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SYMPOSIUM

INTRODUCTION: "WHAT IF" COUNTERFACTUALS IN CONSTITUTIONAL HISTORY

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Counterfactual reasoning is a staple of legal analysis. When juries are asked to determine whether "but for" causation exists in a tort suit, they must imagine that the defendant's wrongful conduct did not occur and decide whether the plaintiff still would have been harmed. When appellate courts review an error in a criminal trial to determine if it was harmless, they must pretend that the error never happened and ask themselves if the jury would have acquitted the defendant. And when judges construe a contract following an event that was not foreseen by the agreement, they frequently approach the case by thinking about what the parties would have done if they had known about the problem during the drafting process.

When we turn to constitutional law, counterfactuals might seem more whimsical than practical. Of course, it is fun to consider whether the Constitution would have survived if George Washington had died of the anthrax that he contracted a few months after he was inaugurated in 1789.[1] Or whether President Franklin D. Roosevelt's Court-packing plan would have become law if Justice Owen Roberts had been stubborn in the first half of 1937.[2] And exploring a fun set of topics is a perfectly good reason to hold a symposium. My claim, though, is that asking "what if" is also a handy tool for attorneys and scholars grappling with complex constitutional issues and should be embraced here just as it is in torts, criminal law, and contracts.

The most difficult challenge for constitutional lawyers is the scarcity of precedent. That assertion might sound odd. More than two centuries of constitutional practice should have produced many relevant authorities, and certainly there are some doctrinal areas that are dense. Unfortunately, that is not the case with respect to the most controversial issues. They involve extremely low probability events that need a much longer time horizon to occur enough

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I want to thank all of the panelists and the student organizers for making this Symposium such a terrific event.

1. *See* RON CHERNOW, WASHINGTON: A LIFE 586 (2010) ("[N]o sooner had the federal government been formed than its president lay in mortal peril.").

2. *See generally* JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT (2010) (providing an excellent account of the "switch in time").

times to yield meaningful guidance. A disputed presidential election that turned on the recount procedures in a single state, for instance, was the legal equivalent of a five-hundred-year flood and generated unsatisfying Supreme Court opinions partly because people felt that the Justices followed their partisan preferences in the absence of law.[3]

A common response to novel constitutional issues is the use of hypotheticals. Take the ongoing litigation over the individual health insurance mandate enacted in 2010.[4] There is no case that addresses the main claim against the provision; namely, that Congress may not require activity (or regulate inactivity) under the Commerce Clause, in large part because this is an unprecedented exercise of that power. Consequently, lawyers have spent a great amount of time arguing about whether Congress can force people to buy broccoli as a public health measure.[5] That is not because a broccoli statute is imminent. Instead, the hypothetical gives people something concrete that they can use to evaluate the legal theories being advanced to support or undercut the constitutionality of compulsory health insurance.

Counterfactuals are just another type of hypothetical. They are, though, superior to a fictional example because they are grounded in actual facts. While care must be taken to avoid making unreasonable assumptions or extrapolations in a "what if" scenario, these kinds of case studies can greatly multiply the interpretive resources available to lawyers who need help. The wide range of topics covered by the participants in this Symposium illustrate the potential of this method, which I think is destined to become more prevalent in constitutional discourse over the coming years. And even if I am wrong about that, these essays are still fun to read.

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3. *See* Bush v. Gore, 531 U.S. 98 (2000).

4. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

5. *See* Liberty Univ., Inc. v. Geithner, No. 10-2347, 2011 WL 3962915, at *40 (4th Cir. Sept. 8, 2011) (Davis, J., dissenting) ("[R]ecognizing that the uninsured's passing on $43 billion in health care costs to the insured constitutes a substantial effect on interstate commerce in no way authorizes a purchase mandate for broccoli or any other vegetable."), *petition for cert. filed*, (U.S. Oct. 7, 2011) (No. 11-438); Florida *ex rel.* Attorney Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1351 (11th Cir. 2011) (Marcus, J., concurring in part and dissenting in part) ("The parade of horribles said to follow ineluctably from upholding the individual mandate includes the federal government's ability to compel us to purchase and consume broccoli, buy General Motors vehicles, and exercise three times a week."), *petition for cert. filed*, (U.S. Sept. 27, 2011) (No. 11-400).

THE COUNTERFACTUAL THAT CAME TO PASS: WHAT IF THE FOUNDERS HAD NOT CONSTITUTIONALIZED THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS?

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INTRODUCTION

Unlike the other participants in this Symposium, my contribution explores a constitutional counterfactual that has actually come to pass. Or so I will argue it has. What if, this Essay asks, the Founding generation had *not* constitutionalized the privilege of the writ of habeas corpus?

As is explored below, in many respects, the legal framework within which we are detaining suspected terrorists in this country today—particularly suspected terrorists who are citizens[1]—suggests that our current legal regime stands no differently than the English legal framework from which it sprang some two-hundred-plus years ago. That framework, by contrast to our own, does not enshrine the privilege of the writ of habeas corpus as a right enjoyed by reason of a binding and supreme constitution. Instead, English law views the privilege as a right that exists at the pleasure of Parliament and is, accordingly, subject to legislative override. As is also shown below, a comparative inquiry into the existing state of detention law in this country and in the United Kingdom reveals a notable contrast—namely, notwithstanding their lack of a constitutionally-based right to the privilege, British citizens detained in the United Kingdom without formal charges on suspicion of terrorist activities enjoy the benefit of far more legal protections than their counterparts in this country.

The Essay proceeds as follows: Part I offers an overview of key aspects of the development of the privilege and the concept of suspension, both in England and the American Colonies, in the period leading up to ratification of the Suspension Clause as part of the United States Constitution. Part II offers an overview of the dominant understanding of how the privilege and its suspension functioned in the constitutional scheme through at least the Civil War and Reconstruction periods. Part III turns to discuss the modern view of the Suspension Clause as illustrated in recent cases arising out of the war on

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1. It is important to clarify at the outset that unless stated otherwise, the discussion herein is limited exclusively to citizens detained on domestic soil for suspected terrorist activity. Detentions involving non-citizens and extra-territorial suspensions potentially invite a number of complicating factors to the inquiry. For more discussion, see Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. (forthcoming 2012) [hereinafter Tyler, *Forgotten Core Meaning*].

terrorism.[2] Part IV then takes the reader back to England to survey the existing legal landscape for detention of suspected terrorists in that country.

I. THE UNDERSTANDING OF THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS AND ITS SUSPENSION IN ENGLISH LAW DURING THE PERIOD LEADING UP TO RATIFICATION

Article I, Section 9 provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[3] These words both enshrine a term of art from English law and provide for the limited circumstances in which the protections embodied within the privilege may be suspended—namely, "in Cases of Rebellion or Invasion."[4] Thus, there are two sides to the Suspension Clause. The Clause both contemplates a dramatic emergency power (by permitting suspension of the privilege in certain circumstances) and operates as a significant constraint on what government may do in the absence of a valid suspension (by implicitly recognizing the availability of the privilege at all other times).

As noted, in adopting the Suspension Clause, the Founding generation imported the privilege and the power to suspend it from English tradition.[5] It is no wonder, accordingly, that Chief Justice John Marshall once said of "this great writ": "The term is used in the constitution, *as one which was well understood*."[6] Determining the import of the Clause requires, in turn, ascertaining what English law understood the privilege to embody as well as how the privilege related to the concept of suspension.

In other work, I have gone back to the pre-Ratification period in England to do just this—namely, to unearth just what it was that English law during this period understood the privilege to protect and its suspension to accomplish.[7] That work concludes that in the two hundred years leading up to Ratification, the privilege had evolved to become the principal safeguard against preventive detention for criminal or national security purposes for persons who clearly fell within the protection of domestic English law[8]—including, most especially, the crown's subjects.[9] Over time, the privilege came to equate with not just a generic

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2. Parts I-III of this Essay rely heavily on my prior work in this area. *See generally* Tyler, *Forgotten Core Meaning*, *supra* note 1; Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600 (2009) [hereinafter Tyler, *Emergency Power*].

3. U.S. CONST. art. I, § 9, cl. 2.

4. *Id.*

5. *See* Tyler, *Forgotten Core Meaning*, *supra* note 1 (manuscript at 18-85).

6. *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 201 (1830) (emphasis added); *see also Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 94 (1807) (noting that "resort may unquestionably be had to the common law" to ascertain the import of the writ).

7. *See* Tyler, *Forgotten Core Meaning*, *supra* note 1 (manuscript at 23-53).

8. This Essay will use the phrases "persons within protection" and "persons owing allegiance" to convey the same idea—namely, to reference persons subject to the law of treason.

9. Tyler, *Forgotten Core Meaning*, *supra* note 1 (manuscript at 7-8).

right to due process derived from Magna Carta, but—in keeping with the evolution of the common law writ, the Petition of Right, the Habeas Corpus Act, the Declaration of Rights, and the Trial of Treasons Act[10]—the privilege came to embody a particular demand that persons within protection suspected of posing a danger to the state be charged criminally and tried in due course or discharged.[11]

Parsing English history during this period also reveals that the privilege of the writ of habeas corpus and the crime of treason forged a special link in the celebrated Habeas Corpus Act of 1679.[12] The Act granted those persons subject to the law of treason and arrested for criminal or national security purposes the right to invoke the privilege to secure discharge if not timely tried for treason or other felonies. Specifically, Section 7 of the Habeas Corpus Act commanded that where one "committed for high treason or felony" was not indicted and tried by the second succeeding court term (a period typically spanning three to six months), the prisoner "shall be discharged from his Imprisonment."[13] By this period, high treason had long been settled to comprise, among other things, "forming and displaying by an overt act an intention to kill the king"; "levying war against the king"; and "adhering to the king's enemies."[14]

As one of the leading contemporary scholars of English law instructed, English law also subscribed during this time to the position that "those who raise war against the king may be of two kinds, subjects or foreigners: the former are not properly enemies but rebels or traitors."[15] Thus, writing in the 1700s in his *History of the Pleas of the Crown*, Sir Matthew Hale observed that disloyal subjects of the Crown are to be differentiated from foreign enemies and, as such, treated as rebels or traitors.

Marrying this principle with the protections embodied in the Habeas Corpus Act resulted in a legal regime whereby the Crown could not treat English subjects like foreign enemies in times of war, but had to prosecute them within the ordinary criminal process.[16] By reason of the Habeas Corpus Act, that process encompassed a number of significant protections for those charged with high treason or a felony, including the right to a timely trial or discharge.[17] When, in the wake of the adoption of the Habeas Corpus Act in 1679, a series of

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10. *Id.* (manuscript at 32).

11. *See id.*

12. Habeas Corpus Act 1679, 31 Car. 2, c. 2 (1679).

13. *See id.* § 7. Later, Lord Holt would write in 1694 that "the design of the Act was to prevent a man's lying under accusation of treason, &c. above two terms." Crosby's Case, (1694) 88 Eng. Rep. 1167 (K.B.) 1169.

14. *See* Treason Act 1351, 25 Edw. III, St. 5, c. 2. The Edwardian statute established the law of high treason that remained largely in effect for five hundred years. *See* Tyler, *Forgotten Core Meaning*, *supra* note 1 (manuscript at 29 n.161).

15. 1 MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 159 (Sollom Emlyn ed., 1847).

16. *See generally* Tyler, *Forgotten Core Meaning*, *supra* note 1 (manuscript at 30-32).

17. *See id.* (manuscript at 28-29).

wars triggered a longstanding period of instability, Parliament adopted the practice of suspending the Act's protections as a means of freeing the executive from having to comply with its stringent requirements.

In the immediate wake of the Glorious Revolution and while fighting to retain control of the throne, William asked Parliament in 1689 to suspend habeas corpus for the very first time.[18] During this period, the dethroned James and his supporters inside and outside the realm were not inclined to accept the newly-installed William as King.[19] Instead, they remained committed to returning the Stuarts to power. For his part, James had been received at the French Court and, "aided by foreign enemies and a powerful body of English adherents, was threatening . . . the crown with war and treason."[20] In the meantime, Ireland was already in revolt and Scotland was on the verge of the same.

In response to these many threats, William sought a suspension of Section 7 of the Habeas Corpus Act for the express purpose of bringing within the law arrests on *suspicion alone*—that is, without formal charges—of treasonous activity. As his emissary to Parliament explained things, the Crown wanted the power to confine persons "committed on suspicion of Treason only" and not formally charged with criminal activity, lest they be "deliver[ed]" by habeas corpus.[21] The same objective animated later suspensions enacted by Parliament in the decades that followed in order to empower the Crown to arrest on suspicion alone and hold preventively those persons suspected of Jacobite sympathies.[22] Throughout this period, English law came to embrace the position that it was *only* by a suspension of the privilege that detention without charges of persons within protection (i.e., subjects) for criminal or national security purposes could be made lawful—even during wartime.[23]

In keeping with this understanding, Parliament enacted a series of suspensions during the Revolutionary War to legalize the preventive detention of captured American soldiers on English soil during that War. As described by

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18. *See* PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 247 (2010).

19. *See id.*

20. 2 THOMAS ERSKINE MAY, THE CONSTITUTIONAL HISTORY OF ENGLAND: SINCE THE ACCESSION OF GEORGE THIRD, 1760-1860, at 253 (1864).

21. 9 Anchitel Grey, *Debates in 1689: March 1st-9th*, GREY'S DEBATES OF THE HOUSE OF COMMONS 128-48 (1769), *available at* http://www.british-history.ac.uk/report.aspx?compid=40490 (remarks of Richard Hampden).

22. *See* Tyler, *Forgotten Core Meaning*, *supra* note 1 (manuscript at 37-51) (detailing these suspensions).

23. This explains why Blackstone wrote during this period that the default position of English law viewed it as "unreasonable to send a prisoner [to jail], and not to signify withal the crimes alleged against him." 1 WILLIAM BLACKSTONE, COMMENTARIES *137. For discussion of the decline in use of bills of attainder as a means around this rule, see Tyler, *Forgotten Core Meaning*, *supra* note 1 (manuscript at 32 n.184, 40 n.234, & 42 n.250). It is important to put to the side historical exceptions to this rule involving situations in which prosecution was not an option. *See id.* (manuscript at 15 & 17 n.88) (discussing historical exceptions, including commitment of the mentally ill).

historian Paul Halliday, the English needed to transport captured American soldiers being detained on English ships to English soil for long-term detention because of overcrowding on the ships.[24] Unlike in the Colonies, however, the Habeas Corpus Act remained in full effect in England proper[25] and as such, promised the captured rebels a timely trial on criminal charges or discharge. Indeed, for this very reason, Lord Mansfield advised the Secretary of State for America, Lord George Germain, that so long as the colonists claimed subjecthood, their commitment on English soil could only be defended against a petition for a writ of habeas corpus by sworn criminal charges presented against them.[26]

Parliament's solution? Adoption of suspension legislation applicable to "every Person or Persons who have been, or shall hereafter be seised or taken in the Act of High Treason . . . or in the Act of Piracy" during the "*Rebellion and War" that was being "openly and traitorously levied*."[27] The original 1777 Act made it explicit that its purpose was to permit the detention of American prisoners—whom the Act deemed to be "traitors"—outside the normal criminal process. Thus, Parliament provided in the legislation that it was being adopted precisely because "*it may be inconvenient in many such Cases to proceed forthwith to the Trial of such Criminals,*"—namely, the revolting colonists—"*and at the same Time of evil Example to suffer them to go at large.*"[28] Against this backdrop, one can see why once Parliament approached the point of accepting that the colonists had broken their allegiance, that body permitted the series of suspensions to lapse and in their place adopted a law declaring that colonists in custody on English soil were officially "prisoners of war," whose rights would no longer be governed by domestic law but instead the "law of nations."[29]

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24. *See* HALLIDAY, *supra* note 18, at 251.

25. For discussion of the consistent denial by the Crown of application of the Act to the American colonies, see Tyler, *Forgotten Core Meaning*, *supra* note 1 (manuscript at 48-51).

26. *See* Letter from Lord Mansfield to Lord George Germain (Aug. 8, 1776), *in* 12 DOCUMENTS OF THE AMERICAN REVOLUTION: 1770-1783, at 179, 180 (K.G. Davies ed., 1976) (contrasting American prisoners with "prisoners of war," whom, Mansfield wrote, "the King might keep . . . where he pleased").

27. An Act to impower his Majesty to secure and detain Persons charged with, or suspected of, the Crime of High Treason, committed in any of his Majesty's Colonies or Plantations in *America*, or on the High Seas, or the Crime of Piracy, 17 Geo. III, ch. 9 (1777) (emphasis added) (royal assent given March 1777).

28. *Id.* (emphasis added). Lord North, who introduced the bill, said that its adoption was necessary to empower the Crown to treat the treasonous colonists "like other prisoners of war"—that is, to permit their detention outside the criminal process. 19 THE PARLIAMENTARY HISTORY OF ENGLAND: FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 3 (T.C. Hansard ed., Johnson Reprint Corp. 1966) (1777). No such legislation was necessary in the colonies, where the Crown had steadfastly denied application of the Habeas Corpus Act. *See* Tyler, *Forgotten Core Meaning*, *supra* note 1 (manuscript at 50-51) (detailing this denial).

29. An Act for the better detaining, and more easy Exchange, of *American* Prisoners brought into *Great Britain*, 22 Geo. III, ch. 10 (1782).

II. THE EARLY AMERICAN UNDERSTANDING OF THE PRIVILEGE AND ITS SUSPENSION

The English backdrop leading up to Ratification helps put in context many of the comments made during the Constitutional Convention and Ratification debates about the Suspension Clause. In particular, the robust set of protections generally understood to run with the privilege in English law by that time helps explain why Alexander Hamilton took the position in support of Ratification that a Bill of Rights was unnecessary.[30] He expressly married the Suspension Clause with the right to a jury trial and believed, consistent with this history, that the securing of the privilege in the body of the Constitution and the fact that the writ embodied many of the constitutional protections later encompassed within the Bill of Rights—like the right to indictment and a speedy trial—rendered it such that amendments were unnecessary.[31] This backdrop also explains why Thomas Jefferson, when arguing against the recognition of any suspension power in the Constitution, pointed to the treason clause as the appropriate basis by which the government should and could proceed against persons owing allegiance who sided with the enemy in times of war.[32]

The understanding that controlled during the early days of the Republic was the same. In the absence of a suspension, as was the case, for example, during the Whiskey Rebellion, it was simply taken for granted that persons owing allegiance who took up arms against the government had to be dealt with through the criminal process. Indeed, that is how President Washington directed the insurgents during that period be treated.[33] This backdrop also explains why President Jefferson—despite his prior reluctance to embrace the concept of suspension during the Ratification debates—sought a suspension from Congress during his presidency to empower him to hold the alleged Burr conspirators in military detention without charges.[34] Once the House declined to adopt the suspension that had passed the Senate, all understood and accepted that the fate of the alleged conspirators would be resolved by the criminal process.[35]

As I also have documented extensively in other work, the same

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30. *See* THE FEDERALIST NO. 83 (Alexander Hamilton). Hamilton wrote: "trial by jury in criminal cases, aided by the habeas corpus act . . . [is] provided for, in the most ample manner . . . ." *Id.*

31. *See id.*

32. *See* Letter from Thomas Jefferson to James Madison (July 31, 1788), *in* 13 THE PAPERS OF THOMAS JEFFERSON 440, 442 (Julian P. Boyd ed., 1956). For details on the understanding of the privilege and suspension during the colonial period, which was consistent with the English backdrop, see Tyler, *Forgotten Core Meaning*, *supra* note 1 (manuscript at 57-74).

33. For details and citations, see Tyler, *Forgotten Core Meaning*, *supra* note 1 (manuscript at 76).

34. For extensive discussion, see Tyler, *Emergency Power*, *supra* note 2, at 630-37.

35. *See* Tyler, *Forgotten Core Meaning*, *supra* note 1 (manuscript at 77-85) (detailing events).

understanding of the relationship between the privilege, suspension, and allegiance also informed the formal legal framework during the Civil War and Reconstruction suspensions,[36] the only two domestic suspensions ever enacted by Congress.[37] The Reconstruction suspension, for example, followed from Congress's decision in 1871 to authorize President Grant to suspend the writ in order to combat the Ku Klux Klan in the South.[38] The authorization applied only where "the conviction of . . . offenders and the preservation of the public safety shall become in such district impracticable"[39]—that is, where the existing criminal justice framework had broken down. Such was the case in the South Carolina upcountry, a key Klan stronghold, and accordingly, President Grant suspended the writ in that area.[40] Attorney General Amos T. Akerman is reported to have remarked at the time that the Klan's actions "amount[ed] to war . . . and [could] not be effectively crushed on any other theory."[41] In the events that followed, military officials, led by Major Lewis Merrill, arrested scores of suspected Klan members.[42] As Merrill's aide in South Carolina, Louis Post, wrote, these arrests were "without warrant or specific accusation" of criminal conduct; persons were targeted based on their "presum[ed] . . . members[hip]" in the Klan.[43]

Two key points bear highlighting from this episode. First, when the suspension lapsed, it was understood that suspects could no longer be detained without charges and, accordingly, many of those in custody were referred for prosecution on federal criminal law charges, while those who were not charged were released.[44] Second, in evaluating the suspension immediately in its wake, Congress concluded "that where the membership, mysteries, and power of the organization have been kept concealed [suspension] is the most and perhaps *only* effective remedy for its suppression."[45] It goes without saying that there are

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36. *See id.*; Tyler, *Emergency Power*, *supra* note 2, at 637-55. During the Civil War period, martial law prevailed in many of the areas that saw the worst of the fighting. *See* Tyler, *Forgotten Core Meaning*, *supra* note 1 (manuscript at 93 n.574) (discussing martial law).

37. There have been two suspensions invoked in federal territories. For details, see Tyler, *Emergency Power*, *supra* note 2, at 663 & nn.311-12.

38. *See id.* at 655-62 (detailing both the Klan's reign of terror and the implementation of the suspension).

39. *Id.* at 657 (alteration in original) (citation omitted).

40. *See* Ulysses S. Grant, A Proclamation (Oct. 17, 1871), *in* 9 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 4090, 4090-92; Ulysses S. Grant, A Proclamation (Nov. 10, 1871), *in* 9 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 4093, 4093-95.

41. LOU FALKNER WILLIAMS, THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS: 1871-1872, at 44-45 (Paul Finkelman & Kermit L. Hall eds., 1996).

42. *See id.* at 49.

43. Louis F. Post, *A "Carpetbagger" in South Carolina*, 10 J. NEGRO HIST. 10, 41 (1925). For more details, see Tyler, *Emergency Power*, *supra* note 2, at 655-62.

44. *See* Tyler, *Emergency Power*, *supra* note 2, at 657.

45. H.R. REP. NO. 42-22, pt. 1, at 99 (1872) (emphasis added). In the months leading up to the suspension, Merrill had investigated the Klan in the area, but his efforts were frustrated by the

parallels to be drawn between this episode and many of the challenges posed by the threat of terrorism today.

III. THE TREATMENT OF CITIZEN "ENEMY COMBATANTS" IN THE WAR ON TERROR

Notwithstanding this backdrop, a rather profound shift took place in the twentieth century in this country away from the understanding that previously held sway regarding the limits imposed by the Suspension Clause on the government's power to hold citizens for criminal or national security purposes. Although isolating an explanation for the shift presents considerable challenges, its ramifications are much clearer.

During and following World War II, preventive national security detentions in the absence of suspension legislation—including those of citizens—have become something of an accepted practice during wartime. The most stark example of this dramatic change in course consists of the forced detention of over 70,000 American citizens of Japanese ancestry on the West Coast during World War II on the purported basis that they *might* spy on behalf of the enemy Japanese Empire.[46] This mass detention of American citizens did not follow under the imprimatur of a suspension but instead came pursuant to military orders.[47] To take another example, consider Congress's decision during the Cold War to adopt the Emergency Detention Act of 1950 in which it disclaimed that it was suspending habeas corpus[48] but also authorized the President to declare an "internal security emergency" and detain individuals—including citizens—without charges based solely on the executive's belief that they were *likely* to engage in spying or sabotage on behalf of our enemies.[49] Recent legislative proposals seek to revive the equivalent of this law to deal with suspected terrorists, whether they be citizens or non-citizens.[50]

Even before recent legislative initiatives, many persons, including citizens, were detained as material witnesses in the immediate wake of the devastating attacks of September 11, 2001.[51] And, as part of the war on terrorism that

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secrecy and compartmentalization of the organization. *See* David Everitt, *1871 War on Terror*, AM. HIST., June 2003, at 26, 30.

46. *See* Stephen Breyer, *Making Our Democracy Work: The Yale Lectures*, 120 YALE L.J. 1999, 2019-21 (2011) (detailing events of the period).

47. *See* Tyler, *Forgotten Core Meaning*, *supra* note 1 (manuscript at 10-12) (detailing events).

48. Emergency Detention Act of 1950, 50 U.S.C. § 826 (1951) (repealed 1971).

49. *Id.* §§ 811-26.

50. Specifically, Senator John McCain, along with others, introduced a bill last year that approved the detention without trial of what the bill called "unprivileged enemy belligerents," a category expressly inclusive of citizens. *See* Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010, S. 3081, 111th Cong. § 5 (2010); *see also* H.R. 4892, 111th Cong. § 5 (2010).

51. *See* Tyler, *Forgotten Core Meaning*, *supra* note 1 (manuscript at 12) (discussing these

followed those attacks, the government has taken numerous individuals as prisoners and labeled them "enemy combatants."[52] At one point, this category included at least two citizens whose cases drew considerable public attention and eventually reached the Supreme Court: José Padilla and Yaser Hamdi.[53]

In 2002, the government arrested Padilla on American soil when he deplaned at O'Hare International Airport en route from Pakistan (via Switzerland).[54] After a short stint as a material witness, the government moved Padilla to military detention and held him without criminal charges for over three years[55] based on the President's untested assertion that Padilla was working with al Qaeda and allegedly was planning to detonate a "dirty bomb."[56] During this time, the government extended considerable efforts to preclude Padilla from consulting with counsel.[57] Hamdi, in turn, was captured overseas by allied forces in Afghanistan (specifically, the Northern Alliance), who then turned him over for a bounty to the United States military.[58] The military initially transported Hamdi to Guantánamo Bay for detention and then, upon learning that he was a United States citizen, it transferred him to the United States for continued military detention. As in Padilla's case, the government took the position that Hamdi's status as an "enemy combatant" justified "holding him in the United States indefinitely—without formal charges or proceedings—unless and until it ma[de] the determination that access to counsel or further process [wa]s warranted."[59]

Both Padilla and Hamdi petitioned for writs of habeas corpus, arguing that their detention without charges violated the Constitution.[60] In both cases, the government defended the lawfulness of the petitioners' detention as enemy combatants pursuant to both the executive's inherent authority to command the military and authority conferred upon the executive by Congress in the Authorization for Use of Military Force (AUMF), which Congress had enacted in the immediate wake of the attacks of September 11, 2001.[61] The Supreme

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detentions and the surrounding legal landscape).

52. *See id.*

53. *Id.*

54. *See* Rumsfeld v. Padilla, 542 U.S. 426, 430 (2004).

55. *See id.* at 430-32.

56. *See* Memorandum from George W. Bush, President of the U.S., to Donald Rumsfeld, Sec'y of Def. (June 9, 2002), *reprinted in* Padilla v. Hanft, 423 F.3d 386, 389 (4th Cir. 2005).

57. *See Padilla*, 542 U.S. at 464-65 (Stevens, J., dissenting) (arguing that the Court should hear Padilla's petition and that "[a]ccess to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process"). For more details on Padilla's case, see generally Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013 (2008).

58. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004).

59. *Id.* at 510-11.

60. *Id.* at 511; *Padilla*, 542 U.S. at 432.

61. Pub. L. No. 107-40, 115 Stat. 224 (2001) (granting the executive the authority to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001

Court reached the merits only in Hamdi's case, finding procedural problems with Padilla's case.[62] In *Hamdi*, a plurality led by Justice O'Connor concluded that the constitutional promise of the privilege posed no barrier to the government holding a citizen without criminal charges for the duration of a war—even one such as the war on terrorism, which, she acknowledged, may have no end.[63] Indeed, without any apparent qualification, the plurality concluded: "*There is no bar to this Nation's holding one of its own citizens as an enemy combatant.*"[64] To reach this holding, the plurality relied heavily upon Ex parte *Quirin*,[65] a World War II decision in which the Court had concluded that "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of . . . the law of war."[66]

All the same, the plurality concluded that Hamdi was entitled to some opportunity to argue that his initial classification as an enemy combatant was erroneous, though the plurality declined to rule out that the government could rely upon hearsay evidence in justifying a detention and left open the possibility that a military commission could serve this function.[67] *Hamdi* presents the only occasion on which the Supreme Court has opined on the constraints embodied in the constitutional privilege during wartime, for the earlier litigation in *The Japanese Cases* centered on issues of race and ethnicity.[68]

As already noted, Hamdi had been captured overseas by allied forces during a war of international character. Accordingly, it is not entirely clear how his case compares to the historical examples that I have discussed above, or to Padilla's case for that matter.[69] To the extent that the *Hamdi* Court's conclusion that citizens may be held as enemy combatants in the absence of a suspension governs Padilla's case—a case in which the government arrested a citizen suspected of

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. . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons").

62. *See Padilla*, 542 U.S. at 451 (dismissing Padilla's habeas petition as filed in the wrong jurisdiction).

63. *Hamdi*, 542 U.S. at 519 (O'Connor, J.).

64. *Id.* (emphasis added). The brief explanation given by Justices Souter and Ginsburg of why they joined Justice O'Connor's opinion to make a Court in *Hamdi* leaves open whether they fully subscribed to this aspect of Justice O'Connor's opinion. *See id.* at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (explaining that they joined this part of Justice O'Connor's opinion for the purpose of making a Court).

65. 317 U.S. 1 (1942).

66. *See Hamdi*, 542 U.S. at 519 (alterations in original) (quoting *Quirin*, 317 U.S. at 37-38).

67. *See id.* at 509 (O'Connor, J.); *id.* at 533-34 ("Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding."); *id.* at 538 ("There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal.").

68. *See* Tyler, *Forgotten Core Meaning*, *supra* note 1 (manuscript at 9-12, 100-02).

69. For greater discussion of the possible distinctions between the two cases, see *id.* (manuscript at 102-10).

being a terrorist on domestic soil, far from a formal battlefield setting, and then referred him to military custody—it is an indication of just how far removed the Supreme Court's interpretation of the "privilege" enshrined in the Suspension Clause is from the conception of the privilege that controlled at the time of the Founding.

Recall the Jacobite sympathizers during William's struggles to retain the throne who were feared to be plotting his undoing. To hold such persons preventively during recurrent periods of unrest and war with France, William sought and regularly received a suspension of Section 7 of the Habeas Corpus Act from Parliament.[70] The same objectives animated the Reconstruction suspension targeting the Klan and its reign of terror.[71] It is frankly hard to see how Padilla's case is any different from these historical examples, yet applying the reasoning of *Hamdi* to Padilla's case suggests that Padilla's detention is lawful and may be authorized by ordinary legislation. In short, in this country, under the reasoning of *Hamdi*, suspension is no longer understood as a prerequisite to legalize such extraordinary detention.

IV. THE DETENTION OF TERRORISM SUSPECTS TODAY IN THE UNITED KINGDOM

This brings us back to the United Kingdom. In the period following ratification of the United States Constitution, England witnessed frequent suspensions and the robust protections long associated with the privilege of habeas corpus came under considerable and regular fire in English law.[72] Given the absence of a binding and supreme constitution in the English legal framework preserving the privilege, along with the absence of strict limitations on the circumstances within which a suspension could take place, it is easy to see how, over time, a natural and predictable reaction by Parliament to alleged threats to national security moved beyond the suspension model. Thus, in the twentieth century, with the rise in violence at the hands of the Irish Republican Army (IRA) and Loyalist factions, Parliament repealed Section 7 of the Habeas Corpus Act and authorized by ordinary legislation the temporary preventive detention of suspected terrorists.[73]

A turning point in the story of habeas corpus in England came earlier, however. During the world wars, "despite the almost religious prestige of habeas corpus, the government assumed detention powers that were essentially

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70. *See supra* notes 21-23 and accompanying text.

71. *See supra* notes 36-43 and accompanying text.

72. *See* 2 MAY, *supra* note 20, at 255 (describing the effect of repeated suspensions as "any subject could now be arrested on suspicion of treasonable practices, without specific charge or proof of guilt: his accusers were unknown; and in vain might he demand public accusation and trial").

73. *See* Act of 1971, c. 23, § 56(4), sch. 11, pt. IV (repealing 31 Car. 2, c. 2, § 7); Stephen J. Schulhofer, *Checks and Balances in Wartime: American, British and Israeli Experiences*, 102 MICH. L. REV. 1906, 1931-34 (2004) (detailing legal treatment of IRA violence).

unchecked."[74] During both wars, Parliament vested the Home Secretary with virtually unconstrained authority to detain persons for the public safety and in defense of the realm.[75] Pursuant to this authority, many were detained, including numerous citizens and, during World War II, even one sitting member of Parliament.[76] During both periods, moreover, the House of Lords upheld such detentions as lawful.[77] In the wake of the Second World War, many questioned whether more limited methods would have sufficed to address the dangers of the times. Even Churchill, once a supporter of such measures, came to conclude that "[t]he power of the Executive to cast a man into prison without formulating any charge known to the law, and particularly to deny him the judgement [sic] of his peers, is in the highest degree odious and is the foundation of all totalitarian government . . . ."[78]

It was with the onset of IRA and Loyalist violence stemming from the conflict over Northern Ireland that the U.K.'s modern framework for detention of terrorists in the absence of charges really took hold, although its roots date all the way back to the partitioning of Ireland in 1922. By 1971, IRA and Loyalist violence had reached dramatic proportions. At that point, the U.K. government declared a state of emergency and invoked the emergency powers that had been provided for in the original laws governing the partition of Ireland.[79] Pursuant to those powers, the government claimed the right to hold persons for a range of purposes and, in extreme cases, for an indefinite period upon an executive determination that "internment was expedient in the interests of the preservation of peace."[80] During this same period, as already noted, Parliament repealed what was originally Section 7 of the Habeas Corpus Act in the Courts Act of 1971.[81] Together, these developments rendered habeas—for those detained for "the preservation of peace"—essentially meaningless.

As the violence relating to Northern Ireland continued, the U.K. government stepped back from the most aggressive of emergency regulations in 1972 and adopted a new regime that was slightly more protective of suspects. Parliament,

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74. Schulhofer, *supra* note 73, at 1935.

75. *See id.*

76. *See id.*

77. *See* Liversidge v. Anderson, [1942] A.C. 206 (H.L.) (appeal taken from Eng.) (concluding that detention of British subject under Regulation 18B, enacted pursuant to the Emergency Powers (Defence) Act of 1939, that followed from the Home Secretary's determination that he was "of hostile origin or associations" was not subject to judicial review); King v. Halliday, [1917] A.C. 260 (H.L.) (appeal taken from Eng.) (upholding detention of naturalized British subject without charges pursuant to Regulation 14B of the Defence of the Realm Regulations, 1914).

78. Schulhofer, *supra* note 73, at 1936 (quoting A.W. BRIAN SIMPSON, IN THE HIGHEST DEGREE ODIOUS frontispiece, vii, 408 (1992)).

79. *See id.*

80. *See id.* at 1936 (citing Ireland v. United Kingdom, 2 Eur. Ct. H.R. (ser. B) 25, ¶¶ 81-84 (1978)).

81. *See* Act of 1971, c. 23, § 56(4), sch. 11, pt. IV.

in turn, renewed this regime every year through the 1990s.[82] With the rise of new threats of terrorism in the period leading up to the attacks of September 11, 2001, Parliament modified the U.K. legal framework for dealing with terrorism again.

Although still providing for temporary detention of suspected terrorists without charges, current U.K. law no longer encompasses the open-ended grant of authority to detain as it did at the height of violence relating to the status of Northern Ireland.[83] Specifically, under current law, preventive or investigative detention is provided for in the Terrorism Act of 2000[84] and control orders are permitted under the Prevention of Terrorism Act of 2005.[85] These acts apply to both citizens and foreigners. Both laws authorize enormous inroads on individual liberty outside of the criminal process. Notably, however, the Terrorism Act also includes important—and substantial—limitations on this power. The most restrictive of control orders, moreover, are subject to continuing judicial review.

The Terrorism Act of 2000 provides the police with the powers of both warrantless arrest[86] and pre-charge detention.[87] The Act allows police to arrest and detain a person without warrant or charge for up to forty-eight hours if the officer reasonably suspects the person of being a terrorist.[88] To continue to hold

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82. For details, see Schulhofer, *supra* note 73, at 1936-43. Note that the European Court of Human Rights (ECHR) ruled that many of these practices violated various aspects of the European Convention on Human Rights ("Convention"), to which the United Kingdom is a signatory. Because the U.K. had given formal notice of intent to derogate from the relevant requirements and because there was little dispute over the fact that conditions amounted to a "public emergency threatening the life of the nation," the ECHR focused its ruling on the proportionality of the measures adopted and ultimately deferred to the U.K.'s choice of detention practices for addressing the emergency. *See Ireland*, 2 Eur. Ct. H.R. at 51, 90-92, 96-97.

83. Note that current U.K. law normally requires that those arrested must be charged or released within twenty-four or thirty-six hours, depending on the seriousness of the offense, or at most ninety-six hours with judicial approval. *See* Police and Criminal Evidence Act, 1984, c. 60, §§ 41-42 (Eng.). In 2004, the House of Lords declared the indefinite detention provision of Section 23 of the Anti-terrorism, Crime and Security Act of 2001, which applied only to foreign nationals suspected of terror-related activities who could not be legally deported, incompatible with Article 5 of the European Convention on Human Rights, rejecting the government's argument that indefinite detention was "required by the exigencies of the situation." *See* A v. Sec'y of State for the Home Dep't [2004] UKHL 56, [2005] 2 A.C. 68 (H.L.) [43] (appeal taken from Eng.); *see also supra* note 82 and *infra* note 104 (discussing the Convention).

84. Terrorism Act 2000, c. 11 (Eng.), *available at* http://www.legislation.gov.uk/ukpga/2000/11/contents.

85. Prevention of Terrorism Act 2005, c. 2 (Eng.), *available at* http://www.legislation.gov.uk/ukpga/2005/2/contents.

86. *See* Terrorism Act 2000, c. 11, § 41.

87. *See id.* c. 11, sch. 8, Part III (as amended), *available at* http://www.legislation.gov.uk/ukpga/2000/11/schedule/8/part/III.

88. *See id.* c. 11, § 41 (as amended) ("A constable may arrest without a warrant a person whom he reasonably suspects to be a terrorist.").

a person without charges beyond the forty-eight hours, the police must petition to a "judicial authority" for an extension of the detention.[89]

A judicial authority may grant the extension warrant only if he or she is satisfied that:

> (1)(b) the investigation in connection with which the person is detained is being conducted diligently and expeditiously[; and]
> (1A) The further detention of a person is necessary . . .—
> (a) to obtain relevant evidence whether by questioning him or otherwise;
> (b) to preserve relevant evidence; or
> (c) pending the result of an examination or analysis of any relevant evidence or of anything the examination or analysis of which is to be or is being carried out with a view to obtaining relevant evidence.[90]

These requirements call upon the police to inform the court of extensive details regarding the investigation and are drafted with an eye toward the eventual filing of criminal charges. Experience shows, moreover, that the courts do not always grant such petitions.[91]

As originally conceived, the Terrorism Act permitted such detentions to be extended only once for up to seven days; amendments then extended this period first to fourteen and later to twenty-eight days.[92] In January 2011, the law reverted back to a maximum period of fourteen days of detention under this framework.[93] It remains the case within this framework that the prisoner is

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89. The definition of a "judicial authority" varies by jurisdiction within the United Kingdom. *See id.* sch. 8, pt. III, § 29(4).

90. *Id.* sch. 8, pt. III, § 32.

91. *See* Clare Feikert, *Pre-Charge Detention for Terrorist Suspects: United Kingdom*, LIBR. CONGRESS (Oct. 2008), *available at* http://www.loc.gov/law/help/uk-pre-charge-detention.php.

92. Under the original version of the Terrorism Act of 2000, detention was authorized for no more than seven days. *See* Terrorism Act 2000, sch. 8, pt. III, § 29(3A). This period was extended to fourteen days under Criminal Justice Act 2003, c. 44, § 306, and later extended again to twenty-eight days under Terrorism Act 2006, c. 11, § 23. The twenty-eight-day period reflected a compromise reached in reaction to the Labour Party's introduction of a proposal to extend the period to ninety days. *See* Matthew Tempest*, Blair Defeated on Terror Bill*, GUARDIAN, Nov. 9, 2005, http://www.guardian.co.uk/politics/2005/nov/09/uksecurity.terrorism. When available, the extension from fourteen to twenty-eight days required approval by a High Court judge. *See* Terrorism Act 2006, c. 11, § 23(7).

93. *See* SEC'Y OF STATE FOR THE HOME DEP'T, REVIEW OF COUNTER-TERRORISM AND SECURITY POWER: REVIEW FINDINGS AND RECOMMENDATIONS 7, 13-14 (Jan. 2011) [hereinafter FINDINGS], *available at* http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/review-findings-and-rec?view=Binary (noting that the most recent extension of the twenty-eight-day period expired on January 24, 2011, and recommending that Parliament keep the maximum period of pre-charge detention set at fourteen days but draft emergency legislation to have on hand as needed to extend the period to twenty-eight days in the future). An attempt to

guaranteed review by a judge every seven days.[94] During this period, moreover, the detainee enjoys a right to both consult with and be represented by counsel at the extension hearings.[95]

Another tool to combat terrorism is found in the Prevention of Terrorism Act of 2005, which authorizes control orders. Such orders resemble highly restrictive orders of house arrest and/or monitoring that impose considerable restraints upon freedom of movement and association. The legislation providing for them was "designed to address the threat from a small number of people engaged in terrorism . . . whom the Government could neither successfully prosecute nor deport."[96] Since adoption of the Prevention of Terrorism Act of 2005, some forty-eight persons have been subjected to control orders, a group that includes twenty British citizens.[97] Significantly, there is no formal restriction on the length of time that a control order may be in place.[98] Those control orders that are deemed to "restrict" rather than "deprive" liberty are subject to only limited judicial review,[99] whereas those deemed to "deprive" liberty (namely, those that involve more severe restrictions on individual freedoms) require more rigorous judicial review to ensure that "on the balance of probabilities . . . the controlled person is an individual who is or has been involved in terrorism-related activity."[100] In the latter context, judicial review is called for every six months, but just as with restrictive orders, renewals apparently may proceed indefinitely.[101] Control orders are, in this respect, an important weapon in the

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extend the twenty-eight-day period to forty-two days failed in 2008. *See, e.g.*, Nico Hines & David Byers, *Gordon Brown's Last-Ditch Appeal Fails as Lords Reject 42-day Bill*, THE TIMES (LONDON) (Oct. 13, 2008), *available at* http://www.timesonline.co.uk/tol/news/politics/article4935478.ece.

94. *See* Terrorism Act 2000, c. 11, sch. 8, pt. III, § 36.

95. *See id.* § 33. Note, however, that the judicial authority may exclude the detainee and his or her counsel during the presentation of sensitive material. *See id.* §§ 33(3), 34.

96. FINDINGS, *supra* note 93, at 36. "The objective of the orders was to prevent these individuals engaging in terrorism-related activity by placing a range of restrictions on their activities, including curfews, restrictions on access to associates and communications and, in some cases, relocation." *Id.* Parliament enacted the control orders regime partially in response to the House of Lords decision in *A v. Secretary of State for the Home Department*, finding portions of the Anti-terrorism, Crime and Security Act of 2001 incompatible with Article 5 of the European Convention on Human Rights. *See supra* note 83 (discussing the case).

97. *See* FINDINGS, *supra* note 93, at 36.

98. *See* Prevention of Terrorism Act 2005, c. 2, § 4 (Eng.). There are two kinds of control orders: derogating and non-derogating. *See id.* The former are so named because they impose obligations that require derogating from the European Convention on Human Rights, *see id.* § 1(10); *supra* note 82; *infra* note 104 (discussing the Convention), and therefore require more extensive procedures to impose by contrast to non-derogating orders.

99. *See* Prevention of Terrorism Act 2005, c. 2, § 2.

100. *See id.* § 4. The governing law sets out in greater detail the factors that the judge should consider. *See id.* These more restrictive control orders are derogating orders. *See supra* note 98.

101. *See* Prevention of Terrorism Act 2005, c. 2, §§ 4, 6, 8-12.

government's arsenal for fighting terrorism.[102] The most restrictive of control orders, however, are subject to ongoing judicial review. Notably, moreover, the Secretary of State for the Home Department recently recommended that the current control order regime be repealed, observing that the "system is neither a long term nor an adequate alternative to prosecution, which remains the priority."[103]

The key point for present purposes is this: by reason of the fact that English law has never elevated the privilege of habeas corpus to formal constitutional status and in light of the repeal of what was originally Section 7 of the 1679 Habeas Corpus Act, Parliament clearly possesses the power to authorize preventive detention without charges of British citizens through ordinary legislation. Put another way, Parliament may achieve this end through legislation that is not formally structured as a suspension of the privilege.[104] This practice is directly at odds with the conception of the privilege that held sway in the late seventeenth and eighteenth centuries and the model of suspension that emerged during that same period. Because, however, English law never enshrined the privilege of habeas corpus in a binding, supreme constitution, parliamentary override always remained a possibility. This being said, the current U.K. legal framework only permits the government to detain suspected terrorists without charges for a very brief period of time (currently, no more than fourteen days) and requires timely and recurring judicial review of both detentions and the most restrictive of control orders.[105]

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102. The House of Lords has ruled that some of the restrictions in non-derogating control orders are so restrictive as to amount to a deprivation of liberty in contravention of Article 5 of the Convention and are, accordingly, incompatible. *See, e.g.*, Sec'y of State for the Home Dep't v. JJ [2007] UKHL 45, [2008] 1 A.C. (H.L.) [385] (appeal from Eng.); *see* also *supra* note 82; *infra* note 104 (discussing the Convention). Imposing these restrictions therefore requires that the Home Secretary proceed through the process of obtaining a derogatory control order.

103. *See* FINDINGS, *supra* note 93, at 41.

104. To be sure, the Convention continues to impose significant external constraints on English law and, under the U.K.'s Human Rights Act of 1998, U.K. courts enjoy the ability to declare domestic law "incompatible" with the Convention. *See* Human Rights Act 1998, c. 42, § 4 (Eng.); *see, e.g.*, A v. Sec'y of State for the Home Dep't, [2004] UKHL 56, [2005] 2 A.C. 68 (H.L.) [43] (appeal taken from Eng.) (declaring the Anti-terrorism, Crime and Security Act of 2001 incompatible with the Convention). Rulings by the ECHR stress the importance of timely judicial review. Thus, one decision held that in this context fourteen days of detention without review was impermissible, even where Turkey had derogated from the Convention. *See* Aksoy v. Turkey, 23 Eur. Ct. H.R. 553, 589-90 (1996). Further, the ECHR has emphasized the need to resist major departures from the standard criminal justice system's definition of "reasonableness" in assessing the threat posed by suspects. *See, e.g.*, Fox, Campbell & Hartley v. United Kingdom, 13 Eur. Ct. H.R. 157, 167 (1990). Thus, it is reasonable to suggest that the Convention and ECHR have influenced recent developments in U.K. law.

105. As noted above, moreover, current U.K. law does not draw sharp distinctions between British citizens and foreigners.

CONCLUSION

Two major conclusions may be drawn from comparing the development of English and American law in the wake of Ratification with respect to the protections embodied in the privilege of the writ of habeas corpus, at least as those protections were understood in the late eighteenth century.

First, reading the Supreme Court's decision in *Hamdi* to control cases involving domestically-captured citizens who are suspected terrorists suggests that the original impetus for the Suspension Clause essentially has been forgotten, if not consciously discarded. In its place, we now appear to have a legal regime that places the ultimate decision whether to authorize wartime preventive detention of citizens for national security purposes in the hands of a legislature largely free of constitutional restraints. In so doing, our legal tradition has come in many respects to resemble the English framework that has always treated the privilege and the protections it historically embodied as existing in considerable measure by legislative grace.[106] In this respect, we have witnessed a constitutional counterfactual that has come to pass—namely, the Founders' deliberate choice to constitutionalize the privilege and the protections that it embodied at the Founding and to limit its suspension to specific extraordinary situations has been discarded in favor of a regime that renders it far easier for the political branches to entrench upon previously protected liberty interests during times of war.[107]

Second, a very interesting conclusion may be drawn from comparing the treatment of terrorism suspects today under English and American law. Specifically, those held without charges in the U.K. under its Terrorism Act (both citizens and foreign nationals) appear to enjoy greater liberty protections than their American citizen counterparts in this country. This conclusion follows from the fact that detentions in the United Kingdom are strictly cabined in duration, subject to regular judicial review, and often matched with a robust right to counsel.[108] By contrast, the plurality in *Hamdi* suggested that citizen-enemy combatants potentially could be held without charges for the duration of the war on terrorism—a war that may never end—once an arbiter determines that sufficient evidence exists to support the government's allegations that an individual may be a terrorist.[109]

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106. Concededly, this suggestion may give too little credit to the entrenched, though unwritten, principles of the English Constitution.

107. For a much greater explication of this thesis, see generally Tyler, *Forgotten Core Meaning*, *supra* note 1.

108. In addition, the U.K. government has a greater record of bringing suspects in terrorist attacks to trial on criminal charges than does the United States, which has yet to try the suspects in custody for plotting the attacks of September 11. *See* Raymond Bonner, *2 British Anti-terror Experts Say U.S. Takes Wrong Path*, N.Y. TIMES, Oct. 22, 2008, at A12, *available at* http://www.nytimes.com/2008/10/22/world/europe/22britain.html.

109. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 519-21 (2004) (concluding that so long as the relevant conflict continued, the government could continue to hold an enemy combatant captured

In short, not only has the counterfactual "what if the Founders had not constitutionalized the privilege?" come to pass, but citizens in this country today appear to enjoy even less protection from preventive detention than their counterparts in the U.K. who do not possess the constitutional guarantee of the privilege of habeas corpus.[110]

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under the auspices of the AUMF).

110. This conclusion raises a host of interesting questions over both the value and adaptability of constitutional regimes, some of which I hope to explore in future work.

WHAT IF *KELO V. CITY OF NEW LONDON* HAD GONE THE OTHER WAY?

ILYA SOMIN*

INTRODUCTION

Kelo v. City of New London[1] is one of the most controversial decisions in U.S. Supreme Court history. The *Kelo* Court held that the Public Use Clause of the Fifth Amendment allows government to condemn private property and transfer it to other private parties for purposes of "economic development."[2] The ruling resulted in an unprecedented political backlash, with some eighty percent of the public opposing the decision and a record forty-three states enacting eminent domain reform legislation in its aftermath.[3]

This Article considers the question of what might have happened if the Supreme Court decided *Kelo v. City of New London* in favor of the property owners. What might a ruling in favor of the owners have said? Would the cause of property rights have been better or worse off with such an outcome? Given that a contrary decision in *Kelo* might have prevented the political backlash that followed the real-world ruling in favor of the government, is it possible that property rights advocates actually won more by losing *Kelo* than they could have achieved by winning it?

Such counterfactual analysis may seem frivolous. After all, *Kelo* came out the way it did. What use is there in speculating about alternative outcomes that never happened? But counterfactual speculation is, in fact, useful in understanding constitutional history. Any assessment of the impact of a given legal decision depends on at least an implicit judgment as to the likely consequences of a ruling the other way. Analysis can be improved by making these implicit counterfactual assumptions clear and systematically considering their implications.

Part I briefly describes the *Kelo* case and its aftermath, focusing especially on the massive political backlash. That backlash led to numerous new reform laws. However, many of them turned out to be largely symbolic, purporting to forbid economic development takings but actually allowing them to continue under other names.[4] This has important implications for assessing the possible implications of a decision in favor of the property owners.

Part II discusses the potential value of a counterfactual analysis of *Kelo*. It could help shed light on a longstanding debate over the effects of Supreme Court

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1. 545 U.S. 469 (2005).

2. *Id.* at 478-86.

3. Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100, 2111-15 (2009) [hereinafter Somin, *Limits of Backlash*].

4. *See id.* at 2120-30.

decisions on society. Scholars such as Gerald Rosenberg and Michael Klarman have argued that court decisions have little impact, mostly protecting only those rights that the political branches of government would protect of their own accord.[5] Others contend that this analysis underrates the potential effect of Supreme Court decisions.[6]

Part III considers the possible legal effect of a ruling in favor of the property owners. Such a decision could have taken several potential forms. One possibility is that the Court could have adopted the view advocated by the four *Kelo* dissenters: that economic development condemnations are categorically forbidden by the Public Use Clause.[7] This would have provided strong protection to property owners and significantly altered the legal landscape. However, "blight" condemnations would have been allowed to continue. And it is not entirely clear whether the dissenters' approach would forbid condemnations under very broad definitions of "blight" of the sort that have been adopted by many states. Nonetheless, a decision categorically forbidding economic development takings would have greatly strengthened judicial protection for property rights.

It is also possible that the Court could have decided in favor of the property owners on one of two narrower grounds. The first of these would have invalidated the taking because there was no clear plan as to what should be done with the condemned property. Under this approach, state and local governments would be much less constrained than under a categorical ban on economic development condemnations. Most economic development condemnation could still be upheld so long as the condemning authority has a clear plan as to how the property will be used.

Another possible narrow ground for striking down the taking would be to hold that it is invalid because the officially announced "public purpose" was actually "pretextual." There was considerable evidence that the New London condemnations were instigated for the benefit of the Pfizer Corporation rather than to advance the public interest. Whether such a holding would have significantly constrained future condemnations depends very much on the standards that the Court adopted for determining whether a taking counts as pretextual or not. Overall, however, it is unlikely that the Court would have adopted a pretext standard that imposed more than relatively modest restrictions on state and local governments. In the real world, *Kelo* ruled that pretextual

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5. *See, e.g.*, MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 5-7 (2004); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 9-36 (2d ed. 2008); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

6. *See, e.g.*, R. SHEP MELNICK, BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS (1994); David E. Bernstein & Ilya Somin, *Judicial Power and Civil Rights Reconsidered*, 114 YALE L.J. 591 (2004) (reviewing MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004)).

7. *See* Kelo v. City of New London, 545 U.S. 469, 499-504 (2005) (O'Connor, J., dissenting); *id.* at 506-21 (Thomas, J., dissenting).

takings are still unconstitutional, but also concluded that the New London condemnations were not pretextual.[8] Since *Kelo*, state and federal courts have differed widely among themselves in their efforts to define the concept of "pretext."[9]

Part IV weighs the potential political impact of a decision favoring the property owners. Such an outcome might have forestalled the massive political backlash that *Kelo* caused. Ironically, a narrow ruling in favor of the owners that did not significantly constrain future takings might have left the cause of property rights worse off than defeat did. That could have occurred if the narrow ruling avoided angering public opinion, thereby preventing a political backlash. On the other hand, a strong ruling categorically banning economic development takings would likely have done more for property rights than the backlash did, especially considering the uneven nature of the latter. Such a decision would have protected property owners nationwide, while the backlash left some key states with no reforms and many others with only cosmetic ones. Furthermore, political movements sometimes build on legal victories, as well as defeats, as previously happened the case of the Civil Rights movement in the wake of *Brown v. Board of Education*.[10] It is possible that property rights advocates could have similarly exploited a victory in *Kelo*.

Public knowledge is a key factor in each of these scenarios. In previous work, I have argued that the public's "rational ignorance" about politics explains many key aspects of *Kelo* and its aftermath.[11] For example, it explains why there was so little public anger about takings before *Kelo* (most of the public was simply unaware of the problem) and why so many of the new reform laws were ineffective (interest groups and politicians exploited the public's inability to tell the difference between genuine and purely cosmetic reforms).[12] The political effect of a pro-property rights decision in *Kelo* would also depend in large part on the extent to which it would influence a generally inattentive public.

I. *KELO* AND ITS AFTERMATH

A. The Decision

Kelo arose from the condemnation of ten residences and five other properties as part of a 2000 development plan in New London, Connecticut.[13] Planners

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8. *See id.* at 478-86.

9. For a detailed discussion of the disagreements in this area, see Ilya Somin, *The Judicial Reaction to* Kelo, 4 ALB. GOV'T L. REV. 1, 25-35 (2011) (Introduction to the Symposium on Eminent Domain in the United States) [hereinafter Somin, *Judicial Reaction*].

10. 349 U.S. 294 (1955).

11. Somin, *Limits of Backlash*, *supra* note 3, at 2154-70.

12. *See id.* at 2163-65.

13. *Kelo*, 545 U.S. at 475. For a detailed history of the development project that led to the litigation, see JEFF BENEDICT, LITTLE PINK HOUSE: A TRUE STORY OF DEFIANCE AND COURAGE (2009).

intended to transfer the property to private developers for the stated purpose of promoting economic growth in the area.[14] Unlike in many other takings cases, none of the condemned tracts were alleged to be "blighted or otherwise in poor condition."[15] The key constitutional question arising in the case was whether a taking that transferred property from one private owner to another in order to promote economic development qualifies as a "public use" under the Fifth Amendment's Public Use Clause. The Clause has historically been interpreted as permitting property to be taken only for a "public use."[16] The Connecticut Supreme Court upheld the *Kelo* takings against both state and federal constitutional challenges in a narrow 4-3 decision concluding that "economic development" is indeed a public use.[17]

In a closely divided 5-4 ruling, the U.S. Supreme Court upheld the New London takings and endorsed the economic development rationale for condemnation.[18] Justice John Paul Stevens's majority opinion defended a "policy of deference to legislative judgments in this field."[19] The Court rejected the property owners' argument that the transfer of their property to private developers rather than to a public body required a heightened degree of judicial scrutiny.[20] It also refused to require the City to provide any evidence that the takings were likely to actually achieve the claimed economic benefits that provided their justification in the first place.[21] On all these points, the *Kelo* majority emphasized that courts should not "second-guess the City's considered judgments about the efficacy of [the] development plan."[22]

Despite this result, *Kelo* may have actually represented a slight tightening of judicial scrutiny relative to earlier cases such as *Hawaii Housing Authority v. Midkiff*, which held that the public use requirement is satisfied so long as "the exercise of the eminent domain power is rationally related to a conceivable public purpose."[23] Moreover, the fact that four Justices not only dissented but actually concluded that the economic development rationale should be categorically forbidden shows that the judicial landscape on public use had changed.[24] Justices Sandra Day O'Connor and Clarence Thomas both wrote forceful dissents chiding the majority for gutting the Public Use Clause and arguing that economic

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14. *Kelo*, 545 U.S. at 473-75.

15. *Id.* at 475.

16. U.S. CONST. amend. V; *see also Kelo*, 545 U.S. at 475.

17. Kelo v. City of New London, 843 A.2d 500, 528 (Conn. 2004), *aff'd*, 545 U.S. 469 (2005).

18. *Kelo*, 545 U.S. at 483-84.

19. *Id.* at 480.

20. *Id.* at 487-88.

21. *Id.* at 488.

22. *Id.*

23. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984); *see also* Berman v. Parker, 348 U.S. 26 (1954) (establishing highly deferential approach to public use).

24. *See Kelo*, 545 U.S. at 505 (O'Connor, J., dissenting); *id.* at 521–22 (Thomas, J., dissenting).

development takings are unconstitutional.[25]

The key swing voter in the case, Justice Anthony Kennedy, signed on to the majority opinion.[26] But he also wrote a concurrence emphasizing that heightened scrutiny should be applied in cases where there is evidence that a condemnation was undertaken as a result of "impermissible favoritism" toward a private party.[27] The close 5-4 split was a marked change from the unanimity the Court displayed in earlier decisions that gave the government nearly unlimited discretion to condemn property for almost any reason.[28]

Finally, the majority opinion noted that the government is still not "allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."[29] This aspect of Kelo has caused considerable controversy in lower state and federal courts,[30] and might have formed the basis of a ruling in favor of the property owners.

B. The Political Reaction

Kelo triggered a massive political backlash. Surveys showed that some eighty percent of the public opposed the decision.[31] The ruling was also denounced by politicians, activists, and advocacy groups from across the political spectrum, including former President Bill Clinton, Democratic National Committee Chair Howard Dean, conservative talk show host Rush Limbaugh, liberal activist Ralph Nader, and others.[32] Forty-three states and the federal government enacted legislation intended to curb economic development takings.[33]

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25. *See id.* at 494 (O'Connor, J., dissenting) (claiming that "all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded"); *see also id.* at 523 (Thomas, J., dissenting) (criticizing the majority for allowing "boundless use of the eminent domain power").

26. *Id.* at 470.

27. *Id.* at 493 (Kennedy, J., concurring).

28. *See Midkiff*, 467 U.S. at 241 (concluding that a public use was any objective "rationally related to a conceivable public purpose"); *Berman*, 348 U.S. at 32 (ruling that the legislature has "well-nigh conclusive" discretion in determining what counts as a public use); *see also* Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After* Kelo, 15 SUP. CT. ECON. REV. 183, 224-25 (2007) (discussing *Midkiff* and *Berman* in greater detail) [hereinafter Somin, *Controlling the Grasping Hand*].

29. *Kelo*, 545 U.S. at 478.

30. *See* Somin, *Judicial Reaction*, *supra* note 9, at 25-35.

31. Somin, *Limits of Backlash*, *supra* note 3, at 2109.

32. *Id.* at 2109 nn.37-39 and accompanying text.

33. See generally *id.* for the most comprehensive discussion of the post-*Kelo* reforms. For other discussions, see, for example, Janice Nadler et al., *Government Takings of Private Property*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 286, 287 (Nathaniel Persily et al. eds., 2008); Lynn E. Blais, *Urban Revitalization in the Post*-Kelo *Era*, 34 FORDHAM URBAN L.J. 657 (2007); James W. Ely, Jr., *Post*-Kelo *Reform: Is the Glass Half Full or Half Empty?*, 17 SUP. CT. ECON. REV. 127 (2009); Edward J. López et al., *Pass a Law, Any Law, Fast!: State Legislative*

This is probably the broadest legislative reaction ever generated by any Supreme Court ruling.[34]

However, it eventually became evident that the majority of the post-*Kelo* reform statutes imposed little or no meaningful constraint on economic development takings.[35] Many states forbade condemnations that transfer property to a private party for "economic development" purposes, but continued to allow them for the purpose of eliminating "blight"—a term defined so broadly that almost any area qualifies.[36] In many cases, this simply continued a pre-*Kelo* practice of defining "blight" in a way that maximized local government discretion to condemn any property they might wish to take.[37] In the years just before *Kelo*, state courts ruled that such unlikely areas as Times Square in New York City and downtown Las Vegas were blighted.[38]

Why did so many post-*Kelo* reform laws turn out to be ineffective? Various factors played a role, but a particularly crucial one was voters' ignorance about the details of reform legislation. A 2007 Saint Index survey found that only twenty-one percent of Americans knew whether their state had enacted post-*Kelo* reforms, and only thirteen percent knew whether their state's reforms were likely to be effective in restricting economic development takings.[39] For most voters, paying little or no attention to political issues is actually rational behavior, because there is so little chance that any one vote will have an impact on electoral outcomes.[40] Public knowledge and ignorance turn out to be crucial to assessing the possible impact of alternative holdings in *Kelo*.

II. *KELO* AND THE CASE FOR CONSTITUTIONAL COUNTERFACTUALS

Given that *Kelo* was a close and controversial decision, there is a real

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Responses to the Kelo *Backlash*, 5 REV. L. & ECON. 101 (2009), *available at* http://www.bepress.com/rle/vol5/iss1/art5/; Andrew P. Morriss, *Symbol or Substance? An Empirical Assessment of State Responses to* Kelo, 17 SUP. CT. ECON. REV. 237 (2009); Timothy Sandefur, *The "Backlash" So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 MICH. ST. L. REV. 709, 711-68.

34. Somin, *Limits of Backlash*, *supra* note 3, at 2101-02.

35. *See id.* at 2120-38; *see also* Morriss, *supra* note 33, at 266-68 (reaching a similar conclusion); Sandefur, *supra* note 33, at 726-68 (same).

36. Somin, *Limits of Backlash*, *supra* note 3, at 2120-30.

37. *See* Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305, 320–21 (2004); Ilya Somin, *Blight Sweet Blight*, LEGAL TIMES, Aug. 14, 2006, at 1.

38. *See* City of Las Vegas Downtown Redevelopment Agency v. Pappas, 76 P.3d 1, 13-15 (Nev. 2003); W. 41st St. Realty LLC v. N.Y. State Urban Dev. Corp., 744 N.Y.S.2d 121, 124-26 (App. Div. 2002).

39. Somin, *Limits of Backlash*, *supra* note 3, at 2155-57.

40. For the concept of rational ignorance, see ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 238-59 (1957). For a recent defense of the idea, see ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE ch. 4 (manuscript on file with author).

possibility that it could have turned out differently. But is there anything to be gained from such a counterfactual analysis? The answer is yes.

In trying to understand the impact of *Kelo*, or any court decision, a key issue is whether events would have turned out differently without it. Whenever we claim that X caused Y, we are implicitly saying that Y would not have happened without X, or at least that the probability of Y occurring would have been lower. To assess the claim that X caused Y, it often helps to consider what might have happened without X.

Considerations such as these have led leading historians and social scientists to advocate the use of counterfactual scenarios. These scholars include Niall Ferguson,[41] Philip Tetlock and Geoffrey Parker,[42] Hugh Trevor-Roper,[43] and Geoffrey Hawthorn.[44] As Tetlock and Parker put it, "[w]henever we draw a cause-effect lesson from the past, we commit ourselves to the claim that, if key links in the causal chain were broken, history would have unfolded otherwise."[45]

To be sure, some scholars reject the use of counterfactuals on the grounds that they are hopelessly speculative, subjective, and permeated with political bias.[46] However, these dangers can be minimized by rigorously stating the assumptions of a counterfactual scenario and checking it against the available evidence. Even more importantly, some degree of counterfactual analysis is inevitable any time we make causal claims about past events. Given that reality, explicitly discussing counterfactual scenarios and making their assumptions explicit can actually reduce the risks of bias and subjectivity. It is easier to hide biased and subjective elements in counterfactual scenarios when they are only implicitly stated.

Bias and subjectivity can also be reduced if scholars stick to Philip Tetlock and Aaron Belkin's "minimal-rewrite" rule,[47] which urges scholars to focus on scenarios that are based on "plausible premises that require tweaking as little of

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41. *See* VIRTUAL HISTORY: ALTERNATIVES AND COUNTERFACTUALS (Niall Ferguson ed., 1997).

42. Philip E. Tetlock & Geoffrey Parker, *Counterfactual Thought Experiments: Why We Can't Live Without Them & How We Must Learn to Live with Them*, *in* UNMAKING THE WEST: "WHAT-IF?" SCENARIOS THAT REWRITE WORLD HISTORY 14-44 (Philip E. Tetlock et al. eds., 2006).

43. Hugh Trevor-Roper, *History and Imagination*, *in* HISTORY & IMAGINATION: ESSAYS IN HONOR OF H.R. TREVOR-ROPER 356-69 (Hugh Lloyd-Jones et al. eds., 1981).

44. GEOFFREY HAWTHORN, PLAUSIBLE WORLDS: POSSIBILITY AND UNDERSTANDING IN HISTORY AND THE SOCIAL SCIENCES (1991).

45. Tetlock & Parker, *supra* note 42, at 17.

46. *See, e.g.*, E. H. CARR, WHAT IS HISTORY? 81-102 (1961); Richard J. Evans, *Telling It Like It Wasn't*, 5 HISTORICALLY SPEAKING (2004), *available at* http://www.bu.edu/historic/hs/march04.htm#s.

47. Philip E. Tetlock & Aaron Belkin, *Counterfactual Thought Experiments in World Politics: Logical, Methodological, and Psychological Perspectives*, *in* COUNTERFACTUAL THOUGHT EXPERIMENTS IN WORLD POLITICS: LOGICAL, METHODOLOGICAL, AND PSYCHOLOGICAL PERSPECTIVES 18-25 (Philip E. Tetlock & Aaron Belkin eds., 1996).

the actual historical record as possible."[48] As we shall see, several alternative outcomes to *Kelo* are entirely consistent with the "minimal-rewrite rule."[49]

In sum, counterfactual scenarios are useful in assessing causal claims. More specifically, constitutional counterfactuals about Supreme Court cases are useful in assessing causal claims concerning the impact of Supreme Court decisions.

In the case of *Kelo*, considering counterfactual scenarios can help shed light on a longstanding debate over the social impact of Supreme Court decisions. Some scholars argue that the Court's decisions have little social impact, except possibly their ability to stimulate a political backlash, such as the "massive resistance," with which white southerners responded to *Brown v. Board of Education*.[50] Others contend that these arguments understate the impact of the Court.[51] If a victory by the property owners in *Kelo* would have had little effect, this would tend to support the former school of thought, what Gerald Rosenberg calls the "constrained court" theory.[52] That position would be even more strongly supported if a victory for the property owners would have actually led to fewer gains for property rights than occurred in reality, by forestalling the anti-*Kelo* political backlash.

If, on the other hand, a victory for the property owners would have strengthened protection for property rights more generally, that would cut against the "constrained court" hypothesis, especially if the added protection was extensive in nature. That view would also be reinforced if a win for the property owners were to stimulate political efforts to protect property rights rather than impede them.

III. POSSIBLE ALTERNATIVE HOLDINGS IN *KELO*

What might a Supreme Court decision in favor of the property owners have looked like? The most likely scenario is one in which Justice Anthony Kennedy, the key swing-voter in the case, had sided with the four dissenters, thereby creating a pro-*Kelo* majority. There are two possible ways in which Kennedy might have joined with the dissenters.

The first possibility is one where Kennedy signs on to Justice Sandra Day O'Connor's position that economic development takings are categorically unconstitutional.[53] Alternatively, Kennedy could have written a concurring opinion striking down the New London condemnations on narrower grounds, holding that the takings in question were pretextual because the official rationale for them was just an excuse for a scheme to promote the interests of a private party.

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48. Tetlock & Parker, *supra* note 42, at 34.

49. *See infra* Part II.

50. *See* KLARMAN, *supra* note 5, at 415; *see generally* ROSENBERG, *supra* note 5; Dahl, *supra* note 5.

51. *See generally* MELNICK, *supra* note 6; Bernstein & Somin, *supra* note 6.

52. ROSENBERG, *supra* note 5, at 10-36.

53. Kelo v. City of New London, 545 U.S. 469, 497-504 (2005) (O'Connor, J., dissenting).

Both scenarios are historically plausible. They would require only one justice to switch his vote. And Anthony Kennedy is known for having some degree of a libertarian streak that might lead him to be sympathetic to property rights.[54] Prior to *Kelo,* Kennedy had given conservatives a decisive fifth vote in several important 5-4 property rights decisions under the Takings Clause.[55] It is not hard to imagine him aligning with fellow swing-voter Justice O'Connor in *Kelo* as well.

This type of change would be consistent with the "minimal-rewrite" rule, which requires counterfactual analysis to stick to relatively modest, plausible alterations of the past.[56] If anything, it is even easier to imagine Justice Kennedy voting to strike down the *Kelo* takings without voting to invalidate all economic development condemnations. As discussed below, such a decision would not have required him to give up the idea that public use cases should generally be evaluated under a "deferential standard of review."[57]

Either of these alternative paths could have led Kennedy to vote to strike down the New London takings, but they would have had very different implications for future cases. Joining with O'Connor and the other *Kelo* dissenters would have provided strong protection for property rights. By contrast, a narrower decision holding that economic development takings are generally valid, but striking down the *Kelo* takings because of their pretextual nature would have imposed only modest restrictions on future condemnations.

A. What if Justice Kennedy Had Joined with Justice O'Connor?

The simplest way for Justice Kennedy to change the outcome in *Kelo* would have been to sign on to Justice O'Connor's dissenting opinion, thereby instantly converting it into the majority opinion of the Court. Justice O'Connor insisted in no uncertain terms that economic development takings are categorically forbidden by the Fifth Amendment: "Are economic development takings constitutional? I would hold that they are not."[58]

She approvingly cited Justice Ryan's dissenting opinion in the "infamous" 1981 Michigan Supreme Court decision in *Poletown Neighborhood Council v.*

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54. See HELEN J. KNOWLES, THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY (2009), for an interpretation of Kennedy's jurisprudence that highlights his libertarian tendencies. *But see* Ilya Shapiro, *A Faint-Hearted Libertarian at Best: The Sweet Mystery of Justice Anthony Kennedy*, 33 HARV. J.L. & PUB. POL'Y 333 (2010) (reviewing and critiquing HELEN J. KNOWLES, THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY (2009)).

55. *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 626-30 (2001); Dolan v. City of Tigard, 512 U.S. 374, 392 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992);

56. *See supra* Part II.

57. *Kelo*, 545 U.S. at 490 (Kennedy, J., concurring); *see infra* Part III.B (discussing how Kennedy could have preserved this deferential approach while voting to strike down the *Kelo* takings on narrow grounds).

58. *Kelo*, 545 U.S. at 498 (O'Connor, J., dissenting).

City of Detroit, which argued that "economic development takings 'seriously jeopardiz[e] the security of all private property ownership.'"[59] The *Poletown* case was by far the most famous economic development taking in American history prior to *Kelo*. The takings upheld in *Poletown* forcibly displaced some 4000 Detroit residents in order to transfer their property to General Motors for the construction of a new factory.[60] If Kennedy had given O'Connor's position a fifth vote, it would have banned economic development takings across the country.

Would this have given property owners ironclad protection against future *Kelos* and *Poletowns*? It is logically possible that it would not have. Although Justice O'Connor's opinion unequivocally repudiated economic development takings, it did not invalidate blight condemnations.[61] Indeed, O'Connor's opinion distinguishes blight condemnations from economic development takings on the ground that the former remove a "precondemnation use of the targeted property [that] inflicted affirmative harm on society."[62] She therefore would not overrule the Supreme Court's 1954 decision in *Berman v. Parker*, which held that blight condemnations are permissible.[63] On this point, O'Connor's approach differs from that of Justice Clarence Thomas, who argued that *Berman* was wrongly decided and would at least "consider" overruling it.[64] In the unlikely event that Kennedy chose to join Thomas's opinion rather than O'Connor's, there would still have been only two votes for overruling *Berman*. In that scenario, O'Connor's opinion would still have been the controlling one as the ruling of the justice who concurred on the "narrowest grounds."[65]

With blight takings still permitted, it is possible that a victory for the property owners under O'Connor's approach would have still given states a free hand to condemn virtually any property simply by defining blight extremely broadly. As we have seen, this is exactly what has happened in many states that have enacted post-*Kelo* reform laws banning economic development takings, but leaving broad definitions of blight in place.[66]

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59. *Id.* at 504-05 (quoting Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 465 (Mich. 1981) (Ryan, J., dissenting), *overruled by* Cnty. of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004)) (alteration in original).

60. *Poletown*, 304 N.W.2d at 457; *see also* Ilya Somin, *Overcoming* Poletown: County of Wayne v. Hathcock, *Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1006-27 (discussing in detail the *Poletown* decision and its effects).

61. *See supra* Part I.B (discussing blight takings).

62. *Kelo*, 545 U.S. at 500 (O'Connor, J., dissenting).

63. Berman v. Parker, 348 U.S. 26, 35-36 (1954).

64. *Kelo*, 545 U.S. at 519-21 (Thomas, J., dissenting).

65. *See* Marks v. United States, 430 U.S. 188, 194 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those [m]embers who concurred in the judgments on the narrowest grounds. . . .'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976))).

66. *See supra* Part I.B.

However, it is unlikely that a *Kelo* decision where O'Connor's opinion becomes the majority would have actually led to this result. O'Connor repeatedly emphasized that the reason why the economic development rationale must be struck down is that under it "all private property is now vulnerable to being taken and transferred to another private owner."[67] It seems unlikely that a Supreme Court majority committed to O'Connor's view, or lower courts, would interpret the decision in a way that allows the same risk to enter through the back door. Moreover, if insufficient "economic development" is not enough to qualify as an "affirmative harm" justifying a taking,[68] the same logic applies to "blight" that essentially consists of inadequate development.[69] In 2006, the Ohio Supreme Court directly addressed the issue of whether blight condemnations under a definition of "blight" that includes economic underdevelopment, can be reconciled with a state constitutional ban on economic development takings.[70] It ruled that they are not.[71] The Ohio Supreme Court cited Justice O'Connor's interpretation of the federal Public Use Clause as a model for its decision under its Ohio state equivalent.[72] It is likely that federal courts interpreting O'Connor's opinion would have reached the same result.

A *Kelo* decision based on O'Connor's opinion would therefore have given property owners far stronger protection against takings than before. It would have eliminated economic development takings in all fifty states and would also have put a stop to the growing tendency to use expansive definitions of blight to subject virtually any property to condemnation.[73] On the other hand, it would have fallen short of ending all blight condemnations. Blight takings in genuinely dilapidated and unhealthy neighborhoods would still be allowed to continue. Historically, these have displaced far more people than pure economic development takings.[74] Despite this important limitation, a *Kelo* decision based on Justice O'Connor's opinion would have been a major victory for property rights – the most important in many decades. It would have prevented numerous takings and also reversed the longstanding conventional wisdom that the Public Use Clause imposes no meaningful limits on condemnations.

B. What if the Kelo *Condemnations Had Been Invalidated on Narrow Grounds?*

While it is possible to imagine Justice Kennedy signing on to O'Connor's

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67. *Kelo*, 545 U.S. at 494 (O'Connor, J., dissenting); *see also id.* at 505.

68. *Id.* at 500.

69. *See* Somin, *Limits of Backlash*, *supra* note 3, at 2120-31 (explaining how many state statutes with broad definitions of "blight" essentially define blight in terms of insufficient development).

70. City of Norwood v. Horney, 853 N.E.2d 1115, 1146-47 (Ohio 2006).

71. *Id.* at 1146-52.

72. *Id.* at 1136-37.

73. *See supra* Part I.B.

74. *See* Somin, *Controlling the Grasping Hand*, *supra* note 28, at 269-71.

opinion, it is even more plausible to imagine him voting to strike down the *Kelo* takings without simultaneously holding that all economic development takings are constitutional. Doing so would have enabled him to rule in favor of the property owners without jeopardizing his preference for a deferential approach in most public use cases.

1. The Pretext Standard.—The most obvious way for Justice Kennedy to do this would have been to conclude that the *Kelo* condemnations were impermissible because the economic development rationale was a mere pretext for a scheme intended to benefit a private party: the Pfizer Corporation. The *Kelo* majority emphasized that pretextual takings "for the purpose of conferring a private benefit on a particular private party" are still forbidden by the Public Use Clause.[75] Similarly, Justice Kennedy wrote that a taking may be invalidated if it was the result of "impermissible favoritism" to a private party.[76]

There was in fact considerable evidence of "favoritism" in the *Kelo* takings. The Pfizer Corporation had played a key role in instigating the condemnations.[77] Although Pfizer was not expected to be the actual owner of the condemned property, it hoped to benefit from the takings because the resulting development would provide facilities that would increase the value of the new headquarters it was building in the area.[78] Some of the evidence of Pfizer's involvement in the project did not become available until after the Supreme Court had already reached its decision.[79] Nonetheless, considerable evidence of Pfizer's role was available to the Court. At state court trial, New London's own expert testified that Pfizer was the "[ten-thousand] pound gorilla" behind the takings.[80] The trial evidence also revealed that the New London Development Corporation's plans for the development project closely matched Pfizer's demands.[81] Claire Gaudiani, the Chairman of the NLDC, was the wife of a high-ranking Pfizer employee, and her connections with the firm played a key role in instigating the takings.[82]

In the end, all nine Supreme Court Justices concluded that there was no pretextual motive in the case, as had the justices of the Connecticut Supreme Court.[83] But it is possible to imagine Justice Kennedy reaching a different

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75. Kelo v. City of New London, 545 U.S. 469, 477 (2005).

76. *Id.* at 491 (Kennedy, J., concurring).

77. *See* Somin, *Controlling the Grasping Hand*, *supra* note 28, at 237 (summarizing the relevant evidence).

78. *See id.*

79. *Id.* The evidence was obtained as a result of a Freedom of Information Act request filed by *The Day*. Ted Mann, *Pfizer's Fingerprints on Fort Trumbull Plan*, THE DAY, Oct. 16, 2005, http://www.theday.com/article/20051016/BIZ04/911119999.

80. Brief of Petitioners at 4-5, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), 2004 WL 2811059 at *4-5.

81. *Id.*

82. BENEDICT, *supra* note 13, at 24-26.

83. *See* Kelo v. City of New London, 545 U.S. 496, 478 (2005) (asserting that "there was no evidence of an illegitimate purpose in this case"); *id.* at 493 (Kennedy, J., concurring) (stating that there is no evidence of "an impermissible private purpose"); *id.* at 495 (O'Connor, J., dissenting)

conclusion on this issue, either because he interpreted the available evidence differently or because the evidence discovered after the case somehow emerged earlier.

What would have been the effect of a decision striking down the *Kelo* condemnations as pretextual takings? Much depends on how Kennedy would have chosen to define what counts as pretextual. In the actual *Kelo* decision, both his concurrence and the majority opinion were extremely unclear on this point.[84] As a result, there is deep division in both federal and state courts over the question.[85] Lower courts have identified four possible standards for determining whether a taking is pretextual:[86]

1. The magnitude of the public benefit created by the condemnation. If the benefits are large, it seems less likely that they are merely pretextual.
2. The extensiveness of the planning process that led to the taking.
3. Whether or not the identity of the private beneficiary of the taking was known in advance. If the new owner's identity was unknown to officials at the time they decided to use eminent domain, it is hard to conclude that government undertook the condemnation in order to advance his or her interests.
4. The subjective intent of the condemning authorities. Under this approach, courts would investigate the motives of government decision-makers to determine what the true purpose of a taking was.[87]

At least two of these four standards find direct support in Kennedy's

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(stating that the NLDC had acted "[c]onsistent[ly] with its mandate" to "assist the city council in economic development planning"); Kelo v. City of New London, 843 A.2d 500, 538-41 (Conn. 2004) (concluding that the NLDC and New London were not motivated by a desire to advance Pfizer's interests), *aff'd*, 545 U.S. 469 (2005); *id.* at 595 (Zarella, J., concurring in part and dissenting in part) (stating that "[t]he record clearly demonstrates that the development plan was not intended primarily to serve the interests of Pfizer, Inc., or any other private entity but, rather, to revitalize the local economy").

84. *See* Somin, *Judicial Reaction*, *supra* note 9, at 24-25; *cf.* Goldstein v. Pataki, 488 F. Supp. 2d 254, 288 (E.D. N.Y. 2007), *aff'd*, 516 F.3d 50 (2d Cir. 2008) ("[A]lthough *Kelo* held that merely pretextual purposes do not satisfy the public use requirement, the *Kelo* majority did not define the term 'mere pretext' . . . .").

85. *See* Somin, *Judicial Reaction*, *supra* note 9, at 25-35.

86. *See id.*

87. *Id.* at 25 (citing Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 SUP. CT. ECON. REV. 173, 184-99 (2009)). Note, however, Kelly proposes his own alternative approach after finding fault with these criteria. *See* Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 SUP. CT. ECON. REV. 173, 215-20. See Somin, *Judicial Reaction*, *supra* note 9, at 25-35, for further description of the use of all four standards by state and federal courts.

concurring opinion. Kennedy seems to endorse the relative benefits standard, writing that a taking may be invalidated if it has "only incidental or pretextual public benefits."[88] He also noted that the absence of a known private beneficiary was a relevant factor in *Kelo*.[89]

Either of these standards could potentially have justified a ruling in favor of the property owners in *Kelo*. Although Pfizer was not intended to be the new owner of the condemned property, it was possible to conclude that the lion's share of the benefits of the project would go to the firm indirectly. And, Pfizer was certainly a known, private beneficiary of the takings. Unfortunately, Kennedy's and the majority's attention was diverted away from this point because the private benefit to Pfizer did not take the form of ownership rights to the condemned property. However, one can imagine Kennedy concluding that the pretext doctrine should treat indirect, private benefits the same way as benefits from ownership.[90] Finally, Kennedy could also have justified a pretext-based ruling on the basis of condemnor intent. As discussed above, Pfizer's lobbying played a major role in instigating the taking.[91]

A decision striking down the *Kelo* takings based on the intent standard probably would have imposed only minor constraints on future economic development takings.[92] Motivations for takings are often difficult to discern, especially in cases that have not received as much media scrutiny as *Kelo*, and where the property owners lack the kind of top-notch representation that the New London property owners got from the Institute for Justice.[93] Moreover, in practice, officials can often convince themselves that a condemnation undertaken for the purpose of benefiting a politically influential private interest also benefits the public. For these reasons, an intent test is only likely to ferret out the most extreme cases of blatant favoritism.

The relative benefits approach could potentially have had greater bite. If Justice Kennedy chose to adopt a test under which the public benefits had to greatly outweigh those to the main private beneficiary, that could substantially impair many takings. In practice, however, it seems unlikely that he would have adopted such a restrictive approach. Doing so would have forced lower courts to make difficult case-by-case assessments of the benefits of proposed takings and their distribution. Lower courts that have adopted this strategy since *Kelo* have generally singled out only extreme cases for heightened scrutiny.[94] Like the intent test, the relative benefits test would probably weed out only unusually blatant cases of favoritism.

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88. *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring).

89. *Id.* at 491-92.

90. *See* Somin, *Judicial Reaction*, *supra* note 9, at 29-30 (discussing this possibility).

91. *See supra* Part III.B.1.

92. For a more extensive discussion of the limitations of the intent approach, see Somin, *Controlling the Grasping Hand*, *supra* note 28, at 235-38.

93. *See* BENEDICT, *supra* note 13, at 158-61.

94. *See* Somin, *Judicial Reaction*, *supra* note 9, at 27-28 (reviewing lower court cases adopting this standard).

Finally, it is unlikely that Justice Kennedy would have applied the known beneficiary standard in a highly restrictive way. Almost every taking has *some* beneficiary whose identity is known in advance. Even if the identity of the future owners of the condemned property is unknown, it is usually possible to identify other likely beneficiaries, such as local businesses who might benefit from new development in their vicinity or interest groups that might benefit from a potential increase in the local government's tax base.

This reality may be the reason why no lower court has invalidated a taking solely based on this standard in the aftermath of *Kelo*,[95] though a Third Circuit panel did rely on the *absence* of a known beneficiary as a reason to *uphold* a taking.[96] To make the standard workable, Kennedy would probably have had to restrict it to cases where the presence of a known beneficiary was combined with a vast disproportion of benefits or improper condemnor intent. In either case, the rule would have imposed only modest restrictions on future economic development takings.

2. The Absence of a Clear Use for the Condemned Property.—An alternative basis for a narrow decision in favor of the property owners was the lack of a clear plan for the use of the condemned property. The property owners argued that New London did not have a set plan for how the condemned land would be used.[97] They cited evidence showing that the City's plan for the condemned properties had assigned four of the lots to an "office building" that might never be built and eleven to unspecified "[p]ark [s]upport" purposes.[98] This, they contended, was not a specific enough plan to qualify as a genuine public use.[99]

Justice Kennedy could have adopted this argument, ruling that economic development takings are impermissible unless the condemning authority has a clear and specific plan for the future use of the property it seeks to take. Several state court decisions previously adopted this approach under their state constitutions.[100] The Supreme Court itself ruled in a 1930 case that a taking was

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95. *See id.* at 28-30.

96. *See* Carole Media LLC v. N.J. Transit Corp., 550 F.3d 302, 311 (3d Cir. 2008).

97. Brief of Petitioners, *supra* note 80, at 40-43.

98. *Id.* at 40-41.

99. *Id.* at 40-42.

100. *See, e.g.*, State *ex. rel.* Sharp v. 0.62033 Acres of Land in Christiana Hundred, New Castle Cnty., Del., 110 A.2d 1, 6 (Del. Super. Ct. 1954), *aff'd*, 112 A.2d 857 (Del. 1955) (holding that "[t]he doctrine of reasonable time prohibits the condemnor from *speculating* as to *possible* needs at some *remote* future time" (emphasis added)); Alsip Park Dist. v. D & M P'ship, 625 N.E.2d 40, 45 (Ill. App. Ct. 1993) (holding that "if the facts" in a condemnation proceeding "established that [the condemnor] had no ascertainable public need or plan, current or future for the land, [the property owner] should prevail"); Krauter v. Lower Big Blue Natural Res. Dist., 259 N.W.2d 472, 475-76 (Neb. 1977) (holding that "a condemning agency must have a present plan and a present public purpose for the use of the property before it is authorized to commence a condemnation action. . . . The possibility that the condemning agency at some future time may adopt a plan to use the property for a public purpose is not enough to justify a present condemnation.").

impermissible if based solely on a future use "to be determined only by such future action as the city may hereafter decide upon."[101]

Adoption of this rule would have constrained speculative economic development takings that lacked a clear plan for the future use of the property. But it would still have been easy for local governments to pursue economic development condemnations, so long as they developed a clear plan in advance for how the property in question would be used. Once the rule was firmly established, state and local governments would be able to adjust their planning practices to comply with it without having to give up on very many planned takings.

IV. THE POLITICAL IMPACT

To fully understand the potential effects of a decision in favor of the property owners in *Kelo*, we have to assess its likely political effects, as well as the purely legal ones. Unlike most Supreme Court decisions, *Kelo* resulted in a massive political backlash that led to the enactment of eminent domain reform laws in forty-three states.[102] If *Kelo* had come out the other way, it is possible that there would not have been any outburst of popular anger and, therefore, no post-*Kelo* reform laws. If so, winning *Kelo* might have been less advantageous to the property rights movement than losing turned out to be.

Despite this possibility, it seems highly likely that *Kelo* would have been a major victory for property rights if Justice Kennedy had joined with Justice O'Connor and the other *Kelo* dissenters in voting for a categorical ban on economic development takings.[103] Such a decision would have banned economic development takings all over the country and also probably would have prevented blight condemnations conducted under extremely broad definitions. By contrast, the majority of the new post-*Kelo* laws are likely to be ineffective because they essentially allow economic development takings to continue under the guise of blight takings.[104]

A handful of states have enacted post-*Kelo* reform laws that give property rights even greater protection than they would have had if Justice O'Connor's dissenting opinion had become the majority.[105] Two states—Florida and New Mexico—have banned blight condemnations entirely.[106] South Dakota has banned blight condemnations that transfer property to a private party.[107] Finally, Kansas has restricted blight condemnations to properties that are "unsafe for

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101. City of Cincinnati v. Vester, 281 U.S. 439, 448 (1930).

102. *See supra* Part I.B.

103. *See supra* Part III.A.

104. *See* Somin, *Limits of Backlash*, *supra* note 3, at 2120-31.

105. *See id.* at 2138-39 (discussing reform laws in states such as Florida, New Mexico, South Dakota, and Kansas, which provide increased protection for property owners).

106. *Id.* at 2138.

107. *Id.* at 2139.

occupation by humans under the building codes."[108] Because they forbid or severely restrict even narrowly defined blight condemnations, post-*Kelo* reform laws in these four states give property owners broader protection than Justice O'Connor's opinion would have.

Some fifteen other states have adopted reform laws that give property owners roughly the same level of protection as they would have enjoyed under the O'Connor approach.[109] These laws ban economic development takings and restrict the definition of blight to areas that are genuinely dilapidated or pose a danger to public health.[110] Minnesota and Pennsylvania have enacted similar laws, which are weakened by temporary geographic exemptions for takings in their largest urban areas.[111] The state of Utah banned both blight and economic development takings even before *Kelo*.[112]

This leaves twenty-two states that enacted ineffective reforms that impose little or no constraint on economic development takings, and six others (not including Utah) that have not adopted any post-*Kelo* reforms at all.[113] Minnesota and Pennsylvania's reform laws also give property owners less protection than Justice O'Connor's approach would have, because of their geographic exceptions. All told, an O'Connor majority opinion would probably have given property rights greater protection than the *Kelo* backlash in thirty states, roughly equal protection in sixteen (including Utah), and lower protection in four.[114] The thirty states where O'Connor's opinion would have led to an increase in protection for property rights include numerous big states with large numbers of condemnations, such as California, New York, Massachusetts, New Jersey, and Texas.[115]

A very different picture emerges when we consider the potential effects of a narrower decision in favor of the property owners that did categorically forbid economic development takings. A decision striking down the New London takings as pretextual would probably have imposed only very modest restraints on economic development takings.[116] The same goes for a decision in favor of the property owners based on the fact that New London did not have a clear plan for how to use the condemned property.[117] It is highly likely that the laws enacted

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108. *Id.* (internal citation omitted).

109. *See id.* at 2140-48 (discussing reform laws in Alabama, Georgia, Idaho, Indiana, Michigan, New Hampshire, Virginia, and Wyoming, among others). This includes a Delaware law that I could not fully analyze because it was enacted just as my article on post-Kelo reform went to press. *See id.* at 2133 n.143.

110. *Id.* at 2140-48.

111. *Id.* at 2141-42.

112. *Id.* at 2120 n.81 and accompanying text.

113. *See id.* at 2115 tbl.3.

114. *See id.* at 2115-16 tbls.3-4.

115. *See id.* at 2115-16 tbl.4, 2118-19 tbl.5, 2111-32, 2135-37 (discussing these states individually).

116. *See supra* Part III.B.1.

117. *See supra* Part III.B.2.

as a result of the *Kelo* backlash provided much greater protection for property owners in those states that succeeded in banning economic development takings. In states with ineffective reform laws, a narrow decision in favor of the property owners would have strengthened protection for property rights only slightly. It is therefore likely that a narrow decision in favor of the property owners would actually have left the cause of property rights worse off than it would have been otherwise.

The above analysis assumes, conservatively, that there would have been *no* state-level eminent domain reform in the aftermath of a property rights victory in *Kelo*. The assumption is that the *Kelo* backlash would simply never have gotten started in the absence of an adverse Supreme Court ruling that galvanized public opinion. That assumption may not be completely accurate, however. History shows that legal victories sometimes galvanize political movements as much, or more, than defeats do. For example, *Brown v. Board of Education*[118] and other legal victories in the 1950s provided a political boost for the civil rights movement.

More generally, because the public knows very little about the details of eminent domain law,[119] much would have depended on how the media portrayed a *Kelo* decision in favor of the property owners. If the decision were portrayed as a minor matter or as a complete solution to the problem of eminent domain abuse, there might have been little public reaction. By contrast, if it was portrayed as merely the first step in dealing with a wider problem, the reaction may have been different. The latter portrayal might have created an opportunity for the Institute for Justice and other property rights advocates to promote reform laws in the aftermath of a legal victory, much as they actually did in the aftermath of defeat.

In sum, it seems clear that a legal victory in *Kelo* could have given property owners much greater protection than they eventually got from the gains created by the *Kelo* backlash. However, such an outcome would only have been likely if the Court had imposed a categorical ban on economic development takings. A narrower decision in favor of the property owners might have been even worse than an outright defeat.

CONCLUSION

The *Kelo* story provides some support for those who believe judicial decisions can have major effects on public policy.[120] But the exact nature of those effects is heavily dependent on the details of the legal rule adopted by the Court and the way in which it interacts with public opinion. In the best case scenario for activists, a victory in the courts both provides stronger protection for their rights and focuses favorable public attention on their issue, thereby leading to

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118. 349 U.S. 294 (1955).

119. *See* Somin, *Limits of Backlash*, *supra* note 3, at 2154-70 (describing evidence of widespread public ignorance).

120. *See supra* notes 5-6 and accompanying text.

follow-up political successes.

A highly visible defeat that stirs public outrage can also galvanize political efforts, as happened in the real world version of *Kelo*. Such a decision would have little effect in a world where voters follow politics closely and are well aware of the details of current policy. In such a world, most voters would have known about the problem of eminent domain abuse long before *Kelo*, and any resulting public backlash would already have occurred. In a world of widespread political ignorance, however, a high-profile Supreme Court decision can raise political awareness about issues that most of the public would otherwise ignore. The *Kelo* case was a particularly striking example of this phenomenon.

On the other hand, a narrowly technical legal victory that has little effect on future cases can be even worse than no victory at all. If the public believes that the courtroom triumph has solved the problem, there will be little or no momentum for legislative reform. Much depends on how the decision will look to voters who are "rationally ignorant" about the details of public policy and usually do not follow politics closely.

WHAT IF MADISON HAD WON? IMAGINING A CONSTITUTIONAL WORLD OF LEGISLATIVE SUPREMACY

ALISON L. LACROIX*

INTRODUCTION

In the summer of 1787, when the delegates to the Constitutional Convention gathered in Philadelphia, one of the most formidable hurdles they faced was building a functional federal government that contained more than one sovereign. Throughout much of the colonial period, British North American political thinkers had challenged the orthodox metropolitan insistence on unitary sovereignty vested in Parliament, and the accompanying metropolitan aversion to any constitutional system that appeared to create an *imperium in imperio*, or a sovereign within a sovereign.[1] By the 1780s, despite much disagreement among the members of the founding generation as to the precise balance between sovereigns, both political theory and lived experience had convinced Americans that their system could, and indeed must, not just accommodate but also depend upon multiple levels of government.[2]

Identifying the proper degree of federal supremacy and the best means of building it into the constitutional structure were thus central concerns for many members of the founding generation.[3] Their real project was an institutional one: whether—which soon became how—to replace the highly decentralized, legislature-centered structure of the Articles of Confederation with a more robust, multi-branch general government to serve as the constitutional hub connecting the state spokes. In preparing for the convention, Virginia delegate James Madison, who was at the time also a member of the Confederation Congress, conducted an exhaustive study of ancient and modern confederacies.[4] Madison hoped to find lessons about how to avoid what he viewed as the fatal "defect" that had ultimately destroyed them all: the lack of "subjection in the members to the general authority," which Madison concluded had "ruined the whole Body."[5] In order to avoid following these storied confederacies into the dim annals of history, Madison argued that the United States government must be armed with a "negative," or a veto, on state legislation.[6] The negative would be

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1. *See* ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 133-34 (2010).

2. *See id.* at 132-33.

3. *See id.* at 83-84, 132-35.

4. *Notes on Ancient and Modern Confederacies*, *in* 9 THE PAPERS OF JAMES MADISON 3, 3-24 (Robert A. Rutland et al. eds., 1975).

5. *Id.* at 8.

6. *See* LACROIX, *supra* note 1, at 138-39.

vested in Congress—most likely the Senate—and would operate as a broad check by the federal legislature on the states.[7] Madison even went so far as to suggest that congressional approval would be the "necessary final step" in the states' legislative processes.[8] The negative would thus have given the general government a standing power to intervene in the state lawmaking process.

This Essay asks what would have happened if Madison had convinced his fellow delegates that the negative was desirable and necessary. It then asks what would have happened if the Constitution had therefore vested ultimate supervisory power over federal supremacy in Congress, rather than in the federal courts by way of the mechanism of judicial review that the delegates ultimately adopted via the Supremacy Clause.[9]

One potential response to this question is: nothing, or at least nothing materially different, would have happened. The modern constitutional landscape in a world with the federal negative would look functionally similar to the existing constitutional arrangement in which federal supremacy is doubly secured by judicial review and Congress's power to preempt state legislation. On this view, the subjunctive of the "what would have happened" inquiry should be refashioned into a declarative "what did happen" statement. Thus, one might argue, both the negative and preemption should be seen as legislative safeguards of federalism's commitment to the supremacy of the general government.

But the apparent functional equivalence between the negative and preemption begins to erode upon closer examination. In particular, at least three important differences separate the negative and preemption: the scope that each ascribes to Congress's power to act in arenas beyond its enumerated Article I powers; the default presumption of each approach toward the validity of state legislation; and the meaning each attributes to congressional silence. Moreover, the functional inquiry is a post hoc one that emphasizes abstract similarities between the negative and preemption as determined ahistorically, without reference to any specific constitutional issue or moment in time. The focus of this Essay, in contrast, seeks to be more historical: how would the adoption of the negative have changed the arguments and analysis that contemporaries offered in particular instances of constitutional conflict?

This Essay therefore examines the potential significance of the negative through the lens of a nineteenth-century case study: the debate over Congress's power to regulate interstate commerce. Had the negative been incorporated into the Constitution in 1787, the combined force of the negative's distinctive characteristics and the precedent that it established in one constitutional controversy after another might ultimately have led not to the stronger union that Madison desired, but to forceful resistance to federal power by diverse state legislatures in a variety of circumstances. In contrast to Madison's and many modern commentators' understanding of the negative as a highly centralizing mechanism, then, the successful negative might potentially have led to

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7. *Id.* at 135.
8. *Id.* at 153.
9. *See id.* at 171-72.

fragmentation and disintegration between the federal center and the state peripheries decades before the sectional crisis ignited in the 1860s.

I. THE FEDERAL NEGATIVE

Long before the Philadelphia Convention began its deliberations, Madison was troubled by what he and many other political thinkers perceived as the dangerous weakness of the federal government.[10] Under the Articles of Confederation, the sole institution through which federal authority operated was "the United States, in Congress assembled."[11] Madison and others—including George Washington, John Adams, and James Wilson—spent the early 1780s increasingly worried about parochial state legislation, the inability of Congress to collect revenues and thus service the nation's war debt, the nation's lack of international credibility, and the consequences of occasional violent uprisings against the general government such as Shays' Rebellion.[12] Anxious correspondents from Georgia to Maine fretted over what they viewed as the "imbecility" and impotence of the Confederation.[13] "Our situation is becoming every day more [and] more critical," Madison wrote.[14] "No money comes into the federal Treasury. No respect is paid to the federal authority; and people of reflection unanimously agree that the existing Confederacy is tottering to its foundation."[15]

But Madison had a solution, which he described in a letter to Thomas Jefferson.[16] "Over [and] above the positive power of regulating trade and sundry other matters in which uniformity is proper," Madison's reform plan would "arm the federal head with a negative *in all cases whatsoever* on the local Legislatures."[17] Based on his archival research, Madison believed that the negative would provide the best institutional solution to what he viewed as the key problem of federal supremacy.[18] Vesting the general government, specifically Congress, with the power to veto any and all laws passed by the state legislatures would ensure that states would no longer be able to engage in purely

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10. The following paragraphs build on my earlier discussions of these topics. *See generally id.* (especially chapter 5, which discusses central government authority).

11. ARTICLES OF CONFEDERATION OF 1781, art. II.

12. *See* PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, at 11-17 (2010). *See generally* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969) (describing the crises of the 1780s).

13. *See* MAIER, *supra* note 12, at 264.

14. Letter from James Madison to Edmund Randolph (Feb. 25, 1787), *in* 9 THE PAPERS OF JAMES MADISON, *supra* note 4, at 299.

15. *Id.*

16. Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), *in* 9 THE PAPERS OF JAMES MADISON, *supra* note 4, at 317, 318.

17. *Id.*

18. *See* Madison's Notes (June 8, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 164, 164-65 (Max Farrand ed., 1911).

self-serving regulation to the detriment of their neighbors or to the Union as a whole.[19] If a state passed a law penalizing out-of-state creditors or establishing its own import duties, Congress would have the power to veto that law. Moreover, the state law in question would not need to rise to the level of unconstitutionality, and members of Congress would not be required to make a particularized finding about precisely how the state law would harm the Union. Instead, Madison insisted that Congress must have the power to veto state laws "in all cases whatsoever."[20]

Indeed, Madison's notes and correspondence demonstrate that he viewed the negative as the complement to Congress's power to approve state legislation. To be sure, this approval would be expressed silently, by the absence of a veto; but Madison clearly regarded some action by Congress as the necessary final step in the state legislative process. Under the negative, "[t]he States [could] of themselves then pass no operative act, any more than one branch of a Legislature where there are two branches, can proceed without the other," Madison insisted.[21] The negative would therefore have given the federal government a continuous power to intervene in the state lawmaking process and to override state laws.

Despite Madison's efforts to convince his fellow delegates of the negative's virtues (including a speech in which he described it as a helpful adaptation of the Privy Council's power to review colonial legislation under the empire),[22] the negative ultimately failed to win sufficient support in the Convention to become part of the Constitution. Instead, a few days after the final defeat of the negative, the delegates moved toward a different institutional approach to the supremacy question.[23] Instead of a legislative solution, the majority of delegates shifted toward a judicial mechanism.[24] In arguing against the negative, Gouverneur Morris articulated a strong preference for a judicial device: "A law that ought to be negatived will be set aside in the Judiciary [department] and if that security should fail; may be repealed by a [National] law."[25] Writing from Paris, Jefferson responded to Madison's enthusiasm for the negative with a critique of its overbreadth.[26] The negative, Jefferson argued, "proposes to mend a small hole by covering the whole garment. Not more than 1. out of 100. state-acts concern the confederacy. This proposition then, in order to give [Congress] 1. degree of

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19. *Id.*

20. Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), *in* 9 THE PAPERS OF JAMES MADISON, *supra* note 4, at 317, 318 (emphasis omitted).

21. Madison's Notes (June 8, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 165.

22. *Id.* at 168.

23. Madison's Notes (July 17, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 25, 28.

24. *Id.*

25. *Id.*

26. Letter from Thomas Jefferson to James Madison (June 20, 1787), *in* 10 THE PAPERS OF JAMES MADISON, *supra* note 4, at 63, 64 (1977).

power which they ought to have, gives them 99. more which they ought not to have. . . ."[27] Instead of the negative, Jefferson advocated "an appeal from the state judicatures to a federal court, in all cases where the act of Confederation [controlled] the question."[28] This judicial remedy would, he argued, "be as effectual a remedy, [and] exactly commensurate to the defect."[29]

Within a few weeks, the delegates adopted what became the Supremacy Clause of Article VI, which states that the "Constitution, and the laws of the United States . . . and all Treaties . . . shall be the supreme Law of the Land," and that "the Judges in every State shall be bound thereby."[30] Read in conjunction with the judiciary provisions of Article III, the Supremacy Clause endorsed judicial review of state law for conformity with federal law as the Constitution's chief supremacy-enforcing mechanism.[31] The Supremacy Clause-Article III complex established a norm of federal supremacy at the level of state legislation and insisted that that norm would be backed by judicial enforcement. Rather than giving Congress the power to wield a negative over state laws, then, the Constitution provided for a Supreme Court with the power to review state laws for compatibility with the Constitution.[32]

II. PREEMPTION: THE FUNCTIONAL EQUIVALENT OF THE NEGATIVE?

The rejection of the negative by the Philadelphia Convention should be understood not only as a loss for the specific plan that Madison proposed, but also as a move by the delegates away from legislature-based approaches to what they viewed as the problem of supremacy. To be sure, in addition to proposing the negative, Madison's Virginia Plan emphasized the need to give Congress greater substantive powers,[33] especially over commerce and taxation. The negative would have given Congress the power to stop New York from passing an impost that would require Connecticut residents to pay taxes to New York on goods imported through New York. But Congress's corresponding affirmative power to regulate import duties was also a vital element of Madison's reform plan, one that—unlike the negative—ultimately won adoption at the convention.[34] The combination of the congressional powers listed in Article I, Section 8, with the limitations on congressional powers in Section 9 and on the

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27. *Id.*

28. *Id.*

29. *Id.*

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

31. *See* LACROIX, *supra* note 1, at 168-69.

32. *Id.* at 165.

33. *See* Virginia Plan, para. 6, *in* 10 THE PAPERS OF JAMES MADISON, *supra* note 4, at 12, 16 (1977) ("Resolved . . . that the national Legislature ought to be impowered [sic] . . . to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation . . . .").

34. *See id.*

states in Section 10,[35] together with the principle of enumeration itself, suggested that the delegates were intensely focused on setting clear boundaries that would define the respective substantive powers of the state and federal legislatures.

Nevertheless, the enumeration of Congress's powers in Article I was, for many delegates to the Philadelphia Convention, not an adequate solution to the problem of establishing federal supremacy. The Articles of Confederation had sought to maintain a balance between the powers of the states and those of the general government by focusing entirely on the powers of the two levels of legislature.[36] The Confederation Congress had the power to declare peace and war, to enter into treaties, to settle disputes between the states, to regulate the value of coinage, to establish a post office, and to regulate trade with Indian tribes.[37] It could also request, but not require, that the states contribute funds to the common treasury.[38] The Articles thus represented an attempt by American thinkers of the revolutionary period to enshrine in the new general government the type of subject-matter separation between the respective powers of the states and the general government for which they had argued during the constitutional crisis with the British Empire in the 1760s and 1770s.[39] The colonial rejoinder to metropolitan assertions of unitary parliamentary sovereignty and against *imperium in imperio* had insisted that no *imperium in imperio* existed when the powers and duties of the imperia in question were clearly demarcated and did not overlap.[40] Thus, commentators such as John Dickinson, John Adams, and Thomas Jefferson had labored during the 1760s and 1770s to demonstrate that the separate legislative domains of Parliament and the colonial assemblies might coexist, as long as all parties agreed on an overarching distinction between the types of authority each might permissibly wield.[41] For Dickinson, the dividing line lay between taxation to regulate the empire (permissible for Parliament to regulate) and taxation to raise a revenue from the colonies (reserved to the colonial assemblies).[42] For Adams and Jefferson, as for some agents of the British Empire such as colonial governors Thomas Pownall and Francis Bernard, the line of separation was somewhat murkier but lay between the general arenas of external matters concerning the entire empire (overseen by Parliament) and matters internal to each province (reserved to the colonial assemblies).[43]

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35. U.S. CONST. art. I, §§ 8-10.

36. *See generally* ARTICLES OF CONFEDERATION OF 1781.

37. *Id.* at art. IX.

38. *Id.* at art. VIII.

39. *See* LACROIX, *supra* note 1, at 60-67; *see also* Alison L. LaCroix, *Rhetoric and Reality in Early American Legal History: A Reply to Gordon Wood*, 78 U. CHI. L. REV. 733, 734 (2011) [hereinafter LaCroix, *Rhetoric*].

40. *See* LaCroix, *Rhetoric*, *supra* note 39, at 733-34.

41. *See id.*

42. *See* [John Dickinson], *Letters from a Farmer in Pennsylvania, to the Inhabitants of the British Colonies* 17 (1767), *available at* http://ia700407.us.archive.org/11/items/cihm_14505/cihm_14505.pdf.

43. *See* John Adams, *Novanglus No. III*, *in* 4 THE WORKS OF JOHN ADAMS, SECOND

Much of the energy driving the constitutional reforms of the 1760s through the early 1780s thus focused on allocating specific powers between different levels of legislatures. By the mid-1780s, however, the perceived exigencies of the postwar period had driven Madison and many of his contemporaries to believe that a functioning constitution must do more than describe arenas of legislative authority.[44] A functioning constitution, one that would provide a normative vision for government in addition to a simple description of institutions and powers, would provide some supervening authority to assess whether the competing legislatures had in fact trenched on each other's power in a given situation.[45] Indeed, although Madison's negative offered a legislative solution to the problem of supremacy, it did not make more specific declarations about the relative powers of each legislature. Instead, the negative promoted one of the legislatures—Congress—to the level of umpire, with the authority to decide when the state legislatures had overstepped their powers.[46] The negative, therefore, like the judicial review that supplanted it, added an overarching structural mechanism aimed at settling boundary disputes between various branches of legislative power. Although their supporters emphasized different institutions (Congress for one, the Supreme Court for the other),[47] the negative and judicial review shared a similar commitment to writing a fundamental, structural rule of intergovernmental conflict resolution into the Constitution. This focus by the mid-1780s not just on "who decides," but on "who decides who decides," represented a shift from enumeration and boundary-demarcation toward the identification of an ultimate interpretive authority as a means of ameliorating what contemporaries came to view as the inevitable friction between American federalism's multiple levels of government.[48] The negative, therefore, was not

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PRESIDENT OF THE UNITED STATES 29, 37-38 (Charles Francis Adams ed., 1851); FRANCIS BERNARD, SELECT LETTERS ON THE TRADE AND GOVERNMENT OF AMERICA; AND THE PRINCIPLES OF LAW AND POLITY, APPLIED TO THE AMERICAN COLONIES (Kessinger Publishing 2007) (1774); THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA (Limitless Press 2010) (1774); THOMAS POWNALL, THE ADMINISTRATION OF THE COLONIES (2d ed. 1765).

44. *See* LACROIX, *supra* note 1, at 169-71.

45. *See generally* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967) (analyzing the American Revolution). Morton Horwitz has characterized the work of Bailyn as distinguishing between small-c constitutions and large-C Constitutions. *See* Morton J. Horwitz, *A Historiography of* The People Themselves *and Popular Constitutionalism*, 81 CHI.-KENT L. REV. 813, 817 (2006).

46. Note that under the Virginia Plan, Congress was not the sole arbiter of the balance between federal and state legislation. Article VIII of the plan proposed a "[c]ouncil of revision" comprising "the Executive and a Convenient number of the National Judiciary," who would be vested with "authority to examine every act of the National Legislature before it shall operate, [and] every act of a particular Legislature before a Negative thereon shall be final." Virginia Plan, para. 8, *in* 10 THE PAPERS OF JAMES MADISON, *supra* note 4, at 12, 16 (1977).

47. *See supra* Part I.

48. *Cf.* DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 88 (Wilson Carey McWilliams & Lance Banning eds., 2003) (describing the Coercive

simply a more elaborate form of enumeration.

Moreover, the negative differed in important ways from the modern form of interlegislature dialogue: preemption. Recall Gouverneur Morris's critique of the negative on the floor of the convention, moments before it was voted down once and for all: "A law that ought to be negatived will be set aside in the Judiciary [department] and if that security should fail; may be repealed by a [National] law."[49] Morris's succinct statement set forth a spectrum of potential solutions to the problem of supremacy: (1) the negative; (2) judicial review; and (3) preemption, or repeal of a state law by a national law. For Morris, as for many of his contemporaries, the negative presented an altogether distinct (and undesirable) mode of policing federal supremacy that differed in important ways from both judicial review and preemption.

Morris's reference to the possibility that a state law might be "repealed by a [National] law" is intriguing because it appears to assume that even without any specific textual grant of power to Congress, that body could override state laws. A similar presumption had long underpinned Anglo-American law under the empire, for the earliest colonial charters had mandated that laws passed by the provincial assemblies be "as neere as conveniently may, agreeable to the forme [sic] of the lawes [sic] [and] pollicy [sic] of England."[50] Throughout the seventeenth and early eighteenth centuries, most British and British North American commentators adhered to the view that Parliament had at least some authority to legislate for the colonies by specifically mentioning them in its acts.[51] In addition, the hybrid legislative-adjudicative body of the Privy Council had the power to invalidate specific colonial laws from its seat in Whitehall.[52] By 1787, when Morris set forth his array of alternatives to the negative, his fellow delegates seemed comfortable with the notion that Congress could

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Acts of 1774 as standing for the proposition not that Parliament was to decide every issue, but that it "was to decide where everything was to be decided").

49. Madison's Notes (July 17, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 25, 28.

50. *See* Letters Patent from Elizabeth I to Sir Humfrey Gylberte (1578), *in* 1 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATE, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 49, 51 (Francis Newton Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS].

51. *See, e.g.*, I WILLIAM BLACKSTONE, COMMENTARIES *107-08 ("Our American plantations are . . . . distinct (though dependent) dominions. They are subject, however, to the control of the parliament; though (like Ireland, Man, and the rest) not bound by any acts of parliament, unless particularly named."). *See generally* MARY SARAH BILDER, THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE (2004) (discussing the "transatlantic constitution" and the applicability of the laws of England to the colonies); 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801 (Paul A. Freund ed., 1971).

52. *See* JOSEPH HENRY SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS 503 (1950); 2 EDWARD RAYMOND TURNER, THE PRIVY COUNCIL OF ENGLAND IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES 1603-1784, at 47-48, 293-94 (1928).

effectively nullify a state law by passing federal legislation that superseded or conflicted with it. This view of Congress's power likely stemmed from Americans' familiarity with the multilayered hierarchy of laws under the empire. It was also reflected in the "supreme law of the land" language of the Supremacy Clause, which in the hands of Chief Justice John Marshall and later interpreters came to amount to a textual basis for Congress's power effectively to repeal state law by preempting it through federal legislation.[53]

The negative might appear to be functionally similar to preemption insofar as both are mechanisms by which Congress can effectively override state laws. Although less formal or textually grounded than the negative, preemption operates as a means of maintaining federal supremacy by giving Congress a check on the actions of state legislatures.[54] Modern case law divides preemption into three categories: express, field, or conflict preemption.[55] Express preemption, based upon Congress's explicit intention to nullify state law, provides the closest parallel with the negative. However, all three species of preemption might possess the potential to achieve the purposes that Madison identified: reducing parochial state legislation, augmenting the power of the federal government (especially with respect to taxation and commerce), and increasing individuals' attachment to the Union. Indeed, implied preemption—whether categorized as "field" or "conflict"—might be viewed as allowing members of Congress to reap the centralizing, power-consolidating benefits of the negative more covertly than Madison's scheme would have permitted.

Yet three important differences between the negative and preemption suggest

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53. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210 (1824) ("[T]he acts of New-York must yield to the law of Congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous."); *see also* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 108 (1992). *But cf.* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 778-81 (1994); S. Candice Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause*, 24 CONN. L. REV. 829, 842-55 (1992) (challenging the view that broad preemption principles necessarily follow from the Supremacy Clause).

54. *See* Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1353-54 (2006) (arguing that the Supreme Court has used preemption doctrine to protect national commercial uniformity); Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. (forthcoming 2012) (discussing preemption by federal agencies). *See generally* WILLIAM W. BUZBEE ET AL., PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION (William W. Buzbee ed., 2009).

55. *See Gade*, 505 U.S. at 98 ("Pre-emption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.' . . . [W]e have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' and conflict pre-emption, where 'compliance with both federal and state regulations is a physical impossibility,' or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'") (citations omitted).

that the functional-equivalence hypothesis fails to capture either the foundational beliefs that lay behind Madison's vision of the negative, or the consequences of how it would have operated in practice. These differences center on (1) the scope that the negative and preemption each ascribes to Congress's power to act in areas beyond its enumerated Article I powers; (2) the default presumption of each toward the validity of state legislation; and (3) the meaning each ascribes to congressional silence.

The potential scope of Congress's power in a world with the negative would have been far broader than the actual scope of Congress's power when it preempts state law. According to Madison's broadest version of the negative, Congress would have had the authority to veto any state law that in Congress's view was not consistent with the federal interest. As originally presented to the convention, the Virginia Plan granted Congress the power to negative state laws "contravening in the opinion of the National Legislature the articles of Union."[56] When the negative became the central topic of debate just over a week later, Charles Pinckney of South Carolina moved that the scope of the power be expanded to cover any state act that Congress deemed "improper."[57] Madison seconded the motion, insisting that "an indefinite power to negative legislative acts of the States" was "absolutely necessary to a perfect system," but the broader language failed to win majority support.[58] Madison also argued that Congress ought to deploy agents into the states to allow for rapid federal assent to state legislation—and, not incidentally, to drive home the point that the federal level of government was a necessary participant in state lawmaking.[59]

Whether the delegates had ultimately granted Congress a negative "in all cases whatsoever" (as Madison initially described it in his letters)[60] over "improper" state laws, or only over state laws that contravened the Constitution, the result would have given Congress dramatically broader supervisory power over the state legislatures than it possesses even under the broadest possible conception of preemption. Most significantly, the negative would have been an enumerated power of Congress. Had it been adopted, the negative would itself have been committed to text as a structural provision built into the Constitution, either in Article I or else, like the Supremacy Clause, in a subsequent provision describing the functions of the constitutional system as a whole. A Congress invoking the negative would not need to point to a separate, enumerated, substantive power under which it was acting. In other words, a negativing Congress would not be engaging in regulation, but rather exercising its structural

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56. Virginia Plan, para. 6, *in* 10 THE PAPERS OF JAMES MADISON, *supra* note 4, at 12, 16 (1977).

57. Journal (June 8, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 162.

58. *Id.* at 164, 168.

59. *Id.* at 168 ("The case of laws of urgent necessity must be provided for by some emanation of the power from the [National Government] into each State so far as to give a temporary assent at least.").

60. *See supra* notes 14-17 and accompanying text.

authority to oversee the product of the state legislatures.

This structural power to negative stands in sharp contrast to the preemption power. Preemption doctrine permits Congress to override state laws in many situations, but the preempting federal legislation must always be consistent with Congress's enumerated Article I powers.[61] In effect, the enumeration principle provides a substantive limitation on when Congress can preempt state laws. Moreover, in moments when the Supreme Court is construing Congress's enumerated powers narrowly, Congress might have more difficulty preempting state legislation, or it might be less eager to attempt preemption.

A second important difference between the negative and preemption is the default presumption of each mechanism toward the validity of state legislation. Under the regime of the negative, if Congress did not veto a particular state law, the state law would stand. But Madison's presumption was that Congress could intervene and brandish the negative whenever it chose. Recall Madison's statement in the convention that "[t]he States [could] of themselves then pass no operative act, any more than one branch of a Legislature where there are two branches, can proceed without the other."[62] On this view, Congress and the states would operate as a single compound legislature for purposes of state lawmaking.[63]

The Supreme Court's case law on preemption, in contrast, has at least at times articulated "the assumption that the historic . . . powers of the States [are] not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress."[64] To be sure, commentators have questioned whether this presumption against preemption truly exists,[65] while others have criticized the presumption.[66] Still, the fact remains that preemption's invasiveness on state lawmaking processes varies widely depending on the subject matter of the particular legislation and on the particular species of preemption (express, field, or conflict) that Congress is arguably exercising. Moreover, preemption is a complex doctrinal area requiring judicial interpretation, especially with respect to difficult questions of congressional intent.[67] Taken together, these differences

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61. The fact that federal regulations, as well as statutes, may have preemptive effect can add an additional layer to this analysis. *See* Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985). But such regulations must nevertheless be adopted pursuant to a validly enacted federal statute, and therefore the enumeration analysis still applies.

62. Madison's Notes (June 8, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 165.

63. *See* LACROIX, supra note 1, at 152.

64. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (citing Napier v. Atl. Coast Line R. Co., 272 U.S. 605 (1926); Allen-Bradley Local v. Wis. Emp't Relations Bd., 315 U.S. 740 (1942)), *rev'd sub nom.* Rice v. Bd. of Trade of Chi., 331 U.S. 247 (1947); *see also* Bradford R. Clark, *Process-Based Preemption*, *in* BUZBEE ET AL., *supra* note 54, at 192, 193.

65. *See, e.g.*, Susan Raeker-Jordan, *The Pre-Emption Presumption That Never Was: Pre-Emption Doctrine Swallows the Rule*, 40 ARIZ. L. REV. 1379 (1998).

66. *See* Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085 (2000).

67. *See, e.g.*, Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption?:*

in the two mechanisms' default presumptions suggest that even the narrowest version of the negative would have involved the federal government in state lawmaking to a far greater degree than the current regime of preemption.

Finally, congressional silence would carry different meaning in the context of the negative from the import it bears in the preemption context. According to Madison's vision of the negative, if Congress did not veto a particular state act, the act would stand.[68] Although the negative was based on the premise that Congress could intervene whenever it chose (the coordinate legislatures idea), any action Congress did take would be clear cut: either a veto, or assent via one of the agents of federal authority that Madison described as an "emanation of the power from the [National Government] into each State."[69] But in a system with the negative, what would be the meaning of silence—neither a veto nor assent—from Congress? At some point, would silence become in effect a ratification of state law?

The records of Madison's plans do not provide many details about how he envisioned the negative actually operating in practice. Besides his statement that the negative ought to be "lodged in the senate alone," and his reference to emanations of federal authority into the states,[70] it is difficult to obtain a sense of, for example, the timeline for the negative's exercise. Had the delegates approved the negative, one imagines that within a few decades, the Senate would have formed a committee to oversee the review of state laws and would have established rules governing procedural matters such as the deadline for vetoing a state law and the point at which a state law could be considered ratified and not simply not vetoed. This committee on the negative would presumably also have had to coordinate the Senate's processes with those of the Council of Revision,[71] perhaps by sending notice to the Council of the Senate's intention to veto a state law. Such notice would then trigger the Council's duty to "examine . . . every act of a particular Legislature before a Negative thereon shall be final," in the words of the Virginia Plan.[72]

In short, putting the negative into operation would have required Congress, as well as the other branches of the federal government, to produce a significant body of procedural rules. Uncertainty regarding Congress's intentions would have meant enormous costs to state law, norms of state sovereignty, and individuals' reliance on stable legal rules. Eighteenth-century Americans' experiences waiting for the Privy Council's verdict on specific colonial statutes had taught them the perils of long periods of review. Indeed, charges that George III had permitted his councilors to delay their review of colonial laws had formed

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A Case Study of the Failure of Textualism, 33 HARV. J. ON LEGIS. 35 (1996).

68. *See supra* notes 16-21 and accompanying text.

69. Madison's Notes (June 8, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 168.

70. *Id.*

71. *See* Virginia Plan, para. 8, *in* 10 THE PAPERS OF JAMES MADISON, *supra* note 4, at 12, 16 (1977).

72. *Id.*

one of the particular grievances listed in the Declaration of Independence.[73] Consequently, one can reasonably assume that the Constitution's drafters and ratifiers would not have been content to leave the details of the negative's operation ambiguous, especially the key question whether a veto had issued or not.

In the preemption realm, by contrast, many unresolved questions surround the meaning of congressional silence. As in the context of the Dormant Commerce Clause, courts and commentators are routinely forced to try to determine when congressional silence exists, when it is meaningful, and when it is simply the result of inattention, unintentional inaction, or the hierarchy of legislators' priorities.[74] Also like the Dormant Commerce Clause, preemption analysis is paradigmatically undertaken by courts, unlike the negative's legislature-centered procedures.[75]

In short, important textual, functional, and ideological differences between the negative and preemption suggest that not only does the modern American constitutional system not have the negative, the preemption doctrine that it does have would have failed to satisfy many of the central concerns about the issue of supremacy that occupied late-eighteenth-century constitutional thinkers.

III. A COUNTERFACTUAL NINETEENTH-CENTURY CASE STUDY

Given these arguments that preemption is not the modern equivalent of the negative, and that the key aspects of Madison's negative therefore did not survive the Philadelphia Convention, it is possible to ask the true what-if question: what if the Constitution had contained the negative? Possible sites of counterfactual historical exploration abound. Let us focus on an example from the early nineteenth century: the debates over Congress's power to supersede state legislation in the realm of interstate commerce as those debates were crystallized in the case of *Gibbons v. Ogden*.[76] This case study suggests that rather than leading to greater centralization, the presence of the negative might well have helped foment sectional crisis by raising the stakes of federalism-related debates throughout the early national period.

The facts of *Gibbons* present the paradigmatic early-nineteenth-century scenario of state regulation intersecting with federal legislation in the context of

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73. *See* THE DECLARATION OF INDEPENDENCE para. 4 (U.S. 1776) ("He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.").

74. *See, e.g.*, Duckworth v. Arkansas, 314 U.S. 390, 400 (1941) (Jackson, J., concurring) (observing that some state and local restraints on interstate commerce are "individually too petty, too diversified, and too local to get the attention of a Congress hard pressed with more urgent matters," and therefore the Court is justified in engaging in Dormant Commerce Clause analysis).

75. *See* Yates's Notes (June 8, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 169, 169-70.

76. 22 U.S. (9 Wheat.) 1 (1824).

the technological and commercial developments of the post-1815 market revolution.[77] Familiar as they are, facts are particularly important for a counterfactual inquiry, so let us briefly review them.[78] Aaron Ogden acquired a license from John Livingston, who had previously required it from Robert Fulton and Robert Livingston, to operate a ferry between Manhattan and Elizabethtown Point in New Jersey.[79] Livingston had been chancellor of New York; Fulton had invented and patented the first steamboat.[80] A New York statute gave Fulton and Livingston the exclusive right to operate steamboats in New York waters; Ogden claimed that that right was transferred to him along with the license.[81] Subsequently, Ogden's former partner Thomas Gibbons began operating a competing ferry service in New York waters.[82] Provoked by Ogden's claims that his license was exclusive, Gibbons challenged Ogden to a duel, but Ogden—prudently and in keeping with changing mores of conflict resolution in the early nineteenth century—instead filed a trespass action.[83] Subsequently, Ogden filed an injunction suit in New York's Court of Chancery arguing that Gibbons's competing ferry violated the state legislature's grant of a monopoly to Fulton and Livingston, and therefore to Ogden.[84] Ogden prevailed in the Court of Chancery, where Chancellor James Kent upheld the New York grant.[85] The chancery decision was affirmed by New York's Court for the Trial of Impeachments and Correction of Errors,[86] and Gibbons later appealed to the U.S. Supreme Court.[87] In support of his claim, Gibbons cited a 1793 act of Congress titled "An Act for Enrolling and Licensing Ships or Vessels to be Employed in the Coasting Trade and Fisheries, and for Regulating the Same."[88] Gibbons argued that his steamboats (the *Bellona* and the *Stoudinger*) were licensed under

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77. *See generally* DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848 (David M. Kennedy ed., 2007) (characterizing the early nineteenth century as a communications and technological revolution); CHARLES SELLERS, THE MARKET REVOLUTION: JACKSONIAN AMERICA, 1815-1846 (1991) (characterizing the same period as a market revolution).

78. *See generally* MAURICE G. BAXTER, THE STEAMBOAT MONOPOLY: *GIBBONS V. OGDEN*, 1824 (Paul Murphy ed., 1972) (discussing the facts of *Gibbons v. Ogden*); THOMAS H. COX, *GIBBONS V. OGDEN*, LAW, AND SOCIETY IN THE EARLY REPUBLIC (2009) (discussing *Gibbons v. Ogden*); Norman R. Williams, Gibbons, 79 N.Y.U. L. REV. 1398 (2004) (discussing *Gibbons v. Ogden*).

79. *See* Williams, *supra* note 78, at 1408.

80. *Id.* at 1407.

81. *Id.* at 1407-08.

82. *Id.* at 1408.

83. *See* BAXTER, *supra* note 78, at 32.

84. *Id.* at 33.

85. *See* Ogden v. Gibbons, 4 Johns. Ch. 150 (N.Y. Ch. 1819), *aff'd*, 17 Johns. 488 (N.Y. 1820), *rev'd*, 22 U.S. (9 Wheat.) 1 (1824).

86. *Gibbons*, 17 Johns. 488.

87. Williams, *supra* note 78, at 1410.

88. Act of Feb. 18, 1793, ch. 8, 1 Stat. 305.

this federal statute, and consequently that the New York monopoly was invalid.[89]

Chief Justice John Marshall's opinion for the Court today seems to bear an aura of hornbook inevitability, making it an ideal candidate for counterfactual examination. After engaging in a wide-ranging exploration of the Commerce Clause, Marshall determined that Congress did have the power to involve itself in steamboat traffic in New York Harbor.[90] The Court concluded that the New York monopoly must yield before the federal coasting statute.[91] Marshall found that the New York statute came into "collision" with the act of Congress, and that the Supremacy Clause therefore required the Court to strike down the state law.[92] "[T]he framers of our constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it," Marshall wrote.[93] In cases of collision such as this one, "the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it."[94] Thus, the Court held that the federal coasting statute applied to the steamboat trade in New York Harbor, that it was a valid exercise of Congress's commerce power, and—most important for our purposes—that the New York monopoly grant conflicted with the federal statute, and the state law therefore must give way.[95]

Thus for the factual; now to the counterfactual. What would the result have been in *Gibbons* in a constitutional world with the negative? Is this even a valid question, or in such a world would the case even have come before the Court as it did?

On one view, *Gibbons* would have produced the same result even in the regime of the negative. Marshall's argument can be read to point strongly in this direction. Here the timeline becomes important. Congress passed the federal coasting statute in 1793; New York granted the original monopoly to Fulton and Livingston in 1798, and in 1807—upon Livingston and Fulton's production of a steamboat capable of reaching the speed of five miles per hour—extended the monopoly for thirty years.[96] With the negative at its disposal, Congress might well have simply vetoed either the original 1798 state monopoly grant or the 1807 extension. Had Congress needed to offer a justification for the veto, it could have cited the conflict with the coasting statute or a general federal interest in promoting interstate commerce (both points that Marshall's decision later emphasized).[97] Especially given contemporary uncertainty on the question whether Congress's power over interstate commerce was exclusive rather than

89. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 239-40 (1824).
90. *Id.*
91. *Id.* at 240.
92. *Id.* at 221.
93. *Id.* at 210.
94. *Id.* at 211.
95. *Id.* at 221-22.
96. Williams, *supra* note 78, at 1407.
97. *See Gibbons*, 22 U.S. (9 Wheat.) at 206, 210.

concurrently held with the states,[98] one can easily imagine a coalition of Federalist or National Republican senators, senators from landlocked interior states who depended on navigable rivers, and senators who generally supported commerce and development coming together to wield the negative against the New York monopoly.

Yet it is also possible to question the apparently seamless logic of Marshall's reasoning.[99] Indeed, one need look no further than the writings of the great Chancellor Kent to find rebuttals to the Chief Justice's arguments. In upholding the New York monopoly, and in his later *Commentaries*, Kent took note of the federal coasting statute but disputed Marshall's interpretation of the statute's purpose and effect.[100] Kent argued that it was not clear that Congress had intended to supplant all state regulation of interstate commerce on water.[101] Moreover, Kent and other critics (including Ogden's lawyers) argued that the purpose of the federal coasting statute might simply be to designate a vessel as American in order to avoid its being subjected to foreign-vessel tariffs.[102] The federal law might not actually confer an affirmative right to navigate, let alone an exclusive right, contrary to Marshall's suggestion. Thus, the combined arguments of Ogden's advocates, Kent for the court below, and Kent and others as commentators offered strong challenge to Marshall's premise that the case presented a "collision" between state and federal law. Challenging that premise in turn calls into question Marshall's conclusion that simple application of the Supremacy Clause required that the state law be invalidated.

Counterfactual interpretation depends in large part on the version of the facts that the counterfactualist chooses to begin with. If one accepts Marshall's interpretation of the *Gibbons* facts, in a world with the negative, Congress would most likely have simply vetoed the New York monopoly at some point prior to 1824; Gibbons would clearly have been able to operate his competing steamboat concern; and the case would never have come before the Court. But if one adopts Kent's competing theory of the facts, Congress might never have vetoed the New York monopoly, *even if it had the power of the negative*, because it would not have occurred to Congress that it ought to block state laws of this type. The Kent theory, then, suggests that the presence of the negative might well have made little difference, and that the dispute between Gibbons and Ogden—and the

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98. *See, e.g.*, *id.* at 209 ("It has been contended by the counsel for the appellant, that, as the word 'to regulate' implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. . . . There is great force in this argument, and the Court is not satisfied that it has been refuted."). *But see generally* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851) (resolving the question in favor of concurrence and rejecting the exclusive view of Congress's commerce power).

99. *See* Williams, *supra* note 78, at 1399 (describing Marshall's interpretation of the federal coasting statute as "a stretch").

100. *See id.* at 1409.

101. *See* Ogden v. Gibbons, 4 Johns. Ch. 150, 156 (N.Y. Ch. 1819), *aff'd*, 17 Johns. 488 (N.Y. 1820), *rev'd*, 22 U.S. (9 Wheat.) 1 (1824).

102. *See id.*

ensuing collision between federal and state law—would have unfolded just as it did.

Gibbons demonstrates the degree to which a counterfactual inquiry into the negative returns again and again to the issue of congressional silence. In a regime with the negative, if New York passes the monopoly statute and Congress does nothing, what result? Might that inquiry depend on the particular moment in question—Congress doing nothing when the monopoly was first granted in 1798, versus doing nothing when the monopoly was extended in 1807? Congressional silence might mean, or be taken by contemporaries used to dealing with this question in the regime of the negative to mean, that New York could grant the monopoly. This result would be a very different outcome from the decision in *Gibbons*. Or, on the contrary, congressional silence might mean that New York could not grant the monopoly, insofar as the silence amounted to a lack of federal assent. Such a view might have been most compatible with Madison's goals for the negative. In addition, the view that congressional silence was fatal to the state monopoly would have been consistent with Marshall's hint in *Gibbons* that federal power over interstate commerce might be exclusive. So, if in a world with the negative, Congress did not veto the New York monopoly and the case ended up before the Court, a justice of Marshall's convictions might have simply pointed to the lack of congressional assent to hold that the state law was invalid. Each of these counterfactual scenarios presents one significant difference from the actual constitutional world of the nineteenth century, and indeed the twentieth century: the possibility that the contours of the federal commerce power might have been elaborated by conflict between Congress and the state legislatures, rather than the Supreme Court.

Of course, as Madison pointed out in the convention debates, the mere fact of the negative's existence might well deter the states from regulating for fear of prompting a veto.[103] Whether such a chilling effect on state legislation would be desirable or not, however, one can equally imagine the effect of the negative in the early nineteenth century as driving some states to become more resistant to federal power. By explicitly building state-federal conflict into the Constitution, the negative would arguably have prompted conflict between the levels of government, rather than confining it to a specific case or controversy, as judicial review for the most part did. One consequence of the negative might therefore have been to galvanize state sovereignty at an early moment in the Republic's history. Rather than state sovereignty arguments occasionally surfacing (e.g., the Virginia and Kentucky Resolutions of 1798-99, the Hartford Convention during the War of 1812) before reaching a constant roar in the nullification conflict of the 1830s and the secession crisis of the 1860s, the constitutional shouting and brinksmanship would have begun in the nation's first years. Moreover, the friction from below would likely have been widespread, sweeping in not only slaveholding states but diverse interests such as New York's impulse to protect

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103. *See* Madison's Notes (June 8, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 164 (quoting Madison's statement that "[t]he existence of such a check would prevent attempts to commit" aggressive acts of legislation against other states or the Union).

its harbor traffic[104] and Maryland's and Ohio's opposition to the Bank of the United States.[105]

One can certainly tell an optimistic counterfactual story about a constitutional world with the negative. On this view, the negative might have staved off the sectional crisis, and perhaps even the Civil War, by establishing a clear rule of federal supremacy and staving off the expansion of slavery into the territories, and perhaps even the continuation of slavery where it existed.[106] But one can also tell at least two more sinister stories. In one, the negative would have permitted slaveholding interests to have captured the federal level of government far more completely than the "slave power conspiracy" that periodically held the Court, the Senate, and the presidency was able to do, resulting in a federalization of proslavery views.[107] A more diffusely pessimistic story suggests that whatever its substantive outcomes, the presence of the negative would have increased the salience of state sovereignty claims, creating more arenas of dispute between state and federal power, and perhaps uniting diverse states behind a broad banner of resistance to federal—or at least congressional—authority.

CONCLUSION

The federal negative is a fundamentally different species of structural mechanism from the Constitution's existing modes of judicial review and congressional preemption. The negative is typically seen as a highly centralizing mechanism; that was clearly Madison's purpose in promoting it at the Philadelphia Convention, and indeed for the rest of his life.[108] Madison and others believed that the negative was the best available solution to the problem of institutionalizing federal supremacy.[109] Commentators ever since have viewed it as evidence of Madison's nationalism.[110] But had the negative succeeded, it

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104. *See Ogden*, 4 Johns. Ch. at 164-65.

105. *See* Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738 (1824); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

106. *See generally* Arthur Bestor, *The American Civil War as a Constitutional Crisis*, 69 AM. HIST. REV. 327 (1964) (describing the Civil War as resulting in large part from the channeling of many disputes into a framework of constitutional law).

107. *See generally* LEONARD L. RICHARDS, THE SLAVE POWER: THE FREE NORTH AND SOUTHERN DOMINATION, 1780-1860 (1st ed. 2000) (discussing and analyzing the slave power thesis).

108. As late as 1831, five years before his death, Madison continued to defend his proposal for the negative. *See* Letter from James Madison to Nicholas Trist (Dec. 1831), *in* 9 THE WRITINGS OF JAMES MADISON 471, 473 (Gaillard Hunt ed., 1910).

109. *See* Madison's Notes (June 8, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 18, at 164-70 (citing discussion of the Negative at the Federal Convention of 1787).

110. *See* Alison L. LaCroix, *The Authority for Federalism: Madison's Negative and the Origins of Federal Ideology*, 28 LAW & HIST. REV. 451, 462 n.31 (2010).

might well have led to fragmentation and disintegration between the federal center and the state peripheries in the early years of the nation's history, long before the antebellum sectional controversy began. The negative might have brought more centralization, but at the price of raising every conflict to a constitutional crisis decades before the Civil War.

WHAT IF *SLAUGHTER-HOUSE* HAD BEEN DECIDED DIFFERENTLY?

KERMIT ROOSEVELT III*

> "[W]hy are you asking us to overrule 150, 140 years of prior law . . . when you can reach your result under substantive due [process] . . . unless [you are] bucking for a . . . place on some law school faculty[?]"[1]

INTRODUCTION

In *District of Columbia v. Heller*,[2] the Supreme Court surprised many veteran Court-watchers by breathing life back into the long-moribund Second Amendment. The federal government's power to restrict individual gun ownership was meaningfully limited, the Court wrote: the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation."[3]

But *Heller* dealt only with federal regulation.[4] What about the states? For over a century, the Supreme Court has approached questions about whether a particular Bill of Rights liberty could be asserted against the states by asking whether the right was "incorporated" in the Fourteenth Amendment's Due Process Clause.[5] Nonetheless, when *McDonald v. City of Chicago*[6] presented the Second Amendment question, Alan Gura, the petitioners' lawyer, asked the Court to take a different tack.

Rather than deciding whether the Second Amendment met the test for incorporation in the Due Process Clause,[7] Gura suggested the Court should ask whether private possession of firearms was one of the privileges or immunities of U.S. citizenship protected by the Fourteenth Amendment's Privileges or

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1. Transcript of Oral Argument at 6-7, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521), 2010 WL 710088 at *6-7 (quoting Justice Scalia).

2. 554 U.S. 570 (2008).

3. *Id.* at 592.

4. *See id.*

5. For early cases, see, for example, *Hurtado v. California*, 110 U.S. 516 (1884), and *Chicago B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

6. 130 S. Ct. 3020 (2010).

7. The most frequently cited formulation of the selective incorporation test is probably that of *Palko v. Connecticut*, 302 U.S. 319 (1937), which asked whether the asserted right was "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 325 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934), *overruled in part by* Malloy v. Hogan, 378 U.S. 1 (1964)).

Immunities Clause.[8] In *The Slaughter-House Cases*,[9] the Court had adopted a reading of the Privileges or Immunities Clause that excluded the Bill of Rights liberties from its scope, but, Gura contended, that "narrow [reading] . . . should now be rejected."[10]

The Justices' questions at oral argument indicated no enthusiasm for reconsidering *Slaughter-House*. Justice Scalia, in particular, demanded whether it was "easier" to reach Gura's desired result via Privileges or Immunities than through the Court's established substantive due process approach (Gura admitted it was not)[11] and whether a Privileges or Immunities jurisprudence might end up using exactly the same test (Gura admitted it might).[12]

In the end, the Court went the Due Process route. Gura got Justice Thomas's vote for his Privileges or Immunities theory, but even Thomas seemed hard-pressed to explain why it would make a practical difference. His concurrence offered an argument that the Court's Due Process approach to fundamental rights was problematic (it "strains credulity for even the most casual user of words" and is "particularly dangerous" because it lacks a guiding principle).[13] However, his suggested turn to Privileges or Immunities did not seem to be much of an improvement: the only restriction he was able to place on the rights he would recognize under that clause was that they be "fundamental,"[14] which is the same limit the Court has observed, with more or less rigor, in its substantive due process jurisprudence.[15] Thus, as Scalia implied during oral argument,[16] a revitalized Privileges or Immunities Clause would probably simply take over the function currently performed by the Due Process Clause.

That is more or less the academic consensus. *Slaughter-House* was wrong—blatantly,[17] maliciously,[18] egregiously.[19] (Pick your adverb.) But

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8. *See* Transcript of Oral Argument, *supra* note 1, at 4.

9. 83 U.S. (16 Wall.) 36 (1872).

10. *McDonald*, 130 S. Ct. at 3028.

11. Transcript of Oral Argument, *supra* note 1, at 6.

12. *Id*. at 11.

13. *McDonald*, 130 S. Ct. at 3062 (Thomas, J., concurring).

14. *Id*. at 3067 (quoting Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230)).

15. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 719-21 (1997) (describing methodology). Thomas did advert briefly to the view that the Bill of Rights exhausts the meaning of Privileges or Immunities, see *McDonald*, 130 S. Ct. at 3075-76 (Thomas, J., concurring), but this probably does not help much given that the Bill of Rights, in the Ninth Amendment, proclaims itself to be a nonexhaustive list of rights. For a recent and valuable discussion of the Ninth Amendment, see Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 COLUM. L. REV. 498 (2011).

16. Transcript of Oral Argument, *supra* note 1, at 11.

17. Alan Gura et al., *The Tell-Tale Privileges or Immunities Clause*, 2010 CATO SUP. CT. REV. 163, 183 (2010).

18. *Id*.

19. Brief for Constitutional Law Professors as Amici Curiae Supporting Petitioners at 33,

overruling it would not change much about the current state of constitutional law.[20] The brief for constitutional law professors as amici curiae in *McDonald*, after some forceful language about the error of *Slaughter-House*, concluded that section with the somewhat anticlimactic observation that "[a]s professors of constitutional law, we look forward to the day when we can teach our students how the Supreme Court corrected this grievous error."[21] It should surprise no one that the Justices were unmoved.

My aim in this Article is not to disturb that consensus. Reviving the Privileges or Immunities Clause would probably not change the results in cases currently decided as part of our equal protection or fundamental rights substantive due process jurisprudence.[22] In particular, it would not make the problems associated with that line of cases go away; judicial identification of unenumerated fundamental rights is going to be problematic no matter what the textual hook.[23]

The interesting question, I will suggest, is not what might happen in the future if the clause returned to life, but what would have happened in the past if it had not been killed in the first place. And the puzzle for such a counterfactual history, I will argue, is not what the Court's jurisprudence of Privileges or Immunities would look like. There are two possibilities, and we are quite familiar with them. They are what we now call Equal Protection and (substantive) Due Process.

Instead, the real puzzle is what Equal Protection and Due Process would look like if the Privileges or Immunities Clause had fulfilled its mission rather than passing the torch to them. I will suggest that they might look very different, and that our constitutional jurisprudence, as a whole, might look somewhat better. Thus, there would have been a real consequence to reaching the results we now reach through Equal Protection and Due Process through Privileges or Immunities instead: It would have freed up one or both of those clauses to do something else of value. *Slaughter-House* cost us something, I will argue, not because it killed the Privileges or Immunities Clause[24]—the substance of that clause made it into our doctrine anyway. It cost us something because the price of getting Privileges or Immunities through Due Process and Equal Protection was the original and intended substance of those clauses.

The first Part of this Article gives a brief description of the *Slaughter-House* case and the interpretation of Privileges or Immunities which the majority

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McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521), 2009 WL 4099504 at *33.

20. *See, e.g.*, Jeffrey Rosen, *Translating the Privileges or Immunities Clause*, 66 GEO. WASH. L. REV. 1241, 1242 (1998) (suggesting that "*Lochner* will bite us one way or the other").

21. Brief for Constitutional Law Professors as Amici Curiae, *supra* note 19, at 35.

22. As Justice Thomas put it in *Saenz v. Roe*, 526 U.S. 489 (1999), a revitalized Privileges or Immunities Clause would probably "displace, rather than augment, portions of our equal protection and substantive due process jurisprudence." *Id.* at 528 (Thomas, J., dissenting).

23. *See generally* Kermit Roosevelt III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 U. PA. J. CONST. L. 983 (2006) (describing substantive due process methodology).

24. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

adopted. Part II goes on to discuss the interpretations proposed by the dissents. And Part III considers what Equal Protection and Due Process might have looked like if the Court had adopted one or both of the dissents.

I. *SLAUGHTER-HOUSE* AND THE EVISCERATION OF PRIVILEGES OR IMMUNITIES

In 1869, the Louisiana legislature enacted a statute that created the Crescent City Live-Stock Landing and Slaughter-House Company and gave it the exclusive right to engage in the slaughtering of livestock within New Orleans and its environs.[25] The evident purpose was to protect the public health from the filth of unrestricted butchery, which contributed to regular outbreaks of cholera.[26] Other butchers were permitted to use the Crescent City facilities upon payment of a prescribed fee.[27] Unhappy with this state of affairs, they sued, challenging the statute on every available ground, including the Thirteenth Amendment and every clause of the Fourteenth.[28] "[F]or the first time," the Court wrote, it was called upon "to give construction to these articles."[29]

The Court's analysis of the possible application of the Thirteenth Amendment, Due Process, and Equal Protection was relatively brief, and it has not exerted much influence on subsequent law.[30] *Slaughter-House* is famous, instead, for its evisceration of the Privileges or Immunities Clause.[31]

The Clause, Justice Miller observed, protects the privileges and immunities of federal citizenship from state interference.[32] What are these privileges and immunities? Not those associated with state citizenship.[33] They are, instead, those "which own their existence to the [f]ederal government, its [n]ational [c]haracter, its Constitution, or its laws."[34] An ordinary reader might think from this description that Bill of Rights provisions would be included, since they

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25. *Id.* at 59.

26. *See id.* (indicating purpose of statute was for public health). For a description of the conditions in New Orleans prior to the enactment of the law at issue in *Slaughter-House*, see, for example, JACK BEATTY, AGE OF BETRAYAL: THE TRIUMPH OF MONEY IN AMERICA, 1865-1900, at 117-20 (2007).

27. *Slaughter-House*, 83 U.S. (16 Wall.) at 60.

28. *Id.* at 58.

29. *Id*. at 67.

30. *See id.* at 72, 80-81.

31. Just as one may choose from several adverbs to describe the quality of the Court's error, colorful descriptions of the decision's impact on the Privileges or Immunities Clause abound. Most use words suggestive of butchery, which is appropriate, if obvious. *See, e.g.*, Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the* Slaughter-House Cases *without Exhuming* Lochner*: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1, 1 (1996) ("liquidated"); Timothy Sandefur, *Privileges, Immunities, and Substantive Due Process*, 5 N.Y.U. J. L. & LIBERTY 115, 115 (2010) ("mutilated" and "entombed").

32. *Slaughter-House*, 83 U.S. (16 Wall.) at 74-76.

33. *Id*. at 74.

34. *Id*. at 79.

"ow[e] their existence to the . . . Constitution."[35] Indeed, it is possible to read Miller's opinion as not foreclosing Bill of Rights incorporation through Privileges or Immunities.[36] But later cases have read it to exclude the Bill of Rights,[37] and if Miller thought those provisions included, it is odd that he did not turn to them as examples. Instead, he offered the right "to come to the seat of government . . . to transact any business he may have with it" and "the right of free access to its seaports."[38] He went on to include the right "to demand the care and protection of the Federal government . . . when on the high seas . . . the privilege of the writ of *habeas corpus* . . . [t]he right to use the navigable waters of the United States."[39] Last, in an especially odd twist, he added, "the rights secured by the thirteenth and fifteenth articles of amendment."[40] A broader reading, Miller warned, would "radically change[] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people."[41]

As many people have pointed out, Miller's reasoning is somewhat less than satisfactory.[42] Most obviously, changing the relationship between the states, the federal government, and the people was exactly the purpose of the Reconstruction Amendments. The political paradigm of the founding generation took a distant central government as threatening to the liberty of individuals and looked for protection to the states in their sovereign capacity. That was the lesson of the Revolution, when state militiamen faced down Redcoats from overseas. So the founders' Constitution limited federal power and preserved the military capacity of the states, most notably with the Second Amendment.[43]

But that political theory was proved false, or at least incomplete, by the Civil War and its aftermath. In the minds of the Reconstruction Congress, the national

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35. *Id.* The counterargument is that the Bill of Rights guarantees are actually pre-existing natural rights that exist independent of the Constitution.

36. *See, e.g.*, Jonathan Lurie, *Reflections on Justice Samuel F. Miller and the* Slaughter-House Cases*: Still a Meaty Subject*, 1 N.Y.U. J. L. & LIBERTY 355 (2005); Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the* Slaughter-House Cases, 109 YALE L. J. 643, 649 (2000).

37. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 759 n.6 (1997) (Souter, J., concurring).

38. *Slaughter-House*, 83 U.S. (16 Wall.) at 79 (quoting Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 44 (1867)).

39. *Id.*

40. *Id.* at 80.

41. *Id.* at 78.

42. *See, e.g.*, CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 41-85 (1997).

43. When the original constitution protected individuals against states, it was most concerned to protect them against *other* states. Averting discrimination against out-of-staters is a central concern of Article IV of the Constitution, reflected primarily in the Privileges or Immunities Clause but also the Full Faith and Credit Clause. Protections for individuals against their own states were very narrow, most notably the Ex Post Facto and Bill of Attainder Clauses.

government was not the threat to individual liberty, but rather its protector.[44] And the states were not defending their citizens from a tyrannical national government; they were oppressing them, or at least some of them.[45] The Reconstruction Congress envisioned what the Framers largely did not, that federal laws and federal rights could come between individuals and their states in order to protect liberty.[46] The Reconstruction Amendments could hardly be clearer in terms of enacting this model, superimposing the new vision onto the old constitutional structure.

This fact was not lost on the dissenters. "The first eleven amendments to the Constitution," wrote Justice Swayne, "were intended to be checks and limitations upon the government which that instrument called into existence."[47] The Reconstruction Amendments, by contrast, "are a new departure, and mark an important epoch in the constitutional history of the country. They trench directly upon the power of the [s]tates, and deeply affect those bodies. They are, in this respect, at the opposite pole from the first eleven."[48] "By the Constitution, as it stood before the war," he continued, "ample protection was given against oppression by the Union, but little was given against wrong and oppression by the [s]tates. That want was intended to be supplied by this amendment."[49]

From that perspective, Miller's list of federal privileges and immunities is bizarre. Most of the rights he identifies are certainly not those about which the Reconstruction Congress was concerned. As Alan Gura said in his opening statement in *McDonald*, "The Civil War was not fought because [s]tates were attacking people on the high seas or blocking access to the Bureau of Engraving and Printing."[50] The rights secured by the Thirteenth and Fifteenth Amendments, by contrast, are rights about which Congress was concerned, but Miller's inclusion of them in his list actually just makes things worse.

The problem is that those rights run against the states by their own force; they do not need another amendment to gather them up and protect them. States cannot enslave people or deny the right to vote on racial grounds because of the Thirteenth and Fifteenth Amendments by themselves, whether the Privileges or Immunities Clause exists or not. So including these pre-existing federal rights is simply redundant. As Justice Field put it, if that is its effect, then the Fourteenth Amendment "was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its

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44. *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 56 (1998).

45. *See, e.g.*, *id.* at 258.

46. *See Slaughter-House*, 83 U.S. (16 Wall.) at 128 (Swayne, J., dissenting) ("The prejudices and apprehension as to the central government which prevailed when the Constitution was adopted were dispelled by the light of experience. The public mind became satisfied that there was less danger of tyranny in the head than of anarchy and tyranny in the members.").

47. *Id*. at 124 (Swayne, J., dissenting).

48. *Id.* at 125.

49. *Id*. at 129.

50. Transcript of Oral Argument, *supra* note 1, at 3-4.

passage."[51]

More or less everyone agrees that the Miller reading makes little sense, at least if we take the rights he listed as truly exemplary of the privileges and immunities of federal citizenship. But how should the clause have been read? Here interpretations diverge into what we can call the anti-discrimination and the fundamental rights camps. Each makes sense, textually and historically, to a greater extent than Miller's reading. And each has a representative among the dissenters in *Slaughter-House*. Those dissents are a convenient way to develop the views.

II. THE ROADS NOT TAKEN

A. Anti-discrimination

The anti-discrimination reading starts with the observation that the original Constitution also refers to privileges and immunities. Article IV, Section Two, provides that "[t]he [c]itizens of each [s]tate shall be entitled to all [p]rivileges and [i]mmunities of [c]itizens in the several States."[52] This clause was intended to protect against discrimination citizens of one state who ventured into another. It was designed to knit the several states into a federal union by providing that an individual from Maryland, for instance, who traveled to Virginia, would not be deemed a stranger to its laws but would instead receive all the benefits accorded to Virginians.[53]

This was an example of the Framers' concern with discrimination against out-of-staters. Discrimination among a state's citizens was an object of much less concern for the Framers, but of course it rose to prominence after the Civil War. How could an amendment respond?

One way might be to build on the Article IV Privileges or Immunities Clause. That clause could be paraphrased as saying that states may not abridge the privileges or immunities of citizens of other states, "privileges or immunities" here meaning rights under local state law. What was needed now was saying that states could not do this to their own citizens either—that states could not abridge the privileges or immunities of citizens of other states, or of their own citizens. Put these two categories of citizens together, and you get all state citizens—"citizens of the United States." Where the Article IV clause aims to make one nation out of the several states, we could say the Fourteenth

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51. *Slaughter-House*, 83 U.S. (16 Wall.) at 96 (Field, J., dissenting). As he went on to explain, "[w]ith privileges and immunities thus designated or implied no [s]tate could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the Constitution and the laws of the United States always controlled any [s]tate legislation of that character." *Id.*

52. U.S. CONST. art. IV, § 2, cl. 1.

53. Or at least the important ones. In *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230), the canonical Article IV Privileges and Immunities case, Justice Washington noted that the clause guaranteed fundamental rights.

Amendment clause aims to make us one people within the several states. Or, as Justice Field put it,

> What the [Article IV] clause . . . did for the protection of the citizens of one State against hostile and discriminating legislation of other [s]tates, the [F]ourteenth [A]mendment does for the protection of every citizen of the United States against hostile and discriminating legislation against him in favor of others, whether they reside in the same or in different [s]tates. If under the fourth article of the Constitution equality of privileges and immunities is secured between citizens of different [s]tates, under the [F]ourteenth [A]mendment the same equality is secured between citizens of the United States.[54]

A textually and historically plausible reading of the Fourteenth Amendment clause, and one endorsed by some scholars,[55] is thus that it announces that discrimination among state citizens is now to be viewed as skeptically as discrimination against citizens of other states was under the Article IV clause. "Privileges or Immunities" denotes rights created by state law, just as in Article IV, and "citizens of the United States" sets out the class of people protected against discriminatory abridgement.

The Supreme Court, of course, has not adopted this reading. And from one perspective, that is a loss. A prohibition on discrimination against a state's own citizens is certainly something that the Reconstruction Congress wanted, and it is normatively appealing as well. But from another perspective, nothing of significance has been lost. We do, after all, have lots of cases holding that certain kinds of discrimination among state citizens are unconstitutional: that is our Equal Protection jurisprudence.

So Field's dissent has, in one sense, been vindicated; the Court is now, under the Equal Protection Clause, doing what he urged it to do under the Privileges or Immunities Clause. If Field's dissent had prevailed in *Slaughter-House*, we would have reached those results under a different clause, but they might be very much the same. The difference would lie elsewhere—it would be in the different tack that Equal Protection jurisprudence might have taken. I discuss that possibility in Part III; first, there is another dissent to consider.

B. Fundamental Rights

The preceding section suggested that one way of describing the concerns of the Reconstruction Congress was to say that they had realized that there was a danger of states discriminating not just against citizens of other states, but also against some of their own citizens. That description leads naturally to the anti-discrimination understanding of Privileges or Immunities. But there is also another way of describing the concern.

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54. *Slaughter-House*, 83 U.S. (16 Wall.) at 100-01 (Field, J., dissenting).

55. *See, e.g.*, John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1451-73 (1992).

The Framers, we could say, were worried about oppression by the national government and, therefore, they gave individuals rights against it.[56] After the Civil War, the Reconstruction Congress realized that oppression by the states was also a danger. How could a constitutional amendment resolve such concerns?

An obvious way would be to take the same rights that protected individuals against the federal government and apply them to the states as well. "No state shall . . . abridge"[57] does a pretty good job of explaining that these rights can be asserted against states. But how to describe the rights? They are the rights that the Constitution gives, that belong to every American[58]—they are "the privileges or immunities of citizens of the United States."[59]

In his dissent, Justice Bradley suggested this interpretation. "In my judgment," he wrote, "it was the intention of the people of this country in adopting [the Fourteenth] amendment to provide [n]ational security against violation by the [s]tates of the fundamental rights of the citizen."[60] Enumerating his conception of Privileges or Immunities, he listed some Bill of Rights provisions and concluded, "[t]hese, and still others are specified in the original Constitution, or in the early amendments of it, as among the privileges and immunities of citizens of the United States, or, what is still stronger for the force of the argument, the rights of all persons, whether citizens or not."[61]

This "fundamental rights"[62] reading of the Privileges or Immunities Clause is the one most commonly held by scholars.[63] Like the anti-discrimination reading, it makes good textual and historical sense.[64] Again, the Supreme Court has not adopted it, and again, that is a loss from one perspective. That states should not be able to violate the fundamental rights of their citizens—both those

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56. It is worth noting, however, that grants of individual rights were probably considered the least significant protection against federal tyranny by the Framers, as shown by the initial failure to include a Bill of Rights. The grant of limited powers to the federal government was likely considered a more valuable protection, as was the correlative preservation of state authority. *See, e.g.*, THE FEDERALIST No. 84, at 515 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that the Constitution itself is "to every useful purpose, a Bill of Rights") (emphasis omitted).

57. U.S. CONST. amend. XIV, § 1.

58. Citizenship is not necessary for some rights, of course. For instance, Fifth Amendment Due Process protects "persons." U.S. CONST. amend. V. But citizenship is sufficient.

59. U.S. CONST. amend. XIV, § 1; *see also supra* note 58 and accompanying text. Rather than setting out the class of protected people, "of citizens of the United States" identifies the rights as based in federal, rather than state, law.

60. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 122 (1872) (Bradley, J., dissenting).

61. *Id.* at 118-19.

62. *See id.* at 111-24.

63. *See generally, e.g.*, AMAR, *supra* note 44 (evaluating the creation and reconstruction of the Bill of Rights and the impact of the Fourteenth Amendment); Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. Rev. 1071 (2000) (describing the fundamental rights approach).

64. I suggested in *supra* Part II.A that there is a textual basis for the anti-discrimination reading, but the fundamental rights reading may be more straightforward. *See supra* note 63.

enumerated in the Constitution and, perhaps, some others—is a principle that Congress valued during Reconstruction and that we should value now. But again, it is also a principle that is well established in our case law. Protecting fundamental rights from state abridgment is what our substantive due process jurisprudence does.[65]

Just like Justice Field's dissent then, Justice Bradley's dissent has won out under a different name. *Slaughter-House* may have emptied the Privileges or Immunities Clause, but its contents are still with us. The two visions of Privileges or Immunities that the dissenters offered are what we now know as Equal Protection and substantive due process.[66] Overruling *Slaughter-House* in order to shove those doctrines back into the Privileges or Immunities Clause at this point would be a largely pointless exercise.

But that does not mean that Miller's victory did not matter. It did. By forcing Equal Protection and Due Process to shoulder a burden that Privileges or Immunities let slip, *Slaughter-House* prevented them from performing other functions. The question worth asking is not how things might change now if we overruled *Slaughter-House*; it is how things might have been different if the dissents had won in 1872, if Equal Protection and Due Process had not been called on to play roles more properly assigned to Privileges or Immunities. That is the counterfactual that this Article seeks to explore.

III. COUNTERFACTUALS

A. Disclaimer

First, a word about the kind of counterfactual analysis I will employ. We sometimes speak of the development of doctrine as though the law unfolded autonomously, working itself pure, or fully realizing its conceptual commitments. This account of doctrinal change is like the teleological view of biological evolution as a steady progress towards higher or better forms of life. And, like the teleological view of evolution, it is wrong. Evolution is not driven by values exterior to the world. What direction it takes, what forms of life will reproduce and perpetuate themselves, depends not on their intrinsic merits but on how their characteristics fit the circumstances with which they must contend.

Law, likewise, does not grow in a vacuum towards some ideal form; it is responsive to social context. The path of our equal protection jurisprudence, for instance, owes much less to the specific beliefs of the Reconstruction Congress or the true philosophical meaning of equality than to the changing social understanding of equality's demands. For example, *Brown*[67] was not generated

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65. *See* Washington v. Glucksberg, 521 U.S. 702, 719-21 (1997).

66. *See* Rosen, *supra* note 20, at 1233 (stating that "both equal protection and substantive due process jurisprudence in the twentieth century seem to have evolved similarly (although not identically) to the way Privileges or Immunities jurisprudence might have developed if the dissenters' views in *Slaughter-House* had prevailed").

67. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

by the law alone, but by the Justices of the Warren Court, the lawyers of the NAACP, and the members of the civil rights movement. Vague and value-laden constitutional provisions like equal protection serve most often as a site for ideological antagonists to debate their competing visions,[68] and law goes nowhere without people to take it.

That said, Supreme Court decisions do have an obvious effect on the development of doctrine, even if they cannot be explained entirely in terms of prior doctrine. They make certain arguments and outcomes more or less plausible. They may foreclose certain theories that once looked persuasive, and they may open the door to claims that previously seemed outrageous. A theory that was "off-the-wall" yesterday may be on the table tomorrow.[69] What I seek to identify in the following sections, then, are some arguments that ended up "off-the-wall," as things worked out in the real world, but might have been on the table if *Slaughter-House* had come out differently.

B. What Equal Protection Could Have Been

If we start with the text of the Equal Protection Clause, which guarantees "the equal protection of the laws,"[70] there is something a little surprising about our current jurisprudence. Equal protection doctrine, in the main, is about government classifications; it is about the content of state laws, and in particular whether they have drawn lines based on impermissible characteristics.[71] This is surprising because the most natural reading of "equal protection of the laws" probably takes it to be about application or enforcement, rather than content.[72] On this reading, the paradigm violation of equal protection—the sort of thing the Reconstruction Congress believed was at the heart of what the Equal Protection Clause prohibited—would not be race-segregated schools or railroad cars. It would be the failure to enforce state tort or criminal law to protect freed slaves from night-riders and the Klan, or the failure to enforce common carrier laws against racial discrimination by innkeepers and restaurateurs. One could think of the three different clauses of the Fourteenth Amendment as addressing three different problems. First, the content of state laws is unjust and discriminatory. The Privileges or Immunities Clause responds to that problem by forbidding

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68. *See* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 554-66 (2009).

69. Balkin talks about this as arguments going from "off-the-wall" to "on-the-wall." *See id.* at 577. I think that "on the table" improves the image, but I can't take credit for it; the change was suggested by Richard Primus in conversation.

70. U.S. CONST. amend. XIV, § 1.

71. *See, e.g.*, Kermit Roosevelt, *Justice Scalia's Constitution—and Ours*, 8 J.L. & SOC. CHANGE 27, 32 (2005).

72. Another criticism of current law is that the jurisprudence should be concerned with oppression rather than classification, i.e., that it should follow an anti-subordination rather than an anti-classification tack. I will discuss below how anti-subordination might acquire greater prominence in my counterfactual history. *See infra* Part III.C.

discrimination and/or protecting fundamental rights. Second, state officials act outside the law, violating the rights of minorities without legal warrant. The Due Process Clause responds to that problem by requiring them to observe it. Third, state officials fail to enforce their facially neutral laws in favor of freed slaves. The Equal Protection Clause responds to that problem by requiring them to do so.

The idea that states may not selectively withhold the benefits of their laws is, of course, not foreign to our Equal Protection cases. In *DeShaney v. Winnebago County Department of Social Services*,[73] the Court stated just that principle, though in a footnote and with the qualification that protection could not be denied "to certain disfavored minorities."[74] But the cases that form the core of our understanding of Equal Protection are about laws that grant rights to one group and deny them to another—cases like *Brown*[75] and *Loving*,[76] or more recently *Gratz*,[77] *Grutter*,[78] and *Parents Involved*.[79]

What would have happened to Equal Protection if Justice Field's dissent had prevailed and discrimination cases like *Brown* and *Loving* were decided instead under the Privileges or Immunities Clause? Of course we can only speculate. But here are some thoughts.[80]

Equal Protection would be understood to be focused on the failure of state officials to enforce state law to the benefit of certain individuals or groups. Such selective enforcement would be the core Equal Protection violation, rather than the somewhat marginal one it is today. We would understand Equal Protection as a positive right, as guaranteeing some affirmative assistance and protection from the state. With this positive right well established, we would have a lesser overall commitment to the idea that the Constitution is generally "a charter of negative liberties."[81] And we would have a greater receptivity to the idea that

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73. 489 U.S. 189 (1989).

74. *Id.* at 197 n.3.

75. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

76. Loving v. Virginia, 388 U.S. 1 (1967).

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

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

79. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

80. In two recent articles, Christopher Green has argued for the failure to protect understanding of equal protection and developed many of the same points addressed here. *See* Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. C.R. L.J. 1 (2008) [hereinafter Green, *Pre-Enactment History*]; Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. C.R. L.J. 219, 224-55, 293-309 (2009) [hereinafter Green, *Subsequent Interpretation and Application*]. He also considers some points I do not, such as the argument that a failure to protect understanding would support constitutional challenges to the death penalty. *Id.* at 223, 307.

81. Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982). No judge in my counterfactual world would say what Posner went on to say: that the Constitution "tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary

failure to protect is constitutionally problematic.

How would these general trends be reflected in specific doctrine? For clarity, I will now use "failure to protect" to mean the counterfactual Equal Protection and "anti-classification" to mean the actual one. My main suggestion is that separating cases involving failure to protect from cases involving classifications generally might allow for more robust judicial supervision of failure to protect. In the anti-classification context, a strong textualist enforcement of the Equal Protection Clause is neither possible nor desirable. As Justice Kennedy observed in *Romer v. Evans*,[82]

> The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. . . . We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.[83]

Which is to say, exceptions must be made to the anti-classificationist command. Sometimes discrimination (by which I mean merely differential treatment) is morally required: We should treat people who have committed crimes differently from those who have not. Sometimes it is obviously justified: We should deny driver's licenses to the blind. And sometimes it is in keeping with our idea of merit and desert: There is no problem with giving admissions preferences to applicants with higher grades or test scores. Rational basis review in the absence of a suspect classification, and the related rule that disparate impact by itself merits only rational basis review,[84] limit judicial interference.

But these concerns have much less purchase in the failure to protect context. I have a hard time thinking of circumstances in which morality demands that some people be denied the benefit of law enforcement.[85] And while the idea of

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a service as maintaining law and order." *Id.* For an early argument that the negative rights conception of the Constitution can be linked to *Slaughter-House*, see Michael J. Gerhardt, *The Ripple Effects of* Slaughter-House*: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409 (1990).

82. 517 U.S. 620 (1996).

83. *Id.* at 631 (internal citations omitted).

84. There are different explanations for the Court's use of rational basis review in disparate impact cases. The main one, discussed later in this Article, is that the touchstone for an anti-classification claim is intentional discrimination, which is lacking in disparate impact cases. Another is that groups differ in various physical or socioeconomic characteristics, so that neutral and sensible laws will inevitably affect the sexes (or, less commonly, the races) differently. Again, this is not an argument that can be made as easily with respect to failures to protect: it is not the case that groups inherently differ with respect to their entitlement to protection.

85. Stripping people of legal protection used to be a form of punishment and was a relatively common feature of bills of attainder. *See* Akhil Reed Amar, *Attainder and Amendment 2:* Romer*'s*

merit and desert pervasively supports and legitimizes discrimination in the allocation of scarce resources, it operates more weakly with regard to failure to protect. Law enforcement resources are scarce, of course, and we could create an analog to merit by saying that they should be allocated to the most serious offenses. But a deliberate refusal or grossly negligent failure to enforce the law to protect or compensate an injured individual probably strikes most people as worse than the creation of a merit-based admission system for a public university.

What that means is that we could have a more aggressive judicial stance with respect to failure to protect cases than anti-classification ones.[86] That would make some cases easier. When classification according to a certain characteristic receives only rational basis review, it is hard to argue that failure to protect based on that characteristic is unconstitutional, since we think of classification and not failure to protect as the core Equal Protection concern. In *Romer v. Evans*, for instance, the Court considered a Colorado state constitutional amendment that withdrew from gays, lesbians, and bisexuals the protection of local anti-discrimination laws.[87] This was, wrote Justice Kennedy, "denial of equal protection of the laws in the most literal sense."[88] But under settled law at the time, discrimination on the basis of sexual orientation received only rational basis review.[89] And given the purported validity of *Bowers v. Hardwick*, which upheld a criminal ban on same-sex sexual activity,[90] striking down the Colorado law required some fancy footwork. As Justice Scalia argued, if the conduct that defines a class can be criminalized, can we really say it is not rational to permit private discrimination against that class?[91] Probably not, which is why sexual orientation discrimination is now widely understood to be governed by something higher than rational basis review, even though the Court has not explicitly said so.[92]

But if we separate anti-classification from failure to protect, rational basis review for classifications need not imply equally deferential review for failure to protect. A classification may be explained by many things; failure to protect is more likely, as Kennedy wrote in *Romer*, "inexplicable by anything but

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Rightness, 95 MICH. L. REV. 203, 212 (1996) (describing bills of "outlawry"). But, of course, attainders were one of the few things the original Constitution intervened between states and their own citizens to bar.

86. As the Court noted in *Washington v. Davis*, 426 U.S. 229 (1976), rejecting the invitation to apply Title VII standards to equal protection disparate impact claims more generally, aggressive judicial review is more tolerable when its scope is narrower. *See id.* at 247-48.

87. *Romer*, 517 U.S. at 623-24.

88. *Id.* at 633.

89. *See id.* at 636 (Scalia, J., dissenting) (acknowledging *Bowers v. Hardwick*).

90. 478 U.S. 186, 196 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

91. *Romer*, 517 U.S. at 641 (Scalia, J., dissenting).

92. Based on the criteria the Court has set out in cases such as *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973), the argument for heightened scrutiny seems fairly strong, but that is another issue.

animus."[93] If failure to protect and anti-classification were separated, we could have more demanding scrutiny in failure to protect cases without risking excessive judicial intervention in classification cases.

Under a slightly more demanding review, some cases might also come out differently. It is hard to see, for instance, what justification the state could give for its failure to protect Joshua DeShaney that would stand up to more than rational basis scrutiny.[94] At least, that is so if differential failure to protect is what is needed to make out a claim.[95] Under our current anti-classificationist approach, something more is needed—discriminatory intent. Without intentional discrimination, there can be no anti-classification claim.

That makes some sense as far as anti-classification is concerned. Under current law, and as seen most clearly in some of Justice Kennedy's opinions, classification by itself violates the Equal Protection Clause.[96] Governmental sorting of individuals into racial categories—regardless of whether this sorting is the basis for oppression, or even for differential treatment of the categories—is itself the harm the clause seeks to avert.[97] Unintentional discrimination does not

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93. *Romer*, 517 U.S. at 632.

94. *See* Deshaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989) (involving case where child's mother brought claim against social workers for failure to remove child from abusive father's custody). In fact, the Court did not use rational basis scrutiny. It simply decided that the conduct alleged fell outside the scope of the right asserted. "[N]othing in the language of the Due Process Clause itself," the Court wrote, "requires the [s]tate to protect the life, liberty, and property of its citizens against invasion by private actors." *Id.* at 195. It is not entirely clear why Joshua DeShaney's lawyers did not pursue a rational basis equal protection claim, though perhaps the answer is that they could not allege intentional discrimination.

95. One might also argue, as Christopher Green does, that just as the Privileges or Immunities Clause might have both anti-discrimination and fundamental rights elements, Equal Protection should be understood both to prohibit differential failure to protect and to require some minimal baseline of protection. *See* Green, *Pre-Enactment History*, *supra* note 80, at 3 (stating that "the requirement of equal protection is a requirement that the government supply 'protection of the laws,' and do so equally").

96. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 782 (2007) (Kennedy, J., concurring) (suggesting that what was offensive about the school assignments was that they used "official labels proclaiming the race of all persons"). The harm here appears to be to an individual's self-definition, which interestingly aligns Kennedy's equal protection jurisprudence with his substantive due process opinions. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) ("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. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the [s]tate.").

97. This is why, for instance, the majority could find an Equal Protection violation in *Parents Involved*, where individual students were sometimes assigned to schools based on race but no racial group was treated differently in aggregate. *See Parents Involved*, 551 U.S. at 711-12 (describing racial tiebreaker). It is also, presumably, why Justice Kennedy suggested in that case that race-conscious action that did not use explicit classifications, such as "drawing attendance zones with

involve any such classification and, therefore, it is reasonable that unintentional discrimination cannot create a claim under anti-classificationist equal protection.[98]

But from the failure to protect perspective, the harm more likely lies in the actual injury suffered, which the state has failed to avert or remedy. Intent is far less relevant. Put another way, failure to protect seems to demand equality of outcome in a way that anti-classification does not. Perhaps, one might say, ex ante equality is sufficient, so that inevitable failures to protect particular individuals due to bad luck or unforeseeable circumstances, which produce ex post inequality, do not create a claim. But gross negligence seems morally culpable enough to be actionable, and policies with disparate impact might be subjected to heightened scrutiny (if tiers of scrutiny existed in failure to protect jurisprudence[99]) if knowledge, rather than intent, could be shown. (A state that *knows* it is failing to protect a group plausibly violates its equal protection obligations regardless of whether it intends that consequence.)

That could produce a different result in, for instance, cases challenging the failure of police forces to treat domestic violence as seriously as stranger violence.[100] These policies disproportionately impact women, but since the government classification is sex-neutral on its face (it relies not on the sex of the victim but whether the victim knew the assailant), it receives rational basis review under the anti-classification approach.[101] Given that the outcome of the policies is overwhelmingly a failure to protect women, however, the argument for heightened scrutiny would be strong once the intent requirement is abandoned or reduced to knowledge.

Last, a failure to protect perspective might give a different look to some of the questions about Congress's power to enforce the Equal Protection Clause under Section Five of the Fourteenth Amendment. In *United States v. Morrison*, for instance, the Court held that the creation of the Violence Against Women

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general recognition of the demographics of neighborhoods" would not face strict scrutiny. *Id.* at 789 (Kennedy, J., concurring).

98. One might, of course, quibble with this doctrine, perhaps on the ground that the analysis should focus on oppression and subordination rather than classification, but that is not my current concern.

99. I suggested above that the baseline level of scrutiny might be something more than rational basis review. It might still make sense to have even higher levels of scrutiny for failure to protect certain groups, for essentially the reasons the Court has adopted in the anti-classification context.

100. *See, e.g.*, Hynson v. City of Chester Legal Dep't, 864 F.2d 1026 (3d Cir. 1988) (finding no equal protection violation where plaintiffs alleged that police officers treated "domestic abuse cases differently than non-domestic abuse cases"). Much the same argument could be made against marital rape exemptions. *See generally* Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 45 (1990) (stating that "a more obvious denial of equal protection is difficult to imagine").

101. *See* Ricketts v. City of Columbia, Mo., 36 F.3d 775, 781 (8th Cir. 1994) (noting that over ninety percent of victims of domestic violence are female).

Act's Civil Rights Remedy exceeded Congress's power under Section Five.[102] The Civil Rights Remedy gave victims of gender-motivated violence a cause of action in federal court as a substitute for the state-law claims that state and federal task forces had found inadequate because of pervasive sex-based discrimination in state judicial systems.[103]

To reach that result, the *Morrison* majority relied on the Reconstruction-era civil rights cases, divining the rule that Section Five legislation could not regulate private parties.[104] That rule left Congress with no practical means to address the problem it had identified. A civil remedy against state officials was essentially inconceivable: Bias by state judges or other officials would be difficult to prove in individual cases. A federal remedy that ran against them for their official conduct would be absurdly intrusive, in addition to overturning longstanding traditions of judicial and prosecutorial immunity.

Leaving Congress without a means to remedy the problem might seem acceptable if the kind of violation Congress identified is at the periphery of equal protection, as it is from the anti-classificationist perspective. After all, substantial power to remedy state classifications persists. But from the failure to protect perspective, *Morrison* renders Section Five almost a nullity with respect to the Equal Protection Clause; it strikes down federal legislation in the paradigm case, not a marginal one. Thus, if equal protection had gone the failure to protect route, the Court might have been less willing to forbid a Section Five remedy against private actors.

In sum, focusing equal protection on failure to protect and leaving anti-discrimination for privileges or immunities might have had very significant effects. It could, as a general matter, have produced a greater receptivity to arguments for positive rights.[105] More specifically, it might have allowed the Court to engage in more aggressive review of failure to protect claims than it currently does under the Equal Protection Clause. Such claims would be seen as the core, and not a peripheral, concern of the Clause, and aggressive review—abandoning the rule that disparate impact merits only rational basis review, for instance, or adopting a slightly more demanding baseline than rational basis—would not necessarily operate in the anticlassification context. Last, seeing failure to protect as the paradigm case might have made it harder for the Court to rule that Section Five remedies in such cases cannot run against private actors, since that ruling leaves the violations all but irremediable.

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102. United States v. Morrison, 529 U.S. 598, 627 (2000).

103. *See* Joseph R. Biden, *Domestic Violence: A Crime, Not a Quarrel*, TRIAL 56, 59 (June 1993).

104. *Morrison*, 529 U.S. at 620.

105. I do not discount the formidable practical problems associated with a jurisprudence of positive rights. Most notably, aggressive judicial enforcement of positive rights risks complete judicial takeover of government: one might see judges running police departments by injunction. But some of these problems could be dealt with by limiting remedies to damages, rather than injunctions, and in any event my claim is only that judges in the counterfactual world would be relatively more receptive to positive rights arguments than they are in the real world.

C. What Due Process Could Have Been

Alternatively, what if the Bradley dissent in *Slaughter-House*[106] had prevailed? The Privileges or Immunities Clause, rather than the Due Process Clause, would be the one that protects fundamental rights, including most Bill of Rights liberties, from state interference. What would due process do in this world?

It is relatively common to assert that substantive due process arose as a replacement for the privileges or immunities jurisprudence that should have been.[107] If we believe that, then the most likely counterfactual history for the Due Process Clause, assuming that privileges or immunities took the fundamental rights tack, is one in which substantive due process never existed. But the assertion is partially accurate at best. Substantive due process existed before *Slaughter-House*; it existed before the Fourteenth Amendment or the Civil War, most famously in *Dred Scott*.[108] (Existed as a concept, that is, not a name; the phrase would not be coined until considerably later and would not appear in a Supreme Court opinion until 1948.)[109] So while it is probably fair to say that the incorporation of the Bill of Rights through the Due Process Clause, and the associated "fundamental rights" version of substantive due process, is a replacement for privileges or immunities jurisprudence, this does not exhaust the concept. Indeed, the early version of substantive due process was something quite different.[110]

Substantive due process now is a matter of finding in the Due Process Clause, by whatever test, fundamental rights that can trump state laws. In this guise it has been criticized as hard to derive from the text of the clause, and even, famously, oxymoronic.[111] The merits of those criticisms aside, they cannot be levied at the early version, for that kind of due process follows easily from the text. It is a requirement that if the government proposes to deprive individuals of life, liberty, or property, it do so by means of a valid law. It gives individuals a federal constitutional right—against the federal government through the Fifth Amendment and the states through the Fourteenth—against lawless government action.

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106. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 111-24 (1872) (Bradley, J., dissenting).

107. *See* Sandefur, *supra* note 31, at 147-48 (noting and criticizing this trend).

108. Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1856), *superseded by* U.S. CONST. amend. XIV; *see also* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 467 (2010).

109. *See* Wayne McCormack, *Economic Substantive Due Process and the Right of Livelihood*, 82 KY. L.J. 397, 406 & n.55 (1993) (citing Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 90 (1948) (Rutledge, J., dissenting)).

110. For a more extensive development of some of the following points, see Roosevelt, *supra* note 23.

111. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18-20 (1980).

Since the Due Process Clause does not, on this reading, create any additional grounds of invalidity, it protects individuals only from the enforcement of laws that are invalid for some independent reason. It does not, that is, create rights that can serve as trumps against otherwise-valid laws. Rather, it provides a means of resisting laws that exceed the sovereign's legislative power. But the failure to create rights does not make it redundant, or even unimportant.

Without the Due Process Clause, an individual could perhaps resist unauthorized government action on state law grounds. He could, for instance, characterize the government officials trying to enforce a law as trespassers and sue them in tort.[112] But a state tort claim and a federal constitutional claim are very different, notably in terms of an individual's ability to invoke federal jurisdiction. Prior to the ratification of the Due Process Clause, individuals frequently challenged state action on the basis of the argument that it exceeded the bounds of state police power.[113] This was typically understood as an appeal to general constitutional law—principles common to all free states—and hence not a claim based on federal law.[114] Federal courts could, and did, hear these suits when some other basis for jurisdiction, such as diversity, existed, but most individuals with such claims could not get into federal court.[115]

The ratification of the Due Process Clause changed things; by giving individuals a federal right against lawless state action, it effectively federalized the general constitutional limits on state police power.[116] Armed with both Fifth and Fourteenth Amendment Due Process rights, individuals could now assert in federal court, as federal constitutional claims, arguments that state or federal governments had overstepped the limits on their powers.[117]

What are these limits? With respect to the federal government, the most obvious limit is the fact that federal powers are specific and enumerated; there is no general federal police power. When Congress regulates intrastate noncommercial activity, it goes beyond its enumerated powers, according to *Morrison*[118] and *Lopez*.[119] But what constitutional provision shields an individual against such *ultra vires* lawmaking? The Supreme Court has not given this question much apparent thought, but on the account developed above, it is the Due Process Clause that should be invoked.

Another limit, which applies to state legislative jurisdiction (or used to), is

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112. See Akhil Amar's suggestion of state tort law as a remedy for Fourth Amendment violations, in, for example, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994).

113. *See* Michael G. Collins, *Before* Lochner*—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1304-15 (2000).

114. *Id.*

115. *Id.*

116. *See* Michael G. Collins, *October Term, 1896—Embracing Due Process*, 45 AM. J. LEGAL HIST. 71, 72-74 (2001).

117. *See id.* at 92-95.

118. United States v. Morrison, 529 U.S. 598 (2000).

119. United States v. Lopez, 514 U.S. 549 (1995).

geography. One of the seminal *Lochner*-era cases—indeed, one frequently cited for its alleged recognition of a fundamental right—is *Allgeyer v. Louisiana*.[120] In that case, Louisiana sought to apply its marine insurance regulations to a local company that had entered into a contract in New York and subsequently mailed a notification letter from New Orleans.[121] Impermissible, the Court said: A contract that "was valid in the place where made and where it was to be performed," was one that Louisiana had "no right or jurisdiction to prevent its citizen from making outside the limits of the state."[122] This is not, of course, saying that a fundamental right to contract trumps a state's police power—New York surely could have sanctioned the parties for not complying with its marine insurance laws, which is what Louisiana was trying to do. It is rather the recognition that an attempt to impose liability based on conduct outside a state's legislative jurisdiction is not due process of law because the law by which the state attempts to act is invalid.[123] The law literally cannot reach the parties to impose its sanctions, and any attempt to confiscate their money (Louisiana wanted to fine Allgeyer) is a deprivation of property without legal warrant.[124]

Last, and most notoriously, the Supreme Court used to use more or less abstract political theory—the general constitutional law mentioned earlier—to derive limits on the police power of the states.[125] This is *Lochner*-era substantive due process, and if we want to know what due process might have done had it not been drafted into the fundamental rights business, that is what we need to look at.

According to the view that I find persuasive,[126] courts applying *Lochner*-era

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120. 165 U.S. 578 (1897). For the characterization of *Allgeyer* as recognizing a fundamental right, see, for example, David N. Mayer, *Justice Clarence Thomas and the Supreme Court's Rediscovery of the Tenth Amendment*, 25 CAP. U. L. REV. 339, 368 n.95 (1996).

121. *Allgeyer*, 165 U.S. at 579-80.

122. *Id.* at 592.

123. This is no longer the case. In a series of cases culminating in *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), the Supreme Court relaxed the geographical limits on state legislative jurisdiction.

124. *See Allgeyer*, 165 U.S. at 588-89.

125. *See* Collins, *supra* note 113, at 1304-11.

126. There has been much debate about the proper characterization of the *Lochner* era. Contemporary critics charged that the Court was simply substituting its views of wise policy for those of the legislature. *See, e.g.*, EDWARD S. CORWIN, COURT *OVER* CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT (1950) (discussing judicial review as a mechanism for substituting legislative policy). This was a rhetorically powerful move, given the American public's persistent concern with the specter of judicial activism, and it established a conventional wisdom about *Lochner* that persisted into the 1990s. Then, beginning with work by Howard Gillman, Barry Cushman, and others, a revisionist view of *Lochner*, which took it to be animated in large part by equality concerns, developed. Most recently, David Bernstein has attempted to argue, contrary to the revisionists, that *Lochner*-ian jurisprudence was more concerned with fundamental rights than with partial legislation. David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1 (2003).

due process were not attempting to identify unenumerated fundamental rights that trumped otherwise valid exercises of state power. Instead, starting with the principle that people did not delegate unlimited power to the government, but rather created it for certain limited purposes, they were preventing the government from doing things that people could never have intended it to do.[127] The people would never, courts reasoned, have given the power to do such things, and therefore no attempt to achieve them could be dignified with the name due process of law.

What sort of things might be categorically beyond the limits of government power? In *Calder v. Bull*, Justice Chase gave examples: People would not give the government power to punish innocent actions, or to make people judges in their own cases, or to take property from one person and give it to another.[128] To put the point generally, we could say that people would not give the government power to act contrary to the public interest.[129] This distinction—between laws that were good faith attempts to promote the public interest and those that were arbitrary, oppressive, or partial legislation—was the one that *Lochner*-era courts sought to enforce.

If the issue is just whether a law is in the public interest, it might seem that a judge can strike it down based simply on a policy disagreement—in which case, *Lochner*'s contemporary critics would be right after all. But *Lochner*-era courts steadfastly denied that they had this power.[130] And they were right, in the sense that they relied on some principles that limited judicial discretion. Notably, they tended to take the common law as a neutral baseline and to view skeptically laws that departed from the common law to favor one group or another. Such laws could be upheld if they were intended to promote some traditional object of the

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I find Barry Cushman's rebuttal of Bernstein persuasive. *See* Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881, 883-944 (2005). For an analysis of the development of the concept of rights as trumps, see Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RES. Q. 623 (1994).

127. Probably the canonical cite for this principle is Justice Chase's opinion in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798), which sought to identify inherent limits on the police power via a species of social contract reasoning. Justice Chase noted, "The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it: The nature, and ends of legislative power will limit the exercise of it." *Id.* "An act of the legislature," Chase continued, "(for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority." *Id.* (emphasis omitted).

128. *Calder*, 3 U.S. (3 Dall.) at 388.

129. *See* JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY 51-73 (2003) (exploring evolution of the public interest requirement).

130. *See* Lochner v. New York, 198 U.S. 45, 56-57 (1905) ("This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the state it is valid, although the judgment of the court might be totally opposed to the enactment of such a law.").

police power, such as health—this is why the Court upheld a maximum hour law for miners in *Holden v. Hardy*.[131] But if they looked like attempts to redistribute bargaining power, such as a minimum wage or maximum hour law without a health justification, the Court was liable to strike them down, as it did in *Adkins v. Children's Hospital*[132] and *Lochner* itself.

But these tools—the idea of the common law as a pre-legal given and of redistribution as an impermissible state purpose—melted in the cauldron of Legal Realism[133] and the Great Depression. Once the Court recognized that common law was, in fact, state law—an insight usually associated with *Erie v. Tompkins*[134]—its use as a baseline from which to measure redistributive departures became incoherent. Equally serious, the idea that people would never have authorized the government to engage in redistribution came to seem simply implausible. It might be, for instance, that some kind of redistribution is the only alternative to widespread economic collapse.[135] In such cases, people would presumably want the government to have the power to do it.

Without such principles to guide its discretion, the Court had only two choices: It could engage in a relatively unguided supervision of legislative policy decisions, or it could defer. The American commitment to self-governance by the people and their elected representatives makes the former choice hard to sustain, and eventually the Court embraced deference. "[W]hen the legislature has spoken," it pronounced in *Berman v. Parker*, "the public interest has been declared in terms well-nigh conclusive."[136]

What does this mean? If the early version of substantive due process died for reasons unrelated to *Slaughter-House*, one might think, then a counterfactual history in which the Privileges or Immunities Clause bore the burden of protecting fundamental rights still would not be meaningfully different as far as substantive due process goes. It would just be the Due Process Clause that was moribund, rather than Privileges or Immunities.

But, in fact, *Lochner*-era substantive due process did not die—or at least, it did not in the 1930s. The canonical repudiation of aggressive substantive due process review is *United States v. Carolene Products Co.*,[137] where the Court pronounced:

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131. 169 U.S. 366, 398 (1898).

132. 261 U.S. 525 (1923), *overruled in part by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

133. For a description of this movement, see, for example, Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731 (2009).

134. 304 U.S. 64, 79 (1938).

135. Historically, this was the justification used in *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934). More recently, the federal government used it to justify the Troubled Asset Relief Program (TARP) bank bailout. *See generally* ANDREW ROSS SORKIN, TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM FROM CRISIS—AND THEMSELVES (2009) (providing background information on the bank bailout).

136. Berman v. Parker, 348 U.S. 26, 32 (1954).

137. 304 U.S. 144 (1938).

> [R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[138]

But, like Galileo muttering beneath his breath "[a]nd yet it moves,"[139] the Court appended to that sentence its most famous footnote, footnote four.[140]

What is footnote four about? It is about when judicial review may legitimately be more aggressive than the deferential rational basis standard. Some of the occasions the Court offers are obvious: When a law is "on its face . . . within a specific prohibition of the Constitution"[141] no one would say that the Court is acting illegitimately in striking it down. Some are perhaps more controversial: Laws that restrict the political process, the Court says, may be more closely scrutinized even, apparently, if they do not fall afoul of a particular constitutional provision.[142] Again, however, the reasoning is relatively easy to make out: If courts are supposed to defer to legislatures for reasons of democratic legitimacy, they must be confident that the legislature is not undermining the democratic process to insulate itself from popular review.[143]

Last, footnote four suggests that prejudice against certain "discrete and insular minorities" may be a special factor militating in favor of more aggressive judicial review.[144] It is now commonplace to cite this part of the footnote as the birthplace of the "suspect class" equal protection doctrine, which is fair given

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138. *Id.* at 152 (citations omitted).

139. *See, e.g.*, James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 45 (2003) (recounting story).

140. *Carolene Prods.*, 304 U.S. at 152 n.4 ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or racial minorities . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. . . .") (citations omitted).

141. *Id.*

142. *Id.*

143. The problem is that sometimes the legislature may be attempting to improve the political process, and it may have a better sense than the Court of what will do so. The Court's apparent view that more speech is always better is crude and almost certainly wrong. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

144. *Carolene Prods.*, 304 U.S. at 152 n.4.

that this is how the Court now seems to conceive of it.[145] But if we think about *Carolene Products* in context, the idea that the Court had decided to use footnote four to chart a new course for equal protection seems a bit odd.[146] The more natural understanding is that the end of the footnote is explaining when courts can strike down laws on due process grounds without repeating the sin of *Lochner*, that of substituting judicial for legislative policymaking. It tells us, that is, when a legislature's assessment of the public interest cannot be trusted.

The core idea is that legislatures are responsive to the politically powerful and not the powerless, and that they may therefore not give appropriate weight to the interests of the politically weak. Footnote four illustrates this point by citing *McCulloch v. Maryland*[147] and *South Carolina State Highway Department v. Barnwell Bros.*,[148] each of which involve state laws benefiting locals at the expense of out-of-staters. As *Barnwell Brothers* puts it "when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state."[149]

When burdens fall on those who have no voice in state politics, that is, legislators will tend to discount those burdens. They will enact laws that make their constituents better off, even if those laws do not increase public welfare when their burdens are taken into account. They will enact laws, in short, that

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145. *See, e.g.*, Toll v. Moreno, 458 U.S. 1, 23 (1982) (Blackmun, J., concurring) (describing *Carolene Products* as "the moment the Court began constructing modern equal protection doctrine"); Robert J. Cynkar, *Dumping on Federalism*, 75 U. COLO. L. REV. 1261, 1297 (2004) (describing *Carolene Products* footnote four as "a statement from the Court of perhaps the single most important element of equal protection doctrine"); Lawrence Schlam, *Equality in Culture and Law: An Introduction to the Origins and Evolution of the Equal Protection Principle*, 24 N. ILL. U. L. REV. 425, 440-41 (2004) (describing *Carolene Products* as "a seemingly innocuous 'economic due process' opinion, [that] would ultimately (and radically) re-structure equal protection doctrine"); *see generally* Felix Gilman, *The Famous Footnote Four: A History of the* Carolene Products *Footnote*, 46 S. TEX. L. REV. 163 (2004) (discussing the historical context of footnote four and its impact on courts and academics).

146. Justice Stone, the author of the footnote, did not seem to think it set out a roadmap for equal protection. In *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 544 (1942) (Stone, C.J., concurring), Stone cited his footnote while asserting that the case should be decided on due process, and not equal protection grounds. *Id.* Stone did not seem to be asserting a law-trumping fundamental right not to be sterilized; he endorsed the proposition that states may interfere with an individual's liberty to prevent the "transmission . . . of his socially injurious tendencies." *Id.* (citing Buck v. Bell, 274 U.S. 200 (1927)). Rather, he argued that when important interests are at stake, narrow tailoring, possibly by individualized hearings, is required. *Id.* A law does not constitute due process, that is, if the scope of its coverage fits too poorly with its underlying justifications. *See id.*

147. 17 U.S. (4 Wheat.) 316 (1819).

148. 303 U.S. 177 (1938).

149. *Id.* at 184 n.2.

are not in the public interest.

Using the public interest phrasing shows us the connection between footnote four and *Lochner*.[150] Footnote four is telling us that *Lochner*-style due process may still legitimately be employed—that legislative assessments of the public interest may legitimately be second-guessed by judges—when legislatures are predictably bad at making the assessment because they care more about the people who are benefited than the people who are burdened.

This general idea is surely sound. It is for that reason that state laws discriminating against out-of-staters were an object of special concern to the Founders. What *Carolene Products* proposed to do was to extend that solicitude to certain in-state groups. How exactly to define those groups is a difficult question; over twenty years ago Bruce Ackerman argued powerfully that *Carolene Products*' focus on "discrete and insular minorities" subject to prejudice was inadequate.[151] But if we want to speculate about where due process might have gone had it not been needed to protect fundamental rights, footnote four points the way.

One might reasonably wonder whether this speculation can lead anywhere. Why should it matter if courts do this analysis under the Due Process Clause rather than the Equal Protection Clause—we have footnote four analysis in either case, don't we?

Actually, no. Footnote four was at one point significant in equal protection, but it is no longer. Footnote four gives an anti-subordination theory—it calls for judicial supervision of circumstances in which legislatures may fail to consider the interests of the politically weak. It does not contain an anti-classification theory—the idea that certain kinds of government line-drawing are impermissible regardless of their purpose or consequence. But modern equal protection doctrine is very much anti-classificationist.[152] *Lochner*-style substantive due process actually died when equal protection shifted from anti-subordination to anti-classification, something that happened in the last decades of the twentieth century.[153] Anti-subordination, and with it the footnote four methodology, is now almost entirely absent from the Court's jurisprudence.

So one thing that would change in this counterfactual world is that an anti-

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150. Another way of looking at this development is through the lens of redistribution. *Lochner* operates under the premise that redistribution is never in the public interest. *See, e.g.*, Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 Nw. U. L. Rev. 591, 634-35 (1998). Cases like *Nebbia v. New York*, 291 U.S. 502 (1934), and *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), recognize that this is not so, that wholesale judicial suspicion of redistribution is mistaken. And footnote four identifies a limited set of redistributions that will remain suspect: Those that work to the detriment of discrete and insular minorities subject to prejudice.

151. *See* Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985).

152. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

153. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 229 (1995) (discussing federal programs); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 496 (1989) (addressing strict scrutiny for state race-based affirmative action).

subordination vision of equality would live on in the Due Process Clause. Several further consequences follow. First, anti-classification would be limited to the states. *Bolling v. Sharpe* is a straightforward Due Process case on this account, easily resolved by footnote four-style thinking.[154] There is no need to suppose that Fifth Amendment due process reverse-incorporates equal protection. In consequence, federal affirmative action programs would not be subject to heightened scrutiny as they are now.[155]

Second, footnote four due process analysis does not require formal classifications to trigger judicial suspicion. The dispositive issue is not whether the legislature has drawn a certain kind of line; it is whether the allocation of burdens and benefits gives cause to doubt the legislature's ability to weigh them accurately. Disparate impact cases might well get heightened scrutiny—at least those where the disparate impact consists of burdening a subset of a vulnerable group. In terms of trusting a legislature's assessment of costs and benefits, such laws should actually be more suspect: If a law burdens none of the powerful and some, but not all, of the powerless, the political counterweight will surely be less than if it burdened all of the powerless. The other kind of disparate impact would probably not get heightened scrutiny: If a law burdens all of the powerless but also many of the powerful, the legislature can probably be trusted since the burdens fall on a significant number of people to whom the legislature is responsive. Thus, if women were considered a group in need of footnote four due process protection, an abortion restriction (which burdens only women, but only some of them) would get heightened scrutiny,[156] while a 1980s preference for veterans (which burdened almost all women but also many men) would not.[157]

Had due process not been required to take up the load of protecting fundamental rights, then it could have continued to serve an anti-subordination function that is now absent from our equal protection jurisprudence. This could produce more searching judicial review in some cases, particularly those where government action burdens a subset of a vulnerable group. Conversely, using a Due Process Clause focused on anti-subordination would produce more lenient judicial review in some cases—the federal government would likely not be subject to anti-classification requirements.

CONCLUSION

What does the counterfactual world look like in general? Let us assume, to

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154. Bolling v. Sharpe, 347 U.S. 497 (1954).

155. For a discussion of the consequences of heightened scrutiny of federal racial classifications, see Richard A. Primus, Bolling *Alone*, 104 COLUM. L. REV. 975 (2004).

156. In trying to determine whether the legislature had inappropriately discounted the interests of women in enacting an abortion restriction, a court might also ask how the tradeoff between life and liberty comes out in cases where the liberty at stake is not that of women alone. *See* Guido Calabresi, *Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 91 (1991).

157. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).

make things interesting, that the ideas of both *Slaughter-House* dissents prevailed. Assume, that is, that rather than reading the Privileges or Immunities Clause to mean nothing, the Court read it to contain both fundamental rights and anti-classification. What might have happened?

Again, I admit that a truly historical counterfactual analysis would have to start with a different *Slaughter-House* decision and then ask not simply what doctrinal developments it made more or less likely, but also how the political landscape would change, including differences in presidential elections and Supreme Court appointments, and how all of those changes would affect the law. I cannot do that analysis—I am not sure that anyone could—and so I am focusing on doctrine alone. And by doing so, I may be implicitly assuming that social movements with views and values close to mine prevailed—that is, I may be describing doctrine more as I would like it to be than as it would in fact have developed. (A Court determined to kill off anti-subordination analysis, for instance, might have done so even if it were housed in the Due Process Clause.)

In terms of possibilities made more or less likely, however, we can say a few things. Had *Slaughter-House* been decided differently, equal protection and due process could have gone in very different directions than the ones they took after the actual decision. Equal protection cases could be about state failure to protect, and due process analysis could be about finding that limited set of cases in which legislative assessment of the public interest was unreliable.

Some of our canonical cases would come out the same way, but under different clauses. *Brown*[158] and *Loving*[159] would not be equal protection decisions. They might be decided under the Due Process Clause, but more likely they would be the anti-discrimination strain of the Privileges or Immunities Clause. The incorporation decisions, which would probably be mostly the same, would be the fundamental rights strain. *Bolling*[160] and *Roe*[161] would have the same outcomes, but they would be decided on a due process theory that was about footnote four considerations, rather than fundamental rights or reverse-incorporation.

And some cases would come out differently. Anti-classification obligations would not be extended to the federal government, as the Court did in *Adarand*;[162] with *Bolling* an easy Due Process case, there would be no impulse to say that the federal government must face the same anti-classification scrutiny as the states. Disparate impact cases where burdens fell on a subset of a vulnerable group—pregnancy discrimination being perhaps the most notable example—would be suspect from a due process perspective and would probably come out the other way. And we would take failure to protect much more seriously. Marital rape exemptions would be pretty clearly unconstitutional; *Deshaney*[163]

158. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

159. Loving v. Virginia, 388 U.S. 1 (1967).

160. Bolling v. Sharpe, 347 U.S. 497 (1954).

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

162. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

163. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989).

might go the other way; the Violence Against Women Act's Civil Rights Remedy might still be good law.[164]

What all of this means—the payoff from the counterfactual exercise—is that the conventional wisdom about *Slaughter-House* is wrong in an interesting way. Overruling *Slaughter-House* would probably not make a difference now, but that does not mean that *Slaughter-House* cost us nothing. It did not deprive us of the intended benefits of the Privileges or Immunities Clause; those were essential and obvious enough to force their way into our doctrine through other pieces of text. But, in so doing, they displaced the original understandings of those texts, which could have been quite significant had they been given room to grow. Work-arounds, like the substitution of due process and equal protection for privileges or immunities, do not bring us back to the starting point, and overruling a mistaken decision will not necessarily undo its consequences.

164. *See* United States v. Morrison, 529 U.S. 598 (2000).

WHAT IF DANIEL ELLSBERG HADN'T BOTHERED?

HEIDI KITROSSER*

INTRODUCTION

In his book, *Secrets: A Memoir of Vietnam and the Pentagon Papers*, Daniel Ellsberg recounts the aftermath of a 1969 *New York Times* story regarding Ellsberg and five of his colleagues at the RAND Corporation.[1] The six had sent a letter to the *Times* calling for complete withdrawal of U.S. forces from Vietnam. The result was a story headlined "six RAND experts support pullout: back unilateral step within one year in Vietnam."[2] The response within RAND to the letter's signatories was almost entirely negative. In a series of inter-office memos, RAND employees lamented that the letter could jeopardize RAND's longstanding "contractual and confidential relationship with the Defense Department."[3] One wrote to the signatories: "while you may feel strongly enough to lay your own jobs on the line, you do not have the right to lay mine there as well."[4] Another wrote that the signatories had "unleash[ed] a torpedo so unerringly as to strike at least glancing blows on your largest and most faithful clients, your employer, and your fellow researchers simultaneously."[5] While Ellsberg resigned from RAND before going on to leak the Pentagon Papers ("Pentagon Papers" or "Papers"), the other signatories had intended to stay on. However, due to blowback from the letter, one signatory was told to find another position while the others reportedly hung "'on to [their] jobs by [their] fingernails.'"[6]

Of course, the professional and personal risks that the signatories took paled in comparison to those that Ellsberg went on to take in secretly photocopying and leaking—first to members of Congress and then to the *New York Times* and other members of the press—the Pentagon Papers, a classified history of the Vietnam War that the Defense Department had commissioned. Ellsberg has said that he believed that he was likely to be incarcerated for the rest of his life for leaking the Papers.[7] He was indicted and tried, although the case was eventually

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1. *See generally* DANIEL ELLSBERG, SECRETS: A MEMOIR OF VIETNAM AND THE PENTAGON PAPERS (2002).
2. *Id.* at 314 (emphasis omitted).
3. *Id.* at 318.
4. *Id.*
5. *Id.*
6. *Id.* at 320.
7. *Id.* at 303-05.

dismissed due to a string of government misconduct.[8] The government had suppressed evidence, burglarized the office of Ellsberg's psychiatrist, illegally wiretapped Ellsberg's conversations, and held secret discussions with the judge trying Ellsberg's case about the judge's possible appointment as FBI Director.[9] Apart from the potential for prosecution and imprisonment, Ellsberg put at risk his future income, potentially impacting not only himself but also his two children and his ex-wife to whom he provided child support and alimony payments.[10] He also put at risk the status and access that came with being a respected former Pentagon and State Department analyst who had spent two years in Vietnam and had advised Former Defense Secretary Robert McNamara and National Security Advisor Henry Kissinger.[11]

I recount these risks to highlight how much easier it would have been for Ellsberg simply not to bother. How many of us, in Ellsberg's shoes, would have said to ourselves "I just can't." But Ellsberg did bother. While still at RAND, as one of a handful of people with authorized access to the full, roughly 7000-page contents of the Pentagon Papers,[12] Ellsberg and his former RAND colleague Anthony Russo, spent nights and weekends copying the Papers on the (agonizingly slow by modern standards) photocopy machine at a business owned by Russo's friend.[13] Ellsberg then contacted several members of Congress, hoping to find one who would hold hearings on the Papers, or enter them into the *Congressional Record*. When these efforts failed, Ellsberg leaked the papers to Neil Sheehan of the *New York Times*. Ellsberg also saw to it, when the government sought to enjoin the *Times*, that the Papers were made available to other publications in order to frustrate attempts to restrain publication.[14]

So Ellsberg bothered, as did Russo, who was tried along with Ellsberg and whose case was dismissed on the same basis as Ellsberg's. But what difference, if any, did the leak and subsequent publication of the Pentagon Papers make? In exploring that question, this Essay takes some liberty with the topic—"constitutional counterfactuals"—of this symposium. Despite this author's vast enjoyment of several classic movies and television episodes featuring parallel worlds,[15] this Essay does not build a counterfactual universe in

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8. *See id.* at 455-56.

9. *See, e.g.*, *id.* at 444-56; INSIDE THE PENTAGON PAPERS 201 (John Prados & Margaret Pratt Porter eds., 2004); SANFORD J. UNGAR, THE PAPERS & THE PAPERS: AN ACCOUNT OF THE LEGAL AND POLITICAL BATTLE OVER THE PENTAGON PAPERS 8-10 (1989).

10. *See, e.g.*, ELLSBERG, *supra* note 1, at 308-09.

11. *See, e.g.*, *id.* at 227-41, 343-51; INSIDE THE PENTAGON PAPERS, *supra* note 9, at 4-6. Indeed, President Nixon's White House chief of staff H.R. Haldeman recounted that "Ellsberg had been one of [Kissinger's] 'boys.'" MARK FELDSTEIN, POISONING THE PRESS: RICHARD NIXON, JACK ANDERSON, AND THE RISE OF WASHINGTON'S SCANDAL CULTURE 150, 152 (2010).

12. *See* ELLSBERG, *supra* note 1, at 244-45, 289, 304; *see also* Hedrick Smith, *Vast Review of War Took a Year*, N.Y. TIMES, June 13, 1971, at 1.

13. ELLSBERG, *supra* note 1, at 290-91, 295, 299-302.

14. *See id.* at 326-28, 331-33, 357-75, 384-406.

15. *See, e.g.*, IT'S A WONDERFUL LIFE (Liberty Films 1946), *available at* http://www.imdb.

which Daniel Ellsberg never leaked the Pentagon Papers. It hints at such a world indirectly, however, by considering the difference that Ellsberg's leak made in the universe that we do occupy.

This Essay considers the impact of the Pentagon Papers leak on public and judicial attitudes toward secrecy-based assertions by the executive branch. I use the term "secrecy-based assertions" to cover two types of claims: claims that information must be kept secret to protect national security, and claims that the public would understand and bless the government's actions if only the public could see the information that they are not permitted to see. This Essay argues that the Pentagon Papers leak and its aftermath helped set in motion a process of social learning—albeit a non-linear one with plenty of limits and setbacks—that continues to this day on the dangers of excessive deference to secrecy-based assertions by the government.

With respect to assertions that the public would bless the government's actions if only it knew what they know, the Pentagon Papers were widely viewed as giving lie to such claims as they related to the Vietnam War. The Papers' revelations impacted Americans' willingness to take on faith the honesty and competence of their government. Nor was this impact lost on the Nixon Administration, whose paranoia skyrocketed in the wake of the leak, contributing to a chain of nefarious activities that led to Nixon's resignation and further catalyzed public distrust in government. This state of affairs led, among other things, to an influx of newly elected congresspersons championing restraints on the executive branch. Yet these events also gave rise to an influential and continuing backlash against restraints on presidential power, one that became most evident during the administration of George W. Bush and continues in the Obama Administration. As the backlash and the ongoing influence of its attendant constitutional claims illustrate, the impact of the Pentagon Papers leak on public, political, and judicial deference to executive power is hardly straightforward. Nonetheless, a key impact of the leak—indeed, the reason that it gave rise to so strong and continuing a backlash—is that it serves as a permanent, high-profile reminder that lies, mistakes, and incompetence may well lurk behind a government admonishment to "'trust the President because only he [He?] knows the facts.'"[16]

Closely related to wariness toward government claims of expertise based on secret knowledge is another type of skepticism fostered by the Papers' leak: Skepticism toward government claims that information must be kept secret in the name of national security in the first place. The impact of the latter, like that of the former, is hardly unmitigated. For example, case law is littered with instances before, after, and even during the period of the leaks and ensuing scandals in which courts defer heavily to national-security based pleas to keep

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com/title/tt0038650/; *Star Trek, The Next Generation: Parallels* (television broadcast Nov. 27, 1993), *available at* http://www.imdb.com/title/tt0708752/; *The Twilight Zone: The Parallel* (television broadcast Mar. 14, 1963), *available at* http://www.imdb.com/title/tt0734670/.

16. ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 331 (1973) (deeming this statement to reflect the mindset of the American people in the 1950s and 1960s).

information secret. Furthermore, even as the Supreme Court refused to grant a prior injunction to prevent the Papers' publication, a number of Justices suggested, in concurring and dissenting opinions, that post-publication punishment might be constitutional if authorized by statute. Nonetheless, the leak of the Papers constitutes a moment of social learning embedded in our national psyche, counseling us to suspect overreaching when the government invokes national security to justify secret-keeping. Indeed, there is good reason, on which I elaborate below, to believe that the federal government would be less restrained than it currently is in punishing leaks of classified information were it not for the Pentagon Papers experience.

Part I of this Essay summarizes the theory of social learning and criticisms of the same. Part I also provides an overview of the ongoing social learning effects, and limits thereupon, of the Pentagon Papers leak. Part II elaborates on the social learning effects of the leak as they generally relate to "presidentialist" arguments, including those based on the President's access to secret information. Part III elaborates on the social learning effects of the leak as they relate to a more specific set of presidentialist claims—those to the effect that only the executive can be trusted to know when particular information is too dangerous to release.

I. SOCIAL LEARNING AND THE PENTAGON PAPERS: AN OVERVIEW

Mark Tushnet describes a process of "social learning" whereby government responses to perceived national security threats grow more reasonable over time as Americans learn from and regret past excesses.[17] Tushnet explains:

> Knowing that government officials in the past have in fact exaggerated threats to national security or have taken actions that were ineffective with respect to the threats that actually were present, we have become increasingly skeptical about contemporary claims regarding those threats, with the effect that the scope of proposed government responses to threats has decreased.[18]

This view is not without its detractors. David Cole suggests that changes over time tend to be superficial, designed to enable the government to distance itself from notorious past episodes.[19] "All we have learned from history," says Cole, "is how to mask the repetition, not how to avoid the mistakes."[20] Other scholars challenge the assumption that government typically overreaches when

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17. Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 283.

18. *Id.* at 283-84.

19. David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 3-4 (2003).

20. *Id.*; *see also* Robert M. Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique*, 101 MICH. L. REV. 1408, 1412, 1418 (2003) (describing this approach as the "adaptive-learning model").

it addresses a new type of threat or that courts defer to such overreaching.[21] And Tushnet himself disclaims any notion that history invariably reflects social learning or that social learning takes place, when it does, along an unbroken trajectory.[22]

This Essay's goals in a sense are narrower, and in a sense are broader, than those of the works just cited. They are narrower in that the Essay considers the impact of one particular set of events—the leak of the Pentagon Papers and its aftermath, including the government's reaction to the leak—over the past several decades, rather than looking at government's relationship to civil liberties in times of war or crisis generally, or even in a class of cases, over longer periods of time. Yet they are broader in that this Essay is interested not solely in the leak's impact on subsequent government actions and judicial outcomes. Rather, it seeks to understand the leak's intellectual impact on the public as well as on elites in the three branches of government. This impact manifests itself partly, though by no means entirely, in decisions made in the executive and judicial branches.

Despite the differences in our respective inquiries, both Tushnet's and Cole's views[23] are helpful framing devices for explaining the impact of the Pentagon Papers leak on the national psyche. On the one hand, the leak has had undeniable social learning effects. To this day, it is invoked in judicial opinions and in public debates alike for the proposition that it is dangerous to defer heavily to executive branch judgments, including executive claims that certain information is too dangerous to release. It is highly plausible that this social learning effect imposes practical constraints on the executive's ability to take legal action against classified information leaks and publications. At minimum, the executive in any given case must be prepared to argue—to the press and the public, if not to the courts—that the leak or publication is distinguishable from the Pentagon Papers. Indeed, some of the public debate about classified information disclosures by the organization called WikiLeaks centers on whether WikiLeaks follows in the tradition of Daniel Ellsberg and the Pentagon Papers (and thus by

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21. *See, e.g.*, Lee Epstein et al., 80 N.Y.U. L. REV. 1, 8-9 (2005) (finding that while courts defer more heavily to the executive during wartime in cases unrelated to the war, courts do not defer more heavily in cases that relate directly to the war); Aziz Z. Huq, *Against National Security Exceptionalism,* 2009 SUP. CT. REV. 225, 226 (2009) (arguing that assumptions of a judicial "'national security exceptionalism' find[] no empirical support in at least one important class of post-9/11 cases: challenges to emergency detention policies"); Gordon Silverstein & John Hanley, *The Supreme Court and Public Opinion in Times of War and Crisis*, 61 HASTINGS L.J. 1453, 1457-60 (2010) (explaining that presidential success in courts during times of war or crisis varies based on factors, including the stage and perceived level of threat and the President's popularity).

22. *See* Tushnet, *supra* note 17, at 284 n.38 (acknowledging that "the common use of a few episodes might be misleading"); *id.* at 292 (explaining that social learning helps us to avoid repeating old mistakes, not "making new and different" ones); *id.* at 298 (noting that social learning may lead us to narrow the reach of incursions to make them increasingly discriminatory against groups perceived as "[o]ther").

23. *See supra* notes 17-19 and accompanying text.

implication is good) or whether it is "no Pentagon Papers" (and thus by implication is bad).[24]

At the same time, the social learning effect is limited in important ways, including through adaptations like those described by Cole. For one thing, while no administration has repeated the Nixon Administration's widely criticized decision to seek a prior restraint against the press, recent administrations have attempted through other means to discourage the publication of leaks that they deem unacceptable, in one case by prosecuting but more generally by threatening to prosecute such publications after the fact. More commonly, the government has focused on prosecuting not publications but leakers themselves, a technique that has been stepped up dramatically in the Obama Administration. Additionally, supporters of these tactics sometimes engage in a direct rhetorical adaptation noted above. That is, they argue that prosecution in a given case is warranted even if it was not warranted in the case of Daniel Ellsberg and the Pentagon Papers, as the newly leaked material is "no Pentagon Papers."[25]

Beyond adaptation, there have been more fundamental challenges to the effects of post-Pentagon Papers social learning. These challenges take the form of increasingly influential constitutional arguments against restrictions on executive power, including executive secret-keeping. The counter-movement that helped to develop such arguments arose in response to restrictions on presidential power issued in the wake of the Pentagon Papers leak and its aftermath.[26]

A backlash and adaptive behavior were almost certainly inevitable in response to the very serious challenge to executive power embodied in the Pentagon Papers leak. In the balance lay public and inter-branch acquiescence to an imperial presidency that had arisen by the mid-twentieth century, fueled by the Cold War, a growing secrecy system, and expanded government. The leak marked a dramatic challenge to this state of affairs, and to the promise of public and inter-branch acquiescence on which it depended. H.R. Haldeman, President Nixon's Chief of Staff, aptly described the danger that the leak posed to the imperial presidency when he told Nixon:

> [O]ut of the gobbledygook [of the Papers], comes a very clear thing: . . . you can't trust the government; you can't believe what they say; and you can't rely on their judgment; and the—the implicit infallibility of presidents, which has been an accepted thing in America, is badly hurt by this, because it shows that people do things the president wants to do even though it's wrong, and the president can be wrong.[27]

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24. *See* discussion *infra* Part III.

25. *See* discussion *infra* Parts III.A, III.B.3.

26. *See* discussion *infra* Part II.D.

27. Audio tape: Nixon Oval Office Meeting with Bob Haldeman, Nixon Presidential Materials Project, Oval-519-1, Cassette 747 (June 14, 1971) (transcribed by Eddie Meadows, National Security Archive, George Washington University), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB48/nixon.html.

II. SOCIAL LEARNING, SKEPTICISM, AND PRESIDENTIAL POWER (OR HOW AMERICANS CAME TO SUSPECT THAT THE IMPERIAL PRESIDENT HAS NO CLOTHES)[28]

A. Backdrop: The Imperial Presidency After World War II

Much has been written about the twentieth century rise of what Arthur Schlesinger, Jr. called "the imperial [p]residency."[29] While there were and are many components and causes of this phenomenon,[30] two are of special note for our purposes. The first is a cultural shift that accompanied the rise of a permanent "national security state" in the wake of World War II and at the onset of the Cold War.[31] As Richard Barnet wrote in 1985:

> The "engineering of consent" is crucial to the national security state. Edward L. Bernays's definition of public relations accurately describes the process by which the consensus on national security is maintained. Most Americans are inhibited from having or expressing personal convictions on matters relating to national security for a number of reasons. First, the topic is amorphous and seemingly complex. The masses of numbers about weapons, budgets, "kill ratios" and other bits of jargon make it seem almost hopeless to follow the "debate." Second, the great emphasis put by government on the creation of classified information and the highly publicized, though not always successful, effort to protect secret information, cause most citizens to believe that they do not know sufficient "facts" to challenge official truth. Third, the threat to the survival of the nation is invoked in support of every new weapons system.[32]

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28. This parenthetical is, of course, a reference to the classic children's story, *The Emperor's New Clothes*, by Hans Christian Andersen.

29. *See generally* SCHLESINGER, *supra* note 16.

30. For recent explorations of this topic, see, for example, CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 17-22, 38-84, 308-30 (2007); GARRY WILLS, BOMB POWER: THE MODERN PRESIDENCY AND THE NATIONAL SECURITY STATE 1-4, 45-53 (2010).

31. *See* Richard J. Barnet, *The Ideology of the National Security State*, 26 MASS. REV. 483, 488-94 (1985).

32. *Id.* at 495. For critiques of the resulting narrowness of mainstream discourse about national security, see, e.g., ANDREW J. BACEVICH, THE NEW AMERICAN MILITARISM: HOW AMERICANS ARE SEDUCED BY WAR 14-15, 18, 90 (2005); WILLS, *supra* note 30, at 161-66, 238-40; Glenn Greenwald, *The NYT's View of "Journalistic Objectivity,"* SALON, Dec. 23, 2009, http://www.salon.com/opinion/greenwald/2009/12/23/objectivity_2/. For a more supportive view of the early national security state's impact on journalistic norms during and after World War II, see GABRIEL SCHOENFELD, NECESSARY SECRETS: NATIONAL SECURITY, THE MEDIA, AND THE RULE OF LAW 145-53, 158-62 (2010).

Closely related to this cultural shift was the creation of a vast infrastructure for secret-keeping, centered on the classification system. The modern classification system began in 1951, when President Harry Truman issued an executive order extending what had been a purely military secrecy system "to non-military agencies, [by] authorizing any executive department or agency to classify information when it seemed 'necessary in the interest of national security.'"[33] Until that time, official secrets were designated only within and by the military.[34] Even the military classification system was not recognized by presidential order until 1940.[35] From the system's beginnings, the criteria for classification have been determined predominantly through executive order.[36] By the 1970s, millions of documents were classified yearly[37] and estimates on the number of persons with some form of classification authority ranged from several thousand to more than one million.[38] Today, roughly sixteen million new official secrets are created yearly,[39] and several million persons in the United States have some form of classification authority.[40]

The secrecy system is deeply entwined with the phenomenon of deference to the executive, as Barnet notes in the passage quoted above. That the President and his advisors have access to so much information not seen by Congress or the courts, let alone the public, contributes to the presidency's mystique and to a sense among those outside of the President's inner circle that they are

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33. SCHLESINGER, *supra* note 16, at 340 (emphasis omitted), *quoted in* Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 U. ILL. L. REV. 881, 890 [hereinafter Kitrosser, *Classified Information*].

34. *See* HAROLD C. RELYEA, SECURITY CLASSIFIED AND CONTROLLED INFORMATION 2 (2008).

35. *See id.*; SCHLESINGER, *supra* note 16, at 339.

36. *See, e.g.*, DANIEL PATRICK MOYNIHAN ET AL., REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, at XXXVIII, 5, 11-13, 15, 23-24 (1997); RELYEA, *supra* note 34, at 1-5; SCHLESINGER, *supra* note 16, at 338–41. A few discrete categories of information are classified by statute. *See, e.g.*, NATHAN BROOKS, CONG. RESEARCH SERV., RS21900, THE PROTECTION OF CLASSIFIED INFORMATION: THE LEGAL FRAMEWORK 2 n.7 (2004).

37. *See* INFO. SEC. OVERSIGHT OFFICE, ANNUAL REPORT TO THE PRESIDENT 35-41 (1979) [hereinafter 1979 REPORT TO THE PRESIDENT]; COMPTROLLER GEN., REPORT TO THE CONGRESS OF THE UNITED STATES: IMPROVED EXECUTIVE BRANCH OVERSIGHT NEEDED FOR THE GOVERNMENT'S NATIONAL SECURITY INFORMATION CLASSIFICATION PROGRAM, at ii, 6-7 (1979).

38. *See* 1979 REPORT TO THE PRESIDENT, *supra* 37, at 27-33; COMPTROLLER GEN., *supra* note 37, at 16-18, 30-31; SCHLESINGER, *supra* note 16, at 341.

39. INFO. SEC. OVERSIGHT OFFICE, REPORT TO THE PRESIDENT 9 (2010) (noting that combined original and derivative classification decisions *averaged* 16.1 million each year from fiscal year 1996 through fiscal year 2009).

40. *See* Heidi Kitrosser, *Supremely Opaque?: Accountability, Transparency, and Presidential Supremacy*, 5 ST. THOMAS J.L. & PUB. POL'Y 62, 100-01 nn.171-77 and accompanying text (2010) [hereinafter Kitrosser, *Supremely Opaque?*] (discussing the relevant statistics and the distinction between original and derivative classification authority).

unequipped to challenge his decisions on national security.[41] Attempts to diminish this information monopoly themselves are frequently blocked by claims that only the President and certain subordinates know when information is too dangerous to be disclosed.[42]

These phenomena—a culture of deference to the President, massive executive branch secrecy, and the mutually reinforcing relationship of the two—are hardly relics of the past. They are alive and well and in some respects more robust than they were during the Cold War. Yet these phenomena, if now stronger and more adaptive in some respects than in the past, also bear the scars and vulnerabilities of past skirmishes. If Congress, courts, and the people remain too quick today to defer to executive branch assertions and secrecy, and I believe that they do,[43] they also confront a large stock of historical examples that challenge the wisdom and suggest the heavy costs of such deference.

In contrast to today's Americans—wizened in experience if not always in deed—chroniclers of the pre-1970s Cold War years portray a relatively unsullied credulousness on the parts of the public and the press toward government assertions about national security and foreign affairs. Journalism professor Mark Feldstein refers to this period as one in which "deference to authority characterized American journalism and politics alike."[44] Political scientist Gabriel Schoenfeld writes of the formal relationships between government and press in the 1950s and early 1960s: "Top reporters and columnists, and approximately twenty-five news-gathering organizations, including the *New York Times*, Time Inc. and CBS, . . . secretly cooperat[ed] with the CIA in all sorts of ways . . . ."[45] He cites Carl Bernstein's findings that reporters were employed

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41. *See, e.g.*, SCHLESINGER, *supra* note 16, at ix-x, 354-56, 361, 372-73; WILLS, *supra* note 30, at 98-99, 138-39, 161-67.

42. Such claims are epitomized, but by no means exhausted by, the "mosaic theory." Under this theory, the executive branch argues that courts are not equipped to recognize when "'apparently harmless pieces of information'" could, if "'assembled together,'" damage national security. David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 630 (2005) (quoting 32 C.F.R. § 701.31 (2005)). Thus, courts should defer to the executive branch's judgment as to when information cannot safely be disclosed. *See, e.g.*, *id.* at 630-32; Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 135 (2006); Christina E. Wells, CIA v. Sims*: Mosaic Theory and Government Attitude*, 58 ADMIN. L. REV. 845, 846-48 (2006).

43. *See generally, e.g.*, Kitrosser, *Supremely Opaque?*, *supra* note 40 (exploring supremacist arguments in relation to accountability and transparency).

44. FELDSTEIN, *supra* note 11, at 5; *see also* Interview by Pub. Broad. Serv. with Mark Feldstein, Professor, George Washington Univ. (Jan. 8, 2007), *available at* http://www.pbs.org/wgbh/pages/frontline/newswar/interviews/feldstein.html (describing journalists' extreme deference to government after World War II, including instances of secret journalistic collaboration with the CIA and law enforcement officials). *See generally, e.g.*, James Aronson, *Mediations*, 31 ANTIOCH REV. 267, 274-76 (1971) (discussing journalistic deference and complacency throughout the Cold War).

45. SCHOENFELD, *supra* note 32, at 161.

"'to help recruit and handle foreigners as agents; to acquire and evaluate information, and to plant false information with officials of foreign governments. Many signed secrecy agreements, pledging never to divulge anything about their dealings with the Agency.'"[46] And as Arthur Schlesinger, Jr. observed, the Congress of this time had much in common with the press when it came to deference.[47] In the decade after the Korean War, Congress, "[m]esmerized by the supposed need for instant response to constant crisis, overawed by . . . 'the cult of executive expertise,' confused in its own mind as to what wise policy should be, delighted to relinquish responsibility, . . . readily capitulated to . . . 'high-flying' theses of presidential prerogative."[48] Academics, too, (including Schlesinger himself, as he concedes) and the press also bought deeply into "the presidential mystique" in those years.[49]

B. The Leak and Early Reactions to It

Even before the leak of the Pentagon Papers, there were cracks in the Cold War consensus. This was due in no small part to the Vietnam War. Reflecting on the Papers and the Vietnam War in 1971, Hannah Arendt wrote that "[u]nder normal circumstances the liar is defeated by reality, for which there is no substitute; no matter how large the tissue of falsehood that an experienced liar has to offer, it will never be large enough . . . to cover the immensity of factuality."[50] The hard facts of Vietnam began to trickle out and to intrude on official versions of reality even before the Papers were leaked. In 1969, the *New York Times* revealed that the U.S. was secretly bombing Cambodia.[51] Jack Anderson, who wrote the popular syndicated column "The Washington Merry-Go-Round," began a series, based on whistleblower leaks, of "eighteen columns exposing the military's covert operations in Vietnam" a few months before the *New York Times* began to publish the Pentagon Papers in 1971.[52] Furthermore, anti-war protests and teach-ins had been underway for years prior to the Papers' publication.[53]

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46. *Id.* (quoting investigative reporter Carl Bernstein).

47. *See* SCHLESINGER, *supra* note 16, at 169.

48. *Id.* (internal citation omitted).

49. *Id.* at ix, 169.

50. Hannah Arendt, *Lying in Politics: Reflections on the Pentagon Papers*, N.Y. REV., Nov. 18, 1971, at 30.

51. *See* FELDSTEIN, *supra* note 11, at 142. As Feldstein notes, the "secret" bombing of Cambodia was never a secret to Cambodians; "[o]nly the American people remained unaware of the destruction unleashed in their name" prior to the *New York Times* story. *Id. See also* WILLS, *supra* note 30, at 152 ("The double use of secrecy—kept from one's own but revealed to the foe—is perfectly illustrated by President Nixon's bombing of Cambodia . . . .").

52. FELDSTEIN, *supra* note 11, at 143-44.

53. *See, e.g.*, *id.* at 142-43 (discussing protests in 1970 and President Nixon's reaction to them); ELLSBERG, *supra* note 1, at 262-73, 336-37, 376-81 (describing anti-war protests and conferences, including some in which Ellsberg participated); Jules Witcover, *Where Washington*

Among journalists, there were mounting expressions of regret for having erred on the side of secrecy throughout the Cold War. The *New York Times*'s decision to water down a story prior to the Bay of Pigs Invasion—removing references to the CIA's involvement and to the invasion's imminence—was held up repeatedly as an example of an unfortunate and unnecessary compromise of journalistic integrity.[54] The incident's high profile as a cautionary tale—whether warranted by the facts or, as some have argued, overblown[55]—was fueled partly by President "Kennedy's hindsight remark to *Times* executive editor Turner Catledge: 'If you had printed more about the [Bay of Pigs] operation, you would have saved us from a colossal mistake.'"[56] James Greenfield, foreign editor of the *New York Times* from 1969-1977, cited another incident—the *Times*'s honoring of a "Washington-ordained news embargo that accompanied the South Vietnamese invasion of Laos"—as having made the paper warier of government secrecy requests.[57] Reflecting on press credulousness about Vietnam generally, a *Los Angeles Times* reporter wrote in the *Columbia Journalism Review* in 1970, "the Washington press corps, like the officialdom it reported on, was comprised largely of men and women in whose lives and political thinking the Cold War had been a reality."[58]

Still, the release of the Pentagon Papers sent shockwaves through the nation's collective psyche like no previous challenge to the Cold War consensus had done. The Papers' impact can be credited partly to the groundwork laid by those earlier challenges. Indeed, one criticism of the Papers was that they offered few revelations that one could not have gathered from carefully following the news.[59] Yet what made the Papers stand out were the sources from which they sprang and the form that they took. For one thing, it would have been difficult for officials to dismiss revelations published in the *New York Times* as unserious,

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Reporting Failed, COLUM. JOURNALISM REV., Winter 1970-71, at 7, 11-12 (discussing 1960s protests and teach-ins and press responses to the same).

54. *See, e.g.*, MAX FRANKEL, THE TIMES OF MY LIFE AND MY LIFE WITH THE *TIMES* 209-11 (1999); Aronson, *supra* note 44, at 273-74; Passing Comment, *Views of the Editors: An Old Issue Anew*, COLUM. JOURNALISM REV., Summer 1966, at 2-3; *see also* W. JOSEPH CAMPBELL, GETTING IT WRONG 69 (2010) (acknowledging and criticizing the widespread view that the *New York Times*'s treatment of the story "offers . . . timeless lessons about the perils of self-censorship . . . and about the hazards of journalists surrendering to the government's agenda").

55. *See, e.g.*, CAMPBELL, *supra* note 54, at 68-84 (arguing that the conventional wisdom about the *New York Times*'s coverage of the invasion is inaccurate and overblown); R.W. Apple, Jr., *James Reston, A Journalist Nonpareil, Dies at 86*, N.Y. TIMES, Dec. 7, 1995, at A1, B19 (quoting Reston's statement that "[i]t is ridiculous to think that publishing the fact that the invasion was imminent would have avoided this disaster").

56. Aronson, *supra* note 44, at 274 (alteration in original) (quoting Crocker Snow, Jr.).

57. *Id.* at 276.

58. Witcover, *supra* note 53, at 9.

59. *See, e.g.*, Arendt, *supra* note 50, at 38 (citing "the fact, much commented on . . . that the Pentagon Papers revealed little significant news that was not available to the average reader of dailies and weeklies").

although such reactions had greeted earlier leaks on Vietnam published by Jack Anderson who, despite many groundbreaking stories, was never viewed as part of the establishment.[60] Nor could the authors of the Papers themselves be written off as unserious or uninformed. To the contrary, the Papers were commissioned by Defense Secretary Robert McNamara and written by a group of insider experts, of whom Ellsberg was one.[61] And the form that the Papers took—that of a historical narrative directed toward understanding the U.S. involvement in Vietnam—enabled readers easily to contrast the Papers' candid assessments with the very different pronouncements that had been offered for public consumption.[62]

The Papers thus erupted along pre-existing fault lines within a culture of deference and trust toward the executive. The eruption was fueled by feelings of shock and betrayal among readers. Jonathan Schell gave voice to these feelings in a *New Yorker* issue published just after the *Times* began to excerpt the Papers.[63] He wrote:

> Almost none of us, it turns out, were cynical enough or ungenerous enough in judging the policymakers, and almost all of us were living in a dream world furnished by official lies and by our own innocent, or complacent, desire to trust our government. Unlearning the misinformation we lived by for years is going to be as different and painful as reversing the effects of a brainwashing.[64]

Speaking as Class Day orator at Harvard College on June 16, 1971—three days after the first excerpts were published—journalist Jimmy Breslin sounded a similar note.[65] He told the graduating students: "This week we all found out that [soldiers have] died to keep alive the lies of some people who thought they were important."[66] And in summing up much of the public sentiment, journalist James Aronson wrote in 1971: "[T]he strong public reaction to the publication of the documents stemmed not so much from an understanding of the issues involved in the American presence in Indochina as from a realization that the public was being lied to by the government."[67]

The Papers thus helped to disrupt the momentum of the national security state and the imperial presidency. It forced a crisis in the culture of deference and trust on which these phenomena relied. Author and intelligence expert Thomas

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60. *See* FELDSTEIN, *supra* note 11, at 148-49.

61. *See* INSIDE THE PENTAGON PAPERS, *supra* note 9, at 12-23.

62. *See, e.g.*, *id.* at 183 ("The revelations confirmed what protesters had been saying from impeccably authoritative sources.").

63. *See* Jonathan Schell, *The Talk of the Town: Notes and Comment*, NEW YORKER, June 26, 1971, at 29.

64. *Id.*

65. *See* Aronson, *supra* note 44, at 267.

66. *Id.* at 267-68 (alteration in original) (quoting Jimmy Breslin).

67. *Id*. at 271; *see also* Arendt, *supra* note 50, at 30 (writing in fall 1971 that "most readers have by now agreed that the basic issue raised by the Papers is deception").

Powers, who was born in 1940, wrote in 2004 that after the Papers' release,

> no one could really say, in the government, we know things that if you knew, would change your mind and make you realize the necessity and importance of us pressing this war forward. . . . Once . . . you see the vast gap that separates claims for the nature of what was going on from the reality of the nature of what was going on, you are likely to be skeptical in the future. I think we live, as a result, in a much more skeptical country than the one I went to high school in.[68]

C. The Road to Watergate and Beyond

1. Paranoia, the Plumbers, and Watergate.—No one can accuse the Nixon Administration of having failed to notice the leak. Indeed, as discussed below in Part III, the administration sought a prior restraint in federal court to stop the Papers' publication and criminally prosecuted Ellsberg and Russo.[69] Apart from litigation, the Nixon Administration reacted through a chain of secretive actions that culminated in the Watergate scandal and the President's resignation. So many actions and decisions led to Watergate that one cannot know for certain if the leak served as a but-for cause. At minimum, the leak was an important contributing factor. It ratcheted up President Nixon's already high paranoia level, leading to a chain of reactive schemes that included the break-in at the Watergate complex and the subsequent cover-up. When discovered, these events would further erode public trust in the executive branch and throw another stumbling block in the path of the imperial presidency.

Fuming over the leak and worried that there were more to come, President Nixon arranged for a secretive anti-leak unit to be formed.[70] The resulting group, the Special Investigations Unit, is best known to history as "the Plumbers."[71] The Plumbers' first major act took place on September 3, 1971, when two of them—G. Gordon Liddy and Howard Hunt—broke into the Los Angeles office of Daniel Ellsberg's psychiatrist, Dr. Lewis Fielding.[72] They had hoped to find information in Fielding's office with which to discredit Ellsberg.[73] They also sought to discern if Ellsberg planned to leak more information.[74] While the break-in turned up no information on Ellsberg,[75] it was just the start for the

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68. INSIDE THE PENTAGON PAPERS, *supra* note 9, at 191.

69. *See infra* Part III.

70. *See* INSIDE THE PENTAGON PAPERS, *supra* note 9, at 87; *see also* EGIL "BUD" KROGH & MATTHEW KROGH, INTEGRITY: GOOD PEOPLE, BAD CHOICES, AND LIFE LESSONS FROM THE WHITE HOUSE 1 (2007).

71. *See* INSIDE THE PENTAGON PAPERS, *supra* note 9, at 87; *see also* KROGH & KROGH, *supra* note 70, at 1.

72. KROGH & KROGH, *supra* note 70, at 65-73.

73. *See id.*

74. *Id.*

75. *Id.* at 73.

Plumbers.

Soon, the Plumbers were recruited to break into and bug the Democratic Headquarters at the Watergate Hotel.[76] In the second of their two Watergate break-ins, the burglars (those who physically conducted the break-in) were caught and arrested.[77] From this sprung the infamous cover-up that was "worse than the crime,"[78] as President Nixon and his inner-circle raced to hide the burglars' ties to the White House and to the earlier break-in at Dr. Fielding's office. Toward this end, they pressured prosecutors, ordered FBI Director L. Patrick Gray to destroy evidence, received secret information from Assistant Attorney General Henry Peterson, and paid the burglars to keep silent about the larger Plumbers operation and its connection to the White House.[79] The cover-up began to unravel when one of the burglars broke his silence to avoid a lengthy prison sentence, implicating White House Counsel John Dean and presidential aide Jeb Stuart Magruder.[80] These revelations prompted the Senate committee investigating Watergate to subpoena members of the President's inner-circle.[81] Appearing before the committee, former presidential aide Alexander Butterfield inadvertently revealed that President Nixon had installed a taping system in the Oval Office.[82] Butterfield's disclosure led to subpoenas for the tapes themselves.[83] Ultimately, the Supreme Court ordered the tapes released in a landmark opinion rejecting President Nixon's claim that the tapes were shielded by executive privilege.[84] The released tapes included a "'smoking gun' . . . that proved beyond doubt Nixon's personal involvement in obstructing the Watergate investigation. The President's position became untenable. As Congress prepared to vote on three articles of impeachment, Nixon resigned from office on August 9, 1974."[85]

The Plumbers constitute the most direct link between the Pentagon Papers leak and President Nixon's downfall. Had Ellsberg never leaked the Papers, the

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76. *See id.* at 121; *see also, e.g.*, Anthony J. Gaughan, *Watergate, Judge Sirica, and the Rule of Law*, 42 MCGEORGE L. REV. 343, 347-49 (2011); David Rudenstine, *The Pentagon Papers Case: Recovering Its Meaning Twenty Years Later*, 12 CARDOZO L. REV. 1869, 1910-11 (1991).

77. *See* Gaughan, *supra* note 76, at 349; *see also The Watergate Trial: Timeline*, GERALD R. FORD LIBR. & MUSEUM, http://www.fordlibrarymuseum.gov/museum/exhibits/watergate_files/content.php?section=1&page=d (last visited July 20, 2011) [hereinafter *Watergate Trial Timeline*].

78. *See* David Johnston, *Coverup: Watergate's Toughest Lesson*, N.Y. TIMES, Feb. 15, 1998, at wk5 ("Watergate bequeathed many things to history, including this famous cliché: The cover-up is worse than the crime.").

79. *See* Gaughan, *supra* note 76, at 349-50, 353, 357, 367-68.

80. *See id.* at 372, 378; *Watergate Trial Timeline*, *supra* note 77.

81. Gaughan, *supra* note 76, at 379.

82. *See Senate Hearings: Timeline*, GERALD R. FORD LIBR. & MUSEUM, http://www.fordlibrarymuseum.gov/museum/exhibits/watergate_files/content.php?section=2&page=d (last visited July 20, 2011).

83. *See id.*

84. *See generally* United States v. Nixon, 418 U.S. 683 (1974).

85. Gaughan, *supra* note 76, at 380.

Plumbers might not have been formed. Without this key organization in place, it is quite possible that neither Watergate nor the President's resignation would have occurred.

A somewhat more diffused link between the leak and Watergate is the former's impact on President Nixon's paranoia level and his willingness to pull out all stops in fighting perceived enemies. Journalist Harrison Salisbury points to a discussion between Nixon and Kissinger a few days after the *New York Times* began to publish the Papers, in which the two plotted strategy to retaliate against Ellsberg, the *New York Times*, and other perceived antagonists. Salisbury writes:

> [T]he embryo of almost all that was later to follow was present in that discussion—the institutionalization of paranoia, the creation of extralegal subversive units (the Plumbers), the organization of massive secret reprisals . . . a campaign for the "discipline of leaks," which would be carried forward (and already had been) by criminal means; the groundwork for an elaborate conspiracy against liberals, intellectuals, and antiwar forces with Ellsberg as its focus; the stirrings of a political scheme to smear the Johnson-Kennedy administrations as architects of failure . . . .[86]

Reflecting the atmosphere that Salisbury describes, Egil "Bud" Krogh, who was initially placed in charge of the Plumbers, recounts being told by John Ehrlichman that "the president was certain that a conspiracy was involved in the release of the Pentagon Papers" and that Ehrlichman had never seen the President angrier about anything else.[87] Krogh cites a discussion, caught on the Oval Office tapes, between Nixon and several aides on the morning that the Supreme Court refused the White House request to enjoin the Papers' publication.[88] In it, Nixon vows: "'We're through with this sort of court case,' . . . . 'They're using any means. We are going to use any means.'"[89] Absent the leak, President Nixon might not have been pushed to the mental brink that generated an atmosphere so conducive to Watergate and its cover-up.

Krogh also views the Fielding break-in as an event that was pivotal for the Plumbers themselves and that made their next steps inevitable.[90] After that episode, Liddy and Hunt—who would soon mastermind Watergate—"knew that under certain circumstances the White House staff would tolerate an illegal act to obtain information."[91] Krogh elaborates: "[H]ardened by their first action, the

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86. HARRISON E. SALISBURY, WITHOUT FEAR OR FAVOR: THE *NEW YORK TIMES* AND ITS TIMES 272 (1980). For a similar assessment of the leak's connection to Watergate, see Rudenstine, *supra* note 76, at 1909-11.

87. KROGH & KROGH, *supra* note 70, at 17.

88. *See id.* at 27-28.

89. *Id.* (quoting President Nixon).

90. *See id.* at 1-2.

91. *Id.* at 2; *see also* Gaughan, *supra* note 76, at 351 (referring to Liddy and Hunt as the "ringleaders" of the break-in).

Plumbers [now] knew that the rules of engagement had been changed and the conventional respect for laws set aside."[92] The Fielding operation "was the first irreversible step by which a presidency ran out of control." [93]

2. The Imperial Presidency in Watergate's Aftermath.—While Vietnam and the Pentagon Papers themselves threatened the culture of deference underlying the imperial presidency, the Watergate crisis turned up the heat considerably. Perhaps the clearest reflections of this were the 1974 congressional elections and the legislative and oversight activities of the mid to late 1970s.

Beginning in 1974, a large group of "freshmen Democrats known as the 'Watergate babies"' was swept into office amid national perceptions of out-of-control presidential power.[94] As a *New York Times* reporter put it at the time:

> What we are beginning to see here are the reactions to the misuse of Presidential power in Vietnam and Watergate. The Congress is determined to try to regain some of the power it lost or abandoned to the President in the postwar generation, to limit the scope of executive privilege, to limit the President's power to make war without the consent of the Congress, and to insist, if possible, that the President spend all funds appropriated by the Congress.[95]

Landmark hearings were held in both houses of the post-Watergate Congress, examining in some detail intelligence and national security related abuses of the preceding several decades.[96]

The hearings led to the creation of the congressional intelligence committees to improve national security oversight and the Foreign Intelligence Surveillance Act to regulate national security surveillance.[97] The post-Watergate Congress also passed, over a veto by President Ford, amendments to strengthen the Freedom of Information Act by limiting the scope of its national security exception.[98]

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92. KROGH & KROGH, *supra* note 70, at 77.

93. *Id.*

94. Steven V. Roberts, *House G.O.P. Freshmen Are Speaking Up on Party Issues*, N.Y. TIMES, Oct. 29, 1979, at A16; *see also* James Reston, *The Class of 1974*, N.Y. TIMES, Dec. 18, 1974, at 45. The text and citations accompanying this footnote, as well as those accompanying *infra* notes 95-96 are taken from: Heidi Kitrosser, *National Security and the Article II Shell Game*, 26 CONST. COMM. 483, 496 (2010) [hereinafter Kitrosser, *National Security*].

95. Reston, *supra* note 94, at 45.

96. *See generally, e.g.*, KATHRYN S. OLMSTED, CHALLENGING THE SECRET GOVERNMENT: THE POST-WATERGATE INVESTIGATIONS OF THE CIA AND FBI (1996).

97. *See, e.g.*, Heidi Kitrosser, *"Macro-Transparency" as Structural Directive: A Look at the NSA Surveillance Controversy*, 91 MINN. L. REV. 1163, 1181-82, 1188-92 (2007).

98. *See Veto Battle 30 Years Ago Set Freedom of Information Norms*, NAT'L SECURITY ARCHIVE (Nov. 23, 2004), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB142/index.htm.

D. Limits on, and a Backlash Against, the Period's Impact

The Pentagon Papers leak and the events that followed marked important moments of social learning about the dangers of excessive deference to the executive branch. Yet even as the events unfolded, there were limits on the reach of these lessons. For example, even as the Supreme Court unanimously rejected President Nixon's claim that the White House tapes were absolutely shielded by executive privilege, they recognized for the first time a presumptive, constitutional privilege for presidential communications.[99] The Court also suggested that a much stronger level of judicial deference would be called for were the President to claim that "military or diplomatic secrets" were at stake.[100] On another front, while Congress did hold landmark hearings in the mid-1970s on executive branch excesses in the name of national security, both the hearings and related legislation encountered impediments grounded in pro-executive power based objections.[101]

More significant still is the ongoing backlash engendered by post-Watergate restraints on the presidency. By the 1970s, conservatives increasingly embraced presidential power in the belief that Republicans would have more luck in taking the presidency than the Congress.[102] Within the national security state, too, a strong presidency had hawkish implications consistent with conservatives' self-depictions as cold war hardliners.[103] To conservatives inside the beltway, then, the fall and disgrace of a Republican president, combined with a wave of congressional assertiveness, constituted a major crisis.[104] Over time, this sense was developed into a series of constitutional arguments supporting robust, unilateral presidential powers. Among other things, these arguments encompass the notion that Congress may not, under many circumstances, constitutionally restrict the President's power to take steps—such as wiretapping without

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99. United States v. Nixon, 418 U.S. 683, 706-13 (1974).

100. *Id.* at 710; *see also id.* at 706.

101. *See* OLMSTED, *supra* note 96, at 2-9, 103-12, 121-43, 147-51, 154-89.

102. *See, e.g.*, Jeffrey Hart, *The Presidency: Shifting Conservative Perspectives?*, NAT'L REV., Nov. 22, 1974, at 1351; Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2096-2100 (2009); Julian E. Zelizer, *The Conservative Embrace of Presidential Power*, 88 B.U. L. REV. 499, 500 (2008).

103. *See, e.g.*, DAVID HALBERSTAM, THE BEST AND THE BRIGHTEST, at xvii-xviii (1992) (discussing Republican tendencies, after World War II, to paint Democrats as soft on communism); Zelizer, *supra* note 102, at 502-03 (discussing more recent ties between hawkishness and presidentialism); JULIAN E. ZELIZER, ARSENAL OF DEMOCRACY 262 (2010) (referring to the "post-1960s generation of hawkish Republicans who . . . . began to champion presidential power on national security policy").

104. *See, e.g.*, Heidi Kitrosser, *It Came from Beneath the Twilight Zone: Wiretapping and Article II Imperialism*, 88 TEX. L. REV. 1401, 1410-11 (2010) (citing examples of fettered presidency narrative); Kitrosser, *Supremely Opaque?*, *supra* note 40, at 72 (discussing narrative of a post-Vietnam fettered presidency).

warrants or using torture in interrogations—that he deems necessary for national security.[105]

Such "presidentialist" arguments have gained increasing traction over the past few decades. They had a coming out of sorts in "the well known report of a minority of congresspersons (hereinafter 'Minority Report') who dissented from the Report of the Congressional Committees Investigating the Iran-Contra Affair in 1987."[106] "The Minority Report was joined by Senators James McClure and Orrin Hatch and by Representatives Dick Cheney, William S. Broomfield, Henry J. Hyde, Jim Courter, Bill McCollum, and Michael DeWine."[107] "Years later, as Vice President, Dick Cheney would point to the Minority Report—written partly by David Addington, then a committee staff member and later chief of staff to Vice President Cheney—as embodying his views on presidential power."[108] "The Minority Report argues that some of the statutory directives that President Reagan and his subordinates were said to have violated in the Iran-Contra [A]ffair were unconstitutional infringements [on presidential power] that the President was free to ignore."[109]

True, presidentialist arguments were widely criticized when they were made during the George W. Bush Administration, partly because of the aggressive manner in which they were pursued and the scandals with which they became associated.[110] But the arguments continue to have currency when pursued with more subtlety. For example, I have detailed elsewhere the important impact that exclusivist arguments have had in generating doubt as to whether warrantless wiretapping in the Bush Administration, though contrary to statute, was illegal.[111] This doubt has helped to stymie calls to investigate the wiretapping program and to hold telecommunications companies responsible for partaking in it.[112]

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105. *See* Kitrosser, *Supremely Opaque?*, *supra* note 40, at 69-74 (summarizing key components of such arguments).

106. *Id.* at 73.

107. *Id.* at 73-74; *see also Minority Report*, *in* REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 100-433, S. REP. NO. 100-216, at 431 (1987).

108. *See* Kitrosser, *Supremely Opaque?*, *supra* note 40, at 74; *see also* FREDERICK A.O. SCHWARZ, JR. & AZIZ Z. HUQ, UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR 154–55, 159–60, 200 (2007).

109. Kitrosser, *Supremely Opaque?*, *supra* note 40, at 74 (elaborating on this aspect of the Minority Report); *see also, e.g.*, Mariah Zeisberg, *Legislative Investigations as Security Power* 11-12 (book chapter draft, Mar. 2011) (on file with author) (discussing Oliver North's introduction of presidentialism to the Iran-Contra hearings, foreshadowing its prominence in the Minority Report).

110. *See, e.g.*, JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 210-13 (2007) (describing the Bush Administration's "open chest-thumping about the importance of maintaining and expanding executive power" and widespread negative reactions to this approach).

111. *See* Kitrosser, *National Security*, *supra* note 94, at 509-20.

112. *Id.*

E. Assessment: The Leaks as Disruption in the Imperial Presidency's Climb

The imperial presidency had been on a steady upward trajectory since the end of World War II. By the late 1960s, a number of forces began to push against that trend. These forces cast doubts on longstanding assumptions that executive expertise lay just beyond curtains of national security secrecy, and that the curtains themselves belonged in place. By leaking the Pentagon Papers, Daniel Ellsberg exacerbated and cemented those doubts for many. The leak and publication of the Papers thus helped to disrupt the imperial presidency's upward climb. When one factors in the connections between the leak and Watergate, the disruptive effect was greater still.

Still, one could argue that, in the long run, the leak did no lasting damage to the imperial presidency. If anything, the resulting backlash strengthened presidential power. Of course, we will never know how events would have unfolded in a counterfactual universe in which Daniel Ellsberg did not bother to leak the Pentagon Papers. My own sense, however, is that the leak, on balance, weakened the foundations of the imperial presidency. The very reason that the leak and subsequent events sparked so strong a backlash is because they shone so harsh a light on the degree to which the presidency had aggrandized power, hidden tragic mistakes behind curtains of secrecy, and been aided and abetted by a compliant populace. This narrative remains an important tool of social learning on the dangers of excessive deference to, and secrecy within, the executive branch.

III. SKEPTICISM, OFFICIAL SECRETS, AND FREE SPEECH (OR HOW AMERICANS REACT TO RULES AGAINST CONFIRMING OR DENYING WHETHER THE PRESIDENT HAS CLOTHES)

Part II offered a broad take on the contemporaneous and longer term impacts of the leak on Americans' attitudes toward presidential power and secrecy. This Part takes a somewhat finer-grained look at the leak's ongoing impact on attitudes toward executive branch secrecy, particularly toward the relationship between classified information and free speech. Sub-part A summarizes major judicial and prosecutorial developments regarding classified information leaks and free speech since the Pentagon Papers episode. Sub-part B takes a closer look at the impact of the Pentagon Papers on modern political and judicial thinking. After a brief overview in sub-part B.1, sub-part B.2 evaluates the propositions for which federal appellate judges have cited the Pentagon Papers episode over the past two decades. Finally, sub-part B.3 considers how the episode factors into current debates over WikiLeaks.

A. Classified Information Leaks and Free Speech: An Overview of Major Judicial and Prosecutorial Developments Since the Pentagon Papers Leak

Despite the common assumption that it is categorically illegal to leak or publish classified information, the United States has never had an official secrets

act that creates such blanket illegality.[113] Instead, actual and contemplated prosecutions have centered on somewhat more qualified statutory provisions, including the Espionage Act.[114] For example, 18 U.S.C. § 793(e) of the Espionage Act prohibits anyone with unauthorized possession of or access to "any document, writing . . . photograph . . . or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation," from communicating, attempting to communicate, or willfully retaining the same.[115] Yet given the breadth and malleability of a § 793(e), it could potentially be used to prosecute almost any possession or transmission of classified information that an administration dislikes for any reason, including political embarrassment.[116] More so, Congress at points has considered passing official secrets acts to explicitly make illegal any transmission of classified information.[117] As recently as 2000, a majority of each house of Congress approved such an act before it was vetoed by President Clinton.[118]

Given the potential reach of existing statutes and the possibility that Congress could pass an official secrets act, the core questions regarding the government's power to punish leaks or publications of classified information are constitutional in nature. Specifically, is the fact that information is classified enough to make its unauthorized dissemination punishable consistent with the First Amendment? If the answer is no, then a closely related question is to what degree courts should defer to the government's classification decision in deciding whether such punishment is consistent with the First Amendment. No less is at stake in such inquiries than the extent to which Americans are permitted the tools to understand and challenge the actions of their government. As discussed above, an enormous amount of information is classified yearly in the United States, and several million people possess some form of classification authority.[119] It also has been long acknowledged across the political spectrum that over-classification

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113. *See, e.g.*, Stephen I. Vladeck, *Inchoate Liability and the Espionage Act: The Statutory Framework and the Freedom of the Press*, 1 HARV. L. & POL'Y REV. 219, 219 (2007).

114. 18 U.S.C. § 793 (2006).

115. *Id.* § 793(e).

116. *See, e.g.*, Vladeck, *supra* note 113, at 223-24, 227, 231-32. *Cf.* Jane Mayer, *The Secret Sharer: Is Thomas Drake an Enemy of the State?*, NEW YORKER, May 23, 2011, at 57 (quoting Morton Halperin as deeming an ongoing leak prosecution against former government employee Thomas Drake so unwarranted that "[i]f Drake is convicted, it means the Espionage Law is an Official Secrets Act").

117. *See generally, e.g.*, SUNSHINE IN GOV'T INITIATIVE, BOND LEGISLATION WOULD CREATE AN "OFFICIAL SECRETS ACT" AND SHIELD INFORMATION FROM THE PUBLIC ABOUT ITS GOVERNMENT (2006), *available at* http://www.sunshineingovernment.org/leaks/SGI_White_Paper_Official Secrets.pdf (discussing the introduction of legislation "that would criminalize any unauthorized disclosure of classified information").

118. *Id.* at 2, 4.

119. *See supra* notes 39-40 and accompanying text.

is a rampant problem.[120] Because so much is classified, leaked information is a journalistic necessity.[121] "Furthermore, it is well known and long acknowledged that much leaking comes from the White House itself and this practice dates back at least to the administration of Theodore Roosevelt. . . . Administrations have long selectively leaked classified information that puts them in a favorable light while guarding less favorable information."[122] Where the executive has free reign not only to classify and selectively disclose information, but to prosecute classified information leaks and publications when it sees fit, a skewing effect on public discourse is inescapable.[123]

What then, is the state of the relevant First Amendment case law and of prosecutions of classified information leaks and transmissions since Daniel Ellsberg leaked the Pentagon Papers? With respect to judicial precedent regarding individuals who, like Ellsberg, leak classified documents to which they had authorized access, the sole federal court opinion on the topic (apart from the district court opinion that it affirmed) remains *United States v. Morison*, decided by the United States Court of Appeals for the Fourth Circuit in 1988.[124] (Recall that the Nixon Administration's prosecution of Ellsberg and Russo was dismissed for government misconduct and resulted in no opinion on the merits of the case.) In *United States v. Morison*, Morison, a government employee, was prosecuted for leaking satellite photographs of a Soviet air carrier to a British periodical.[125] The majority opinion took the view that classification turns information into government property and thus removes it from the purview of the First Amendment when the information is transmitted by a government employee to one not entitled to receive it.[126] One of the judges on the three-judge panel—Judge Wilkinson—joined that opinion but also concurred separately to suggest the slightly milder view that the case implicates First Amendment rights, but that the court should defer very heavily to the political branches (both to executive judgment as evidenced through classification and that of Congress in passing the Espionage Act) rather than conduct an independent analysis of the facts.[127] The third judge in the case—Judge Phillips—wrote a separate opinion that largely echoed Judge Wilkinson's position, though expressed a bit more reticence about extreme judicial deference.[128]

With respect to prosecuting third parties who receive and retain or disseminate classified information from government leakers, the most significant judicial statements on the matter come from a case in which prosecution was not

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120. *See* Kitrosser, *Supremely Opaque?*, *supra* note 40, at 101 nn.178-82 and accompanying text.

121. *See id.* at 108-09.

122. *Id.* at 108 (internal citation omitted).

123. *See id.* at 108-09.

124. United States v. Morison, 844 F.2d 1057 (4th Cir. 1988).

125. *Id.* at 1061-62.

126. *Id.* at 1068-70.

127. *Id.* at 1084 (Wilkinson, J., concurring).

128. *See id.* at 1085–86 (Phillips, J., concurring).

sought. That case, *New York Times Co. v. United States*,[129] occasioned the landmark decision in which the Supreme Court refused to enjoin the publication of the Pentagon Papers.[130] The Court's short per curiam opinion denying the government's request focused solely on the high First Amendment threshold to obtain a prior restraint.[131] Yet in concurrences and dissents, several Justices suggested that statutes or even executive regulations authorizing post-publication prosecutions might be constitutional.[132]

Finally, the only case to deal directly with prosecuting third parties for receiving and retaining or disseminating classified information is *United States v. Rosen*.[133] *Rosen* involved a prosecution, initiated by the George W. Bush Administration, of two lobbyists for receiving classified information concerning foreign affairs and transmitting it to a journalist and an Israeli diplomat.[134] The court's reasoning in the case is somewhat mixed. On one hand, in a 2006 opinion issued in response to the defendants' motion to dismiss the indictment on First Amendment grounds, the court sounded rather deferential notes toward the executive, suggesting that classification might effectively be decisive in making speech punishable.[135] Yet a subsequent opinion softened the potential extremity of the earlier one. Among other things, the second opinion, issued in February 2009, clarified that the jury must independently determine if the Espionage Act's criteria for illegal communications are met.[136] It explained:

> [E]vidence that information is classified is, at most, evidence that the government intended that the designated information be closely held. Yet, evidence that information is classified is not conclusive on this point . . . . Further, the government's classification decision is *inadmissible hearsay* on the second prong of the . . . [statutory definition of national defense information,] namely whether unauthorized disclosure might potentially damage the United States or an enemy of the United States.[137]

Still, even the February 2009 opinion marks a far cry from the First Amendment protections ordinarily applied when speech is prosecuted as a threat to national security. Ordinarily—that is, at least where speech does not include classified information—speech can be punished as a threat to national security only when it is intended to cause, and is likely to cause, imminent illegal activity.[138]

As for positions taken within the executive branch, the Nixon Administration obviously took hard lines against Ellsberg and Russo for leaking and conspiring

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129. 403 U.S. 713 (1971) (per curiam).

130. *See id.* at 714-20.

131. *See id.* at 714.

132. *See* Kitrosser, *Classified Information*, *supra* note 33, at 897-99.

133. 599 F. Supp. 2d 690 (E.D. Va. 2009).

134. *See id.* at 693-94; *see also* Kitrosser, *Supremely Opaque?*, *supra* note 40, at 101-02.

135. *See* Kitrosser, *Classified Information*, *supra* note 33, at 902-03.

136. *See Rosen*, 599 F. Supp. 2d at 695.

137. *Id.* (emphasis added).

138. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

to leak the Papers and against the *New York Times* for publishing them. About a decade later, the Reagan Administration appears—if one extrapolates from the reasoning of the majority opinion in *Morison*—to have taken the position that a government employee who leaks classified information to which she had authorized access should receive no First Amendment protection.[139] Similarly, the George W. Bush Administration, in prosecuting Rosen and Weissman, argued that the defendants were unprotected by the First Amendment. The Administration's core argument "was that Rosen and Weissman engaged in punishable conduct, not protected speech."[140] "Specifically, [the defendants had] 'conspire[d] to steal national defense information' and to 'pass on this stolen property to someone not entitled by its owner to have it.'"[141]

Notably, prosecutions and threatened prosecutions for classified information leaks and publications have been on a sharp upward trajectory for the past several years. *Rosen*, initiated by the Bush Administration, marked the "first Espionage Act case in history brought against private citizens for exchanging information outside of a classic espionage or spying context."[142] The Bush Administration also pursued prosecutions of government employee leaks to the press with vigor. Indeed, "[a] 2007 study by the Reporters Committee for the Freedom of the Press found a five-fold increase since 2001 in subpoenas seeking information on a media outlet's confidential sources."[143] As for the Obama Administration, observers who expected a departure from the Bush Administration's aggressive pursuit of leaks were in for a shock.[144] By the Obama Administration's two-year anniversary, it had pursued more leak prosecutions than any other administration, including the Bush Administration.[145] Indeed, the Obama Administration has pursued more leak prosecutions than every other administration in history combined.[146]

B. The Pentagon Papers' Impact on Contemporary Reasoning About Government Secrecy

1. The Papers as Symbol of Overreaching Secrecy in General.—Whatever the impact of the Pentagon Papers leak on Americans' wariness toward government secrecy, it clearly did not destroy the political or legal viability of aggressively prosecuting leaks of classified information. Nor can we know for certain if such prosecutions would be more numerous, aggressive, or successful

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139. *See supra* note 126 and accompanying text.

140. Kitrosser, *Supremely Opaque?*, *supra* note 40, at 102.

141. *Id.* (internal citation omitted).

142. *Id.* at 105.

143. *Id.* at 106 (quoting Laura Rozen, *Hung Out to Dry: The National-Security Press Dug Up the Dirt, but Congress Wilted*, COLUM. JOURNALISM REV., Jan./Feb. 2009, at 34).

144. *See id.*

145. *See id.* at 106-07; *see also* Mayer, *supra* note 116, at 47.

146. *See* Kitrosser, *Supremely Opaque?*, *supra* note 40, at 106-07; *see also, e.g.*, Mayer, *supra* note 116, at 47.

had Daniel Ellsberg not bothered to leak the Papers. There is reason to believe, however, that Ellsberg's actions and their aftermath have had, and continue to have, some restraining effect on the executive branch and to induce some skepticism in courts toward executive secrecy-based assertions. These effects stem from the Papers' ongoing symbolic impact. Whatever one thinks of the value and rightness of Ellsberg's actions, the fact is that the Papers today are widely understood to symbolize several related points: classification does not automatically mean that information would be dangerous if disclosed; much information is wrongly classified; and some releases of classified information serve the public interest. Again, this is not to say that there are not strong political and legal counter-forces that push against these lessons, often with great success. It is only to say that the lessons of the Papers, too, remain important tools.

An example of these forces and counter-forces at work was mentioned above—the passage by both houses of Congress and the veto by President Clinton of legislation to make unauthorized transmissions of classified information categorically illegal.[147] On the one hand, the congressional votes reflect the political viability—even popularity—of tough talk about cracking down on classified information leaks in the name of national security. On the other hand, the Clinton veto invokes the caution counseled by the Pentagon Papers episode. While acknowledging that "unauthorized disclosures can be extraordinarily harmful to United States national security interests," President Clinton warned that "we must never forget that the free flow of information is essential to a democratic society."[148] He cites Justice Stewart's concurring opinion in *New York Times v. United States*—the Pentagon Papers case—to bolster both of these points.[149] On the latter point, President Clinton quoted Justice Stewart's observation that "the only effective restraint upon executive policy in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government."[150]

Perhaps most strikingly, Erwin Griswold, the former solicitor general of the United States who argued the Pentagon Papers case on behalf of the Nixon Administration, portrayed the episode, years later, as a cautionary tale about excessive government secrecy.[151] Writing in the *Washington Post* in 1989, Griswold acknowledged that "I have never seen any trace of a threat to the national security from the [Papers'] publication. Indeed, I have never seen it even suggested that there was such an actual threat."[152] He also deemed it "apparent to any person who has considerable experience with classified material that there

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147. *See supra* note 118 and accompanying text.

148. 146 CONG. REC. H11,852 (daily ed. Nov. 13, 2000) (statement by President Clinton disapproving H.R. 4392).

149. *Id.*

150. *Id.*

151. *See* Erwin N. Griswold, *Secrets Not Worth Keeping*, WASH. POST, Feb. 15, 1989, at A25.

152. *Id.*

is massive overclassification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another."[153]

2. The Papers and Contemporary Judicial Reasoning.—In the very few judicial opinions involving prosecutions for transmitting classified information, references to the Papers play a somewhat mixed role. While the Papers went unmentioned in the district court opinion in *Morison*,[154] both the majority opinion and Judge Wilkinson's concurrence on appeal distinguished the facts of *New York Times v. United States* from those of Morison's prosecution.[155] The majority drew the distinction toward a somewhat speech-restrictive end, suggesting that Morison's prosecution simply did not raise the First Amendment concerns at issue in *New York Times*, in part because the former did not involve a prior restraint.[156] Judge Wilkinson drew the distinction, on the other hand, toward a relatively speech-protective end.[157] He suggested that the *Morison* majority's restrictive approach should have no bearing either on criminal cases brought against the press or on cases seeking prior restraints.[158]

As for *Rosen*, while the district court did not discuss the Pentagon Papers episode in its 2009 opinion,[159] it did so in its 2006 opinion. The court observed, in the 2006 opinion, that the concurring and dissenting opinions in *New York Times* could be read to support the view that the government may constitutionally prosecute transmissions of classified information by the press or by ordinary citizens.[160] Yet the *Rosen* court also cited the Pentagon Papers episode to emphasize the importance of judicial skepticism toward government secrecy. Stressing that the prosecution before it "implicate[s] the core values" of the First Amendment, the court quoted Justice Stewart's observation in *New York Times*:

> In the absence of the government checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry-in an informed and critical public opinion which alone can here protect the values of democratic government.[161]

Because so few cases have involved prosecutions for transmitting classified information, I also sought to discern whether and how the Pentagon Papers episode factors into judicial discussions of government secrecy or executive

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153. *Id.*

154. United States v. Morison, 604 F. Supp. 655 (D. Md. 1985).

155. United States v. Morison, 844 F.2d 1057, 1068, 1085 (4th Cir. 1988).

156. *Id.* at 1068.

157. *See id.* at 1085 (Wilkinson, J., concurring).

158. *Id.*

159. United States v. Rosen, 599 F. Supp. 2d 690 (E.D. Va. 2009).

160. United States v. Rosen, 445 F. Supp. 2d 602, 638-39 (E.D. Va. 2006), *aff'd*, 557 F.3d 192 (4th Cir. 2009)).

161. *Id.* at 633 (citation omitted).

expertise more generally. To do so, I examined cases from the U.S. Supreme Court and courts of appeals from 1990 through March 4, 2011.[162] Within those parameters, I conducted a Westlaw search for any cases that mentioned, anywhere in their text, either *New York Times v. United States* or the Pentagon Papers.[163] Of the ninety-four cases yielded, I discarded those that addressed only extraneous matters.[164] The final yield was fifty-two cases (eight Supreme Court cases and forty-four appellate court cases) in which at least one opinion (whether majority, concurring, or dissenting) mentioned the Pentagon Papers or *New York Times v. United States*.

As shown in the charts below and with more detail in this Article's appendix, federal judges that cite the Pentagon Papers episode overwhelmingly do so to support points consistent with skepticism toward government secrecy or information suppression.[165] While the concurring and dissenting opinions in *New York Times v. United States* provide fodder for arguments supportive of deference to the executive branch,[166] relatively little of that fodder shows up in the judicial opinions that I studied.

The following two charts list, for Supreme Court and courts of appeals cases respectively, the rough propositions for which the Pentagon Papers episode was cited and the number of opinions (whether majority, concurring, or dissenting) that invoked each proposition from January 1, 1990 through March 4, 2011.[167]

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162. I considered broadening the time span and widening the circle of courts reviewed to include all federal courts, or federal and state courts. However, the final parameters proved necessary to keep the project manageable. When I ran the inquiry (the inquiry is described in *infra* note 163) in Westlaw with no date restrictions in the "allfeds" and "allstates" databases, it yielded 912 cases. Running the same inquiry only in the "allfeds" database yielded 638 cases. Running the same inquiry in just a subset of "allfeds"—specifically, the "sct" and "cta" databases—yielded 320 cases. Limiting the latter inquiry to cases from 1990 through the date of the search (March 4, 2011) yielded ninety-four cases.

163. Specifically, the Westlaw inquiry was as follows: (te("pentagon papers") ("new york times" /3 "united states")).

164. I discarded those cases that did not talk about the Pentagon Papers episode at all or that cited the case's underlying facts for some reason apart from the free speech or secrecy issues in the case. Additionally, I excluded those cases that dealt solely with the congressional speech and debate clause privilege in relation to a case involving the use of the Pentagon Papers by the staff of Senator Mike Gravel. I also excluded those that cited *New York Times v. United States* or the Pentagon Papers only for one or more of the following reasons: to demonstrate that cases can be filed under seal or otherwise dealt with in a manner that protects confidential information; to reference copyright issues; to illustrate that courts can act speedily; to note that the Bill of Rights originally applied only against the federal government; to exemplify the fact that first amendment issues can arise in many contexts; to explain the definition of a prior restraint; or to demonstrate that corporate speech receives first amendment protection. I also excluded cases that were amended after their initial release, withdrawn and superseded, or unpublished.

165. *See infra* pages 115-16 and app. A & B.

166. *See supra* note 132 and accompanying text.

167. *See supra* note 162.

Each chart lists the propositions in order of the number of opinions in which they appear. An asterisk precedes each proposition that is consistent with skepticism toward government secrecy or toward information suppression. An "N" precedes those propositions that are best described as neutral. An "X" precedes those propositions that are best described as supporting deference to executive branch judgments on national security secrecy or information suppression.

Chart #1: Supreme Court Cases

Proposition	**Number of Opinions Citing**
* Heavy presumption against prior restraints on speech	5
X Distinguishing the Pentagon Papers case from a case in which a prior injunction is not at issue	2
* The government has a very high burden to demonstrate that speech should be punished because it threatens national security	2
* It is not certain that one can ever be punished, consistent with the First Amendment, for publishing truthful information	1

Chart #2: U.S. Courts of Appeals Cases

Proposition	**Number of Opinions Citing**
* Heavy presumption against prior restraints on speech	21 (19 cases directly on point, the other 2 make closely related points)
* Government secrecy can be abused	5
* Courts have the power, responsibility and competence to review national security related decisions	5
* Even a temporary loss of a constitutional right constitutes irreparable injury	4
* Constitution's founders protected the press so that it could expose government secrets and protect the people	3
X Executive has primary responsibility for internal security measures	2
N *New York Times v. United States* did not resolve whether the publication of truthful but unlawfully obtained material can be punished where the publisher did not itself act unlawfully to obtain the information	1
* Discussions, criticism of military activity of high public concern, and free speech value	1
* Heavy presumption against content-based speech restrictions	1
* The fact that information is classified does not necessarily mean that it is secret	1
* The timely dissemination of political speech is particularly important	1
* Press' core duty is to publish information, not to guard national security	1
* Threatened or current injuries to First Amendment rights can satisfy the irreparable injury requirement to obtain a preliminary injunction	1
* The press has broad protections for publishing on matters of public concern	1
* Even where no profits are lost, First Amendment rights are injured when the press is prevented from communicating to an audience	1
X Distinguishing the Pentagon Papers case from a case in which a prior injunction is not at issue	1

3. The Papers and the Public Debate over WikiLeaks.—I also examined the impact of the Papers on contemporary public discussions regarding classified information leaks and free speech. Specifically, I looked at their impact on discussions involving WikiLeaks. WikiLeaks is an organization that receives anonymous leaks of information from around the world, including classified information from the United States,[168] and that has disseminated—both to established journalists and in many cases on its own website—thousands of

168. *See* WIKILEAKS, http://www.wikileaks.org/ (last visited Sept. 1, 2011).

documents since its founding in 2006.[169] WikiLeaks "became the focus of a global debate over its role in the release of thousands of confidential messages about the wars in Iraq and Afghanistan and the conduct of American diplomacy around the world."[170] In the United States, WikiLeaks has been a major focus of discussions about classified information leaks in the past year or so. Among other things, commentators have debated whether WikiLeaks founder Julian Assange should be prosecuted for classified information disclosures and whether the arrest and subsequent treatment of alleged WikiLeaks source Bradley Manning, a former U.S. Army private, is justified.[171]

To examine the role of the Pentagon Papers in public discourse over WikiLeaks, I searched for documents in the LexisNexis "allnews" database—which includes many national and local periodicals and news services as well as a number of blogs—in which either Daniel Ellsberg or the Pentagon Papers was mentioned along with WikiLeaks.[172] Within these parameters, I searched for documents dated between August 10, 2010 and August 31, 2010. Because WikiLeaks had issued a major release—of the "Afghanistan war logs"—on July 25, 2010,[173] I anticipated that the studied time period would be one in which WikiLeaks was actively discussed but in which most discussion would take the form of commentary, rather than the expository reporting more likely to have occurred immediately after the release.[174] While a search for just "Wikileaks" in this period yielded 1424 results, a search within the narrower parameters noted above—for WikiLeaks along with either Daniel Ellsberg or the Pentagon Papers—yielded sixty results.[175] Of those sixty documents, I discarded duplicate reports,[176] reports that simply introduced or described a linked video, and multi-item documents in which references to WikiLeaks appeared in news items separate from those referencing Ellsberg or the Pentagon Papers. I also

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169. *See id.*; *Times Topics: WikiLeaks*, N.Y. TIMES, Aug. 30, 2011, http://topics.nytimes.com/top/reference/timestopics/organizations/w/wikileaks/index.html?scp=1-spot&sq=wikileaks&st=cse.

170. *Times Topics: WikiLeaks*, *supra* note 169.

171. *See id.*

172. Specifically, I ran the following search: wikileaks and (Ellsberg or "pentagon papers").

173. *See, e.g.*, Nick Davies & David Leigh, *Afghanistan War Logs: Massive Leak of Secret Files Exposes Truth of Occupation*, GUARDIAN, July 25, 2010, at 1, *available at* http://www.guardian.co.uk/world/2010/jul/25/afghanistan-war-logs-military-leaks.

174. I did, however, run the search described in *supra* note 172 for both the time period mentioned above (August 10, 2010 through August 31, 2010) and for a longer time period beginning right after the release of the Afghanistan War Logs, from July 26, 2010 though August 31, 2010. The search using the longer time-frame yielded 520 results, while the search using the shorter time-frame yielded sixty results. I also ran a search for just "wikileaks" under each time-frame. Under the broader time-frame, the "wikileaks" search yielded over 3000 results. Under the narrower time-frame, it yielded 1424 results.

175. *See supra* note 174.

176. Specifically, I discarded multiple copies of the same story that were re-issued through syndication services, as well as CNN scripts that simply repeated exact statements made in previous hours' broadcasts.

decided to discard non-U.S. documents, as my focus was the ongoing influence of the Pentagon Papers on discourse in the United States. The resulting yield was twenty-seven documents.

Each of the twenty-seven documents in some way compares the WikiLeaks releases to Ellsberg's leak or to the subsequent publications of the Pentagon Papers. Of the documents that used the comparison to make some normative point, the vast bulk of them started from the premise that the Pentagon Papers was (or has been widely understood to be) a quintessential "good leak"—one that served the public interest, involved information that should not have remained classified, or both. From this premise, some made points critical of the WikiLeaks disclosures—for example, that the Pentagon Papers did not endanger national security while WikiLeaks does just that. Others made points supportive of WikiLeaks—for example, that the information disclosed by WikiLeaks is as significant as that revealed in the Pentagon Papers or that alleged WikiLeaks source Bradley Manning is a hero in the mold of Daniel Ellsberg.

Regardless of what one thinks about the merits of the underlying views of the Pentagon Papers leak that these documents reflect, their consistency suggests a collective conventional wisdom. Memories of the Pentagon Papers are treated as reminders that the classification system can be abused and that classified information leaks can serve the public interest. These lessons may well heighten the government's burden of justification—politically, if not legally—in pursuing classified information leaks. When the government argues that a classified information leak is dangerous and wrong, it must be prepared to face the question: Is the instant case like that of the Pentagon Papers? In other words, does the current leak serve the public interest by exposing important, wrongly classified information? And is the government over-reaching now, as it did then? Indeed, columnist Glenn Greenwald cites President Obama's efforts to distinguish alleged WikiLeaks source Bradley Manning from Daniel Ellsberg.[177] Greenwald explains that "it has long been vital for Obama officials and the President's loyalists to distinguish Ellsberg from Manning."[178] Ellsberg himself has expressed concern that he is being used "as a foil against Manning. . . . Daniel Ellsberg good, Manning bad."[179]

The following chart lists the rough propositions for which Daniel Ellsberg or the Pentagon Papers is cited in the LexisNexis search described above. The propositions are listed in order of the number of documents in which they appear. An asterisk precedes each proposition that either embraces or acknowledges the conventional premise that the Pentagon Papers leak was an acceptable or even a good leak. An "N," for neutral, precedes those propositions that do not take or reference a normative position on the leak of the Papers. An "X" precedes those

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177. Glenn Greenwald, *President Obama Speaks on Manning and the Rule of Law*, SALON, Apr. 23, 2011, http://www.salon.com/2011/04/23/manning_10/.

178. *Id.*

179. Anna Mulrine, *WikiLeaks Suspect: Where Army Sees Traitor, Some See Whistleblower*, CHRISTIAN SCI. MONITOR, Mar. 3, 2011, *available at* www.csmonitor.com/USA/Justice/2011/0303/Wikileaks-suspect-where-Army-sees-traitor-some-see-whistleblower.

propositions that either evince a negative view of the Pentagon Papers leak or emphasize speech-restrictive measures that can be pursued against WikiLeaks consistent with *New York Times v. United States*.

Chart #3: Periodical References

Proposition	**Number of Documents Citing**
N Largest classified information disclosure since Pentagon Papers	9
* There are important similarities between the WikiLeaks episode and that of the Pentagon Papers	7
* WikiLeaks' disclosures are less significant than those in the Pentagon Papers	4
* WikiLeaks' information disclosures are more dangerous and careless than the release of the Pentagon Papers	4
X Criticizing celebrations of WikiLeaks or of Bradley Manning that include comparisons to Daniel Ellsberg	2
* The Obama Administration's tactics in response to WikiLeaks are similar to those with which the Nixon Administration responded to the Papers' leak	1
X *New York Times v. United States* may leave room for the government to prosecute WikiLeaks	1

CONCLUSION

The Pentagon Papers leak and its aftermath marked important moments of social learning. To this day, they are invoked as evidence that leaking classified information is not always dangerous, that some leaks serve the public interest, and that government can just as easily use secrecy to shield wrongdoing as to protect national security. These lessons, in turn, have helped to fuel challenges against calls for an official secrets act and against particular leak prosecutions.

At present, the meaning, rightness, and application of these lessons is at issue in debates over the Obama Administration's aggressive pursuit of classified information leaks. Some proponents of these pursuits explicitly reject the Papers' lessons. Yet, the more common approach, as we have seen, is for proponents to draw distinctions between the Papers episode and current leaks. To take the example of WikiLeaks, the typical approach is to distinguish Ellsberg from Manning, the *New York Times* from WikiLeaks, and the Pentagon Papers from the documents disseminated to and by WikiLeaks.

For those who champion skepticism toward government secrecy and support whistleblower rights, the very fact that prosecution proponents feel compelled to draw such distinctions is a partial victory. By drawing such distinctions, prosecution proponents implicitly suggest that classification status alone is not enough, and that it is incumbent upon the government to demonstrate that a particular leak is so dangerous and unwarranted as to merit punishment. Still, as we have seen, the executive is perfectly capable of attempting to have it both

ways in the realm of classified information leaks—to assure courts and the public that a given leak is harmful while insisting that its own judgment to that effect must be final, that it would be too dangerous for courts or others to second-guess that judgment. The most direct measure of the Papers' legacy as it relates to government secrecy and free speech is the extent to which courts and the public accept such calls for deference. As we have seen, the record thus far is both sparse and mixed. The ongoing reactions of courts, the public, and the executive and legislative branches to alleged leakers like Bradley Manning and to information publishers like WikiLeaks will continue to add to this record. How these controversies ultimately play out and impact the Papers' legacy remains to be seen. For now, one can only guess how a future generation might answer the question: "What if Bradley Manning hadn't bothered?"

APPENDIX A

Federal Appellate Court References to Pentagon Papers

Chart #1: Supreme Court Cases (from page 115 of Article)

Proposition	Number of Opinions Citing
* Heavy presumption against prior restraints on speech	5
X Distinguishing the Pentagon Papers case from a case in which a prior injunction is not at issue	2
* The government has a very high burden to demonstrate that speech should be punished because it threatens national security	2
* It is not certain that one can ever be punished, consistent with the First Amendment, for publishing truthful information	1

Elaboration on data:

See *supra* notes 162-67 and accompanying text for information on the search parameters. The following are citations to the opinions referenced for each category in the chart.

Category 1: Heavy presumption against prior restraints on speech:

Bartnicki v. Vopper, 532 U.S. 514, 555 (2001) (Rehnquist, C.J., dissenting); Avis Rent a Car Sys., Inc. v. Aguilar, 529 U.S. 1138, 1143 (2000) (Thomas, J., dissenting from denial of cert.); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 797 (1994) (Scalia, J., concurring in part and dissenting in part); CBS, Inc. v. Davis, 510 U.S. 1315, 1317 (1994); CNN, Inc. v. Noriega, 498 U.S. 976 (1990) (Marshall, J., dissenting from denial of cert.).

Category 2: Distinguishing the Pentagon Papers case from a case in which a prior injunction is not at issue:

Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 763 n.2 (1994); Alexander v. United States, 509 U.S. 544, 550-51 (1993).

Category 3: The government has a very high burden to demonstrate that speech should be punished because it threatens national security:

Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring); Osborne v. Ohio, 495 U.S. 103, 141 n.16 (1990) (Brennan, J., dissenting).

Category 4: It is not certain that one can ever be punished, consistent with the First Amendment, for publishing truthful information:

Bartnicki v. Vopper, 532 U.S. 514, 527-28 (2001).

Chart #2: U.S. Courts of Appeals Cases (from page 116 of Article)

Proposition	**Number of Opinions Citing**
* Heavy presumption against prior restraints on speech	21 (19 cases directly on point, the other 2 making closely related points)
* Government secrecy can be abused	5
* Courts have the power, responsibility and competence to review national security related decisions	5
* Even a temporary loss of a constitutional right constitutes irreparable injury	4
* Constitution's founders protected the press so that it could expose government secrets and protect the people	3
X Executive has primary responsibility for internal security measures	2
N *New York Times v. United States* did not resolve whether the publication of truthful but unlawfully obtained material can be punished where the publisher did not itself act unlawfully to obtain the information	1
* Discussions, criticism of military activity of high public concern, and free speech value	1
* Heavy presumption against content-based speech restrictions	1
* The fact that information is classified does not necessarily mean that it is secret	1
* The timely dissemination of political speech is particularly important	1
* Press' core duty is to publish information, not to guard national security	1
* Threatened or current injuries to First Amendment rights can satisfy the irreparable injury requirement to obtain a preliminary injunction	1
* The press has broad protections for publishing on matters of public concern	1
* Even where no profits are lost, First Amendment rights are injured when the press is prevented from communicating to an audience	1
X Distinguishing the Pentagon Papers case from a case in which a prior injunction is not at issue	1

Elaboration on data:

See *supra* notes 162-67 and accompanying text for information on the search parameters. The following are citations to the opinions referenced for each category in the chart.

Category 1: Heavy presumption against prior restraints on speech:

Wilson v. Cent. Intelligence Agency, 586 F.3d 171, 183 (2d Cir. 2009); Lusk v. Vill. of Cold Spring, 475 F.3d 480, 487 n.6 (2d Cir. 2007); Cox v. City of Charleston, 416 F.3d 281, 284 (4th Cir. 2005); United States v. Bell, 414 F.3d 474, 478 (3d Cir. 2005); Weinberg v. City of Chi., 310 F.3d 1029, 1045 (7th Cir. 2002); Cnty. Security Agency v. Ohio Dep't of Commerce, 296 F.3d 477, 485, 487 (6th Cir. 2002); Schultz v. City of Cumberland, 228 F.3d 831, 851 (7th Cir. 2000); Bernstein v. U.S. Dep't of Justice, 176 F.3d 1132, 1144 n.19 (9th Cir.), *opinion withdrawn*, 192 F.3d 1308 (9th Cir. 1999); Berger v. Hanlon, 129 F.3d 505, 518 (9th Cir. 1997), *vacated*, 526 U.S. 808 (1999); Proctor & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 225 (6th Cir. 1996); *id.* at 228 (Martin, Jr., J., concurring); Woodall v. Reno, 47 F.3d 656, 658 (4th Cir. 1995); Anheuser-Busch, Inc. v. Balducci Publ'ns, 28 F.3d 769, 778 (8th Cir. 1994); Auburn Police Union v. Carpenter, 8 F.3d 886, 903 (1st Cir. 1993); Family Found. v. Brown, 9 F.3d 1075, 1076 (4th Cir. 1993); Kramer v. Thompson, 947 F.2d 666, 674 (3d Cir. 1991); News-Journal Corp. v. Foxman, 939 F.2d 1499, 1512 (11th Cir. 1991); Planned Parenthood Fed'n of Am., Inc. v. Agency for Int'l Dev., 915 F.2d 59, 64 (2d Cir. 1990); *In re* King World Prods., Inc., 898 F.2d 56, 59-60 (6th Cir. 1990); *see also* Pfeiffer v. Cent. Intelligence Agency, 60 F.3d 861, 865 (D.C. Cir. 1995) (observing that burden was not met in Pentagon Papers case); Lind v. Grimmer, 30 F.3d 1115, 1122 (9th Cir. 1994) (same).

Category 2: Government secrecy can be abused:

Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1094 n.1 (9th Cir. 2010) (en banc) (Hawkins, J., dissenting); Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943, 959 n.7 (9th Cir. 2009), *reh'g en banc by* 614 F.3d 1070 (9th Cir. 2010); Arar v. Ashcroft, 585 F.3d 559, 614-15 (2d Cir. 2009) (Parker, J., dissenting); Detroit Free Press v. Ashcroft, 303 F.3d 681, 686 (6th Cir. 2002); El Dia, Inc. v. Rossello, 165 F.3d 106, 109 (1st Cir. 1999).

Category 3: Courts have the power, responsibility and competence to review national security related decisions:

Arar v. Ashcroft, 585 F.3d 559, 613 (2d Cir. 2009) (Parker, J., dissenting); N.J. Media Grp., Inc. v. Ashcroft, 308 F.3d 198, 226-27 (3d Cir. 2002) (Scirica, J., dissenting); Detroit Free Press v. Ashcroft, 303 F.3d 681, 692 n.9, 693 (6th Cir. 2002); Weaver v. U.S. Info. Agency, 87 F.3d 1429, 1453 (D.C. Cir. 1996); Giano v. Senkowski, 54 F.3d 1050, 1062, 1062 nn.4-5 (2d Cir. 1995) (Calabresi, J., dissenting).

Category 4: Even a temporary loss of a constitutional right constitutes irreparable injury:

Mills v. District of Columbia, 571 F.3d 1304, 1312 (D.C. Cir. 2009); Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1234 (9th

Cir. 2006); Tunick v. Safir, 209 F.3d 67, 95-96 (2d Cir. 2000) (Sack, J., concurring); Cheffer v. McGregor, 6 F.3d 705, 711 (11th Cir. 1993), *opinion vacated by* 41 F.3d 1421 (11th Cir. 1994), *reh'g en banc by* 41 F.3d 1422.

Category 5: Constitution's founders protected the press so that it could expose government secrets and protect the people:

Lee v. Dep't of Justice, 428 F.3d 299, 303 (per curiam) (D.C. Cir. 2005); Flynt v. Rumsfeld, 355 F.3d 697, 703 (D.C. Cir. 2004); Detroit Free Press v. Ashcroft, 303 F.3d 681, 683, 710 (6th Cir. 2002).

Category 6: Executive has primary responsibility for internal security measures:

Am. Fed'n of Gov't Emps. v. Dep't of Hous. & Urban Dev., 118 F.3d 786, 794 (D.C. Cir. 1997); Nat'l Fed'n of Fed. Emps. v. Greenberg, 983 F.2d 286, 296 (D.C. Cir. 1993) (Sentelle, J., concurring).

Category 7: *New York Times v. United States* did not resolve whether the publication of truthful but unlawfully obtained material can be punished where the publisher did not itself act unlawfully to obtain the information:

Boehner v. McDermott, 191 F.3d 463, 472-74 (D.C. Cir. 1999), *judgment vacated by* 532 U.S. 1050 (2001).

Category 8: Discussions, criticism of military activity of high public concern, and free speech value:

CACI Premier Tech., Inc. v. Rhodes, 536 F.3d 280, 294 (4th Cir. 2008).

Category 9: Heavy presumption against content-based speech restrictions:

Dimmitt v. City of Clearwater, 985 F.2d 1565, 1570 (11th Cir. 1993).

Category 10: The fact that information is classified does not necessarily mean that it is secret:

Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943, 959-60 (9th Cir. 2009), *reh'g en banc by* 614 F.3d 1070 (9th Cir. 2010).

Category 11: The timely dissemination of political speech is particularly important:

Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 300 (D.C. Cir. 2006).

Category 12: Press' core duty is to publish information, not to guard national security:

N.Y. Times Co. v. Gonzales, 459 F.3d 160, 184 (2d Cir. 2006).

Category 13: Threatened or current injuries to First Amendment rights can satisfy the irreparable injury requirement to obtain a preliminary injunction:

Field Day, LLC v. Cnty. of Suffolk, 463 F.3d 167, 181-82 (2d Cir. 2006).

Category 14: The press has broad protections for publishing on matters of public concern:

Cnty. Sec. Agency v. Ohio Dep't of Commerce, 296 F.3d 477, 486 (6th Cir. 2002).

Category 15: Even where no profits are lost, First Amendment rights are injured when the press is prevented from communicating to an audience:

Rossignol v. Voorhaar, 316 F.3d 516, 522 (4th Cir. 2003).

Category 16: Distinguishing the Pentagon Papers case from a case in which a prior injunction is not at issue:

Pro-Choice Network of W. N.Y. v. Schenck, 67 F.3d 359, 368 n.5 (2d Cir. 1994), *vacated in part by* 67 F.3d 377 (2d Cir. 1995), *cert. granted*, 516 U.S. 1170 (1996), *aff'd in part and rev'd in part*, 519 U.S. 357 (1997).

APPENDIX B

Periodical References to Wikileaks and the Pentagon Papers

Chart #3 (from page 119 of Article)

Proposition	Number of Documents Citing
N Largest classified information disclosure since Pentagon Papers	9
* There are important similarities between the WikiLeaks episode and that of the Pentagon Papers	7
* WikiLeaks' disclosures are less significant than those in the Pentagon Papers	4
* WikiLeaks' information disclosures are more dangerous and careless than the release of the Pentagon Papers	4
X Criticizing celebrations of WikiLeaks or of Bradley Manning that include comparisons to Daniel Ellsberg	2
* The Obama Administration's tactics in response to WikiLeaks are similar to those with which the Nixon Administration responded to the Papers' leak	1
X *New York Times v. United States* may leave room for the government to prosecute WikiLeaks	1

Elaboration on data:

See *supra* notes 172, 174-76 and accompanying text for information on the search parameters. The following are citations to the articles referenced for each category in the chart, as well as additional information, where appropriate, on the meaning of particular categories.

Category 1: Largest classified information disclosure since Pentagon Papers:

Cathy Burke, *Plugging a Leak—Feds Eye Charges vs. Wiki*, N.Y. POST, Aug. 21, 2010, at 8, *available at* http://allbusiness.com/government/government-bodies-offices/15016476-1.html; *CNN Saturday Morning* (CNN broadcast Aug. 21, 2010), *available at* http://transcripts.cnn.com/TRANSCRIPTS/1008/21/cnr.01.html; Joe Gandelman, *Wikileaks Founder Claims Rape Charges "Dirty Trick" Update: Charges Dropped*, MODERATE VOICE (Aug. 21, 2010), http://themoderatevoice.com/83534/wikileaks-founder-claims-rape-charges-dirty-trick/; Interview by Ali Velshi with Chris Lawrence, CNN (Aug. 13, 2010), *available at* http://transcripts.cnn.com/TRANSCRIPTS/1008/13/cnr.06.html; Per Nyberg, *Sweden Drops Rape Accusation Against Founder of Wikileaks*, CNN (Aug. 21, 2010), http://articles.cnn.com/2010-08-21/world/sweden.wikileaks.charge_1_julian_assange-molestation-charge-arrest-warrant?_s=PM:WORLD; *Swedish Pirate Party to Host WikiLeaks Servers*, CNN (Aug. 18, 2010), *available at*

http://articles.cnn.com/2010-08-18/world/sweden.wikileaks_1_wikileaks-wikileaks-whistle-blower-website?_s=PM:WORLD; Ginger Thompson, *Early Struggles of Soldier Charged in Leak Case*, N.Y. TIMES, Aug. 9, 2010, at A1, *available at* http://www.nytimes.com/2010/08/09/us/09manning.html; Brian Todd, *Attorney for Wikileaks Suspect Says He's Seen No Evidence on Documents*, CNN (Aug. 31, 2010), http://articles.cnn.com/2010-08-31/us/wikileaks.suspect.attorney_1_bradley-manning-wikileaks-website-leaker?_s=PM:US; *WikiLeaks Founder Says He's Been Targeted by Smear Campaign,* CNN (Aug. 22, 2010), http://articles.cnn.com/2010-08-22/world/ sweden.wikileaks.assange_1_arrest-warrant-wikileaks-founder-julian-assange?_s=PM:WORLD.

Category 2: There are important similarities between the WikiLeaks episode and that of the Pentagon Papers *(Note: Some of the cited authors make this argument themselves, others reference the argument as made by others. See explanatory parentheticals after citations for more information.)*:

Michael W. Savage, *Army Analyst Celebrated as Antiwar Hero*, WASH. POST, Aug. 14, 2010, at A2 (citing Bradley Manning supporters who take this view); Mark Schlachtenhaufen, *Marchers Support Alleged WikiLeaks Whistleblower*, EDMOND SUN (Aug. 12, 2010), http://www.edmondsun.com/local/x960347899/Marchers-support-alleged-wikileaks-whistleblower; Arthur Silber, *False Criticisms of Wikileaks, and the Rush to Irrelevance and Error*, PAC. FREE PRESS (Aug. 13, 2010), http://www.pacificfreepress.com/news/ 1/6817-false-criticisms-of-wikileaks-and-the-rush-to-irrelevance-and-error.html; Peter Singer, *How Much Transparency Is Too Much?*, PROJECT SYNDICATE, Aug. 18, 2010, http://www.project-syndicate.org/commentary/singer65/English; *Supporters of Former Tasker Milward Pupil March in U.S.*, W. TELEGRAPH (Aug. 12, 2010), http://www.westerntelegraph.co.uk/news/county/8325429.US_activists_march_in_support_of_alleged_whistelblower_Bradley_Manning; Kelley B. Vlahos, *Pincus v. Assange: Who Speaks for You?*, ANTIWAR.COM (Aug. 27, 2010), http://original.antiwar.com/vlahos/2010/08/26/pincus-v-assange-who-speaks-for-you/; *Wkileaks* [sic] *a Preamble for the Last Chopper Out of Kabul*, RUPEE NEWS (Aug. 10, 2010), http://rupeenews.com/?p=31568 (both leaks exposed government dissembling).

Category 3: WikiLeaks' disclosures are less significant than those in the Pentagon Papers *(Note: Some of the cited authors make this argument themselves, others reference the argument as made by others. See explanatory parentheticals after citations for more information.)*:

Chris Floyd, *The Laureate and the Leaker: Swedish Warrant a Salvo in Team Obama's War on Wikileaks*, ATL. FREE PRESS (Aug. 25, 2010), http://atlanticfreepress.com/news/1/13721-the-laureate-and-the-leaker-swedish-warrant-a-salvo-in-team-obamas-war-on-wikileaks.html (explaining that he initially made this critique, in keeping with the "media narrative," but concluding that he was wrong); John R. MacArthur, *Of the IRA and the Afghan War*, HUFF. POST (Aug. 18, 2010), http://www.huffingtonpost.com/john-r-macarthur/of-the-ira-and-the-

afghan_b_688236.html (generally supporting the project of leaking war documents but expressing disappointment with the content of the most recent leaks); *Media Conference Call: Defining Success in Afghanistan*, COUNCIL ON FOREIGN RELATIONS (Aug. 10, 2010), http://www.cfr.org/afghanistan/media-conference-call-defining-success-afghanistan/p22791; Arthur Silber, *False Criticisms of Wikileaks, and the Rush to Irrelevance and Error*, PAC. FREE PRESS (Aug. 13, 2010), http://www.pacificfreepress.com/news/1/6817-false-criticisms-of-wikileaks-and-the-rush-to-irrelevance-and-error.html (author does not make this argument himself, but he refers at some length to this argument as made by others and critiques the same).

Category 4: WikiLeaks' information disclosures are more dangerous and careless than the release of the Pentagon Papers:

156 CONG. REC. E1574 (daily ed. Aug. 10, 2010) (statement of Hon. Rush D. Holt); Jed Babbin, *Let's Have a WikiLeaks Fire Sale*, AM. SPECTATOR, Aug. 23, 2010, http://spectator.org/archives/2010/08/23/lets-have-a-wikileaks-fire-sal; Paul Greenberg, *Blood on Their Hands*, PATRIOT POST (Aug. 16, 2010), http://patriotpost.us/opinion/paul-greenberg/2010/08/16/blood-on-their-hands/; Samuel Magaram, *Wikileaks Is No Pentagon Papers*, ATLANTA J.-CONST. (Aug. 19, 2010), http://www.ajc.com/opinion/wikileaks-is-no-pentagon-595780.html.

Category 5: Criticizing celebrations of Wikileaks or of Bradley Manning that include comparisons to Daniel Ellsberg *(Note: I place these articles in the negative category although neither directly criticizes the Pentagon Papers leak. I err on the side of inferring such critique from each article's larger criticism of the left and of anti-war movements.)*:

Tim Graham, *WaPo Runs Entire Story of Leftist Praise for Suspected Wiki-Leaker 'Hero'—With No Liberal Labels*, NEWS BUSTERS (Aug. 15, 2010), http://newsbusters.org/blogs/tim-graham/2010/08/15/wapo-runs-entire-story-leftist-praise-suspected-wiki-leaker-no-liberal-1; Sister Toldjah, *The Ugly, Pockmarked, Troop-Hating Face of the Anti-War Left*, RIGHTWING NEWS (Aug. 15, 2010), http://rightwingnews.com/war-on-terrorism/the-ugly-pockmarked-troop-hating-face-of-the-anti-war-left/.

Category 6: The Obama Administration's tactics in response to Wikileaks are similar to those with which the Nixon Administration responded to the Papers' leak:

Justin Raimondo, *Smearing Bradley Manning*, ANTIWAR.COM (Aug. 11, 2010), http://original.antiwar.com/justin/2010/08/10/smearing-bradley-manning/.

Category 7: *New York Times v. United States* may leave room for the government to prosecute WikiLeaks:

Kenneth Anderson, *Can the Wikileaks Founder Be Prosecuted for Espionage by the U.S.?*, VOLOKH CONSPIRACY (Aug. 22, 2010), http://volokh.com/2010/08/22/can-the-wikileaks-founder-be-prosecuted-for-espionage-by-the-us/.

WHAT IF CHIEF JUSTICE FRED VINSON HAD NOT DIED OF A HEART ATTACK IN 1953?: IMPLICATIONS FOR *BROWN* AND BEYOND

CARLTON F.W. LARSON*

INTRODUCTION

Early in the morning of September 8, 1953, a blood clot began to block the coronary artery of a sixty-three-year-old man sleeping in a Washington hotel room. Within an hour, Fred M. Vinson, Chief Justice of the U.S. Supreme Court, was dead.[1] The United States Supreme Court, before which *Brown v. Board of Education*[2] was pending, suddenly found itself without a leader. When President Dwight Eisenhower appointed Governor Earl Warren of California to replace Vinson, a new era in Supreme Court history, the so-called "Warren Court," began.[3] In May 1954, Chief Justice Warren announced the Court's unanimous decision in *Brown*, invalidating segregation in public schools.[4]

But what if Chief Justice Vinson's heart attack had never happened? Some historians have suggested that the Court would not have issued a unanimous decision in *Brown* and might even have upheld segregation if Vinson had lived.[5] To what extent did American constitutional history pivot on a blood clot slowly cutting off the oxygen to Fred Vinson's heart on that early September morning?

It is easy to denigrate historical counterfactuals. After all, historians study what happened, not what did not. But historical inquiry is in large part a study of causation: how and why events happened in the way they did. Every causal explanation of history necessarily contains an implicit counterfactual. A claim that the Federal Reserve's tight monetary policy exacerbated the Great Depression necessarily implies that a looser policy would have had a different effect.

Counterfactuals are also important because they highlight the contingency of so many historical events. In 1120, the famous "White Ship" set sail from Barfleur, in Normandy, heading to England.[6] On board was William Adelin, the

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1. JAMES E. ST. CLAIR & LINDA C. GUGIN, CHIEF JUSTICE FRED M. VINSON OF KENTUCKY: A POLITICAL BIOGRAPHY 336 (2002).

2. 347 U.S. 483 (1954).

3. Warren's nomination is described in JIM NEWTON, JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE 1-11 (2006).

4. *Brown*, 347 U.S. at 493.

5. *See infra* notes 14-15 and accompanying text.

6. C. WARREN HOLLISTER, HENRY I 276-77 (Amanda Clark Frost ed., 2001).

only legitimate son of King Henry I of England.[7] Due to the drunkenness of the passengers and crew, the ship sank, drowning William Adelin and leaving England without a male heir.[8] Upon Henry I's death in 1135, England entered a disruptive period known as the "Anarchy," in which Henry's daughter Matilda and his nephew Stephen competed for the English throne.[9] But if the White Ship had safely reached its destination, William Adelin would have succeeded Henry as King William III. Matilda's son Henry II, the greatest builder of the English common law, would have languished in obscurity. But there is even more to it than that. Stephen, the nephew, was supposed to sail on the White Ship.[10] At the last minute he failed to board due to a bout of diarrhea.[11] As historian Warren Hollister observed, Stephen's "diarrhea probably determined the history of England during the nineteen years between 1135 and 1154."[12] I enjoy telling this story to my legal history students, pointing out that this is an excellent example of how history can turn (in this case, literally) on truly random s---.

Contemporaries had little doubt of the significance of Vinson's death. Justice Felix Frankfurter told a clerk that Vinson's death was the first indication he had ever had of the existence of God.[13] But precisely how did Vinson's death matter? Historians have focused primarily on his role in *Brown*, and have frequently argued that Vinson would not have led the Court to a unanimous decision.[14] Others have suggested that Vinson might even have voted to retain segregated schools.[15] A dissent on this point from the Chief Justice would have

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7. *Id.* at 278.

8. *Id.* at 277 & n.175.

9. *Id.* at 477-79.

10. *Id.* at 277.

11. *Id.*

12. *Id.*

13. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 659 (rev. ed. 2004). Frankfurter's contempt for Vinson was rarely far from the surface. After Vinson's death, he released a one-sentence statement: "Chief Justice Vinson's death comes as a great shock to me." NEWTON, *supra* note 3, at 3. The relationship between the two men was strained, bitter, and deeply antagonistic. For an overview of their conflicts, see ST. CLAIR & GUGIN, *supra* note 1, at 174-79.

14. *See, e.g.*, MICHAL R. BELKNAP, THE VINSON COURT: JUSTICES, RULINGS, AND LEGACY 164 (2004) ("[W]hat [Earl Warren] did—and what Vinson could not do—was mass the Court and get everyone to sign onto a single opinion.").

15. *See, e.g.*, *id*. at 43 (suggesting that Vinson could have gone either way in *Brown*); NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 397 (2010) ("Indeed, had Vinson not died, his most significant contribution to the history of the Court might well have been leading a bloc that stood in the way of consensus on the issue of desegregation."); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 300 (2004) ("Vinson . . . could readily reaffirm *Plessy*."); KLUGER, *supra* note 13, at 592 ("Fred Vinson . . . was almost certainly not ready to support the abolition of segregation."); Irving F. Lefberg, *Chief Justice Vinson and the Politics of Desegregation*, 24 EMORY L.J. 243, 285 (1975) ("[T]he best a Vinson led Court could have

provided immense support to opponents of integration.

Fred Vinson has not fared well in the hands of historians. He is typically depicted as a bumbling card-playing crony of Harry Truman, unsuited intellectually for the work of the Court, and a weak leader with almost reactionary instincts in key civil liberties cases. As William Wiecek has observed, the "ever-maligned" Vinson has generally been portrayed as a "nincompoop" and is "unanimously regarded as the least successful Chief Justice" in American history.[16] One historian writes, "[a]ll the Roosevelt appointees to the Court except his fellow Kentuckian, Reed, looked down on Vinson as the possessor of a second-rate mind, and in contrast to the Roosevelt quartet, the Chief glowed dimly indeed."[17] This theme of general stupidity is echoed by others. Dennis Hutchinson writes, "Vinson lacked both the taste for the complex work of the Court and the fine-tuned analytical skills to lead some of the ablest and most self-confident men ever to sit on the Court . . . ."[18] Del Dickson is even more dismissive, claiming "Vinson lacked the intellect, legal reputation, administrative competence, political skills, or personality necessary to hold the Court together."[19]

Vinson's dismal ratings from historians are somewhat surprising in light of the promise that he brought to the job. On paper, he was superbly qualified, having served in high positions in all three branches of the federal government. He had been a congressman, a judge of the Court of Appeals for the District of Columbia Circuit, a high-level administrator for Franklin Roosevelt, and Secretary of the U.S. Department of the Treasury under Harry Truman.[20] Vinson had thrived under difficult circumstances and had earned the respect of highly demanding superiors. He seemed eminently suited to the job of leading, and hopefully unifying, an often bitterly divided Supreme Court. Indeed, only William Howard Taft and Charles Evans Hughes brought more wide-ranging experience to the Chief Justiceship.[21]

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accomplished in 1954 is a six-three desegregation opinion with the Chief Justice in dissent . . . . It is more probable then that a Vinson led Court, in search of unanimity, would have assembled an ambiguous compromise . . . in which *Plessy* emerged barely scathed.").

16. 12 WILLIAM M. WIECEK, THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE BIRTH OF THE MODERN CONSTITUTION, THE UNITED STATES SUPREME COURT, 1941-1953, at 409-10 (Stanley N. Katz ed., 2006).

17. KLUGER, *supra* note 13, at 587.

18. DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE 200 (1998) [hereinafter HUTCHINSON, BYRON R. WHITE].

19. THE SUPREME COURT IN CONFERENCE (1940-1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 100 (Del Dickson ed., 2001).

20. MELVIN I. UROFSKY, DIVISION AND DISCORD: THE SUPREME COURT UNDER STONE AND VINSON, 1941-1953, at 148-49 (1997). For an overview of Vinson's life, see ST. CLAIR & GUGIN, *supra* note 1; WIECEK, *supra* note 16, at 421-29.

21. *See* MICHAEL BENSON, WILLIAM H. TAFT (2005); *Charles Evans Hughes, 1930-1941*, SUPREME COURT HIST. SOC'Y, http://www.supremecourthistory.org/history-of-the-court/chief-justices/charles-evans-hughes-1930-1941/ (last visited Oct. 4, 2011).

This Symposium Essay contends that Vinson's untimely death deprived him of the historical stature to which he otherwise would have been entitled. Fred Vinson, if he had lived, would have authored a unanimous opinion of the Court in *Brown* invalidating segregation in public schools. To be sure, there is evidence pointing the other way, but the evidence in favor at least meets the preponderance of the evidence standard used in civil suits; Vinson's authorship of a unanimous opinion is somewhat more likely than not. Authorship of *Brown* would have given Vinson instant historical immortality, guaranteeing his place among the nation's most significant Chief Justices.

If Vinson had lived, there would have been no "Warren Court," or at least no such Court under Warren's leadership. Earl Warren would likely have been appointed to the open seat created by the death of Justice Robert Jackson in 1954, and subsequent appointments would most likely have created a majority of Justices devoted to the core principles of the "Warren Court." But the "Warren Court" innovations would not have borne the imprimatur of the Chief Justice. Vinson's most likely successors were John Marshall Harlan, under President Eisenhower, or Byron White, under President Kennedy, both of whom were significantly less enthusiastic about "Warren Court" decisions than was Earl Warren himself.

In some ways, these conclusions are not as dramatic in their implications as other historical counterfactuals. When I started this project, I fully expected to conclude that Vinson's survival would have resulted in a non-unanimous opinion in *Brown*. A Symposium on historical counterfactuals is not greatly enhanced by an example of the irrelevance of a particular Justice's death. My research, however, drove me inescapably to the conclusion that Vinson would have authored a unanimous opinion. Vinson's death, traditionally accorded enormous significance, turns out to be less significant than typically assumed. By exploring what would have happened if Vinson had lived, we can gain a better appreciation of the forces at work in *Brown*, and, perhaps, take a small step toward the partial rehabilitation of a Chief Justice currently consigned to the historical rubbish heap.

I. FRED VINSON AND THE VINSON COURT

No one would mistake Fred Vinson for a liberal.[22] He almost always voted against free speech claims and the rights of criminal defendants.[23] His plurality opinion upholding the prosecution of Communists in *Dennis v. United States*,[24] for example, is now viewed as "an embarrassment, or worse."[25] As one historian puts it, his decisions earned him a "well-deserved reputation as a menace to civil

22. *See, e.g.*, Lefberg, *supra* note 15, at 246-50 (documenting Vinson's generally conservative record).

23. KLUGER, *supra* note 13, at 587.

24. 341 U.S. 494 (1951).

25. GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 410 (2004).

liberties."[26]

Nor would anyone mistake Fred Vinson for a leader capable of bringing unity to a contentious Court. Richard Kluger suggests that the Vinson Court "was perhaps the most severely fractured Court in history—testament, on the face of it, to Vinson's failure as Chief Justice."[27] In his last term, the Vinson Court achieved unanimity in a record low nineteen percent of cases.[28] The Justices filed large numbers of concurring opinions, often leaving the Court without a majority opinion.[29]

Race cases, however, were a significant exception to the Vinson Court's overall record of disunity. In many of these cases, it was as if an entirely different Court—and an entirely different Chief Justice—had emerged. There were no dissents and no concurring opinions. Rather, in a steady, unflashy way, Vinson authored unanimous opinions striking down segregationist practices under the Equal Protection Clause.

Vinson's first major encounter with racial issues was in *Shelley v. Kraemer*,[30] which involved state enforcement of racially restrictive real estate covenants. Missouri courts had enjoined a black family from purchasing real estate subject to such a covenant.[31] The case raised difficult issues about state action. The Fourteenth Amendment generally prohibits discriminatory state conduct, not discriminatory private conduct. If judicial enforcement of a privately created covenant was unconstitutional, were all private contracts now subject to constitutional restrictions? Precedent overwhelmingly supported state enforcement; the nineteen state supreme courts that had considered the issue all held that enforcement did not violate the Constitution.[32] Even Thurgood Marshall was skeptical that the Supreme Court would decide this case in favor of the black purchasers and was convinced that the case had been brought prematurely.[33]

Vinson, however, authored a unanimous opinion prohibiting state courts from enforcing the covenant through injunctive relief. For Vinson, state action was obvious: "It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint."[34] Vinson forcefully dismissed the argument that similar covenants might have been enforced against white people, stating, "[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities."[35] Vinson also emphasized the

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26. BELKNAP, *supra* note 14, at 42.
27. KLUGER, *supra* note 13, at 587.
28. ST. CLAIR & GUGIN, *supra* note 1, at 184.
29. *Id.* at 184-85.
30. 334 U.S. 1 (1948).
31. *Id.* at 6.
32. KLARMAN, *supra* note 15, at 213.
33. *See* KLUGER, *supra* note 13, at 248.
34. *Shelley*, 334 U.S. at 19.
35. *Id.* at 22.

historical context of the Fourteenth Amendment:

> Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color.[36]

Vinson's opinion, although rhetorically understated, was relentless in its argumentation and it secured the concurrence of a unanimous Court (with three Justices recused). Although it might have offered a more subtle analysis of the issue's full complexities, the opinion was, as Philip Kurland has noted, a "truly revolutionary opinion of the Vinson Court."[37] Even the most liberal Justices commended Vinson. Justice William Douglas wrote that Vinson's opinion was a "grand job[]" and Justice Frank Murphy wrote that "with time" *Shelley* would make Vinson "immortal."[38]

That same year, the Court issued a brief per curiam opinion in *Sipuel v. Board of Regents*.[39] Oklahoma had denied a black applicant admission to the University of Oklahoma Law School. The Court held that Oklahoma had violated the Equal Protection Clause and that the applicant was "entitled to secure legal education afforded by a state institution."[40] *Sipuel* did not explicitly prohibit Oklahoma from offering this education in a segregated law school, but the Vinson Court's next case did just that.

In 1950, Vinson wrote the Court's unanimous opinion in *Sweatt v. Painter*,[41] ordering the admission of a black applicant, Heman Sweatt, to the University of Texas Law School. In response to lower court decisions, the state had created a separate law school for blacks that supposedly satisfied *Plessy*'s separate but equal requirement.[42] Vinson's opinion focused specifically on graduate education, rather than on segregation more generally. He noted, "[b]roader issues have been urged for our consideration, but we adhere to the principle of deciding constitutional questions only in the context of the particular case before the Court."[43]

To Vinson, it was clear that the black law school was not equal to the white law school, and it never would be. In quantitative terms, the "number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, [and] availability of law review and similar activities,"

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36. *Id.* at 23.

37. PHILIP B. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT 89 (1970).

38. MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961, at 95 (1994).

39. 332 U.S. 631 (1948).

40. *Id.* at 632.

41. 339 U.S. 629 (1950).

42. *Id.* at 633-34.

43. *Id.* at 631.

the white law school was obviously superior.[44] But Vinson went further, emphasizing that intangible qualities were even more important. The white law school possessed "to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school."[45] These included "reputation of the faculty, . . . position and influence of the alumni, standing in the community, [and] traditions and prestige."[46] In addition to these intangible qualities, Vinson noted the crucial social aspects of education. Legal education, he maintained, "cannot be effective in isolation from the individuals and institutions with which the law interacts."[47] At the black law school, Sweatt would be excluded from interacting with eighty-five percent of the Texas population, including the "lawyers, witnesses, jurors, judges, and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar."[48]

Sweatt's focus on these intangible qualities made it virtually impossible for states to offer segregated instruction at the graduate level. Justice Tom Clark had first emphasized these intangible factors in a memorandum to the other Justices.[49] Clark did not see the need to overrule *Plessy* directly in *Sweatt*, but he had little difficulty with weakening it dramatically. As Clark wrote to his fellow Justices, "If some say this undermines *Plessy* then let it fall as have many Nineteenth Century oracles."[50] Indeed, in later years, Justice Clark stated in an interview, "We implicitly overruled *Plessy* . . . in *Sweatt* and *Painter*."[51] NAACP lawyers at the time agreed. Robert Carter felt that *Sweatt* left *Plessy* "moribund."[52] Thurgood Marshall believed the "complete destruction of all enforced segregation is now in sight."[53] Most other commentators believed that *Sweatt* undermined "segregation in elementary and secondary schools."[54]

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44. *Id.* at 633-34.

45. *Id.* at 634.

46. *Id.*

47. *Id.*

48. *Id.*

49. Memorandum on *Sweatt* and *McLaurin* from Mr. Justice Clark to the Conference (Apr. 7, 1950), *reprinted in* Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO L.J. 1, 89-90 (1979).

50. *Id.* at 90.

51. GARY M. LAVERGNE, BEFORE BROWN: HEMAN MARION SWEATT, THURGOOD MARSHALL, AND THE LONG ROAD TO JUSTICE 255 (2010) (quoting Interview by Joe Frantz with Justice Tom Clark, United States Supreme Court (Oct. 7, 1969), *available at* http://www.lbjlib.utexas.edu/Johnson/archives.hom/oralhistory.hom/Clark-T/Clark-T.pdf).

52. *Id.* at 258 (quoting ROBERT L. CARTER, A MATTER OF LAW: A MEMOIR OF STRUGGLE IN THE CAUSE OF EQUAL RIGHTS 92 (2005)).

53. *Id.* (quoting Thurgood Marshall, The Supreme Court as Protector of Civil Rights: Equal Protection of the Laws, *reprinted in* THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 124 (Mark V. Tushnet ed., 2001)).

54. TUSHNET, *supra* note 38, at 147.

McLaurin v. Oklahoma State Regents for Higher Education,[55] decided the same day as *Sweatt*, presented the issue of segregation *within* a graduate school. Oklahoma had admitted a black student, George McLaurin, to a graduate program in education, but it physically separated him from other students.

> [H]e was required to sit apart at a designated desk in an anteroom adjoining the classroom; to sit at a designated desk on the mezzanine floor of the library, but not to use the desks in the regular reading room; and to sit at a designated table and to eat at a different time from the other students in the school cafeteria.[56]

Vinson authored the Court's unanimous opinion invalidating Oklahoma's actions.[57] The restrictions, Vinson declared, "handicapped [McLaurin] in his pursuit of effective graduate instruction."[58] They "impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."[59] Moreover, the restrictions thwarted one of the primary goals of education: to prepare trained leaders for an increasingly complex society.[60] McLaurin's future students would "necessarily suffer to the extent that his training is unequal to that of his classmates."[61] Vinson also rejected the State's contention that students might shun McLaurin even if the restrictions were removed: "There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar."[62] This principle, although ostensibly confined to graduate education, had obvious implications for segregation at the elementary and secondary level.

Vinson's views in *Sweatt* and *McLaurin* had evolved over time. Conference notes of the Justices indicate that Vinson was initially inclined to affirm the lower court in *Sweatt*.[63] Similarly, Vinson, along with Justices Burton and Reed, initially "voted to affirm summarily" the district court's ruling against McLaurin.[64] Vinson was obviously open to argument and debate in race cases and was not locked into rigid positions. His expression of a tentative view on an issue in conference is not a particularly strong indicator of his final vote.

In *Sweatt* and *McLaurin*, Vinson also proved that he was capable of quickly gathering assent for a unanimous opinion. As Dennis Hutchinson points out,

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55. 339 U.S. 637 (1950).

56. *Id.* at 640.

57. *Id.* at 638, 642.

58. *Id.* at 641.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *See* WIECEK, *supra* note 16, at 690.

64. JAN PALMER, THE VINSON COURT ERA: THE SUPREME COURT'S CONFERENCE VOTES; DATA AND ANALYSIS 3, 264 (1990).

"Despite the wide theoretical divisions in Conference, Vinson received indications of agreement in both opinions from all but one Justice within two days."[65] "Vinson's willingness to accommodate" even minor suggestions from his fellow Justices smoothed the path to unanimity.[66]

Certain common themes emerge from Vinson's race opinions. For the most part, they are written in plain, direct language, with little legalese. They focus on common sense and practicality, rather than on technicalities and fine theoretical distinctions. Above all, they emphasize the crucial socializing role of education. In both *Sweatt* and *McLaurin*, Vinson had emphasized that racial commingling was an essential component of graduate education.[67] The opinions are also relatively narrowly written, resolving the particular issues in front of them and not reaching out to prohibit all racial classifications more generally. These characteristics—plain language, practicality, resolution of a narrow issue, and an emphasis on the social aspects of education—are, of course, hallmarks of Chief Justice Warren's opinion in *Brown*.

There is one significant exception to Vinson's general record in race cases—his solo dissent in *Barrows v. Jackson*,[68] his last opinion as a Justice. In *Barrows*, the Court addressed a question left open by *Shelley*: Could a state enforce a damages provision in a racially restrictive real estate covenant?[69] Six Justices held that *Shelley* barred such suits.[70] Even though the suit was between two white litigants, enforcement of damages provisions would clearly harm the interests of black purchasers of real estate and would undermine *Shelley*'s prohibition on injunctive relief.[71]

For Vinson, the issue turned on standing. As he put it, "[t]he plain, admitted fact that there is no identifiable non-Caucasian before this Court who will be denied any right to buy, occupy or otherwise enjoy the properties involved in this lawsuit, or any other particular properties, is decisive to me."[72] Vinson relied on the traditional doctrine "that the Court refrain from deciding a constitutional issue until it has a party before it who has standing to raise the issue."[73] The majority essentially agreed with Vinson that traditional standing principles would not have permitted a white litigant to raise the interests of black purchasers not before the Court.[74] The majority felt, however, that the "peculiar" and "unique" facts of the case justified an exception to traditional standing doctrine.[75]

It is possible to view Vinson's dissent as a harbinger of his eventual vote in

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65. Hutchinson, *supra* note 49, at 25.
66. *Id.* at 27.
67. *See supra* notes 46-47, 57-60 and accompanying text.
68. 346 U.S. 249, 260-69 (1953) (Vinson, C.J., dissenting).
69. *Id.* at 251 (majority opinion).
70. *Id.* at 260.
71. *Id.* at 254.
72. *Id.* at 262 (Vinson, C.J., dissenting).
73. *Id.* at 264.
74. *Id.* at 257 (majority opinion).
75. *Id.*

Brown. After all, Vinson proved that he was willing to issue a solo dissent in a race case. Moreover, his language near the end of the opinion could be read as a comment on the pending *Brown* litigation: "Since we must rest our decision on the Constitution alone, we must set aside predilections on social policy and adhere to the settled rules which restrict the exercise of our power of judicial review—remembering that the only restraint upon this power is our own sense of self-restraint."[76]

On the other hand, Vinson's view is consistent with his repeated emphasis in earlier cases on the Equal Protection Clause as a guarantor of individual rights. In *Shelley*, Vinson had stated, "[t]he rights created by . . . the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."[77] In *Sweatt*, he noted, "[i]t is fundamental that these cases concern rights which are personal and present."[78] Similarly, in *McLaurin*, Vinson stated that the restrictions deprived McLaurin "of his personal and present right to the equal protection of the laws."[79] That Vinson found "personal and present" rights absent in *Barrows* is not especially surprising, nor does it suggest much of anything about his potential approach to *Brown*, where the rights asserted were just as personal and present as those Vinson had recognized in *Sweatt* and *McLaurin*.[80]

II. THE PROCEEDINGS IN *BROWN* UNTIL VINSON'S DEATH

There were five separate cases in *Brown*, from Kansas, Virginia, South

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76. *Id.* at 269 (Vinson, C.J., dissenting).

77. Shelley v. Kraemer, 334 U.S. 1, 22 (1948).

78. Sweatt v. Painter, 339 U.S. 629, 635 (1950).

79. McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637, 642 (1950).

80. Indeed, in the initial *Brown* conference, Vinson specifically invoked the earlier decisions' references to personal rights. *See* Conference Notes of Mr. Justice Clark on the *Segregation Cases* (Dec. 13, 1952), *in* Hutchinson, *supra* note 49, at 91 [hereinafter Clark Notes].

In *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948), the Supreme Court considered the applicability of a Michigan civil rights statute to a company that operated an amusement park on a small Canadian island near Detroit. *Id.* at 29. The company had refused to admit a black passenger to its ferry which transported patrons from Detroit to the island. *Id.* at 31. A majority of the Court held that application of the Michigan civil rights statute to this conduct did not infringe on the federal interest in foreign commerce, given that, for practical purposes, the island amounted to an adjunct of Detroit. *Id*. at 35-36. Justice Jackson, joined by Chief Justice Vinson, dissented.

Vinson almost certainly viewed the case through the lens of federalism rather than race. Jackson's dissent argued that states lacked all power to regulate foreign commerce and that the majority's opinion offered no discernible principle to govern the scope of state power. *Id*. at 44-45 (Jackson, J., dissenting). Under the Jackson/Vinson view, a Michigan statute requiring segregation would have been equally unconstitutional as applied to the operations of the amusement park. Vinson's position in *Bob-Lo* is thus largely explicable by his consistent support of federal power over the states and is not especially probative with respect to his ultimate vote in *Brown*, where the Equal Protection Clause was directly at issue.

Carolina, Delaware, and the District of Columbia, all consolidated for purposes of appeal to the United States Supreme Court.[81] They were initially argued on December 9, 1952, and the Justices met in conference to discuss the cases on December 13, 1952.[82] "At Vinson's suggestion," the Justices did not take an official vote on the case, but rather discussed their views in a more general manner.[83] The Justices' notes of the discussions at this conference are the only surviving direct evidence of Vinson's views on *Brown*.

As Chief Justice, Vinson opened the conference discussion. He began with the District of Columbia case. He noted that there was a "[b]ody of law back of us on separate but equal"[84] and "Congress did not pass a statute deterring [and] ordering no segregation."[85] He found it "[h]ard to get away" from the apparent acceptance of segregation in the District by the drafters of the Fourteenth Amendment and from its "long established" practice.[86] Vinson pointedly noted, however, that he did not "think much of idea that it is for Congress [and] not for us to act."[87] He expressed some doubt about whether Congress could ban segregation in the states.[88]

Turning to the state cases, Vinson expressed his concern that southern states might respond to a desegregation order by abolishing all public education.[89] It was important, he seemed to suggest, that any potential desegregation order allow sufficient time for implementation.[90] Justice Burton recorded Vinson as then stating, "[c]ourage is needed . . . also wisdom."[91] Justice Clark recorded the phrase as, "Boldness is essential but wisdom indispensable."[92]

At the end of his notes of Vinson's comments, Justice Burton noted "Aff?"[93] Burton thus thought that Vinson might be a possible vote to affirm, but his position was far from clear. The question mark would have been unnecessary if Vinson had articulated a firm pro-segregation position.

Burton's uncertainty over Vinson's views is reflected in subsequent analyses by the Justices themselves and by historians. After Vinson's death, Burton wrote in his diary that he thought Vinson would have upheld segregation,[94] a view also

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81. WIECEK, *supra* note 16, at 694-95.

82. *Id.* at 695, 697.

83. Mark Tushnet & Katya Lezin, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867, 1902 (1991).

84. KLUGER, *supra* note 13, at 592 (quoting Jackson notes).

85. *Id.* (quoting Burton notes).

86. *Id.* (quoting Burton and Jackson notes).

87. *Id.* at 593 (quoting Burton notes).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* (quoting Burton notes) (second alteration in original).

92. Clark Notes, *supra* note 80, at 91.

93. KLUGER, *supra* note 13, at 593 (emphasis omitted).

94. *Id.*

expressed by Justice Reed in conversation with a law clerk.[95] Richard Kluger, author of *Simple Justice*, which remains the leading study of the *Brown* case, agrees, stating, "Fred Vinson . . . was almost certainly not ready to support the abolition of segregation."[96]

On the other hand, Justice Clark, probably Vinson's "closest colleague on the Court," believed Vinson would have voted against segregation.[97] Similarly, a careful analysis by Mark Tushnet and Katya Lezin of the Justices' conference notes suggests Vinson's alleged pro-segregation views have been significantly overstated.[98] As they point out:

> Nowhere in his statement did Vinson commit himself either to reaffirming the "separate but equal" doctrine or to overruling *Plessy*, but on balance the tone of his comments suggests that he would go along with a decision by a majority of the Court to hold segregation unconstitutional, as he had gone along in the university cases despite his initial inclination the other way.[99]

Moreover, if Vinson sought to protect segregation, his "boldness is essential" comment is inexplicable.[100] He was, however, deeply concerned about the practical applications of desegregation orders, thus his admonishment that wisdom is "indispensable." These concerns were not trivial, and were shared by even strong opponents of segregation such as Justice Black.[101] Vinson would not have supported an order requiring immediate desegregation of all public schools in the South.

The other Justices then spoke in order of seniority. Justices Black, Douglas, Burton, and Minton clearly stated that segregation was unconstitutional.[102] Justice Frankfurter was prepared to invalidate segregation in the District of Columbia, but proposed re-argument on the issue of the states, perhaps as a delaying tactic.[103] Justice Jackson stated that he was willing to invalidate segregation, provided that the Court present the decision as primarily political rather than legal and that it allow ample time for implementation.[104] Justice Clark argued for delay, and indicated that he could "go along" with an approach that did not require immediate integration.[105] Only Justice Reed spoke clearly in

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95. *Id.*

96. *Id.* at 592.

97. *Id.* at 593.

98. Tushnet & Lezin, *supra* note 83, at 1870-72, 1903-04.

99. *Id.* at 1903-04.

100. *Id.* at 1904.

101. *Id.*

102. KLUGER, *supra* note 13, at 596, 605-06, 613, 617.

103. *Id.* at 603-04, 617. On Frankfurter's delaying strategy, see WIECEK, *supra* note 16, at 695; Tushnet & Lezin, *supra* note 83, at 1918-20.

104. KLUGER, *supra* note 13, at 609-11.

105. Tushnet & Lezin, *supra* note 83, at 1905 (quoting Douglas notes).

favor of upholding segregation, at least for the time being.[106]

Since no formal vote was taken at the conference, it is impossible to know how the Justices would have voted had they been forced to take a clear position. In a May 17, 1954 memo to the file, Justice Douglas claimed that at the original conference, only Black, Burton, Minton, and Douglas "voted that segregation in the public schools was unconstitutional."[107] This is accurate in the sense that these were the only Justices who made their anti-segregation views unmistakably clear. Douglas further claimed that "Vinson and Reed thought that 'the *Plessy* case was right,' and Clark 'inclined that way.'"[108] This is perhaps accurate with respect to Reed, but seems less credible with respect to Vinson and Clark. Finally, Douglas claimed that "Frankfurter and Jackson 'expressed the view that segregation in the public schools was probably constitutional.'"[109] This statement reflects Douglas's intense antipathy to Frankfurter and his desire to mar him in the historical record. As Mark Tushnet and Katya Lezin remind us, Douglas's memorandum must be understood in the context "that Douglas and Frankfurter were nearly at each other's throats during this period."[110] Indeed, at one point Douglas had referred to the Jewish Frankfurter as "Der Fuehrer."[111] Douglas's memorandum suggests a Court more conflicted than it actually was. Tushnet's and Lezin's analysis seems more plausible: "By the end of the conference discussion, it would seem that all except Justice Reed had indicated a willingness to 'go along' with a desegregation decision that allowed for gradual compliance . . . ."[112]

Ultimately, the Court embraced the delaying strategy, and ordered the cases re-argued in the following term.[113] The Court ordered the parties to address five questions, largely drafted by Justice Frankfurter.[114] By the time the cases were re-argued, Chief Justice Vinson was dead,[115] and Chief Justice Earl Warren was sitting in his seat.[116]

But what if Vinson had survived?

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106. KLUGER, *supra* note 13, at 598-99.

107. Tushnet & Lezin, *supra* note 83, at 1881 (quoting Memorandum of Justice William Douglas for the File *In re Segregation Cases* (May 17, 1954)).

108. *Id.*

109. *Id.* (quoting Memorandum of Justice William Douglas for the File *In re Segregation Cases* (May 17, 1954)).

110. *Id.*; *see also* UROFSKY, *supra* note 20, at 259 (stating, "Douglas's memo is not completely reliable . . . .").

111. FELDMAN, *supra* note 15, at 306 (quoting SIDNEY FINE, FRANK MURPHY: THE WASHINGTON YEARS 254 (1984)).

112. Tushnet & Lezin, *supra* note 83, at 1907.

113. KLUGER, *supra* note 13, at 618.

114. *Id.* at 618-19.

115. *Id.* at 659.

116. *Id.* at 668.

III. *BROWN* UNDER CHIEF JUSTICE VINSON

The re-argument of the case under Chief Justice Vinson would have likely focused heavily on the issue of remedy, as did the actual re-argument under Chief Justice Warren.[117] This focus indicated that the Court knew where it was likely to end up, but was concerned about practical issues of implementation. At the Court's subsequent conference, Vinson would again lead off the discussion. He most likely would have indicated support for desegregation, provided that a narrow opinion could be written. He would not have been as enthusiastic about this conclusion as Chief Justice Warren, but he would have ultimately voted the same way. Five significant factors would shape Vinson's vote.

First, Vinson almost always sided with the positions supported by the federal government. As historians have noted, Vinson was "an almost unquestioning supporter of federal policies"[118] and he "nearly always favored the power of the federal government over that of the states."[119] In previous race cases, the federal government had taken a clear position on segregation. The Department of Justice had filed an amicus brief in *Shelley*, citing the findings of President Truman's Committee on Civil Rights.[120] This was the "first time the Department had put its full weight behind an amicus brief in a civil rights case."[121] The Department went even further in *McLaurin* and *Sweatt*, filing briefs urging that *Plessy* be overturned.[122] And in *Brown*, both the Truman and Eisenhower Justice Departments submitted briefs supporting desegregation.[123] For Vinson to side against the stated preferences of the federal government, from both Democratic and Republican administrations, would have been decidedly out-of-character.

Second, the federal government's briefs in the race cases stressed a theme that had particular resonance for Vinson—anti-Communism. The Justice Department's brief in *Shelley* had noted the embarrassments that segregation posed to the conduct of American foreign policy.[124] The Truman Administration's brief in *Brown* claimed, "[r]acial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith."[125] The Department quoted Secretary of State Dean Acheson's observation that "Soviet spokesmen regularly exploit this situation in propaganda against the United States . . . ."[126] Acheson, the Department noted, had concluded that "racial

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117. Hutchinson, *supra* note 49, at 38.

118. UROFSKY, *supra* note 20, at 149.

119. *Id.* at 150.

120. Hutchinson, *supra* note 49, at 13.

121. *Id.*

122. UROFSKY, *supra* note 20, at 255.

123. *See* TUSHNET, *supra* note 38, at 201-02.

124. Hutchinson, *supra* note 49, at 13.

125. TUSHNET, *supra* note 38, at 173 (quoting Brief for the United States as Amicus Curiae at 6, Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

126. Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 111

discrimination in the United States remains a source of constant embarrassment to this Government in the day-to-day conduct of its foreign relations; and it jeopardizes the effective maintenance of our moral leadership of the free and democratic nations of the world."[127] The federal government's position was clear—segregation undermined America's struggle against global Communism.[128]

Such pleas would have reached a receptive ear with Fred Vinson, perhaps the most dedicated anti-Communist ever to sit on the Supreme Court. In *Youngstown*,[129] Vinson had painted a dire picture of the threat posed by Communism, noting, "these are extraordinary times. A world not yet recovered from the devastation of World War II has been forced to face the threat of another and more terrifying global conflict."[130] Communism presented a "threat of aggression on a global scale."[131] He ominously pointed to the size of the Soviet military and warned that the "survival of the Republic itself may be at stake."[132] Vinson's plurality opinion in *Dennis v. United States* described the American Communist Party as a "highly organized conspiracy, with rigidly disciplined members subject to call when the leaders . . . felt that the time had come for action."[133] This party structure, "coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned" convinced Vinson that the conviction of Communist Party leaders was justified.[134] Vinson approvingly cited lower court findings that the

> Communist Party is a highly disciplined organization, adept at infiltration into strategic positions, use of aliases, and double-meaning language; that the Party is rigidly controlled; that Communists, unlike other political parties, tolerate no dissension from the policy laid down by the guiding forces, but that the approved program is slavishly followed by the members of the Party . . . .[135]

Vinson, in short, was terrified of Communists, both at home and abroad.

In *Brown*, the federal government had repeatedly told the Court that a decision upholding segregation would immensely strengthen the forces of global

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(1988).

127. *Id.* at 111-12.

128. On the relation between segregation and the Cold War, see generally MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000).

129. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

130. *Id.* at 668 (Vinson, C.J., dissenting).

131. *Id.* at 669.

132. *Id.* at 682.

133. Dennis v. United States, 341 U.S. 494, 510-11 (1951) (opinion of Vinson, C.J.).

134. *Id.* at 511.

135. *Id.* at 498.

Communism.[136] Vinson would have paid careful attention to this argument. His first instinct would be to dodge and delay the issue, but he would eventually be forced to a decision. A vote to uphold segregation would hand a massive propaganda victory to the forces of global Communism, something Vinson would do almost anything to avoid.

Third, Vinson had tremendous respect for his friend Harry Truman, the President who had appointed him to the Chief Justiceship.[137] In the 1948 election year, Truman had made civil rights a major issue, endorsing a civil rights program broader "than any president had ever dreamed of proposing, by orders of magnitude" and ordering the desegregation of the armed forces.[138] Truman did this knowing it would alienate Southern Democrats, who nominated their own presidential candidate, Strom Thurmond of South Carolina. Vinson would have known that Truman's legacy would rest in large part on his position on civil rights. Would he, as Truman's Chief Justice, really want to be known as the author of an opinion re-affirming *Plessy v. Ferguson*?[139] This, too, seems unlikely.[140]

Fourth, Vinson's initial concerns about the historical support for a desegregation order would have likely been assuaged by a comprehensive memorandum prepared by Alexander Bickel, a law clerk to Justice Frankfurter. Drawing on an exhaustive analysis of historical sources, Bickel concluded that the framers of the Fourteenth Amendment had simply not focused on the issue of segregated schools.[141] Although the Amendment probably was not explicitly intended to abolish segregation, a judicial ruling invalidating the practice was not completely inconsistent with the historical sources, either.[142] If Vinson could be convinced that history did not require re-affirmation of *Plessy*, his path to school desegregation would be much easier.

Finally, there was the doctrinal logic exerted by Vinson's earlier decisions, especially *Sweatt* and *McLaurin*. Although these opinions were narrowly written and could technically be distinguished, they had obvious implications for educational segregation more broadly. In the *Sweatt* conference, Vinson had asked, "How can you have [a] constitutional provision *as to graduate* but *not as*

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136. *See supra* notes 124-28 and accompanying text.

137. *See, e.g.*, Lefberg, *supra* note 15, at 291-93 (documenting the close friendship between the two men and noting that Vinson was Truman's choice to succeed him as President).

138. WIECEK, *supra* note 16, at 660.

139. *Cf.* KLUGER, *supra* note 13, at 269-70 ("[Truman] had staked the Presidency on [civil rights] and he had won . . . . It was not unthinkable that the politically attuned Justices he had selected felt they owed him their allegiance on racial questions.").

140. In 1975, Irving F. Lefberg argued that Vinson's decisions in *Shelley*, *Sweatt*, and *McLaurin* can be explained primarily by his loyalty to Harry Truman and to his fierce anti-Communism. *See generally* Lefberg, *supra* note 15. Curiously, Lefberg claims that Vinson would have dissented in *Brown*, without once considering that these same factors would have been equally applicable in that case. *Id.* at 285.

141. KLUGER, *supra* note 13, at 656-58.

142. *Id.* at 658.

to elementary [schools]?"[143]

Vinson's support for desegregation, however, would not be unqualified. For Vinson, an opinion invalidating school segregation would need to meet two critical tests. First, the opinion would have to be relatively narrow, focusing on segregation in public schools, rather than on racial classifications more broadly. An opinion that also invalidated prohibitions on interracial marriage, for example, would have been a complete non-starter for Vinson. Second, the opinion would have to be conservative with respect to remedy, to assuage Vinson's concerns about the practical implications of a desegregation order. It could not order immediate integration of all public schools, but must allow ample time for a smooth, orderly transition. Both of these features—a narrow opinion focusing on school segregation and a conservative approach to remedy—are, of course, significant features of the *Brown* opinion ultimately authored by Chief Justice Warren.

The other Justices would then have spoken in order of seniority. Justices Black, Douglas, Burton, and Minton would reiterate their support for desegregation.[144] Justice Reed would argue that segregation was constitutional, since it was based not on "inferiority but on racial differences" and had ample historical support.[145] Nonetheless, Reed conceded that the Constitution was "dynamic" and that *Plessy* "might not be correct now."[146] Justice Frankfurter would note that the historical evidence was unclear, but he would not take a strong stand in favor of segregation.[147] Justice Jackson's position remained tortured. He was willing to strike down school segregation, provided the decision was viewed as "political" rather than "judicial."[148] He would later develop these thoughts into a lengthy draft concurring opinion.[149] Justice Clark indicated that he would vote to abolish segregation, but cautioned that the remedy must be "carefully worked out."[150]

The conference discussion would thus indicate a clear majority in favor of desegregation. As Chief Justice, Vinson would have to assign the opinion. Almost certainly, he would have assigned it to himself. In a case of this magnitude, the imprimatur of the Chief Justice was critical. *Sweatt* and *McLaurin*, for example, had been transferred from Black to Vinson so they

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143. Hutchinson, *supra* note 49, at 23 (quoting Clark, J., Conference Notes [Apr. 8, 1950], TCC (UT)) (alteration in original).

144. Black was absent from the actual second *Brown* conference, due to a family illness. TUSHNET, *supra* note 38, at 210. If Vinson had not died, the conference might have been earlier. Regardless, Black's position on the issue was clear.

145. *Id.* at 211 (quoting Burton notes and Douglas notes).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 211-14.

150. *Id.* at 210 (quoting Burton notes). Clark was a rare dissenter between 1949 and 1953, and he generally voted with Vinson. *See* BELKNAP, *supra* note 14, at 82.

would carry the prestige of the Chief Justice.[151] Moreover, by assigning the *Brown* opinion to himself, Vinson could ensure that it stayed within relatively narrow bounds.

Vinson's primary task was to write an opinion that could gain unanimity. One of his "most strongly held convictions was the importance of unanimity to the institutional integrity of the Court."[152] Although his overall record in that respect was abysmal, Vinson had led the Court to unanimity in prior race cases. And *Brown*, more than any other case in Vinson's tenure, demanded unanimity. By writing a narrow opinion that was not accusatory toward the South and which was modest with respect to remedy, Vinson could probably gain the support of most of the Justices.

The two biggest threats were a potential concurrence from Justice Jackson and a dissent from Justice Reed. Both possibilities would be disastrous. If Reed dissented, supporters of segregation could point to an honest division of opinion on a difficult constitutional issue. The Jackson concurrence, if anything, might have been even worse. For Jackson, a northerner, to claim that the Court's decision was justified by politics and not by law would fatally undermine the Court's claim to be speaking in a judicial voice. His concurrence would be exhibit one for the argument that the Justices were little more than politicians in robes.[153]

Jackson went so far as to draft a lengthy concurring opinion that expressed significant reservations about the propriety of invalidating school segregation.[154] It is hard to know, though, just how serious Jackson was about this opinion. Although he showed it to Chief Justice Warren, he did not circulate it to the other Justices.[155] Jackson's law clerk, E. Barrett Prettyman, found much to dislike in the draft and in a forceful memorandum strongly discouraged Jackson from issuing it.[156] Moreover, on March 30, 1954, Jackson suffered a serious heart attack that left him hospitalized for weeks.[157] These circumstances no doubt weakened any resolve Jackson may have had for a separate concurring opinion.

Jackson's failure to issue his concurrence was not a direct result of Chief Justice Warren and would have likely occurred under Vinson as well. First, there is no direct evidence that Warren played a role in persuading Jackson to shelve his opinion. Second, Prettyman's objections and Jackson's heart attack were independent constraints, irrespective of who filled the Chief Justice's seat. Finally, even if Jackson had circulated his concurrence to the full Court, he would have encountered stiff resistance, not only from Vinson, but from other Justices

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151. PALMER, *supra* note 64, at 134.

152. ST. CLAIR & GUGIN, *supra* note 1, at 327.

153. In 1950, Jackson had written a long letter to law professor Charles Fairman, expressing his doubts about whether the Fourteenth Amendment was intended to abolish segregation. The letter is printed in WIECEK, *supra* note 16, at 713-15.

154. *See* KLUGER, *supra* note 13, at 691-94.

155. Tushnet & Lezin, *supra* note 83, at 1918.

156. *See* TUSHNET, *supra* note 38, at 213.

157. KLUGER, *supra* note 13, at 699.

as well, who would have immediately recognized the damage the concurrence might do. Justice Frankfurter, perhaps the most sympathetic to Jackson's perspective, was nonetheless committed to unanimity and would have strongly discouraged the opinion. Overwhelming opposition from the other Justices would likely have persuaded Jackson to abandon the concurrence, as he ultimately did under far less pressure.

Vinson would also have been likely to prevent the Reed dissent, as Warren was able to do. Several factors, independent of either Warren or Vinson, made Justice Reed's position less inflexible than it might have been. First, Reed was not a die-hard opponent of racial equality. With the exception of *Shelley v. Kraemer*, from which he was recused, Reed had joined all of Vinson's unanimous opinions in race cases, and in 1944 had authored the Court's 8-1 decision invalidating the white primary.[158] Second, Reed, like Vinson, was a strong supporter of the positions of the federal government. Richard Kluger argues, "Reed increasingly cast his vote in behalf of the powers and policies of the federal government, which he believed the legitimate if not divinely inspired repository of the public good."[159] In *Brown*, the federal government had made its position unmistakably clear. Third, Reed did not believe that the meaning of the Fourteenth Amendment was inexorably fixed in 1868; he conceded that interpretations of the amendment could change as conditions changed.[160] He probably realized that segregation would eventually be abolished, but he doubted that the country was ready for that conclusion in 1954.

All of these factors would have played into Reed's decision-making when confronted with the prospect of issuing a solo dissent. He knew that the decision would generate immense controversy in the South, and that this controversy would only increase if the decision lacked unanimity.[161] Earl Warren told him, "Stan, you're all by yourself in this now. . . . You've got to decide whether it's really the best thing for the country."[162] Reed eventually agreed, provided that the decision did not require the immediate end of segregation.[163] As he explained in a note to Felix Frankfurter, "[w]hile there were many considerations that pointed to a dissent they did not add up to a balance against the Court's opinion."[164] As the Court's long line of race cases indicated, "the factors looking toward fair treatment for Negroes are more important than the weight of history."[165] As he would later note, "There was an air of inevitability about it

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158. Smith v. Allwright, 321 U.S. 649 (1944); *see also* Morgan D.S. Prickett, *Stanley Forman Reed: Perspectives on a Judicial Epitaph*, 8 HASTINGS. CONST. L.Q. 343, 362 n.93 (1981) (documenting Reed's votes in race cases).

159. KLUGER, *supra* note 13, at 241.

160. *See supra* note 144 and accompanying text.

161. *See* KLUGER, *supra* note 13, at 702.

162. *Id.*

163. *See id.*

164. Hutchinson, *supra* note 49, at 43.

165. *Id.*

all."[166]

Fred Vinson would likely have had a similarly persuasive effect on Reed. Like Warren, Vinson placed a high value on a unanimous opinion. Like Warren, Vinson would have ensured that the opinion did not order immediate desegregation. Unlike Warren, who was a relative stranger to Reed, Vinson would have drawn on deep reservoirs of friendship and companionship with his fellow Kentuckian. Vinson had been a guest at Reed's swearing-in ceremony in 1938.[167] When Vinson was first appointed to the Chief Justiceship, there were some occasional tense moments between the two,[168] but by 1950 Vinson and Reed "had developed both a close working relationship and a strong friendship."[169] Reed was the principal speaker at a 1951 dedication of a plaque marking Vinson's birthplace in Kentucky,[170] and Vinson regularly assigned Reed opinions in important cases.[171] Vinson was easily as well-positioned, and in many ways better positioned, than Warren to persuade Reed to drop his dissent. Given that Reed did so for Warren, he would have likely done the same for Vinson.

On balance, it thus seems more likely than not that Vinson would have ultimately mustered a unanimous opinion in *Brown*. Felix Frankfurter insisted that unanimity "could not possibly have come to pass with Vinson,"[172] but this statement needs to be understood in the context of Frankfurter's vituperative hatred of Vinson. Moreover, Frankfurter himself claimed that although Earl Warren "had a share in the outcome, . . . the notion that he begot the unanimous Court is nonsense."[173] As Frankfurter saw it, the forces pushing for unanimity significantly pre-dated Warren's arrival. Dennis Hutchinson, who has conducted the most extensive study of unanimity in the desegregation cases, agrees, noting, "[o]ne of the persistent myths about the Warren Court is that Earl Warren was responsible for achieving unanimity in the *Segregation Cases* in 1954."[174] Rather, unanimity was "the ultimate step in a gradual process that had begun" in 1950.[175] Hutchinson suggests, "[i]f Vinson could have overcome his concern with the timing and scope of relief in *Brown* . . . , it is probable . . . that Vinson—not Warren—could have authored the unanimous decisions in 1954."[176]

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166. JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION*: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY 65 (2001).

167. JOHN D. FASSETT, NEW DEAL JUSTICE: THE LIFE OF STANLEY REED OF KENTUCKY 207 (1994).

168. *See id.* at 415-18.

169. *Id.* at 488.

170. *Id.* at 508-09.

171. *See id.* at 527-28.

172. Hutchinson, *supra* note 49, at 35 (quoting Letter from Frankfurter, J., to Hon. Learned Hand (July 21, 1954), File 1249, Box 65, FF (LC)).

173. *Id.*

174. *Id.* at 86.

175. *Id.*

176. *Id.* at 87; *see also* UROFSKY, *supra* note 20, at 262 ("[I]t might well have been . . . that

Indeed, from the perspective of 1953, there would have been no particular reason to suspect that Warren would be any more likely to craft a unanimous opinion than Vinson. Fred Vinson had been Chief Justice for seven years[177] and had written unanimous opinions in significant race cases, all on the side of desegregation.[178] Earl Warren was a career politician who had just joined the Court and who had no prior judicial experience.[179] Although he had signed a law abolishing segregated schools in California[180] and supported a state Fair Employment Practices Commission and nondiscriminatory housing requirements,[181] Warren had also been a member of a "Native Sons" group that had urged the preservation of California as a "White Man's Paradise,"[182] and he had vigorously supported the internment of Japanese-Americans during World War II (and would never publicly apologize for the internment during his lifetime).[183] Just eleven years earlier he had supported "a constitutional amendment to exclude all 'persons of Japanese ancestry' from [American] citizenship."[184] In 1953, the smart bet for desegregation may well have been Vinson.

The *Brown* decision, however, was not completely foreordained. There is a significant counterfactual leading to a non-unanimous opinion in *Brown*, but it does not turn on Fred Vinson. There was, in fact, a Supreme Court Justice who might have dissented from *Brown*—former Justice Jimmy Byrnes of South Carolina. Byrnes was nominated to the Court in 1941 by President Roosevelt, but resigned from the Court just one year later to take another job in the administration.[185] At the time of the *Brown* litigation, he was serving as governor of South Carolina.[186] A South Carolina school district was one of the defendants in *Brown*, and Byrnes helped shape the district's defense.[187] Byrnes initiated an aggressive equalization program in an attempt to prevent a desegregation

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Vinson and not his successor could have written the unanimous opinion in *Brown*."); Philip B. Kurland, *Earl Warren, the "Warren Court," and the Warren Myths*, 67 MICH. L. REV. 353, 356 (1968) (suggesting that a unanimous opinion in *Brown* would have happened "even with Fred Vinson still occupying the office of Chief Justice").

177. *See* UROFSKY, *supra* note 20, at 147-48.

178. *See, e.g.*, McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637 (1950); Sweatt v. Painter, 339 US. 629 (1950).

179. *See generally* Kurland, *supra* note 176, at 354-55 (describing Warren's political background).

180. NEWTON, *supra* note 3, at 205.

181. *Id.* at 231.

182. *Id.* at 74.

183. *See id.* at 128-41.

184. *Id.* at 75.

185. John W. Johnson, *Byrnes, James Francis*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 113, 113 (Kermit L. Hall et al. eds., 1992).

186. *See id.*

187. *See* KLUGER, *supra* note 13, at 334-35.

decision.[188] He also announced that if the federal courts ordered desegregation, he would seek the elimination of public education in South Carolina.[189]

If Byrnes had remained on the Court, he would almost certainly have dissented in *Brown*. Although it is conceivable that Byrnes, like Reed, might have been persuaded to drop a dissent, this seems unlikely given Byrnes's much stronger commitment to segregation. Most likely, Byrnes would have issued a forceful dissent in *Brown*, a *cri de coeur* to his fellow southerners that would have done immeasurable damage to the forces of integration. By persuading Byrnes to abandon his Supreme Court seat in 1942, Franklin Roosevelt inadvertently smoothed the path to a unanimous opinion in *Brown*.

Nor should my argument that Vinson would have authored a unanimous opinion in any way detract from the accolades given to Earl Warren for his handling of *Brown*. There were a number of ways a Chief Justice of lesser competence could have mishandled *Brown*, by voting in favor of segregation, for example, or by writing a strident opinion that would not achieve consensus, or by alienating Justice Reed into publishing his dissent. Earl Warren did none of those things. Warren deserves credit for what he accomplished, just as Vinson, had he lived, would have deserved credit as well.

IV. THE SUBSEQUENT HISTORY OF THE SUPREME COURT

Vinson's untimely death had implications for constitutional history far beyond the *Brown* decision. This Part explores appointments to the Court if Vinson had survived.

The first vacancy after Vinson's was the seat of Robert Jackson, who died in the fall of 1954.[190] President Eisenhower appointed John Marshall Harlan II to replace Jackson.[191] This seat, however, would have likely gone to Earl Warren. In an early 1953 phone conversation, Eisenhower declined to offer Warren a Cabinet position, but promised to appoint Warren to the first vacancy on the Court.[192] As Warren recalled, Eisenhower offered this promise as his "personal commitment."[193] To prepare for this vacancy, Warren was offered the position of Solicitor General of the United States, a position he accepted before announcing that he would not run again for governor of California.[194]

After Chief Justice Vinson's death, Warren insisted on holding Eisenhower to his promise.[195] Eisenhower initially balked, contending that his promise applied only to a vacancy for Associate Justice and not for Chief Justice, but he

188. *Id.*
189. *Id.* at 334.
190. *Id.* at 718.
191. *Id.*
192. NEWTON, *supra* note 3, at 7.
193. *Id.*
194. *Id.*
195. *Id.* at 8-9.

ultimately relented and Warren received the appointment.[196] Warren's candidacy may have received an assist from Vice-President Richard Nixon, who desperately wanted Warren out of California Republican politics.[197]

These same factors would all have been at play in 1954 for the Jackson vacancy. Warren would have again sought to hold Eisenhower to his promise, but now as Solicitor General of the United States, Warren would have even more credibility for the job. In addition, he could argue that his relinquishment of the California governorship for the Solicitor Generalship was a significant sacrifice that Eisenhower was obligated to reward.[198] Moreover, Nixon would have feared that a disgruntled Warren might have returned to California politics. It was far safer for him to be politically retired onto the Supreme Court. Warren would thus join the Court one year later than he actually did, but not as Chief Justice. It is likely that his tenure as an Associate Justice would have been far less significant than it was as Chief. His qualities were perfectly suited to the job of Chief Justice. As an Associate Justice, he would have likely been a bit of a journeyman, a genial man with plenty of common sense and experience, but overshadowed by men like Black, Frankfurter, and Douglas.[199]

The second vacancy occurred in 1956, with the retirement of Justice Sherman Minton.[200] Eisenhower intended to replace Minton, a Catholic, with another Catholic Justice.[201] With an eye to the upcoming presidential election, he sought a nominee that would push all the right political buttons.[202] He asked his attorney general to find a "conservative Catholic Democrat with judicial experience—preferably a state court judge."[203] Eisenhower also wanted a relatively young judge.[204] These criteria cast a pretty narrow net; almost certainly this seat would go, as it did, to William Brennan of New Jersey.[205]

The third vacancy occurred in 1957, with the retirement of Stanley Reed.[206] Although Eisenhower appointed the mediocre Charles Whittaker to replace Reed,[207] a far better appointment would have been available: John Marshall

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196. *Id.*

197. HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II 200-01 (5th ed. 2008).

198. On the relative demotion of the Solicitor General job, see NEWTON, *supra* note 3, at 7.

199. *Cf.* UROFSKY, *supra* note 20, at 150-51 ("For all of Earl Warren's many fine attributes, no one has ever claimed that he contributed a great deal to jurisprudential thought.").

200. ABRAHAM, *supra* note 197, at 207.

201. *Id.* at 208.

202. *See id.*

203. NEWTON, *supra* note 3, at 343.

204. *See* SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 78 (2010).

205. *Id.* (noting that Brennan "was the only Catholic [state] appellate judge under the age of sixty").

206. ABRAHAM, *supra* note 197, at 211.

207. *Id.*

Harlan. Because Eisenhower appointed Harlan to replace Jackson,[208] it seems highly likely that Harlan would now be tapped for the Reed seat.

It is around this point that one must consider the eventual death or retirement of Vinson. Actuarial tables suggest that a white male who was sixty years old in 1950, as Vinson was, could have expected to live until age seventy-five.[209] Vinson's early death, however, suggests a weakened health that makes the attainment of age seventy-five unlikely. He could have died at any time, of course, but for purposes of this Essay, I will discuss two plausible scenarios: One, Vinson dies or retires in 1958 at age sixty-eight, during Eisenhower's final term. Two, somewhat less likely, Vinson hangs on until 1961 to age seventy-one, and retires once a fellow Democrat, John F. Kennedy, is in the White House.

A. The 1958 Scenario

In 1958, Eisenhower would have been confronted with two vacancies, the seats of Chief Justice Vinson and Associate Justice Harold Burton. Eisenhower's first decision would be whether to reach outside the Court for a new Chief Justice or to promote someone from within. He would have been unlikely to promote any of the Roosevelt or Truman appointees, so Black, Frankfurter, Douglas, and Clark would be off the list. Similarly, Eisenhower probably would not have nominated William Brennan, a Catholic Democrat; those attributes had been useful to Eisenhower in an election year, but would not have been viewed as positives for the Chief Justiceship. That would leave the two other Eisenhower Associate Justices: Earl Warren and John Marshall Harlan. The Warren possibility is especially intriguing, because it suggests that the "Warren Court" might still have emerged even if Vinson had not died in 1953. But Eisenhower was never especially close to Warren,[210] and having discharged his promise to him, would see little reason to elevate Warren further. The obvious choice for Chief Justice was therefore John Marshall Harlan. Potter Stewart would then be nominated to fill the Burton seat. Eisenhower would nominate a third man to replace Harlan in the Associate Justiceship—call him "Mr. X." Thus in 1958, the composition of the Supreme Court looks like this, in order of seniority: Chief Justice John Marshall Harlan, Justice Black, Justice Frankfurter, Justice Douglas, Justice Clark, Justice Warren, Justice Brennan, Justice Stewart, and Justice "X."

If we assume that John F. Kennedy was still elected President in 1960, then 1962 becomes of supreme importance. In that year, both Charles Whittaker and Felix Frankfurter retired, and Kennedy appointed Byron White and Arthur Goldberg, respectively, to replace them.[211] But under the 1958 scenario, Kennedy gets only one vacancy, the Frankfurter seat,[212] because Whittaker is not

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208. *See supra* note 191 and accompanying text.

209. *Life Expectancy by Age, 1850-2004*, INFOPLEASE.COM (2007), http://www.infoplease.com/ipa/A0005140.html.

210. *See* NEWTON, *supra* note 3, at 7 (noting that "[t]hey did not know each other well").

211. ABRAHAM, *supra* note 197, at 217-20.

212. *Id.* at 219.

on the Court. Since White was ultimately chosen for the Whittaker seat, perhaps he would have received the Frankfurter seat. On the other hand, a White appointment would have left the Court without a Jewish member, and Kennedy may have felt some compulsion to maintain a "Jewish seat" on the Court. On balance, religion probably would have tipped the analysis in Goldberg's favor for the Frankfurter seat.[213]

If Kennedy had picked Goldberg, the core majority of the Warren Court—Black, Douglas, Warren, Brennan, and Goldberg—would have been in place in 1962, when the "Warren Court" really began in earnest.[214] The major decisions of the 1960s would still have happened—but with one highly significant difference. It would not be known as the "Warren Court." The "Harlan Court" would be notable for major rulings that repeatedly provoked the dissent of the Chief Justice. Harlan dissented, for example, from *Mapp v. Ohio*,[215] *Brady v. Maryland*,[216] *Reynolds v. Sims*,[217] and *Katzenbach v. Morgan*.[218] Repeated dissent from the Chief Justice may well have made opposition to the "Warren Court" even more intense.

If Kennedy had picked White, however, constitutional history would have changed significantly. In that case, the core Warren Court Justices would never have had their five votes. Instead, there would have been a moderate/conservative bloc of Harlan, Clark, Stewart, "X," and White. This bloc would have prevailed, for example, in *Miranda v. Arizona*[219] and *Escobedo v. Illinois*.[220]

B. The 1961 Scenario

If Fred Vinson died or retired in 1961, President John F. Kennedy would have selected his successor. Kennedy would have had the option of either promoting a sitting Justice or going outside the Court.

The internal candidates all had fundamental flaws. Black, Frankfurter, and Warren were too old. Douglas was too eccentric. Harlan and Stewart were too conservative. Brennan would have been a tempting pick; as a Democrat nominated by Eisenhower, he had bi-partisan appeal. Kennedy's own Catholicism, however, had been a campaign issue in 1960,[221] and Kennedy would

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213. *See* NEWTON, *supra* note 3, at 393 (stating that Kennedy wanted a Jewish nominee to replace Frankfurter).

214. *Id.* (noting that Goldberg's nomination provided the liberal bloc with a consistent fifth vote).

215. 367 U.S. 643, 672 (1961) (Harlan, J., dissenting).

216. 373 U.S. 83, 92 (1963) (Harlan, J., dissenting).

217. 377 U.S. 533, 589 (1964) (Harlan, J., dissenting).

218. 384 U.S. 641, 659 (1966) (Harlan, J., dissenting).

219. 384 U.S. 436, 504 (1966) (Harlan, J., dissenting).

220. 378 U.S. 478, 492-99 (1964) (dissenting opinions of Justices Harlan, Stewart, and White).

221. See MICHAEL O'BRIEN, JOHN F. KENNEDY: A BIOGRAPHY 411-22 (2005) for a general

have been unlikely to draw renewed attention to religion by elevating a fellow Catholic to the Chief Justiceship. Clark, although the most plausible of the Democratic appointees, was widely reviled as a mediocrity, precisely the type of person with whom Kennedy would have been unimpressed.[222] It is therefore unlikely that Kennedy would have elevated an internal candidate.

On the external side, the clear candidate for a Vinson vacancy would have been Byron White. White had been Kennedy's top pick for the Whittaker vacancy; as a White House lawyer recalled, Kennedy "had one name in mind from day one."[223] As a younger man, White perfectly represented the vigor of the Kennedy Administration and would be in a position to serve for decades. The most significant downsides would be his inexperience as a judge and his relative inexperience with federal law more generally (by this point he would have had only a few months on the job as Deputy Attorney General).[224] But White's fame as a football hero and his undisputed intellect and scholarly credentials would have likely overcome this objection. Moreover, White had previously served as a law clerk to Chief Justice Vinson, making his elevation to Vinson's seat especially appropriate.[225] Arthur Goldberg would probably have been considered also, but for the Vinson vacancy, religion would probably work against Goldberg. Kennedy, as the first Roman Catholic President, would not want to push religious buttons by nominating the first Jewish Chief Justice. Goldberg would, however, be appointed in 1962 to fill the Frankfurter seat.

Under the 1961 scenario, the Supreme Court consists of the following members, in order of seniority, in 1962: Chief Justice White, Justice Black, Justice Douglas, Justice Clark, Justice Warren, Justice Brennan, Justice Harlan, Justice Stewart, Justice Goldberg. Again, as in the 1958 scenario, the core Warren Court Justices—Black, Douglas, Brennan, Warren, and Goldberg—are present here as well. But it would be the White Court, not the Warren Court. And although White joined more Warren Court decisions than did Harlan, he still would have dissented frequently. Indeed, one of the chapters in Dennis Hutchinson's biography of White is entitled, "The Warren Court: White, J., Dissenting."[226] Hutchinson notes that "White's writing has often been elliptical, even opaque, earning the just complaint of colleague, journalist, and scholar alike."[227] White was not a leader on the Court, and it is most unlikely that he would have been perceived as a strong or successful Chief Justice. But perhaps with the addition of the Nixon appointees, White would have led more majorities, presiding over what we know as the Burger Court.

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discussion of the impact of Kennedy's Catholicism on his political career.

222. *See* WIECEK, *supra* note 16, at 432-33. Wiecek notes that historians now generally rate Clark "more favorably than his contemporary critics did." *Id.* at 433.

223. HUTCHINSON, BYRON R. WHITE, *supra* note 18, at 311.

224. *See id.* at 262 (noting that White was tapped for the position of Deputy Attorney General in December 1960).

225. On White's clerkship with Vinson, see *id.* at 194-220.

226. *Id.* at 335.

227. *Id.* at 7.

V. THE VINSON LEGACY

Under the counterfactual presented in this Essay, Fred Vinson's star shines quite a bit more brightly. If Vinson had authored the unanimous opinion in *Brown*, it would be almost impossible to dismiss him as a "nincompoop" and a failure. Instead, he would be remembered as the author of one of the most significant Supreme Court decisions ever issued. Moreover, *Brown* would be seen not as the opening salvo of the Warren Court, but as the logical culmination of Vinson's decisions in a line of unanimous race cases. Predecessor cases like *Sweatt* would receive increased attention.

Vinson's survival also would have guaranteed successors who were no more successful than he. Earl Warren was so significant a Chief Justice that almost anyone who preceded him would look small in comparison. Warren's shadow has contributed greatly to the historical eclipse of Fred Vinson. But if Vinson had instead been succeeded by a Harlan or a White, presiding over a fractured Court and frequently dissenting from the Court's rulings, Vinson's Chief Justiceship would suffer little in comparison. Indeed, his inability to command majorities would seem less of a failing and more like the typical lot of a mid-twentieth century Chief Justice. With *Brown* behind him, Vinson might even be seen as the most significant Chief Justice of the twentieth century.

He came so close. Just as the curtains were about to open on the grandest historical stage yet presented in Vinson's life, he was plucked from the wings and replaced with an understudy, who took the role and commandingly made it his own. Perhaps Vinson might still have stumbled in the bright spotlight. But it is more likely that he would have risen to the occasion, calmly and deliberately walked to center stage, and in his slow, Kentucky drawl, told the nation that school segregation must go.

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NOTES

THE FEDERAL ESTATE TAX AND THE NATIONAL DEBT: WHY THE DEBT FORCES A DEFENSE OF THE TAX

MATTHEW B. GAUDIN*

> "No pecuniary consideration is more urgent than the regular redemption and discharge of the public debt: on none can delay be more injurious, or an economy of the time more valuable."
>
> —President George Washington, Message to the House of Representatives, 1793[1]

INTRODUCTION

For some time the federal estate tax has been a major tax issue in the United States.[2] Conversations about the estate tax reverberate across the country from quaint farmhouses in Indiana to elegant lofts in Manhattan. The first years of the twenty-first century were no exception to estate tax dialogue.[3] President George W. Bush made estate tax repeal a crucial component of his first term domestic goals,[4] arguing this was necessary to save family farms.[5] Opponents of the estate

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1. *The 18th Century*, BUREAU OF PUB. DEBT, http://www.publicdebt.treas.gov/history/1700.htm (last visited Feb. 10, 2011). This quote and the following by President Washington in his Farewell Address present a good summary of the principal argument of this Note. "[I]t is essential that you should practically bear in mind, that towards the payment of debts there must be Revenue; that to have Revenue there must be taxes; that no taxes can be devised which are not more or less inconvenient and unpleasant . . . ." *Rediscovering George Washington*, PBS, http://www.pbs.org/georgewashington/collection/other_1796sep19.html (last visited Oct. 6, 2011).

2. *See, e.g.*, Grayson M.P. McCouch, *The Empty Promise of Estate Tax Repeal*, 28 VA. TAX REV. 369, 373 (2008) (stating, "Estate tax repeal figured as a prominent issue in the 2000 presidential campaign . . . .").

3. *See, e.g.*, *id.*

4. *See, e.g.*, Mitch Frank & Andrew Goldstein, *Campaign 2000: TIME Issues Briefing: The Four Big Differences*, TIME, Nov. 6, 2000, http://www.time.com/time/magazine/article/0,9171,998392,00.html; Richard W. Stevenson, *The 2000 Campaign: The Tax Plan; Bush Tax Plan: The Debate Takes Shape*, N.Y. TIMES, Aug. 26, 2000, http://www.nytimes.com/2000/08/26/

tax claimed, "[I]t is inappropriate to impose a tax by reason of the death of a taxpayer."[6] They managed to displace the phrase "estate tax" from American discourse and insert in its place the expression "death tax."[7]

Supporters of the tax responded with their own arguments. In early 2001, the organization Responsible Wealth authored an advertisement in the *New York Times*, essentially declaring everyday Americans would pay for estate tax repeal.[8] Warren Buffet entered the debate and claimed the estate tax was crucial "in 'helping create a society in which success is based on merit rather than inheritance.'"[9] Apparently, these counterarguments were no match.

In President Bush's first year in office, Congress passed the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA).[10] Notably, EGTRRA affected the estate tax, steadily lowering estate tax rates, while increasing the exemption amounts.[11] In 2010, EGTRRA entirely eliminated the estate tax.[12] Nevertheless, all was not lost for the supporters of the estate tax. A sunset provision scheduled the estate tax to resurface in 2011.[13] This reemerged estate tax would have had the same provisions as the 2001 estate tax.[14] However, Congress preempted this reemergence in December 2010,[15] as it passed the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (2010 Tax Relief Act).[16] The 2010 Tax Relief Act did bring back the estate tax, but it changed its terms, setting the exemption at $5 million and fixing the rate at thirty-five percent.[17]

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us/the-2000-campaign-the-tax-plan-bush-tax-plan-the-debate-takes-shape.html.

5. *See* Daniel W. Matthews, *A Fight to the Death: Slaying the Estate Tax Repeal Hydra*, 28 WHITTIER L. REV. 663, 677 (2006).

6. Reginald Mombrun, *Let's Protect Our Economy and Democracy from Paris Hilton: The Case for Keeping the Estate Tax*, 33 OHIO N.U. L. REV. 61, 77 (2007) (citation omitted).

7. *See, e.g.*, Matthews, *supra* note 5, at 671-74.

8. *See id.* at 690.

9. *Id.* (quoting David Cay Johnston, *Dozens of Rich Americans Join In Fight to Retain the Estate Tax: Buffet, Soros and Gate's Father Call It Only Fair*, N.Y. TIMES, Feb. 14, 2001, at A1).

10. Pub. L. No. 107-16, 115 Stat. 38 (2001) (codified in scattered sections of 26 U.S.C.); *see* Sergio Pareja, *Estate Tax Repeal Under EGTRRA: A Proposal for Simplification*, 38 REAL PROP. PROB. & TR. J. 73, 74 (2003).

11. *See* Kay Bell, *Estate Tax Lies in Limbo, But For How Long?*, FOX BUS. (Oct. 4, 2010), http://www.foxbusiness.com/personal-finance/2010/10/04/estate-tax-lies-limbo-long/.

12. *See id.*

13. *See id.* This provision was inserted by Congress "to comply with congressional budget rules." Matthews, *supra* note 5, at 665 n.13. Specifically, Congress had to conform to the Byrd Rule. *See* Mombrun, *supra* note 6, at 69.

14. *See* Matthews, *supra* note 5, at 665.

15. *See* Julia Steinway, *Tax Relief Act of 2010: Estate, Gift and GST Tax Changes*, MARTINDALE.COM (Dec. 27, 2010), http://www.martindale.com/taxation-law/article_Much-Shelist-Denenberg-Ament-Rubenstein_1210438.htm.

16. Pub. L. No. 111-312, 124 Stat. 3296 (2010) (codified in scattered sections of 26 U.S.C.).

17. *See* Paul Sullivan, *Estate Tax Will Return Next Year, But Few Will Pay It*, N.Y. TIMES,

The 2010 Tax Relief Act is "set to expire in two years," setting up another crucial estate tax debate.[18] Eventually a decision should be made whether to permanently repeal the estate tax or to retain it, perhaps with some modifications. This Note addresses that decision. Part I discusses the history of the death-time taxation in America and Europe. Part II summarizes the arguments for and against the estate tax. Part III briefly balances these arguments and concludes that the adverse consequences of a massive national debt compel estate tax preservation (at least for the time being). Part IV says that if estate tax supporters want to increase support for the tax, they should focus their arguments on exclusively using the tax to reduce, or at least hold off, the growing national debt.

I. THE HISTORY OF DEATH-TIME AND ESTATE TAXATION

The history of estate taxation is vast and detailed. It stretches back thousands of years.[19] It is a history filled with kings,[20] churches,[21] wars,[22] and evasions.[23] This part of the Note attempts to succinctly display this history. Having some knowledge of this history should enable the reader to better understand present day arguments.

A. The Ancient World

Estate or death-time "taxes are ancient taxes."[24] Archaeologists and historians have proven that these taxes appeared first in Ancient Egypt during the reign of Psametichus I (654-616 B.C.).[25] Psametichus I forced "a ten percent tax"

Dec. 18, 2010, at B1, *available at* http://www.nytimes.com/2010/12/18/your-money/taxes/18wealth.html. It should be noted that the new law gives options to those heirs who had decedents die in 2010. *See id.* One option is "to treat the estate by the tax laws in place in 2010, . . . calculat[ing] the capital gains on all assets in the estate to determine if the value is above a level the Internal Revenue Service is allowing." *Id.* The other choice is to simply use the new estate tax provisions. *Id.*

18. *See id.*

19. *See* Louis Eisenstein, *The Rise and Decline of the Estate Tax*, 11 TAX. L. REV. 223, 223 (1956).

20. *See, e.g.*, GARY ROBBINS, THE HERITAGE FOUND., ESTATE TAXES: AN HISTORICAL PERSPECTIVE 1 (2004), *available at* http://s3.amazonaws.com/thf_media/2004/pdf/bg1719.pdf.

21. *See, e.g.*, Barbara R. Hauser, *Death Duties and Immorality: Why Civilization Needs Inheritances*, 34 REAL PROP. PROB. & TR. J. 363, 369-70 (1999).

22. *See, e.g.*, Eddie Metrejean & Cheryl Metrejean, *Death Taxes in the United States: A Brief History*, 7 J. BUS. & ECON. RES. 33, 34-35 (2009), *available at* http://journals.cluteonline.com/index.php/JBER/article/view/2246/2294; ROBBINS, *supra* note 20, at 2.

23. *See, e.g.*, Hauser, *supra* note 21, at 367. Archaeologists have found a papyrus presumably depicting ancient Egyptian death-time tax evasion. Mary R. Wampler, Note, *Repealing the Federal Estate Tax: Death to the Death Tax, or Will Reform Save the Day?*, 25 SETON HALL LEGIS. J. 525, 528 n.13 (2001).

24. Eisenstein, *supra* note 19, at 223.

25. Hauser, *supra* note 21, at 366.

upon death-time land conveyances.[26] He justified the tax as a "redemption fee,"[27] because in ancient Egypt "'full title rested only in the ruler.'"[28] The tax even applied to "[c]lose family members,"[29] unlike some other ancient death-time taxes.[30]

The ancient Greeks had a form of death-time taxation that they seemed to have copied from the Egyptians.[31] Evidently this tax created a significant amount of government income in addition to generating protest and fraud.[32]

The Romans, like the Greeks, looked to the ancient Egyptians for inspiration for death-time taxation.[33] During the first century A.D., "the *Vicesina Hereditatium*, a tax on successions and legacies to all but close relatives,"[34] financed Roman army pensions.[35] The tax applied exclusively to Roman citizens,[36] and it had a "rate of [five] per cent [sic] on all of the excess over the specified minimum."[37] Emperor Augustus established the tax by using cunning political strategy, vowing to restore a "direct land tax" if his tax plan was not approved.[38] Augustus's successors tinkered with his original law.[39] Trajan, for example, commanded "almost all close relatives" be excused from the tax.[40] Pliny the Younger applauded this reform.[41] He claimed that "a father who had just lost his son should not be called upon in his bereavement to take an inventory of what had been left him; to tax him at such a time would be to add to his burden

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26. *Id.*

27. *Id.*

28. *Id.* (quoting WILLIAM J. SHULTZ, THE TAXATION OF INHERITANCE 3 (1926)).

29. *Id.*

30. *See, e.g.*, *id.* at 367.

31. *Id.*

32. *Id.*

33. *See* James Hagerman, Jr., *The Federal Estate Tax: Grounds for Adoption of This Method of Taxation in America, Brief Comment on U.S. Supreme Court Decisions on the Subject, and Suggestion of Certain Inequities in Operation That Might be Removed*, 8 A.B.A. J. 92, 93 (1922).

34. Darien B. Jacobson et al., *The Estate Tax: Ninety Years and Counting*, *in* 27 INTERNAL REVENUE SERV., SOI BULL., no. 1, at 118 (2007), *available at* http://www.irs.gov/pub/irs-soi/07sumbul.pdf.

35. Hauser, *supra* note 21, at 367. This fact, that nations instituted death-time taxation generally to raise revenue, appears throughout history. *See, e.g.*, Kristine S. Knaplund, *Charity for the "Death Tax": The Impact of Legislation on Charitable Bequests*, 45 GONZ. L. REV. 713, 721 (2010) (referring to the fact that the United States government used a death-time tax to help finance the Civil War).

36. J. F. Gilliam, *The Minimum Subject to the* Vicesima Hereditatium, 73 AM. J. PHILOLOGY 397, 397 (1952).

37. Frank J. Maguire, *Problems in Estate Planning*, 30 CORNELL L.Q. 271, 272 (1945).

38. Hauser, *supra* note 21, at 367.

39. *See id.* at 367-68.

40. *Id.* at 367.

41. *See id.*; MAX WEST, THE INHERITANCE TAX 189 (Faculty of Political Sci. of Columbia. Univ. eds., 2d rev. ed. 1908).

of sorrow . . . ."[42]

The Roman death-time tax became a prolific revenue supply.[43] Emperor Caracalla decided to raise "the tax rate," eliminate the family exclusions, and increase the tax base by conferring "Roman citizenship" upon "all the free inhabitants of the whole Empire."[44] The deterioration of the death-time tax, however, accompanied the fading of the Empire.[45] The tax vanished entirely "by the time [the eastern Roman] Emperor Justinian . . . compiled the Justinian Code in 533 A.D."[46]

B. The Middle Ages and Early Modern Europe

Death-time taxes were present in Europe during the Middle Ages.[47] It became rather ordinary for a tax to be imposed after the passing of an individual.[48] The taxes, which were generally "annual property rent,"[49] developed from "the fact that the sovereign or the state owned all assets."[50] Genoa, inspired by Roman law, "adopted a two percent death tax with no exemptions for close family" in 1395.[51] In England, the king would confer real property "to certain individuals during their lifetimes."[52] After death, the estate could keep this "property upon payment of an estate tax."[53] Many communes in the Canton of Glarus in Switzerland "had a *Todesfallsteuer* or death tax for the benefit of their churches or schools."[54]

The church also involved itself in death-time taxes.[55] Pope Innocent IV recommended that individuals give one-third of their possessions to the church upon death.[56] The church in England would regularly demand "the second-best beast, which the family brought with them to the burial."[57] To help "support the war with France," the English church courts introduced a "stamp duty" applicable to probate actions.[58] Needless to say, the church took these matters very

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42. WEST, *supra* note 41, at 189-90 (citation omitted).
43. *See* Hauser, *supra* note 21, at 367-68.
44. *Id.* (citation omitted).
45. *See id.* at 368.
46. *Id.*
47. *See id.*; Jacobson et al., *supra* note 34, at 118.
48. Jacobson et al., *supra* note 34, at 118.
49. *Id.*
50. ROBBINS, *supra* note 20, at 1.
51. Hauser, *supra* note 21, at 371.
52. ROBBINS, *supra* note 20, at 1.
53. *Id.*
54. WEST, *supra* note 41, at 39.
55. *See* Hauser, *supra* note 21, at 369-70.
56. *See id.* at 370.
57. *Id.* at 369-70.
58. *Id.* at 370.

seriously, castigating to Hell those bequeathing no inheritance to the church.[59]

Other European nations began adding death-time taxes as the centuries progressed.[60] Germany and the Dutch provinces, for example, established inheritance taxes.[61] "By the eighteenth century, many countries had adopted some form of duties, fees, or taxes on transfers of property at death."[62]

C. The Early United States

Europeans carried the notion of death-time taxation to America as they crossed the Atlantic Ocean.[63] These taxes appeared early in American history during crises when the country needed more revenue.[64]

1. The Stamp Act of 1797.[65]—Near the close of the eighteenth century, President John Adams and the United States faced a military threat from France.[66] An undeclared naval war existed between the two nations, with France ordering "seizure of American merchant ships," primarily in response to America's recently signed treaty with Great Britain.[67] A special envoy to France, consisting of Elbridge Gerry, Charles Cotesworth Pinckney, and John Marshall (the legendary jurist), failed to elicit peace.[68] President Adams and Congress prepared the nation for war by strengthening the navy.[69] Congress passed the Stamp Act of 1797 to help finance this buildup.[70] The Act required a stamp "on wills offered for probate, as well as on inventories and letters of administration. Stamps also

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59. *See id.*

60. *See id.* at 372.

61. *Id.*

62. Wampler, *supra* note 23, at 529.

63. *See* Mombrun, *supra* note 6, at 67.

64. *See* ROBBINS, *supra* note 20, at 2 (arguing, "[E]state taxes were used as a sporadic, and temporary, way to finance wars"); *see also* David Frederick, *Historical Lessons From the Life and Death of the Federal Estate Tax*, 49 AM. J. LEGAL HIST. 197, 214 (2007) (saying, "Throughout the nineteenth century Congress used death taxes as an effective financial tool to quickly, and with relatively little resistance, raise substantial sums of money in the face of economic crises."); Jacobson et al., *supra* note 34, at 119 (discussing how a death-time tax was used to raise revenue during a naval crisis with France in 1797); Knaplund, *supra* note 35, at 721 (mentioning that a death-time tax was instituted to help finance the Civil War).

65. Ch. XI, 1 Stat. 527 (1797) (repealed 1802).

66. *See* Jacobson et al., *supra* note 34, at 119.

67. *The XYZ Affair and the Quasi-War with France, 1798-1800*, U.S. DEP'T OF STATE OFF. OF THE HISTORIAN, http://history.state.gov/milestones/1784-1800/XYZ (last visited Feb. 11, 2011).

68. *See id.*

69. *See* Jacobson et al., *supra* note 34, at 119; *see also John Adams*, NAVAL HIST. & HERITAGE COMMAND, http://www.history.navy.mil/danfs/j3/john_adams-i.htm (last visited Feb. 11, 2011) (saying, "Difficulties with France during . . . [President Adams's] administration prompted him to push vigorously for construction of the Navy which had been neglected after the treaty of Paris.").

70. *See* Jacobson et al., *supra* note 34, at 119.

were required on receipts and discharges from legacies and intestate distributions of property."[71] Congress repealed the Act once the emergency ended.[72] During the War of 1812, Treasury Secretary Alexander Dallas advocated for the restoration of death-time taxation.[73] The House Ways and Means Committee, however, repudiated the Secretary's proposal.[74] The war concluded soon after, making the tax unessential.[75]

2. The Tax Act of 1862.[76]—A death-time tax returned to the United States with the onset of the Civil War when Congress passed the Tax Act of 1862 to produce revenue.[77] The Tax Act of 1862 "not only taxed probated wills, but taxed the privilege of inheritance as well."[78] The *Congressional Globe* extolled the Act "as a 'large source of revenue which could be most conveniently collected.'"[79] The Internal Revenue Law of 1864,[80] which reinstituted and adjusted the tax, came about as war costs increased.[81] The new amendments included a "succession tax," along with "the nation's first gift tax."[82] Once the war ended the need for extra revenue abated, and Congress dismantled the tax.[83]

3. The War Revenue Act of 1898.[84]—With the outbreak of the Spanish-American War, Congress again turned to death-time taxation to raise revenue.[85] The War Revenue Act of 1898 raised a substantial amount of disagreement and debate.[86] Populists backed the tax, claiming it forced the affluent to pay a just allocation of taxes.[87] Congressman Oscar Underwood of Alabama stated that the tax "is levied on a class of wealth, a class of property, and a class of citizens that do not otherwise pay their fair share of the burdens of the Government."[88] Others replied that the tax would create "a disincentive to accumulate wealth" and

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71. *Id.*

72. *See id.*

73. *See* Metrejean & Metrejean, *supra* note 22, at 34.

74. *Id.*

75. *See id.*

76. Ch. CXIX, 12 Stat. 432 (1862) (modified 1864).

77. *See* Knaplund, *supra* note 35, at 721; ROBBINS, *supra* note 20, at 2.

78. Wampler, *supra* note 23, at 530.

79. Barry W. Johnson & Martha Britton Eller, *Federal Taxation of Inheritance and Wealth Transfers*, *in* INHERITANCE AND WEALTH IN AMERICA 61, 65 (Robert K. Miller, Jr. & Stephen J. McNamee eds., 1998) (quoting Office of Tax Analysis, Legislative History of Death Taxes in the United States 2 (1963) (unpublished manuscript)).

80. Ch. CLXXIII, 13 Stat. 223 (1864) (repealed 1870, 1872).

81. *See* Johnson & Eller, *supra* note 79, at 65.

82. *Id.*; Jacobson et al., *supra* note 34, at 119.

83. ROBBINS, *supra* note 20, at 2.

84. Ch. 448, 30 Stat. 448 (1898) (repealed 1902).

85. Metrejean & Metrejean, *supra* note 22, at 35.

86. *See* Wampler, *supra* note 23, at 530-31.

87. *Id.*

88. Eisenstein, *supra* note 19, at 228 (citation omitted).

compel "small businesses" to close.[89] In *Knowlton v. Moore*, the Supreme Court upheld the tax against a constitutional challenge.[90] The Act brought in $14.1 million, though it only bound "personal property" to taxation.[91] Congress repealed the Act when the war concluded in 1902.[92]

D. The Modern United States

In the early twentieth century, America was deep into the Progressive Era.[93] Progressives began clamoring for a death-time tax to more equitably distribute wealth.[94] President Theodore Roosevelt, a supporter of such a tax, claimed that immense fortunes "are needless and useless, for they make no one really happy and increase no one's usefulness, and furthermore they do infinite harm and they contain the threat of far greater harm."[95] Congress generally did not agree with the progressives, as it rejected death-time taxes in 1909 and 1913.[96]

As World War I approached, "military appropriations" forced Congress to find means to generate revenue.[97] Congress responded by enacting an estate tax in 1916, in addition to "the modern-day income tax."[98] The estate tax portion had similar characteristics of today's estate tax,[99] and "[i]t applied to net estates, defined as the total property owned by a decedent, the gross estate, less deductions."[100] Residents received a $50,000 exemption, with no exemption going to non-residents.[101] Following the initial exemption, the rates began at one percent on smaller estates and increased to ten percent on estates valued above $5 million.[102] The estate owed taxes "[one] year after the decedent's death" with a five percent markdown applied to estates paying before this deadline.[103] A six percent delayed payment fine applied "unless the delay was deemed

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89. Wampler, *supra* note 23, at 531.

90. Knowlton v. Moore, 178 U.S. 41 (1900).

91. Jacobson et al., *supra* note 34, at 120.

92. *Id.*

93. *See Progressive Era (1890-1913)*, AMERICA'S LIBRARY, http://www.americaslibrary.gov/jb/progress/jb_progress_subj.html (last visited Feb. 12, 2011) (citing the Progressive Era as being 1890-1913).

94. *See, e.g.*, Eisenstein, *supra* note 19, at 228-29. The Progressive Party supported "a graduated inheritance tax as a national means of equalizing the holders of property." *Id.* at 229 (citation omitted).

95. *Id.* at 228 (citation omitted).

96. *Id.* at 229.

97. *See id.* at 230.

98. ROBBINS, *supra* note 20, at 2.

99. *Id.*

100. Jacobson et al., *supra* note 34, at 120.

101. *Id.*

102. ROBBINS, *supra* note 20, at 2.

103. Jacobson et al., *supra* note 34, at 120-21.

'unavoidable.'"[104] Like the War Revenue Act of 1898, the Supreme Court upheld the constitutionality of the 1916 estate tax in *New York Trust Co. v. Eisner*.[105]

The United States' entry into World War I prompted Congress to raise the rates of the estate tax in 1917,[106] as the country needed more revenue.[107] A two percent tax applied to estates under $50,000, with the highest estates taxed at twenty-five percent.[108] The estate tax did not apply to military deaths.[109] After the war, the tax did not disappear like previous death-time taxes in the United States.[110]

For the next five decades, other than some slight alterations especially in exemptions and rates, the estate tax stayed fairly stable.[111] In the 1920s, Treasury Secretary Andrew Mellon sought rate reduction, if not outright repeal of the estate tax.[112] He argued there was no "social necessity for breaking up large fortunes in" America.[113] Eventually, the rates were reduced, but the estate tax survived.[114] The onset of the Great Depression forced an increase in the rates of the estate tax to combat the growing deficit.[115] Secretary Mellon, "[t]orn between a dislike for deficits and a dislike for the tax," supported the rate increase.[116]

President Franklin Roosevelt's Administration, however, shifted the primary purpose of the estate tax away from revenue generation and towards wealth redistribution when it made "[t]he levelling of hereditary fortunes . . . one of its objectives."[117] The Senate at one point increased the highest rate to sixty percent with the aid of Senator LaFollette of Wisconsin.[118] This rate applied only to estates greater than $10 million.[119]

President Roosevelt continued to support wealth redistribution through the estate tax saying, "The transmission from generation to generation of vast fortunes by will, inheritance, or gift is not consistent with the ideals and

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104. *Id.* at 121.

105. 256 U.S. 345 (1921).

106. ROBBINS, *supra* note 20, at 2.

107. JOHN R. LUCKEY, CONG. RESEARCH SERV., A HISTORY OF THE FEDERAL ESTATE, GIFT AND GENERATION-SKIPPING TAXES 7 (2003), *available at* http://assets.opencrs.com/rpts/95-444_20030409.pdf.

108. *Id.*

109. *Id.*

110. ROBBINS, *supra* note 20, at 2.

111. Metrejean & Metrejean, *supra* note 22, at 36.

112. *See* Eisenstein, *supra* note 19, at 232.

113. *Id.* at 232.

114. *See id.* at 232-33. An increase in rates, however, preceded this reduction. *See id.* at 232.

115. *See id.* at 234.

116. *Id.* at 234. This sentiment expressed by Secretary Mellon is similar to a basic premise of this Note. Essentially, as the title indicates, the current national debt compels a defense of the estate tax.

117. *Id.* at 235.

118. *Id.*

119. *Id.*

sentiments of the American people."[120] The importance of evening out estates and equitable distribution began to fade after 1935.[121] Rates rose again in 1941, but this was arguably based on the need for revenue to fund the military buildup for World War II.[122]

A considerable change in the estate tax occurred in 1976 when Congress merged "the estate tax and the gift tax into a single graduated rate."[123] Congress also joined the exemptions of the two taxes, creating a "unified estate and gift tax credit."[124] In 1981, Congress increased the exemption amount to $600,000.[125] Congress gave smaller estates more relief in 1997, boosting the exemption to $1 million.[126] However, Congress scheduled the exemption to be introduced gradually, with the full effect not occurring until 2006.[127] Congress ratified EGTRRA in 2001, steadily reducing the estate tax rates and wholly eliminating the tax in 2010.[128] Then Congress passed the 2010 Tax Relief Act, keeping the estate tax for at least two more years.[129]

This brief history of the death-time and estate taxation demonstrates three overriding principles: (1) death-time taxation has a long history both in the United States and abroad;[130] (2) death-time taxation, throughout much of its history, was generally used to produce revenue;[131] and (3) in America, death-time taxes were first used mainly in times of war or national crisis.[132] With those points in mind, the next section of this Note considers in greater detail the primary arguments both in support of, and in opposition of, permanent repeal of the estate tax.

II. ARGUMENTS IN FAVOR OF AND AGAINST PERMANENT REPEAL OF THE ESTATE TAX

Politicians, academics, tax attorneys, economists and others have asserted various arguments in support of, or in opposition to, permanent repeal of the

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120. *Id.*

121. *See id.* at 236.

122. *See id.* Congress simply merged a short-term 1940 defense tax into the estate tax and made it permanent. *Id.*

123. Mombrun, *supra* note 6, at 68.

124. ROBBINS, *supra* note 20, at 3.

125. *Id.*

126. LUCKEY, *supra* note 107, at 23.

127. *Id.*

128. *See* Bell, *supra* note 11.

129. *See* Sullivan, *supra* note 17.

130. *See, e.g.*, Hauser, *supra* note 21, at 367 (mentioning a Roman death-time tax); Jacobson et al., *supra* note 34, at 119 (discussing the Stamp Act of 1797, a death-time tax in early America).

131. *See, e.g.*, Frederick, *supra* note 64, at 214; Hauser, *supra* note 21, at 367 (discussing how Emperor Augustus used a Roman death-time tax to finance army pensions); Knaplund, *supra* note 35, at 721 (discussing how the United States used a death-time tax to help finance the Civil War).

132. *See supra* note 64 and accompanying text.

estate tax. This section considers only the primary arguments of each respective side, leaving the marginal arguments out. Knowing the key arguments for both sides allows one to more rationally balance the interests in determining the approach Congress should adopt when deciding whether to permanently keep the estate tax or repeal it.[133]

A. Arguments Against the Estate Tax

1. The Estate Tax and Small Businesses.—Opponents of the estate tax have consistently highlighted the adverse effects the tax has on farmers and small business owners.[134] On the campaign trail in 2000, George W. Bush claimed, "[T]o keep farms in the family, we are going to get rid of the death tax . . . ."[135] In 2010, Senator Jim DeMint of South Carolina insisted, "Killing the death tax will create jobs and save thousands of family farms and small businesses. It's time to kill the death tax once and for all . . . ."[136]

Opponents generally assert, "Estates that consist largely of family-owned businesses are the most vulnerable to the death tax."[137] These businesses typically reinvest earned income "back into the business," acquiring land or equipment for example.[138] The estate must incorporate the decedent's share of these assets in the value of the estate when a business owner dies.[139] Because these assets are normally "valuable" they can push the decedent's estate past the estate tax minimum.[140] If the "business's available cash does not cover" the estate tax when it comes due, these assets may need to be sold.[141] The problem, however, is that it is not simple to sell these assets, as they are essential in keeping the business

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133. The purpose in this section is not to weigh the sides against each other, but instead to attempt to lay out the arguments of each. Prominent studies that each group uses to evidence its claims will be cited as a means to both further explain each side and to give an example of where each side has drawn some of its proof.

134. *See, e.g.*, Wampler, *supra* note 23, at 536; CURTIS S. DUBAY, THE HERITAGE FOUND., THE ECONOMIC CASE AGAINST THE DEATH TAX 3 (2010), *available at* http://thf_media.s3.amazonaws.com/2010/pdf/bg2440.pdf; PATRICK F. FAGAN, THE HERITAGE FOUND., HOW THE DEATH TAX KILLS SMALL BUSINESSES, COMMUNITIES—AND CIVIL SOCIETY 1 (2010), *available at* http://thf_media.s3.amazonaws.com/2010/pdf/bg2438.pdf; Douglas Holtz-Eakin, *Kill the "Death Tax,"* L.A. TIMES, May 6, 2009, http://articles.latimes.com/2009/may/ 06/opinion/oe-holtz-eakin6.

135. Matthews, *supra* note 5, at 677 (citation omitted).

136. *DeMint to Force Vote to Kill Death Tax Permanently*, JIM DEMINT: U.S. SENATOR, SOUTH CAROLINA, http://demint.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=bd148757-fd1b-4f32-82b5-ab0e71a9a3f3&ContentType_id=a2165b4b-3970-4d37-97e5-4832fcc68398&Group_id=9ee606ce-9200-47af-90a5-024143e9974c&MonthDisplay=7&YearDisplay=2010 (last visited Nov. 06, 2010).

137. DUBAY, *supra* note 134, at 3.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

running.[142] Opponents say that if the estate must sell these assets the business will likely lose some "income-generating capability" and need to lay off employees.[143] The worst case scenario would be complete liquidation of the business, which some say may and does happen.[144]

Additionally, these businesses must spend money on accountants and lawyers for estate tax planning, further increasing costs.[145] A 1998 Congressional Report stated that family businesses spend on "average $16,113 on lawyers, $14,632 on accountants, and $2,392 on other financial advisers."[146]

Opponents contend that the estate tax unfavorably affects more than just affluent Americans.[147] A "congressional Joint Economic Committee" report remarked that "more than 37,000 'closely-held businesses,' as well as 24,000 farms" paid the estate tax from 1995 to 2004.[148] The Committee concluded "that the estate tax has broad and significant costs for thousands of family businesses."[149]

Opponents of the estate tax draw on personal estate tax "horror stories" to drive home their point.[150] In 1995 opponents of the tax brought Chester Thigpen, an African American tree farmer and "grandson of slaves," to Washington, D.C. to testify to Congress.[151] Thigpen testified that under the estate tax his family may have to sell his farm because of the high value of his property and trees, even though according to him, he was not rich.[152] More recently, Victor Mavar, a businessman, testified that he had declined to invest in new businesses in hurricane-ravaged Biloxi because of the estate tax.[153] He said he did not want to

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142. *See id.*

143. *Id.*

144. *See* Joseph H. Astrachan & Roger Tutterow, *The Effect of Estate Taxes on Family Business: Survey Results*, 9 FAM. BUS. REV. 303, 303 (1996) (saying, "Estate taxes are a crucial issue facing our country, causing family-owned businesses to downsize and liquidate . . . ."); *see also* Daniel Kadlec, *Why These Guys are Dead Wrong*, TIME, Feb. 26, 2001, http://www.time.com/time/magazine/article/0,9171,999309,00.html (arguing the estate "tax may even force the sale or partial liquidation of a farm or family business").

145. *See* Stephanie A. Weber, Note, *Re-Thinking the Estate Tax: Should Farmers Bear the Burden of a Wealth Tax?*, 9 ELDER L.J. 109, 118 (2001).

146. *Id.*

147. *See, e.g.*, Jeff Jacoby, Op-Ed., *Let's Keep the Death Tax Dead*, BOS. GLOBE, Jan. 3, 2010, http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2010/01/03/lets_keep_the_death_tax_dead (arguing, "[T]he nation's wealthiest citizens aren't the ones the estate tax hurts.").

148. *Id.*

149. *Id.*

150. Matthews, *supra* note 5, at 674-77; *see also* FAGAN, *supra* note 134, at 2-6 (discussing these types of stories).

151. Matthews, *supra* note 5, at 681-82.

152. *Id.*

153. FAGAN, *supra* note 134, at 5.

encumber his children with a possible tax after his death.[154] Mr. Mavar continued, saying the estate "tax has encouraged a 'wealth-redistribution,' not from the rich to the poor, but from the local community to the national corporations."[155] Kevin Hancock, president of Maine-based Hancock Lumber, stated the estate "tax has been a leading cause of green-space and forest loss in Maine, as multiple private forests have been sold in order to pay the death tax."[156] These stories add a personal dimension to the usually abstract debate about the estate tax. They are "an easy sell to most Americans even though most do not own businesses or farms."[157]

2. The Estate Tax and the Revenue It Generates.—Opponents of the estate tax generally argue the estate tax does not raise a sufficient amount of revenue.[158] The estate tax generated "less than [one percent] of federal revenue" in 2008.[159] Opponents "simply dismiss the revenue yield [of the estate tax] as insignificant."[160] In fact, opponents have said the estate tax may actually lose income.[161]

3. The Estate Tax and Investment and Savings.—Opponents of the estate tax say the tax dampens "savings and investment" by incentivizing spending to avoid paying the tax.[162] The theory is the estate tax conveys the following message to Americans:

> If you work hard, save thriftily and accumulate a fortune, you'll be taxed constantly and then see up to one-half of your savings go to your distant Uncle Sam instead of the heirs that you choose. Why not stop building up your net wealth, spend what you have and die poor?[163]

The "excessive spending" by those trying to avoid the tax divides "the wealthy from the non-wealthy" still more.[164] Additionally, opponents say the estate "tax slows economic growth, destroys jobs, and suppresses wages because it is a tax on capital and on entrepreneurship."[165] William Beach of the Heritage Foundation says "that the federal estate tax alone is responsible for the loss of

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154. *Id.*

155. *Id.* (citation omitted).

156. *Id.* at 4.

157. Matthews, *supra* note 5, at 675.

158. *See, e.g.*, *id.* at 696.

159. Michael J. Graetz, *It's Fair, and We Need the Revenue*, WALL ST. J., Sept. 20, 2010, http://online.wsj.com/article/SB10001424052748704358904575477593075638722.html.

160. Matthews, *supra* note 5, at 696.

161. *See, e.g.*, J.D. Foster, *Is the Estate Tax A (Revenue) Loser?*, TAX FOUND., Dec. 20, 1999, http://www.taxfoundation.org/news/show/187.html.

162. *See, e.g.*, DUBAY, *supra* note 134, at 2.

163. Ed McCaffery, *It's Unfair, and There's a Better Way*, WALL ST. J., Sept. 20, 2010, http://online.wsj.com/article/SB10001424052748704206804575467920711270954.html.

164. Wampler, *supra* note 23, at 537.

165. DUBAY, *supra* note 134, at 2.

between 170,000 and 250,000 potential jobs each year."[166]

Opponents say the estate tax restrains entrepreneurs themselves from investing in and creating their own businesses.[167] When an entrepreneur assesses whether to start a business, he considers all potential costs to figure his possible gain.[168] The estate tax is one such potential cost.[169] Opponents say this cost prospect "causes many entrepreneurs to refrain from starting a business," affecting economic and employment growth.[170]

Generally, opponents of the estate tax argue that the estate tax creates resource apportionment inefficiency.[171] Capital owners are induced "to shift resources from their most productive uses into less efficient (though more tax-friendly) uses."[172] These less efficient investment options decrease output.[173] Opponents of the estate tax say there would have been $850 billion more "of capital in the economy" had there been no estate tax in the previous decades.[174] Thus, the contention is "that the estate tax results in a net economic loss for the United States economy."[175]

4. The Compliance Cost of the Estate Tax.—Opponents of the estate tax cite, in their view, high compliance costs and inefficiency as a reason to eliminate the tax.[176] Opponents say the estate tax can be circumvented (at least somewhat) by employing attorneys and estate planners.[177] This is "economically wasteful."[178] A 1992 report "estimated the cost of complying with estate taxes to be [one dollar] for every dollar of revenue raised—nearly five times more costly per dollar of revenue than the notoriously complex federal income tax."[179] The report goes on to say, "[T]he ratio of excess burden to revenue of wealth transfer

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166. WILLIAM W. BEACH, THE HERITAGE FOUND., SEVEN REASONS WHY CONGRESS SHOULD REPEAL, NOT FIX, THE DEATH TAX 1 (2009), *available at* http://thf_media.s3.amazonaws.com/2009/pdf/wm2688.pdf.

167. *See* DUBAY, *supra* note 134, at 2-3.

168. *See id.* at 2.

169. *See id.* (maintaining the estate tax "raises the costs an entrepreneur will pay because it promises to confiscate a portion of his business upon his death").

170. *Id.*

171. *See, e.g.*, JOINT ECON. COMM., 105TH CONG., THE ECONOMICS OF THE ESTATE TAX at iii (Comm. Print 1998), *available at* http://www.house.gov/jec/fiscal/tx-grwth/estattax/estattax.htm (claiming, "The distortionary incentives in the estate tax result in the inefficient allocation of resources, discouraging saving and investment and lowering the after-tax return on investments.").

172. *Id.* at 18.

173. *See id.*

174. Matthews, *supra* note 5, at 694.

175. *Id.*

176. *See, e.g.*, ANDREW CHAMBERLAIN ET AL., TAX FOUND., DEATH AND TAXES: THE ECONOMICS OF THE FEDERAL ESTATE TAX 3-4, 8 (2006), *available at* http://www.taxfoundation.org/files/sr142.pdf.

177. *See id.* at 3.

178. *Id.*

179. *Id.*

taxes is among the highest of all taxes."[180] Opponents have claimed that the estate tax's "administrative costs" to the IRS are too great when balanced against the revenue generated.[181] Advertisements in newspapers have put administrative costs of the estate as high as "sixty-five cents on the dollar."[182]

5. Traditionally Disadvantaged Groups.—According to opponents of the estate tax, the tax excessively harms traditionally disadvantaged groups, like minorities, disabled persons, and women.[183] Opponents frequently cite examples where the businesses of black owners may not survive the owner's death because of the estate tax.[184] Congressional Black Caucus member Sanford Bishop said, "Employees of family businesses, many of whom are minorities, are at risk of losing their jobs because their employers are forced to pay the unfair and exorbitant death taxes levied on them . . . ."[185] President Bush communicated a story of a Hispanic "taco-shop owner" who told him "to get rid of the death tax so I can pass my business from one generation to the next."[186]

A group named the Disabled Americans for Death Tax Repeal inserted an anti-estate tax advertisement in major newspapers.[187] One opponent of the estate tax asserted that there were over two million disabled "family members of millionaires" who required their inheritances to counteract increasing medical expenses.[188] Patricia Soldano, an anti-estate tax advocate and an original member of Women Impacting Public Policy (WIPP), warned women that many of them would be saddled with the weight of estate tax preparation, as the majority of wives live longer than their husbands.[189] WIPP has come out against the estate tax and now circulates "estate tax horror stories" involving women.[190]

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180. *Id.* at 3-4.

181. Matthews, *supra* note 5, at 691.

182. *Id.* at 691-92.

183. *Id.* at 681-86.

184. *See, e.g.*, *id.* at 681-82; FAGAN, *supra* note 134, at 6. Patrick Fagan, Ph.D., an opponent of the estate tax, has cited Black Entertainment Television as a company that "will not survive its founder's death under current [estate] tax law." *Id.* Mr. Fagan goes on to report that "*The Chicago Daily Defender*, the oldest black-owned daily newspaper in the United States, was already forced into bankruptcy by the death tax in 2003." *Id.*

185. Deroy Murdock, *How Death Tax Shafts Black Americans*, HUM. EVENTS (July 6, 2006), http://www.humanevents.com/article.php?id=15927.

186. Rosie Hunter & Chuck Collins, *"Death Tax" Deception: Who's Behind the Movement to Repeal the Nation's Only Tax on Inherited Wealth?*, DOLLARS & SENSE, http://www.dollarsandsense.org/archives/2003/0103hunter.html (last visited Feb. 14, 2011).

187. Matthews, *supra* note 5, at 682-83. The text stated, "In order to live a full life, these [disabled] Americans may require medical help, nursing and living assistance far beyond that which is covered by medical insurance. Warren Buffet, Bill Gates, Sr. and George Soros believe that these people should be denied full financial help from their parents." Hunter & Collins, *supra* note 186.

188. Matthews, *supra* note 5, at 683; Hunter & Collins, *supra* note 186.

189. *See* Matthews, *supra* note 5, at 684.

190. *Id.*

6. The Morality and Double Taxation of the Estate Tax.—Estate tax opponents argue, "Death [s]hould [n]ot [b]e a [t]axable [e]vent."[191] Naming the estate tax the "death tax" solidifies this point.[192] Opponents also say that the estate tax results in double taxation.[193] President Bush said the estate tax should be repealed "because people shouldn't be taxed twice on their assets."[194] Oprah Winfrey expressed a similar sentiment on her show.[195] Robert Johnson, the creator of Black Entertainment Television, and others put an advertisement in well-known newspapers stating, "[T]he 'estate tax is unfair double taxation since taxpayers are taxed twice—once when the money is earned and again when you die.'"[196]

B. Arguments in Support of the Estate Tax

1. The Revenue of the Estate Tax and the Cost of Repeal.—Supporters of the estate tax argue that it raises an important amount of revenue.[197] In 2008 the estate tax generated around $29 billion.[198] Professor Michael Graetz argues that this amount can roughly cover three-quarters of the Department of Homeland Security's costs.[199] Professor Daniel Matthews has said the revenue of the estate and gift tax combined "is more than the government currently spends on education."[200]

Supporters contend that repeal of the estate tax is economically reckless, saying it will greatly increase future deficits.[201] One report supporting the estate

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191. Mombrun, *supra* note 6, at 77; s*ee also* Phil Kerpen, *Bury This Death-Tax Compromise: Estate-Tax Repeal Advocates Need to Liven Up the Battle*, NAT. REV. ONLINE (July 6, 2006), http://www.nationalreview.com/articles/218142/bury-death-tax-compromise/phil-kerpen (stating, "The death tax is first and foremost a moral issue. Americans do not believe that death should be a taxable event."); Bloomberg News, *Buffet Says No Estate Tax Would be a Gift to the Rich*, N.Y. TIMES, Nov. 15, 2007, http://www.nytimes.com/2007/11/15/business/15buffett.html (quoting Senator Charles Grassley of Iowa as saying, "[D]eath should not be a taxable event.").

192. *See* Mombrun, *supra* note 6, at 77.

193. *See, e.g.*, Carl Hulse, *Fate of Estate Tax Imperils Obama's Ambitions*, N.Y. TIMES, Apr. 11, 2009, http://www.nytimes.com/2009/04/12/us/politics/12hill.html (stating, "Republicans and other critics consider the estate tax to be fundamentally unfair, saying it represents double taxation since those who accumulated the assets had already paid taxes throughout their lifetime.").

194. Matthews, *supra* note 5, at 704 (citation omitted).

195. *See id.*

196. *Id.* (quoting MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH 174 (2005)).

197. *See, e.g.*, Matthews, *supra* note 5, at 696-97; Graetz, *supra* note 159.

198. Graetz, *supra* note 159.

199. *Id.*

200. Matthews, *supra* note 5, at 696. It should be noted, however, that Professor Matthews's article is somewhat dated, as it was published in 2006.

201. *See The Estate Tax: Myths and Realities*, CTR. ON BUDGET & POLICY PRIORITIES, 1 (Feb. 23, 2009), *available at* http://www.cbpp.org/files/estatetaxmyths.pdf [hereinafter *Myths and*

tax shows permanent repeal of the tax "would cost almost $1.3 trillion" during only the first decade of its absence.[202] The number is broken down into roughly $1 trillion in vanished revenue "and $277 billion in increased interest payments on the national debt."[203] Interest payments are included because repeal costs would likely be supported by borrowing more money instead of enlarged taxes or budget balancing.[204] Supporters also say abolishing the estate tax will decrease "income and gift tax revenue."[205] Specifically, "[T]he Joint Tax Committee expects repeal of the estate tax to *reduce* capital gains revenue by increasing the 'lock-in effect,' whereby people choose to hold appreciated assets until they die rather than to sell the assets while they are alive and pay the capital gains tax."[206]

2. The Estate Tax and Investment and Savings.—Supporters typically take issue with the argument that the estate tax decreases private savings and that repeal would increase private savings.[207] The Congressional Research Service has said that "virtually no empirical evidence about the effect of estate and gift taxes [on saving behavior] exists."[208] Supporters disagree with opponents' use of "dubious assumptions" when making their arguments about the estate tax and savings.[209] Supporters highlight the fact that there are many unknowns about the estate tax and savings.[210] The argument is estate tax repeal may incentivize one person to save, but another to spend.[211] For example, assume a person only wanted to leave his heirs a specific inheritance.[212] Here, "[H]e would save less if the estate tax were repealed, because he could provide the target inheritance without accumulating as much wealth (since no tax would have to be paid on the estate)."[213] Supporters also claim estate tax repeal may give heirs money to save, but it may also incentivize them to spend.[214] If an heir inherits a large sum of money, he may feel that he has more time and "less need to save for the future," thus increasing his spending now.[215]

Realities].

202. *Id.*

203. *Id.*

204. Chye-Ching Huang, *The High Cost of Estate Tax Repeal*, CTR. ON BUDGET & POLICY PRIORITIES, 2 (Jan. 28, 2009), *available at* http://www.cbpp.org/files/6-5-06tax.pdf.

205. *Id.* (emphasis omitted).

206. *Id.*

207. *See, e.g.*, Aviva Aron-Dine*, Estate Tax Repeal Would Decrease National Saving: Long-Run Impact on Economy Negligible and Possibly Negative*, CTR. ON BUDGET & POLICY PRIORITIES, 1 (June 8, 2006), *available at* http://www.cbpp.org/files/6-8-06tax.pdf; *Myths and Realities*, *supra* note 201, at 4-5.

208. Aron-Dine, *supra* note 207, at 2 (citation omitted).

209. *Id.* at 1.

210. *See, e.g.*, *id.* at 2.

211. *See id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

3. The Estate Tax and Small Businesses.—Supporters of the estate tax argue the estate tax does *not* actually hurt a substantial amount of farms and small businesses.[216] Around one point three percent of estates subjected to the estate tax "are small business or farm estates."[217]

One fact estate tax supporters cite is that the American Farm Bureau Federation indicated in 2001 it could name not one situation where the estate tax forced a farm to liquidate.[218] The year is significant here, because it "was *before* the estate tax exemption level was more than tripled and the top rate was reduced."[219] Professor Neil Harl, an economist, conducted an exhaustive search and said he never discovered a situation where the estate tax drove a farm to liquidate.[220]

The IRS has published data showing "that most estates do not have liquidity problems."[221] The study demonstrated, "[L]iquid assets are more than eight times greater in value than illiquid business and farm assets in taxable estates."[222] A Congressional Budget Office (CBO) study using numbers for 2009 showed only a small number of farm estates would have to sell some of the farm to cover the estate tax.[223] Moreover, the CBO clarified that it might have overvalued these liquidity limitations "because it was unable to include certain assets held in trusts (such as life insurance trusts) in calculating the liquid assets available to help pay the tax."[224]

4. The Estate Tax and Charitable Contributions.—Supporters of the estate tax say charitable contributions will considerably diminish if the estate tax is repealed.[225] The basis for this claim is the estate tax induces people to donate to

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216. *See, e.g.*, Matthews, *supra* note 5, at 674-81; *Myths and Realities*, *supra* note 201, at 2-3 (asserting, "The number of small, family-owned farms and businesses that owe any estate tax at all is tiny, and virtually no such farms and businesses have to be liquidated to pay the tax.").

217. *Myths and Realities*, *supra* note 201, at 2-3.

218. *See* Gillian Brunet & Chye-Ching Huang, *Unlimited Estate Tax Exemption For Farm Estates Is Unnecessary and Likely Harmful*, CTR. ON BUDGET & POLICY PRIORITIES, 2 (June 29, 2010), *available at* http://www.cbpp.org/files/6-29-10tax.pdf; *see also* Chye-Ching Huang, *Impact of Estate Tax on Small Businesses and Farms is Minimal: Almost No Small Business and Farm Estates Owe the Tax; Those That Do Only Owe Modest Amounts*, CTR. ON BUDGET & POLICY PRIORITIES, 3 (Feb. 23, 2009), *available at* http://www.cbpp.org/files/2-23-09tax.pdf; David Cay Johnston, *Talk of Lost Farms Reflects Muddle of Estate Tax Debate*, N.Y. TIMES, Apr. 8, 2001, http://www.nytimes.com/2001/04/08/us/talk-of-lost-farms-reflects-muddle-of-estate-tax-debate.html. It does seem, though, that American Farm Bureau did present one case, as apparently a widow "had to mortgage a California grape vineyard she inherited from her husband to pay taxes on his estate." Matthews, *supra* note 5, at 677-78. This event, however, took place before the "unlimited marital exclusion," which Congress introduced in 1981. *Id.* at 678.

219. Brunet & Huang, *supra* note 218, at 2.

220. *See* Matthews, *supra* note 5, at 678.

221. *Id.* at 676.

222. *Id.* at. 676-77.

223. *See* Brunet & Huang, *supra* note 218, at 2.

224. *Id.* at 2-3.

225. *See, e.g.*, Matthews, *supra* note 5, at 698-700; Aviva Aron-Dine, *Estate Tax Repeal—or*

charitable organizations "during life *and* at death."[226] This is because these contributions shrink the amount of a person's estate, thus decreasing the total estate tax.[227] One-sixth of decedents who paid the estate tax in 2001 had charitable contributions.[228] These charitable contributions are an enormous amount, clustered amongst the most affluent Americans.[229] For example, 301 decedents, possessing estates of at least $20 million, donated "$6.8 billion to charity" in 2001.[230] A 2004 CBO report that is cited to support the estate tax showed if "the estate tax [had] been repealed in 2000" then charitable donations would have dropped by $13 billion up to $25 billion.[231] The CBO also "concluded that repealing the estate tax would reduce charitable bequests by sixteen to twenty-eight percent and charitable giving during life by six percent to eleven percent."[232] Another study has had "charitable contributions" decreasing by as much as "twenty-four to forty-four percent" without the estate tax.[233]

5. The Voluntary Nature of the Estate Tax.—Supporters of the estate tax rebut the claims of opponents and say that the tax is *not* voluntary.[234] Essentially, they argue the estate tax is not easily avoided and that it can only be wholly avoided by (1) leaving "one's entire estate to one's surviving spouse"; (2) donating to charity "one's entire estate"; and (3) spending "one's wealth during one's lifetime."[235] A 2009 article by Professors Paul Caron and James Repetti presents evidence to demonstrate that the estate tax is a considerable weight to wealthy Americans.[236] The article concludes "that the estate tax is clearly not voluntary today, unless one wishes to actually reduce the real value of assets transferred to heirs."[237]

6. The Estate Tax and an Obligation "Owed to the Government."[238]— Supporters of the estate tax say the wealthiest Americans owe something to a

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Slashing the Estate Tax Rate—Would Substantially Reduce Charitable Giving, CTR. ON BUDGET & POLICY PRIORITIES, 1 (June 7, 2006), *available at* http://www.cbpp.org/files/6-7-06tax.pdf; JON M. BAKIJA & WILLIAM G. GALE, EFFECTS OF ESTATE TAX REFORM ON CHARITABLE GIVING, URBAN-BROOKINGS TAX POLICY CTR. 1 (2003), *available at* http://www.taxpolicycenter.org/UploadedPDF/310810_TaxPolicy_6.pdf.

226. Matthews, *supra* note 5, at 698 (emphasis added).

227. *Id.*

228. BAKIJA & GALE, *supra* note 225, at 1-2.

229. *See id.* at 2 (claiming, "[C]haritable bequests are heavily concentrated among the wealthiest estates.").

230. *Id.*

231. Matthews, *supra* note 5, at 698.

232. *Id.*

233. *Id.*

234. *See, e.g.*, *id.* at 702-03.

235. *Id.* at 703.

236. Paul L. Caron & James R. Repetti, *The Estate Tax Non-Gap: Why Repeal a "Voluntary" Tax?*, 20 STAN. L. & POL'Y REV. 153, 154 (2009).

237. *Id.* at 169.

238. Mombrun, *supra* note 6, at 89.

government that enabled them to be so prosperous.[239] Basically, the argument is that the wealthy receive a substantial amount of benefits from the government.[240] Supporters say the wealthy even depend on and receive more security and benefits from "the government's protection of individual property rights" than the less affluent.[241] Thus, according to at least some supporters of the estate tax, "It seems fair that people who have prospered the most in this society help to preserve it for future generations through tax revenues that derive from their estates."[242] Bill Gates, Sr. has summed up this argument nicely:

> The reason the estate tax makes so much sense is that there is a direct relationship between the net worth people have when they pass on and where they live. The government that protects their business activities, the traditions that enable them to rely on certain things happening, that's what creates capital and enables net worth to increase.[243]

7. The Compliance Costs of the Estate Tax.—Proponents of the estate tax refute the claim that compliance costs of the tax are excessively high, diminishing any positive aspect of the tax.[244] They claim that compliance costs of the estate tax are no more burdening than other taxes.[245] Some studies supporting this position show "estate tax compliance" and administrative costs are around "[seven] percent of estate tax revenues."[246] By comparison, "administrative and compliance costs equal about 14.5 percent of the revenue raised by the individual and corporate income taxes . . . ."[247] Estate tax opponents often cite a piece economist Henry Aaron co-wrote in 1992 claiming the tax has substantial compliance costs.[248] Mr. Aaron, however, now disassociates himself from this work and has come out "against estate tax repeal."[249] Finally, supporters maintain that sometimes estate tax compliance costs are exaggerated by incorporating costs in the calculation, such as preparing a will and other documents, that would be

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239. *See, e.g.*, *id.* at 89-91; *Myths and Realities*, *supra* note 201, at 5.

240. *See Myths and Realities*, *supra* note 201, at 5. These benefits include "defense, education, health care, scientific research, environmental protection, and infrastructure." *Id.*

241. *Id.*

242. *Id.*

243. *Id.* (citation omitted).

244. *See, e.g.*, Matthews, *supra* note 5, at 691-94; *Myths and Realities*, *supra* note 201, at 6; *see also* Joel Friedman & Ruth Carlitz, *Cost of Estate Tax Compliance Does Not Approach the Total Level of Estate Tax Revenue*, CTR. ON BUDGET & POLICY PRIORITIES, 1 (June 9, 2006), *available at* http://www.cbpp.org/files/6-14-05tax.pdf (asserting, "[T]here is no credible evidence that compliance costs — including the IRS' costs of administering the estate tax and the cost taxpayers bear in terms of estate planning and administering an estate when a person dies — carry a cost anywhere near the estate tax revenue yield.").

245. *See Myths and Realities*, *supra* note 201, at 6.

246. *Id.*

247. *Id.*

248. *See* Matthews, *supra* note 5, at 692-93.

249. *Id.* at 693-94.

included in estate planning even if the estate tax did not exist.[250]

8. The Estate Tax and Enormous Wealth.—Professor Mombrun has said that "it may be un-American to transfer . . . [large] fortune[s] from generation to generation and choke off opportunities for others."[251] These types of transfers could result in wealth concentration, possibly creating "poor economic performance in the long run."[252] President Theodore Roosevelt supported the estate tax by saying, "No advantage comes either to the country as a whole or to the individuals inheriting the money by permitting the transmission in their entirety of the enormous fortunes which would be affected by such a[n estate] tax . . . ."[253] Finally, supporters note repeal of the estate tax would convey roughly $1 trillion to the most affluent Americans over the next decade, further increasing the wealth disparity in the country.[254]

III. BALANCING OF THE ARGUMENTS

Weighing the arguments of whether the estate tax must be repealed or retained proves difficult. Both sides make convincing claims. The estate tax does seem to negatively affect some small business owners and farmers.[255] If they do not actually pay the tax, they surely contemplate paying it, forcing them to take actions and make decisions they otherwise would not desire.[256] However, as estate tax proponents declare and demonstrate, the number of businesses and farms that pay the tax is rather little.[257]

On many claims the sides entirely disagree. Opponents maintain that the estate tax readily incentivizes people to spend money.[258] Proponents argue that the incentives of the estate tax are much more nuanced.[259] Opponents assert that the estate tax is voluntary.[260] Proponents retort that it is actually quite involuntary.[261]

On some aspects of the estate tax, the two sides present competing evidence. For example, opponents of the estate tax display evidence showing the compliance costs of the tax make it ineffective.[262] Supporters of the tax respond with their own evidence demonstrating the compliance costs are analogous to

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250. *See Myths and Realities*, *supra* note 201, at 6.
251. Mombrun, *supra* note 6, at 91.
252. *Id.* (citation omitted).
253. Eisenstein, *supra* note 19, at 229 (citation omitted).
254. *See* Mombrun, *supra* note 6, at 92.
255. *See supra* notes 134-57 and accompanying text.
256. *See supra* notes 150-56 and accompanying text.
257. *See, e.g.*, *Myths and Realities*, *supra* note 201, at 2-3.
258. *See supra* notes 162-63 and accompanying text.
259. *See supra* notes 207-15 and accompanying text.
260. *See, e.g.*, Matthews, *supra* note 5, at 702-03.
261. *See, e.g.*, *id.*
262. *See supra* notes 176-80 and accompanying text.

other taxes.[263]

Therefore, on the whole, this is a close issue, with valid arguments presented by both groups. If the estate tax is repealed it might increase savings and investment,[264] and small business owners who pay the tax would get relief from hardships the tax may impose.[265] Yet, scrapping the estate tax will likely decrease charitable contributions,[266] and retaining it will probably generate upwards of $20 billion in revenue.[267] However, there is *one* factor *alone* that forces a defense of the estate tax at this time in the United States. This factor is the national debt.

This part of the Note explains the national debt and articulates five reasons why having a large national debt can be labeled a crisis.[268] It then ties the original purpose of death-time taxation in the United States (generation of revenue during a national emergency)[269] with the current debt situation. The Note then argues that though the estate tax has some adverse consequences, the national debt crisis compels the imposition of the estate tax.[270] In other words, the enormity of the national debt balances the debate in favor of estate tax preservation, even though the estate tax does have some negative aspects.[271]

A. The National Debt

The national debt currently stands at over $14 trillion dollars, equating to around $47,000 per American citizen.[272] In March of 2010 the CBO released its analysis of President Obama's budget proposals for fiscal year 2011.[273] The CBO concluded, "If the President's proposals were enacted, the federal government would record deficits of $1.5 trillion in 2010 and $1.3 trillion in 2011."[274] In fact, it is argued that President Obama's proposed "budget more than doubles the national debt held by the public, adding more to the debt than all previous

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263. *See supra* notes 245-47 and accompanying text.

264. *See supra* notes 162-63 and accompanying text.

265. *See supra* notes 134-57 and accompanying text.

266. *See supra* notes 225-33 and accompanying text.

267. *See, e.g.*, Graetz, *supra* note 159 (giving some data on estate tax revenue for 2008).

268. The national debt can surely cause more harms than those communicated here. This Note simply mentions some common problems that emanate from a too large national debt.

269. *See supra* note 64 and accompanying text.

270. For a Wall Street Journal article arguing that the revenue of the estate tax is one of the reasons why the estate tax should be preserved, even though the estate tax has some negative aspects, see Graetz, *supra* note 159.

271. *See, e.g.*, *id.* (commenting that the estate tax should be preserved even though it does have some negative aspects).

272. U.S. DEBT CLOCK.ORG, http://www.usdebtclock.org (last visited Oct. 20, 2011) (giving the total national debt figure as well as the national debt per person figure).

273. *See* CONG. BUDGET OFF., AN ANALYSIS OF THE PRESIDENT'S BUDGETARY PROPOSALS FOR FISCAL YEAR 2011, at 1 (2010), *available at* http://www.cbo.gov/ftpdocs/112xx/doc11280/03-24-apb.pdf.

274. *Id.* at vii.

presidents—from George Washington to George W. Bush—combined."[275] There is no argument that the debt is not substantial.

Reasonable people do disagree about the necessity of spending (that adds to the national debt) in times of a recession.[276] However, there is little doubt that a continuous and sustained massive national debt will lead to economic problems.[277] Some make a claim that a national debt "over roughly [ninety] percent of GDP" reduces economic growth.[278] The United States is not at that point now.[279] Current policies, though, are likely to take the country there by decade's end.[280] This Note now presents the problems of such a large national debt in more detail, showing fiscal changes should be made in order to deter disaster. This lays the foundation for this Note's central argument: that the estate tax must be retained *solely* as a device to reduce the national debt or at least thwart the growth of the debt.

1. Economic Growth.—Broadly speaking, a massive federal debt to GDP ratio equates to slower economic growth.[281] Interestingly, this argument holds whether the country is an "advanced econom[y]" or an "emerging" economy.[282] As mentioned above, economic growth decelerates when the national debt

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275. Michael J. Boskin, *Obama's Radicalism is Killing the Dow: A Financial Crisis is the Worst Time to Change the Foundations of American Capitalism*, WALL ST. J., Mar. 6, 2009, at A15, *available at* http://online.wsj.com/article/SB123629969453946717.html.

276. Some argue that the government must spend money with the onset of a recession. This argument is as follows: "It begins with the idea that an economic shock has left demand persistently and significantly below potential supply. As people stop spending money, businesses pull back production, and the ensuing vicious circle of falling demand and production shrinks the economy. Keynesians believe that government spending can make up this shortfall in private demand." BRIAN M. RIEDL, THE HERITAGE FOUND., WHY GOVERNMENT SPENDING DOES NOT STIMULATE ECONOMIC GROWTH: ANSWERING THE CRITICS 2 (2010), *available at* http://s3.amazonaws.com/thf_media/2010/pdf/bg_2354.pdf. However, others generally have the opposite view. *See, e.g.*, *id.* at 1 (arguing, "The idea that government spending stimulates the economy has a long history of failure" and "[t]he only way to increase economic growth is by increasing productivity and the labor supply.").

277. *See, e.g.*, *CBO Report: Debt Will Rise to 90% of GDP*, WASH. TIMES, Mar. 26, 2010, http://www.washingtontimes.com/news/2010/mar/26/cbos-2020-vision-debt-will-rise-to-90-of-gdp/; Mark Whitehouse, *Reinhart and Rogoff: Higher Debt May Stunt Economic Growth*, WALL ST. J. (Jan. 4, 2010, 3:32 PM), http://blogs.wsj.com/economics/2010/01/04/reinhart-and-rogoff-higher-debt-may-stunt-economic-growth/.

278. Carmen M. Reinhart & Kenneth S. Rogoff, *Growth in a Time of Debt*, 100 AM. ECON. REV. 573, 573 (2010).

279. *See CBO Report: Debt Will Rise to 90% of GDP*, *supra* note 277.

280. *See id.*

281. *See, e.g.*, Reinhart & Rogoff, *supra* note 278, at 573 (concluding, "[W]hereas the link between growth and debt seems relatively weak at 'normal' debt levels, median growth rates for countries with public debt over roughly [ninety] percent of GDP are about one percent lower than otherwise; average (mean) growth rates are several percent lower.").

282. *Id.*

exceeds "[ninety] percent of GDP."[283] Thus, "High levels of debt and growth don't go hand in hand."[284]

Slow economic growth can lead to countless problems. For example, in 1980s Latin America and 1990s Japan, "mounting debt led to roughly a decade of stagnant and sub-par growth."[285] Government revenue typically declines with slow economic growth.[286] The United States may generate $50 billion less in revenue in 2011 because of slow economic growth.[287] When sluggish economic growth is coupled with rising prices, stagflation can appear.[288] Stagflation happened in the 1970s in the United States, wreaking havoc on American business.[289] In 2005, Alan Greenspan, then Chairman of the Federal Reserve, opined, "[R]ising interest rates and a rising federal budget deficit, if left unchecked, 'would cause the economy to stagnate or worse.'"[290]

Generally, there is evidence of deflation when "slow economic growth" combines with "high unemployment" and sinking prices.[291] Deflation (as well as inflation) "lead[s] to withering investment environments and tough markets when it comes to finding work."[292] Finally, sluggish economic growth means a lower family income.[293] It is estimated, "By 2014, the average family's income will be . . . $1,800 lower because of the slower income growth that results when government competes with the private sector for a limited pool of savings or borrows more from abroad."[294]

2. Financial Disaster.—A mounting national debt enhances the possibility of a fiscal disaster.[295] Normally a crisis begins by the government announcing it

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283. *Id.*

284. Kevin G. Hall, *High U.S. Debt Means Slower Growth, History Suggests*, MCCLATCHY (Jan. 11, 2010), http://www.mcclatchydc.com/2010/01/11/81969/high-us-debt-means-slower-growth.html.

285. *Id.*

286. *See What the IMF's Slow-Growth Forecast Means for Bulky U.S. Fiscal Deficit*, WASH. EXAMINER, Oct. 7, 2010, http://www.washingtonexaminer.com/opinion/blogs/examiner-opinion-zone/what-the-imfs-slow-growth-forecast-means-for-bulky-us-fiscal-deficit.

287. *See id.*

288. *See Stagflation, a Powerful Cocktail of Economic Risks, Threatens Spain*, UNIVERSIA KNOWLEDGE @ WHARTON (Feb. 6, 2008), http://www.wharton.universia.net/index.cfm?fa=viewArticle&id=1463&language=english.

289. *See* Paul R. La Monica, *A Not-So-Fun 'Stag' Party?*, CNN MONEY (Apr. 21, 2005, 4:15 PM), http://money.cnn.com/2005/04/21/news/economy/stagflation/index.htm.

290. *Id.*

291. John Tamny, *Inflation vs. Deflation*, FORBES.COM (Oct. 19, 2009, 12:00 AM), http://www.forbes.com/2009/10/18/inflation-deflation-dollar-opinions-columnists-john-tamny.html.

292. *Id.*

293. *See* THE BROOKINGS INST., RESTORING FISCAL SECURITY: HOW TO BALANCE THE BUDGET I, at 9 (Alice M. Rivlin & Isabel V. Sawhill eds., 2004), *available at* http://www.brookings.edu/es/research/projects/budget/fiscalsanity/full.pdf.

294. *Id.* at i.

295. *See Economic and Budget Issue Brief: Federal Debt and the Risk of a Fiscal Crisis*,

must borrow a great sum of money.[296] "In such a crisis, investors become unwilling to finance all of a government's borrowing needs unless they are compensated with very high interest rates; as a result, the interest rates on government debt rise suddenly and sharply relative to rates of return on other assets."[297] This makes borrowing tougher, compelling the government to raise taxes and decrease spending, hoping to comfort investors.[298] The government may also "renege on the terms of its existing debt" or enlarge the quantity of money, increasing inflation.[299] In effect, there is a possibility of default if the national debt becomes too high.[300] Global leaders have contemplated this, as the Prime Minister of China "publicly questioned the safety of U.S. Treasury debt."[301]

Essentially, the United States faces the possibility of a having a fiscal crisis similar to Greece in 2009 and 2010.[302] In 2008, Greece "owed its creditors" around 110% "of the country's GDP."[303] When the world-wide recession occurred, this percentage grew, increasing the interest rate on Greek bonds by two "percentage points over rates on comparable German bonds."[304] "Investors' confidence" worsened.[305] The interest rates on Greek bonds continued to rise.[306] Eventually, the International Monetary Fund and some European countries vowed to loan Greece billions of Euros to help remedy the crisis.[307] The Greek example is simply one of many demonstrating the calamitous effect an inflated national debt can have on a country.[308]

3. National Security and Sovereignty.—An increasing and massive federal debt can negatively affect the national security and sovereignty of the United States.[309] With a national debt, America is constrained.[310] Government

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CONGR. BUDGET OFF., 4 (July 27, 2010), *available at* http://www.cbo.gov/ftpdocs/116xx/doc11659/07-27_Debt_FiscalCrisis_Brief.pdf [hereinafter *Economic and Budget Issue Brief*].

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *See, e.g.*, Alan J. Auerbach & William G. Gale, *Here Comes the Next Fiscal Crisis*, L.A. TIMES, July 8, 2009, http://articles.latimes.com/2009/jul/08/opinion/oe-auerbach8.

301. *Id.*

302. *See Economic and Budget Issue Brief*, *supra* note 295, at 6 (discussing the fiscal crisis in Greece).

303. *Id.*

304. *Id.*

305. *Id.*

306. *See id.*

307. *Id.*

308. Argentina and Ireland are other countries who have faced disasters at least in part because of an enormous national debt. *See id.* at 5-6.

309. *See, e.g.*, *Clinton: National Debt Holding America Back*, FOXNEWS.COM (Sept. 8, 2010), http://www.foxnews.com/politics/2010/09/08/clinton-calls-diplomatic-strategy-best-hope-dangerous-world; *Mullen: Debt is Top National Security Threat*, CNN U.S. (Aug. 27, 2010), http://articles.cnn.com/2010-08-27/us/debt.security.mullen_1_pentagon-budget-national-debt-

borrowing "from foreign countries," at least in part to finance spending and the national debt, "weakens America's standing and its freedom to act."[311] As Secretary of State Hillary Clinton has said, the national debt has "eroded America's ability to 'chart our own destiny.'"[312] It slowly chips away at America's sovereignty and freedom.[313] When one person is indebted to another, he loses some of his personal freedom and choices. He becomes obligated to another. He may no longer be able to afford to purchase those fifty acres of farmland that he has always dreamed about. That new truck he wanted becomes unattainable. He must restrict his budget, cutting down on spending and only purchasing that which is absolutely necessary. The interest alone sometimes becomes unbearable. A country is no different. When the United States borrows an extensive amount of money to finance its national debt, it becomes "beholden to interests outside . . . [its] borders."[314]

The national debt is causing a noteworthy amount of economic leverage to be lost.[315] America's power decreases and China's power increases.[316] This is because the Chinese fund much of the United States' debt.[317] China sells a large amount of "manufactured goods" to the United States and then loans the amassed income generated "back to the U. S."[318] All of these effects of the national debt show that "[t]he American model is being undermined before the rest of the world."[319]

4. Private Investment.—An enormous national debt can eventually "crowd out private investment."[320] Generally, "increased government borrowing tends to crowd out private investment in productive capital, because the portion of people's savings used to buy government securities is not available to fund such investment."[321] The effect is poorer production and diminished capital.[322] A decrease in capital translates into less capital inheritance "to future

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michael-mullen?_s=PM:US (quoting Joint Chiefs of Staff Chairman Admiral Michael Mullen as saying, "The most significant threat to our national security is our debt . . . ."); Rep. Ron Paul, *Government Debt—The Greatest Threat to National Security*, LEWROCKWELL.COM (Oct. 26, 2004), http://www.lewrockwell.com/paul/paul213.html.

310. *See Clinton: National Debt Holding America Back*, *supra* note 309.

311. Capital Journal, *Deficit Balloons Into National-Security Threat*, WALL ST. J., Feb. 2, 2010, http://online.wsj.com/article/SB10001424052748703422904575039173633482894.html.

312. *Clinton: National Debt Holding America Back*, *supra* note 309.

313. *See* Paul, *supra* note 309 (stating, "Debt destroys U.S. sovereignty, because the American economy now depends on the actions of foreign governments.").

314. *Id.*

315. *See Clinton: National Debt Holding America Back*, *supra* note 309.

316. *See* Capital Journal, *supra* note 311.

317. *See id.*

318. *Id.*

319. *Id.*

320. *Economic and Budget Issue Brief*, supra note 295, at 3.

321. *Id.*

322. *Id.*

generations."[323]

5. Morality.—It may be immoral to burden future generations with a massive national debt created and sustained by the current generation.[324] President Thomas Jefferson nicely made this case. He said, "[T]he principle of spending money to be paid by posterity, under the name of funding, is but swindling futurity on a large scale."[325] President Jefferson also stated, "[W]e shall all consider ourselves unauthorized to saddle posterity with our debts, and morally bound to pay them ourselves; and consequently within what may be deemed the period of a generation, or the life of the majority."[326]

B. Retaining the Estate Tax Because of the National Debt

Throughout a significant part of American history Congress used the death-time taxes only temporarily.[327] These taxes popped up during national crises and disappeared once the crises relented.[328] Their goal was to generate revenue to finance America's response to the emergency.[329] Today, if the national debt is not already a crisis, it soon will be.[330] The above analysis certainly indicates that a monstrous and unsustainable national debt is a severe problem. The United

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323. MARC LABONTE, CONG. RESEARCH SERV., THE NATIONAL DEBT: WHO BEARS ITS BURDEN? 8 (2005), *available at* http://old.concordcoalition.org/doc/crs-debt-burden.pdf.

324. *See, e.g.*, *Dems Rally Against Social Security Plan*, CNN.COM (Feb. 3, 2005, 5:54 PM), http://www.cnn.com/2005/ALLPOLITICS/02/03/dems.ss/ (quoting letter from forty-four U.S. Senators to President George W. Bush (Feb. 3, 2005)) (urging the President to not increase the national debt to pay for his social security plan and saying, "[S]hifting financial obligations of this magnitude to future generations is immoral, unacceptable, and unsustainable.").

325. *Private Banks (Quotation)*, THOMAS JEFFERSON MONTICELLO, http://wiki.monticello.org/mediawiki/index.php/Private_Banks_(Quotation)#_ref-3 (last visited Jan. 3, 2011) (citation omitted).

326. Pete V. Domenici, *Fighting the Good Fight: Washington's Quest for a Balanced Budget*, 16 ST. LOUIS U. PUB. L. REV. 17, 25 (1996) (citation omitted).

327. *See supra* note 64 and accompanying text.

328. *See supra* note 64 and accompanying text.

329. *See supra* note 64 and accompanying text.

330. *See, e.g.*, *Growing National Debt May Be Next Economic Crisis*, FOXNEWS.COM (July 3, 2009), http://www.foxnews.com/politics/2009/07/03/growing-national-debt-economic-crisis/ (quoting Peter Orszag, White House Budget Director, as saying, "We are on an utterly unsustainable fiscal course."); Gary D. Halbert, *CBO: U.S. Debt Crisis on the Horizon*, INVESTORSINSIGHT.COM (Aug. 10, 2010, 6:05 PM), http://www.investorsinsight.com/blogs/forecasts_trends/archive/2010/08/10/cbo-u-s-debt-crisis-on-the-horizon.aspx (discussing a CBO report and saying, the CBO "warns that we will face financial calamity if we do not get our massive budget deficits under control"); *Lieberman Addresses National Debt Crisis*, JOE LIEBERMAN UNITED STATES SENATOR FOR CONNECTICUT (Nov. 10, 2009), http://lieberman.senate.gov/index.cfm/news-events/speeches-op-eds/2009/11/lieberman-addresses-national-debt-crisis (quoting Senator Lieberman as saying, "Now more than ever, we must come to terms with the potentially crippling amount of debt on our nation's books.").

States is approaching a perilous size of debt,[331] and something must be done to better the situation.[332] One possible step is retaining the estate tax.[333]

The estate tax is far from a perfect tax,[334] if there is such a concept. It pops its head up during times of grief. It frightens small business owners and farmers as they contemplate paying it.[335] Yet, it raises revenue,[336] and repealing it will roughly cost upwards of $1 trillion over a decade.[337] The fact the estate tax has some negative aspects should not automatically condemn it. Instead, the negative aspects must be examined with a view toward the overall goal of the tax, while considering the net effect on the country.[338]

President George Washington's words quoted at the beginning of this Note are pertinent here.[339] "The national debt level is one of the most important public policy issues [facing the United States]."[340] A large national debt causes substantial economic problems, stifling growth and decreasing private investment.[341] It hinders national security and diminishes domestic sovereignty.[342] Continuing on this path of debt will undoubtedly change America now, but also in the future.[343]

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331. *See, e.g.*, Timothy R. Homan, *Greenspan Sees Threat U.S. Congress Will Hamper Fed (Update2)*, BLOOMBERG (Sept. 16, 2009, 9:26 AM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ajTHW2dMQ3fM (citing Alan Greenspan, as advising, "[T]he U.S. must rein in its 'very dangerous' level of [national] debt . . . .").

332. *See, e.g.*, *Skyrocketing National Debt is Dangerous*, JOHN THUNE UNITED STATES SENATOR—SOUTH DAKOTA (Aug. 28, 2009), http://thune.senate.gov/public/index.cfm/op-eds?ID=c77be52d-3cc1-4287-a180-f4b283b71925 (quoting Senator Thune as saying, "We cannot simply continue to increase the dangerous level of debt by passing it along to future generations thinking that it will magically resolve itself.").

333. *See* Frederick, *supra* note 64, at 214 (saying, "[T]he most effective way to use the estate tax may be as a mechanism to raise revenue during financial crises."); Graetz, *supra* note 159 (arguing, "[W]e need the estate tax, with our nation's financial situation more precarious than it has been in half a century . . . .").

334. *See id.* (saying, "[T]he estate tax is not ideal").

335. *See, e.g.*, DUBAY, *supra* note 134, at 8 (saying if the estate tax was repealed, "family businesses" would be "winners" as they "would no longer have to *worry* about their future survival") (emphasis added); Weber, *supra* note 145, at 118 (mentioning the estate tax and the "anxiety" it gives "small business owners").

336. *See* Graetz, *supra* note 159.

337. *See Myths and Realities*, *supra* note 201, at 1 (mentioning the cost of repeal).

338. Professor Graetz essentially does this. *See* Graetz, *supra* note 159 (saying, "Even with its shortcomings, we need the estate tax . . . .").

339. *See supra* note 1 and accompanying text.

340. Troy Adkins, *What the National Debt Means to You*, YAHOO! FINANCE (Apr. 22, 2010, 4:50 PM), http://finance.yahoo.com/news/What-The-National-Debt-Means-investopedia-4099066083.html?x=0.

341. *See supra* notes 281-84, 320-23 and accompanying text.

342. *See supra* notes 309-19 and accompanying text.

343. *See, e.g.*, LABONTE, *supra* note 323, at 8.

Examining the national debt situation in this light makes preserving the estate tax much more attractive.[344] To allow this source of revenue to disappear without it decreasing the national debt or at least hindering the growth of the national debt would most definitely be unwise.[345] The estate tax revenue should be used *exclusively* as a tool to help fix the national debt situation.[346] Therefore, the estate tax currently is justified *solely* by the fact that it raises revenue which could be used to decrease the national debt.

No tax, however, is attractive to all, and this is understandable. Relatively few, though, in actuality pay the estate tax.[347] Senator Bernie Sanders from Vermont, when debating the recent estate tax law, said the following about the estate tax: "Ninety-nine point seven percent of American families will not pay one nickel in an estate tax . . . . This is not a tax on the rich. This is a tax on the very, very, very rich."[348] Nevertheless, it is unfortunate that some have to suffer because of taxes. President Washington recognized this. But he also understood in order to pay debts, there must be revenue; and to have revenue requires taxes.[349]

It is important then to see the estate tax as a tool to help remedy the grim fiscal and economic condition of the United States.[350] Doing this leads to the conclusion that the estate tax should be preserved now, and most likely when the current estate tax law expires in two years.[351] Like Secretary Mellon did during the Great Depression,[352] the negative features of the estate tax ought to be temporarily overlooked because of the giant national debt.[353] The calamitous

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344. *See, e.g.*, *Myths and Realities*, *supra* note 201, at 2 (saying, "Given the nation's serious long-term fiscal problems, repealing or further weakening the estate tax would not be fiscally responsible.").

345. *See, e.g.*, *id.* at 1 (saying, "Repealing the estate tax, or weakening it . . . would add trillions of dollars to future deficits and be fiscally irresponsible.").

346. This Note in no way intends to argue preservation of the estate tax would fix the debt problem. Keeping the estate tax is only a small part of an overall and massive plan that is needed to remedy the dire debt situation.

347. *See* Sullivan, *supra* note 17 (discussing how not many individuals will pay the new estate tax).

348. David M. Herszenhorn & Carl Hulse, *Estate Tax Cutoff Draws Special Fire in Congress*, N.Y. TIMES, Dec. 10, 2010, at A14, *available at* http://www.nytimes.com/2010/12/11/us/politics/11cong.html?_r=2&ref=politics.

349. *See supra* note 1 and accompanying text.

350. *See, e.g.*, *supra* note 333.

351. The main reason why the estate tax almost certainly will need to be kept past the two year timeline is because of the completely dire long-term national debt situation. *See generally* NICOLA MOORE, THE HERITAGE FOUND., U.S. LONG-TERM DEBT SITUATION IS ONE OF THE WORLD'S WORST (2010), *available at* http://thf_media.s3.amazonaws.com/2010/pdf/wm2972.pdf.

352. *See supra* notes 115-16 and accompanying text.

353. Again, Professor Graetz makes a somewhat similar argument in that he generally says that the United States needs the estate tax, even though the current estate tax does have some negative aspects. *See* Graetz, *supra* note 159.

state of the national debt demands this.[354]

IV. REFRAMING THE ESTATE TAX DEBATE

In 2010, Gallup and *USA Today* conducted a public opinion poll asking about "[p]erceived [t]hreats" towards the United States.[355] Forty percent of those questioned deemed the national debt an "[e]xtremely serious" threat, with another thirty-nine percent calling the national debt a "[v]ery serious" threat.[356] By comparison, only twenty-six percent named maintaining soldiers in Afghanistan/Iraq an "[e]xtremely serious" threat, while forty percent titled this a "[v]ery serious" threat.[357] These numbers are not unique to this one poll.[358] In a Fox News Poll, seventy-eight percent said, "[T]he national debt is so large it is hurting the future of the country . . . ."[359] This number involved "majorities of Democrats (64 percent), Republicans (92 percent) and independents (85 percent)."[360] Further, seventy-four percent replied they "worry about 'leaving the country worse off for future generations.'"[361] And, though double the amount of those questioned in a Bloomberg National Poll said they believe unemployment is a bigger issue than government debt and spending, the latter category received more than twice as many votes as either healthcare or the War in Afghanistan.[362] All of these polls demonstrate Americans are quite troubled by the growing national debt.[363]

Those supporting the estate tax should use these opinions about the national debt to garner support for the estate tax. In other words, the estate tax issue should be reframed with an eye towards the national debt. Supporters should link the massive and bourgeoning national debt with the estate tax and its revenue, highlighting how the tax revenue should exclusively be used to either reduce the national debt, or offset increased spending. The cost of repeal, perhaps upwards

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354. *See, e.g.*, *supra* notes 344-46 and accompanying text.

355. Lydia Saad, *Federal Debt, Terrorism Considered Top Threats to U.S.*, GALLUP (June 4, 2010), http://www.gallup.com/poll/139385/federal-debt-terrorism-considered-top-threats.aspx.

356. *Id.*

357. *Id.*

358. *See, e.g.*, Dana Blanton, *Fox News Poll: National Debt Hurting the Country*, FOXNEWS.COM (Oct. 1, 2009), http://www.foxnews.com/story/0,2933,558700,00.html.

359. *Id.*

360. *Id.*

361. *Id.*

362. *See Problems and Priorities*, POLLINGREPORT.COM, http://www.pollingreport.com/prioriti.htm (last visited Jan. 5, 2011).

363. *See, e.g.*, Bruce Bartlett, *How Much Does the National Debt Matter?*, FORBES.COM (Mar. 5, 2010, 12:01 AM), http://www.forbes.com/2010/03/04/consumer-debt-deficit-budget-opinions-columnists-bruce-bartlett.html (contending, "It's a rare public opinion poll these days that doesn't show the national debt near the top of Americans' concerns. Huge budget deficits as far as the eye can see are a source of great worry . . . .").

of $1 trillion,[364] should be emphasized. In the words of Professor Graetz, "We [n]eed the [r]evenue."[365]

This reframing is pertinent, considering a recent public opinion poll. A Gallup and *USA Today* poll question from November 2010 asked Americans to comment on whether certain accomplishments were crucial for the "lame duck" Congress to achieve.[366] Fifty-six percent said, "[p]assing legislation that would keep the estate tax from increasing significantly next year" was "[v]ery important."[367] Twenty-six percent of those surveyed believed this action to be "[s]omewhat important."[368] Only seventeen percent said this accomplishment was "[n]ot too/[n]ot at all important."[369] Further, a survey conducted by the Tax Foundation in part asked about the fairness of different taxes.[370] Those surveyed deemed the estate tax as the most unfair federal tax.[371] Generally, "Americans don't like the estate tax."[372]

Therefore, in order to have broad public support, it would likely be effective for proponents of the estate tax to tie estate tax revenue and the national debt together. Proponents might try communicating the goal of the estate tax proposed in this Note (to reduce the national debt and/or offset spending increases). If this is done, estate tax support may quite possibly increase. One survey has indicated, "[G]iven a set [of] limited choices for balancing the national budget, [Americans] would prefer to see taxes increased for the wealthy."[373] This fact bodes quite well for estate tax proponents, as generally only the wealthiest Americans pay the estate tax.[374]

CONCLUSION

The United States is on the brink of a crisis, if not already mired in one.[375]

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364. *See Myths and Realities*, *supra* note 201, at 1.

365. *See* Graetz, *supra* note 159.

366. Jeffrey M. Jones, *In U.S., Tax Issues Rank as Top Priority for Lame-Duck Congress*, GALLUP (Nov. 23, 2010), http://www.gallup.com/poll/144899/tax-issues-rank-top-priority-lame-duck-congress.aspx.

367. *Id.*

368. *Id.*

369. *Id.*

370. *See Poll: Tax Code Complex, Federal Income Taxes "Too High,"* TAX FOUND. (Mar. 22, 2007), http://www.taxfoundation.org/news/show/2281.html.

371. *Id.*

372. Karlyn Bowman, *The Estate Tax Lives? Dies?*, THE AMERICAN (Dec. 1, 2010, 9:52 AM), http://blog.american.com/?p=23258.

373. Stephanie Condon, *Poll: To Reduce Deficit, Most Americans Say Tax the Rich More*, CBS NEWS (Jan. 3, 2011, 3:08 PM), http://www.cbsnews.com/8301-503544_162-20027036-503544.html.

374. *See, e.g.*, Herszenhorn & Hulse, *supra* note 348 (quoting Senator Bernie Sanders as generally saying only the most affluent Americans pay the estate tax).

375. *See supra* notes 330-31 and accompanying text.

The escalating national debt will likely cause a myriad of problems.[376] Economic growth is likely to slow,[377] and private investment will likely decrease.[378] The national debt exposes the United States to the possibility of a fiscal catastrophe,[379] and it negatively affects national security and sovereignty.[380] Our country's leaders should take steps to stave off disaster.[381] One initial action should be retaining the estate tax. Using the estate tax during a national crisis to generate revenue is consistent with much of historical death-time taxation in the United States.[382]

Therefore, the estate tax should be retained, at least for the foreseeable future, and be used *solely* to reduce the national debt or offset increased spending. This policy likely would help avert the harmful effects of a monstrous federal debt. Estate tax preservation will not by itself fix the national debt problem. Nevertheless, it is one step in the right direction and deserves to be considered when leaders debate how to fix America's debt crisis.

376. *See supra* notes 281-326 and accompanying text.
377. *See supra* notes 281-94 and accompanying text.
378. *See supra* notes 320-23 and accompanying text.
379. *See supra* notes 295-308 and accompanying text.
380. *See supra* notes 309-19 and accompanying text.
381. *See supra* note 332 and accompanying text.
382. *See supra* notes 327-33 and accompanying text.

UNITED STATES V. ALVAREZ: WHAT RESTRICTIONS DOES THE FIRST AMENDMENT IMPOSE ON LAWMAKERS WHO WISH TO REGULATE FALSE FACTUAL SPEECH?

JARED PAUL HALLER*

INTRODUCTION

Xavier Alvarez was a newly elected member of the Three Valleys Municipal Water District Board of Directors when, during his introductory remarks at a public meeting in July of 2007, Alvarez boasted that he was a retired Marine and a recipient of the Medal of Honor.[1] Both claims were false.[2] Two months later, the United States Attorney for the Central District of California filed a single-count information alleging that Alvarez violated the Stolen Valor Act, codified at 18 U.S.C. § 704.[3] The following year, Alvarez entered into a conditional plea agreement in which he pleaded guilty to one count of falsely claiming to have received the Congressional Medal of Honor, in violation of 18 U.S.C. § 704(b).[4]

When Congress first set out to criminalize false claims of military honors, it began by forbidding only the unauthorized replication of medals. "As originally enacted, [§] 704 criminalized the wearing, manufacture, or sale of unauthorized military awards. Congress, however, [subsequently] felt that this statute was inadequate to protect 'the reputation and meaning of military decorations and medals.'"[5] Passage of the Stolen Valor Act in 2006 broadened the scope of § 704 to punish pure speech. The Stolen Valor Act makes it a crime to falsely claim—either verbally or in writing—receipt of congressionally authorized military honors and service decorations.[6] As counsel for one defendant pointed out:

> The law does not require proof of fraud, or that the false statement was made in order to obtain some benefit. It does not require any showing

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1. Opening Brief for Petitioner-Appellant at 3, United States v. Alvarez, 617 F.3d 1198 (9th Cir. 2010) [hereinafter Opening Brief], *reh'g denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, 2011 WL 3626544 (U.S. Oct. 17, 2011) (No. 11-210).

2. *Id.* at 3-4.

3. *Id.* at 3.

4. *Id.* Alvarez was fined $5,000 and his sentence included 416 hours of community service at a V.A. hospital. *Divided 9th Circuit Strikes Down Stolen Valor Act*, FIRST AMENDMENT CENTER (Aug. 18, 2010), http://www.firstamendmentcenter.com/news.aspx?id=23278 [hereinafter *Divided 9th Circuit*].

5. United States v. Strandlof, 746 F. Supp. 2d 1183, 1185 (D. Colo. 2010) (citing 18 U.S.C. § 704(a) and quoting Pub. L. No. 109-437 § 2, 120 Stat. 3266, 3266 (2006)).

6. 18 U.S.C. § 704(b) (2000 & Supp. 2011).

> that the statement caused reliance or was material. It does not even require that [the defendant] knew . . . his statement was false. It simply criminalizes the incorrect claim to certain military decorations in every context.[7]

False claims are punishable by a fine and/or a period of imprisonment not to exceed six months.[8] Lying about being awarded top honors—such as the Medal of Honor—triggers an enhanced penalty of up to one year in prison.[9]

As part of his plea agreement, Alvarez expressly reserved the right to challenge the constitutionality of the Stolen Valor Act.[10] A three-judge panel from the Ninth Circuit Court of Appeals heard Alvarez's challenge.[11] In a split decision that was released on August 17, 2010, the Ninth Circuit struck down Alvarez's criminal conviction and ruled that the Stolen Valor Act was unconstitutional because it violated the Free Speech Clause of the First Amendment.[12]

Writing for the Ninth Circuit panel majority, Judge Milan D. Smith, Jr. stressed that the Stolen Valor Act "imposes a *criminal* penalty of up to a year of imprisonment, plus a fine, for the *mere utterance or writing* of what is, or may be perceived as, a false statement of fact—without anything more."[13] After espousing concern that the statute would set "a precedent whereby the government may proscribe speech solely because it is a lie," the majority held that the government must show a compelling need in order to regulate false factual speech[14]—just the same as it must for other content-based speech restrictions[15]—"unless the statute is narrowly crafted to target the type of false factual speech previously held proscribable because it is not protected by the First Amendment."[16]

Stated somewhat differently, the Ninth Circuit held that restrictions on false factual speech are subject to strict scrutiny—unless the speech at issue falls into certain discrete categories that the Supreme Court previously held lie outside the

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7. Motion to Dismiss Information at 2, United States v. Strandlof, 746 F. Supp. 2d 1183 (D. Colo. 2010) (No. 09-cr-00497-REB).

8. 18 U.S.C. § 704(b).

9. *Id.* § 704(c)-(d).

10. Opening Brief, *supra* note 1, at 3.

11. *Divided 9th Circuit*, *supra* note 4.

12. United States v. Alvarez, 617 F.3d 1198, 1218 (9th Cir. 2010), *reh'g denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, 2011 WL 3626544 (U.S. Oct. 17, 2011) (No. 11-210).

13. *Id.* at 1200. Judge Thomas Nelson was the other member of the majority. Judge Jay Bybee authored a dissenting opinion.

14. *Id.*

15. A content-based restriction is "[a] restraint on the substance of a particular type of speech. This type of restriction is presumptively invalid but can survive a constitutional challenge if it is based on a compelling state interest and its measures are narrowly drawn to accomplish that end." BLACK'S LAW DICTIONARY: POCKET EDITION 141 (3d ed. 2006).

16. *Alvarez*, 617 F.3d at 1200.

protection afforded by the First Amendment.[17] Those proscribable categories of speech include obscenity, fighting words,[18] true threats,[19] fraud, and illegal incitement to violence.[20] If a content-based restriction falls into one of the discrete categories, then the First Amendment analysis normally need proceed no further.[21] If, on the other hand, a content-based restriction is outside the recognized exceptions to the Free Speech Clause, then the law in question is subject to First Amendment analysis.[22]

The threshold issue in *United States v. Alvarez* is whether false statements of fact are a constitutionally unprotected category of speech like obscenity, fighting words, true threats, fraud, and illegal incitement to violence. The *Alvarez* majority held that the Stolen Valor Act is not completely beyond the purview of the First Amendment;[23] and for the time being, that position is clearly ascendant.[24]

That said, the counterargument—namely, that the First Amendment does not protect false statements made knowingly and intentionally—is still worthy of thoughtful consideration.[25] One reason to examine the counterargument is the

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17. *Id.*

18. Fighting words are those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (footnote omitted). "Such words are presumed to play little or no part in the exposition of ideas and are, therefore, deemed to be a type of speech that falls outside the First Amendment umbrella." ALLAN IDES & CHRISTOPHER N. MAY, CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS 356 (5th ed. 2010) (citing *Chaplinsky*, 315 U.S. at 572).

19. True threats are "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Virginia v. Black, 538 U.S. 343, 359 (2003) (citing Watts v. United States, 394 U.S. 705, 708 (1969); R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 388 (1992)).

20. JEROME A. BARRON & C. THOMAS DIENES, FIRST AMENDMENT LAW 20 (4th ed. 2008).

21. *Id.* at 20-21.

22. *Id.*

23. United States v. Alvarez, 617 F.3d 1198, 1200 (9th Cir. 2010), *reh'g denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, 2011 WL 3626544 (U.S. Oct. 17, 2011) (No. 11-210).

24. The Ninth Circuit is the only United States Court of Appeals that has ruled on the matter of whether the Stolen Valor Act is constitutional. *United States v. Strandlof* is now on appeal before the Tenth Circuit. David L. Hudson, Jr., *Federal Judge Upholds Stolen Valor Act*, FIRST AMENDMENT CENTER (Jan. 6, 2011), http://www.firstamendmentcenter.com/analysis.aspx?id=23756. The district court in that case ruled that the law violated the First Amendment. United States v. Strandlof, 746 F. Supp. 2d 1183 (D. Colo. 2010). Additionally, on January 3, 2011, Judge James P. Jones of the United States District Court for the Western District of Virginia upheld the Stolen Valor Act. Hudson, *supra*. He rejected a motion to quash an indictment challenged on First Amendment grounds. *Id.*

25. On its face, the Stolen Valor Act appears to apply even in instances where the accused does not make his false statement knowingly (i.e., in cases where the accused does not recognize that his statement is false). Such an interpretation makes the law more difficult to defend. In upholding the Stolen Valor Act, Judge Jones of the United States District Court for the Western District of Virginia interpreted the law as applying only to "outright lies" made knowingly with

simple fact that the Supreme Court has made a series of conflicting comments concerning whether false statements, by themselves, lack constitutional protection.[26] This fact is illustrated in Part I's discussion of seven decades of Court precedent. Another reason to examine the counterargument is because the Supreme Court recently announced that it has chosen to weigh in on the question of what restrictions the First Amendment imposes on lawmakers who wish to regulate false factual speech.[27]

Part I of this Note further describes the Stolen Valor Act and the discrete categories of content-based speech restrictions that the Supreme Court has previously held are constitutionally unprotected. Part II examines the arguments for and against adding deliberate false statements of fact to that list of categories entirely outside the protection of the First Amendment. Because the majority in *Alvarez* found that the Stolen Valor Act is subject to First Amendment analysis, this Note also surveys the arguments for and against finding both a compelling government interest and narrow tailoring. Part III briefly examines the consequences that might result if a different court were to hold that the Stolen Valor Act does not violate the First Amendment.

I. THE STOLEN VALOR ACT AND CONTENT-BASED SPEECH RESTRICTIONS OUTSIDE THE PROTECTION AFFORDED BY THE FIRST AMENDMENT

The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech . . . ."[28] Despite this seemingly absolute proscription, "it is well understood that the right of free speech is not absolute at all times and under all circumstances."[29] The Supreme Court has asserted on numerous occasions that "as a general matter, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'"[30] However, it has long been said that the framers of the Constitution recognized from the beginning that there would be exceptions: "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem."[31] These "historic and traditional categories long

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intent to deceive. Hudson, *supra* note 24.

26. Lyle Denniston, *Another Test of First Amendment*, SCOTUS BLOG (Oct. 17, 2011, 12:29 PM), http://www.scotusblog.com/?p=129780.

27. The federal government's petition for certiorari was granted by the Supreme Court on October 17, 2011 (just as this Note was going to press). *See id.* At the time this Note was published, oral arguments in the case of *United States v. Alvarez* (docket 11-210) had not yet been scheduled. *Id.*

28. U.S. CONST. amend. I.

29. Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942) (footnote omitted).

30. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983) (quoting Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972)).

31. *Chaplinsky*, 315 U.S. at 571-72.

familiar to the bar"[32] include obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.[33]

Content-based speech restrictions are arguably the most serious type of infringement on the freedom of speech because of the concern that the force of law is being used to distort the public debate, either by suppressing those messages perceived as objectionable, or by favoring some particular messages.[34] Consequently, the first principle of the Free Speech Clause is that government restrictions must be content neutral; the general rule is that content-based speech restrictions are ordinarily subjected to strict scrutiny.[35] The various exceptions to that rule—the "historic and traditional categories long familiar to the bar"[36]—are justified in large measure on the ground that the types of content being regulated are merely examples of so-called "low value speech."[37] The central issue in *Alvarez* is whether false statements of fact are likewise of such little value that they fall outside the protection afforded by the First Amendment. It should be noted that there can be little doubt as to whether the Stolen Valor Act is a content-based speech restriction. The Act provides that:

> Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned . . . or both.[38]

The Act is clearly a content-based regulation of speech since the statute takes aim at words that are about a specific subject—namely, the awarding of military medals.[39]

On its face, the Stolen Valor Act does not require any awareness on the part of the transgressor that he has made a statement that is false.[40] The statute criminalizes any false claim of military honor, regardless of whether the defendant knew that his statement was false.[41] Admittedly, a real-life scenario in

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32. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991).

33. United States v. Stevens, 130 S. Ct. 1577, 1584 (2010) (citations omitted).

34. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) (explaining that regulations unrelated to the content of speech "pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue").

35. *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000).

36. *See supra* note 32 and accompanying text.

37. *See* BARRON & DIENES, *supra* note 20, at 83.

38. 18 U.S.C. § 704(b) (2000 & Supp. 2011).

39. United States v. Alvarez, 617 F.3d 1198, 1202 (9th Cir. 2010), *reh'g denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, 2011 WL 3626544 (U.S. Oct. 17, 2011) (No. 11-210).

40. *See* 18 U.S.C. § 704(b).

41. *See id.*

which a defendant is not cognizant of the fact that he is making a false claim appears unlikely. It is not impossible to construct a hypothetical scenario in which a defendant violates the Stolen Valor Act without knowledge that his claim is false. However, a case such as that is far more likely to appear on a law school exam than in a federal courthouse. In the real world, the vast majority of people can be expected to know whether they were awarded a military medal or decoration. As the government argued in the *Alvarez* case, "The Act would not tend to reach the innocent because it prohibits only falsity by a person about himself . . . ."[42]

A. The Dissent's Position

In cases such as *Alvarez*, the defendant's false statements of fact are made knowingly and intentionally. They are, in other words, deliberate lies. If one accepts the notion that "the right to freedom of speech, press, assembly, and petition [are] vital to the process of discovering *truth*, through exposure to all the facts, open discussion, and testing of opinions,"[43] then it is not hard to see why some might argue that "restraining deceptive communication furthers rather than disrupts enlightenment of the populace—by promoting *truth*."[44]

In their defense of the Stolen Valor Act, the government and Judge Bybee (from here on, collectively referred to as the dissent) rely on this reasoning and a long line of Supreme Court cases supporting it.[45] *Chaplinsky v. New Hampshire*[46]—the 1942 decision that spawned the "fighting words" doctrine—may be said to be the first case in this line, as it is usually the first case that is cited when the Supreme Court notes that some categories of speech are not protected by the First Amendment.[47] The *Chaplinsky* court observed that:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no

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42. Government's Answering Brief at 14, United States v. Alvarez, 617 F.3d 1198 (9th Cir. 2010) [hereinafter Gov't Answering Brief], *reh'g denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, 2011 WL 3626544 (U.S. Oct. 17, 2011) (No. 11-210).

43. Thomas I. Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PA. L. REV. 737, 740 (1977) (emphasis added).

44. Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1108 (2006) (discussing MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT (1984)) (emphasis added).

45. Gov't Answering Brief, *supra* note 42; *see also Alvarez*, 617 F.3d at 1218-41 (Bybee, J., dissenting).

46. 315 U.S. 568 (1942).

47. *See, e.g.*, United States v. Stevens, 130 S. Ct. 1577, 1584 (2010).

> essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[48]

In short, the *Chaplinsky* court held that inflammatory speech which might incite a violent response does not promote a meaningful discourse or contribute to the search for truth.[49] However, "[w]hile *Chaplinsky* [compiled] a variety of categories of expression that did not merit First Amendment protection, more recent Supreme Court decisions have taken a more flexible—and more imprecise—approach to categorical analysis."[50]

Chaplinsky is the traditional starting point. It is not, however, the case that does the heavy lifting when the Supreme Court wants to make the point that some categories of speech are unprotected under the First Amendment. That case is *Gertz v. Robert Welch, Inc*.[51] *Gertz* is helpful because it explains the dichotomy between the First Amendment's absolute protection of ideas and the lesser protection afforded to false factual speech.[52] It also clearly states that false factual speech is "not worthy of constitutional protection."[53]

Writing for the majority, Justice Lewis Powell's declaration of "common ground" begins with the unqualified assertion that "[u]nder the First Amendment there is no such thing as a false idea."[54] Powell explains that "[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[55] In the view of the *Gertz* court, false ideas and false statements are very different.[56] Unlike false ideas—which may contribute to the enlightenment function of free expression—false statements of fact have no constitutional value.[57] Quoting *Chaplinsky*, as well as the famous libel case *New York Times Co. v. Sullivan*,[58] Powell states:

> Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is

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48. *Chaplinsky*, 315 U.S. at 572-73 (footnotes omitted).

49. *Id.* at 573.

50. BARRON & DIENES, *supra* note 20, at 20.

51. 418 U.S. 323 (1974).

52. *See* Varat, *supra* note 44, at 1110-11.

53. United States v. Alvarez, 617 F.3d 1198 (9th Cir. 2010) (quoting *Gertz*, 418 U.S. at 340), *reh'g denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, 2011 WL 3626544 (U.S. Oct. 17, 2011) (No. 11-210).

54. *Gertz*, 418 U.S. at 339.

55. *Id.* at 339-40 (footnote omitted).

56. *Id.* at 340.

57. *Id.*

58. 376 U.S. 254, 270 (1964).

clearly outweighed by the social interest in order and morality."[59]

The distinction between false facts and false ideas is not one that is overlooked by the dissent.[60] As the prosecutors in the *Alvarez* case were quick to point out, the Stolen Valor Act targets the former rather than the latter.[61] And while the government is willing to concede that the First Amendment protects false speech in some instances, it steadfastly maintains that the First Amendment does not protect false speech in instances where such speech is made with knowledge of falsity or reckless disregard of the truth.[62] Not surprisingly, both the government and Judge Bybee cite *Gertz* and its progeny in support of their contention that "false factual speech may be proscribed without constitutional problem-or even any constitutional scrutiny."[63]

The dissent's position is not that false factual speech falls neatly into one of the categorical exceptions explicitly named in *Chaplinsky*—"the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words."[64] Rather, the dissent argues that "false speech need not fall into any of the foregoing categories in order to lack protection."[65] The dissent does not argue that the defendant's false claim in *Alvarez*—that he was awarded a military medal—is obscene or libelous.[66] Instead, the argument is that false factual speech, like obscene or libelous speech, has no constitutional value because it does not contribute to the enlightenment function of free expression.[67] In other words, in the dissent's view, false factual speech is another discrete category of speech that the Supreme Court has already held is entirely outside the protection afforded by the First Amendment. The government states this plainly in its response brief,[68] and Judge Bybee offers a more expansive argument for it in his dissenting opinion.[69]

Judge Bybee argues that defamation is a subset of a larger unprotected category—namely, false statements of fact.[70] Judge Bybee writes: "The Supreme Court has regularly repeated, both inside and outside of the defamation context, that false statements of fact are valueless and generally not within the protection

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59. *Gertz*, 418 U.S. at 340 (citations omitted).

60. United States v. Alvarez, 617 F.3d 1198, 1220 (9th Cir. 2010) (Bybee, J., dissenting), *reh'g denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, 2011 WL 3626544 (U.S. Oct. 17, 2011) (No. 11-210).

61. Gov't Answering Brief, *supra* note 42, at 5-6.

62. *Id.*

63. *Alvarez*, 617 F.3d at 1203.

64. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (footnote omitted).

65. *See* Gov't Answering Brief, *supra* note 42, at 12.

66. *See Alvarez*, 617 F.3d at 1221-23 (Bybee, J., dissenting).

67. *Id.*

68. Gov't Answering Brief, *supra* note 42, at 8-12.

69. *Alvarez*, 617 F.3d at 1221-23 (Bybee, J., dissenting).

70. *Id.* at 1220.

of the First Amendment."[71] Thus, in the dissent's view, "the general rule is that false statements of fact are not protected by the First Amendment."[72] The matter is made somewhat more complicated, however, by the dissent's concession that there is an exception to Judge Bybee's "general rule."

Judge Bybee acknowledges that some false factual speech is protected by the First Amendment.[73] In its "landmark" decision in *Sullivan*, the Supreme Court held that the First Amendment protects the publication of false statements concerning public officials—where such statements are not knowingly false or made in reckless disregard of the truth.[74] Writing for the Court, Justice William Brennan explained that the First Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[75]

The reason for this relatively high hurdle is concern about the potential chilling effect of defamation lawsuits.[76] The *Sullivan* Court feared that the press might exercise excessive self-censorship out of concern that public officials would sue to recover damages for false statements.[77] With this in mind, the Court in *Sullivan* held that the First Amendment protects some false factual speech in order not to stifle constitutionally valuable speech that is deemed necessary for democratic governance.[78] In the Court's words, the First Amendment represents "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[79]

The dissent concedes that there is a need to protect untrue statements that are not knowingly false, but it draws the line at deliberate false statements of fact noting that defamatory statements made with actual malice are not protected under the First Amendment.[80] Therefore, in the dissent's view, the general rule is that false statements of fact are not protected by the First Amendment, but there

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71. *Id.* (citation omitted).

72. *Id.* (footnote omitted).

73. *Id.* at 1220-21.

74. *See* IDES & MAY, *supra* note 18, at 358-59. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), was a famous libel case which established the actual malice standard. Under this standard, a public official can recover damages only if he proves by clear and convincing evidence that a false statement was made with knowledge that it was: (1) false or (2) made with reckless disregard of whether the statement was true or false. *Id.* at 279-80. *Sullivan* is an important decision supporting the freedom of the press.

75. *Sullivan*, 376 U.S. at 279-80.

76. IDES & MAY, *supra* note 18, at 358-59.

77. *Sullivan*, 376 U.S. at 271-72, 279.

78. *See* IDES & MAY, *supra* note 18, at 358-59.

79. *Sullivan*, 376 U.S. at 270.

80. United States v. Alvarez, 617 F.3d 1198, 1220-24 (9th Cir. 2010) (Bybee, J., dissenting), *reh'g denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, 2011 WL 3626544 (U.S. Oct. 17, 2011) (No. 11-210).

is an exception for some false factual speech that is not deliberate.[81]

Here again, the *Gertz* Court provides helpful language. Writing for the majority, Justice Powell explained that "[a]lthough the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate."[82] Because punishment of error "runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press,"[83] it is sometimes necessary to protect false factual speech in order to give the freedoms of speech and press the "breathing space that they need to survive."[84] Justice Powell summarized the argument in this way: "The First Amendment requires that we protect some falsehood in order to protect speech that matters."[85]

To recap, in the dissent's view, the general rule should be that false statements of fact are not protected by the First Amendment, but there is an exception for some false factual speech—namely, that which is not deliberate.[86] Interestingly, Judge Bybee also acknowledged that there is an exception to the exception.[87] Though it has no direct bearing on the *Alvarez* case, Judge Bybee made room in his dissent for "an important caveat" to the rule that deliberate false statements of fact are not protected by the First Amendment[88]:

> The [Supreme] Court has recognized that some statements that, literally read, are technically "knowingly false" may be "no more than rhetorical hyperbole" . . . such as satire or fiction. In *Hustler* [*Magazine, Inc. v. Falwell*], the Supreme Court held that the First Amendment protects defamatory statements about a public figure "that could not reasonably have been interpreted as stating actual facts about the public figure involved."[89]

Judge Bybee explains that the rationale for protecting deliberate false statements of facts that take the form of satire (and its equivalent) is very much like the basis for protecting some false factual speech without actual malice.[90] Quoting *Milkovich v. Lorain Journal Co.*, Judge Bybee asserts that such protection "provides assurance that public debate will not suffer for lack of imaginative expression or the rhetorical hyperbole which has traditionally added much to the discourse of our Nation."[91] Judge Bybee concludes:

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81. *Id.* at 1218-21.
82. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).
83. *Id.*
84. *Sullivan*, 376 U.S. at 272 (citation omitted).
85. *Gertz*, 418 U.S. at 341.
86. *Alvarez*, 617 F.3d at 1218-21 (Bybee, J., dissenting).
87. *Id.* at 1222.
88. *Id.*
89. *Id.* (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988)).
90. *Id.* at 1222-23.
91. *Id.* at 1222 (quoting Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990)).

> In a sense, the Court has established that "lies" made in the context of satire and imaginative expression are not really lies at all and perhaps not really even statements of "fact," because no reasonable listener could actually believe them to be stating actual facts . . . .
> . . . In sum, the Supreme Court's jurisprudence on false statements of fact involves a general rule with certain exceptions and exceptions-to-exceptions.[92]

Judge Bybee could have characterized his "exceptions-to-exceptions" as definitional details offered merely to clarify the general rule. His decision to approach the matter differently was fortuitous in at least once sense, however. This is the case because the "exceptions-to-exceptions" framework puts the differences between the court's opinion and Judge Bybee's dissenting opinion in more stark relief. As the next section makes clear, the majority and the dissent have very different ideas about what the general rule should be when assessing the extent to which the First Amendment imposes restrictions on lawmakers who wish to regulate false factual speech.

B. The Majority's Position

The "marketplace of ideas" is a concept widely used as a rationale for freedom of speech.[93] The concept draws on both the legitimacy and the explanatory power of liberal economic theory. The underlying premise is the belief that free market theories are as applicable to ideas as they are to traditional economic categories like capital and labor.[94] As explained by Justice Oliver Wendell Holmes, the marketplace of ideas theory is the notion that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[95] According to this theory, authoritatively imposed truth is inferior to truth discovered through competition with falsehood.[96]

To at least some degree, both the dissent and the majority pay homage to the notion of a marketplace of ideas. The dissent pays tribute to the marketplace of ideas theory in an implicit fashion—through its discussion of the *Sullivan* decision, and through its related explanation of the potential chilling effect of defamation lawsuits.[97] The Ninth Circuit panel majority, on the other hand, goes

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92. *Id.*

93. *See*, *e.g.*, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 896 (2010); Turner Broad. Sys., Inc. v. FCC, 507 U.S. 1301, 1301 (1993); FCC v. Pacifica Found., 438 U.S. 726, 745-46 (1978).

94. *See* JEROME A. BARRON & C. THOMAS DIENES, CONSTITUTIONAL LAW 40 (8th ed. 2010) ("Government must not prevent the free exchange of ideas in the marketplace. Free competition is the best test of an idea's worth.").

95. Abrams v. United States, 250 U.S. 616, 630 (1919) (dissenting opinion).

96. Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 6 (1984).

97. *See supra* text accompanying notes 76-81.

further—explicitly endorsing the marketplace of ideas theory, and even going so far as to quote John Stuart Mill's treatise *On Liberty* (via a footnote in the Supreme Court's decision in *Sullivan*).[98]

The British philosopher John Stuart Mill is strongly associated with the right to freedom of speech—that is, the freedom to communicate ideas and opinions without government intervention.[99] He is also widely recognized as a leading advocate of the marketplace of ideas theory.[100] In his writings, Mill was highly critical of government censorship.[101] He theorized that repression inhibits the truth in one of three ways:

> [F]irst, if the censored opinion contains truth, its silencing will lessen the chance of our discovering that truth; secondly, if the conflicting opinions each contain part of the truth, the clash between them is the only method of discovering the contribution of each toward the whole of the truth; finally, even if the censored view is wholly false and the upheld opinion wholly true, challenging the accepted opinion must be allowed if people are to hold that accepted view as something other than dogma and prejudice; if they do not, its meaning will be lost or enfeebled.[102]

Consequently, Mill was of the opinion that "those who considered clashes among competing views unnecessary wrongly presumed the infallibility of their own opinions."[103] Along these same lines, the majority in *Alvarez* wrote, "the right to speak and write whatever one chooses—including, to some degree, worthless, offensive, and demonstrable untruths—without cowering in fear of a powerful government is, in our view, an essential component of the protection afforded by the First Amendment."[104]

Mindful of the valuable role that the marketplace of ideas plays in democratic society, the majority in *Alvarez* surveyed the Supreme Court's decisions concerning the First Amendment and reached a very different conclusion from the dissent.[105] Where the dissent found support for a general rule that false factual speech is constitutionally unprotected—with "certain exceptions and exceptions-

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98. United States v. Alvarez, 617 F.3d 1198, 1214 (9th Cir. 2010) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 n.19 (1964) (quoting JOHN STUART MILL, ON LIBERTY 15 (Oxford: Blackwell, 1947))), *reh'g denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, 2011 WL 3626544 (U.S. Oct. 17, 2011) (No. 11-210).

99. Kent Greenawalt, *Books*, 69 COLUM. L. REV. 920, 920 (1969) (reviewing AMERICAN CIVIL LIBERTIES UNION, THE PRICE OF LIBERTY: PERSPECTIVES ON CIVIL LIBERTIES BY MEMBERS OF THE ACLU (Alan Reitman ed., 1968)).

100. *Id.*

101. *See generally*, JOHN STUART MILL, ON LIBERTY 91-113 (Currin V. Shields ed., Liberal Arts Press, Inc. 1956).

102. Ingber, *supra* note 96, at 6.

103. *Id.*

104. United States v. Alvarez, 617 F.3d 1198, 1205 (9th Cir. 2010), *reh'g denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, 2011 WL 3626544 (U.S. Oct. 17, 2011) (No. 11-210).

105. *Id.* at 1200.

to-exceptions"[106]—the majority found support for its holding that "[t]he fundamental rule is found in the First Amendment itself."[107] In the majority's view, all government restrictions on speech are initially presumed to be covered by the First Amendment.

> In other words, we presumptively protect *all* speech against government interference, leaving it to the government to demonstrate, either through a well-crafted statute or case-specific application, the historical basis for or a compelling need to remove some speech from protection (in this case, for some reason other than the mere fact that it is a lie).[108]

Both sides think that the other has confused the general rule with the exception. As the majority explains it: "The dissent accuses us of confusing rules with exceptions, but with due respect, we disagree with [Judge Bybee's] postulate that we must commence our constitutional analysis with the understanding that all false factual speech is unprotected."[109] Instead, the majority holds that all speech—including knowingly false statements—is presumptively protected by the First Amendment in order to ensure that the marketplace of ideas continues to function properly.

Like the dissent, the majority finds that *Gertz* is a helpful case from which to draw material for a discussion of the exceptions to a general rule; but not surprisingly, the majority disagrees with the dissent's interpretation of the case.[110] While the dissent relies on *Gertz* and its progeny to support the absolute proposition that "the erroneous statement of fact is not worthy of constitutional protection," the majority views the holding more narrowly.[111] The majority asserts that "*Gertz*'s statement that false factual speech is unprotected, considered in isolation, omits discussion of essential constitutional qualifications on that proposition."[112]

To support its interpretation, the majority emphasizes the conditional language in *Gertz* rather than the unqualified phrases that the dissent quotes in isolation.[113] The majority points out that the *Gertz* court recognized the inevitability of false factual speech and the need to protect it, not for its own sake, but rather in order to "protect speech that matters."[114] Just as importantly, the majority stresses that "[t]o distinguish between the falsehood related to a matter of public concern that is protected and that which is unprotected, *Gertz* held that there must be an element of fault."[115] Judge Smith writes:

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106. *Id.* at 1222 (Bybee, J., dissenting).
107. *Id.* at 1205 (majority opinion).
108. *Id.*
109. *Id.*
110. *Id.* at 1202-03.
111. *Id.* at 1202.
112. *Id.* at 1203.
113. *Id.* at 1206.
114. *Id.* (citation omitted).
115. *Id.* (citation omitted).

> The First Amendment is concerned with preventing punishment of innocent mistakes because the prospect of punishment for such speech "runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press." Thus, many false factual statements are shielded by the First Amendment *even under Gertz*, regardless of how valueless they may be.[116]

In addition to *Gertz*—and the long line of cases that followed it—the majority also relies heavily on *Sullivan* and its progeny to buttress its conclusion that in many circumstances the First Amendment does in fact protect false statements.[117] In *Sullivan*, the Court held that actual malice (i.e., proof of the requisite state of mind) must be proven even in instances where officials seek to recover damages for statements of fact that are shown to be false.[118] In other words, the "actual malice standard" established in *Sullivan* provides a qualified privilege to publish.[119] Likewise, in *Garrison v. Louisiana*, the Court held that "calculated falsehood" must be proven.[120] In these and other cases involving defamation, false statements of fact alone are not enough to deny constitutional protection. Instead, there must be "additional elements that serve to narrow what speech may be punished."[121]

All of the cases that the dissent cites to support its inverted general rule are defamation or commercial-speech cases.[122] But as the majority interprets these decisions, they are not evidence that false statements are simply outside the protection of the First Amendment. Rather, the majority points out that in all of these cases, false factual speech may be proscribed only when other essential constitutional qualifications are also present.[123] In other words, all of the Court's past assertions that false factual speech is unprotected relied on the existence of a false statement *plus* an established and proven injury "either to the reputation or other protected interests of the victim or to the rights of consumers to be free from false or deceptive advertising."[124]

It is important to understand that in the majority's view, the cases cited by the dissent are not anomalous. None of the constitutionally unprotected categories of speech (e.g., fighting words, true threats, fraud, and illegal incitement to violence) involve false statements proscribed merely because they are false,

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116. *Id.* at 1207 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974)).

117. *Id.* at 1206-07.

118. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

119. *See* IDES & MAY, *supra* note 18, at 358-59.

120. Garrison v. Louisiana, 379 U.S. 64, 75 (1964).

121. Rickhoff v. Willing, No. SA-10-CA-140-XR, 2010 U.S. Dist. LEXIS 96557, at *18 (W.D. Tex. Sept. 14, 2010), *summary judgment granted in part, case dismissed by* 2010 U.S. Dist. LEXIS 109607 (W.D. Tex. Oct. 14, 2010).

122. *Alvarez*, 617 F.3d at 1218-22 (Bybee, J., dissenting).

123. *Rickhoff*, 2010 U.S. Dist. LEXIS 96557, at *17-19 & n.4.

124. Answer Brief at 24, United States v. Strandlof, No. 09-cr-00497-REB (10th Cir. argued May 12, 2011) [hereinafter Answer Brief].

without anything more. Rather, in the majority's own words: "All previous circumstances in which lies have been found proscribable involve not just knowing falsity, but [also] additional elements that serve to narrow what speech may be punished."[125]

Having shown that the long line of cases cited by the dissent do not stand for the simple rule that false factual speech is constitutionally unprotected, the majority next considers whether the Stolen Valor Act fits into the defamation category.[126] To be fair, the dissent never claims that the Stolen Valor Act belongs in the defamation category, and both sides recognize that the category is one of a list that the Supreme Court previously articulated lie outside the protection afforded by the First Amendment.[127] The majority proceeds with this analysis, therefore, simply for pedagogical reasons.

Analyzing the Stolen Valor Act in light of Court precedent, the majority quickly concludes that the Act does not fit this particular exception because, as previously noted, § 704(b) "does not require a malicious violation, nor does it contain any other requirement or element of scienter (collectively, a scienter requirement)."[128] The majority goes on to note, however, that a scienter requirement would not be enough to save the statute.[129] This is the case because the Stolen Valor Act also includes no requirement that the accused speech or writing proximately damage the reputation and meaning of a decoration or medal.[130]

The majority concludes that all of the Court's previous defamation decisions demonstrate that in the absence of the requisite state of mind on the part of speaker/writer, government restrictions on speech are initially presumed to be covered by the First Amendment. As the majority points out:

> Even laws about perjury or fraudulent administrative filings—arguably the purest regulations of false statements of fact—require at a minimum that the misrepresentation be willful, material, and uttered under circumstances in which the misrepresentation is designed to cause an injury, either to the proper functioning of government (when one is under an affirmative obligation of honesty) or to the government's or a private person's economic interests.[131]

Applying this logic to the Stolen Valor Act, the Ninth Circuit panel majority holds that because the Act does not require proof of fraud or evidence that the

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125. *Alvarez*, 617 F.3d at 1200.

126. *Id.*

127. *See id.* at 1202 (majority opinion), 1220 (Bybee, J., dissenting).

128. *Id.* at 1209. Scienter is defined as "[a] degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission; the fact of an act's having been done knowingly, esp. as a ground for civil damages or criminal punishment." BLACK'S LAW DICTIONARY: POCKET EDITION, *supra* note 15, at 635.

129. *Alvarez*, 617 F.3d at 1209.

130. *Id.*

131. *Id.* at 1211 (citation omitted).

false claim was made in order to obtain some benefit, "its reach is not limited to the very narrow category of unprotected speech identified in [*Sullivan*] and its progeny."[132] To be clear, the dissent posits that defamation is but a subset of a larger unprotected category—namely, false statements of fact—but all of its arguments are drawn from defamation or commercial-speech cases.[133]

In the end, while both sides pay homage to the notion of a marketplace of ideas—only the majority is willing to follow the concept to its logical conclusion. Where the majority views the right to speak and write knowingly false statements as an essential component of the protection afforded by the First Amendment, the dissent believes the inverse is true. It asserts that the "protection of lies is not necessary to promote an uninhibited marketplace of ideas."[134] More specifically, in the dissent's view, the Stolen Valor Act does not inhibit open debate on matters essential to the people's ability to actively participate in governing.[135] This is the case from the dissent's perspective because "protection of false claims . . . is not necessary to a free press, to free political expression, or otherwise to promote the marketplace of ideas."[136] From the dissent's perspective, falsely claiming receipt of military honors can never be equated with an attempt to persuade others to adopt a viewpoint on a matter of public concern.[137]

At first blush, the dissent's arguments sound persuasive. Knowingly false statements do not engender a lot of sympathy until one remembers Mill's warning that repression inhibits the truth even if the censored view is wholly false. Because falsehood spurs the search for truth, knowingly false statements are presumptively protected by the First Amendment in order to ensure that the marketplace of ideas continues to function properly.

II. THE APPLICATION OF STRICT SCRUTINY

The threshold question in *Alvarez* was whether the First Amendment protects false factual speech, and if so, why. "Having concluded that the [Stolen Valor] Act does not fit within the traditional categories of speech excluded from First Amendment protection," the Ninth Circuit panel majority held that that Act's constitutionality had to be measured by an ad hoc balancing test to determine whether the government could prove that the law was narrowly tailored to achieve a compelling state interest.[138] The strict scrutiny test should be familiar to most readers, but for the uninitiated it should suffice to say that the test has both an ends and a means component.[139] The end that the restriction seeks to

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132. Rickert v. Wash. Pub. Disclosure Comm'n, 168 P.3d 826, 829 (Wash. 2007).

133. *Alvarez*, 617 F.3d at 1218-22 (Bybee, J., dissenting).

134. Gov't Answering Brief, *supra* note 42, at 11.

135. *See id.*

136. *Id.* at 12.

137. *See id.* at 11-12.

138. *Alvarez*, 617 F.3d at 1215-16.

139. *See* WILLIAM BURNHAM, INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES 345 (4th ed. 2006); IDES & MAY, *supra* note 18, at 83-86.

bring about must be very important, and the means that the government chooses to employ to achieve that end "must be one that involves the least possible burden."[140]

A. Compelling Government Interest

In this case, there is some question as to what exactly the Stolen Valor Act was designed to achieve. As originally enacted, the law criminalized the wearing, manufacture, or sale of unauthorized military awards, but not false verbal and written claims of having received military honors.[141] Passage of the Stolen Valor Act in 2006 broadened the scope of § 704 to punish pure speech—that is to say, § 704 now punishes false statements merely because they are false, without anything more.[142] According to the legislative history, Congress felt that the original language was inadequate to protect "the reputation and meaning of military decorations and medals."[143] Congress made the following findings:

> (1) Fraudulent claims surrounding the receipt of the Medal of Honor, the distinguished-service cross, the Navy cross, the Air Force cross, the Purple Heart, and other decorations and medals awarded by the President or the Armed Forces of the United States damage the reputation and meaning of such decorations and medals.
>
> (2) Federal law enforcement officers have limited ability to prosecute fraudulent claims of receipt of military decorations and medals.
>
> (3) Legislative action is necessary to permit law enforcement officers to protect the reputation and meaning of military decorations and medals.[144]

According to the record, the clear purpose of the Stolen Valor Act is the protection of the reputation and meaning of the military decorations and medals themselves, rather than the reputation of the men and women upon whom these honors are bestowed. The issue has been framed somewhat differently, however, by some proponents of the Stolen Valor Act. In the Government's Answering Brief, U.S. Attorney Thomas P. O'Brian argues that the Stolen Valor Act serves the state's interest in "safeguarding the honor of the nation's war heroes."[145] In the government's words:

> War heroes make up an important part of our national treasure. Protecting that treasure includes protecting the worth and value of the nation's highest military award. That award, given to a handful of men and one woman over the years, is a national symbol of heroism and self-

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140. BURNHAM, *supra* note 139, at 345.

141. United States v. Strandlof, 746 F. Supp. 2d 1183, 1185 (D. Colo. 2010).

142. *See id.* at 1185-86.

143. Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2, 120 Stat. 3266, 3266 (2006).

144. *Id.*

145. Gov't Answering Brief, *supra* note 42, at 6.

> sacrifice for the common good and the values upon which this country was founded. Congress can and should protect its meaning and worth from erosion by false claims.[146]

It would seem, therefore, that while the reputation and meaning of the decorations and medals are ostensibly the subject of the Stolen Valor Act, it can be argued that protecting them is but an indirect means of shielding the men and women who have been awarded these honors. John Salazar, a Democratic Congressman from Colorado and the bill's author, made essentially the same point when he defended the Stolen Valor Act following the Ninth Circuit's *Alvarez* decision in 2010. Representative Salazar was quoted as saying: "You go out and you sacrifice and you earn these awards because of heroism. If somebody comes and tries to act like a hero, it kind of degrades what they did. It's defending their honor, as I see it."[147]

Protecting the reputation and meaning of the decorations and medals may have a second derivative purpose as well. According to the government, the stated interest is also a factor motivating the performance of the men and women of the U.S. Armed Forces.[148] In other words, "[p]rotection of the meaning and worth of military honors . . . is important to encourage heroism."[149] In summary, the stated goal of protecting "the reputation and meaning of military decorations and medals" is thought to serve two purposes derived from the stated goal. First, protection of the reputation and meaning of the decorations and medals upholds the honor of the heroes who earn them. Second, protection of the meaning and worth of military honors encourages heroism.

While they disagreed on many things, the three judges of the panel that heard *Alvarez* agreed that the Stolen Valor Act serves a compelling state interest.[150] Writing for the majority, Judge Smith concedes: "Especially at a time in which our nation is engaged in the longest war in its history, Congress certainly has an interest, even a compelling interest, in preserving the integrity of its system of honoring our military men and women for their service and, at times, their sacrifice."[151] This has not stopped others, however, from questioning whether the government can prove the existence of a compelling state interest. UCLA law professor Eugene Volokh has questioned whether the false claims covered by the Stolen Valor Act harm genuine heroes—and by extension, he questions whether protecting the meaning and worth of military honors is necessary to encourage

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146. *Id.* at 18-19.

147. Dan Elliott, *Law Punishing Fake Heroes May Go to Supreme Court*, ABC NEWS (Oct. 11, 2010), http://abcnews.go.com/US/wireStory?id=11847574 [hereinafter, *Law Punishing Fake Heroes*].

148. United States v. Alvarez, 617 F.3d 1198, 1216 (9th Cir. 2010), *reh'g denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, 2011 WL 3626544 (U.S. Oct. 17, 2011) (No. 11-210); Gov't Answering Brief, *supra* note 42, at 19.

149. Gov't Answering Brief, *supra* note 42, at 19.

150. *Alvarez*, 617 F.3d at 1216.

151. *Id.*

heroism.[152] In an interview with the Associated Press, Volokh said: "I don't think that anybody's going to stop being a brave soldier, or be a less brave soldier, or have less respect for a brave soldier, because some number of people lie about it."[153]

Judge Robert E. Blackburn of the United States District Court for the District of Colorado reached a similar conclusion in a case that is currently before the Tenth Circuit Court of Appeals.[154] In the case of *United States v. Strandlof*, the defendant was charged with falsely claiming to have been awarded a Purple Heart and a Silver Star.[155] In reply to an amicus brief of the Rutherford Institute, the government filed a response suggesting that "soldiers may well lose incentive to risk their lives" in order to earn medals such as those falsely claimed by the defendant.[156] In his order granting the defendant's motion to dismiss the information, Judge Blackburn wrote:

> This wholly unsubstantiated assertion is, frankly, shocking, and indeed, unintentionally insulting to the profound sacrifices of military personnel the Stolen Valor Act purports to honor. To suggest that the battlefield heroism of our servicemen and women is motivated in any way, let alone in a compelling way, by considerations of whether a medal may be awarded simply defies my comprehension. Indeed, the qualities of character that the medals recognize specifically refute the notion that any such motivation is at play. I find it incredible to suggest that, in the heat of battle, our servicemen and women stop to consider whether they will be awarded a medal before deciding how to respond to an emerging crisis. That is antithetical to the nature of their training, and of their characters.[157]

Judge Blackburn also rejected the stated goal of protecting the reputation and meaning of military decorations and medals.[158] Blackburn noted that courts have struck down restrictions on speech where the compelling state interest proffered by the government is merely symbolic:

> Clearly, the Act is intended to preserve the symbolic significance of military medals, but the question whether such an interest is compelling is not at all as manifest as the government's *ipse dixit* implies. Although the analogy is not completely on all fours, I find the Supreme Court's

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152. Nathan Koppel, *Legal Battle Over Stolen Valor Act Heats Up*, WALL ST. J. L. BLOG (Oct. 11, 2010, 11:13 AM), http://blogs.wsj.com/law/2010/10/11/legal-battle-over-stolen-valor-act-heats-up/ [hereinafter *Legal Battle Over Stolen Valor Act*].

153. *Id.*

154. *See* United States v. Strandlof, 746 F. Supp. 2d 1183 (D. Colo. 2010).

155. *Id.* at 1185.

156. *Id.* at 1190.

157. *Id.* at 1190-91.

158. *Id.* at 1189-91.

decision in *Texas v. Johnson* (S. Ct. 1989), highly instructive.[159]

In *Johnson*, the defendant was convicted under a state statute for burning a U.S. flag.[160] Texas phrased its interest as "preserving the flag as a symbol of nationhood and national unity."[161] Because the Supreme Court found that Texas's interest was directly related to the expressive element of the restricted conduct (i.e., because the harm Texas sought to combat "blossom[s] only when a person's treatment of the flag communicates some message"),[162] the Court concluded that the law was content-based, and subsequently, that the State's interest was insufficiently compelling to withstand First Amendment scrutiny.[163] Likewise, the Stolen Valor Act is a content-based speech restriction with the express purpose of preserving symbolic meaning; and in Judge Blackburn's view, it too is insufficiently compelling to withstand First Amendment scrutiny.[164]

B. Narrow Tailoring

The trial court's decision in *Strandlof* shows that the federal government's efforts to prove the existence of a compelling state interest are not invulnerable to attack—even after the Ninth Circuit's concession on this point. But that is not the real problem for proponents of the Stolen Valor Act. As is so often the case when strict scrutiny is applied, the more serious hurdle is the test for narrow tailoring.

It can be difficult to prove that there is not a less restrictive alternative that serves the government's purpose. Often, the best the government's lawyers can hope to do is undermine the alternatives that are suggested by the other side. In the Government's Answering Brief in the *Alvarez* case, U.S. Attorney O'Brian simply asserts that the Stolen Valor Act is "as narrowly tailored as possible to prevent false statements about military medals and decorations."[165] Judge Bybee, for his part, all but ignores the matter after concluding that the Stolen Valor Act is not subject to First Amendment protection.[166]

Several arguments support the assertion that the Stolen Valor Act is not narrowly tailored. Writing for the majority, Judge Smith returns to the concept of a marketplace of ideas as he notes that "Alvarez's lie, deliberate and despicable as it may have been, did not escape notice and correction in the marketplace."[167] Thus, one arguably less restrictive alternative to this particular content-based

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159. *Id.* at 1189 (citation omitted).

160. Texas v. Johnson, 491 U.S. 397, 399 (1989).

161. *Id.* at 413.

162. *Id.* at 410.

163. *Strandlof*, 746 F. Supp. 2d at 1189.

164. *Id.* at 1190-92.

165. Gov't Answering Brief, *supra* note 42, at 21.

166. United States v. Alvarez, 617 F.3d 1198, 1218-41 (9th Cir. 2010) (Bybee, J., dissenting), *reh'g denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, 2011 WL 3626544 (U.S. Oct. 17, 2011) (No. 11-210).

167. *Id.* at 1216 (majority opinion).

speech restriction is simply "more speech."[168]

Ultimately, the majority finds that the Stolen Valor Act is not narrowly tailored for precisely this reason.[169] It concludes that the law's intended purpose—namely, to honor and motivate the members of the armed services—can be accomplished without restricting speech. Judge Smith writes:

> [I]t is speculative at best to conclude that criminally-punishing lies about having received Congressionally-awarded medals is the best and only way to ensure the integrity of such medals . . . . The greatest damage done seems to be to the reputations of the liars themselves . . . . Further, even assuming that there is general harm to the meaning of military honors caused by numerous imposters, other means exist to achieve the interest of stopping such fraud, such as by using *more* speech, or redrafting the Act to target actual impersonation or fraud.[170]

A strong case can be made for the notion that there was little need for the Stolen Valor Act in an environment where false claims of military honors already drew the ire of the general public. This much is evident from the media coverage that these cases generate. Professor Jonathan Turley, a constitutional scholar at George Washington University School of Law, asserts that the Stolen Valor Act "answers no real legal need and was written merely for political reasons."[171] Turley states that: "There's already a considerable deterrent for people who are engaged in this kind of conduct."[172] If public attention is generally enough to curb the sort of behavior where fraud charges are not available, then the restrictions in § 704(b) are not the least restrictive alternative that might serve the government's purpose.

A related, but perhaps simpler argument, is to suggest that the previous version of § 704 (i.e., the existing law before the passage of the Stolen Valor Act) was already adequate to protect the reputation and meaning of military decorations and medals. This argument dovetails nicely with the fact that existing fraud laws cover cases where false claims are made in order to obtain some benefit. As Professor Turley points out, "Many of [the] people [who make false claims] are charged with fraud."[173] With this in mind, it is not hard to see why some constitutional scholars contend that the Stolen Valor Act is simply redundant.

It is also worth noting that in enacting the Stolen Valor Act, Congress overlooked a twenty-first century solution to the problem it sought to address. Julie Hilden, a First Amendment scholar and media legal commentator, has suggested another less restrictive alternative that serves the government's purpose. She argues that the Stolen Valor Act is not narrowly tailored because

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168. *Id.*
169. *Id.* at 1216-17.
170. *Id.* at 1217 (citation omitted).
171. *Legal Battle Over Stolen Valor Act*, *supra* note 152.
172. *Id.*
173. *Id.*

a "consolidated, searchable online government database of the names and ages of all true U.S. medal recipients" could support private efforts to establish the truth[174]:

> Until the government creates such a database . . . it is hard to credit its claim that it needs to invoke the criminal law to punish medal liars. The government should have started with the easy online-database solution, and then asked for the [Stolen Valor Act] solution only if it proved truly necessary.[175]

Hilden's proposal is not just less restrictive, it is also relatively simple to implement. After all, the government knows who has been awarded military honors, and it already publishes a list of those awarded the Congressional Medal of Honor.[176]

At a time when the number of Internet-enabled smartphones and tablet computers is growing rapidly,[177] the appeal of Hilden's proposal is readily apparent. If an online database of medal winners was available, skeptical audience members at future public meetings could verify statements like the ones Alvarez made on the spot. The availability and use of such a database would presumably deter most people from improperly appropriating society's accolades by way of deceit; but even where the underserving were not initially deterred, the ire of the general public would serve the government's purpose equally as well as, if not more effectively than, the Stolen Valor Act.

The fact that it is so easy to identify less restrictive alternatives to the Stolen Valor Act lends credibility to Turley's assertion that the statute was written primarily for political reasons. As defense counsel in a similar case explained, "[i]n all likelihood, the Act was actually born of Congress's disgust at people publicly claiming entitlement to military medals they have not earned."[178] What Congress and supporters of the Stolen Valor Act appear to have overlooked, however, is the fact that the Supreme Court has unequivocally held that "[t]he fact that society may find speech offensive is not a sufficient reason for

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174. Julie Hilden, *Litigating the Stolen Valor Act: Do False Claims of Heroism in Battle Harm Genuine Heroes?*, FINDLAW LEGAL COMMENTARY (Nov. 22, 2010), http://writ.news.findlaw.com/hilden/20101122.html.

175. *Id.*

176. *See* U.S. Army Ctr. of Military History, *Medal of Honor*, U.S. ARMY (Dec. 3, 2010), http://www.history.army.mil/moh.html.

177. *See* Paul Miller, Combined Sales of Smartphones and Tablets to Surpass the Humble PC in 18 Months, Says IDC, ENGADGET (Dec. 7, 2010, 12:44 PM), http://www.engadget.com/2010/12/07/combined-sales-of-smartphones-and-tablets-to-surpass-the-humble/; Lance Whitney, *Cell Phone, Smartphone Sales Surge*, CNET NEWS (May 19, 2010, 10:01 AM), http://news.cnet.com/8301-1035_3-20005359-94.html.

178. Answer Brief, *supra* note 124 at 60.

suppressing it."[179] Recent decisions like *United States v. Stevens*[180] and *Snyder v. Phelps*[181] suggest that the current Supreme Court is not likely to reverse direction in the event that the *Alvarez* decision reaches the Court, but a discussion of this case would not be complete without briefly considering the potential consequences of a decision to uphold the Stolen Valor Act.

III. CONSEQUENCES AND CONCLUSIONS

The Ninth Circuit's decision in *Alvarez* has already garnered the attention of constitutional scholars.[182] It has also attracted a fair amount of attention in the popular media[183]—including a significant amount of negative commentary.[184] The fact that the *Alvarez* decision generated consternation in some quarters should come as no surprise. After all, the same circumstances that gave rise to the Stolen Valor Act in 2005 (i.e., shooting wars abroad and cultural wars at home)[185] are still largely a factor in 2011.

Arguably, what should concern society most is not the fate of the Stolen Valor Act, but rather, as the Ninth Circuit panel majority warned, the precedent the Act might establish were it to survive the current constitutional challenge. The majority cautions:

> [I]f the Act is constitutional under the analysis proffered by Judge Bybee, then there would be no constitutional bar to criminalizing lying about one's height, weight, age, or financial status on Match.com or Facebook, or falsely representing to one's mother that one does not smoke, drink alcoholic beverages, is a virgin, or has not exceeded the speed limit while driving on the freeway. The sad fact is, most people lie about some aspects of their lives from time to time. Perhaps, in context, many of these lies are within the government's legitimate reach. But the government cannot decide that some lies may not be told without a reviewing court's undertaking a thoughtful analysis of the constitutional

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179. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988); *see also* R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 396 (1992) (striking down regulation on "reprehensible" speech).

180. 130 S. Ct. 1577 (2010) (holding that a statute criminalizing the sale of videos depicting animal cruelty violates the First Amendment).

181. 131 S. Ct. 1207 (2011) (concluding that funeral protestors' statements were in this case entitled to First Amendment protection).

182. *See, e.g.*, Hilden, *supra* note 174; Ken Paulson, *The Truth about Lies and the First Amendment*, FIRST AMENDMENT CTR. (Sept. 9, 2010), http://www.firstamendmentcenter.com/commentary.aspx?id=23355.

183. *See, e.g.*, *Law Punishing Fake Heroes*, *supra* note 147; *Legal Battle Over Stolen Valor Act*, *supra* note 152.

184. *Id.*

185. At the time the author was writing this Note, the United States had combat troops fighting wars in Afghanistan and Iraq; the two houses of Congress were bitterly divided; the Tea Party movement was in ascendance within the Republican Party.

concerns raised by such government interference with speech.[186]

As this excerpt makes clear, the ways in which people lie—and the matters about which they lie—are virtually endless. Xavier Alvarez is a perfect example. His imagination was not limited to stories about military heroics. In his imagination, Alvarez also had careers as a hockey player for the Detroit Redwings and as a police officer.[187] He also claimed to have "been secretly married to a Mexican starlet."[188]

One would be hard-pressed to find a less sympathetic character on which to base a case against the Stolen Valor Act. Alvarez's behavior is so disturbing that it is almost comical. The majority describes his penchant for deliberate lies this way: "Alvarez makes a hobby of lying about himself to make people think he is 'a psycho from the mental ward with Rambo stories.'"[189] In short, Alvarez can be safely labeled a pathological liar.

Because of the extreme nature of Alvarez's lies, it is possible to feel detached both from Alvarez's predicament, and the legal implications should the Ninth Circuit's decision be overturned. Many people are guilty of embellishing at a high school reunion, exaggerating during a conversation at a bar, or posting misleading statements and photos online.[190] But because most of those people do not see themselves as having crossed the same line that Alvarez transgressed, they likely assume that government intervention in their lives/lies is extremely unlikely. Such complacency is unwise. Past efforts to enact content-based speech restrictions illustrate that, even when such laws are targeted at minority expression, in aggregate, they can potentially impinge on the breathing space that is essential to the open debate that makes possible the participatory democracy shared by all. In short, content-based speech restrictions should be everybody's concern.

With regard to the *Alvarez* case, a decision to uphold the Stolen Valor Act would significantly enlarge the scope of the categorical exceptions to the First Amendment.[191] Were the Supreme Court to reverse the Ninth Circuit Court of Appeals decision, the states and the federal government would arguably be free to restrict most false factual speech simply because a statement of fact was known to be untrue. As Julie Hilden (the First Amendment scholar whose idea for an online database was discussed earlier) warns, "[t]he specter of the government's defining what is truth and what is falsity in marginal cases . . . is a troubling one."[192]

To understand what is potentially at stake in this case, it is helpful to consider

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186. United States v. Alvarez, 617 F.3d 1198, 1200 (9th Cir. 2010), *reh'g denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, 2011 WL 3626544 (U.S. Oct. 17, 2011) (No. 11-210).

187. *Id.* at 1201.

188. *Id.*

189. *Id.*

190. *See* Paulson, *supra* note 182.

191. *Alvarez*, 617 F.3d at 1200.

192. Hilden, *supra* note 174.

a scenario that Hilden theorizes could easily pass from fiction to reality in the not too distant future.[193] Hilden imagines a world where the Supreme Court decides that the Stolen Valor Act is constitutional.[194] In the wake of such a decision, she envisions a statute similar to the Stolen Valor Act being "applied to public school teachers who are deemed to be telling 'lies' about American history."[195] Admittedly, a statute that criminalized lies of this sort could not be enacted without at least some popular support. But while support for such a measure might sound far-fetched to some, the enactment of a law such as this one would not likely come as a surprise to anyone living in one of the communities where efforts by school districts to revise textbooks have already become the central issue in school board elections.[196]

John Stuart Mill understood that the problem is not necessarily which statements are proscribed, but rather the fact that government censorship inhibits the truth regardless of whether the censored statement contains the truth, part of the truth, or none of the truth whatsoever.[197] Because falsehood spurs the search for truth, the First Amendment imposes restrictions on lawmakers who seek to regulate false factual speech. Knowingly false statements are presumptively protected by the First Amendment; and in this case, the analysis required by the First Amendment reveals that the Stolen Valor Act cannot survive strict scrutiny. This is true because the government may not have demonstrated a compelling interest, and because the Act is clearly not narrowly tailored. The decision in this case stands for the principle that the regulation of false factual speech is constitutionally suspect when that regulation has the consequence of deterring other types of speech as well. All speech, including false statements, must be presumptively protected by the First Amendment if society wants to ensure that the marketplace of ideas continues to function properly.

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193. *Id.*

194. *Id.*

195. *Id.*

196. For an account of the Texas State Board of Education's recent efforts to change the curriculum in that state, see Russell Shorto, *How Christian Were the Founders*, N.Y. TIMES MAG., Feb. 11, 2010, at MM32, *available at* http://www.russellshorto.com/article/christian-founders-2.

197. *See generally*, MILL, *supra* note 101, at 91-113.

LESSONS FROM *AVENT*: JUDICIAL ESTOPPEL AND DUTY TO DEFEND IN NO-INJURY PRODUCT LIABILITY LITIGATION

LARA LANGENECKERT*

INTRODUCTION

Consider the predicament an insured defendant faces in a typical no-injury product liability action. He must fight a battle on two fronts: first, against his insurance company, who will argue that it has no duty to defend him, and second, against the plaintiff, who is suing him.[1] Frequently, the defendant's best legal strategy will require him to assert one position against the insurance company while simultaneously asserting a different position against the plaintiff.[2] If the defendant is fortunate enough to prevail against one party, he may become vulnerable to the imposition of judicial estoppel, which will preclude him from asserting any position against the other party that directly contradicts his prior, successful argument.[3]

Furthermore, the defendant must navigate the judicial estoppel minefield while simultaneously traversing the somewhat uncharted terrain of the no-injury product liability lawsuit.[4] Traditionally, a plaintiff bringing a product liability

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1. *See* Haskel, Inc. v. Superior Court, 39 Cal. Rptr. 2d 520, 529 (Cal. Ct. App. 1995) (noting that the situation described "requires the insured to fight a two-front war, litigating not only with the underlying claimant, but also expending precious resources fighting an insurer over coverage questions—this effectively undercuts one of the primary reasons for purchasing liability insurance"); *see also* KENNETH S. ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11, at 170 (Harvard Univ. Press 2008) (noting that, because of the insurance industry's practice of denying claims, insured defendants have actually only purchased an option to litigate those future claims, rather than a guarantee of defense and indemnity).

2. *See* Medmarc Cas. Ins. Co. v. Avent Am., Inc., 612 F.3d 607, 614 (7th Cir. 2010) (noting that "the insured may have to attack the opponent's case in ways that seem to remove it from the scope of the insurance contract").

3. Douglas W. Henkin, Comment, *Judicial Estoppel—Beating Shields into Swords and Back Again*, 139 U. PA. L. REV. 1711, 1711 (1991).

4. *See* Meryl C. Maneker, *Defending the No-Injury Products Liability Class Action*, 14 PRAC. LITIGATOR, May 2003, at 13, 14-15 (noting that the no-injury product liability class action

lawsuit had to prove that he had suffered some injury as a result of the defective product.[5] However, some plaintiffs have brought claims based not on any present injury or illness, but rather on an increased future risk of injury or illness from a defective product.[6] Such claims still require the plaintiff to prove the increased risk to a "substantial (more probable than not) medical probability" in order to recover damages, which can present a significant obstacle to recovery.[7] The no-injury product liability claim removes that obstacle from the plaintiff's path.[8] Instead of proving an actual increased risk of future harm, the plaintiff tries to show that the risk of harm is itself an injury, regardless of the actual probability of harm, because it causes him to be unwilling to use the product as desired or unable to resell it for the expected value, thus depriving him of the enjoyment of his purchase.[9] To the extent that the plaintiff is arguing that he has been denied the benefit of his bargain, the no-injury product liability claim moves away from tort law and into the realm of contract law.[10]

To the defendant, however, these distinctions may seem unimportant; his main concern will be ensuring that his Commercial General Liability (CGL) insurance policy will both pay for the legal work necessary to defend him against the plaintiff's lawsuit and pay any judgment that the plaintiff might win against him.[11] All fifty states have laws requiring the insurer to defend the policyholder

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lawsuit is "increasingly common").

5. *See* Rebecca Korzec, Lloyd v. General Motors Corporation*: An Unfortunate Detour In Maryland Products Liability Law*, 38 U. BALT. L.F. 127, 127 (2008).

6. *Id.*

7. James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815, 820 (2002) (alteration in original).

8. *See* Maneker, *supra* note 4, at 14-15 (noting that "these lawsuits challenge a fundamental tenet of tort law—that the plaintiff must suffer an injury to be entitled to recover").

9. *See id.* (noting that plaintiffs frequently also claim emotional distress damages in no-injury product liability lawsuits).

10. *See* Rivera v. Wyeth-Ayerst Labs., 283 F.3d 315, 320 (5th Cir. 2002) (noting that "[t]he plaintiffs' most plausible argument for finding they have suffered 'invasion of a legally protected interest' is their claim they were denied 'the benefit of the bargain' due to them under general, contract law type principles").

11. *See* Lisa C. Friedlander, Note, *Construction Defect Litigation: Courts' Fragmented Rationales Regarding Coverage for Contractor's Faulty Workmanship*, 11 SUFFOLK J. TRIAL & APP. ADVOC. 119, 125-26 (2006) ("The CGL insurer has two major duties to the insured, the duty to indemnify for settlements and judgments within the coverage granted, and the duty to provide defense for the policyholder. . . . The duty to defend feature of the CGL policy is exceptionally significant to policyholders challenged with circumstances such as 'product liability [including asbestos], environmental, construction defects, intellectual property or any other potentially covered claim' where defense costs may considerably exceed policy limits.") (alteration in original) (quoting Tracy Alan Saxe, *What Every Lawyer, Risk Manager Should Know About Coverage*, CONN. LAW TRIB., Apr. 19, 2004, at 5); *see generally* Clyde M. Hettrick, *How an Insured Can Block a Carrier's Coverage Litigation Blitz*, 26 ENT. & SPORTS LAW. 9 (2008) (explaining, through

against any claim in which the complaint "even suggests facts which could potentially bring the claim within the policy's coverage grant."[12] Unfortunately for the defendant policyholder, however, his CGL policy likely only provides coverage for claims in which the plaintiff is alleging a "bodily injury."[13] By definition, in no-injury product liability cases, the plaintiff does not generally allege a "bodily injury."[14] Therefore, the insurer can easily argue that the plaintiff's claim falls outside the scope of the insurance policy, because it does not allege a "bodily injury," and try to deny coverage to the policyholder on that basis.[15] Ultimately, the determination as to whether a particular complaint makes a sufficient allegation of "bodily injury" to trigger coverage is dependent upon the precise language of both the complaint itself and the insurance contract.[16] The interpretation of that language is an unsettled area of the law; two federal circuit courts have recently examined virtually identical language and reached two different results.[17]

Avent America, Inc. was a defendant in just this situation, fighting against both the plaintiff and its own insurance company, in a recent case before the Seventh Circuit Court of Appeals.[18] In that case, the lower court had consolidated various class action lawsuits filed against Avent, a manufacturer of various products intended for use by children, including baby bottles.[19] The plaintiffs, consumers who purchased the baby bottles, claimed that Avent failed to warn them that the bottles were made from plastic containing a hazardous chemical called Bisphenol-A (BPA).[20] The plaintiffs were concerned that the BPA could leach out of the bottles and into their contents, where children could potentially

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extensive use of sports metaphors, various ways in which insured defendants can defeat their insurer's efforts to deny coverage).

12. Friedlander, *supra* note 11, at 125.

13. *See* Jeffrey W. Stempel, *The Insurance Policy as Social Instrument and Social Institution*, 51 WM. & MARY L. REV. 1489, 1516 (2010) (noting that "almost all CGL policies" provide coverage for "claims against a policyholder for bodily injury to plaintiff(s) caused by an 'occurrence'") (quoting Addison Ins. Co. v. Fay, 905 N.E.2d 747, 753 (Ill. 2009)).

14. Maneker, *supra* note 4, at 13-14.

15. *See generally* 9A LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 129:5 (3d ed. 2010) (defining "bodily injury" for the purposes of most CGL policies as "bodily injury, sickness or disease sustained by a person including death resulting from any of these at any time").

16. Medmarc Cas. Ins. Co. v. Avent Am., Inc., 612 F.3d 607, 613 (7th Cir. 2010).

17. *See id.* at 616 (holding that the plaintiffs' underlying complaints, relating to the presence of an allegedly toxic chemical in baby bottles, "do not reach the level of asserting claims 'because of bodily injury'" and thus do not trigger a duty to defend under the defendant's CGL policy); N. Ins. Co. of N.Y. v. Balt. Bus. Commc'ns, Inc., 68 F. App'x 414, 419 (4th Cir. 2003) (holding that the plaintiffs' underlying complaint, relating to the alleged emission of radiation from cellular telephones, "asserts a claim for 'damages because of bodily injury,' as contemplated within the terms of the [defendant's CGL] [p]olicy").

18. *Avent*, 612 F.3d 607.

19. *Id.* at 609.

20. *Id.*

ingest it.[21] The plaintiffs also claimed that Avent failed to warn consumers of the potential health hazards associated with such ingestion.[22] In the majority opinion, Judge Flaum noted the potential for prejudice to the defendant inherent in an application of judicial estoppel in the insurance coverage context.[23] Judge Flaum encapsulated the "tension" between judicial estoppel and the duty to defend:

> We must be careful when applying judicial estoppel in the duty to defend context. If an insurance company refuses to defend its insured in a given case, that insured still must put forth a zealous defense. In doing so, the insured may have to attack the opponent's case in ways that seem to remove it from the scope of the insurance contract. That does not necessarily absolve the insurance company from providing the exact same defense, or later reimbursing the insured for the defense. While judicial estoppel may be appropriate in certain duty to defend situations, we must be cognizant of this tension when we consider applying this doctrine in these types of cases.[24]

Although Judge Flaum discusses this situation abstractly, *Avent* is actually a very concrete example. When Avent received notice of the plaintiffs' lawsuit, it sought "defense and indemnification" from three insurance companies from which it had purchased CGL policies during the relevant time period: Medmarc, Pennsylvania General, and State Farm.[25] All three denied coverage, and after some maneuvering, they all filed motions to dismiss Avent's coverage lawsuit on the grounds that the plaintiffs' complaint fell outside the scope of the CGL policies' coverage.[26]

Meanwhile, Avent began its defense against the underlying lawsuit by filing "a motion to dismiss the complaints on the ground that they did not state a legally cognizable injury."[27] In the ensuing coverage litigation, the insurance companies argued that by filing this motion, Avent had admitted that the underlying complaint did not seek damages either "for bodily injury" or "because of bodily injury," thus "remov[ing] it from the scope of the insurance contract."[28] Thus, the insurance companies asserted, Avent should be estopped from arguing the opposite position in the coverage litigation.[29] The court disagreed, however, and declined to impose judicial estoppel against Avent.[30]

Although he recognized that Avent was in an difficult position, Judge Flaum was careful not to say that judicial estoppel should never be applied against

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21. *Id.*
22. *Id.* at 609-10.
23. *Id.* at 614.
24. *Id.*
25. *Id.* at 612.
26. *Id.*
27. *Id.* at 610.
28. *Id.* at 614.
29. *Id.* at 613.
30. *Id.*

defendants who have lost their duty to defend battle, or that a finding of judicial estoppel necessarily requires a finding that the insurer has a duty to defend.[31] However, in his opinion, he made two important points about judicial estoppel and the duty to defend. First, he highlighted the interconnection between the two issues.[32] Second, he raised the issue of whether it is ever appropriate to apply judicial estoppel in the insurance coverage context, especially in such an unsettled area of the law as no-injury product liability.[33]

Part I of this Note briefly explains the doctrine of judicial estoppel, the two primary ways in which it is applied, policy arguments for and against it, and its recent applications in insurance coverage litigation. Part II provides an overview of the no-injury product liability lawsuit, including some special considerations that arise in the duty to defend context, as well as a survey of the conflicting circuit decisions. Part III explores various policy arguments for and against the imposition of judicial estoppel in the duty to defend context. Part IV suggests how the United States Supreme Court should rule if it grants certiorari in *Avent* and propounds a new framework for the application of judicial estoppel in the insurance coverage context that strikes a better balance between the insured defendant's interest in vigorously advocating for his interests and the judicial system's interest in consistency.

I. JUDICIAL ESTOPPEL

As Judge Easterbrook noted in *Neal v. Honeywell, Inc.*,[34] "[s]ometimes the judiciary must act in self-defense."[35] Judicial estoppel is a powerful weapon in the judiciary's self-defense arsenal.[36] This Part first explores the functions of judicial estoppel, including examples from case law. Second, it describes the two primary ways that judicial estoppel is applied. Third, it summarizes some of the policy reasoning both for and against the application of judicial estoppel in

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31. *Id.* at 614.

32. *Id.*

33. *Id.*

34. 191 F.3d 827 (7th Cir. 1999).

35. *Id.* at 830. Judge Easterbrook was expressing his frustration with a defendant who pursued an interlocutory appeal under 28 U.S.C. § 1292(b) (2006) (thus stipulating that the case turned on a controlling question of law; in this case, the length of the statute of limitations), lost that interlocutory appeal and the subsequent jury trial, and then appealed the final judgment on a factual question as to whether the plaintiff had timely filed. *Neal*, 191 F.3d at 829-30. The Seventh Circuit held that the factual question was precluded by the prior interlocutory appeal and accompanying stipulation—a clear application of judicial estoppel, although Judge Easterbrook did not use that term that in his opinion. *Id.* at 830.

36. Eugene R. Anderson & Nadia V. Holober, *Preventing Inconsistencies in Litigation with a Spotlight on Insurance Coverage Litigation: The Doctrines of Judicial Estoppel, Equitable Estoppel, Quasi-Estoppel, Collateral Estoppel, "Mend the Hold," "Fraud on the Court" and Judicial and Evidentiary Admissions*, 4 CONN. INS. L.J. 589, 612 (1998) (noting that "the primary purpose of the doctrine of judicial estoppel is to protect courts").

general. Finally, it examines some recent applications of judicial estoppel in the context most germane to this study: insurance coverage litigation.

A. The Functions of Judicial Estoppel

Judicial estoppel primarily serves "to protect the integrity of the judicial process."[37] By limiting litigants to asserting arguments that are not inconsistent with each other, judicial estoppel prevents inconsistent rulings, the resulting appearance of unfairness, and ultimately "the devolution of the judicial system into a forum of 'mere gamesmanship.'"[38] In addition to its primary function, however, judicial estoppel also serves two secondary functions. First, it protects the efficiency of the judicial system by preventing parties from relitigating issues that have already been decided by the court, thus bringing a sense of finality to the judicial process.[39] Second, it increases the predictability of judicial outcomes, allowing litigants to more effectively plan their affairs, secure in the knowledge that they can rely on court precedent.[40]

Judicial estoppel allows the court to protect its own integrity when it is threatened by the machinations of litigants.[41] For example, in *RSR Corp. v. International Insurance Co.*,[42] the plaintiff corporation argued that its two different environmental CGL policies covered different types of industrial pollution.[43] However, in a previous successful action, the plaintiff had argued that the two policies covered the same liabilities.[44] The Fifth Circuit found that the plaintiff was judicially "estopped from arguing that the . . . policies covered different liabilities."[45] *RSR Corp.* illustrates the necessity of judicial estoppel as a protective measure; the court noted that the plaintiff corporation was asserting the inconsistent argument in an effort to obtain a "double recovery" by collecting

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37. New Hampshire v. Maine, 532 U.S. 742, 749-50 (2001) (quoting Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6th Cir. 1982)).

38. Anderson & Holober, *supra* note 36, at 622 (quoting Brief and Appendix of Amicus Curiae Insurance Environmental Litigation Ass'n in Support of Continental Insurance Co., Aetna Casualty & Surety Co. and Firemen's Insurance Co. of Newark, N.J., at 25 n.21, Cnty. of Columbia, N.Y. v. Cont'l Ins. Co., 595 N.Y.S.2d 988 (N.Y. App. Div. 1993) (No. 65599)).

39. *Id.*

40. *See id.* (noting that judicial estoppel "fosters credibility and certainty within the judicial system").

41. *Id.* at 616.

42. 612 F.3d 851 (5th Cir. 2010).

43. *Id.* at 859-60.

44. *See* Int'l Ins. Co. v. RSR Corp., No. 3:00-CV-0250-P, 2003 WL 23175284 at *1 (N.D. Tex. Oct. 17, 2003) (holding that insurer was required to indemnify defendant for cleanup costs), *aff'd*, 426 F.3d 281, 284 (5th Cir. 2005); *see also* RSR Corp. v. Int'l Ins. Co., No. 3:00-CV-0250-P, 2009 WL 927527 at *9 (N.D. Tex. Mar. 23, 2009) (holding that the insured plaintiff's "arguments [in this case] are directly contrary to the position that it took in the Harrison County Action . . . a position that was adopted by the state court in 2003"), *aff'd*, 612 F.3d 851, 854 (5th Cir. 2010).

45. *RSR Corp.*, 612 F.3d at 861.

full indemnity from multiple insurers for the same occurrence.[46]

Moreover, the courts cannot depend upon the litigating parties to respect the dignity of the judicial process and refrain from arguing contradictory positions.[47] On the contrary, although they may not admit it to the court, many parties would likely not hesitate to adopt a contradictory position if doing so would be strategically advantageous.[48] As one seasoned litigant put it, "[W]e should push ahead, on a case by case basis, for whichever theory suits us best in a particular case. Thus, I have no problem with our simultaneously contending (in different courts, of course) for both . . . theories."[49] Although litigants understandably wish to achieve the best possible outcome for themselves, most courts have acknowledged that the judicial system has a responsibility to disallow such inconsistency.[50] As the First Circuit noted in *Patriot Cinemas, Inc. v. General Cinemas Corp.*,[51] "[i]f parties feel free to select contradictory positions before different tribunals to suit their ends, the integrity and efficacy of the courts will suffer."[52]

In much the same way that res judicata and collateral estoppel do,[53] judicial estoppel prevents needless and duplicative litigation and thus promotes judicial efficiency.[54] By asking a court to adopt a position that is inconsistent with one already adopted by an earlier court, a litigant is effectively "consuming the resources of the judiciary while creating the possibility that a later decision will render an earlier one meaningless."[55] Judicial estoppel allows the court to prevent this waste of resources.[56] If the Fifth Circuit had declined to apply judicial estoppel in *RSR Corp.*, the trial court would have been forced to revisit the policy language interpretation issue, despite the fact that another court had already

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46. *Id.* at 862.

47. Anderson & Holober, *supra* note 36, at 600-01.

48. *Id.*

49. *Id.* at 601 (quoting an internal corporate communication made by a "senior Aetna Life & Casualty Company claims executive") (alterations in original).

50. *Id.* at 597.

51. 834 F.2d 208 (1st Cir. 1987).

52. *Id.* at 214.

53. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979) ("Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action."). Judicial estoppel, on yet a third hand, "precludes a litigant from asserting a position that is inconsistent with a position that the litigant or its privy unequivocally asserted in a prior testimony or affidavit, pleading, legal argument, brief, stipulation, or settlement which has received judicial acceptance." Anderson & Holober, *supra* note 36, at 608-09 (citations omitted).

54. Anderson & Holober, *supra* note 36, at 620-21.

55. Kelly L. Morron, *Time for the Federal Circuit to Take a Judicious Approach to Judicial Estoppel*, 28 AIPLA Q. J. 159, 162 (2000).

56. Anderson & Holober, *supra* note 36, at 620-21.

resolved that issue.[57] The application of judicial estoppel in *RSR Corp*. thus prevented valuable judicial resources from being wasted in unnecessary reexamination of a decided question.

Judicial estoppel also increases the reliability of judicial rulings, and thus the predictability of the judicial system.[58] For example, if the Fifth Circuit had not upheld the district court's imposition of judicial estoppel in *RSR Corp.*, the district court would have had the opportunity to reinterpret the same policy language that the state court had already construed to mean something different.[59] That opportunity would create the potential for two equally valid but diametrically opposed judicial interpretations of the same policy language.[60] This potential would decrease the reliability of judicial outcomes, weaken the value of precedent, and thus increase uncertainty for litigants.[61]

B. Common Approaches to the Application of Judicial Estoppel

Most courts and commentators agree as to the function of judicial estoppel, but its application is more varied.[62] Some commentators have suggested that this "fluidity" is a result of the doctrine's essentially equitable nature.[63] Although the details differ from court to court, judicial estoppel is generally applied under one of three approaches: the "judicial acceptance" approach, the "sanctity of the oath" approach, and the "fast and loose" approach.[64]

The "judicial acceptance" approach, sometimes called the "prior success" approach, is designed first and foremost to preserve the integrity of the judicial system.[65] Under the judicial acceptance approach, a court deciding whether to apply judicial estoppel against a litigant must consider whether or not another court accepted the litigant's prior inconsistent statement.[66] Some courts that have adopted this approach have made judicial acceptance a mandatory prerequisite to

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57. *See* RSR Corp. v. Int'l Ins. Co., No. 3:00-CV-0250-P, 2009 WL 927527 at *9 (N.D. Tex. Mar. 23, 2009) (noting that in 2003, a Texas state court accepted RSR's argument that its CGL policy covered "all unexpected and unintended pollution"), *aff'd*, 612 F.3d 851, 854 (5th Cir. 2010).

58. Anderson & Holober, *supra* note 36, at 619-20.

59. *See* RSR Corp. v. Int'l Ins. Co., 612 F.3d 851, 860-61 (5th Cir. 2010).

60. *Id.*

61. Anderson & Holober, *supra* note 36, at 621-22.

62. *See generally* Kira A. Davis, Note, *Judicial Estoppel and Inconsistent Positions of Law Applied to Fact and Pure Law*, 89 CORNELL L. REV. 191, 202-08 (2003) (providing a survey of the different approaches to judicial estoppel taken by the U.S. Courts of Appeals).

63. Steve R. Johnson, *The Doctrine of Judicial Estoppel*, 11 NEV. LAW., Dec. 2003, at 8, 10.

64. *See* Anderson & Holober, *supra* note 36, at 623 (describing the "judicial acceptance" and "sanctity of the oath" approaches and noting the presence of a third approach, "fast and loose," that is similar to but broader than the "sanctity of the oath" approach because it does not require that the prior inconsistent statement have been made under oath in order for judicial estoppel to apply).

65. *Id.* at 627-29.

66. *Id.* at 623.

the application of judicial estoppel, but others have established judicial acceptance as merely one of several factors that a court should consider when deciding whether to apply judicial estoppel.[67]

The majority of lower federal courts have adopted some form of the judicial acceptance approach,[68] including all of the federal circuit courts of appeal except the Third Circuit and the Eleventh Circuit.[69] Further, the United States Supreme Court adopted the judicial acceptance approach in *New Hampshire v. Maine*.[70] In that case, the Court acknowledged the unsettled state of the law of judicial estoppel, but noted three factors that courts commonly consider when deciding whether judicial estoppel is appropriate in a particular case:

> First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not

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67. *Compare* Perry v. Blum, 629 F.3d 1, 11 (1st Cir. 2010) ("The party proposing an application of judicial estoppel must show that the relevant court actually accepted the other party's earlier representation."), *with* United States v. Liquidators of Eur. Fed. Credit Bank, 630 F.3d 1139, 1148 (9th Cir. 2011) ("In determining whether to apply [judicial estoppel], we typically consider (1) whether a party's later position is 'clearly inconsistent' with its original position; (2) whether the party has successfully persuaded the court of the earlier position; and (3) whether allowing the inconsistent position would allow the party to 'derive an unfair advantage or impose an unfair detriment on the opposing party.'") (quoting United States v. Ibrahim, 522 F.3d 1003, 1009 (9th Cir. 2008)).

68. Eric A. Schreiber, Comment, *The Judiciary Says, You Can't Have It Both Ways: Judicial Estoppel—A Doctrine Precluding Inconsistent Positions*, 30 LOY. L.A. L. REV. 323, 336 (1996).

69. *Liquidators of Eur. Fed. Credit Bank*, 630 F.3d at 1148; CRV Enters., Inc. v. United States, 626 F.3d 1241, 1248 (Fed. Cir. 2010), *cert. denied*, 131 S. Ct. 2459 (2011); *Perry*, 629 F.3d at 11; Capella Univ., Inc. v. Exec. Risk Specialty Ins. Co., 617 F.3d 1040, 1051 (8th Cir. 2010); Gen. Conference Corp. of Seventh-Day Adventists v. McGill, 617 F.3d 402, 414 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 2097 (2011); RSR Corp. v. Int'l Ins. Co., 612 F.3d 851, 859 (5th Cir. 2010); Medmarc Cas. Ins. Co. v. Avent Am., Inc., 612 F.3d 607, 613 (7th Cir. 2010); Comcast Corp. v. FCC, 600 F.3d 642, 647 (D.C. Cir. 2010); Israel v. Chabra, 601 F.3d 57, 65 n.2 (2d Cir. 2010); Whitten v. Fred's, Inc., 601 F.3d 231, 241 (4th Cir. 2010); Eastman v. Union Pac. R.R. Co., 493 F.3d 1151, 1156 (10th Cir. 2007).

70. 532 U.S. 742, 749 (2001) ("This rule, known as judicial estoppel, 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" (quoting Pegram v. Herdrich, 530 U.S. 211, 227 n.8 (2000))).

estopped.[71]

This is a flexible inquiry, not a list of requirements; for example, if "the litigant has made an egregious attempt to manipulate the legal system," or other circumstances warrant it, the court can apply judicial estoppel even if the litigant asserted the prior position unsuccessfully.[72] Furthermore, the Court noted that the three enumerated considerations were not necessarily the only relevant factors to consider, and suggested that courts should supplement those considerations as necessary and appropriate to the facts of the individual case at bar.[73]

A minority of courts, including the Eleventh Circuit,[74] take the "sanctity of the oath" approach to judicial estoppel.[75] Under this approach, the preservation of the sanctity of the oath, rather than the dignity of the court, is the primary public policy reason behind the doctrine.[76] In deciding whether to apply judicial estoppel under this approach, the courts consider only one question: "whether the position that the litigant seeks to assert in the present proceeding conflicts with a position stated *under oath* in a prior proceeding."[77] If so, the court will apply judicial estoppel to bar the litigant from asserting the conflicting position in the present proceeding.[78] Unlike the judicial acceptance approach, the sanctity of the oath approach does not depend on whether the court accepted the litigant's prior position.[79]

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71. *Id.* at 750-51 (internal quotations and citations omitted).

72. 30 JEFFREY A. SCHAFER, CAL. JUR. 3D, *Estoppel and Waiver* § 29 (2011).

73. *New Hampshire*, 532 U.S. at 751.

74. Robinson v. Tyson Foods, Inc., 595 F.3d 1269, 1273 (11th Cir. 2010) (stating a two-part test for the application of judicial estoppel: "First, it must be shown that the allegedly inconsistent positions were made under oath in a prior proceeding. Second, such inconsistencies must be shown to have been calculated to make a mockery of the judicial system") (quoting Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1285 (11th Cir. 2002)). The court also noted that judicial acceptance is one of the circumstances that courts should consider as part of a holistic analysis. *Id.* (citing *New Hampshire*, 532 U.S. at 750-51).

75. *See* Gen. Conference Corp. of Seventh-Day Adventists v. McGill, 617 F.3d 402, 414 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 2097 (2011) ("The doctrine of judicial estoppel bars a party from (1) asserting a position that is contrary to one that the party has asserted *under oath* in a prior proceeding, where (2) the prior court adopted the contrary position either as a preliminary matter or as part of a final disposition. A court should also consider whether the party has gained an unfair advantage from the court's adoption of its earlier inconsistent statement." (quoting Lorillard Tobacco Co. v. Chester, Willcox & Saxbe, LLP, 546 F.3d 752, 757 (6th Cir. 2008)) (emphasis added)); *see also* Schreiber, *supra* note 68, at 326 (describing the "sanctity of the oath" approach as an early application of judicial estoppel that has now been largely abandoned as overly harsh in favor of the judicial acceptance approach); Anderson & Holober, *supra* note 36, at 625-26 (describing various cases in which courts have taken the sanctity of the oath approach).

76. Anderson & Holober, *supra* note 36, at 624.

77. *Id.* at 624-25 (emphasis added).

78. *Id.*

79. *Id.*

Lastly, a few courts, including the Third Circuit,[80] take the "fast and loose" approach to judicial estoppel.[81] Although it is similar to the sanctity of the oath approach, the fast and loose approach does not require that the litigant's prior statement have been made under oath in order for judicial estoppel to apply.[82] Of the three approaches, the fast and loose approach gives the court the most discretion in the application of judicial estoppel, because the only requirement (aside from the assertion of an inconsistent position) is a finding that the litigant "changed his or her position in bad faith—i.e., with intent to play fast and loose with the court."[83] From a public policy angle, the fast and loose approach takes account of the fact that litigants may try to argue contradictory positions even without having previously stated them under oath, and that such a contradiction would still be problematic from the court's perspective.[84] However, it has also been criticized as being too vague; the courts have not established any firm definition of "fast and loose behavior" deserving of judicial estoppel.[85]

C. The Public Policies Underlying Judicial Estoppel

The application of judicial estoppel in appropriate cases promotes several important public policies. First, as discussed previously, it combats the problems that can result when litigants are freely permitted to assert contradictory positions: unnecessary litigation, fractured judicial integrity, and a corresponding decline in public respect for the courts.[86] In addition, judicial estoppel helps promote predictability and consistency in litigation.[87] For example, if a court accepts a party's position, the opposing party may rely on that position as established, not only for the purposes of the instant case, but for subsequent litigation against the same party.[88] Although the doctrine of equitable estoppel is also available to

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80. *In re* Kane, 628 F.3d 631, 638 (3d Cir. 2010).

81. *See* Anderson & Holober, *supra* note 36, at 625-26 (describing various cases in which courts have applied judicial estoppel against litigants who were attempting to "play[] 'fast and loose' with the courts") (quoting Patriot Cinemas, Inc. v. Gen. Cinema Corp., 834 F.2d 208, 212 (1st Cir. 1987)); *see also* Schreiber, *supra* note 68, at 338 (noting that a minority of courts have adopted the "fast and loose" approach to judicial estoppel).

82. Schreiber, *supra* note 68, at 338.

83. *Kane*, 628 F.3d at 638 (applying the "fast and loose" approach, but also restricting the application of judicial estoppel to situations where it is "tailored to address the harm identified and no lesser sanction would adequately remedy the damage done by the litigant's misconduct") (emphasis omitted) (quoting Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp., 337 F.3d 314, 319 (3d Cir. 2003)); *see also* Schreiber, *supra* note 68, at 342-43 (criticizing the "fast and loose" approach as overbroad and unclear).

84. Anderson & Holober, *supra* note 36, at 627.

85. Schreiber, *supra* note 68, at 343.

86. Anderson & Holober, *supra* note 36, at 591.

87. *Id.* at 621-22.

88. *See* Schreiber, *supra* note 68, at 355 (listing "reliance" as one of the factors that courts should weigh in applying judicial estoppel).

protect parties who can show detrimental reliance on the prior position, no such showing is required for judicial estoppel, so the burden on the opposing party is lower.[89]

There are, however, some significant costs associated with the imposition of judicial estoppel. The most obvious cost is prejudice to the party who is estopped from asserting an argument—prejudice that can result in the loss of a single claim or even an entire case.[90] Furthermore, because judicial estoppel is such a "flexible" doctrine, it can be difficult for litigants to predict how and when it will apply.[91] Even when litigants are able to make those predictions with relative confidence, the differences in application between various courts may lead litigants to forum shop for the jurisdiction most likely to allow them to assert inconsistent positions or to impose judicial estoppel against their opponent.[92]

D. Judicial Estoppel in Insurance Coverage Litigation

The insurance industry in particular has a complicated relationship with judicial estoppel. On the one hand, large national insurance companies are particularly vulnerable to the imposition of judicial estoppel because they are involved in a huge number of lawsuits in virtually every jurisdiction.[93] Indeed, some companies have positively embraced the use of inconsistent arguments whenever courts will allow their use.[94] On the other hand, many of the same insurance companies have frequently used judicial estoppel as a defensive weapon in coverage litigation, arguing for its imposition against insured defendants to preclude their arguments in favor of coverage.[95]

In some insurance coverage cases, courts have applied the "judicial acceptance" approach and declined to impose judicial estoppel against a party because the lower court had not accepted the party's prior position. For example, in *Capella University, Inc. v. Executive Risk Specialty Insurance Co.*,[96] the plaintiff requested reimbursement for a certain amount of fees and costs from the

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89. *Id.* at 331; *see also* Anderson & Holober, *supra* note 36, at 632-35 (criticizing the Second Circuit for conflating equitable estoppel and judicial estoppel in Young v. U.S. Dep't of Justice, 882 F.2d 633 (2d Cir. 1989), but noting that the court "omitted entirely any discussion of reliance" in later judicial estoppel cases).

90. Schreiber, *supra* note 68, at 330.

91. *See* Anderson & Holober, *supra* note 36, at 635 (emphasizing the "flexible approach" as best for courts).

92. *See* George D. Brown, *The Ideologies of Forum Shopping—Why Doesn't a Conservative Court Protect Defendants?*, 71 N.C. L. REV. 649, 656 n.38 (1993) (noting that, according to the United States Supreme Court, "the twin aims of *Erie* were the avoidance of forum-shopping and inequitable administration of the laws").

93. *See* Anderson & Holober, *supra* note 36, at 592-93 (noting that "the insurance industry is the largest, most frequent private user of the civil justice system").

94. *Id.* at 600-02.

95. *Id.* at 597-99.

96. 617 F.3d 1040 (8th Cir. 2010).

defendant insurance company.[97] The trial court refused its request, but did order reimbursement of a smaller amount.[98] Subsequently, the plaintiff amended its request to include interest.[99] The defendant argued that the plaintiff should be estopped from so amending by its earlier request, but the district court disagreed.[100] The Eighth Circuit upheld the district court's decision not to impose judicial estoppel against the plaintiff for two reasons: first, the district court did not accept the plaintiff's original position; and second, the defendant would not suffer any unfair prejudice if the court allowed the plaintiff's new argument.[101]

Similarly, in *G-I Holdings, Inc. v. Reliance Insurance Co.*,[102] the defendant withdrew its first argument and substituted a new one before the district court had a chance to rule on the pending motion.[103] The Third Circuit upheld the district court's denial of judicial estoppel against the defendant's original argument because the district court had never accepted that argument.[104] The appellate court held that "[w]here, as here, a defendant has changed position in response to an amended complaint, there is no offense to the integrity of the judicial process warranting estoppel. There is only danger to that process averted."[105] The court fleshed out its reasoning by exploring the ramifications of the opposite ruling, which would allow plaintiffs to "checkmate opposing counsel by introducing a new claim the defense of which contradicts the opposition's initial position," and thus would require the defendant to forfeit one of the defenses or else face judicial estoppel.[106] The court decried this result as contrary to public policy, noting, "a defendant ought to have the opportunity to put up the best possible defense in light of all the claims against it."[107]

In other cases, however, courts have applied judicial estoppel against defendants in the insurance coverage litigation context. For example, in *RSR Corp.*, the plaintiff corporation held both an environmental insurance policy and a CGL policy for indemnity in case it was found liable for industrial pollution.[108] In a previous successful action against other insurance companies for industrial pollution indemnification, the plaintiff had argued that the two policies covered the same liabilities, and the court accepted that argument and approved the subsequent settlement agreement.[109] In the instant action, the plaintiff wanted its insurer to indemnify it against an Environmental Protection Agency assessment

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97. *Id.* at 1044.
98. *Id.*
99. *Id.*
100. *Id.* at 1051.
101. *Id.*
102. 586 F.3d 247 (3d Cir. 2009).
103. *Id.* at 262.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. RSR Corp. v. Int'l Ins. Co., 612 F.3d 851, 854-55 (5th Cir. 2010).
109. *Id.* at 855-56.

of cleanup costs for industrial pollution, but the insurer demurred, arguing that the plaintiff had already been indemnified by the prior settlement agreements.[110] The plaintiff then tried to argue that the environmental policy and the CGL policy actually covered different liabilities, so the plaintiff should not be precluded from recovering indemnity from the insurer by the existence of the prior negotiated settlement agreements.[111] However, the district court imposed judicial estoppel to bar the plaintiff from arguing that the policies did not cover the same liabilities.[112] The Fifth Circuit affirmed, in a clear application of the judicial acceptance approach.[113]

Likewise, in *United National Insurance Co. v. Spectrum Worldwide, Inc.*,[114] the plaintiff sued the defendant for trademark infringement.[115] At the beginning of the litigation, the plaintiff petitioned the court for a preliminary injunction to force the defendant to stop using the allegedly infringing label on its products.[116] Based on the defendant's assertion that it had been using substantially the same label since 1999 (over two years prior to the filing of the lawsuit in 2001), and that therefore the defendant "was not in danger of experiencing immediate harm," and despite the plaintiff's assertion that the defendant did not begin using the allegedly infringing label until 2001, the court did not issue the preliminary injunction.[117]

Ultimately, the parties settled, and the defendant looked to its insurer to pay the settlement.[118] The insurer demurred, arguing that the policy had been issued in 2001 and thus did not cover the defendant's 1999 label.[119] The defendant countered "that it was the 2001 label, not the 1999 version, that resulted in the [underlying] action, and that the 2001 label constituted distinct infringing material."[120] The Ninth Circuit held that the defendant was judicially estopped from making that argument because it had "benefitted from arguing in 2001 that [the plaintiff's] alleged infringement claim arose from materials first published in 1999."[121] The court reasoned that if the defendant was permitted to change its position in the duty to defend suit, its "'gaming' of the courts" would allow it to win by asserting the same argument that it successfully opposed when it defeated the motion for a preliminary injunction.[122] The court concluded that as a result, the plaintiff and the defendant's insurer would both suffer unfair prejudice, and

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110. *Id.* at 856.
111. *Id.* at 860.
112. *Id.* at 860-61.
113. *Id.*
114. 555 F.3d 772 (9th Cir. 2009).
115. *Id.* at 774-76.
116. *Id.* at 775.
117. *Id.*
118. *Id.* at 776.
119. *Id.* at 775-76.
120. *Id.* at 779.
121. *Id.*
122. *Id.* at 779-80.

the defendant would enjoy an undeserved windfall.[123]

Spectrum clearly illustrates how arguments that seem effective against the plaintiff in the underlying lawsuit can come back to haunt the defendant in the subsequent determination of his insurer's duty to defend or indemnify. Even if the defendant tries to resolve the coverage issue first, hoping to avoid fighting two battles at once, he may be unable to do so; insurers can choose to begin defending the case immediately, but reserve some coverage defenses for later determination.[124] Thus, the insurance coverage litigation can drag on long past the resolution of the underlying lawsuit.[125]

II. THE DUTY TO DEFEND IN NO-INJURY PRODUCT LIABILITY CASES

As previously discussed in the Introduction, insurance coverage litigation becomes particularly problematic for the insured defendant facing no-injury product liability claims.[126] A no-injury product liability lawsuit is something of a misnomer, because although these cases often involve a defective product, most successful actions are brought under contract claims (such as breach of contract) rather than traditional product liability claims (such as negligence or failure to warn).[127] This Part first defines a no-injury product liability lawsuit and discusses the three main types of no-injury product liability claims in the context of an example case. Second, it engages in an extended analysis of *Medmarc Casualty Insurance Co. v. Avent America, Inc.*,[128] a no-injury product liability lawsuit that incorporated both insurance coverage and judicial estoppel issues.[129] Finally, it examines some alternative interpretations of similar policy language from other recent and factually analogous cases.

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123. *Id.*

124. *See* ABRAHAM, *supra* note 1, at 167-70 (describing the many barriers that stand in an insured defendant's way in his quest to obtain coverage); *see also* RSR Corp. v. Int'l Ins. Co., 612 F.3d 851, 856 (5th Cir. 2010) (noting that the defendant's insurer chose to litigate some of its coverage issues in a jury trial "while reserving unripe coverage and damages issues for future resolution").

125. *See* Capella Univ., Inc. v. Exec. Risk Specialty Ins. Co., 617 F.3d 1040, 1042-43 (8th Cir. 2010) (noting that the underlying complaint was dismissed in 2005, and finally resolving the coverage issue); *see also RSR Corp.*, 612 F.3d at 855 (noting that the insurance coverage litigation in that case began back in 1993, and finally resolving the coverage issues).

126. *See* discussion *supra* Introduction.

127. *See* Maneker, *supra* note 4, at 20 (noting that "by far the most common and successful challenge to no-injury products liability class actions has been to seek dismissal based on the plaintiffs' failure to plead damages" which are often a required element in traditional product liability claims such as "negligence, strict liability, fraud, breach of warranty, and violation of the consumer protection statute").

128. 612 F.3d 607 (7th Cir. 2010).

129. *Id.*

A. The No-Injury Product Liability Lawsuit: Definitions and an Example

In a no-injury product liability lawsuit, the plaintiff is generally suing to recover based on a defect that has not yet manifested itself in his particular product or an injury that he expects his past use of the product may cause him in the future.[130] These cases are frequently brought as class actions because the individual claims generally have a low value; only by aggregating them can they be made worthwhile for the plaintiffs and their attorneys to pursue in court.[131] The most salient and unconventional characteristic of these cases is that for which they are named: the total lack of any allegation that the product caused any actual injury to any plaintiff.[132] Rather, "the plaintiffs have either not yet experienced a malfunction because of the alleged defect or have experienced a malfunction but not been harmed by it."[133] As such, the plaintiffs allege purely economic harm caused by their inability to use the product for its intended purpose.[134]

The myriad cases huddled under the "no-injury product liability" umbrella can be categorized as follows: "true" product liability cases, "false" product liability cases, and hybrid cases.[135] In a true product liability case, the plaintiff brings tort claims that require him to show that the product is defective, but do not require him to allege any physical injury.[136] Rather, he alleges that his use of the defective product places him at greater risk of future injury or illness.[137] He may also seek damages for the mental anguish he suffered as a result of that increased risk or for the medical monitoring he will now require.[138] These suits are almost always dismissed, either for substantive failures (such as failure to state a claim or required element of a claim) or procedural failures (such as lack of standing for failure to allege an injury).[139] In false product liability cases, on the other hand, the plaintiff brings claims that do not require him to show that the product is defective.[140] Usually these are breach of contract or other contract claims, and plaintiffs can often recover expectation damages.[141]

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130. Maneker, *supra* note 4, at 14.

131. *Id.*

132. *Id.*

133. *Id.* at 15 (quoting Coghlan v. Wellcraft Marine Corp., 240 F.3d 449, 455 n.4 (5th Cir. 2001)).

134. *Coghlan*, 240 F.3d at 455 n.4.

135. These categorizations are helpful because they clearly delineate the cases based on type of claim. *But see* Maneker, *supra* note 4, at 14-15 (dividing the cases into three somewhat different categories: "diminished value" cases, "fraud or violation of consumer protection statute" cases, and "combined theories" cases).

136. *Id.*

137. *Id.*

138. *Id.*

139. *See id.* at 15 ("The courts, both state and federal, have not been eager to embrace the no-injury products liability class action.").

140. *Id.* at 14.

141. *Id.*

In hybrid cases, the plaintiff brings both product liability and contract claims.[142] The product liability claims are generally dismissed, but the contract claims are sometimes allowed to go forward.[143] For example, in *Coghlan v. Wellcraft Marine Corp.*, the plaintiffs purchased a boat, believing that it was made entirely of fiberglass.[144] When they discovered that it was actually made of fiberglass-coated plywood, they sued the manufacturer on both product liability and contract claims.[145] The district court dismissed all of the plaintiffs' claims for failure to plead damages, but the Fifth Circuit overturned the dismissal of the contract claims,[146] reasoning that the plaintiffs had adequately pled "benefit of the bargain" damages when they requested "the difference in value between what they were promised, an all fiberglass boat, and what they received, a hybrid wood-fiberglass boat." [147]

B. Avent*: A Case Study*

Medmarc Casualty Insurance Co. v. Avent America, Inc.[148] is a good example of both a no-injury product liability lawsuit and an application of judicial estoppel. *Avent* is a hybrid no-injury product liability case; the plaintiffs pled both contract claims ("unjust enrichment") and product liability claims (breach of warranties and of various consumer protection and fair trade practices laws) in their complaint.[149] However, the Seventh Circuit implied that only the contract claims had any validity, pointing out that the plaintiffs "never allege[d] that they or their children ever used the products or were actually exposed to the BPA. Instead, the plaintiffs allege a uniform injury across all plaintiffs that stems from their purchasing an unusable product."[150] In their complaint, the plaintiffs requested relief in the form of reimbursement for the cost of the products purchased, as well as myriad other damages, costs, and fees.[151]

Avent filed a motion to dismiss, arguing that the plaintiffs' failure to plead any concrete injury, medical expenses, mental anguish, potential for future illness or corresponding need for medical monitoring demonstrated that the case was "essentially a 'no-injury product liability' action and should be dismissed."[152]

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142. *See id.* at 14-15 (describing these types of cases as "combined theories").

143. *See* Coghlan v. Wellcraft Marine Corp., 240 F.3d 449, 455 (5th Cir. 2001) (dismissing the plaintiff's product liability claims, but allowing the contract claims to go forward).

144. *Id.* at 451.

145. *Id.*

146. *Id.* at 455.

147. *Id.* at 452.

148. 612 F.3d 607 (7th Cir. 2010).

149. *Id.* at 610.

150. *Id.*

151. *Id.*

152. *Id.* at 610-11 (quoting Omnibus Introduction to Defendants' Motions to Dismiss at 9, *In re* Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig., 687 F. Supp. 2d 897 (W.D. Mo. 2009) (No. 08-1967)).

The trial court accepted this argument in part and subsequently dismissed the negligence claims, but allowed some of the contract claims to go forward. The court reasoned that in this case, like in *Coghlan*, the plaintiffs had purchased a product and then learned something about it that made it impossible for them to use it as they had intended, in which case they may be entitled to expectation damages.[153] In the concurrent insurance coverage litigation, the trial court resolved the coverage issue on similar grounds, finding that the plaintiffs' claims were for purely economic injury and thus not covered by the terms of Avent's policies with any of its three insurers.[154] Avent appealed the trial court's ruling on the coverage issue to the Seventh Circuit.[155]

While that appeal was pending, Avent continued defending itself against the underlying lawsuit, and argued that the plaintiffs' claims should be dismissed because they were not "for bodily injury," but in fact were "no-injury" product liability claims.[156] The district court accepted Avent's argument and dismissed most of the plaintiffs' claims, finding that the real "injury" in the case was that the plaintiffs were unaware of the presence or health risks of the BPA.[157] Unfortunately for Avent, this favorable ruling would be used against it in the insurance coverage litigation.[158]

In response to Avent's partial victory in the underlying lawsuit, the insurance companies argued that in the coverage litigation, Avent should be judicially estopped from asserting that the plaintiffs' claims were "for bodily injury," and thus covered under the terms of the policies.[159] The insurers argued that Avent had successfully asserted the opposite position before another court, and thus judicial estoppel should bar Avent's coverage argument.[160] The Seventh Circuit, however, found that judicial estoppel did not apply on the grounds that Avent's arguments did not actually contradict each other.[161] Rather, the court found that Avent was arguing that the language "because of bodily injury" (which was used in the insurance contract) is broader and implies a duty to defend in more cases than the language "for bodily injury" (which Avent used in its motion to

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153. *Id.* at 611.

154. Medmarc Cas. Ins. Co. v. Avent Am., Inc., 653 F. Supp. 2d 879, 885 (N.D. Ill. 2009) (granting "Medmarc's Motion for Judgment on the Pleadings . . . Pennsylvania General's Motion for Judgment on the Pleadings . . . [and] State Farm's Motion for Summary Judgment"), *aff'd*, 612 F.3d 607 (7th Cir. 2010).

155. *Avent*, 612 F.3d at 608-09.

156. *Id.* at 610-11.

157. *In re* Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig., No. 08-1967, 2009 WL 3762958 at *2 (W.D. Mo. Nov. 9, 2009) (allowing all plaintiffs to assert unjust enrichment claims, and allowing plaintiffs who still owned the products when they learned of the health risks to assert claims for "fraudulent and negligent omissions of material fact (under common law or statute) and breach of implied warranty of merchantability").

158. *Avent*, 612 F.3d at 613.

159. *Id.*

160. *Id.*

161. *Id.*

dismiss).[162] Thus, the court reasoned, "because Avent only argued the claims were not 'for bodily injury' in the underlying suit, it does not preclude their argument here that the underlying complaints state claims for damages 'because of bodily injury.'"[163]

Although the Seventh Circuit did not preclude Avent's argument in support of its appeal of the duty to defend issue, the court did not accept that argument either.[164] In affirming the trial court's finding that the insurers were not obligated to defend Avent against the BPA lawsuit, the Seventh Circuit framed the question as: "whether the allegations in the complaint point to a theory of recovery that falls within the insurance contract: Do the allegations amount to a claim for damages 'because of bodily injury' due to 'an occurrence'?"[165] The court answered this question in the negative, finding that "even if the underlying plaintiffs proved every factual allegation in the underlying complaints, the plaintiffs could not collect for bodily injury because the complaints do not allege any bodily injury occurred."[166]

C. Avent *as Compared to* Baltimore Business*: The Circuit Split*

As the *Avent* court acknowledged, however, other circuits have found that pleadings that do not allege bodily injury can still trigger a duty to defend under policies with similar language.[167] In *Northern Insurance Co. of New York v. Baltimore Business Communications, Inc.*,[168] the defendant's insurance company argued that the underlying lawsuit fell outside the scope of the policy coverage.[169] The Fourth Circuit held that as long as the complaint alleges that the product is potentially harmful, the coverage issue should be resolved in the insured's favor.[170] After examining the plaintiffs' complaint, the court concluded that the standard was satisfied: "in alleging that persons using cell phones without headsets suffer from the radiation emitted by such phones, the Complaint alleges a 'bodily injury.'"[171] The court made this finding in spite of unequivocal language in one of the plaintiffs' briefs stating that their recovery was not predicated on allegations of injury.[172] The court noted that other passages in the brief did allege that use of the defendant's product had exposed the plaintiffs to

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162. *Id.* at 613-14.

163. *Id.* at 614.

164. *Id.* at 613-14.

165. *Id.* at 613.

166. *Id.* at 614.

167. *Id.* at 617-18.

168. 68 F. App'x 414 (4th Cir. 2003).

169. *Id.* at 422.

170. *Id.*

171. *Id.* at 419 (finding that the plaintiffs' complaint fell within the confines of the policy language: "damages because of bodily injury").

172. *Id.* at 420.

health risks,[173] and concluded that overall, the plaintiff's statements in the brief did not "eliminate the potentiality that [the defendants] could be liable" to the plaintiffs for "damages because of bodily injury."[174] In light of that "potentiality," the court found that the insurer did have a duty to provide a defense to the insured defendant.[175]

Avent cited *Baltimore Business* in its argument to the Seventh Circuit on the coverage issue, but the court rejected the Fourth Circuit's reasoning.[176] Treating the standard for pleading as a state law issue, the Seventh Circuit declined to apply the Fourth Circuit's rule, citing concerns that it "would trigger the duty to defend at the mere possibility that a complaint, which on its face falls outside the parameters of the insurance policy, could be amended at some future point in a manner that would bring the complaint within the coverage limits."[177] According to the Seventh Circuit's reading of Illinois law, the court instead concluded that the proper way to address the coverage issue was to "look only to the complaint as it stands now and not as it may (or may not) stand in the future."[178] As the next section will show, this conclusion was both well-reasoned and fair to both parties, and other courts should follow suit.

III. POLICY CONSIDERATIONS WEIGH AGAINST THE APPLICATION OF JUDICIAL ESTOPPEL IN THE DUTY TO DEFEND CONTEXT: WHY *AVENT* WAS CORRECTLY DECIDED

Although judicial estoppel can further important public policy goals in some cases, these goals are often diminished or outweighed by negative outcomes when judicial estoppel is applied in duty to defend cases. First, this Part briefly states some of the negative consequences that follow an application of judicial estoppel in any context. Second, it hypothesizes several different holdings that the Seventh Circuit could have reached in *Avent* and compares and contrasts them with the actual holding. Finally, this Part discusses other actions that Avent and similarly situated defendants could take to improve their lot, and why those actions are generally impracticable.

As discussed previously, judicial estoppel can preserve the consistency of judicial decisions and thus help maintain public respect for the courts;[179] however,

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173. *Id.* at 421; *see also* Plaintiff's Memorandum of Law in Opposition to Defendants' Joint Motion to Dismiss the Third Amended Farina Complaint at 25, Farina v. Nokia, 578 F. Supp. 2d 740 (E.D. Pa. 2008), *aff'd*, 625 F.3d 97 (3d Cir. 2010), *cert. denied*, 2011 WL 4536521 (U.S. Oct. 3, 2011) (No. 10-1064) (alleging that "the phones [the defendant] sold are defective right now, and . . . [e]very time someone uses that defective product he or she is being exposed to [radio frequency radiation] which can and does cause biological changes in the body").

174. *Balt. Bus.*, 68 F. App'x at 421-22.

175. *Id.*

176. Medmarc Cas. Ins. Co. v. Avent Am., Inc., 612 F.3d 607, 617-18 (7th Cir. 2010).

177. *Id.*

178. *Id.* at 618.

179. Anderson & Holober, *supra* note 36, at 591.

a defendant who is barred by judicial estoppel from asserting a vigorous defense is unlikely to appreciate that consistency, and may have less respect for a court system that he feels treated him unfairly. The imposition of judicial estoppel can be highly prejudicial to the estopped party, resulting in the loss of a single claim or even an entire lawsuit.[180] In addition, both because different courts take different approaches to judicial estoppel[181] and because many courts take a highly discretionary approach,[182] it can be difficult for litigants to know if a particular argument will cross the line and provoke the court to impose judicial estoppel against them. Furthermore, even if a litigant feels confident in his ability to predict which court will be most favorable to the arguments he wishes to make, that very prediction will naturally lead him to "shop around" for the most advantageous forum, a practice that the courts have long been anxious to prevent.[183] Finally, in the insurance coverage context, the application of judicial estoppel against insured defendants may have the long-term effect of discouraging the purchase of CGL policies. Corporations are unlikely to want to pay premiums if they believe that they are only purchasing an option to litigate every underlying claim and coverage issue under the threat of judicial estoppel.[184]

Although it avoided the above difficulties, Avent is likely displeased with the Seventh Circuit's holding that its insurers have no duty to defend it; however, things could have gone much worse for Avent. Obviously, if the court had found against Avent on both the judicial estoppel issue and the duty to defend issue, the situation would have been grim. Avent would have had essentially no remaining argument that the plaintiffs' claims were covered under the terms of its insurance policy, so any appeal of the duty to defend issue would have been extremely difficult without first winning a reversal of the judicial estoppel issue. As the decision stands, Avent still has a few options to appeal the adverse coverage decision. It can petition the Seventh Circuit for a rehearing en banc,[185] and there is also some chance (albeit a very slim one) of making a successful application for a writ of certiorari to the Supreme Court.[186]

On the other hand, consider the consequences that would have resulted if the

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180. Schreiber, *supra* note 68, at 330.

181. Anderson & Holober, *supra* note 36, at 622 (noting that courts do not apply judicial estoppel according to any "pat formula" (quoting Czajkowski v. City of Chicago, 810 F. Supp. 1428, 1436 (N.D. Ill. 1993))).

182. *See* Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990) (noting that judicial estoppel is "an equitable doctrine invoked by a court at its discretion" (quoting Religious Tech. Ctr. v. Scott, 869 F.2d 1306, 1311 (9th Cir. 1989) (Hall, J., dissenting))).

183. *See* Brown, *supra* note 92, at 651 (listing the myriad evils of forum shopping).

184. *See* ABRAHAM, *supra* note 1, at 170 (noting that insured defendants are likely to have to litigate any claims that they make under their CGL policy).

185. *See* FED. R. APP. P. 40 (describing the procedures that parties must follow when petitioning for rehearing en banc).

186. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2272 (2009) (Roberts, C.J., dissenting) (noting that "[t]he success rate for certiorari petitions before this Court is approximately 1.1%").

court had imposed judicial estoppel against Avent but found on some other ground that its insurers had a duty to defend. Such an outcome might have been acceptable for Avent, but the future implications might have been troublesome for defendants and their insurers alike. If insured defendants had to worry about staying within the scope of their policy while defending themselves against a lawsuit, they would be left with two equally unattractive options.

First, they could take an extremely cautious approach to plaintiffs, making sure only to make arguments that kept them within the scope of their policy. This would be bad for defendants, because they would not be able to make a vigorous defense, so they would be less likely to choose this option. Also, if the insurer later lost the coverage lawsuit, it might be obligated to defend against the underlying claim while bound by the arguments that the plaintiff had made in the coverage lawsuit. An insurer in that situation would find the defense process especially difficult. The plaintiff might be able to win a large verdict or leverage an equally large settlement, and the insurer could end up paying out more than it would have if it had simply assumed the defense at the outset and reserved its coverage defenses until after the underlying case was concluded.

Alternatively, defendants in this situation could try to force the coverage determination before the underlying litigation goes forward, so that the defendant and the insurance company could be on the same side. Insurance companies, however, often enjoy the right to reserve some coverage issues for later litigation,[187] so even if they are initially required to defend, they can essentially relitigate that decision later and potentially win a reversal.[188] Thus, any attempt to completely resolve the coverage issue prior to addressing the underlying claim would be both difficult procedurally and bad for plaintiffs because it would needlessly prolong their litigation.

Ultimately, based on an examination of the alternative policy outcomes, the Seventh Circuit's decision in *Avent* offers the best result both for that particular case and for future cases. In cases where the defendant's positions can be clarified so that they are not in direct opposition to each other, the policy favoring the defendant's right to present a vigorous defense outweighs the court's concern about inconsistent outcomes. In the rare cases where they are undeniably mutually exclusive, that balance reverses, and the defendant's interest in advocating its position must yield to a greater necessity: the preservation of judicial integrity.

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187. RSR Corp. v. Int'l Ins. Co., 612 F.3d 851, 856 (5th Cir. 2010) (noting that "RSR and International tried certain coverage issues . . . before a jury, while reserving unripe coverage and damages issues for future resolution").

188. *Id.* at 863 (affirming the trial court's determination that the defendant insurance company did not owe indemnity to the plaintiff insured, in spite of an earlier determination to the contrary).

IV. IN CASE OF CERTIORARI: WHY THE SUPREME COURT SHOULD CLARIFY THE LAW OF JUDICIAL ESTOPPEL AND THE STANDARD FOR PLEADING IN THE INSURANCE COVERAGE LITIGATION CONTEXT

By granting certiorari in *Avent*, the Court would have the opportunity to resolve two circuit splits in one case. This Part first provides an overview of established Supreme Court precedent on the law of judicial estoppel. Next, it describes the two circuit splits that the Court could address if it granted certiorari in *Avent*. Finally, it explores various options for resolving those splits, and suggests the best possible outcome.

A. The Current State of the Law of Judicial Estoppel

Although the Supreme Court, by its own admission, has rarely addressed the issue of judicial estoppel,[189] it has done so in two recent cases.[190] The first of these, *Cleveland v. Policy Management Systems Corp.*,[191] resolved a circuit split on the question of whether a plaintiff's successful application for Social Security Disability Insurance benefits could be used to judicially estop her from bringing a claim for wrongful termination under the Americans with Disabilities Act.[192] The Court noted that the plaintiff successfully distinguished her allegedly contradictory statements in her brief.[193] As such, it held that the imposition of judicial estoppel to defeat the plaintiff's claim on summary judgment was inappropriate and remanded the case to the trial court.[194]

The second case, *New Hampshire v. Maine*,[195] adopted a form of the judicial acceptance approach to judicial estoppel[196] and has been cited favorably by several circuit courts of appeals.[197] In that case, the party states were contesting the location of a state boundary line.[198] The dispute was long-standing; the defendant's argument for the imposition of judicial estoppel to dismiss the plaintiff's case was predicated on "two prior proceedings—a 1740 boundary determination by King George II and a 1977 consent judgment entered by [the

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189. New Hampshire v. Maine, 532 U.S. 742, 749 (2001) (noting "we have not had occasion to discuss the doctrine elaborately").

190. *See* Johnson, *supra* note 63, at 9 n.23.

191. 526 U.S. 795 (1999).

192. *Id.* at 800-01.

193. *Id.* at 807.

194. *Id.*

195. 532 U.S. 742 (2001).

196. *Id.* at 749-51.

197. *See, e.g.*, CRV Enters., Inc. v. United States, 626 F.3d 1241, 1248 (Fed. Cir. 2010) ("Under the doctrine, courts weigh whether (1) the supposedly contradictory positions are 'clearly inconsistent,' (2) the party succeeded in persuading the lower court of its earlier position, and (3) the party would derive an unfair advantage from the inconsistent advantage." (quoting *New Hampshire*, 532 U.S. at 750)).

198. *New Hampshire*, 532 U.S. at 745.

Supreme] Court."[199] Both of those proceedings established that, as the plaintiff argued, the boundary line was located at the midpoint of the Piscataqua River.[200] In the instant case, the plaintiff was arguing that the Maine shoreline was the boundary.[201] The Court noted that it had accepted the plaintiff's prior position as to the boundary line, and accordingly, it imposed judicial estoppel to bar the plaintiff from asserting its new and directly contradictory position.[202]

These two cases establish an important precedent. In both of them, the Court spends a significant portion of its analysis discussing whether or not the allegedly contradictory positions can be reasonably reconciled, either by the plaintiff or by the Court itself.[203] This aspect of the judicial estoppel inquiry—the strict requirement that the two positions be mutually exclusive—figures prominently in the solution suggested in this Note.[204]

B. The Two Circuit Splits

By revisiting the judicial estoppel issue and granting certiorari in *Avent*, the Court could address two important and disputed issues in a single case. In *Avent*, the appellant raised two issues for the Seventh Circuit's consideration: whether Avent should be judicially estopped from making its coverage argument,[205] and whether the underlying complaint was sufficient to trigger coverage under Avent's CGL policies.[206] The lower courts have split on both of these issues,[207] and the Court should take this opportunity to resolve both splits.

First, the Court could clarify the law of judicial estoppel by resolving two sub-issues. The primary issue is determining what qualifies as a "clearly inconsistent" position for the purposes of the first factor in the judicial estoppel

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199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 755.

203. *Id.* at 751-55; Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 802-07 (1999).

204. *See* discussion *infra* Part IV.D.

205. Medmarc Cas. Ins. Co. v. Avent Am., Inc., 612 F.3d 607, 613-14 (7th Cir. 2010).

206. *Id.* at 614-18.

207. *Compare id.* at 613-14 (holding that the phrases "for bodily injury" and "because of bodily injury" were not in "direct tension" and declining to impose judicial estoppel against the defendants), *with* RSR Corp. v. Int'l Ins. Co., 612 F.3d 851, 860 (5th Cir. 2010) (imposing judicial estoppel based on an implied contradiction in the plaintiff's arguments); *compare Avent*, 612 F.3d at 616 (holding that the plaintiffs' underlying complaints, relating to the presence of an allegedly toxic chemical in baby bottles, "do not reach the level of asserting claims 'because of bodily injury'" and thus do not trigger a duty to defend under the defendant's CGL policy), *with* N. Ins. Co. of N.Y. v. Balt. Bus. Commc'ns, Inc., 68 F. App'x 414, 419 (4th Cir. 2003) (holding that the plaintiffs' underlying complaint, relating to the alleged emission of radiation from cellular telephones, "asserts a claim for 'damages because of bodily injury,' as contemplated within the terms of the [defendant's CGL] [p]olicy").

analysis that the Court laid out in *New Hampshire*.[208] The secondary issue is the addition of a new factor to the judicial estoppel analysis.[209]

The circuit courts have split on exactly what constitutes "clearly inconsistent." In *Avent*, the Seventh Circuit established a firm requirement that the conflicting positions be in "direct tension" when it held that there was enough of a distinction between the phrases "for bodily injury" and "because of bodily injury" to allow the defendant to escape the imposition of judicial estoppel.[210] In *RSR Corp*., however, the Fifth Circuit imposed judicial estoppel based on an inference that the court made about what the plaintiff corporation was alleging: "[the plaintiff] has not alleged that any of its pollution at Harbor Island was intentional. Therefore, by implication, all of the pollution at Harbor Island was alleged to be accidental" and thus covered by both the environmental policy and the CGL policy.[211] Thus, the Fifth Circuit imposed judicial estoppel against the plaintiff for attempting to argue that the policies covered different liabilities, even though the plaintiff was not making a contradictory argument until the court interpreted it as such.[212] Establishing an unequivocal definition of "clearly inconsistent" would make it easier for parties to determine whether the court would be likely to judicially estop them from making their argument.

Second, the Court could decide if a complaint must specifically allege "actual physical harm to the plaintiffs" in order to trigger the duty to defend, as the Seventh Circuit held in *Avent*, or if the duty can be triggered even in the absence of such specific allegations, as the Fourth Circuit held in *Baltimore Business*.[213] That would effectively clarify the standard for pleading required to trigger a duty to defend in a no-injury product liability case. Although insurance coverage law is generally determined at the state level,[214] the Court has recently characterized state "pleading standards" as procedural;[215] therefore, there is unlikely to be an *Erie* barrier to the establishment of a uniform federal pleading standard of this kind. Based on the current trend toward judicial rejection of no-injury product liability cases,[216] as well as on the fact that the Seventh Circuit's approach is

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208. *New Hampshire*, 532 U.S. at 750-51.

209. *See* discussion *infra* Part IV.D.

210. *Avent*, 612 F.3d at 613-14.

211. *RSR Corp.*, 612 F.3d at 860.

212. *Id.* (interpreting the plaintiff's arguments as diametrically opposed to each other).

213. *Compare Avent*, 612 F.3d at 615 (finding no duty to defend because the complaint failed to specifically allege that the plaintiffs suffered any physical injury), *with* N. Ins. Co. of N.Y. v. Balt. Bus. Commc'ns, Inc., 68 F. App'x 414 (4th Cir. 2003), *and* Plantronics, Inc. v. Am. Home Assurance Co., 2008 WL 4665983 (N.D. Cal. 2008) (both holding that no specific allegation of physical injury was necessary in order to trigger the duty to defend).

214. *See Avent*, 612 F.3d at 618 (noting that the interpretation of the policy language was a question to which the court applied Illinois law).

215. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1441 (2010) (citing "pleading standards" as an example of a state procedural rule for the purposes of analysis under the *Erie* doctrine).

216. *See* Maneker, *supra* note 4, at 13 ("Recently, some plaintiffs have attempted to bring

clearer and thus easier for courts to apply, the Court should require a specific allegation of physical harm in the event that it addresses this issue.

C. Two Solutions to the Judicial Estoppel Problem and Why the Court Should Reject Them

There are two solutions to the judicial estoppel problem that may seem obvious, but should be rejected. First, the Supreme Court could simply disallow judicial estoppel in the insurance coverage context altogether. Second, the Court could import the requirement of detrimental reliance from the equitable estoppel analysis into the judicial estoppel analysis. Neither of these solutions are advisable, however, because they would defeat the policy objectives behind judicial estoppel and leave the courts overly vulnerable to the assertion of inconsistent positions.

The Supreme Court should not impose a complete bar against the application of judicial estoppel in the insurance coverage context, for three reasons. First, the waste of judicial resources caused by such a bar would be considerable.[217] For example, imagine a case in which *A* asserts an argument against *B*, and the court accepts *A*'s argument. In subsequent litigation, *A* asserts a new argument (either against *B* or against a new party, *C*) that is in direct tension with its prior position. If the court could not apply judicial estoppel to bar *A*'s new argument, it would likely find against *A*, based both on the reasoning behind the first ruling and on a desire to avoid overruling itself.[218] The result would be a kind of "estoppel effect" in which the court's ruling would essentially be a foregone conclusion. By disallowing judicial estoppel, thus forcing the court and the parties to go through the motions of revisiting the already litigated issue, a great deal of time and money could be wasted.[219]

Second, judicial estoppel effectively ensures consistent judicial outcomes and thus preserves the value of court precedent.[220] Consider what would happen if, in the above hypothetical, the court accepted both *A*'s initial argument and its subsequent directly contradictory argument. The resulting precedents would be impossible both for lawyers and other courts to reconcile and apply.[221] Such contradiction would frustrate litigants and damage public perception of the legal

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class action products liability actions that don't allege typical tort damages. The results have been encouraging—for the defense.") (emphasis omitted).

217. *See* Anderson & Holober, *supra* note 36, at 620 (noting that "judicial estoppel prevents unnecessary litigation which diminishes the efficiency of the judicial system").

218. *Id.* at 619.

219. *Id.* at 620-21 (discussing Allen v. Zurich Ins. Co., 667 F.2d 1162 (4th Cir. 1982), and noting that "[t]rial and judgment notwithstanding the verdict would have been avoided had the district court exercised its judicial estoppel power before the trial stage to preclude the litigant's inconsistent position").

220. *Id.* at 619.

221. *See id.* at 622 (noting that "inconsistent positions obstruct the orderly administration of justice by undermining principles of finality of judgments").

system.[222]

Finally, the Court should find that the maintenance of judicial integrity weighs heavily in favor of preserving courts' ability to apply judicial estoppel. Where the Court must balance a party's right to assert an argument against a court's right to preserve consistency and dignity in its rulings and proceedings,[223] it has a vested interest on one side of the scale, as well as a duty to protect itself and lower courts from becoming parties to absurd contradictions.[224] Ultimately, the Supreme Court, as highest judicial authority,[225] should find this balance in favor of the judiciary rather than the litigant.

The Court could also decide to borrow one of the requirements from equitable estoppel and add it to the judicial estoppel framework in insurance coverage cases. Equitable estoppel "bars a party from asserting an inconsistent position when another person has [detrimentally] relied upon the prior position."[226] The key feature of equitable estoppel is reliance by a party; if no party has demonstrated reliance, the doctrine does not apply.[227] The key feature of judicial estoppel (at least in the prior acceptance approach) is also reliance, but it is reliance by a court; if no court has demonstrated reliance by accepting the prior position, the doctrine does not apply.[228]

In light of this similarity, the Court could borrow one of the requirements for equitable estoppel for use in the application of judicial estoppel in insurance coverage cases: detrimental reliance.[229] The Court could find that judicial estoppel only applies against a party (*A*) if equitable estoppel also applies; in other words, both the court and at least one adverse party (*B*) must have materially relied on *A*'s prior position in order for *A* to be estopped from asserting a new position that directly contradicts the prior one.[230] Because *B* would be prejudiced if *A* were allowed to assert the new position, the prejudice caused to *A* by barring the old position is somewhat balanced out. However, this kind of

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222. *See id.* at 619 (noting that "inconsistent judicial results . . . weaken public confidence in the judiciary").

223. *See* New Hampshire v. Maine, 532 U.S. 742, 751 (2001) (considering the "balance of equities" when determining whether to apply judicial estoppel).

224. *See* Grochocinski v. Mayer Brown Rowe & Maw LLP, No. 06-c-5486, 2010 WL 1407256, at *17 (N.D. Ill. Mar. 31, 2010) (noting that "judicial estoppel is reserved for those cases where considerations of equity persuade the court that the integrity of the judicial system must be protected, and in those instances, a court should not shy from its duty to preserve that integrity").

225. Janella Ragwen, Developments, *The Propriety of Independently Referencing International Law*, 40 LOY. L.A. L. REV. 1407, 1436 (2007) (describing the Supreme Court as "the head of the judicial branch").

226. Anderson & Holober, *supra* note 36, at 604.

227. *See id.*

228. *Id.* at 637.

229. *See id.* at 632 ("A doctrine intended to protect *courts*, judicial estoppel does not require elements of the related doctrines of equitable and collateral estoppel, which are intended primarily to protect *litigants*.").

230. *See generally id.* at 635-45 (explaining the application of equitable estoppel).

bright-line rule might not give the court enough power to protect itself.[231] For instance, the court would be unable to apply judicial estoppel if *B* did not detrimentally rely on the earlier position; instead, *A* would still be able to place the court in the position of potentially making two contradictory findings.

D. Towards a Solution: "threading the judicial estoppel needle"[232]

The Court should derive a better solution from Judge Flaum's majority opinion in *Avent*: "Although appellant's argument may appear to be threading the judicial estoppel needle, it is meritorious."[233] Essentially, the Seventh Circuit found judicial estoppel was inappropriate because the two arguments were not in "direct tension."[234] Requiring such a precise showing of total opposition would allow the defendant to have more freedom in his defense, secure in the knowledge that as long as he could "thread the needle" and distinguish his positions from each other, he would not be estopped from asserting either of them. It would also retain the protection of the judicial system that the doctrine of judicial estoppel was originally intended to provide; the court could still impose it where absolutely necessary to protect itself from the indignity of entertaining two directly contradictory arguments from the mouth of a single litigant.

For this reason, the Supreme Court should adopt the narrower "direct tension" standard employed by the Seventh Circuit, rather than the broader "implication" standard employed by the Fifth Circuit. The Seventh Circuit standard is better for litigants because it allows them more latitude to assert their best arguments while still allowing courts to preclude obviously self-serving contradictory positions.[235] Although the direct tension standard still permits a certain amount of judicial discretion in the determination of whether a litigant's arguments are reconcilable with each other, that discretion is appropriate in light of the primary purpose of judicial estoppel: the protection of judicial integrity.[236]

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231. *Id.* at 635 (expressing concern that conflating the doctrines of equitable estoppel and judicial estoppel by imposing the reliance requirement in judicial estoppel doctrine "fails to protect the judiciary from the appearance of control by powerful and frequent litigants").

232. Medmarc Cas. Ins. Co. v. Avent Am., Inc., 612 F.3d 607, 614 (7th Cir. 2010).

233. *Id.*

234. *Id.*

235. *See generally* Anderson & Holober, *supra* note 36, at 635 (advocating a "flexible approach" to judicial estoppel).

236. From a procedural standpoint, the judicial estoppel doctrine would operate in substantially the same way that it does now. The court would still have the right to impose judicial estoppel *sua sponte*, because the purpose of the doctrine is to protect the court itself. Anderson & Holober, *supra* note 36, at 632. This is analogous to the court's ability to raise a question of subject-matter jurisdiction *sua sponte*, because the court is responsible for ensuring that it does not overstep its jurisdictional bounds. FED. R. CIV. P. 12(h)(3). Much like the summary judgment standard, the court should be required to draw all inferences in favor of the party against whom judicial estoppel is being considered. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986).

In order for this solution to be effective, however, courts must consider the alignment of the parties, which is the whole source of the difficulty in insurance coverage litigation. The defendant fighting a war on two fronts has a vested interest in being able to assert different (and sometimes contradictory) arguments against each of his adversaries. However, such a defendant does not have that same interest in asserting contradictory arguments against the same or similarly aligned adversaries. Consider *RSR Corp.*, in which the plaintiff corporation made a similarly fine distinction, arguing that its two different insurance policies covered different types of industrial pollution.[237] However, in a previous (and successful) action, the corporation had argued that the two policies provided overlapping coverage.[238] The Fifth Circuit upheld the district court's imposition of judicial estoppel against the plaintiff corporation, reasoning:

> RSR clearly alleged in state court that its [Comprehensive General Liability] policies covered all accidental pollution, whether or not it was sudden. RSR has not alleged that any of its pollution at Harbor Island was intentional. Therefore, by implication, all of the pollution at Harbor Island was alleged to be accidental. Because RSR's original interpretation of the CGL and Environmental policies allowed accidental pollution to be covered under both policies, and because the only pollution alleged to have occurred at Harbor Island was accidental, we hold that the district court did not abuse its discretion by holding that RSR was estopped from arguing that the CGL and Environmental policies covered different liabilities.[239]

The solution to this conflict is to consider the identity and alignment of the parties as a fourth factor in the judicial estoppel inquiry, to be considered either only and specifically in the insurance coverage litigation context or more broadly. By considering alignment, the Court could neatly synthesize *Avent* and *RSR Corp.*; after all, the plaintiff in *RSR Corp.* had already prevailed against some of its insurers with its prior argument, and yet it was asserting its new argument against its other insurers in an effort to collect on its other policies.[240] In *Avent*, on the other hand, the defendant had partially prevailed against the plaintiffs with its first argument, but was asserting its new argument against its insurer, a party differently aligned from the plaintiffs.[241] The potential for prejudice is greater in the latter case, because the plaintiff in *RSR Corp.* had already collected on some of its policies and was suing its insurers for more,[242] while the defendant in *Avent* had not received any benefit from its policies and was simultaneously fighting the

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237. RSR Corp. v. Int'l Ins. Co., 612 F.3d 851, 860 (5th Cir. 2010).

238. *Id.*

239. *Id.* at 860-61.

240. *Id.* at 862 (expressing concern about the plaintiff possibly obtaining a windfall "double recovery" if it prevailed in this case).

241. Medmarc Cas. Ins. Co. v. Avent Am., Inc., 612 F.3d 607, 613-14 (7th Cir. 2010).

242. *RSR Corp.*, 612 F.3d at 856.

plaintiffs and its own insurer.[243] This new requirement would require courts to fully consider the interests of insured defendants, make their "two-front battle" a little easier to fight, and preserve the value of the insurance coverage that they purchased for just this type of eventuality. Therefore, the Court should hold that a court considering the application of judicial estoppel must consider not just the content of the conflicting positions, but also the parties by whom and against whom they are offered.

These two minor yet important changes to the law of judicial estoppel, required showings of direct contradiction and similarly aligned parties, could go a long way toward mitigating the prejudice to the party against whom estoppel is imposed. Requiring courts to consider the alignment of the parties would give special consideration to defendants caught between a rock (the plaintiff) and a hard place (their own liability insurer). Similarly, allowing parties to "thread the judicial estoppel needle" when necessary would preserve as much of the parties' freedom to vigorously litigate as possible while still permitting the court to disallow egregious manipulation.

CONCLUSION

Insurance coverage litigation is a particularly thorny area of the law in which to apply judicial estoppel because of the extreme potential for prejudice to a defendant who is simultaneously litigating against the plaintiff and his own insurance provider. However, certain changes to the law could mitigate that prejudice. If the United States Supreme Court granted certiorari in *Avent*, it would have the opportunity to make those changes in two ways. First, it could resolve two existing splits among the circuit courts of appeal: what language must be present in the plaintiff's complaint in order to trigger a duty to defend under a CGL policy, and what constitutes a "clearly inconsistent" position for the purposes of judicial estoppel.[244] Second, it could impose a new requirement for the application of judicial estoppel in the duty to defend context.[245]

The Court could choose to bar judicial estoppel entirely in the insurance coverage context, or it could impose an additional requirement of detrimental reliance. The total bar is inadvisable because it leaves courts unprotected and generally defeats the important policy objectives behind judicial estoppel. Similarly, although borrowing the reliance requirement from equitable estoppel could result in less prejudice to the defendant, it may not be enough to protect the courts from inconsistent arguments.[246]

Instead, the Court should establish a uniform federal standard of pleading required to trigger the duty to defend in a product liability case. In *Avent*, the Seventh Circuit held that a specific allegation of harm was required to trigger the

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243. *Avent*, 612 F.3d at 612.

244. *See* discussion *supra* Part IV.B.

245. *See* discussion *supra* Part IV.B.

246. *See* discussion *supra* Part IV.C.

duty,[247] but in *Baltimore Business*, the Fourth Circuit held that the duty could be triggered even without such a specific allegation.[248] The Court should apply the Seventh Circuit's approach because it is clearer, easier to apply, and generally more in line with the judiciary's current strict approach to no-injury product liability cases.[249] Requiring that the two "inconsistent" positions be absolutely irreconcilable, rather than simply somewhat contradictory, is an effective choice because it permits courts to protect themselves regardless of the reliance issue, but only when it is absolutely necessary to prevent an inconsistent judicial result.[250]

The Court should also add a fourth factor to the judicial estoppel inquiry: the alignment of the parties. This factor would target the problem of prejudice to the defendant who is involved in litigation on two fronts, where it is most serious.[251] If a litigant successfully asserted its first argument against one party and later attempts to assert a second and irreconcilable argument against the same or a similarly aligned party (like the plaintiff did in *RSR Corp.*), that should weigh in favor of imposing estoppel because it is more likely that the second argument was driven by self-interest than by necessity.[252] If, on the other hand, a litigant had asserted its first argument against one party and attempts to assert a second and irreconcilable argument against a differently aligned party (like the defendant did in *Avent*), that should weigh against imposing estoppel, because it is more likely that the second argument was driven by necessity than by self-interest.[253]

By establishing a uniform standard of pleading required to trigger a duty to defend and requiring a showing of irreconcilability and a consideration of party alignment before imposing judicial estoppel, the Court could mitigate much of the prejudice to the defendant inherent in an application of judicial estoppel in the duty to defend context. In *Avent*, the defendant had the benefit of these refinements to the law of judicial estoppel, and as a result, it was not estopped from vigorously contesting its insurer's attempt to deny coverage. Whenever possible, defendants should have that benefit, so that their two-front battle is easier to fight, and they do not end up wishing that they had never purchased their CGL policy in the first place.

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247. *Avent*, 612 F.3d at 615.

248. N. Ins. Co. of N.Y. v. Balt. Bus. Commc'ns, Inc., 68 F. App'x 414, 422 (4th Cir. 2003).

249. *See* discussion *supra* Part IV.D.

250. *See* discussion *supra* Part IV.D.

251. *See* discussion *supra* Part IV.D.

252. *See* RSR Corp. v. Int'l Ins. Co., 612 F.3d 851, 862 (5th Cir. 2010) (suggesting that the plaintiff was trying to get a windfall "double recovery" by asserting its second argument).

253. *See* Medmarc Cas. Ins. Co. v. Avent Am., Inc., 612 F.3d 607, 614 (7th Cir. 2010) (noting that if his insurance company refuses to defend him, the plaintiff "may have to attack the opponent's case in ways that seem to remove it from the scope of the insurance contract").

PARK51 AS A CASE STUDY: TESTING THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT

ALEX R. WHITTED*

INTRODUCTION

Few institutions in this world are as universally celebrated and divisive as religion. Imagine that you are the patriarch of a middle class Muslim family living in Lower Manhattan. You were born and raised in New York City and are proud of your Muslim-American heritage. On September 11, 2001, you were devastated to learn that Muslim extremists were responsible for the suicide attacks that caused the World Trade Center's Twin Towers to collapse, ending the lives of so many fellow Americans.

During the twenty-four hours following that fateful day you were struck by the realization that your religion and your country would never be the same. You began to wonder if "Muslim-American" would become an oxymoron. That is, you began to speculate whether the atrocities committed by a few Islamic extremists would serve to "awaken a sleeping giant"[1] and cause America's predominantly Christian population[2] to support restrictions on the religious tolerances guaranteed by the First Amendment.[3] In essence, would your family have to choose between being Muslim and being American?

On December 8, 2009, the *New York Times* published an article that seemed to answer this final looming question with a resounding "no."[4] The article explained that Imam Feisal Abdul Rauf, a cleric and leader within the Muslim-American community, was collaborating with others to construct an Islamic community center ("Park51") just blocks away from "ground zero."[5] Imam Feisal Abdul Rauf is heralded "as having built [his] career preaching tolerance and interfaith understanding."[6] Moreover, the Imam explained that the location's

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1. TORA! TORA! TORA! (20th Century Fox 1970) (quoting the memorable words attributed to Japanese Admiral Isoroku Yamamoto after the Japanese attacked Pearl Harbor on December 7, 1941).

2. BARRY A. KOSMIN & ARIELA KEYSAR, AMERICAN RELIGIOUS IDENTIFICATION SURVEY (ARIS 2008): SUMMARY REPORT 3 tbl. 1 (2009), *available at* http://www.americanreligionsurvey-aris.org/reports/ARIS_Report_2008.pdf (finding that seventy-six percent of American adults are Christian).

3. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

4. Ralph Blumenthal & Sharaf Mowjood, *Muslim Prayers and Renewal Near Ground Zero*, N.Y. TIMES, Dec. 8, 2009, http://www.nytimes.com/2009/12/09/nyregion/09mosque.html?_r=3&sq=mosque%20ground%20zero&st=nyt&scp=1&pagewanted=all.

5. *Id.*

6. *Id.*

close proximity to the World Trade Center "sends the opposite statement to what happened on 9/11."[7] Finally, you think to yourself, a permanent reminder will be built in New York City proclaiming to the world that Islamic extremists did not prevail on September 11, 2001.

However, some families of 9/11 victims and right-wing political organizations oppose the construction of Park51.[8] One of the opposition's more poignant arguments is its assertion that "throughout Islam's history, whenever a region was conquered, one of the first signs of consolidation was/is the erection of a mosque atop the sacred sites of the vanquished . . . ."[9] Assuming arguendo this is historically accurate, unless Imam Feisal Abdul Rauf, collaborators involved in planning the project, or another source provides conclusive evidence that Park51 will be a "victory mosque[],"[10] the opposition's argument mirrors the Runnymede Trust's definition of "Islamophobia."[11]

What's more, "[t]he wide dissemination of misrepresentations about Islam and Muslims has given the impression of public credence to many falsities about the project."[12] According to Deepa Kumar, a professor of media studies at Rutgers University's School of Communication and Information, "the mainstream media and the political elite have helped generate an attitude toward Muslims that has been largely negative."[13] The emotionally charged media surrounding what the opposition has named the "Ground Zero mosque"[14] is exacerbating anti-

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7. *Id.*

8. *See* Cristian Salazar, Associated Press, *Conservative Group Vows Legal Action After NYC Panel Clears Way for Mosque Near Ground Zero*, FOX NEWS (Aug. 4, 2010), http://www.foxnews.com/us/2010/08/04/conservative-group-vows-legal-action-nyc-panel-clears-way-mosque-near-ground/.

9. Raymond Ibrahim, *The Two Faces of the Ground Zero Mosque*, MIDDLE E. F. (June 22, 2010), http://www.meforum.org/2678/ground-zero-mosque.

10. *See* Brian Montopoli, *Renee Ellmers Ad: No Muslim "Victory Mosque" at Ground Zero*, CBS NEWS (Sept. 22, 2010, 3:33 PM), http://www.cbsnews.com/8301-503544_162-20017307-503544.html.

11. THE RUNNYMEDE TRUST, ISLAMOPHOBIA: A CHALLENGE FOR US ALL (1997), *available at* http://www.runnymedetrust.org/uploads/publications/pdfs/islamophobia.pdf (outlining eight components created by the Runnymede Trust, a leading race equality think tank, to define "Islamophobia." In this context, the two components implicated are "enemy" and "manipulative." The "enemy" component represents those who view Islam "as violent, aggressive, threatening, supportive of terrorism, engaged in 'a clash of civilisations' [sic]." The "manipulative" component represents those who view Islam "as a political ideology, used for political or military advantage.").

12. M. Cherif Bassiouni, *GR White Paper: Islamophobia and the New York Mosque Controversy*, GROVE REP. (Sept. 27, 2010), http://www.grovereport.org/2010/09/27/islamophobia-and-the-new-york-mosque-controversy/.

13. Nicole Pride, *Hot Topics: Examining Islamophobia in America*, RUTGERS TODAY (Sept. 22, 2010), http://news.rutgers.edu/medrel/special-content/fall-2010/hot-topics-whats-beh-20100921.

14. Jean Marbella, *When a 'Ground Zero Mosque' Really is Neither: What a Difference Two Blocks Makes*, BALT. SUN (Aug. 14, 2010), http://articles.baltimoresun.com/2010-08-14/news/bs-md-marbella-ground-zero-mosque-20100814_1_ground-zero-mosque-vesey-street-hallowed-

Muslim sentiments across the nation.[15]

The result is the current national debate concerning "Islam's place in American society."[16] In Murfreesboro, Tennessee, this debate has entered the courtroom with the case of *Estes v. Rutherford County Regional Planning Commission*.[17] In *Estes*, the plaintiffs opposed the county's decision to approve site plans for the construction of an Islamic center in Murfreesboro.[18] Although the point of contention in *Estes* is merely a subset of the main issue, it represents the focal point on which the national debate turns: "whether the Islamic [c]enter[s] of Murfreesboro[, New York City, etc. are] entitled to protection under the First Amendment."[19] Thus, the federal law implicated in *Estes*[20] and similar cases is inextricably linked to one of America's most polarizing issues.

The Religious Land Use and Institutionalized Persons Act (RLUIPA)[21] is the federal law being invoked in courts across the country to resolve litigation concerning the construction of Islamic community centers.[22] In general, the RLUIPA protects religious organizations from zoning restrictions that impose a "substantial burden" on the organization's "religious exercise."[23] However, courts have reached different conclusions when applying the RLUIPA's legal terms.[24] Unfortunately, the resulting uncertainty in applying the RLUIPA is

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ground.

15. *See* Laurie Goodstein, *Across Nation, Mosque Projects Meet Opposition*, N.Y. TIMES (Aug. 7, 2010), http://www.nytimes.com/2010/08/08/us/08mosque.html.

16. Thomas S. Kidd, *Whether Park 51 or Burning Qurans, Liberty is Not Propriety*, USA TODAY (Sept. 8, 2010), http://www.usatoday.com/news/opinion/forum/2010-09-09-kidd09_ST_N.htm.

17. No. 10CV-1443 (Tenn. Ch. Ct. Rutherford Cnty. filed Sept. 17, 2010).

18. *See* Associated Press, *Justice Department Wades into Tennessee Mosque Controversy on Side of Islam*, FOX NEWS (Oct. 18, 2010), http://www.foxnews.com/politics/2010/10/18/justice-department-wades-tennessee-mosque-controversy-islam/.

19. *Id.*

20. *See* Brief for United States of Am. as Amicus Curiae, Estes v. Rutherford Cnty. Reg'l Planning Comm'n, No. 10CV-1443 (Tenn. Ch. Ct. Rutherford Cnty. filed Oct. 18, 2010).

21. 42 U.S.C. § 2000cc (2006).

22. John Schwartz, *Zoning Law Aside, Mosque Projects Face Battles*, N.Y. TIMES (Sept. 3, 2010), http://www.nytimes.com/2010/09/04/us/politics/04build.html (emphasizing the central role of the RLUIPA in resolving legal disputes surrounding Islamic community centers by quoting Daniel Lauber, a past president of the American Planning Association, as saying that "[e]very planner and zoning lawyer I've talked to about this is saying the same thing — Rluipa [sic]").

23. 42 U.S.C. § 2000cc(a)(1).

24. *Compare* Henley v. City of Youngstown Bd. of Zoning Appeals, 735 N.E.2d 433, 439 (Ohio 2000) (allowing a society of Catholic nuns to convert a portion of their convent into apartments for homeless women and noting that "[s]everal courts have specifically permitted residential accommodations in church buildings as accessory uses."), *with* Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 347-48 (2d Cir. 2007) (stating that the RLUIPA is implicated in this case because the religious school's expansion project calls for the construction of classrooms that "will [all] be used at some time for religious education . . . ." The court takes

prejudicial to both municipalities and religious organizations because neither group is able to plan future building projects with a reasonable degree of confidence that their position will prevail in court.

This Note discusses the strengths and weaknesses of judicial opinions interpreting the RLUIPA with the goal of creating and advocating for a uniform standard that fuses unique ideas with the strengths of opinions from different jurisdictions. Part I of this Note explains the history of the RLUIPA and discusses the Act's significance and intended purpose. Part II examines the various ways in which courts define "religious exercise" and "substantial burden" to illustrate the different ways RLUIPA is applied across jurisdictions. Part III advocates for a uniform standard that incorporates some of the strengths of opinions from different jurisdictions. Finally, Part IV applies this hybrid standard to the current controversy concerning the Park51 Islamic community center to illustrate how the standard will function.

I. THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT: HISTORICAL PERSPECTIVE, SIGNIFICANCE, AND INTENDED PURPOSE

Both houses of Congress unanimously passed the Religious Land Use and Institutionalized Persons Act.[25] Signed into law on September 22, 2000,[26] the RLUIPA provides protection of land used as "religious exercise" by giving churches or other religious institutions a way to avoid zoning law restrictions[27] that impose a "substantial burden" on their property use:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
> (A) is in furtherance of a compelling governmental interest; and
> (B) is the least restrictive means of furthering that compelling governmental interest.[28]

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the opportunity to contrast this case with one that would presumably not implicate the RLUIPA: "a case like the building of a headmaster's residence, where religious education will not occur in the proposed expansion.").

25. U.S. DEP'T OF JUSTICE, REPORT ON THE TENTH ANNIVERSARY OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT 2 (Sept. 22, 2010), *available at* http://www.justice.gov/crt/rluipa_report_092210.pdf [hereinafter REPORT].

26. *Id.* at 2.

27. 42 U.S.C. § 2000cc(a)(2)(C) (stating that the scope of the "[g]eneral rule" expressed in 42 U.S.C. § 2000cc(a)(1) applies when "the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved").

28. *Id.* § 2000cc(a)(1).

Additionally, the RLUIPA prohibits the government from enacting regulations that discriminate or exclude religious land use within municipalities. Specifically, the "[e]qual terms" provision provides that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution."[29] Ultimately, the RLUIPA's two provisions that protect land use constituting "religious exercise" from "[s]ubstantial burdens"[30] and "[d]iscrimination and exclusion"[31] impose "strict scrutiny judicial review of land use conflicts between religious organizations and local authorities."[32]

A. Historical Perspective

The United States Supreme Court has recognized that the "RLUIPA is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens, consistent with [the Supreme] Court's precedents."[33] That is, federal legislation aimed at protecting religious exercise by imposing strict scrutiny on government regulations is not a novel concept. The RLUIPA's predecessor, the Religious Freedom Restoration Act of 1993 (RFRA),[34] although providing more "[u]niversal" coverage,[35] contained language similar to the RLUIPA.[36] However, the RFRA was invalidated by the Supreme Court's decision in *City of Boerne v. Flores*.[37] In *City of Boerne*, the Court found the RFRA to be overly broad, "holding that the [RFRA] exceeded Congress' remedial powers under the Fourteenth Amendment."[38]

The RLUIPA is Congress' response to the Supreme Court's decision in *City of Boerne*.[39] The RLUIPA is "[l]ess sweeping than RFRA"[40] because "[t]he

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29. *Id.* § 2000cc(b)(1).

30. *Id.* § 2000cc(a).

31. *Id.* § 2000cc(b).

32. Julie M. Osborn, *RLUIPA's Land Use Provisions: Congress' Unconstitutional Response to City of Boerne*, 28 ENVIRONS ENVTL. L. & POL'Y J. 155, 156 (2004).

33. Cutter v. Wilkinson, 544 U.S. 709, 714 (2005).

34. 42 U.S.C. § 2000bb (1994), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997) (declaring the Act unconstitutional).

35. *Cutter*, 544 U.S. at 715.

36. The "RFRA prohibits 'government' from 'substantially burdening' a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'" City of Boerne v. Flores, 521 U.S. 507, 515-16 (1997) (quoting former 42 U.S.C. § 2000bb-1A (1994)).

37. *Id.* at 532-36.

38. *Cutter*, 544 U.S. at 715.

39. *Id.* (stating that "Congress . . . responded [to the Supreme Court's decision in *City of Boerne*], this time by enacting RLUIPA.").

40. *Id.* (elaborating that "RLUIPA targets two areas . . . [1.] land-use regulation . . . [2.]

drafters of RLUIPA sought . . . to avoid RFRA's fate by limiting the [RLUIPA's] scope . . . ."[41] As a result, Congress specifically designed the RLUIPA to be different enough from the RFRA to pass judicial review, something the RFRA was unable to do, yet similar enough to accomplish many of the same goals set forth in the RFRA.[42]

B. Significance and Intended Purpose

The RLUIPA's legislative history is instructive when considering the federal law's significance and intended purpose.[43] The Act is significant because the legislators responsible for its design recognized that:

> The right to assemble for worship is at the very core of the free exercise of religion. Churches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements. The right to build, buy, or rent such a space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes.
>
> The hearing record compiled massive evidence that this right is frequently violated. Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation.[44]

Additionally, President Bill Clinton succinctly explained the significance of the RLUIPA in his official remarks upon signing the Act: "Religious liberty is a constitutional value of the highest order, and the Framers of the Constitution included protection for the free exercise of religion in the very first Amendment. This Act recognizes the importance the free exercise of religion plays in our democratic society."[45]

Moreover, although the RLUIPA is more than ten years old, its topical significance cannot be overstated. In its "Report on the Tenth Anniversary of the Religious Land Use and Institutionalized Persons Act," the United States

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religious exercise by institutionalized persons . . . .").

41. Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 897 (7th Cir. 2005).

42. Osborn, *supra* note 32, at 156.

43. Cathedral Church of the Intercessor v. Inc. Vill. of Malverne, 353 F. Supp. 2d 375, 389-90 (E.D.N.Y. 2005) (turning to the RLUIPA's legislative history to evaluate the Plaintiffs' assertion that "the facts of this case are precisely what was contemplated by Congress when it enacted RLUIPA").

44. 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy).

45. REPORT, *supra* note 25, at 2 (quoting Presidential Statement on Signing The Religious Land Use and Institutionalized Persons Act of 2000, 36 WEEKLY COMP. PRES. DOC. 2168 (Sept. 22, 2000)).

Department of Justice emphasized the RLUIPA's continued significance.[46] The Report stated:

> [N]early a decade after the attacks of September 11, 2001, Muslim Americans continue to struggle for acceptance in many communities, and still face discrimination. Of [eighteen] RLUIPA matters involving possible discrimination against Muslims that the Department has monitored since September 11, 2001, eight have been opened since May of 2010.[47]

According to the Report, during the period of approximately nine years between the 9/11 terrorist attacks and the Report's publication, nearly half of all "RLUIPA matters" opened by the Department involving Muslims occurred in the five months prior to the Report's publication.[48] Hence, during this nine year period, forty-four percent of cases involving Muslims were opened during only five percent of the total time.

It is not merely coincidence that a sudden influx of "RLUIPA matters" involving Muslims began in May 2010. The reason for the influx is understood once one realizes that the Park51 Islamic community center building project was approved on May 5, 2010.[49] Thus, although not expressly stated in the Report, the Department's rate of cases concerning "RLUIPA matters involving possible discrimination against Muslims"[50] has increased since the Park51 project was formally approved. Consequently, the RLUIPA is tied to a topical matter of national interest and is the legal tool used to resolve the cases involved.

The RLUIPA's intended purpose is to "ameliorate the effect of local land use regulations and widen the land use rights of religious institutions in land use conflicts."[51] Clearly, the RLUIPA protects religious institutions from the effects of overtly discriminatory land use regulations. However, religious liberty can also be threatened by the effects of land use regulations that more subtly discriminate against religious institutions.[52] For example, "discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan.'"[53]

In fact, Congress recognized that the individualized assessments involved in

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46. *Id.*

47. *Id.* at 12.

48. *Id.*

49. Anne Barnhard & Alan Feuer, *Outraged, and Outrageous*, N.Y. TIMES (Oct. 8, 2010), http://www.nytimes.com/2010/10/10/nyregion/10geller.html.

50. REPORT, *supra* note 25, at 12.

51. Heather M. Welch, *The Religious Land Use and Institutionalized Persons Act and Mega-Churches: Demonstrating the Limits of Religious Land Use Exemptions in Federal Legislation*, 39 U. BALT. L. REV. 255, 256 (2010).

52. *See* REPORT, *supra* note 25, at 3.

53. 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy).

land use regulation foster "covert"[54] discrimination.[55] Covert forms of discrimination "make it difficult to prove discrimination in any individual case."[56] Acknowledging the difficulties posed by covert discrimination, "Congress chose to cast a wide net in seeking to eradicate this covert discrimination by barring 'substantial burdens' on religious activity, rather than just aiming RLUIPA at clearly intentional discrimination."[57] That is, the RLUIPA protects against subtle forms of discrimination because "[i]f a land-use decision . . . imposes a substantial burden on religious exercise . . . and the decision maker cannot justify it, the inference arises that hostility to religion, or more likely to a particular sect, influenced the decision."[58]

Particularly, the RLUIPA widens the land use rights of religious institutions by mandating that courts construe key terms within the statute broadly.[59] An individual or organization wishing to bring suit under the RLUIPA "must present evidence that the land use regulation at issue as implemented: (1) imposes a substantial burden (2) on the 'religious exercise' (3) of a person, institution, or assembly."[60] Accordingly, the threshold issue becomes whether the intended land use of the institution bringing suit is a "religious exercise."[61] Because the number of ways a church can claim protection under the RLUIPA is positively correlated to the breadth with which a court interprets "religious exercise," it is important to understand the scope of the term.

Whereas "First Amendment jurisprudence has limited 'religious exercise' to the actual practice of religious beliefs 'fundamental' to the person's faith, most judicial interpretations of 'religious exercise' as used in RLUIPA have given the term a wider meaning."[62] Therefore, broadly defining and constructing the key terms within the RLUIPA also provides wider land use rights for religious institutions.

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54. Daniel P. Lennington, *Thou Shalt Not Zone: The Overbroad Applications and Troubling Implications of RLUIPA's Land Use Provisions*, 29 SEATTLE U. L. REV. 805, 817 (2006).

55. 146 CONG. REC. S7775 (daily ed. July 27, 2000).

56. *Id.*

57. Lennington, *supra* note 54, at 817.

58. Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 900 (7th Cir. 2005) (internal citation omitted).

59. *See, e.g.*, Cathedral Church of the Intercessor v. Inc. Vill. of Malverne, 353 F. Supp. 2d 375, 390 (E.D.N.Y. 2005) (citing "the broad language in the legislative history of RLUIPA").

60. Bikur Cholim, Inc. v. Vill. of Suffern, 664 F. Supp. 2d 267, 275 (S.D.N.Y. 2009) (citing 42 U.S.C. § 2000cc(a)(1) (2006)).

61. Civil Liberties for Urban Believers v. City of Chi., 342 F.3d 752, 760 (7th Cir. 2003) ("In order to prevail on a claim under the substantial burden provision, a plaintiff must first demonstrate that the regulation at issue actually imposes a substantial burden on religious exercise.").

62. Trinity Assembly of God of Balt. City, Inc. v. People's Counsel for Balt. Cnty., 941 A.2d 560, 572 (Md. Ct. Spec. App. 2008) (citing Civil Liberties for Urban Believers v. City of Chi., 342 F.3d 752, 760 (7th Cir. 2003)), *aff'd*, 962 A.2d 404 (Md. 2008).

II. JURISDICTIONAL DIFFERENCES IN DEFINING "SUBSTANTIAL BURDEN" AND "RELIGIOUS EXERCISE"

Determining whether the Islamic community centers facing opposition across the country are entitled to protection under the RLUIPA is difficult because the scope given to key terms such as "substantial burden" and "religious exercise" varies across jurisdictions.[63] Although the RLUIPA defines "religious exercise"[64] and First Amendment jurisprudence interprets "substantial burden,"[65] variations in the application of these terms has resulted in a split among the circuits. Accordingly, developing a uniform standard for applying the RLUIPA necessitates an understanding of the different interpretations of both "substantial burden" and "religious exercise."

A. Religious Exercise

Courts have reached different conclusions even when applying the legal terms and standards explicitly defined by the RLUIPA. Particularly, courts in various jurisdictions have differed in the scope they give to the term "religious exercise." The RLUIPA defines "religious exercise" as "includ[ing] any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[66] The RLUIPA clarifies this definition by stating that "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose."[67] Clearly, RLUIPA's definitions of "religious exercise" indicate "Congress's intent to expand the concept of religious exercise contemplated . . . in . . . First Amendment jurisprudence,"[68] but the question becomes how far Congress intended to extend the definition.

In *Westchester Day School v. Village of Mamaroneck*,[69] the Second Circuit recognized Congress's intent to provide expansive protections for religious organizations when it stated that "[t]o remove any remaining doubt regarding how broadly Congress aimed to define religious exercise, RLUIPA goes on to state that the Act's aim of protecting religious exercise is to be construed broadly and 'to the maximum extent permitted by the terms of this chapter and the

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63. *See generally* Shelley Ross Saxer, *Assessing RLUIPA's Application to Building Codes and Aesthetic Land Use Regulation*, 2 ALB. GOV'T L. REV. 623 (2009) (providing cases illustrating the different ways jurisdictions have applied "religious exercise" and "substantial burden").

64. 42 U.S.C. § 2000cc-5(7)(A) (2006).

65. *See* Lovelace v. Lee, 472 F.3d 174, 187 (4th Cir. 2006) ("RLUIPA itself does not define 'substantial burden,' but the Supreme Court has defined the term in the related context of the Free Exercise Clause.").

66. 42 U.S.C. § 2000cc-5(7)(A).

67. *Id.* § 2000cc-5(7)(B).

68. Civil Liberties for Urban Believers v. City of Chi., 342 F.3d 752, 760 (7th Cir. 2003) (internal citation omitted).

69. 504 F.3d 338 (2d Cir. 2007).

Constitution.'"[70]

In *Westchester*, the court interpreted "religious exercise" as protecting a religious day school's right to renovate and expand its facilities.[71] Westchester Day School, a Jewish private school, provided a dual curriculum aimed at providing students with an education integrating Judaic and general studies. In 1998, the school determined its facilities were inadequate and the deficiencies had rendered the school unable to meet educational standards required by Orthodox Judaism.[72] Consequently, the school developed an expansion project that involved renovating existing facilities and constructing a new building.

In 2001, Westchester Day School applied to the zoning board for a modification of its special permit so the expansion project could proceed. Initially, the zoning board voted unanimously in finding the school complied with preliminary requirements allowing consideration of the project to proceed.[73] However, the zoning board later rescinded that decision due to mounting public opposition to the school's expansion project. Consequently, the Westchester Day School invoked the RLUIPA and claimed the zoning board's decision constituted a substantial burden on the school's religious exercise.[74]

The court extended RLUIPA protection in *Westchester* because each of the proposed rooms to be built by the school would be used "at least in part for religious education and practice."[75] However, the court did not indicate what percentage of total time must be dedicated to religious purposes for an intended use to be "at least in part for religious education and practice." Rather, the court declined the opportunity to create a bright line rule stating the exact point in which a building project implicates the RLUIPA.[76]

Instead, the Second Circuit stated "[t]hat line exists somewhere between this case, where every classroom being constructed will be used at some time for religious education, and a case like the building of a headmaster's residence, where religious education will not occur in the proposed expansion."[77] Nevertheless, what if the particular religious sect affiliated with the school professes a sincere religious belief that a headmaster should reside where his pupils study the particular religion?[78] In such a case, an expansion providing living quarters for the headmaster might be necessary to facilitate the sect's religious practices. Further, the issue becomes whether an expansion adding living quarters for the headmaster would be considered "at least in part for

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70. *Id.* at 347 (citing 42 U.S.C. § 2000cc-3(g) (2006)).

71. *Id.* at 347-48.

72. *Id.* at 345.

73. *Id.* at 345-46.

74. *Id.* at 346.

75. *Id.* at 348.

76. *Id.*

77. *Id.*

78. *See* Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005) ("Although RLUIPA bars inquiry into whether a particular belief or practice is 'central' . . . the Act does not preclude inquiry into the sincerity of [an individual or institution's] professed religiosity.") (internal citation omitted).

religious education and practice."

These questions are also implicated in *Greater Bible Way Temple of Jackson v. City of Jackson*.[79] In *Greater Bible Way*, the Michigan Supreme Court found the Greater Bible Way Temple had not established that building an apartment complex would constitute "religious exercise."[80] The court reached this decision despite the Greater Bible Way Temple's bishop having signed and submitted an affidavit stating the Temple's "mission" as follows: "The Greater Bible Way Temple stands for truth, the promotion of the Gospel of Jesus Christ through the Apostolic Doctrine, and an exceptional level of service to the community. This includes *housing*, employment, consulting and supports as determined appropriate in fulfilling our Mission."[81] Furthermore, the affidavit stated that the Temple "wishes to further the teachings of Jesus Christ by providing housing and living assistance to the citizens of [the city] . . . . [and] there is a substantial need in the [city] for clean and affordable housing, especially for the elderly and disabled."[82]

Nevertheless, the Michigan Supreme Court found that there was no evidence "that the proposed apartment complex would be used for religious worship or for any other religious activity."[83] Moreover, the court stated that "the building of an apartment complex would be considered a commercial exercise, not a religious exercise."[84] Finally, the court concluded that a "commercial exercise" does not become a "religious exercise" merely because a religious institution owns the building.[85]

However, building the apartment complex fulfills a core tenet of the Temple's religion because it could be used to "further the teachings of Jesus Christ by providing housing and living assistance to the citizens of [the city]."[86] Therefore, because the Temple considered the construction and maintenance of the apartment complex to be religious exercise, it should "be considered . . . religious exercise of the person or entity that uses or intends to use the property for that purpose."[87]

Accordingly, it seems that the court's primary reason for refusing to extend the definition of "religious exercise" to protect the apartment complex rests in the fact that an apartment complex is traditionally a "commercial exercise" and not a "religious exercise." Thus, although not explicitly stated in the court's opinion, it appears that an intended religious activity that resembles a traditionally

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79. 733 N.W.2d 734, 746 (Mich. 2007).

80. *Id.*

81. *Id.* (emphasis added).

82. *Id.* at 746, 746 n.17.

83. *Id.* at 746.

84. *Id.*; *see also* Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 663 (10th Cir. 2006) ("[The] jury found that the Church[, which was operating a day care,] failed to prove it was engaged in a *sincere* exercise of religion.").

85. *Greater Bible Way Temple*, 733 N.W.2d at 746.

86. *Id.*

87. 42 U.S.C. § 2000cc-5(7)(B) (2006).

"commercial exercise"[88] is less likely to gain protection under RLUIPA because the court may question the sincerity of the activity's "religiosity."[89]

The facts in *Greater Bible Way* contrast with the hypothetical scenario posed by the court in *Westchester*. Whereas the court in *Westchester* did not state that proponents of the hypothetical headmaster's residence offered evidence indicating the school considered such a use "religious exercise,"[90] the proponents of the apartment complex provided proof via a signed affidavit establishing that part of the Temple's "mission" included providing housing.[91] So if the Second Circuit's language in *Westchester*[92] were applied in this case, would the construction of an apartment complex to fulfill the Temple's "mission" constitute a use "at least in part for religious . . . practice"?[93]

Other courts have found that religious organizations that operate concurrently with, or operate as, traditionally commercial activities do not qualify as "religious uses."[94] In *Gallagher v. Zoning Board of Adjustment*,[95] the Young People's Church of the Air sought a use permit to operate a radio station aimed at advancing the organization's "interdenominational religious program and activity [by] broadcasting religious services and messages to radio listeners."[96] In that case, the court concluded that the radio station would operate as a commercial broadcasting facility during the week by selling broadcasting time to its customers.[97] Accordingly, the court denied the use permit, declaring that the proposed use was secular because "[o]nly a small number of broadcasting hours would be devoted each Sunday to . . . religious purpose."[98]

The *Gallagher* court engaged in an evaluation similar to that used by the Second Circuit to determine whether an intended use constituted "religious exercise." That is, the *Gallagher* court contrasted the portion of time the radio broadcasting station would devote to "religious purpose" with the amount of time

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88. *Greater Bible Way Temple*, 733 N.W.2d at 746.

89. Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005); *see also* Jeffrey F. Ghent, Annotation, *What Constitutes "Church," "Religious Use," or the Like Within Zoning Ordinance*, 62 A.L.R. 3d 197 (2009).

90. Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 348 (2d Cir. 2007) (alluding to the fact that the Westchester Religious Institute had requested permission to build a headmaster's residence in 1986; although that request was not before the court in this decision, the court used it as a hypothetical scenario to illustrate its point).

91. *Greater Bible Way Temple*, 733 N.W.2d at 746.

92. *See Westchester Day Sch.*, 504 F.3d at 348.

93. *Id.*

94. *See, e.g.*, Scottish Rite Cathedral Ass'n of L.A. v. City of L.A., 67 Cal. Rptr. 3d 207, 216-17 (Cal. Ct. App. 2007) (involving a commercial entity without Masonic ties, which operated the Scottish Rite Cathedral by "market[ing] the Cathedral as a venue for all events, commercial events included").

95. 32 Pa. D. & C.2d 669 (1963).

96. *Id.* at 669-70.

97. *Id.* at 671.

98. *Id.* at 674.

devoted to secular, commercial purposes. In *Gallagher*, a few hours of broadcasting time each week dedicated to "religious purpose" was not sufficient when the remaining time was used for "commercial exercise." Applying this analysis to the facts in *Westchester*, it is unclear whether the court would have found that the day school's construction qualified as "religious exercise" if each room in the proposed expansion "would be used at least . . . [a few hours each week] for religious education and practice,"[99] with the remaining time used for commercial interests. In other words, the question becomes which is the threshold inquiry: what percentage of the intended use will be enough to constitute "religious exercise," or whether the time not used strictly as "religious exercise" is used for pecuniary gain?

The answer seems to be the latter. One of the best ways to illustrate this concept is to compare the results in *Grace United Methodist Church v. City of Cheyenne*[100] with the results in *Unitarian Universalist Church of Central Nassau v. Shorten*.[101] In *Grace*, the church desired to establish a public child daycare center that would accommodate one hundred children and provide "religious education."[102] In *Grace*, the Tenth Circuit affirmed the jury's decision to withhold RLUIPA protection because the church's intended use, the proposed childcare center, did not constitute a "religious exercise."[103]

In *Unitarian Universalist Church*, the church also sought to provide daycare facilities for children.[104] Unlike the Tenth Circuit's decision in *Grace*, finding that the proposed childcare center did not qualify as a "religious exercise,"[105] the Supreme Court of New York found that "a review of prior decisions makes evident that operation of a day care center is . . . well within the ambit of religious activity."[106] Why did the Supreme Court of New York find that the childcare facility in *Unitarian Universalist Church* qualified as a "religious activity," while the Tenth Circuit did not find the childcare facility in *Grace* constituted "religious exercise?"

Admittedly, attempting to answer this question may prove futile considering a court's determination of what is and is not a "religious use" is not typically guided by a distinct rule and "each case ultimately rests upon its own facts."[107] Nevertheless, whereas *Unitarian Universalist Church* was decided using First Amendment jurisprudence, *Grace* was decided using the RLUIPA which contains

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99. Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 348 (2d Cir. 2007).

100. 451 F.3d 643 (10th Cir. 2006).

101. 314 N.Y.S.2d 66 (N.Y. App. Div. 1970).

102. *Grace United Methodist Church*, 451 F.3d at 655 (citing Grace United Methodist Church v. City of Cheyenne, 235 F. Supp. 2d 1186, 1201 (D. Wyo. 2002)).

103. *Id.* at 669.

104. *Unitarian Universalist Church*, 314 N.Y.S.2d at 68.

105. *Grace United Methodist Church*, 451 F.3d at 669.

106. *Unitarian Universalist Church*, 314 N.Y.S.2d at 71.

107. McGann v. Inc. Vill. of Old Westbury, 741 N.Y.S.2d 75, 76 (N.Y. App. Div. 2002) (quoting Cmty. Synagogue v. Bates, 136 N.E.2d 488, 493 (N.Y.)), *appeal dismissed*, 779 N.E.2d 188 (N.Y. 1956).

a definition of "religious exercise" that is broader than that of the same term applied in First Amendment jurisprudence.[108] So what factual difference between the two cases might explain why a court following a broader definition did not extend protection by defining an intended purpose "religious exercise,"[109] while a similar intended purpose was protected as "religious activity" by a court applying a less expansive definition?[110]

This apparent anomaly might be explained by the fact "that the proposed daycare [facility in *Grace*] would charge a fee for its services commensurate with fees charged by other daycare facilities in [the same city]."[111] On the other hand, the proposed child daycare center in *Unitarian Universalist Church* was to be operated as a "not-for-profit corporation."[112] In this case, it is possible that the discrepancy can be explained by reasoning that operating a child daycare facility, an otherwise "[r]eligious use,"[113] transformed into a "commercial exercise"[114] because the facility would be used for a distinctly pecuniary purpose, which is a hallmark of "commercial exercise."

The different outcomes in *Grace* and *Unitarian Universalist Church* are consistent with the legislative history providing congressional intent for the RLUIPA. Congress recognized that:

> In many cases, real property is used by religious institutions for purposes that are comparable to those carried out by other institutions. While recognizing that these activities or facilities may be owned, sponsored or operated by a religious institution, or may permit a religious institution to obtain additional funds to further its religious activities, this alone does not automatically bring these activities or facilities within the bill's definition or [sic] "religious exercise."[115]

Moreover, RLUIPA does not "extend[] its protection even to those non-religious activities necessary to financially support the [religious organization's] continued operation."[116]

The legislative history provides an excellent example regarding the limit to which the term "religious exercise" extends to provide protection for an organization with religious purposes:

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108. *See* Civil Liberties for Urban Believers v. City of Chi., 342 F.3d 752, 760 (7th Cir. 2003).

109. *See Grace United Methodist Church*, 451 F.3d at 669.

110. *See Unitarian Universalist Church*, 314 N.Y.S.2d at 71.

111. *Grace United Methodist Church*, 451 F.3d at 648.

112. *Unitarian Universalist Church*, 314 N.Y.S.2d at 70.

113. *Id.* at 71.

114. *See* Greater Bible Way Temple of Jackson v. City of Jackson, 733 N.W.2d 734, 746 (Mich. 2007).

115. 146 CONG. REC. S7776 (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy).

116. Scottish Rite Cathedral Ass'n of L.A. v. City of L.A., 67 Cal. Rptr. 3d 207, 215-16 (Cal. Ct. App. 2007).

> [I]f a commercial enterprise builds a chapel in one wing of the building, the chapel is protected if the owner is sincere about its religious purposes, but the commercial enterprise is not protected. Similarly, if religious services are conducted once a week in a building otherwise devoted to secular commerce, the religious services may be protected but the secular commerce is not.[117]

However, several courts have recognized that the way congregants and communities view their places of worship has evolved over the last half-century. Specifically, "the concept of what constitutes a church has [changed] from a place of worship alone, used once or twice a week, to a church used during the entire week, nights as well as days, for various parochial and community functions."[118] This evolution has expanded the way courts define "religious uses and activities":

> A church is more than merely an edifice affording people the opportunity to worship God. Strictly religious uses and activities are more than prayer and sacrifice and all churches recognize that the area of their responsibility is broader than leading the congregation in prayer. Churches have always developed social groups for adults and youth where the fellowship of the congregation is strengthened with the result that the parent church is strengthened.[119]

In fact, the courts embracing this more expansive view recognize that limiting "religious uses and activities" to strictly prayer and other more traditional forms of worship "would, in a large degree . . . depriv[e] the church of the opportunity of enlarging, perpetuating and strengthening itself and the congregation."[120]

Accordingly, "[n]ontraditional religious uses of a building have been considered religious exercise under [this] more expansive view of RLUIPA protection."[121] Many of the "religious uses" in this category are aimed at providing benefits to the community or social programming for congregants of the church.[122] In many ways the churches in this "nontraditional" category are similar to the "commercial exercise" churches in *Grace* and *Bible Way* because both the "nontraditional" and "commercial exercise" churches use their facilities

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117. 146 CONG. REC. E1563-01 (daily ed. Sept. 21, 2000) (statement of Hon. Canady).

118. *Unitarian Universalist Church*, 314 N.Y.S.2d at 71 (allowing a church to operate a daycare center on its premises). *But see* Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 664 (10th Cir. 2006) (denying church permission to operate a daycare facility).

119. Cmty. Synagogue v. Bates, 136 N.E.2d 488, 493 (N.Y. 1956) (allowing a synagogue to establish a twenty-four acre tract of land containing youth activities as well as social groups for both men and women).

120. Solid Rock Ministries Int'l v. Bd. of Zoning Appeals of Monroe, 740 N.E.2d 320, 325 (Ohio Ct. App.) (quoting *Cmty. Synagogue*, 136 N.E.2d at 493), *dismissed*, 736 N.E.2d 901 (Ohio 2000).

121. Saxer, *supra* note 63, at 636.

122. *Id.* at 635-38.

to "offer services beyond traditional worship services."[123] Furthermore, both "nontraditional" and "commercial exercise" churches may generate funds by offering these "services beyond traditional worship services."[124] Nevertheless, unlike the churches in *Grace* and *Bible Way*, the churches in the "nontraditional" category provide their services for non-pecuniary reasons. This important distinction allows "nontraditional" churches to avoid the "commercial exercise" label and increases the likelihood that a court will extend RLUIPA protections by defining their services as "religious exercise."

For instance, in *Episcopal Student Foundation v. City of Ann Arbor*,[125] the United States District Court for the Eastern District of Michigan interpreted "religious exercise" as including a "socializing hall"[126] used by a religiously affiliated group on the University of Michigan's campus.[127] In *Episcopal*, a non-profit corporation affiliated with the Episcopal Church sought to demolish its current building to make way for a "large and multi-faceted church"[128] designed to facilitate the organization's growing membership and "unconventional approach to religion."[129] The church's unconventional approach to religious worship includes hosting social events such as a weekly "Jazz Mass,"[130] "an alternative spring break, and a Saturday night concert series."[131] Accordingly, the court found that the services offered by the church went "beyond traditional worship services."[132]

In *Episcopal*, the court provided a transparent and methodical approach for evaluating whether a non-profit, religiously affiliated organization's non-traditional worship services constitute "religious exercise" under RLUIPA. First, the court considered the church's stated religious mission and beliefs.[133] The "[church] claim[ed] its religious mission and beliefs include[d]: 'providing a spiritual community for its members, creating a progressive and creative worship experience for its members, offering meditation, prayer and study groups for its members, and continually working to welcome new members into the congregation.'"[134] The court also found that "[c]ommunity outreach and regular worship as a whole are also 'central to [the church's] faith and its emphasis on

123. Episcopal Student Found. v. City of Ann Arbor, 341 F. Supp. 2d 691, 701 (E.D. Mich. 2004).

124. *Id.*

125. *Id.*

126. Trinity Assembly of God of Balt., Inc. v. People's Counsel for Balt. Cnty., 941 A.2d 560, 572 (Md. Ct. Spec. App.), *aff'd*, 962 A.2d 404 (Md. 2008).

127. *Episcopal Student Found.*, 341 F. Supp. 2d at 700-01.

128. *Id.* at 694.

129. *Id.* at 693.

130. *Id.*

131. *Id.*

132. *Id.* at 701.

133. *Id.* at 700.

134. *Id.* (internal citation omitted).

spiritual community.'"[135]

Next, the court determined whether the church's non-traditional worship activities fit within a broad category of activities typically offered by religious organizations to supplement traditional worship services.[136] For example, this court established that "churches regularly hold fundraisers . . . to support the church's religious endeavors."[137] Furthermore, it found that the church's concert series fit under this broad category of "fundraisers."[138]

At this stage in the evaluation, the court asserted that "*many religions* offer services beyond traditional worship services as part of their religious offerings."[139] Therefore, the court made the distinction between religions that "offer services beyond traditional worship services as part of their religious offerings" and other religions that do not.[140] Although the court did not examine this topic further in *Episcopal*, the subtle distinction illustrates the court's delicate task in evaluating whether a claimant's activities constitute "religious exercise" under RLUIPA.

Finally, the *Episcopal* court determined whether the particular, non-traditional activity had a "religious purpose" by evaluating whether the benefits achieved by engaging in the activity support the religious organization's stated mission and beliefs.[141] In this case, the court found that:

> [E]ven [the church's] concert series has a religious purpose, in that it (a) enables the church to collect financial contributions to further the church's mission, and (b) provides members with an opportunity to meet and educate non-members in the community about [the church's] religion. In turn, such events enable [the church] to seek growth in its local community.[142]

Thus, the court concluded that the church's "activities constitute[d] 'religious exercises,' as defined by the RLUIPA."[143] As a result, "the religious exercises identified by [the church] qualif[ied] for RLUIPA's protections."[144]

However, establishing that a religious institution's intended land use constitutes "religious exercise," as defined by RLUIPA, merely satisfies the threshold issue. Next, the court must determine whether the land use regulation at issue imposes a "substantial burden" on the RLUIPA-protected "religious exercise."

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135. *Id.* (internal citation omitted).
136. *Id.* at 701.
137. *Id.*
138. *Id.*
139. *Id.* (emphasis added).
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 700.
144. *Id.*

B. Substantial Burden

Whereas the RLUIPA defines "religious exercise,"[145] the "RLUIPA purposely does not define 'substantial burden.'"[146] Instead, the statute's legislative history indicates that the term "is to be interpreted by reference to RFRA and First Amendment jurisprudence."[147] Accordingly, the Supreme Court addressed whether a substantial burden has been placed on an *individual's* religious exercise and found that "a substantial burden on religious exercise exists when an individual is required to 'choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other hand.'"[148]

However, the Supreme Court's analysis and application of the term "substantial burden" to an individual's "religious exercise" is not appropriate for evaluating and applying that same term in the context of religious land use.[149] Therefore, "when there has been a denial of a religious institution's building application, courts appropriately speak of government action that directly *coerces* the religious institution to change its behavior, rather than government action that forces the religious entity to choose between religious precepts and government benefits."[150]

This synthesis of the Supreme Court's language and the Second Circuit's logic leaves plenty of room for courts in various jurisdictions to differ as to how direct a government's action must be in relation to the allegedly coercive impact or effect that causes a religious institution to change its behavior. Accordingly, courts have reached different conclusions when determining whether a land use regulation creates a "substantial burden." This fact has been recognized by legal commentators who find that "[a]lthough several federal circuits have defined 'substantial burden' in a similar vein, there is not yet an agreed upon national standard by which to judge a RLUIPA violation."[151]

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145. *See* 42 U.S.C. § 2000cc-5(7)(A) (2006).

146. Fortress Bible Church v. Feiner, 734 F. Supp. 2d 409, 501 (S.D.N.Y. 2010).

147. Civil Liberties for Urban Believers v. City of Chi., 342 F.3d 752, 760 (7th Cir. 2003) (citing 146 CONG. REC. S7776 (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy) ("The term 'substantial burden' as used in this Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise.")).

148. Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 348 (2d Cir. 2007) (citing Sherbert v. Verner, 374 U.S. 398, 404 (1963)).

149. *Id.* at 348-49 (stating that "in the context of land use, a religious institution is not ordinarily faced with the same dilemma of choosing between religious precepts and government benefits. When a municipality denies a religious institution the right to expand its facilities, it is more difficult to speak of substantial pressure to change religious behavior, because in light of the denial the renovation simply cannot proceed").

150. *Id.* at 349; *see, e.g.*, Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004).

151. Saxer, *supra* note 63, at 638.

The resulting split has produced opinions in several circuits that appear "strict" when compared to those developed in other jurisdictions.[152] The "strictness" of an opinion refers to the degree of difficulty placed on churches to prove that a "substantial burden" has been imposed on their "religious exercise."[153] In turn, the degree of difficulty stems from the degree of directness that the claimant is required to show when "proving" that the government's action "coerce[d] the religious institution to change its behavior."[154] Thus, for illustrative purposes, the rules developed in different circuits to define the term "substantial burden" can be placed on a continuum from "strictest" to "least strict." The strictest rule on the continuum is the rule applied in the Seventh Circuit.[155] On the opposite end of the continuum, the Second Circuit's rule is the most relaxed.[156]

In *Westchester*, the Second Circuit adopted the most relaxed standard in holding that "[t]here must exist a close nexus between the coerced or impeded conduct and the institution's religious exercise for such conduct to be a substantial burden on that religious exercise."[157] The Second Circuit's standard makes it easier for a church to prove that a "substantial burden" has been placed on the "religious exercise" of an organization. The Fourth Circuit has developed a standard similar to that used in the Second Circuit.[158] In *Lovelace v. Lee*,[159] the Fourth Circuit defined "substantial burden" as "put[ting] substantial pressure on an adherent to modify his behavior and to violate his beliefs."[160] The standards developed in the Second and Fourth Circuits are similar because the language used in both of these rules imposes a much less onerous burden of proof on churches to show that the land use regulation is a "substantial burden" on their "religious exercise."

The Ninth Circuit has taken a middle of the road position by stating that "[f]or a land use regulation to impose a 'substantial burden,' it must be 'oppressive' to a 'significantly great' extent. That is, a 'substantial burden' on 'religious exercise' must impose a significantly great restriction or onus upon such exercise."[161]

The next strictest standard is in the Eleventh Circuit where, in *Midrash*

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152. *See generally id.* at 638-39.

153. *Id.* at 638-41.

154. *Westchester Day Sch.*, 504 F.3d at 349 (emphasis omitted).

155. *See* Civil Liberties for Urban Believers v. City of Chi., 342 F.3d 752, 760 (7th Cir. 2003).

156. *See Westchester Day Sch.*, 504 F.3d at 349.

157. *Id.* at 349.

158. *See* Saxer, *supra* note 63, at 638-39.

159. 472 F.3d 174 (4th Cir. 2006).

160. *Id.* at 187 (quoting Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 718 (1981)).

161. Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter, 456 F.3d 978, 988 (9th Cir. 2006) (quoting San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004)).

Sephardi, Inc. v. Town of Surfside,[162] the court developed a rule that "requires a more coercive type of government action."[163] The Eleventh Circuit characterizes "substantial burden" as a burden that "place[s] more than an inconvenience on religious exercise" and is "akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly."[164]

In *Civil Liberties for Urban Believers v. City of Chicago*,[165] the Seventh Circuit developed and applied the strictest rule in holding that "a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise-including the use of real property for the purpose thereof within the regulated jurisdiction generally-effectively impracticable."[166] Therefore, a land use regulation in the Seventh Circuit will not be defined as a "substantial burden" unless it causes a particular "religious exercise" to be "effectively impracticable."[167] Accordingly, the Seventh Circuit's standard is very strict because the rule makes it difficult for churches to prove that a "substantial burden" has been placed on their "religious exercise."

Determining whether the Islamic community centers facing opposition across the country are entitled to protection under the RLUIPA is difficult because the scope given to key terms such as "substantial burden" and "religious exercise" varies across the jurisdictions. Nevertheless, studying the reasoning behind the seemingly inconsistent holdings in different jurisdictions reveals underlying themes and patterns that lend themselves to organization. Armed with a concrete understanding of the different interpretations attributed to key RLUIPA terms such as "religious exercise" and "substantial burden," it is possible to develop a uniform standard for applying the RLUIPA.

III. RECOMMENDED UNIFORM STANDARD FOR APPLYING THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT

The circuit courts should adopt a uniform standard for evaluating alleged violations brought under the RLUIPA. This standard would build on the strengths of opinions from the different jurisdictions that have analyzed and applied the RLUIPA in litigation involving "[p]rotection of land use as religious exercise."[168] Specifically, the standard would provide the necessary framework for courts to evaluate claims under the "[s]ubstantial burdens" provision of the RLUIPA.[169] By adopting a uniform standard, courts would streamline RLUIPA litigation and create a more transparent system upon which municipalities and

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162. 366 F.3d 1214 (11th Cir. 2004).
163. Saxer, *supra* note 63, at 639.
164. *Midrash Sephardi, Inc.*, 366 F.3d at 1227.
165. 342 F.3d 752 (7th Cir. 2003).
166. *Id.* at 761.
167. *Id.*
168. 42 U.S.C. § 2000cc (2006).
169. *Id.* § 2000cc(a).

religious organizations could rely when considering future land usage.

The streamlined litigation would lower the "costs that religious groups have [traditionally] incurred as a result of RLUIPA."[170] The adoption of a uniform standard is necessary given the increasing significance of the Act[171] and the fact that the current form of the "RLUIPA has not merely failed to alleviate the purported burdens on religious land users but has actually saddled religious entities with greater burdens incurred in the pursuit of costly court cases and in the waging of protracted battles with neighbors and community officials."[172]

The uniform standard would function by weighing a religious institution's purported "religious exercise" to determine which circuit's standard to impose. The standard used to determine which circuit's "substantial burden" rule to apply would be driven by how necessary the intended land use is to the institution's religious exercise. Essentially, the uniform standard mirrors a constitutional equal protection challenge in that "the level of judicial scrutiny varies with the type of classification utilized and the nature of the right affected."[173]

However, there is an important difference between analysis under the proposed RLUIPA uniform standard and constitutional equal protection claims. Although both employ the same basic concept of using a sliding scale of scrutiny levels to evaluate claims depending on the classification of a particular claim, the relation of the level of scrutiny to the intended religious land use is inverted when compared to the same relationship in a constitutional equal protection case. For example, a court evaluating a claim under equal protection "begins by weighing the importance of the interests affected, and as the right asserted becomes more fundamental, the challenged law is subjected to more rigorous scrutiny at a more elevated position on the sliding scale."[174] Conversely, under the proposed RLUIPA uniform standard, as the purported "religious exercise" becomes more "traditional," in regards to the claimants religious beliefs, the challenged law is subjected to the more relaxed rules on the "less strict" portion of RLUIPA uniform standard's continuum.

Accordingly, churches must prove increasing levels of directness regarding the impact of a challenged law when the purported "religious exercise" resembles "commercial exercise"[175] or accessory uses that are not auxiliary to the church's

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170. Bram Alden, Comment, *Reconsidering RLUIPA: Do Religious Land Use Protections Really Benefit Religious Land Users?*, 57 UCLA L. REV. 1779, 1783 (2010) (finding that RLUIPA has burdened religious organizations with three types of costs: "(1) litigation costs, (2) reliance costs, and (3) reputational costs").

171. *See* REPORT, *supra* note 25.

172. Alden, *supra* note 170.

173. 16B AM. JUR. 2D *Constitutional Law* § 857 (2011) (citing State v. Wamala, 972 A.2d 1071, 1079 (N.H. 2009), *habeas corpus denied sub nom.* Wamala v. Blaisdell, No. 10-CV-87-SM, 2011 WL 285692 (D.N.H. Jan. 28, 2011)).

174. *Id.* (citing Lot 04B & 5C, Block 83 Townsite v. Fairbanks N. Star Borough, 208 P.3d 188, 192 (Alaska 2009)).

175. Greater Bible Way Temple of Jackson v. City of Jackson, 733 N.W.2d 734, 746 (Mich. 2007).

"traditional" core beliefs.[176] If the church is unable to prove the necessary level of directness, then the challenged land use regulation will not constitute a "substantial burden" under the proposed RLUIPA uniform standard analysis.

On the other hand, the requisite level of directness between the challenged law and the claimant's purported "religious exercise," necessary to substantiate a "substantial burden" claim, would decrease as the claimant's alleged "religious exercise" increasingly resembles "traditional" tenets of a given religion.

Accessory uses are those that are "customarily incidental and subordinate to the principal use of a building or property, and which are dependent on, or pertain to, the principal permitted use."[177] Courts have not developed bright line rules for determining whether accessory uses should gain RLUIPA protection once the principal use is adjudged to be a "religious exercise."[178] For purposes of illustrating the functionality of the proposed uniform standard, any truly "accessory uses" will be evaluated in the same manner as principal uses under the methodical approach developed in *Episcopal Student Foundation v. City of Ann Arbor*.[179]

Under the RLUIPA's uniform standard analysis, the more relaxed rules expressed in the Second Circuit[180] and the Fourth Circuit[181] would be applied to land uses and accessory uses that are "traditional" tenets[182] to a given religion. Alternatively, courts would apply the more strict rules expressed in the Seventh Circuit[183] and the Eleventh Circuit[184] when the "religious exercise" represents

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176. *See generally* Saxer, *supra* note 63, at 638-41.

177. Shelley Ross Saxer, *Faith in Action: Religious Accessory Uses and Land Use Regulation*, 2008 UTAH L. REV. 593, 615 (2008) (citation omitted).

178. *See id.* at 615-16.

179. 341 F. Supp. 2d 691, 700-01 (E.D. Mich. 2004).

180. *See* Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 349 (2d Cir. 2007) (finding that "[t]here must exist a close nexus between the coerced or impeded conduct and the institution's religious exercise for such conduct to be a substantial burden").

181. *See* Lovelace v. Lee, 472 F.3d 174, 187 (4th Cir. 2006) (holding that a "'substantial burden' is one that 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs'" (internal citation omitted)).

182. Under the RLUIPA, it is inappropriate to inquire as to whether a claimant's purported "religious exercise" is "central" to a religious institution's religion. *See* 42 U.S.C. § 2000cc-5(7)(A) (2006). Nevertheless, RLUIPA does not "bar inquiry into whether a particular belief or practice constitutes an aspect, central or otherwise, of a [religious institution's] religion." Greater Bible Way Temple of Jackson v. City of Jackson, 733 N.W.2d 734, 745 (Mich. 2007).

183. *See* Civil Liberties for Urban Believers v. City of Chi., 342 F.3d 752, 761 (7th Cir. 2003) (holding "a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable").

184. *See* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004) (holding that "a 'substantial burden' must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that

"less traditional" land uses such as "commercial exercise"[185] or accessory uses that are not auxiliary to the church's core beliefs.

RLUIPA's uniform standard is premised on the realization that, theoretically, there are an infinite number of religions and an equally infinite number of ways to practice any given religion. And although "not every activity carried out by a religious entity or individual constitutes 'religious exercise,'"[186] the RLUIPA's broad definition of "religious exercise"[187] allows for the assumption that every religious entity has certain values or beliefs that must be expressed or symbolized through land use.

Thus, resolving the question of whether an intended land use constitutes a "religious exercise" is heavily dependent on the facts. However, this is an acceptable reality given that courts of law are designed to sift through facts in pursuit of truth. Ultimately, the decision as to whether a land use regulation "substantially burdens" an alleged "religious exercise" should depend on the facts of a given case, not on the rule adopted or developed in a given circuit. The rule should be as fluid as the concept it is designed to analyze.

This point is supported by the fact that sects representing various religions practicing within the United States are geographically located without respect to what federal circuit they inhabit. That is, when a given church was founded, it probably did not choose its location based on the federal circuit presiding over the particular geographic area. Moreover, given the likelihood that some religious sects span many, if not all, of the federal circuits, it seems logical to adopt a uniform standard to ensure that sects are treated consistently regardless of which circuit they are located.[188]

IV. APPLICATION OF THE UNIFORM STANDARD TO THE PARK51 ISLAMIC COMMUNITY CENTER IN NEW YORK CITY

Based on the designs for the proposed Islamic community center in New York City, it is unclear whether Park51 would prevail in a suit claiming a violation of RLUIPA under the uniform standard. Nevertheless, the outcome,

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tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.").

185. *Greater Bible Way Temple*, 733 N.W.2d at 746.

186. 146 CONG. REC. S7776 (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy).

187. Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs of Boulder Cnty., 612 F. Supp. 2d 1163, 1171-72 (D. Colo. 2009) (RLUIPA's "definition is broader than the definition of 'religious exercise' used under the RFRA and in constitutional jurisprudence under the First Amendment"), *aff'd*, 613 F.3d 1229 (10th Cir. 2010).

188. *See, e.g.*, *Business Services: Uniform Commercial Code*, CYBER DRIVE ILLINOIS, http://www.cyberdriveillinois.com/departments/business_services/uniform_commercial_code/home.html (last visited July 5, 2011) ("UCC requires that the administration of the UCC be conducted in a manner that promotes both local & multi-jurisdictional commerce by striving for uniformity in policies and procedures among the various states.").

however anticlimactic it may be, is less important than the methodology involved in applying RLUIPA's uniform standard to the unique facts in the hypothetical case involving Park51.

Suppose that the New York City Department of City Planning[189] rejects Park51's application for a building permit after deliberations pursuant to a land use ordinance that permits the Department to perform an "individualized assessment[] of the proposed uses for the property involved."[190] The individualized assessment performed by the New York City Department of City Planning fulfills the jurisdictional prerequisite necessary to begin evaluating the case under a RLUIPA "substantial burden" claim.

Analyzing Park51's claim under the RLUIPA's uniform standard involves a three-step process. First, the court must evaluate the "religiosity"[191] of Park51's purported "religious exercise" by following the procedure outlined in *Episcopal*.[192] Next, the court must determine, based upon the level of "religiosity" found in part one, which available rule on the continuum of rules ranging from "strictest" to "least strict" would be appropriate for analyzing the current case. Finally, the court must apply the appropriate standard to determine whether New York's land use regulation imposes a "substantial burden" on Park51's "religious exercise."

A. Determine the "Religiosity" of the Claimant's "Religious Exercise"

Accordingly, the RLUIPA uniform standard evaluation begins by determining the "religiosity" of Park51's purported "religious exercise" as outlined in *Episcopal*. First, the court must consider the church's stated religious mission and beliefs.[193] Park51's vision statement provides this component of the analysis:

> Park51 will be a vibrant and inclusive community center, reflecting the diverse spectrum of cultures and traditions, serving New York City with programs in education, arts, culture and recreation. Inspired by Islamic values and Muslim heritage, Park51 will weave the Muslim-American identity into the multicultural fabric of the United States.[194]

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189. *See generally New York City Department of City Planning*, NYC.GOV, http://www.nyc.gov/html/dcp/home.html (last visited Jan. 18, 2011) (providing general information regarding the New York City Department of City Planning).

190. 42 U.S.C. § 2000cc(a)(2)(C) (2006).

191. *See* Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005).

192. Episcopal Student Found. v. City of Ann Arbor, 341 F. Supp. 2d 691, 700-01 (E.D. Mich. 2004).

193. *See id.* at 700.

194. *Vision*, PARK51 COMMUNITY CENTER, http://blog.park51.org/vision/ (last visited Aug. 24, 2011).

B. Determine Whether the Non-Traditional Activity Can Be Categorized

Next, the court must determine whether the church's non-traditional worship activities fit within a broad category of activities typically offered by religious organizations to supplement traditional worship services.[195] In this case, the non-traditional activities can be categorized by the facilities that house them. Such facilities include "recreation spaces and fitness facilities (swimming pool, gym, basketball court)[,] an auditorium[,] a restaurant and culinary school[,] cultural amenities including exhibitions[,] education programs[,] a library, reading room and art studios[,] childcare services[, and] a September 11th memorial and quiet contemplation space, open to all."[196] It is at this stage in Park51's analysis that a court would need expert testimony from both of the opposing sides to determine what broad categories of activities are typically offered in Islamic community centers. Without this vital knowledge it is difficult to determine whether the non-traditional activities provided in Park51's facilities would satisfy this portion of the analysis.

Nevertheless, the broad categories needed to complete this portion of the analysis may be gleaned from a Muslim's description of a mosque[197] and the activities one might expect therein:

> A mosque, totally unlike a church or a synagogue, serves the function of orchestrating and mandating every aspect of "life" in a Muslim community from the religious, to the political, to the economic, to the social, to the military. In Islam, religion and life are not separate . . . there is no concept of a personal relationship between the person and the entity being worshiped, so "worship" itself, is of a different nature than that performed in a church or synagogue. So we see that a mosque is a seat of government. A mosque is a school. A mosque is a court. A mosque is a training center. A mosque is a gathering place, or social center. It is not just a place of "worship" per se as understood and as practiced in Western societies.[198]

Therefore, "training center"[199] might be the title of a broad category of activities typically offered in an Islamic community center. Accordingly, "recreation spaces and fitness facilities"[200] such as basketball courts would fit under "training

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195. *See Episcopal Student Found.*, 341 F. Supp. 2d at 701.

196. *Facilities*, PARK51 COMMUNITY CENTER, http://blog.park51.org/facilities/ (last visited Jan. 18, 2011).

197. *See, e.g.*, Marbella, *supra* note 14 (noting that many supporters of the project and those managing the project itself do not refer to Park51 as a "mosque"; rather, the correct terminology is "community center").

198. Jerry Gordon, *Mega-Mosque Conflicts in America*, NEW ENG. REV., Aug. 2010, *available at* http://www.newenglishreview.org/custpage.cfm/frm/68924/sec_id/68924 (interviewing Sam Solomon, "former Muslim and Sharia jurist").

199. *Id*.

200. *Facilities*, *supra* note 196.

center" because basketball courts provide a center for athletic training.

C. Determine Whether the Non-Traditional Activity Promotes a Religious Purpose

Finally, the court must determine whether the particular, non-traditional activity has a "religious purpose" by evaluating whether the benefits achieved by engaging in the activity support the religious organization's stated mission and beliefs.[201] In this case, the court would likely find that offering "recreation spaces and fitness facilities" provides locations for Lower Manhattan community members to participate in recreational programs and social opportunities.[202] As a result, "the religious exercises identified by [the Islamic community center are likely to] qualify for RLUIPA's protections."[203]

However, upon considering Second Circuit opinions, even though analysis under part one resulted in RLUIPA protection, basketball courts may be judged to have a lower level of "religiosity" than a facility designed for multi-purpose recreational usage. This is particularly true in the Second Circuit. In *Westchester*, the Second Circuit stated that "if a religious school wishes to build a gymnasium to be used exclusively for sporting activities, that kind of expansion would not constitute religious exercise."[204]

Accordingly, the court would likely apply the Eleventh Circuit's rule to evaluate Park51's intended land use to build basketball courts. The Eleventh Circuit characterizes "substantial burden" as a burden that "place[s] more than an inconvenience on religious exercise" and is "akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly."[205]

Upon application of the Eleventh Circuit's rule, the court would likely find that New York's land use regulation does not impose a "substantial burden" on Park51's "religious exercise" in this particular instance. In this case, the court would likely find that denying Park51's building permit to construct a basketball court does not amount to "more than an inconvenience on religious exercise."[206] The court would likely allow Park51 to construct a multi-purpose recreational facility that could include basketball goals. Therefore, the court's decision is not coercive because Park51 is not forced to conform or change its plan.[207] That is, the facility can still accommodate basketball, but the multi-purpose recreational area will also be used for activities other than sporting events.

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201. *See* Episcopal Student Found. v. City of Ann Arbor, 341 F. Supp. 2d 691, 701 (E.D. Mich. 2004).

202. *See Facilities*, *supra* note 196.

203. *Episcopal Student Found.*, 341 F. Supp. 2d at 700.

204. Westchester Day Sch. v. Vill. of Mamaroneck 504 F.3d 338, 347 (2d Cir. 2007).

205. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004).

206. *Id.*

207. *See id.*