health and public welfare effects of global warming are proper subjects for local regulation.

III. LAND USE: A QUINTESSENTIAL LOCAL GOVERNMENT FUNCTION

Before discussing land use regulations as related to GHG emissions, a basic understanding of land use decision-making powers is helpful. Land use regulation is a quintessential function of state and local government police power.[28] Because the Tenth Amendment expressly limits the scope of federal powers, the residuum is either state police power or power retained by citizens.[29]

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[24] *See Coastal Zones and Sea Level Rise*, EPA, http://www.epa.gov/climatechange/effects/coastal/ (last updated Aug. 19, 2010).

[25] *Id. See generally* BLACK'S LAW DICTIONARY, *supra* note 3, at 1276 (stating that local police power is derived from the Tenth Amendment and involves the right "to establish and enforce laws protecting the public's health, safety, and general welfare").

[26] Proposed Endangerment, 74 Fed. Reg. at 18886.

[27] *E.g.*, AN INCONVENIENT TRUTH, *supra* note 14.

[28] *See* City of Edmonds v. Oxford House, 514 U.S. 725, 744 (1995) (Thomas, J., dissenting) ("[L]and-use regulation is one of the historic powers of the States."); FERC v. Mississippi, 456 U.S. 742, 768 n.30 (1982) ("[R]egulation of land use is perhaps the quintessential state activity."); *see also supra* note 3 (briefly discussing Dillon's Rule and noting that land use policy is a critical function of local government).

[29] The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. For a general discussion of the application of the Tenth Amendment to land use, see, for example, John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365, 366–67 (2002) (discussing the emerging role of local governments in environmental protection); Peter S. Taub, *Land Use Reform and the Clean Air Act After* Dolan, 6 FORDHAM ENVTL. L.J. 731, 736–37 (1995) (discussing the role of local land use decision-making and compliance with the CAA).

A. Zoning and Local Land Use Affirmed as Constitutional

Village of Euclid v. Ambler Realty Co. firmly established the constitutionality of zoning as a local land use regulation.[30] According to *Euclid*, local land use regulations are constitutional unless the regulations "are clearly arbitrary and unreasonable, having *no substantial relation* to the public health, safety, morals, or general welfare."[31] Just two years later, the U.S. Supreme Court reaffirmed both the *Euclid* principle that a municipality may enact zoning regulations as part of the police power, delegated from the state, as well as the principle that the power to enact such regulations is limited to regulation that bears a "*substantial relation* to the public health, safety, morals, or general welfare."[32] The Supreme Court explained that a court could not simply substitute its judgment for the local municipality.[33] Thus, if the "substantial relation" of the regulation is at least "fairly debatable" and the regulation is not "clearly arbitrary and unreasonable," a court does not have the general power to substitute its judgment for that of the municipal body.[34]

Land use regulation is thus a central function of local government, and courts have a limited power of judicial review of local land use decisions.[35] If a local land use regulation is substantially related to public health, safety, and welfare issues, the regulation enjoys high deference.[36]

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[30] 272 U.S. 365, 395–96 (1926) (rejecting a facial challenge to a local land use ordinance).

[31] *Id.* at 395 (emphasis added).

[32] Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928) (rejecting an as-applied challenge to a land use ordinance) (emphasis added).

[33] *Id.* at 187–88.

[34] Moore v. City of E. Cleveland, 431 U.S. 494, 514 n.1 (1977) (Stevens, J., concurring) (quoting Zahn v. Bd. of Pub. Works, 274 U.S. 325, 328 (1927)) (stating that there is a "settled rule" that a court will not substitute its judgment for the local government if the decision was "fairly debatable"); Vill. of Belle Terre v. Boraas, 416 U.S. 1, 4 (1974) (quoting *Euclid*, 272 U.S. at 388) (demonstrating deference to local government when zoning decision is "fairly debatable"); *Nectow*, 277 U.S. at 188 (stating that a court's judgment should generally not be substituted for the local land use decisions, but the local ability to restrict land use is not unlimited and restrictions cannot be imposed without a substantial relation to general welfare). *See generally* 83 AM. JUR. 2D *Zoning and Planning* §§ 48, 953 (2003) (explaining that the "fairly debatable" standard of review is subject to a threshold of "reasonable debate," and "if the evidence of reasonableness is insufficient, the presumption of reasonableness is overcome").

[35] Such land use regulations are further limited by a second requirement: the regulation cannot deprive the landowner of "economically viable use of his land." Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).

[36] Leigh Kellett Fletcher notes a second purpose for zoning and design codes: "protecting and enhancing property values." Leigh Kellett Fletcher, *Green Construction*

B. Limited Federal Usurpation of Local Land Use Decision-Making

Land use policy-making is a central function of local government, but that power is not absolute. In general, the federal government has limited intrusion into local land use decision-making in deference to state and local government powers.[37] John Nolon specifically notes that the federal government, not just in a CAA context, follows a general reluctance to interfere with local land use decisions, as evident in the failure to pass the National Land Use Planning Act in the 1970s, that—as the name suggests—called for national land use planning.[38]

While the federal government has not recently proposed a *generalized* national land use strategy,[39] recent issue-specific federal laws may indicate the continued reluctance to supplant traditional land use authority.[40] For example, the Energy Policy Act of 2005[41] contains provisions that preempt local land use authority based on national energy policy in areas such as the location of liquefied natural gas ("LNG") terminals in coastal areas[42] and national "energy right-of-way" corridors for high-voltage electric transmission lines.[43] Both are highly

Costs and Benefits: Is National Regulation Warranted?, 24 NAT. RESOURCES & ENV'T 18, 23 (2009).

[37] *See supra* note 29 and accompanying text.

[38] Nolon, *supra* note 29, at 367 (noting that the House of Representative rejected the proposal to append the National Land Use Planning Act to the National Environmental Policy Act); *see also* Holly Doremus, *Patching the Ark: Improving Legal Protection of Biological Diversity*, 18 ECOLOGY L.Q. 265, 289 (1991) (noting that the National Land Use Policy Act was rejected due to deference to local land use policy). Further evidence of reluctance of federal intervention in local land use decisions includes, for example, the Coastal Zone Management Act, 16 U.S.C. §§ 1451–66 (2006); *e.g.*, Am. Petroleum Inst. v. Knecht, 456 F. Supp. 889, 923 (C.D. Cal. 1978) (stating that "Congress was particularly careful to circumscribe the role of the federal government in particular [energy facility] siting decisions [under the Coastal Zone Management Act]").

[39] Some argue that national land use planning is necessary. *See, e.g.*, Jerold S. Kayden, *National Land-Use Planning in America: Something Whose Time Has Never Come*, 3 WASH. U. J.L. & POL'Y 445 (2000) (arguing for national coordination of land use decision-making).

[40] Recent general examples of federal preemption in a local land use context include the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7) (2006) (limiting local land use authority related to siting of mobile telephone network facilities and antennas), and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc (2006) (limiting restrictions on land use regulations related to religious groups).

[41] 42 U.S.C. §§ 15801–16538 (2006).

[42] *See* Kenneth T. Kristl, *Renewable Energy and Preemption: Lessons from Siting LNG Terminals*, 23 NAT. RESOURCES & ENV'T 58 (2009) (commenting on preemption related to locating liquefied natural gas (LNG) depot facilities in coastal areas under 15 U.S.C. § 717b (2006)).

[43] 42 U.S.C. § 15926 (2006) (defining energy right-of-way corridors on federal land). A recent National Public Radio (NPR) series specifically addressed the increasing friction between local communities and federal agencies regarding the national energy corridors and the proposed national electrical grid. *Building Power Lines Creates a Web of Problems*,

controversial with strong state and local opposition,[44] and both would preempt local land use decision-making when local land use issues conflict with national policies. And while the Energy Policy Act of 2005[45] demonstrates that Congress may preempt local land use policy-making, the Act does so in a manner limited to specific federal policy objectives.

Thus, land use decisions are made largely by local governments. When the federal government has preempted local authorities related to land use issues, the preemption is typically narrowly defined. Furthermore, the federal government, in deference to the states and local governments, and as limited by the Tenth Amendment,[46] has not developed a national land use policy.

IV. LOCAL LAND USE POLICY IS DIRECTLY RELATED TO GHG EMISSIONS

Land use directly and indirectly contributes to GHG emissions. Note that the term "land use" commonly has two applications or meanings: (1) the "use of the land" and (2) the policies developed to regulate the use of the land. Both applications are relevant to assessing the effects of land use on GHG emissions.

First, land use can describe the general surface use, or "cover," of land such as forest, cropland, grassland, commercial development, or residential development.[47] As land use transitions from lower intensity uses, such as forest and cropland, to more intensive uses, such as commercial development, the resulting land use affects the climate

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(NPR radio broadcast Apr. 28, 2009), *available at* http://www.npr.org/templates/story/story.php?storyId=103537250.

[44] *See, e.g.*, Kristl, *supra* note 42, at 60 (regarding the opposition against the siting of LNG terminals); *Eastern States Reject Electricity Transmission Corridor*, ENV'T NEWS SERV. (Nov. 6, 2007), http://www.ens-newswire.com/ens/nov2007/2007-11-06-095.asp (discussing strong gubernatorial opposition to the proposed eastern national corridor); *see also* National Electric Transmission Congestion Report: Order Denying Rehearing, 73 Fed. Reg. 12959 (Mar. 11, 2008), *available at* http://nietc.anl.gov/denial/index.cfm (information on order denying an appeal for rehearing of the decision on the Mid-Atlantic Area and Southwest Area National Corridors).

[45] 42 U.S.C. §§ 15801–16524.

[46] U.S. CONST. amend. X.

[47] *See, e.g.*, EPA, INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990–2008 7-1 to 7-60 (Apr. 15, 2010), *available at* http://www.epa.gov/climatechange/emissions/downloads10/US-GHG-Inventory-2010_Report.pdf (discussing the "net greenhouse gas flux" arising from land use change); CITY OF PORTLAND & MULTNOMAH COUNTY, LOCAL ACTION PLAN ON GLOBAL WARMING 2, 18 (Apr. 2001), *available at* http://www.portlandonline.com/shared/cfm/image.cfm?id=112115 (noting the necessity of coordinating land use decision-making to reduce greenhouse gas emissions); Gregg Marland et al., *The Climatic Impacts of Land Surface Change and Carbon Management, and the Implications for Climate-Change Mitigation Policy*, 3 CLIMATE POL'Y 149, 150–51 (2003), *available at* http://www.fs.fed.us/pnw/mdr/mapss/publications/pdf/marland2003.pdf (discussing the effects of land use decisions on mitigating climate change).

because the intensity of use correlates with increases in GHG emissions.[48]

Second, land use describes the policies controlling patterns of development such as zoning, comprehensive community planning, and subdivision regulations.[49] As communities develop new land uses consistent with land use policies, those uses contribute to GHG emissions by, for example, increasing traffic,[50] replacing natural carbon sinks that reduce GHGs with uses that increase GHG emissions such as parking lots,[51] and increasing utility use.[52] Land use policies with significant negative effects are commonly, and pejoratively, termed "urban sprawl."[53] Urban sprawl describes post-1940s land development patterns that emphasize decentralized communities and are largely and intentionally accessible by private, motor vehicles.[54] Sprawling development contributes to GHGs, for example, by increasing traffic and private automobile use as residents of the community are forced to drive to shop, attend school, work, et cetera.[55]

The discussion in this Note focuses primarily on the latter definition of land use: land use as a policy-making tool. It should not be forgotten, however, that the first definition of land use, as the land cover or "use of the land," is also implicated in global-warming analysis.

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[48] Marland et al., *supra* note 47, at 150–51; *see also* INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990–2008, *supra* note 47, at 7-1 (noting GHG flux in forests).

[49] *See* J. Kevin Healy, *Local Initiatives*, *in* GLOBAL CLIMATE CHANGE AND U.S. LAW 421, 426–27 (Michael B. Gerrard ed., 2007).

[50] AM. PLANNING ASS'N, POLICY GUIDE ON PLANNING & CLIMATE CHANGE 9, 10 (2008), *available at* http://www.planning.org/policy/guides/pdf/climatechange.pdf ("Nationally, the transportation sector is responsible for approximately one-third of CO_2 emissions, and if current trends continue, those emissions are projected to increase rapidly.").

[51] *See id.* at 8, 9.

[52] *See id.* at 9–10, 25–26.

[53] *See* WALTER KIESER, CLIMATE PROTECTION CAMPAIGN, LAND USE AND URBAN FORM: OPPORTUNITIES FOR GREENHOUSE GAS EMISSION REDUCTION IN SONOMA COUNTY 1 (Apr. 2007), *available at* http://www.climateprotectioncampaign.org/ccap/ccap-report/source-material/6%20Land%20Use.pdf (describing urban sprawl).

[54] *Id.* (providing a concise statement of the linkage between land use and GHG reductions); *see also* John R. Nolon, Golden *and Its Emanations: The Surprising Origins of Smart Growth*, 23 PACE ENVTL. L. REV. 757, 811–19 (2006) (summarizing the efforts of the state of New York to combat sprawl). *See generally* THE END OF SUBURBIA: OIL DEPLETION AND THE COLLAPSE OF THE AMERICAN DREAM (Electric Wallpaper 2004) (discussing the need for reform in community development priorities) (on file with author); EBEN FODOR, BETTER[,] NOT BIGGER: HOW TO TAKE CONTROL OF URBAN GROWTH AND IMPROVE YOUR COMMUNITY 21–28 (2d ed. 2001) (providing an activist manual for controlling urban growth).

[55] KIESER, *supra* note 53, at 1.

A. Professional Organizations Recognize the Effect of Poor Land Use Decisions as Contributing to Increased GHG Emissions

Major advocacy and professional organizations related to land use issues recognize the plain link between community development (involving land use policies) and GHG emissions. For example, the U.S. Green Building Council cites as an important organizational objective the need for model land use policies that facilitate green building programs and reduce GHGs.[56] Smart Growth America, in its citizen's guide for new development, specifically states that ad hoc planning has led to sprawl and significant deterioration of communities including effects on global warming.[57] Similarly, a recent report by the Union of Concerned Scientists states: "[T]he magnitude of warming that occurs during *this* century—and the extent to which Pennsylvanians will need to adapt—depend largely on energy and land-use choices made within the next few years . . . ."[58] The American Association of State Highway and Transportation Officials ("AASHTO") recently developed a new website for state and local governments to address specific solutions to global warming arising from transportation.[59]

The American Planning Association ("APA") is the foremost authority for community planning professionals in the United States.[60] The APA's *Policy Guide on Planning & Climate Change* expressly

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[56] U.S. GREEN BLDG. COUNCIL, RESEARCH COMMITTEE POSITION STATEMENT: FUNDING FOR RESEARCH ADVANCING HIGH-PERFORMANCE GREEN BUILDING 3–4 (Mar. 2007), *available at* http://www.usgbc.org/ShowFile.aspx?DocumentID=2464.

[57] DAVID GOLDBERG, CHOOSING OUR COMMUNITY'S FUTURE: A CITIZEN'S GUIDE TO GETTING THE MOST OUT OF NEW DEVELOPMENT 2, 45–46, *available at* http://org2.democracyinaction.org/o/5184/t/1623/signUp.jsp?key=192.

[58] UNION OF CONCERNED SCIENTISTS, CLIMATE CHANGE IN PENNSYLVANIA: IMPACTS AND SOLUTIONS FOR THE KEYSTONE STATE 1 (Oct. 2008), *available at* http://www.ucsusa.org/assets/documents/global_warming/Climate-Change-in-Pennsylvania_Impacts-and-Solutions.pdf.

[59] Craig D. Brooks, *Notes from the Director,* 10 JOINT LEGISL. AIR & WATER POLLUTION CONTROL & CONSERVATION COMMITTEE NEWSL.: ENVTL. SYNOPSIS 1, 2 (Oct. 2009), *available at* http://jcc.legis.state.pa.us/resources/ftp/documents/newsletters/Environmental%20Synopsis%20-%20October%202009.pdf (solutions include a proposed federal program to coordinate and improve land use decision-making in an effort to reduce vehicle miles driven and thus reduce GHG emissions). According to the American Association of State Highway and Transportation Officials (AASHTO), a new federal transportation bill expressly requires "as a part of the transportation planning process, States and their metropolitan planning organizations must establish greenhouse gas emission reduction targets and strategies to meet those targets." Press Release, AASHTO, New Transportation Website Targets Greenhouse Gases (July 27, 2009), *available at* http://news.transportation.org/press_release.aspx?Action=ViewNews&NewsID=249. The new AASHTO website, entitled *Real Solutions for Climate Change,* is available at http://climatechange.transportation.org/ (last visited Nov. 8, 2010).

[60] *See* APA Mission and Vision, APA, http://www.planning.org/apaataglance/mission.htm (last visited Nov. 15, 2010).

recognizes the link between community planning and GHG emissions, and the guide significantly incorporates land use policy revisions as a method for mitigating associated climate change.[61] Due to the influence of the APA, a detailed overview of current policies may provide insights into land use and climate change relationships.

The policy guide recognizes the fundamental role of local action by noting that "local, state[,] or regional plans are necessary to provide the appropriate guidance for specific areas and communities."[62] The APA guide further recommends that "new zoning and development standards should incorporate climate change impacts and implications in required environmental reviews and decision-making. Climate change should be incorporated into comprehensive planning that meets new emission goals and targets."[63] This policy statement indicates that climate change is now a fundamental factor in evaluating the environmental impacts of local land development projects, expanding beyond the immediate-effects analysis traditionally applied by local governments.

In sharp contrast to traditional urban sprawl development, the APA recommends that to mitigate the effects of poor planning, "new policies and regulations should be developed that promote mixed use development, transit-oriented design, and greater development intensity to create communities with land use patterns with reduced energy consumption, fewer vehicle miles traveled[,] and reduced greenhouse gases."[64] These recommendations attempt to reduce the primary negative aspects of traditional development, that is, requiring significant traffic infrastructure to support the sprawling development. Regarding these links between land development and traffic, the APA maintains that "[l]and use patterns play a significant role in reducing Vehicle Miles Travelled ("VMT") and . . . [the] associated greenhouse gas emissions."[65]

The policy guide specifically recommends that local planning incorporate local energy production, green space creation and preservation, green building practices, assessment of GHG effects when considering development, and local foods production to mitigate GHG emissions.[66] The APA document and its influence on community planners demonstrate that the APA is not debating *whether* such policy

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61 AM. PLANNING ASS'N, *supra* note 50, at 7–10.

62 *Id.* at 13.

63 *Id.* at 39.

64 *Id.* Interestingly, the APA's recommendations are not a radical departure from the CAA itself. The congressional purpose for the CAA states, in part, "that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the *increasing use of motor vehicles*, has resulted in mounting dangers to the public health and welfare." 42 U.S.C. § 7401(a)(2) (2006) (emphasis added).

65 AM. PLANNING ASS'N, *supra* note 50, at 8.

66 *Id.* at 7–10.

changes are required, but instead is providing concrete recommendations to affect climate change by implementing and significantly revising local land use policies.

Thus, major professional and advocacy organizations consistently recommend that local action is necessary to address global warming. The weight these organizations carry provides compelling support for local communities seeking to invoke police powers to limit GHG emissions. In other words, the APA firmly establishes the link between land use policy and reducing GHG emissions, thus obviating challenges that such local actions are arbitrary or capricious.[67]

B. Local Government Land Use Policy Revisions to Address GHG Emissions

State governments, especially local governments, are integrating GHG emissions-reduction programs into local land use decision-making.[68] In September 2008, California passed significant legislation that expressly addresses the link between land use policies and GHG emissions reductions, providing clear direction for local governments to take action.[69] The California law provides incentives to builders who incorporate GHG reductions into development plans, emphasizes sustainable community design, and encourages reductions in vehicle traffic by encouraging the development of "walkable" communities.[70]

Local, community-specific initiatives are growing. Sonoma County in California released a policy report plainly emphasizing the focus on climate change as the impetus for new land use policies in the county.[71] The policies include emphasizing city redevelopment, directing new community growth to existing cities and urban areas, and using

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[67] *See supra* Part III and notes 28–34 (discussing land use as a quintessential function of local government according to *Vill. of Euclid v. Ambler Realty Co.* and its progeny).

[68] The analysis in this Note focuses primarily on local government initiatives. States are likewise taking significant actions to reduce GHGs. *See generally* PACE LAW SCH. CTR. FOR ENVTL. LEGAL STUDIES, UPDATE TO CHAPTER 11—THE STATE RESPONSE TO CLIMATE CHANGE: 50[-]STATE SURVEY (June 25, 2010), *available at* http://www.abanet.org/abapubs/globalclimate/docs/stateupdate_102908.pdf (providing an online update to Pace Law School Center for Environmental Legal Studies, *The State Response to Climate Change: 50-State Survey, in* GLOBAL CLIMATE CHANGE AND U.S. LAW 371 (Michael B. Gerrard ed., 2007)).

[69] Press Release, Office of the Governor, Governor Schwarzenegger Signs Sweeping Legislation to Reduce Greenhouse Gas Emissions Through Land-Use (Sept. 30, 2008), *available at* http://gov.ca.gov/press-release/10697.

[70] *Id.* "Walkable" communities are also termed "new urbanist," in which communities focus on providing necessary services within walking distance of the home. *E.g.*, THE END OF SUBURBIA, *supra* note 54 (encouraging the development of communities with non-automobile transportation focus).

[71] KIESER, *supra* note 53, at 4–5.

transferrable development credits to minimize growth in rural areas.[72] The initiatives are intended to reduce vehicular traffic by focusing community growth in areas with existing infrastructure that obviates or minimizes the use of vehicles, thus reducing GHG emissions.[73]

Montgomery County in Pennsylvania developed a county-level *Climate Change Action Plan*.[74] The plan addresses links between land use policies and GHG emissions reductions, and especially emphasizes the critical link between transportation and GHG emissions: "Land use and transportation are inextricably linked. Research has shown the compactness and integration of uses in a community encourages a decrease in the [number] of vehicle miles traveled."[75] The report also emphasizes the need to maintain green space (for example, forests and open areas) to help mitigate GHGs.[76]

The Minnesota Climate Change Advisory Group, a leading advocacy group for Minnesota cities, unanimously approved a plan to reduce GHG emissions in the state.[77] The primary focus of the unanimously adopted initiative was "improving land use planning and development practices."[78] The goals of the plan included focusing development in already-urbanized areas, reducing development in rural areas by increasing minimum lot size requirements for rural development projects, and implementing state-wide reductions in vehicle miles traveled.[79]

As is evident in these examples, local governments are addressing GHG emissions through local police powers and local land use policies. The initiatives largely address the fundamental links between transportation, land development, open space preservation, and general land use policies in an effort to address GHG emissions comprehensively.

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72 *See id.* at 4.

73 *Id.* at 1–3.

74 MONTGOMERY CNTY. GREENHOUSE GAS REDUCTION TASK FORCE, GREENPRINT FOR MONTGOMERY COUNTY: CLIMATE CHANGE ACTION PLAN 2 (Dec. 2007), *available at* http://greenprint.montcopa.org/greenprint/cwp/view,a,1657,q,63169,greenprintNav,%7C.asp.

75 *Id.* at 27.

76 *Id.* at 28, 30. Similar initiatives in Pennsylvania include Chester County's task force, *see* GHGR TASK FORCE, CHESTER CNTY., PA, http://dsf.chesco.org/chesco/cwp/view.asp?a=1511&q=633902 (last visited Nov. 7, 2010), and a green infrastructure initiative in Lancaster County, *Greenscapes*, LANCASTER CNTY. PLANNING COMM'N, http://www.co.lancaster.pa.us/planning/cwp/view.asp?a=2&q=624655 (last updated Apr. 15, 2010).

77 MINN. CLIMATE CHANGE ADVISORY GRP., LAND USE PLANNING KEY TO REDUCING GREENHOUSE GAS EMISSIONS (rev. Feb. 3, 2009), *available at* http://www.gmetrust.org/wp-content/uploads/2009/10/landuse_mccag_final_020309.pdf.

78 *Id.*

79 *Id.*

V. *MASSACHUSETTS V. EPA*—A CATALYST FOR FEDERAL GHG REGULATION

Until 2007, whether the federal government had the power to regulate GHGs was uncertain.[80] Thus, the federal government apparently could not preempt a local land use ordinance that was based on mitigating GHG emissions because no express federal power existed to affect the preemption as related to GHGs.[81] The Clean Air Act, a likely candidate for the regulation of GHGs, regulated air pollutants—not GHGs *per se*[82]—and the primary GHGs, with the exception of nitrous oxide, are not listed air pollutants under the CAA.[83] *Massachusetts v. EPA*,[84] however, served as a catalyst for resolving the uncertainty related to federal regulation of GHGs—albeit not a complete resolution.[85]

A discussion of GHG issues is incomplete without a few comments on *Massachusetts v. EPA*, in which the Supreme Court first tackled climate change.[86] The Supreme Court held that the EPA Administrator has the statutory power to regulate CO_2, a GHG, from mobile sources.[87] The case involved an effort by states and other entities to force the EPA to regulate CO_2 emissions in an effort to reduce the effects of global warming.[88] The Court held that the refusal to regulate CO_2 from mobile sources was arbitrary and capricious.[89] Note, however, that the Court did not specifically say the EPA *must* regulate CO_2.[90] Rather, the EPA

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80 Arnold W. Reitze, Jr., *Federal Control of Carbon Dioxide Emissions: What Are the Options?*, 36 B.C. ENVTL. AFF. L. REV. 1, 1–2 (2009).

81 *Id.*

82 *Regulating Greenhouse Gases Under the Clean Air Act*, WORLD RESOURCES INSTITUTE, Apr. 2009, at 1, *available at* http://pdf.wri.org/bottom_line_ghg_clean_air.pdf.

83 The six common criteria air pollutants, standardized by the EPA through National Ambient Air Quality Standards under the CAA are ozone, particulate matter, carbon monoxide, nitrous oxide, sulfur dioxide, and lead. *Compare What Are the Six Common Air Pollutants?*, EPA, http://www.epa.gov/air/urbanair/ (last updated July 1, 2010), *and Air Pollutants*, EPA, http://www.epa.gov/air/airpollutants.html (last updated Feb. 20, 2009) (listing all air pollutants, including hazardous air pollutants), *with* U.S. ENERGY INFO. ADMIN., *supra* note 1, at 1 (GHGs include carbon dioxide, methane, and nitrous oxide).

84 549 U.S. 497 (2007).

85 Arguably, the *Massachusetts v. EPA* holding does not expressly state that the EPA must regulate CO_2 in new motor vehicles, but instead holds that the EPA cannot evasively cite "uncertainty" as the basis for not regulating CO_2. *See id.* at 505, 534.

86 *See generally* Lisa Heinzerling, *Climate Change in the Supreme Court*, 38 ENVTL. L. 1 (2008) (a cogent "insider" assessment of the posture and outcomes of *Massachusetts v. EPA*).

87 549 U.S. at 505, 528.

88 *Id.* at 505, 528. *See also* Heinzerling, *supra* note 86, at 1–4.

89 549 U.S. at 528, 534–35.

90 Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the Clean Air Act's Cooperative Federalism Framework Is Useful for Addressing Global*

cannot claim that it does not have the statutory power to regulate CO_2 because CO_2 is not an "air pollutant" as defined by the CAA, and thus not subject to regulation by the EPA via the CAA.[91] While *Massachusetts v. EPA* was less than conclusive, the holding does advance the debate on federal GHG regulation and has led to more recent developments in which the EPA has initiated efforts to regulate CO_2 formally as a GHG under the CAA.[92]

The Court's opinion in *Massachusetts v. EPA* does appear to allow agency deference in the CO_2 regulation issue. In an article on agency deference in interpreting regulations, Lisa Schultz Bressman argues that congressional delegation of regulatory functions should rarely be overturned as long as the regulation is not "so illogical as to constitute virtual category mistakes or polar opposites."[93] Bressman states that if Congress delegates the regulation of *x* to an agency, the agency is not authorized to regulate *y*.[94] But a corollary, and the issue largely at stake in *Massachusetts v. EPA*, is also true: "[W]hen Congress instructs an agency to regulate *x*, it cannot decline to regulate one type of *x*."[95] Thus, if the EPA can regulate air pollutants and if CO_2 is an air pollutant, then the EPA cannot decline to regulate CO_2.[96] Arguably, applying

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Warming, 50 ARIZ. L. REV. 799, 831 n.171 (2008). It is worth noting, however, the compelling contrary views that argue the CAA structure is not intended to address climate change. *E.g.*, Jason Scott Johnston, *Climate Change Confusion and the Supreme Court: The Misguided Regulation of Greenhouse Gas Emissions Under the Clean Air Act*, 84 NOTRE DAME L. REV. 1, 1–2 (2008) (stating that claims by environmentalists that *Massachusetts v. EPA* was an "important victory in the battle to curb global warming" are "alarmist" and that "in the short-to-medium run, a warmer climate will be predominantly beneficial, rather than harmful, to the United States").

[91] 549 U.S. at 528–530. Note, however, that the effect of the decision did not leave the EPA with much room to conclude regulation was unnecessary. Doremus & Hanemann, *supra* note 90, at 831 n.171.

[92] *See supra* notes 22–24. The latest summary of the EPA regulatory agenda for both current and long-term regulatory strategy indicates that the EPA incontrovertibly seeks to regulate CO_2 under the authority of the CAA, including requiring mandatory reporting of GHGs, offering specific findings that GHGs endanger public health, and developing scientific methods for measuring GHGs for long-term monitoring. EPA, EPA-230-Z-09-001, SPRING 2009 SEMIANNUAL REGULATORY AGENDA 36, 44, 69 (2009), *available at* http://www.epa.gov/lawsregs/documents/regagendabook-spring09.pdf. For a concise, current summary of the proposed mandatory GHG reporting rule, see Seth A. Rice, *EPA's Mandatory Greenhouse Gas Emission Reporting Rule Takes Shape*, TRENDS, Sept./Oct. 2009, at 13.

[93] Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 585 (2009).

[94] *Id.*

[95] *Id.* at n.156.

[96] *Id.* A similar analysis with a similar result arose in the mid-1970s related to lead pollution. Lead in motor fuels was deemed a criteria pollutant under the CAA; once lead was listed, the EPA did not have discretion not to regulate it as an air pollutant. Natural Res. Def. Council v. Train, 411 F. Supp. 864, 870 (S.D.N.Y. 1976).

Bressman's logic, *Massachusetts v. EPA* does pave the way to regulating CO_2 as an air pollutant subject to the CAA regulatory structure.

As of this writing, there is little doubt that the EPA will regulate CO_2.[97] The power to regulate is evident; the *will* to regulate is now also evident. Under the Obama Administration, the EPA is moving rapidly to reconsider the Bush Administration's refusal to take action, even after *Massachusetts v. EPA*, to regulate CO_2.[98] As indicated above, the administration has set aggressive goals for GHG emissions reductions—a 28% reduction by 2020.[99] The EPA is also taking direct action to regulate CO_2 as a criterion pollutant under the CAA.[100]

VI. FUNDAMENTAL LIMITS ON FEDERAL PREEMPTION

The Supremacy Clause of the Constitution allows federal law preemption of state or local laws when they conflict with the federal law.[101] There are two types of preemption: field preemption, in which the regulatory scheme is so comprehensive that the state is left with little or no room to regulate, and conflict preemption, in which complying with both a federal and state law is logically impossible.[102] In the CAA context, "the CAA does not preclude state and local regulation of air pollution, so long as any state or local regulation is no less strict than

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[97] *See supra* notes 22–23, 92.

[98] Press Release, EPA, EPA Administrator Jackson Orders Review of Key Clean Air Document (Feb. 17, 2009) *available at* http://yosemite.epa.gov/opa/admpress.nsf/8b770facf5edf6f185257359003fb69e/3274377ad2d9fc42852575600077efb5!OpenDocument. Environmental groups have strongly supported the review of CO_2. *E.g.*, Posting of Terry Winckler to unEARTHED Blog, Update: Obama's Six Easy Things, http://unearthed.earthjustice.org/blog/2009-february/update-obamas-six-easy-things (Feb. 18, 2009, 11:30 AM) (commenting that the Obama Administration's review of the Bush Administration decision not to regulate CO_2 via the CAA was "[o]ne of the most significant actions" of the Obama Administration).

[99] *Energy & Environment*, *supra* note 2.

[100] *See supra* notes 22–23, 92.

[101] U.S. CONST. art. VI, cl. 2; *see, e.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 371, 372, 388 (2000) (holding a Massachusetts law limiting trade with Burma impermissibly interfered with federal law and presidential powers and was thus preempted); CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 663–64 (1993) (superseded by statute on other grounds) (noting railroad crossings are regulated by federal law that preempts state tort law actions regarding railroad crossings); Se. Oakland Cnty. Res. Recovery Auth. v. City of Madison Heights, 5 F.3d 166, 168 (6th Cir. 1993) (holding a community cannot adopt clean air standards as part of police powers to prevent location of an incinerator when such standards conflict with federal standards). *See generally* 61B AM. JUR. 2D *Pollution Control* § 150 (2010) (summarizing retention of state authority and preemption issues in the CAA context).

[102] *See* Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000) (providing an extensive discussion of the preemption doctrine in context of a negligence case related to automobile air bags); Gade v. Nat'l Solid Wastes Mgmt. Assoc., 505 U.S. 88, 98 (1992) (regarding preemption in a health-and-safety regulation context).

federal standards."[103] The shared responsibility for regulation in the CAA between federal, state, and local governments indicates that the CAA is not a comprehensive scheme preempting all state and local regulations; to the contrary, the CAA expressly provides for such shared regulation.[104] Thus, preemption issues related to local regulations are likely to arise as conflict preemption on a case-by-case basis and not in the context of field preemption.

A. Federal Statute Does Not Preempt Local Land Use, GHG-Related Regulations

Conflict preemption could technically arise in two contexts: (1) direct conflict between a local regulation and federal law or (2) conflict between a local regulation and state law.[105] Regarding the latter conflict, "nowhere does the CAA affirmatively grant *local* governments the independent power to regulate air pollution."[106] Logically, therefore, any air pollution regulatory powers by the local government may derive indirectly from state grants of such power to the local governments.[107] Thus, at the minimum, the local government initiatives cannot conflict with state initiatives or state air pollution regulation policy. The source of this conflict is the limit on delegated powers from the state to local governments.

The former issue, a conflict between federal and local policy, is the focus of this discussion.[108] As related to land use regulation, the federal preemption issue is distinguished from preemption arising from, for example, local building codes and other local laws.[109] While both land use regulations and building codes may implicate local government

[103] *Se. Oakland Cnty.*, 5 F.3d at 169 (citing 42 U.S.C. § 7401(a)(3) (1993)).

[104] *See* 42 U.S.C. §§ 7401(a)(3)–(4), 7402(a), 7416, 7431 (2006).

[105] The latter conflict between state and local air policies is mentioned in this Note, but is not the subject of the discussion.

[106] *Se. Oakland Cnty.*, 5 F.3d at 169 (emphasis added).

[107] *See id.*

[108] The CAA expressly recognizes that air pollution regulation fundamentally involves state and local actors: "[A]ir pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the *primary responsibility of States and local governments* . . . ." 42 U.S.C. § 7401(a)(3) (2006) (emphasis added). Thus, state and local actions are presumed to be a fundamental part of any air pollution regulatory scheme.

[109] Leigh Kellett Fletcher discusses the emerging conflict between local green building initiatives and federal regulation of GHGs in a recent article and specifically notes the conflicts between land use regulations and green building. Fletcher, *supra* note 36, at 20–24. In the green building context, Fletcher cogently notes that local green building initiatives are in potential conflict with national regulatory policies. *Id.* at 23. Fletcher further cautions that federal preemption may needlessly threaten local initiatives. *See id.* at 24.

regulation of GHG emissions, issues related to building codes deal more directly with statutory preemption—especially when the local codes attempt to establish local energy efficiency standards for appliances that conflict with specific national standards.[110]

For example, a case closely watched by attorneys in the U.S. District Court for the District of New Mexico was brought by the Air Conditioning, Heating, and Refrigeration Institute challenging a green building code implemented by the City of Albuquerque.[111] The code establishes, among other objectives, a rigorous green buildings program to enhance energy efficiency within the city as part of the city's 2030 Challenge Program.[112] The industry group challenged the energy efficiency requirements related to "HVAC[113] products and water heaters" because, the group alleges, the standards directly conflict with federal law on energy efficiency and are thus preempted by the federal law.[114] The group specifically cites conflict with the Energy Policy and Conservation Act.[115]

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[110] The distinction is subtle but important. The CAA provides for state and local government roles in implementing air pollution standards, for example, 42 U.S.C. § 7401 (2006), whereas the energy efficiency standards are set by federal agencies without provision for state or local input. Energy efficiency standards for common household appliances, for example, are set by the U.S. Department of Energy. *State Appliance Standards*, U.S. DEP'T OF ENERGY, http://www.eia.doe.gov/emeu/efficiency/appliance_standards.html (last updated Aug. 2010). Standards for air conditioning equipment are also set by the Department of Energy. *Analysis of Efficiency Standards for Air Conditioners, Heat Pumps & Other Products*, U.S. DEP'T OF ENERGY, http://www.eia.doe.gov/oiaf/servicerpt/eff/ (Feb. 2002).

[111] *E.g.*, Leslie Guevarra, *Federal Judge Puts Albuquerque's Green Building Code on Hold*, GREENER BLDGS. (Oct. 6, 2008), http://www.greenbiz.com/news/2008/10/06/federal-judge-puts-albuquerques-green-building-code-hold (referencing Air Conditioning, Heating & Refrigeration Institute v. City of Albuquerque, No. Civ. No. 08-633 MV/RLP, 2008 U.S. Dist. LEXIS 106706, at *2 (D.N.M. Oct. 3, 2008)).

I thank attorney Alan Flenner for identifying this important case and noting its significance. Telephone Interview with Alan Flenner, Associate, High Swartz, LLP, (Jan. 15, 2009).

[112] *Green Building*, CITY OF ALBUQUERQUE, http://www.cabq.gov/albuquerquegreen/green-goals/green-building (last visited Nov. 8, 2010).

[113] HVAC stands for heating, ventilation, and air conditioning equipment. EPA, A GUIDE TO ENERGY-EFFICIENT HEATING AND COOLING 2 (Aug. 2009), *available at* http://www.energystar.gov/ia/partners/publications/pubdocs/HeatingCoolingGuide%20FINAL_9-4-09.pdf.

[114] *Air Conditioning, Heating & Refrigeration Inst.*, 2008 U.S. Dist. LEXIS 106706 at *2–3.

[115] *Id.* at *2. The City of Albuquerque defended by emphasizing that the standards implemented by the city and at issue are not mandatory requirements, but are simply one option to meet the new code. *Id.* at *22.

I thank Chief District Judge Martha Vazquez and her very helpful staff for kindly providing valuable information regarding this case.

Air Conditioning, Heating, and Refrigeration Institute is mentioned here to provide important contrast to the type of preemption at issue in a more generalized land use ordinance. Because the CAA does not expressly preempt state and local initiatives and because it even arguably encourages such initiatives,[116] the particularized express preemption of the type asserted in *Air Conditioning, Heating, and Refrigeration Institute* would not likely arise when challenging a generalized local land use ordinance in which the locality has compelling support for enacting such policy decisions. A specific energy efficiency standard is markedly different from a local zoning ordinance or local comprehensive plan that justifies local land use decisions by citing global warming and GHG emissions reductions as its purpose. In other words, there is likely no express preemption at stake in the *generalized* land use policy.

Therefore, while the CAA is a complex statutory section, the CAA does not expressly preempt the field in air pollution regulation.[117] The CAA, instead, is an example of cooperative federalism in which states (and by delegation, local governments) and the federal government cooperate to affect the regulatory goals of the CAA.[118] Thus, the CAA itself does not delegate exclusive GHG regulation and policy-making to the federal government, but rather shares those policy-making roles among federal, state, and local actors.[119]

B. 42 U.S.C. § 7431—Express Limits on Federal Interference with Local Land Use Decisions

The preemption of a land use ordinance based on a claim of conflict with the CAA is apparently limited by a lesser-known statutory provision within the CAA itself.[120] The statute, entitled "Land Use

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[116] *See* 42 U.S.C. §§ 7401, 7416 (2006).

[117] The purpose of the CAA is to address air pollution at a national level. *Id.* §§ 7401, 7402. Yet the statutory structure of the CAA, especially for non-mobile sources, specifically acknowledges the continuing viability of state and local programs when those programs enforce air quality standards no less than those required by EPA regulations. *Id.* §§ 7401, 7402, 7416.

[118] Doremus & Hanemann, *supra* note 90, at 799–801.

[119] 42 U.S.C. § 7401(a)(3) ("[A]ir pollution control at its source is the primary responsibility of States and local governments . . . ."); *Id.* § 7416 (stating that the exception of some mobile sources, the CAA does not exclude state and local regulations as long as those regulations are not "less stringent" than federal standards). *See generally* Johnston, *supra* note 90, at 9–56 (detailing the problems of applying the CAA to reduce emissions to mitigate generalized climate change).

[120] Note, however, that at least one Environmental Appeals Board (EAB) decision does indicate that the EPA defers to local land use agencies related to selecting sites for CAA-regulated projects and specifically cites Section 7431 as the statutory justification for the deference. *In re* S. Shore Power, L.L.C., 2003 WL 21500413, at *16 (EAB 2003) (order denying review) (citing *In re* Haw. Elec. Light Co., 8 E.A.D. 66, 109 (EAD 1998)). In

Authority" and codified at 42 U.S.C. § 7431, reads: "Nothing in this chapter constitutes an infringement on the existing authority of counties and cities to plan or control land use, and nothing in this chapter provides or transfers authority over such land use."[121]

As noted by law professor Susan Smith, Congress twice affirmed the limits in this statutory provision during revisions and amendments to the CAA in 1977 and 1990.[122] Thus, Congress appears to have restricted the CAA specifically and repeatedly as related to land use issues.[123] Analyzing the language used in Section 7431, Congress appears to have limited the ability to use the CAA to trump local land use ordinances.[124]

Of particular importance to the analysis in this Note is the fact that Section 7431 was enacted in response to concerns that CAA regulation of indirect sources of mobile air pollutant emissions was directly interfering with local land use powers.[125] The argument derives from federal infringement on state and local government powers contrary to the Tenth Amendment.[126] The CAA power to regulate "mobile sources" included power to regulate transportation-related, mobile, indirect sources of air pollutants such as parking lots and highways, that is, sources related to transportation.[127] Section 7431 expressly limited this

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another significant case brought before the EAB, activists for environmental justice claimed the CAA should allow re-siting of an energy plant to avoid disrupting a traditional black neighborhood; the EPA cited Section 7431 as evidence that siting decisions are *per se* local decisions. Eileen Gauna, *Major Sources of Criteria Pollutants in Nonattainment Areas: Balancing the Goals of Clean Air, Environmental Justice, and Industrial Development*, 3 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 379, 393 (1996) (citing 42 U.S.C. § 7431 (1994)).

[121] 42 U.S.C. § 7431.

[122] Susan L. Smith et al., *Clean Air Act*, *in* 3 ENVIRONMENTAL LAW PRACTICE GUIDE: STATE AND FEDERAL LAW § 17.03(2)(d), at 17-89 (Michael B. Gerrard, ed.); (*see also* Clean Air Act Amendments, Pub. L. No. 101-549, 104 Stat. 2399, 2689 (1990) (codified at 42 U.S.C. § 7431 (2006)) (providing the current text of Section 7431).

[123] *See* Keith Bartholomew, *Cities and Accessibility: The Potential for Carbon Reductions and the Need for National Leadership*, 36 FORDHAM URB. L.J. 159, 197–98 (2009). In the context of transportation planning, planners hoped for coordination of land use and CAA conformity requirements despite the fact that the "Clean Air Act specifically disavows any 'infringement on the existing authority of counties and cities to plan or control land use.'" *Id.* at 197.

[124] *See* 11A STACY L. DAVIS ET AL., FEDERAL PROCEDURE, LAWYERS EDITION § 32:165 (West 2010) (describing retention of state authority as related to the CAA).

[125] Nolon, *supra* note 29, at 366–67 & n.4; Smith et al., *supra* note 122, at 17–89.

[126] The Tenth Amendment limits the federal government powers to those powers enumerated in the U.S. Constitution and reserves other powers to the states or the people. U.S. CONST. amend. X; *see also* Nolon, *supra* note 54, at 812 n.321.

[127] Robert W. Adler, *Integrated Approaches to Water Pollution: Lessons from the Clean Air Act*, 23 HARV. ENVTL. L. REV. 203, 248–50 & n.285 (1999) (providing an excellent summary of CAA effects); John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1206–07 (1995) (noting Section 7431 was enacted in response to state opposition to perceived federal encroachment on land use decision-making);

power to regulate such "indirect" mobile sources due to the inherent conflict between local land use powers and the CAA, and it also expressly stated that the CAA could not be used to interfere with local land use decisions.[128]

As analyzed above, local land use ordinances dealing with GHG emissions regulation typically address the indirect GHG emissions arising from transportation.[129] The tensions arising from the intersection of transportation-related air pollution controls under the CAA and local government powers related to land use are not new. As early as 1993, attorney Peter A. Buchsbaum presciently cautioned that despite the apparent limits imposed by Section 7431, inherent conflict exists between the CAA and local land use decision-making related to reducing vehicular traffic[130]: "Thus, despite the lack of direct land-use powers accorded to the federal government in the Clean Air Act, the Act will affect local land-use decision[-]making at least indirectly, by influencing choices for commutation and hence where housing and industry can locate . . . ."[131] According to law professor Robert Adler, the backlash and resistance by local and state governments to CAA-related interference with local land use powers contributed to the enactment and affirmation of Section 7431.[132]

In 1994, Buchsbaum and attorney Thomas C. Shearer insightfully noted the inherent potential for conflict between local land use decisions and environmental regulation as evident in the CAA: "[The CAA] states that its requirements do not override the existing authority of counties and cities over land use, notwithstanding the fact that the Clean Air Act's restrictions on commuter traffic are likely to have significant indirect land-use implications and could be the future "sleeping giant" of land-use and growth-management policy."[133]

Thus, Section 7431 apparently intentionally poses a formidable obstacle to any claim that the CAA supports federal preemption of local land use ordinances that address GHG emissions. Rather, the CAA by definition recognizes the fundamental roles of states and local

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Annotation, *What Are "Land-Use and Transportation Controls" [That] May Be Imposed, Under § 110 (a)(2)(b) of Clean Air Act of 1970 (42 USCS § 1857c-5(a)(2)(B)), to Insure Maintenance of National Primary Ambient Air Quality Standards[?]*, 30 A.L.R. FED. 156 (1976, rev. 2008) (discussing the limits on land use controls related to the CAA).

[128] DAVIS ET AL., *supra* note 124, at § 32:165; Smith et al., *supra* note 122, at 17–89.

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

[130] *See* Peter A. Buchsbaum, *Federal Regulation of Land Use: Uncle Sam the Permit Man*, 25 URB. LAW. 589, 624–25 & nn.174, 176 (1993).

[131] *Id.* at 625.

[132] Adler, *supra* note 127, at 247–48.

[133] Peter A. Buchsbaum & Thomas C. Shearer, *Report of the Subcommittee on Federal Regulation of Land Use*, 26 URB. LAW 831, 837 (1994).

governments in regulating the sources of air pollutants.[134] As an express limit on CAA application to land use decisions, Section 7431 is not surprising in this context.

C. A Suggested Test for Applying 42 U.S.C. § 7431

Section 7431 is a limit on the application of the CAA by the federal government in certain land use situations. Practically speaking, however, the statute does not appear to be an absolute bar on all land use-related decisions. While courts have not yet developed a test for applying Section 7431, the following three elements seem to be a requirement to invoke Section 7431 protection:

(1) The party seeking protection via Section 7431 must be a local government actor, such as a county or city, seeking to control land use or plan land use activities;[135]

(2) The regulation, statute, or action challenged by the local government actor must fall within the scope of the CAA;[136] and

(3) A more specific statute or regulation does not preempt the Section 7431 protection.[137]

As is evident in the suggested test, Section 7431 is not an absolute bar but is rather a compelling defensive tool for local governments in specific circumstances. These circumstances include two primary scenarios: (1) when a party asserts the CAA as the basis for imposing upon or interfering with local land use authority (imposition scenario) and 2) when a party seeks to avoid a local land use regulation that, for example, enacts GHG-related policies (avoidance scenario).[138] In either

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[134] 42 U.S.C. § 7401(a)(3) (2006).

[135] *Id.* § 7431 (2006).

[136] Here, the local government actor challenges an action, regulation, or statute that was invoked by a party (e.g., a federal government actor) claiming the CAA as the authority for the action, regulation, or statute. In this case, Section 7431 could apply because Section 7431 is a limit on actions arising from the CAA. *See, e.g., id.* §§ 7401, 7402, 7431 (2006) (defining the scope of the CAA, the express cooperative nature of the CAA, and the exemption regarding local land use activities).

[137] *See supra* Part VI.A and note 40. This prong of the suggested test includes those situations in which the CAA is attenuated or indirectly related to the regulation challenged. An attenuated application may apply, for example, in selecting a site for a power generation facility or an incinerator. In these cases, the CAA is implicated because the power generation facility may need to comply with the CAA, but the CAA is not implicated directly in the land use decision to site the facility at the specific location in conflict with local land use regulations. *E.g.*, Se. Oakland Cnty. v. City of Madison Heights, 5 F.3d 166, 168 (1993) (community impermissibly attempted to adopt local clean air standards to prevent location of an incinerator that would otherwise be permissible at the proposed site, that is, according to local land use regulations).

[138] The latter scenario is supported by implication from Section 7416 that expressly allows state, and by extension local actors, to enact air quality regulations as long as those regulations are not *less stringent* than federal standards—thus allowing state actors,

scenario, as the test above proposes, the local government body can invoke Section 7431 for protection as long as the local regulation is not preempted by a more specific statute or regulation and as long as the local regulation is directly related to land use decision-making authority (that is, it is not an attenuated application).

VII. CONCLUSION—LOCAL GOVERNMENT POWER TO REGULATE GHGS

As demonstrated, local land use policy decisions related to GHG reductions are arguably protected under the current federal statutory and regulatory structures. The protections arise from the following:

(1) Well-settled law, relying on the Tenth Amendment,[139] establishing land use as a quintessential function of local government;[140]

(2) The reluctance of the federal government when developing federal laws that preempt local land use decision-making, such as the Energy Policy Act of 2005, to interfere with the traditional balance of federalism beyond limited preemption for specifically defined purposes;[141] and

(3) The express limitation of the application of the CAA, in which the CAA is the presumptive federal means to regulate GHGs, in land use contexts through Section 7431.[142]

Together, these provisions provide compelling support for local initiatives that attempt to reduce or mitigate GHG emissions. Unless the federal government implements a new statutory and regulatory scheme to address GHGs and similar pan-jurisdictional pollutants,[143] local governments, consistent with state mandates, should have significant latitude to address GHG emissions on a local level directly using traditional land use regulatory powers.

Shannon Brown

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presumably, to adopt *more stringent* standards. 42 U.S.C. § 7416 (2006). *See supra* Part III for discussion of the relationship between state and local governments and the delegation of state police power.

[139] U.S. CONST. amend. X.

[140] *See supra* Part III.

[141] *See supra* Part III.B.

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

[143] Some argue that the CAA is not the proper structure to address GHGs. For example, Jason Scott Johnston claims that "the pollution Congress attacked in the CAA was not interregional or interjurisdictional, but primarily local." Johnston, *supra* note 90, at 13.