JUDGE NEIL M. GORSUCH

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE

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Published Writings

COLUMBIA SPECTATOR

111 years of publication 25 years of independence

Learning, not earning

Adjunct Business School Professor Asher Edelman thinks students in his corporate merger class need a little something to fire them up about the coursework. So Edelman, one of Wall Street's leading raiders, recently came up with the perfect incentive: a $100,000 finder's fee to a student who could come up with a suitable corporation for Edelman to take over. Great, right? Now there's a real reason to hit those books. But then that stodgy old B-School Dean John Burton began to rain on the money parade. "Totally inappropriate," he said, forbidding the reward. And Edelman's unhappy students had to go back to grubbing for grades instead of money.

What's the problem, some students ask? Incentives like Edelman's are part of the real world of business, and they have a legitimate teaching role in the graduate program. No one can deny that financial incentive is a powerful motivator. But the question is whether an academic institution should be reinforcing the seedy Wall Street sentiment that money-chasing—rather than corporate efficiency, worker satisfaction or increased productivity—is the *summum bonum* of business enterprise. Edelman's generous offer perpetuates a flawed and dangerous notion—that the only things worth doing right are those that pay off big.

Even the New York Times sees Burton's insistence on "academic purity" as unreasonably idealistic—especially at the B-school, where making money the new-fangled way is the *raison d'etre*. But if you can't advocate ideals in the university setting, where can you? The goals of classroom learning must be broader and more ethically sound than the goals of the average Wall Street grind.

The business program, however closely linked to Wall Street, has a responsibility to teach not only what is, but what should be. No one expects professors training students for the cut-throat world of business to be ivory tower idealists. But the B-school remains an academic institution, and some academic conventions must be respected—like the very basic idea that professors don't pay their students for in-class performance. Stodgy old Dean Burton was right.

Comment

Mayor Koch v. Father Bruce

Breaking the Covenant

Anyone who has traversed the desperation-strewn battlefield of Manhattan's porn district will immediately understand why this world needs more people like Father Bruce Ritter. Times Square and its surroundings comprise the backdrop for many thousands of existences too horrible for sequestered Ivy Leaguers like me to fully grasp: of young refugees from shattered and impoverished homes, now bereft of family and shelter, forced to choose between stealing and selling their bodies simply to eat.

For many of these unfortunates, there would be no hope were it not for Ritter and his sanctuary, Covenant House. Ritter



Spectator/Mark Smylie

Start making sense

Dirk Ziff

is perhaps the single greatest social hero this country has. For the past 20 years he has passionately and selflessly devoted himself to the task of providing a roof, a hot meal, and a chance to live for the hordes of misguided, mistrented, and misunderstood youths who have lost their way and found themselves on the streets of our cities, often at the mercy of callous pimps and the child-porn industry. Along the way, Ritter has bravely fought these pimps, the discouragement of seeing kids die, financial nightmares, and a personal bout with Hodgkin's disease. But now he's fighting an unnecessary battle against the ultimate bully: New York City and its pompous mayor, Ed Koch.

The dispute revolves around space, a theme hypnotically familiar to any Manhattanite. Father Ritter began his mission in a small apartment on the Lower East Side, where he provided shelter and food for a half dozen or so kids a night. But today, more than 300 young people—almost all of them black and Hispanic—spend each night in Covenant House's facility on 41st Street and 10th Avenue, 80 of them on the floor because there simply isn't room for any more beds.

So when Ritter learned that the Maritime Union Building, a large, lodge-like structure at 17th Street and 9th Avenue, was going up for sale, he rounded up his financial allies and thought long and hard before entering a bidding circle that included the mayor's office. When the bids were opened, Ritter's $33 million figure was the highest, and he was awarded the deal, fair and square.

That should have been the end of it. But Koch, incensed at having been outbid, refused to bow out gracefully. He began to stubbornly flex his political biceps at this most unlikely and unfortunate target.

Apparently, the city had plans to convert the building into a "work release center"—a euphemism for a prison. And apparently these were plans that, like they say in the mob, were not made to be broken. The building is somewhat of a prize. It's well located and, most importantly, it's in move-in condition. Koch doesn't want to spend the money to renovate any of the numerous acceptable alternative sites at his disposal. Instead, he has decided to shove around one of his most honorable and valuable constituents.

Under the power of eminent domain, the city has the technical right to condemn, and then assume control of, any property within its boundaries, if it can prove the need is great enough. This is what Koch is openly threatening to do to Covenant House. We are all familiar with the overcrowding of penitentiary systems nationwide, and New York's is no exception. Of course it needs new space for correctional facilities. But to take that space from Covenant House and the many homeless kids for whom it might be a bridge back to life—that's unconscionable.

Ritter himself is perplexed and frightened. Speaking on WABC Radio earlier this month, he said, "I feel like the city has aimed its steamroller right at Covenant House, and it's clanking away." He knows there is a very real possibility that his dream of a new facility to help runaways might end up like so much paper collecting footprints on the floor of City Hall. He's seen enough to know that life isn't fair.

Ritter believes that of the 1,000 people who pass through the doors of Covenant House each week, more than two-thirds will die young. For the estimated 800,000 homeless teenagers

See *Covenant*, p.11

Dirk Ziff is a second-semester senior in Columbia College.

The score at Barnard: Men 150, Women 1

By Stephanie Bailey

Despite two weeks of student complaints and pressure from the Student Government Association, sexual discrimination at Barnard's new dorm construction site is only getting worse. In early October, only one of the 80 hard hats on the site was a woman, far short of the goal of 6.9 percent women per trade set by Federal Executive Order 11246. That was bad enough. But since then, Tishman Construction and Realty Corp., builder of the new dorm, has hired more than 70 new workers—all of them men. And eligible women workers continue to be turned away.

As staff workers at Non-Traditional Employment for Women, a non-profit group that trains and places women in construction, Barnard junior Alexa Berghager and I brought more than 25 well-qualified women to the Barnard site this summer. We urged Tishman to work with NEW to fulfill its equal opportunity obligations, but Tishman managers were unresponsive to our women workers.

Last week, Alexa Berghager returned to the Barnard site with a group of NEW women to negotiate for jobs. In keeping with Tishman's tradition of sexual discrimination, site officials refused to hire even one woman, and then informed Berghager that the male work force had almost doubled in the last week.

Federal officials say they won't take legal action against Tishman unless the company—one of the largest construction firms in New York—fails to make "good faith efforts" to find women hard hats. What passes for good faith? Executive Order 11246 contains several hundred pages of standards for

See *Tishman*, p.10

Stephanie Bailey is a Barnard College junior.

Letters

Where's the racism?

To the Editor:

Pardon our ignorance, but we just do not see the racial implications in Columbia College Junior Class President Duane Bartsch's joke about providing "booze, crack, and dirty needles" at an upcoming community carnival. Is the use of drugs and alcohol limited only to the black community? We read the Oct. 16 article over and over again, trying to figure out why members of the Black Students Organization were so offended (if Spectator's account is right). It seems to us that if *this* can be considered a racial slur, anything can be interpreted that way, if that is what the listener wants to hear.

Loren Zeitler, CC '90
Sandi Jacobs, CC '90

The independent *Fed*

To the Editor:

In an Oct. 16 article reporting harassment charges against JBC head Anthony Calenda, former Student Council Vice Chair James Hunter alleges, "The Federalist Paper identified itself as a political organization last year when applying for University recognition." The Federalist Paper did no such thing.

The statement of purpose presented to the presidential delegate for student affairs along with our application for University recognition contained no reference to political or ideological perspective. That statement read, in part: "Our aim is to open a forum and to create an atmosphere in which an intelligent debate may be held on the issues of the day . . . Ours is an independent organization that has formed out of disappointment over the level of campus debate, and with a sense of adventure in our plans to improve it . . . ."

Hunter's assertion that the Federalist Paper claims to be a political organization is simply untrue. Furthermore, never has any particular ideology been held as correct in our pages. Rather, our purpose is to provide those who want to express opinions that have not been heard on campus a forum for doing so.

M. Adele Aslani-Far, CC' 90 Neil Gorsuch, CC '89
Stephen Later, CC '90 Eric Prager, CC '90
Dave Vatti, CC '90
Editors, *The Federalist Paper*

Looking for loopholes

To the Editor:

We are shocked and dismayed by Barnard Director of Public Relations Ruth Safarty's assertion that Tishman Realty and Construction Corp. is not *required* to employ 6.9 percent women at its Barnard construction site. Formerly, we thought that Barnard College's function was to promote equal opportunities for women. Now it seems to be to searching for legal loopholes in defense of its sexist policies.

While 6.9 percent women, compared to 51 percent women in the general population, is hardly "equal opportunity," it appears that Barnard administrators are not willing to promote even this modest improvement. Here's the chance for Barnard to make good on its commitment to all women—not just college-trained professionals. We all know what the right side is. Now come on, let's see some action.

Lise Broer, CC '90
Debra Laefer, CC '89

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PREFACE

This issue of the *Harvard Journal of Law & Public Policy* begins with the Ninth Annual National Federalist Society Symposium on Law and Public Policy, "The Future of Civil Rights Law." The Symposium presents an unusually broad array of views on many of the major issues facing civil rights lawyers and policymakers: the definition of civil rights and the beneficiaries thereof, the economic impact of civil rights policies, the effects test, the limits on judges' power to order remedies, "hate speech" regulation, and the direction of the civil rights agenda in the future. We are extremely pleased to present this Symposium, particularly in view of the timeliness and importance of the topic.

Two articles follow the Symposium. Professor Ruth Grant, relying on the doctrine of separation of powers and a view of limited government, presents an original and compelling argument that the exclusionary rule is required by the United States Constitution. She cogently explains the logical difficulties associated with the balancing rationale prevalent in recent Supreme Court decisions regarding the exclusionary rule. Following Professor Grant's article, Professor Michael DeBow invokes public choice theory to elucidate the perils of adopting a "populist" antitrust policy, that is, one dominated by appeals to "fairness" and to the redistribution of business opportunities and dispersion of economic power.

We are also pleased to present a review of Robert Bork's *The Tempting of America* by Judge David Sentelle, who was named to the United States Court of Appeals for the District of Columbia Circuit when Judge Bork still served that court. The issue concludes with student-written Recent Developments on major cases decided by the Supreme Court in its 1989 Term.

We sincerely appreciate the support of the Federalist Society and the continued generosity of the *Journal*'s other contributors.

Charles M. Oellermann
Editor-in-Chief

The Federalist Society



Presents

The Future of Civil Rights Law

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SYMPOSIUM

PANEL I: WHAT ARE CIVIL RIGHTS AND TO WHOM DO THEY BELONG?

INTRODUCTION: CIVIL RIGHTS POLITICS AS INTEREST-GROUP POLITICS

DANIEL B. RODRIGUEZ*

I am pleased to introduce this symposium panel on "What Are Civil Rights and to Whom Do They Belong?" Because some contributors to this symposium have suggested that the process of enacting civil rights statutes reflects little more than legislative business as usual,[1] I will focus my introduction on the proposition that civil rights politics, however public-regarding its ultimate objectives, is just another form of interest-group politics.

Whether one is troubled by this assertion depends ultimately upon one's normative conceptions of legislation and political choice. One who clings to a decidedly anti-pluralist or "civic republican" conception of legislative decisionmaking,[2] is likely to view equating the civil rights movement with, say, the National Association of Manufacturers, as cause for alarm. To civic republicans, civil rights is regarded as the province of a special, perhaps even "moral," political process. For them, the struggles of the 1950s and 1960s against Jim Crow and *de jure* segregation, and the subsequent struggle for public and private affirmative action, represent a sort of high politics, character-

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1. *See* Bolick, *Unfinished Business: A Civil Rights Strategy for America's Third Century*, 14 HARV. J.L. & PUB. POL'Y 137 (1991); Roback, *The Separation of Race and State*, 14 HARV. J.L. & PUB. POL'Y 58 (1991).

2. For elaborations of modern civic republican (or "neo-republican") conceptions of public law, see *Symposium: The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988); Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); and Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985). Interesting critiques of neo-republicanism include Fallon, *What is Civic Republicanism and is it Worth Reviving?*, 102 HARV. L. REV. 1695 (1989); Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685 (1988); and Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713 (1988).

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ized by reasoned debates over great issues of social justice.[3]

For those less sanguine about the potential of legislative politics to reject self-interested decisionmaking in favor of public-spirited dialogue, treating the civil rights community as one among several competing interest groups does no disservice to the movement. On the contrary, the emergence of civil rights advocates alongside the many other powerful interest groups in the American political process represents an achievement in itself. For those who conceive of political justice as procedural in part, success in accordance with the rules of the legislative game reflects real progress. In this light, considering civil rights politics as ordinary interest-group politics appeals to a familiar normative pluralist conception of political choice.[4]

Furthermore, examining civil rights politics through the lens of contemporary interest-group analysis[5] raises a number of provocative intellectual questions. Most fundamentally, what explains the recent legislative successes of the civil rights movement? Interest-group analysis suggests that civil rights groups would not only face difficult political barriers but would also be unlikely to form as pressure groups in the first place.[6] Civil rights are public goods. Accordingly, the civil rights community should face the debilitating collective action problems that Mancur Olson and others have described.[7] What are the incentives for any subset of the large group benefitting from

3. *See, e.g.*, W. ESKRIDGE & P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 2-64 (1988). Professors Eskridge and Frickey contrast the Civil Rights Act of 1964, a statute they regard as neo-republican in its creation and orientation, with interest-group statutes such as the Smoot-Hawley Tariff of 1930. "Albeit imperfect in many ways, the Civil Rights Act was a great moment in our community, when public representatives and we ourselves discussed what kind of society we want and how to go about changing attitudes which were immoral." *Id.* at 65. Comprehensive descriptions of the legislative struggle over civil rights at the federal level include H. GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY (1990); and C. WHALEN & B. WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985).

4. For a good general description of normative pluralist political theory, see Chapman, *Voluntary Association and the Theory of Pluralism*, 11 NOMOS 87 (1969).

5. *See, e.g.*, R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); M. FIORINA, CONGRESS—KEYSTONE OF THE WASHINGTON ESTABLISHMENT (2d ed. 1989); M. HAYES, LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS (1981).

6. Starting from the premise that ethnic groups seek political advantage as a means to economic advantage, Professor Jennifer Roback has examined civil rights politics from the perspective of interest-group analysis. *See* Roback, *Racism as Rent Seeking*, 27 ECON. INQUIRY 661 (1989); *see also* Roback, *supra* note 1.

7. *See* M. OLSON, THE LOGIC OF COLLECTIVE ACTION (1965); *see also* R. HARDIN, COLLECTIVE ACTION (1982).

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civil rights legislation to organize, and to invest resources in reaping these benefits?

Perhaps the answer to this question requires a recharacterization of the modern civil rights interest group. Although standard interest-group analysis tends to treat civil rights groups as ordinary rent-seeking entities,[8] these groups may in fact organize principally for non-economic reasons. Maximizing its utility by securing desirable wealth transfers may represent a crucial component of the typical civil rights group's agenda, but may not reflect its *raison d'etre*.

James Madison understood that some factions might arise for non-economic reasons. In *The Federalist Number 10*, he defined faction as "a number of citizens . . . who are united and actuated by some *common impulse of passion*, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[9] Ordinary interest groups are the sort of factions most feared; thus, Madison noted that "the most common and durable source of factions has been the various and unequal distribution of property."[10] But economic groups do not exhaust the supply of powerful factions; more ideological factions may persist so long as individuals are united by such common impulses of passion.[11] After all, it is not merely the acquisition of material wealth or the structure of government that generates factions; instead, Madison notes that the causes of faction are "sown in the nature of man."[12]

Yet recharacterizing civil rights groups as ideological interest groups rather than economic interest groups blurs the pluralist theoretical picture. Are such groups organized around the "zeal for different opinions"[13] like the standard, economically motivated interest group described by pluralists, or are they or-

8. *See* Roback, *supra* note 1.

9. THE FEDERALIST No. 10, at 78 (J. Madison) (C. Rossiter ed. 1961) (emphasis added).

10. *Id.* at 79.

11. For a useful discussion of this type of faction, see D. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 59-61 (1984).

12. THE FEDERALIST No. 10, *supra* note 9, at 79. In his extended essay on *The Federalist Number 10*, Professor David Epstein notes that the causes of faction are not completely individualistic or pre-political, but are socially constructed. In particular, they are shaped by the existing governmental arrangement in which the interested individual finds himself. Hence, "the causes of faction seem to be sown not simply in the nature of man but in a political arrangement. . . . Faction is partly the result of the benign government which it endangers." D. EPSTEIN, *supra* note 11, at 72.

13. THE FEDERALIST No. 10, *supra* note 9, at 79.

ganized more as a collective version of the public-regarding civic republicans celebrated by anti-pluralists?

Another question raised by the application of interest-group analysis to modern civil rights politics concerns the civil rights constituency's constitutional status as a protected class. One consequence of the growing success of the civil rights movement in the legislative arena might be an increased reluctance on the part of courts to intervene on behalf of such groups. Courts may come to ask whether civil rights advocates can have it both ways. Can they successfully pursue their legislative aims while maintaining that minorities remain "discrete and insular" in terms of modern equal protection doctrine?[14]

Professor Bruce Ackerman has suggested that the protection that *Carolene Products*-based strict scrutiny affords certain groups on the basis of their discreteness and insularity might be misplaced.[15] In reality, notwithstanding the assumptions behind footnote four of *Carolene Products* and the "process-perfecting" constitutional theories spawned by these assumptions,[16] so-called discrete and insular groups may be better situated to protect their interests in the normal political process than other minority groups. In other words, if interest-group pluralism is working as it should, then the rationale for special constitutional protection *on process-based grounds* is correspondingly weakened.[17]

Consider, in this light, a passage from the Supreme Court's recent decision in *City of Richmond v. J.A. Croson Co.*[18] In passing on the City of Richmond's claim that reserving a certain per-

14. The "discrete and insular" phrase was originated in United States v. Carolene Products, 304 U.S. 144 (1938):

> Nor need we enquire [now] whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . 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.

Id. at 152-53 n.4 (citations omitted).

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

16. The most notable explication of a "process-perfecting" theory is J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

17. Professors Farber and Frickey have argued that judicial protection of civil rights has seldom turned on "process-perfecting" rationales. *See* Farber & Frickey, *Is* Carolene Products *Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 78 CAL. L. REV. — (forthcoming 1991).

18. 488 U.S. 469 (1989) (striking down a city ordinance that required contractors awarded city contracts to subcontract at least 30 percent of the dollar amount of each contract to minority business enterprises).

centage of city contracts for minority subcontractors was necessary to protect minorities from majoritarian prejudice or indifference, the Court noted that "blacks comprise approximately 50% of the population of the city of Richmond [and that f]ive of the nine seats on the City Council are held by blacks."[19] From these observations, the Court concluded that "[t]he concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case."[20] Similarly, in his concurrence, Justice Scalia pointed out that Richmond had enacted a set-aside "clearly and directly beneficial to the dominant political group, which happens also to be the dominant racial group."[21]

To the *Croson* court, then, the political power of contemporary civil rights interest groups militated against special judicial protection. Such decisions may place civil rights advocates in a predicament. Must they now calculate at what point legislative advantage results in the surrender of judicial advantage? Is participation on fair terms in the legislative arena worth sacrificing salutary judicial protection, or is there real political value in being considered "discrete and insular"?[22]

Another set of interesting questions raised by viewing civil rights politics as interest-group politics involves the interpretation of civil rights statutes. As difficult interpretive issues arise under these laws, courts must choose among different methods of statutory construction. Here again, many argue that civil rights warrant a special approach. Accordingly, certain legal scholars contend that however powerful notions of legislative supremacy and judicial restraint may be in construing "ordinary" statutes, civil rights laws require courts to employ creative and dynamic methods of construction to further the goals of racial justice expressed in those laws.[23]

19. *Croson*, 488 U.S. at 495.

20. *Id.* at 496.

21. *Id.* at 524 (Scalia, J., concurring in judgment).

22. The premise of this question may over-simplify reality. Few believe that the contemporary legislative process is completely open and equal. Hence, current arguments between and among pluralists and their critics begin from the assumption that the American political process is imperfect. *See* R. DAHL, DEMOCRACY AND ITS CRITICS 176-92 (1989); C. LINDBLOM, POLITICS AND MARKETS 170-200 (1977); Dahl, *Pluralism Revisited*, 10 COMP. POL. 191 (1978).

23. *See, e.g.*, R. DWORKIN, A MATTER OF PRINCIPLE 316-31 (1985); Eskridge, *Dynamic*

The Civil Rights Act of 1990[24] mirrors this attitude. Its sponsors have inserted a section that instructs courts and agencies that "[a]ll federal laws protecting the civil rights of persons shall be broadly construed to effectuate the purpose of such laws to eliminate discrimination and provide effective remedies."[25] In the House and Senate Committee reports accompanying the bill, supporters stressed that this section would merely codify the well-established principle that civil rights statutes, like other remedial statutes, should be construed broadly.[26]

The strength of such an injunction rests in large part on the traditional conception of the civil rights movement as a disadvantaged group. This conception does not imply merely that the class of individuals for whom the civil rights movement speaks is disadvantaged—this is hardly a controversial assertion—but that the movement itself is disadvantaged in comparison to other groups vying for political support. As civil rights interest groups wield more political power, however, the case for what amounts to affirmative action in statutory construction diminishes.

Whatever the direction of future civil rights legislation, integrating the civil rights movement and what might be called the modern civil rights interest group into our present understanding of how democratic politics works, warts and all, represents progress. There is nothing sinister or subversive about characterizing civil rights politics as interest-group politics. Civil rights politics can be simultaneously ordinary, as part of the normal processes of political change, and special, as part of an

Statutory Interpretation, 135 U. PA. L. REV. 1479 (1987). Both authors start with a skeptical attitude toward judicial reliance on statutory history and legislative intent. *See, e.g.*, R. DWORKIN, LAW'S EMPIRE 313-17 (1986); Eskridge, *Spinning Legislative Supremacy*, 78 GEO. L.J. 319 (1989). Professor Daniel Farber reaches a similar conclusion concerning the proper scope of contemporary civil rights laws. Focusing in particular on the legality of affirmative action programs under Title VII, Farber argues that such programs are based on (relatively) discernable and constitutionally binding legislative intent. *See* Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989).

24. H.R. 4000, 101st Cong., 2d Sess. (1990); S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. S1019-20 (daily ed. Feb. 7, 1990). The Civil Rights Act of 1990, as passed by Congress, was vetoed by President Bush on October 22, 1990, Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1632 (Oct. 22, 1990).

25. H.R. 4000, 101st Cong., 2d Sess. § 11 (1990); S. 2104, 101st Cong., 2d Sess. § 11, 136 CONG. REC. at S1020 (daily ed. Feb. 7, 1990).

26. *See* S. REP. No. 315, 101st Cong., 2d Sess. 36-37, 57-58 (1990).

evolving national consensus on how best to protect the rights of all Americans and eradicate the profound harms associated with decades of discrimination and prejudice.

SOME OBSERVATIONS ON BROADLY CONSTRUING CIVIL RIGHTS LAWS

CHARLES A. SHANOR*

At the Equal Employment Opportunity Commission (EEOC), civil rights are *legal* rights, not merely moral rights. These civil rights come complete with procedural restrictions and limitations on their remedies. Part of my job involves construing the reach of these rights, processes, and remedies, often through briefs filed in the federal courts, including the United States Supreme Court. I formulate EEOC positions based on statutory language, legislative history, judicial decisions, and prior agency interpretations of civil rights. While my decisions are sometimes difficult, they are firmly rooted in majoritarian policy choices. Congress has passed specific civil rights laws, and it is my duty to enforce those laws.

To workers, the civil rights laws that the EEOC enforces are doors of opportunity. But these rights are not immutable. They may be changed by Congress, interpreted divergently by courts, and enforced more or less effectively by individual advocates and government agencies. Though less grandiose than the inalienable rights alluded to in the Declaration of Independence, and the natural and human rights discussed by philosophers and theologians, these statutory rights are specific, practical, and enforceable. Legal rights are very much a part of America's social fabric, and when these legal civil rights change, America's social fabric changes.

Societal changes that result from changes in civil rights laws are manifested in a number of ways. First, people behave differently toward each other. Eventually, they may even think differently about each other and about themselves. Second, wealth transfers occur. Beneficiaries of civil rights laws convert rights into jobs, access to facilities, and the like. Third, secondary cultures and bureaucracies develop. Lawyers earn ample livelihoods plumbing the processes by asserting, or defending against, claims based on these rights. Government agencies are established to regulate compliance with civil rights laws, and

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individuals spend all or part of their professional lives serving in these agencies.

This brings me to the Civil Rights Act of 1990.[1] Some claim that the Supreme Court's 1989 decisions on civil rights issues[2] worked doctrinal changes that are deleterious to the social fabric that existed before those decisions.[3] I will not address the extent to which the Court's decisions departed from or followed the law as it existed before 1989.[4] I will state categorically, however, that the proposed Civil Rights Act of 1990 would alter America's social fabric fairly dramatically. Workers would have stronger remedies, businesses would face greater liabilities, and incentives for employers to use numerical balancing within their work forces would increase, notwithstanding the disclaimer in Section 13 of the Act.[5] Furthermore, civil-

1. H.R. 4000, 101st Cong., 2d Sess. (1990); S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. S1019-20 (daily ed. Feb. 7, 1990). The Civil Rights Act of 1990, as passed by Congress, was vetoed by President Bush on October 22, 1990, Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1632 (Oct. 22, 1990).

2. *See* Public Employees Retirement Sys. v. Betts, 109 S. Ct. 2854 (1989) (employees must prove that an employee benefits plan was intended to serve the purpose of discrimination in some aspect of the employment relationship unrelated to fringe benefits); Independent Fed'n of Flight Attendants v. Zipes, 109 S. Ct. 2732 (1989) (award of attorney fees is appropriate only where the intervenor's action was frivolous, unreasonable, or without foundation); Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702 (1989) (a municipality may not be held liable for its employees' violation of 42 U.S.C. § 1981 unless caused by custom or policy of the municipality); Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) (reevaluating 42 U.S.C. § 1981); Will v. Michigan Dep't of State Police, 109 S. Ct. 2304 (1989) (neither a state nor its officials acting in their official capacities are "persons" under 42 U.S.C. § 1983); Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989) (statute of limitations period begins when seniority system is adopted); Martin v. Wilks, 109 S. Ct. 2180 (1989) (nonminority employees may subsequently challenge a consent decree entered into by minority employees and employer); Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989) (plaintiffs must demonstrate that specific elements of an employer's hiring process have a significantly disparate impact; burden of proof does not shift to employer to prove business necessity); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (burden of proof shifts to employer when employee presents evidence that unlawful motive was a substantial factor in an employment decision); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (strict scrutiny applied to race-based relief requires evidence of past discrimination before remedial measures can be adopted).

3. *See* Clark, *The Future Civil Rights Agenda: Speculation on Litigation, Legislation, and Organization*, 38 CATH. U.L. REV. 795 (1988-89); Hoeflich, *After the War: Poverty Law in the 1980's—Introduction*, 38 EMORY L.J. 565 (1989); Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989).

4. For a more complete discussion of my views, see Shanor & Marcosson, *Battleground for a Divided Court: Employment Discrimination in the Supreme Court, 1988-89*, 6 LAB. LAW. 145 (1990).

5. "Nothing in the Amendment made by this Act shall be construed to affect court ordered remedies, affirmative action, or conciliation agreements that are otherwise in accordance with the Law." H.R. 4000, 101st Cong., 2d Sess. § 13 (1990); S. 2104, 101st Cong., 2d Sess. § 13, 136 CONG. REC. S1020 (daily ed. Feb. 7, 1990).

rights lawyering by the plaintiffs' bar would become more attractive financially than it is now. Whether one thinks these are positive changes depends upon one's political and social views.

My focus is on a fundamental though rarely noticed provision of the Act that would greatly change the work that judges, lawyers, and bureaucrats do in construing legal civil rights. Section 11 of the Act would add this rule of construction to the Civil Rights Act of 1964:[6] "All federal laws protecting the civil rights of persons shall be broadly construed to effectuate the purposes of such laws to eliminate discrimination and provide effective remedies."[7] While this is a fairly short clause, it is a provision I find deeply troubling, because I have no clue whatsoever as to what it means. It may be more hortatory than substantive, like the Ninth and Tenth Amendments to the Constitution. On the assumption that the clause might be construed to have some meaning, however, I would like to touch upon some areas of its ambiguity.

First, which federal laws "protect civil rights"? Presumably, the Civil Rights Act of 1964 qualifies, as do Sections 1981 and 1983 of Title 42.[8] How about Executive Order 11,246?[9] How about the Fourteenth Amendment to the Constitution? Executive Order 11,246 definitely deals with race and sex discrimination, but it never went through the legislative processes that most laws traverse. The Equal Protection Clause of the Fourteenth Amendment[10] clearly deals with discrimination, but it has not yet been broadly construed, for example, to protect individuals from sexual orientation discrimination.[11] Furthermore, *Washington v. Davis*,[12] along with *Personnel Administrator of Massachusetts v. Feeney*,[13] specifically held that the Fourteenth Amendment does not encompass the disparate impact theory of discrimination.

Second, if a particular law is considered a civil rights law,

6. 42 U.S.C. §§ 1971, 2000a-2000h (1988).

7. H.R. 4000, 101st Cong., 2d Sess. § 11 (1990); S. 2104, 101st Cong., 2d Sess. § 11, 136 CONG. REC. S1020 (daily ed. Feb. 7, 1990).

8. 42 U.S.C. §§ 1981, 1983 (1988).

9. Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), *reprinted in* 42 U.S.C. § 2000e app. (1982) (providing equal opportunity in federal employment).

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

11. *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

12. 426 U.S. 229 (1976).

13. 442 U.S. 256 (1979).

how would a court construe it to "provide effective remedies"? The Age Discrimination in Employment Act,[14] for instance, provides back pay to discriminatees and liquidated damages for willful violations.[15] If these remedies are not adequate to protect someone who is harassed because of his or her age, should a court construe the statute to permit awards of punitive damages? Should Executive Order 11,246, currently enforced exclusively by the Department of Labor, be construed to confer a private right of action upon an individual discriminatee when the Department of Labor does not bring suit?

Third, would this provision mandate reexamination of settled Title VII doctrines that narrowly construed provisions of the statute? For example, the Supreme Court held in *International Brotherhood of Teamsters v. United States*[16] that a seniority system that had a disparate impact upon minorities was lawful. According to the Court, Congress only prohibited intentionally discriminatory seniority systems. Yet a broad construction of Title VII, a primary purpose of which was to improve economic opportunities for minorities, might well counsel a contrary holding. Would *Teamsters* still be good law if Section 11 were enacted?

Fourth, the provision assumes that broad construction of "the civil rights of persons" leads directly to the elimination of discrimination. Yet some of the hardest and most controversial cases in recent years belie the simplistic assumption that it is always clear what policies will most effectively eliminate discrimination. In *United Steelworkers of America v. Weber*,[17] for example, the Supreme Court held that a white employee did not have the same right to enter a training program as a black employee, because the company's exclusion was permissible under a race-conscious affirmative action program. If Brian Weber's right had been broadly construed, the result would have been different; conversely, a broad construction of black workers' rights might have led the Court not to place any limits on preferential treatment of minorities. The point is a simple one: In competitive situations, expansion of some employees' rights will inevitably limit other employees' opportunities.

14. 29 U.S.C. §§ 621-634 (1988).
15. *See id.* § 626.
16. 431 U.S. 324 (1977).
17. 443 U.S. 193 (1979).

Fifth, this provision would be a dream come true for the secondary civil rights cultures and bureaucracies to which I belong. The provision is so broad and so amorphous that it would provide substantial fodder for lawyers for decades to come. It would promote arguments by any group that chooses to characterize its desires as "civil rights," even if its particular "right" has not otherwise been codified through the legislative process. And it will impose unpredictable potential liability upon American industry and government.

I am a firm believer in civil rights and have devoted much of my professional life to understanding and enforcing those rights. Nevertheless, I do not want unelected federal judges, however able, to be given an undefined mission to seek ever broader ways to "broaden" "civil rights laws." While I have no objections to certain alterations of our social fabric through the revision of civil rights laws, I want to see, think about, and understand each possible revision. I want such changes to occur through democratic consensus-building processes involving elected officials, not through applications of an interpretive rule made by lifetime appointees in the privacy of their chambers. Provisions like Section 11 are not the way to change America's social fabric.

WOMEN'S RIGHTS AND SOCIAL WRONGS

DEBORAH L. RHODE*

As I was contemplating how best to introduce this presentation, the Federalist Society Symposium brochure arrived in the mail and happily supplied an opening theme. Under the heading "Participants Include" were thirteen men and one woman. Since I had been asked to address the question of civil rights from a "woman's point of view," it struck me that women's problems with rights parallel women's problems with that list. Neither adequately reflects our experience.

The reasons for the continued marginalization of women's interests have to do with a deeper difficulty, which I have elsewhere labeled the "no-problem problem."[1] A central stumbling block in our struggle for gender equality is the perception that the struggle is no longer necessary. Over the past quarter century, the growth in antidiscrimination initiatives, coupled with the gradual erosion in traditional gender roles, has encouraged the illusion that equality for women has been achieved. Whatever sex-linked differences remain have been attributed to women's "different voice" and different choices.[2] Particularly among conservative constituencies, the prevailing wisdom is that gender inequality is either not a serious problem or is not *their* problem. These comments seek to reformulate that perception as the problem.

From the standpoint of women, the current legal landscape is marked by formal rights and social wrongs. Despite recent progress, the sexes have attained equality more in legal status than in daily experience. Women are still dramatically underrepresented in the highest positions of social, economic, and political power and dramatically overrepresented in the lowest positions. Over eighty-five percent of all elective office holders

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1. *See* Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. — (forthcoming 1991).

2. The phrase is drawn from C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982). For critical responses to this use of Professor Gilligan's work, see surveys cited in Rhode, *Theoretical Perspectives on Sexual Difference*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE 1, 4-7 (D. Rhode ed. 1990); and Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 624-25 (1990) [hereinafter Rhode, *Feminist Critical Theories*].

are male, and about two-thirds of indigent adults are female.[3] Whatever our achievements in expanding women's access to traditional male roles, we have been less effective in encouraging men to assume traditional female roles. Women continue to shoulder a highly disproportionate share of responsibilities in the home and to pay a price for that burden in the world outside.[4] On the average, a black female college graduate earns no more than a white male high school dropout.[5] Sexual violence remains common, and reproductive freedom is by no means secure.[6] There is, in short, room for improvement.

The inadequacies of civil rights law with respect to gender equality have several dimensions, including (1) the indeterminacy of formal entitlements; (2) the barriers to their exercise; and (3) the limitations upon their scope. Or, to put the point more simply, we cannot pin down the content of rights, but whatever they are, women do not have enough of them.

The indeterminacy critique has been developed at length by feminist and critical legal studies scholars and needs little elaboration here.[7] In essence, the difficulty is that rights do not re-

3. *See* D. RHODE, JUSTICE AND GENDER 2 n.1, 126 n.33 (1989) (listing additional sources); D. PEARCE, THE FEMINIZATION OF POVERTY: A SECOND LOOK 4 (Institute for Women's Policy Research Working Paper, 1989) (summarizing government data but challenging its methodology of collection); *American Women Today: A Statistical Portrait*, in THE AMERICAN WOMAN, 1990-1991: A STATUS REPORT 349, 359 (S. Rix ed. 1990).

4. Recent studies indicate that in an average household, women remain responsible for about 70 percent of the housework, and that working women spend about twice as much time on domestic tasks as working men. *See* A. HOCHSCHILD & A. MACHUNG, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME 21, 271-73 (1989); J. PLECK, WORKING WIVES/WORKING HUSBANDS (1985). For additional sources documenting the same trends, see D. RHODE, *supra* note 3, at 174 n.35. Women also constitute 90 percent of single parents. *See* R. SIDEL, WOMEN AND CHILDREN LAST 16 (1988).

5. *See Study Shows College-Educated Women Earn the Same as Male High School Dropouts*, Daily Lab. Rep. (BNA) No. 170, at A-5 (Sept. 1, 1988); Rhode, *Gender Equality and Employment Policy*, in THE AMERICAN WOMAN, 1990-1991: A STATUS REPORT, *supra* note 3, at 170. For information on wage gaps faced by minority women, see National Committee on Pay Equity, *The Wage Gap: Myths and Facts*, in RACISM AND SEXISM: AN INTEGRATED STUDY 69 (P. Rothenberg ed. 1988); Bender, *Sex Discrimination or Gender Inequality?*, 57 FORDHAM L. REV. 941, 941 n.3 (1989); and Kreps, *Introduction*, in THE AMERICAN WOMAN, 1987-1988: A STATUS REPORT 24, 27 (S. Rix ed. 1987).

6. For example, it is estimated that 20 to 30 percent of all women will experience a violent sexual assault outside of marriage, and 25 to 50 percent will be beaten by a man with whom they are intimately involved. *See* S. ESTRICH, REAL RAPE 15-18 (1987); M. STRAUS, R. GELLES & S. STEINMETZ, BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY 19-28, 31-50 (1980); Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH L. REV. 267, 273 (1985). Prominent Supreme Court cases that have curtailed the constitutional right to reproductive freedom include Webster v. Reproductive Health Services, 109 S. Ct. 304 (1989); and Harris v. McRae, 448 U.S. 297 (1980).

7. *See, e.g.*, Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984); Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn*

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solve conflict; they only restate it in somewhat abstract and conclusory form.[8] The danger is that mandates of formal equality can mask substantive inequalities. So, too, battles over rights may divert effort from the struggle necessary to give them content.

For example, in the wake of no-fault divorce reform, considerable dispute centered on whether divorcing spouses should be entitled to an equal, or an equitable, division of marital property.[9] In principle, either formulation was defensible; in practice, neither has been. Divorced wives have ended with a far greater share of caretaking responsibilities and far fewer resources to fulfill them. In the aftermath of most divorces, the husband's income substantially rises, while the wife's income substantially declines.[10] In their interpretation of abstract legal mandates, decisionmakers have been insensitive to the permanent economic sacrifices that many homemakers have made.

Similar problems arise in other substantive areas of the law. Over the past two decades, women have won the right to be free from sexual harassment and domestic violence, but the scope of protection has remained open to dispute. Courts have trivialized harassing behavior as "dalliance[s],"[11] or "flirtation."[12] One trial judge expressed a common attitude with uncommon candor: "So, we will have to hear [your complaint], but the court doesn't think too much of it."[13] Spousal assaults, euphemistically characterized as "domestic disturbances," have been treated as if everyone should simply "kiss and make up

Selves, 62 TEX. L. REV. 1563 (1984); Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1382-84 (1984); Rhode, *Feminist Critical Theories*, *supra* note 2, at 633.

8. Given its conclusory nature, a rights-oriented framework often distances us from necessary value choices and obscures the basis on which competing interests are accommodated. *See* sources cited in *supra* note 7. The counterbalancing and empowering dimensions of rights frameworks, however, should not be ignored. *See infra* notes 32-33 and accompanying text.

9. *See* L. WEITZMAN, THE DIVORCE REVOLUTION (1985); D. RHODE, *supra* note 3, at 149-51; Fineman, *Implementing Equality: Ideology, Contradiction, and Social Change*, 1983 WIS. L. REV. 789, 866-67.

10. *See* L. WEITZMAN, *supra* note 9; D. RHODE, *supra* note 3, at 149-51; Fineman, *supra* note 9, at 866-67; Rhode & Minow, *Reforming the Questions: Questioning the Reforms: Feminist Perspectives on Divorce Reform*, in DIVORCE REFORM AT THE CROSS ROADS 191 (S. Sugarman & H. Kay eds. 1990); DISPLACED HOMEMAKERS NETWORK, A STATUS REPORT ON DISPLACED HOMEMAKERS AND SINGLE PARENTS 2 (1987) (40 percent of displaced homemakers—divorced, separated, and widowed women—live below the poverty line, and 20 percent more live near the poverty line).

11. Vinson v. Taylor, 760 F.2d 1330, 1330 (D.C. Cir. 1985) (Bork, J., dissenting from denial of rehearing).

12. Sand v. Johnson Co., 33 Fair Empl. Prac. Cas. (BNA) 716 (E.D. Mich. 1982).

13. Henson v. City of Dundee, 682 F.2d 897, 900 n.2 (11th Cir. 1982).

and get out of court."[14] Seriously battered women are advised to "just leave," but are denied the physical protection and economic assistance that would make departure possible.[15] In a recent Massachusetts case, the trial judge dismissed charges of brutality with the observation that if the parties wanted to "gnaw on each other, fine," but they were not to do it at taxpayer's expense. Three months later, the wife was dead and the husband awaiting trial for murder, also at taxpayer's expense.[16] Such examples highlight the gap between women's rights and women's experience.

This gap reflects a related limitation in contemporary civil rights: The price for their exercise is often prohibitive. In many areas of special concern to women, current procedures victimize the victim. In harassment cases, for example, a plaintiff's "sexually provocative" dress or language has been considered relevant in determining whether a defendant's conduct is culpable.[17] Despite the passage of legislation protecting privacy rights of rape victims, intrusive procedures remain common. Disclosure of a complainant's sexual history is frequently permitted under statutory exceptions or pretrial rules.[18] Similarly, in many employment discrimination cases, plaintiffs must put their character as well as capabilities at issue. The risks of adverse disclosures, collegial resentment, and vocational blacklisting often deter litigation.[19] Allowing defendants to place victims' conduct on trial means that women must intensify their injuries to remedy them. All too often, even if the plaintiff wins,

14. *See* S. SCHECHTER, WOMEN AND MALE VIOLENCE 160-61 (1982); Schafran, *Documenting Gender Bias in the Courts: The Task Force Approach*, 70 JUDICATURE 280, 283-84 (1987); NEW YORK TASK FORCE ON WOMEN IN THE COURTS, SUMMARY REPORT 33, 34-45 (1986). *See generally* U.S. COMM'N ON CIVIL RIGHTS, UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE (1982).

15. *See* C. MACKINNON, THE SEXUAL HARASSMENT OF WORKING WOMEN (1979); D. RHODE, *supra* note 3, at 241 n.31; Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23.

16. *See* Goodman, *My Equal Rites Winners*, Boston Globe, Aug. 25, 1987, at 13, col. 1.

17. *See* Meritor Savings Bank F.S.B. v. Vinson, 477 U.S. 57 (1986); Ukariah v. Magnesium Electron, 31 Fair Empl. Prac. Cas. (BNA) 1315 (D.N.J. 1985); Halpert v. Wertheim and Co., 27 Fair Empl. Prac. Cas. (BNA) 21 (S.D.N.Y. 1980).

18. *See* C. MARSH, A. GEIST & N. CAPLAN, RAPE AND THE LIMITS OF LAW REFORM (1982); Loh, *The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study*, 55 WASH. L. REV. 543 (1980); Bienen, *Rape Reform Legislation in the United States: A Look at Some Practical Effects*, 8 VICTIMOLOGY: AN INT'L JOURNAL 139, 144-47 (1983).

19. *See* K. BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS 91, 109, 111 (1988); Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, 12 SIGNS 421 (1987); Cooper, *Title VII in the Academy: Barriers to Equality for Faculty Women*, 16 U.C. DAVIS L. REV. 975, 1010 n.178 (1983).

she loses. Given evidentiary hurdles, as well as the financial and psychological costs of litigation, many gender-related abuses will remain unchanged and unchallenged.[20]

These barriers are compounded by the inequitable distribution of legal services and the limitations attached to many formal entitlements. The United States spends more on legal services per capita than any other nation but substantially less on civil legal aid programs than other countries with comparable legal systems.[21] As a consequence, rights are often accessible only to individuals who can afford to exercise them. Reproductive rights represent a case in point. Limitations on access to birth control, such as funding prohibitions, coerce childbirth by those least able to afford the consequences.[22]

The restrictions on access to abortions are emblematic of a further inadequacy in the contemporary rights agenda: its lim-

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20. For example, most studies suggest that rape is the most underreported of all violent crimes, and that the likelihood of a reported incident ending in conviction is between two and five percent. *See* R. TONG, WOMEN, SEX AND THE LAW 104-05 (1984); Estrich, *Rape*, 95 YALE L.J. 1087, 1163-66, 1167-72 (1986); Johnson, *On the Prevalence of Rape in the United States*, 6 SIGNS 136, 145-47 (1980); Gavin & Polk, *Attrition in Case Processing, Is Rape Unique?*, 20 J. RES. IN CRIME & DELINQ. 126 (1983). For documentation of particular barriers to reporting by minority women, see Bumiller, *Rape as a Legal Symbol: An Essay on Sexual Violence and Racism*, 42 MIAMI L. REV. 75 (1987).

Underreporting is also common for other forms of sexual abuse. Estimates suggest that half of all incidents of domestic violence are unreported. *See* MacManus & Van Hightower, *Limits of State Constitutional Guaranties: Lessons from Efforts to Implement Domestic Violence Policies*, 49 PUB. ADMIN. REV. 269 (1989); Waits, *supra* note 6; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, INTIMATE VICTIMS: A STUDY OF VIOLENCE AMONG FRIENDS AND RELATIVES (1980); M. STRAUSS, R. GELLES & S. STEINMETZ, *supra* note 6. A recent study by the federal Merit Systems Protection Board indicates that only five percent of sexual harassment victims filed complaints. *See* MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE 23 (1988).

For information regarding barriers to reporting in other contexts involving gender, see K. BUMILLER, *supra* note 19; Crosby, *The Denial of Personal Discrimination*, 27 AM. BEHAV. SCI. 371 (1984); Rhode, *supra* note 1.

21. *See* Johnson, *The Right to Counsel in Civil Cases: An International Perspective*, 19 LOYOLA L. REV. 341, 357-59 (1985). This disparity in commitment of societal resources contributes to a system in which the "haves" repeatedly come out ahead. *See* Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC. REV. 95 (1974).

22. *See, e.g.*, Harris v. McRae, 448 U.S. 297 (1980) (upholding Hyde Amendment, which severely limits use of federal Medicaid funds to reimburse costs of abortions); Maher v. Roe, 432 U.S. 464 (1977) (upholding Connecticut Welfare Department regulation limiting state Medicaid benefits for first trimester abortions to those that are "medically necessary"). For discussions of how restrictions on public funding affect teens, see PANEL ON ADOLESCENT PREGNANCY AND CHILDBEARING, NAT'L RESEARCH COUNCIL, RISKING THE FUTURE: ADOLESCENT PREGNANCY, SEXUALITY AND CHILDBEARING (C. Hayes ed. 1987); and Rhode, *Adolescent Pregnancy and Public Policy*, in THE POLITICS OF PREGNANCY: ADOLESCENT SEXUALITY AND PUBLIC POLICY — (A. Lawson & D. Rhode eds. forthcoming).

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ited scope. The Supreme Court, for example, has upheld denial of abortion funding on the ground that

> [a]lthough government may not place obstacles in the path of a woman's exercise of her freedom of [reproductive] choice, it need not remove those not of its own creation . . . . The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions . . . but rather of her indigency.[23]

Yet to suggest that the state has played no role in creating economic constraints on choice is to reveal an extraordinary degree of myopia. As conservative audiences are particularly aware, government policies regarding welfare, education, employment, taxes, and related issues have an obvious impact on income distribution. Moreover, the usual justification for government's failure to provide assistance, conserving scarce resources, is inapplicable. Federal funds for indigents remain available to subsidize childbirth, which generally costs about ten times more than an abortion.[24] The net effect of such decisions has been, in Professor Catharine MacKinnon's phrase, that "women with privileges get rights."[25]

Moreover, many women lack the rights they need in order to exercise the rights they have. Obvious gaps in contemporary policy include the absence of adequate birth control, child care, parental leave, medical services, educational and vocational assistance, child support, housing, and battered women's programs. In a culture where rights have been defined primarily as "freedoms from" rather than "freedoms to," a wide disparity remains between our rhetorical and financial commitments to gender equality. Of course, talk is cheap, and welfare programs are not. But neither can we insure women's full participation in public life without fundamental changes in legal premises and cultural priorities.

Let me close with a final example. Despite a quarter century's experience with equal opportunity legislation, the one-third

23. *Harris*, 448 U.S. at 316.

24. *See Harris*, 448 U.S. at 348 (Blackmun, J., dissenting); *Maher*, 432 U.S. at 463 (Blackmun, J., dissenting); F. JAFFE, B. LINDHEIM & P. LEE, ABORTION POLITICS: PRIVATE MORALITY AND PUBLIC POLICY 143-47 (1981); Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on* Harris v. McRae, 32 STAN. L. REV. 1113, 1124 (1980).

25. MacKinnon, Roe v. Wade*: A Study in Male Ideology*, in ABORTION: MORAL AND LEGAL PERSPECTIVES 45, 52 (J. Garfield & P. Hennessey eds. 1984).

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pay gap between full-time male and female workers has not changed. Nor have women reached positions of the greatest social, political, and economic influence. Women now constitute over forty percent of new entrants in law and management, but only about two percent of corporate executives and six percent of partners in major law firms.[26] Underrepresentation of women of color is even more pronounced.

Most studies find that objective factors such as education and experience explain only half of these disparities. For some managerial positions, the same resumes or scholarly and artistic achievements are rated lower when they belong to a woman rather than to a man.[27] Because research on racial bias reflects similar patterns, women of color face additional obstacles.[28] At current rates of change, under the current system of legal rights, it could take seventy-five to one hundred years before a sexually balanced work force is achieved.[29]

Equal-pay legislation, as currently interpreted, cannot guarantee equal pay in a labor market that is gender-segregated and gender-stratified and that has historically undervalued women's work. Such patterns reflect deeper cultural roots. As Margaret Mead once noted, there are villages where men fish and women weave, and villages where women fish and men weave, but in both cases, the work performed by women is valued less.[30] The

26. *See Smeal Launches Campaign to Advance Women in Law*, NAT'L NOW TIMES, Jan.-Feb. 1990, at 3; Bender, *supra* note 5, at 941 n.3; A. MORRISON, R. WHITE & E. VAN VELSOR, BREAKING THE GLASS CEILING: CAN WOMEN REACH THE TOP OF AMERICA'S LARGEST CORPORATIONS 5-6 (1987); ABA COMM. ON WOMEN IN THE PROFESSION, A REPORT TO THE AMERICAN BAR ASSOCIATION HOUSE OF DELEGATES (1988).

27. *See* G. POWELL, WOMEN AND MEN IN MANAGEMENT 92 (1988); Ruble, *Sex Stereotypes*, in IN THE EYE OF THE BEHOLDER: CONTEMPORARY ISSUES IN STEREOTYPING 188 (A.G. Miller ed. 1982); Lott, *The Devaluation of Women's Competence*, 41 J. SOC. ISSUES 43, 50 (1985); Rosen & Jerdee, *Effects of Applicant's Sex and Difficulty of Job on Evaluations of Candidates for Managerial Positions*, 59 J. APPLIED PSYCHOLOGY 511 (1974); Paludi & Strayer, *What's in An Author's Name? Differential Evaluations of Performance as a Function of Author's Name*, 12 SEX ROLES 353 (1985); Shepela & Viviano, *Some Psychological Factors Affecting Job Segregation and Wages*, in COMPARABLE WORTH AND WAGE DISCRIMINATION: TECHNICAL POSSIBILITIES AND POLITICAL REALITIES 47, 50-52 (H. Remick ed. 1984).

28. *See* J. FERNANDEZ, RACISM AND SEXISM IN CORPORATE LIFE 62, 94, 211-15 (1981); Lawrence, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); *Black Employment Opportunities: Macro and Micro Perspectives*, 43 J. SOC. ISSUES 1 (1987); G. WATSON, BLACK LIFE IN CORPORATE AMERICA: SWIMMING IN THE MAINSTREAM 5-6 (1982); *For the Black Professional, the Obstacles Remain*, N.Y. Times, July 14, 1987, at A16, col. 1.

29. *See* 2 U.S. COMM'N ON CIVIL RIGHTS, COMPARABLE WORTH: ISSUE FOR THE 80'S 109 (1984) (statement of Joy Ann Grune); Beller, *Occupational Segregation and the Earnings Gap*, in 2 U.S. COMM'N ON CIVIL RIGHTS, *supra*, at 23.

30. *See* M. MEAD, MALE AND FEMALE: A STUDY OF THE SEXES IN A CHANGING WORLD 159 (1949).

same remains true in our society, where parking lot attendants have higher average wages than child care attendants.[31]

Equal rights as traditionally conceived have gained women access to the labor force, but have failed to alter its underlying structure. Our workplace has been designed by and for men, with too few opportunities for accommodating employment and family obligations. About fifteen years ago, when I was interviewing at a leading Wall Street firm, a senior litigator invited me to survey the state of his office crammed with files, folders, and document carriers. He then pointed to a photograph of his wife, four lovely children, and two golden retrievers. Gesturing first toward the picture and then toward the files, he asked with genuine curiosity, "Why would a young lady like you want to trade all that for this?" Why, I wondered, do only ladies have to choose? What I said was regrettably less memorable.

To make those choices less necessary will require us to recast our legal rights and recognize their limitations. To secure gender equality, not only in form but also in fact, we need fundamental changes in our workplace structures: more flexible schedules, parental leaves, child care assistance, meaningful part-time work, pay equity initiatives, and affirmative action. This is not a modest agenda, and our rights-based legal framework must expand to promote it.

Whatever its prior limitations, this framework has made crucial practical contributions to the lives of women and other subordinate groups.[32] Even largely symbolic campaigns, such as the recent struggle for a constitutional equal rights amendment, can be critical not only because of the specific objective they seek, but also for the political mobilization they inspire.[33] The challenge remaining is to refashion our rights-based agenda in the service of a broader vision. We need not only formal entitlements for women, but also concrete recognition of the values women have traditionally sustained.

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31. *See* Lewin, *Small Tots, Big Biz*, N.Y. Times, Jan. 29, 1989, § 6 (Magazine), at 30.

32. *See* Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1366-69 (1988); Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1875-77 (1987); Rhode, *Feminist Critical Theories*, *supra* note 2; Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 602-04 (1986).

33. *See* D. RHODE, *supra* note 3, at 63-80; J. MANSBRIDGE, WHY WE LOST THE E.R.A. (1986).

CIVIL RIGHTS, HUMAN RIGHTS, GAY RIGHTS: MINORITIES AND THE HUMANITY OF THE DIFFERENT

EVAN WOLFSON*

The topic of this panel is "What are civil rights, and to whom do they belong?" After listening to much of the discussion, and considering the current public debate on the civil rights of lesbians and gay men, though, I am reminded of the precept that "When people talk about God, it's not about God that they talk."

It is clear from the speeches here, and from recent decisions by the federal courts concerning civil rights (with the usual subtext that gay people should have none), that those who take anti-gay positions are not really talking about civil rights at all. Something else is present beneath the arguments, some deeper view or gut reaction or obsession in much of the talk about gay people and our rights. Rather than join in the farrago of legalisms about civil rights, I would like to try to get at that "something else."

Before we can properly speak of civil rights, we must understand human rights. I know that anyone like my co-panelist William Allen, who, while charged with protecting the civil rights of all Americans, could deliver a speech entitled, "Blacks? Animals? Homosexuals? What is a Minority?",[1] would surely agree on the importance of acknowledging human rights. I trust he would agree that perhaps the first human right is the right to be considered and treated as human.

Yet throughout history, and to this day, minority groups of people have been dehumanized by others who, granting themselves what C. Vann Woodward called "permissions-to-hate,"[2] felt free to portray them as sub-human, *untermenschen*, animals, and alien. Indeed, dehumanization is the most potent and ef-

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1. *See* Address by William B. Allen, *Blacks? Animals? Homosexuals? What Is a Minority?*, West Coast Symposium on Homosexuality and Public Policy Implications (Oct. 7, 1989) (presented during Allen's tenure as Chair of the United States Commission on Civil Rights).

2. C. WOODWARD, THE STRANGE CAREER OF JIM CROW 81 (2d ed. 1966).

fective tool of bigots and tyrants.[3] A review of historical examples of the dehumanization of the different will put in better perspective many of the current assaults on the equality and civil rights of gay people.

For the past two thousand years Jews have suffered from dehumanization and persecution because of their difference. Classic charges leveled against minorities by the intolerant, including spreading disease, molesting children, sexual depravity, and selfishness, have all been made against the Jews.[4] For example, a Thirteenth-Century French law expressly equated Christians having sex with Jews to those having sex with animals.[5] A similar law in England, promulgated as all Jews were expelled from that country, condemned to death "arsonists, sorcerers, those who abandoned the Christian faith, those who dared sleep with the wife of their feudal lord (or even the nurse of his children), and those who had intercourse with Jews, animals, or persons of their own gender."[6] We should note, as William Allen undoubtedly would, the juxtaposition of the last three.

In *The Judensau: A Medieval Anti-Jewish Motif And Its History*, Isaiah Shachar describes an image of a Jew entwined with a pig, a powerful symbol used in the mass media of the time, carvings on churches in central Europe.[7] Shachar writes that "the Jew

3. *See* J. BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY (1980). Professor Boswell argues that authoritarian governments, governments seeking to consolidate power, and conformity-minded institutions often play a "large role in the narrowing of social tolerance." *Id.* at 270. *See also id.* at 37-38, 121, 127-28, 333.

4. Studies like Boswell's show, first, how connected the fates of vulnerable minorities often are, and second, how common many of the charges made against minorities have been. *See id.* at 15-16; *see also id.* at 16-17 (comparing gay people and Jews as minority groups).

In the Thirteenth Century, Jews were sometimes ordered to wear specific clothing, the "Jewish badge," to distinguish them from the Christians, a dehumanizing measure that ostracized the Jews and aggravated public hostility to them. *See id.* This badge requirement reappeared relatively recently in Nazi Germany, where Jews were identified with Stars of David and gay people with pink triangles, now a symbol of gay identity and resistance to oppression. *See, e.g.*, R. PLANT, THE PINK TRIANGLE: THE NAZI WAR AGAINST HOMOSEXUALS (1986). Plant documents not only the persecution, brutality, and extermination campaign directed against gay people and other groups, but also the shameful failure by historians and government to shatter the "taboo" of silence about this anti-gay horror. Indeed, even at the war's end, when others were liberated, gay victims of Nazism were actually forced by the Allies to remain incarcerated. *See id.* at 181.

5. *See* J. BOSWELL, *supra* note 3, at 274.

6. *Id.* at 292.

7. *See* I. SHACHAR, THE JUDENSAU: A MEDIEVAL ANTI-JEWISH MOTIF AND ITS HISTORY (1974).

sucking the sow's teats is shown in all but two, which show the sow embraced and kissed. Additional occupation with the animal's hindquarters, and the eating and drinking of its excrement are shown in most."[8] He concludes: "The Jews are, by association with the animal, implicitly but clearly labelled as not being human, 'like us' . . . thus sanctioning aggression."[9] In our own time, of course, that dehumanization and aggression led to the Holocaust.

Western history is in part a chronicle of such dehumanization, one that has waxed and waned in cycles of intolerance. The fortunes of minorities as diverse as Jews, gay people, heretics and Christian non-conformists, "witches," moneylenders, gypsies, Moslems, and others frequently rose and fell together.[10] The language and style of dehumanization were startlingly recurrent, and shockingly modern.

The United States was supposed to be different. The Declaration of Independence proclaimed: "We hold that all men are created equal, that they are endowed by their Creator with certain inalienable rights . . . life, liberty, and the pursuit of happiness."[11] America combined the promise of open, unencumbered geographical and historical space with an inheritance from secular philosophy: the new concept of human rights and the ideas of the political revolutions of the Seventeenth and Eighteenth Centuries.[12] Those revolutions included

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8. *Id.* at 2-3. Shachar notes that "[w]hile the meanings attached to the *Judensau* changed considerably over the years, these obvious elements of oral and anal obscenity were always retained and, indeed, elaborated." *Id.* at 5-6.

9. *Id.* at 3. "[T]he attitude expressed in the *Judensau* toward the Jews is not just scurrilous. There was a further element or sub-motif present in all its representations: the Jews belong to the sow, the sow to the Jews. These people, in other words, belong to another and abominable category of beings . . . ." *Id.*

Shachar notes, "It would not be necessary to mention this partly concealed meaning if the question of the common humanity of the Jews had not been so important in Germany since the eighteenth century." *Id.* In an analysis of vital relevance to gay people and other stigmatized minorities today, he observes,

> the notion of [the Jews'] totally alien quality could not have persisted beyond the Middle Ages had it not been *stereotyped* at various cultural levels, including verbal abuse, proverbs, and jokes [and with] forceful image[s such as the *Judensau*,] which kept imprinting itself on the mind, conditioning, indeed stereotyping, an attitude toward Jews . . . help[ing] in fixing the idea of Jews being absolutely *not "of us."*

Id. (emphasis added).

10. *See* J. BOSWELL, *supra* note 3, at 6-7, 15-16 (listing persecuted groups and noting that "the separate histories of Europe's minorities are the same story"); *see also* V. BULLOUGH, HOMOSEXUALITY: A HISTORY 64-65 (1979).

11. The Declaration of Independence para. 1 (U.S. 1776).

12. *See* Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in*

in their battle cries something historically new: an ideal of equality.

But because of particular and massive dehumanization already endemic in American society, the Constitution, when written, acknowledged the need for "Justice," "domestic Tranquility," "general Welfare," and the "Blessings of Liberty," but somehow left out equality.[13] Indeed,the dehumanization of the African-American was expressly codified in the Constitution.[14] As James Madison put it in *The Federalist Number 54*: "The federal Constitution . . . views [African-Americans] in the mixed character of persons and of property. . . . [It] regards the *slave* as divested of two fifths of the *man*."[15] In *Dred Scott v. Sandford*,[16] the Supreme Court reiterated this view of African-Americans as "*beings of an inferior order* . . . so far inferior that they [have] no rights which the white man [is] bound to respect."[17]

This dehumanization has corrupted our society to this day. Whatever our race, we have all been harmed, we have all paid in blood, in social pathology, and in false senses of inferiority or superiority, as Abraham Lincoln foretold in his Second Inaugural Address.[18] For example, in describing the consequences to white children of seeing blacks segregated out of the schools, deprived not only of civil rights, but of equal humanity, Senator Charles Sumner declared, "Their hearts, while yet

Human Rights and the Unwritten Constitution, 30 HASTINGS L.J. 957, 960-61, 966-71 (1979).

13. *See* U.S. CONST. preamble. In fact, judicial construction of the term "citizen" operated to remove the Constitution as a source of protection for the interests of black people, particularly black people as a group. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). Only with the adoption of the Fourteenth Amendment did *all* persons born or naturalized in the United States even in theory become equal citizens.

14. *See* U.S. CONST. art. I, cl. 3 (apportioning representatives and taxes on the basis of the number of free persons and "three fifths of all other Persons," that is, slaves). *See also* U.S. CONST. art. V (protecting the slave trade until 1808); U.S. CONST. art. IV, § 2, cl. 3 ("fugitive slave" clause, which required return of escaped slaves even though they had migrated successfully to a free state).

On the occasion of the Constitution's bicentennial, Justice Thurgood Marshall observed that "[w]hen the Founding Fathers used [the phrase, "We the People"], they did not have in mind the majority of America's citizens," and noted the pre-Civil War constitutional "contradiction between guaranteeing liberty and justice to all, and denying both to Negroes." T. Marshall, Remarks to the San Francisco Patent & Trademark Law Association 2, 6 (May 6, 1987) (available in office of *Harvard Journal of Law & Public Policy*).

15. THE FEDERALIST No. 54, at 337-39 (J. Madison) (C. Rossiter ed. 1961) (emphasis in original).

16. 60 U.S. (19 How.) 393 (1857).

17. *Dred Scott*, 60 U.S. (19 How.) at 407 (emphasis added).

18. *See Second Inaugural Address of President Abraham Lincoln*, *reprinted in* 11 COMPLETE WORKS OF ABRAHAM LINCOLN 44-47 (J. Nicolay & J. Hay eds. 1905).

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tender with childhood, are necessarily hardened by this conduct, and their subsequent lives, perhaps, bear enduring testimony to this legalized uncharitableness."[19] Even more succinctly, Frederick Douglass observed, "No man can put a chain about the ankle of his fellow man, without at last finding the other end fastened about his own neck."[20]

The post-Civil War constitutional revolution for the first time put "equality" into the fundamental law of the land.[21] At last there was hope that all American people would finally receive their civil rights. But the dehumanized image of black people, fueled by selfishness and fear, negated that promise.

Not truly viewing African-American people as equal, the powers in society refused to carry out the plain meaning of this constitutional command. As Richard Kluger documents in *Simple Justice*, with the refusal of Congress and then the courts to enforce the words of the law, dehumanization of black people actually increased.[22] For example, in 1884, a future dean at Harvard cited "the Negro's 'animal nature' and his innate and allegedly uncontrollable immorality"[23] as a basis for disenfranchisement of African-Americans.

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19. R. KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 76 (1977) (quoting Senator Sumner on the need for integration).

Of course, segregation also had negative effects on the African-American children attending segregated schools. *See* Brown v. Board of Educ. of Topeka, 347 U.S. 483, 494 (1954). The *Brown* Court examined sociological studies and concluded that segregation itself had a negative psychological effect on students. *See id.* at 493-94 n.11. The Court therefore held that separate facilities "are inherently unequal." *Id.* at 495.

Segregation was in fact intended to produce this very feeling of inferiority and unequal humanity. *See* Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424-27 (1960). Such dehumanizing segregation fed upon itself, denying members of both races not only their lawful right of association, but the benefits of association as well. *See, e.g.*, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959). By separating black children from white children, the two groups were brought up to distinguish themselves from each other, rather than to recognize their common humanity.

20. Douglass, *The Civil Rights Case: Speech at the Civil Rights Mass-Meeting Held at Lincoln Hall, October 22, 1883, reprinted in* 4 P. FONER, THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 392, 397 (1955). Most Americans can now see how this is true in regard to the effects of racism on majority and minority alike. Fewer see how anti-gay prejudice and our cultural insistence on defining sexuality and sexual orientation by polarization and labels have harmed all people in our society, gay, non-gay, bisexual, homosexual, and asexual. *See infra* note 63.

21. *See* U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States . . . are citizens of the United States. . . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

22. *See* R. KLUGER, *supra* note 19, at 84-85; *see also* C. WOODWARD, *supra* note 2, at 67-109.

23. R. KLUGER, *supra* note 19, at 85.

In 1896, the Prudential Life Insurance Company circulated a report arguing that "the Negro's 'race traits and tendencies' naturally caused his high incidence of tuberculosis, syphilis, scrofula, and other diseases."[24] The high incidence of disease was later recognized, of course, as environmentally, not congenitally, caused. The report concluded that no improvement in the environment of black people, let alone in their legal status and civil rights, would improve their health record, because the root of black people's problem was their "immense amount of immorality."[25]

A flood of books followed. *The Negro a Beast or in the Image of God?*[26] again might sound familiar to the author of "Blacks? Animals? Homosexuals? What is a Minority?" Once more, dehumanization bore its characteristic marks: charges of "immorality" and animal behavior, and association with, and blame for, disease.

We could go on with these examples forever,[27] but I have one more I must share, lest you think this is all ancient history. By next year, 200,000 people in this country will have AIDS. Several times that number are already infected with the virus that appears to cause it.[28] In America, most of the fatalities

24. *Id.*

25. *Id.*

26. *See id.*

27. For example, the American internment of persons of Japanese descent during World War II was the result of dehumanization by the majority. In Korematsu v. United States, 323 U.S. 214 (1944), the Supreme Court upheld the conviction of an American citizen for remaining in his home contrary to Civilian Exclusion Order No. 34. *See id.* at 224. The Court purported to find that Korematsu had been removed from his home, not because of racial prejudice, but because the United States was at war with the Japanese Empire. *See id.* at 223-24.

All three dissenting Justices noted in their separate opinions that only people of Japanese descent were interned even though the United States was also at war with Germany and Italy. *See id.* at 227-28 (Roberts, J., dissenting); *id.* at 240 (Murphy, J., dissenting); *id.* at 243 (Jackson, J., dissenting). Justice Murphy found that the exclusion of all Japanese from military areas went "over 'the very brink of constitutional power' and [fell] into the ugly abyss of racism." *Id.* at 233 (Murphy, J., dissenting). This "obvious racial discrimination . . . deprive[d] all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment." *Id.* at 235 (Murphy, J., dissenting). Justice Murphy noted that the discrimination predated the war with Japan, and was based on "the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices." *Id.* at 239 (Murphy, J., dissenting) (citing testimony of California farmers' association representative that "we don't want want them back when the war ends, either").

28. Recently, the Centers for Disease Control (CDC) reported that over one million people in the United States are infected with HIV, the human immunodeficiency virus linked to AIDS. *See* Centers for Disease Control, *Estimates of HIV Prevalence and Projected AIDS Cases: Summary of a Workshop, October 31-November 1, 1989*, 39 MORBIDITY & MOR-

have been gay men.[29]

This holocaust of gay men was deliberately ignored by our government and our mass media until, and only until, it appeared that non-gay people were also affected.[30] With many of our friends and lovers already dead or dying, with our lives and identity inescapably altered, as we scrambled alone to cope with the onslaught in the face of unremitting social hostility, gay people heard our government say first, nothing, and then,

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TALITY WEEKLY REP. 110 (1990). The CDC estimates that 37,500 new cases of AIDS were reported during the period October 1988 to September 1989, an increase of 14 percent over the preceding year. *See id.* at 117. In the future, the toll will run higher still: in 1990, 52,000 to 57,000 new cases of AIDS and 37,000 to 42,000 AIDS deaths; for the period 1989 to 1993, 390,000 to 480,000 new cases and 285,000 to 340,000 deaths. *See id.*

29. Gay men accounted for the first five reported AIDS cases. *See* Centers for Disease Control, *First 100,000 Cases of Acquired Immunodeficiency Syndrome—United States*, 38 MORBIDITY & MORTALITY WEEKLY REP. 561 (1989). Most reported AIDS cases involve, in the CDC's phrase, "homosexual or bisexual men," although their proportion has been dropping over time. *Id.* Sixty-three percent of cases reported before 1985 involved gay men; by 1989 that percentage had dropped to 56 percent. *See id.*

Of course, death is not AIDS's only effect on those of us in the gay communities and on friends and families. AIDS and dealing with AIDS and fear of AIDS touch one's life in many ways every day. For example, one AIDS activist has described his thoughts on growing close to another person:

> I found myself in love. Like other human beings, I desire the experience. I wanted to hold this man and to kiss him. Is this wanting too much? Is this wanting too much now? *Can any straight person understand what it is like to want to make love but to be terrified that to do so means possible death?* . . . I feel guilty falling in love. I should have much more control over my emotions. I don't want to die.

L. KRAMER, REPORTS FROM THE HOLOCAUST: THE MAKING OF AN AIDS ACTIVIST 228 (1989) (emphasis added).

30. *See, e.g.*, R. SHILTS, AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC (1987). In this history of the AIDS crisis, Shilts observes that "[b]y the time America paid attention to the disease it was too late to do anything about it." *Id.* at xxi. The Reagan administration ignored pleas from scientists for funding; many scientists at first avoided the epidemic "because they perceived little to be gained in studying a homosexual affliction"; public health authorities and politicians refused to act for reasons of political expediency; some gay community activists at first "played politics with the disease"; and the mass media did not want to cover stories about the gay community. *See id.* at xxii, *passim*. Indeed, "[m]ore media attention and federal funding ($22 million) were heaped upon the Tylenol murders in one week than on the AIDS crisis in the first three years of its existence." V. RUSSO, THE CELLULOID CLOSET 325 (rev. ed. 1987); *see also* R. SHILTS, *supra*, at 191.

Dr. C. Everett Koop, Surgeon General from 1981 to 1989, noted that he encountered "considerable opposition within the Reagan administration" for his efforts to promote AIDS education. Adelman, *Do the Right Thing*, WASHINGTONIAN, Apr. 1990, at 81, 87. Even the federal government's own National Commission on AIDS (Commission) has criticized the lack of leadership and dreadful response of the Reagan and Bush administrations. *See Panel Says Government is Not Leading AIDS Fight*, N.Y. Times, Apr. 25, 1990, at A1, col. 2 (citing the second report of the National Commission on AIDS to the President, dated April 24, 1990). The Commission found that "coordination of the [government's] efforts is the missing link to an effective national strategy," and characterized the national AIDS policy even in 1990, the tenth year of the epidemic, as like "an orchestra without a conductor." *Id.*

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only the likes of this hateful bit of dehumanization: "We must conquer AIDS before it affects the heterosexual population and the general population. . . . We have a very strong public interest in stopping AIDS before it spreads outside the risk groups, before it becomes an overwhelming problem."[31]

The history of this epidemic is a national moral disgrace in which people have been allowed to die; to stagger under the burden of fear, caring for others, and fighting to live; to watch their family members and lovers die; and to be mocked, ridiculed, assaulted, and denied humanity at the same time. As one chronicler has described it:

> The number of AIDS cases measured the shame of the nation. . . . The United States, the one nation with the knowledge, the resources, and the institutions to respond to the epidemic, had failed. And it had failed because of ignorance and fear, prejudice and rejection. The story of the AIDS epidemic was that simple . . . . [I]t was a story of bigotry and what it could do to a nation.[32]

Instead of treating it as a health issue, our society has made AIDS first an echoing tomb of silence, then a battleground of antipathy toward "otherness," and now, on the part of many, a smug complacency completely at odds with reality, not to mention humanity. This complacency, of course, has been furthered not only by the association of AIDS with gay men, but now also with other vulnerable and often dehumanized minorities: African-Americans, Latin Americans, intravenous drug users, and the poor.[33]

To this day, all we hear from some quarters of society, (including, I am sorry to say, many at this symposium, in the Federalist Society, and in the administrations you embrace) are calls for forced testing and collecting names,[34] detention,[35] dis-

31. R. SHILTS, *supra* note 30, at 554 (quoting remarks by Margaret Heckler, U.S. Secretary of Health and Human Services, to the first International AIDS Conference, April 15, 1985). The statement was remarkable not only for its insensitivity (Was not AIDS, the unchecked killer of thousands, already an "overwhelming problem"? When did gay people cease to be part of their country's "general population"?), but also for its failure to commit resources or provide leadership even four years into the crisis.

32. *Id.* at 601.

33. *See* Centers for Disease Control, *Update: Acquired Immunodeficiency Syndrome—United States, 1989*, 39 MORBIDITY & MORTALITY WEEKLY REP. 81, 84, 85 (1990).

34. Although public health officials concluded early that mandatory testing, whether selective or universal, is a poor method of infection control, *see* R. BAYER, PRIVATE ACTS, SOCIAL CONSEQUENCES: AIDS AND THE POLITICS OF PUBLIC HEALTH 140-41 (1989), cries for testing, and mandatory reporting of the names of those who test positive for the HIV virus, have been the centerpiece of many politicians' response to the

crimination (actually endorsed by the Justice Department under Edwin Meese),[36] denial of entry into the country,[37] and

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epidemic. *See, e.g.*, Letter of Robert Anderson and John Quigley, N.Y. Times, June 21, 1989, at A21, col. 5 (professors examining failed November 1988 ballot proposition sponsored by anti-gay congressman to set up mandatory reporting and contact tracing).

One major health organization recently summed up the arguments against mandatory reporting:

> Although permissive reporting policies, designed to protect third parties, are warranted under some circumstances, *mandatory* name-reporting requirements would breach patient confidentiality without achieving any significant practical benefit to the public health. Mandatory reporting does not assure successful implementation of contact-tracing programs because the tracing of contacts ultimately depends on the cooperation of infected individuals. Moreover, current data indicate that if name-reporting of HIV-seropositive individuals were legally required, many people would be discouraged from seeking HIV testing and would not have the benefit of early access to counseling and treatment.

American Psychiatric Association, Position Statement Opposing Mandatory Name-Reporting of HIV-Seropositive Individuals (Nov. 1989) (emphasis added). *See also* Association of State and Territorial Health Officials, National Association of County Health Officials & U.S. Conference of Local Health Officers, Guide to Public Health Practice: HIV Partner Notification Strategies 6 (Sept. 1988). The White House has now announced its opposition to such policies. *See Bush Says He Doesn't Favor Mandatory Reporting to AIDS*, N.Y. Times, June 9, 1989, at A8, col. 1.

35. *See Bennett Would Detain Some Carriers of AIDS*, N.Y. Times, June 15, 1987, at A13, col. 1 (quoting Senator Jesse Helms to state: "I think somewhere along the line we are going to have to quarantine, if we are really going to contain this disease.").

Both recent and past experience with syphilis outbreaks have shown that confidentiality and counseling, rather than threatened quarantine, are much more effective at curbing the spread of disease. *See generally* A. BRANDT, NO MAGIC BULLETS: A SOCIAL HISTORY OF VENEREAL DISEASE IN THE UNITED STATES SINCE 1880 (1987); *see also* Gostin, *The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties*, 49 OHIO ST. L.J. 1017, 1026-38 (1989). Education and environmental reinforcement (that is, access to health care, psychological and social support, economic sufficiency, and nondiscrimination) are the keys to enabling each person to modify his or her behavior so as to protect against transmission. *See, e.g.*, Mann, *Global AIDS: Epidemiology, Impact, Projections, Global Strategy*, AIDS PREVENTION & CONTROL, 1988, at 3.

36. An infamous Meese Justice Department memorandum asserted that, while discrimination against a person with AIDS may be impermissible, discrimination based on the *fear* of AIDS, however irrational, is legally permitted. *See* Memorandum of Charles J. Cooper, Assistant Attorney General (June 20, 1986). Fortunately, the Supreme Court rejected such a malicious position in School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987).

The position taken by the Department of Justice in *Arline* was consistent with the Reagan administration's approach throughout the AIDS epidemic. *See* Barnes, *AIDS and Mr. Korematsu: Minorities in Times of Crisis*, 7 ST. LOUIS U. PUB. L. REV. 35, 39-40 (1988). Early and consistently, the administration went "on record as opposing federal action to ban discrimination against those with AIDS, preferring to leave such action to states." *AIDS Panel Endorses Stiffer Anti-Bias Laws*, L.A. Times, June 18, 1988, at 1, col. 2. The administration thus ignored the key recommendation of the Presidential Commission on the HIV Epidemic that the administration itself had, belatedly, appointed in lieu of action. *See id.*

37. *See* 8 U.S.C. § 1182(a) (1988) (excluding aliens from the United States if afflicted with any dangerous contagious disease); 42 C.F.R. § 34.2(b) (1990) (including HIV infection in list of dangerous contagious diseases that must be reported to the immigration service when an alien seeks a visa).

This policy of exclusion drew nearly unanimous condemnation from scientists,

even tattooing[38] of the HIV-infected, as if "health [could be] promoted by vigorously punishing the sick."[39]

How, not fifty years after the Holocaust, not ten years after the genocide in Cambodia, could we hear again such shameful, unashamed hatemongering? How could a society constitutionally dedicated to the proposition that all men (and presumably women) are created equal so blithely allow people to die? Again, the answer is dehumanization. For many people, lesbians and gay men are somehow not people. We are not real. We are not equal. And we most assuredly are not to be free.

Of course, for gay people, dehumanization did not begin with AIDS.[40] Indeed, it was the dehumanized and vulnerable

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health care professionals, and community workers at the Sixth International Conference on AIDS. *See, e.g.*, International AIDS Society, Statement Concerning IAS Cosponsorship (1990) ("there is no valid scientific or public health basis for discriminatory policies toward HIV-infected travellers").

The administration has yet to eliminate this discrimination, despite the conclusion of even the government's own public health experts that HIV-based restrictions are unwarranted. *See U.S. Restrictions on AIDS-Infected Visitors Challenged*, L.A. Times, May 23, 1990, at A14, col. 1 (citing memorandum of James O. Mason, Assistant Secretary of Health and Human Services, March 14, 1990).

38. *See, e.g.*, Buckley, *Crucial Steps in Combatting the AIDS Epidemic*, N.Y. Times, Mar. 18, 1986, at A27, col. 4.

39. *Senator Helms and the Guilty Victims*, N.Y. Times, June 17, 1987, at 30, col. 1 (comparing Helms's proposals for discrimination to Samuel Butler's satire of Victorian hypocrisy).

40. Dehumanization of gay people and hostility toward same-sex sexuality are nothing new, but they have not always been the way they are now. As Boswell convincingly documents, reclaiming gay history from distortion and silence, "Only in comparatively recent times have homosexual feelings come to be associated with moral looseness." J. BOSWELL, *supra* note 3, at 27; *see also* V. BULLOUGH, SEXUAL VARIANCE IN SOCIETY AND HISTORY (1976). Boswell also discusses societal views of homosexuality in Western history. *See* J. BOSWELL, *supra* note 3, at 51.

Indeed, to give just one example, for much of the ancient world, acceptance of homosexuality was equated, not only with normal or ordinary human behavior, but with democracy and human freedom. *See id.* at 51 (quoting Plato on the connection between anti-gay attitudes and "despotism"; quoting Aristotle on the " 'public honor' accorded gay sexuality among barbarians"), 41-60 (generally), 130 (quoting Zeno the Stoic: "Do not make invidious comparisons between gay and non-gay, male and female"; "You make distinctions about love objects? I do not.").

Sexual activity between people of the same sex has always been present in societies around the world; some have idealized it, others condemned it, others merely tolerated it or remained indifferent. *See* Carrier, *Homosexual Behavior in Cross-Cultural Perspective*, in HOMOSEXUAL BEHAVIOR: A MODERN REAPPRAISAL 100 (J. Marmor ed. 1980); C. FORD & F. BEACH, PATTERNS OF SEXUAL BEHAVIOR (1951); *see also* Richards, *supra* note 12, at 982-84.

Nevertheless, Western history recorded a shift in attitudes toward sexuality and gay people, *see generally* J. BOSWELL, *supra* note 3, and by 533 A.D., legislation was adopted proscribing consensual same-sex sexual activity. *See id.* at 171. The original edicts declared that such behavior was the cause of famine, earthquake, and plague. *See* Justinian, *Novellae 77 and 11, reprinted in* D. BAILEY, HOMOSEXUALITY AND THE WESTERN CHRISTIAN TRADITION 73-75 (1955). Blackstone cited Sodom and Gomorrah in support of the death penalty for same-sex sexual acts. *See* 4 W. BLACKSTONE, COMMENTARIES; *but*

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posture of gay people as a minority that permitted AIDS to become what it has become. Our society forbids gay people to marry,[41] denies us equal pay for equal work,[42] throws us off the job,[43] forbids us from serving our country in the armed forces,[44] refuses us health insurance,[45] forces us into the

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see J. BOSWELL, *supra* note 3, at 92-98 (Sodom story in *Genesis* not related to homosexuality). Boswell documents the fundamental stages in the dehumanization of gay people and restructuring of social attitudes toward homosexuality. *See id.*; *see also* J. KATZ, GAY AMERICAN HISTORY (1976).

41. *See Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1606 n.18, 1603-11 (1989) [hereinafter *Sexual Orientation*].

Preventing gay people from marrying, and then discriminating against us in the provision of benefits and the extension of protections because we are not married, is unfair, unconstitutional, and unproductive. It arbitrarily denies gay people access to a state-sustained institution of immense symbolic, legal, and economic importance. It promotes instability. It puts a stamp of inferiority and implausibility on committed gay partnerships, and denies them substantial material and social protections and support. And, there is simply no legitimate government purpose served by such denial. *See id.* at 1608-11.

Historically, many societies have recognized same-sex marriages. *See, e.g.*, J. BOSWELL, *supra* note 3, at 21, 26, 34, 54-55, 69, 71-73, 82. Even in today's more hostile climate, in our heterosexist culture, " 'couplehood' either as a reality or an aspiration, is as strong among gay people as it is among heterosexuals." P. BLUMSTEIN & P. SCHWARTZ, AMERICAN COUPLES 45 (1983). Studies have shown repeatedly that same-sex relationships are very similar to heterosexual relationships in their diversity and their interaction. Despite social hostility and a lack of legal and structural support, many gay and lesbian relationships are characterized by deep commitment and interdependence, and are of long duration. *See* Peplau & Amaro, *Understanding Lesbian Relationships*, in HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL, AND BIOLOGICAL ISSUES 233 (W. Paul, J. Weinrich, J. Gonsiorek & M. Hotvedt eds. 1982); Peplau & Jones, *Symposium on Homosexual Couples*, 8 J. HOMOSEXUALITY 2 (1982); *see also* Braschi v. Stahl Assoc., 74 N.Y.2d 201, 543 N.E.2d 49 (1989) (landmark decision recognizing gay couple as a family).

42. In a pending case, Gay Teachers Ass'n v. Board of Educ. of New York City, Index No. 43069/8 (S. Ct. N.Y. Co. filed May 2, 1988), Lambda Legal Defense & Education Fund has challenged New York City's denial of health benefits to the life partners of teachers and employees who are not legally married.

This denial of health benefits, which amounts to a denial of equal pay for equal work, is unconstitutional, and violates city and state law prohibiting discrimination on the basis of marital status and (in the case of New York City) sexual orientation. For gay persons, this discrimination arises from a state-created "Catch-22," in which, on the one hand, lesbians and gay men are denied benefits unless we are married, and, on the other, are not allowed to marry. Ideally, of course, our society would not base people's access to such important benefits as health care on who people's relatives are or where people work.

43. *See, e.g.*, Levine & Leonard, *Discrimination Against Lesbians in the Work Force*, 9 SIGNS 700 (1984); Levine, *Employment Discrimination Against Gay Men*, 9 INT'L REV. MODERN SOC. 151 (1979).

44. The largest single entity discriminating most comprehensively against lesbians and gay men is the federal government, most notably the military. *See Sexual Orientation*, *supra* note 41, at 1554-71. Defense Department regulations prohibit lesbians and gay men from serving in the armed forces. *See* Gross, *For Gay Soldiers and Sailors, Lives of Secrecy and Despair*, N.Y. Times, Apr. 10, 1990, at A1, col. 1 (discussing Pentagon Departmental Directive No. 1332.14). An enormous amount of taxpayer money and personnel resources are spent each year hounding out of the military men and women who

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closet,[46] arrests us in our bedrooms,[47] harasses our daily as-

wish to serve their country, and who have been trained at great expense to do so. Every year, more than 1,400 men and women are discharged under this policy. *See id.*

The military purports to justify the ban with the same arguments it used for previous discrimination against blacks and women. *See id.*; Moore, *Open Doors Don't Yield Equality*, Wash. Post, Sept. 24, 1989, at A1, col. 3 (women in military face institutionalized discrimination and pervasive sexual harassment). The proffered justifications are in fact post hoc rationalizations to support a policy wholly derived from prejudice. *See generally* A. BERUBE, COMING OUT UNDER FIRE (1990) (documenting history of exclusion of gays).

For example, the military's undocumented allegation that enlisting gay people discourages non-gay enlistment uncomfortably echoes the excuses the military once gave for segregating blacks and whites—that integration would dampen white morale and enlistment. *See* Weisberg, *Gays in Arms*, THE NEW REPUBLIC, Feb. 19, 1990, at 20, 21. President Truman rejected such arguments when desegregating the armed forces. The military itself is responsible for determining how an integrated force will function, whether black and white, male and female, or gay and non-gay. *See, e.g.*, A. BERUBE, *supra*.

Another rationale, that gay people pose greater security risks, would fall if subjected to a requirement of proof. There is overwhelming empirical evidence that gay enlistees pose no greater security risk than non-gay enlistees, and they might pose even less of one. *See* DEFENSE PERSONNEL SECURITY RESEARCH & EDUC. CENTER, PRESERVICE ADJUSTMENT OF HOMOSEXUAL AND HETEROSEXUAL MILITARY, ACCESSIONS: IMPLICATIONS FOR SECURITY CLEARANCE SUITABILITY iii (Jan. 1989). These findings are from a study commissioned by the Pentagon, the results of which the Pentagon attempted to conceal. *See also* DEFENSE PERSONNEL SECURITY RESEARCH & EDUC. CENTER, NONCONFORMING SEXUAL ORIENTATIONS AND MILITARY SUITABILITY (Dec. 1988) (surveying and rejecting military anti-gay policy); E.L. GIBSON, GET OFF MY SHIP 356-67 (1978) (surveying suppression of studies discovered in course of court challenges).

Moreover, practical experience disproves the military's assertions that gay persons are unfit for service; many gays who have been discharged have had exemplary service records. *See* Gross, *supra*; *see also, e.g.*, Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 384 (1990).

The real difficulty is getting a court, let alone Congress or the White House, to make a decision based on evidence rather than on prejudice. Until gay people receive a fair hearing, justice, and equal rights, gay persons will continue to spend energy fighting to enter the nation's service, and the military will continue to squander our tax dollars fighting to keep gay people out.

45. Lambda Legal Defense & Education Fund now represents an Indiana man denied coverage under his employer's group plan because he is gay, although he is in good health. In an earlier case, Lambda represented a non-gay man discriminated against in the provision of insurance because, as a twenty-six year old single man living with a male roommate in New York City, he was perceived to be gay.

46. *See, e.g.*, Gross, *supra* note 44 (lesbians and gays go to extremes to lead closeted lives in attempts to protect their military careers); Branch, *Closets of Power*, HARPER'S, Oct. 1982, at 34 (discussing gay politicians who do not disclose that they are gay).

Psychological studies indicate that gay persons who are forced to be secretive about their sexuality, or are isolated from larger gay or lesbian communities, experience significant emotional and psychological distress. *See, e.g.*, A. BELL & M. WEINBERG, HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN (1978); Malyon, *Psychotherapeutic Implications of Internalized Homophobia in Gay Men*, 7 J. HOMOSEXUALITY 56 (1982). By contrast, gay persons who have come out show the highest degree of adjustment and self-esteem. *See* A. BELL & M. WEINBERG, *supra*; Crocker & Major, *Social Stigma and Self-Esteem: The Self-Protective Properties of Stigma*, 96 PSYCHOLOGICAL REV. 608 (1989).

47. *See* Bowers v. Hardwick, 478 U.S. 186 (1986); *infra* note 59 and accompanying text. *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-21 (2d ed. 1988). Such laws as the Georgia statute enforced in *Hardwick*, and their enforcement against gay and bisexual people through arrest or in other contexts, reinforce social prejudice and

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sociations,[48] takes away our children,[49] beats and kills us in the streets and parks,[50] smothers images of ourselves and others like us,[51] and then tells us we are irresponsible, unstable, and aberrant.

What we all need, gay and non-gay, is, to use Professor Black's phrase, a "humane imagination," defined as the ability and effort to understand and credit "the inwardnesses of others,"[52] the humanity of the different. Once and for all, we need to recognize that being different is part of being human, not a reduction of it, and not a justification for dehumanization or denial of rights.

This recognition is needed not only for the sake of minorities. As Martin Luther King, Jr., wrote, "Eventually the civil rights movement will have contributed infinitely more to the nation than the eradication of racial injustice. It will have enlarged the concept of brotherhood to a vision of total interrelatedness."[53]

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individual hostility toward gay people. *See, e.g.*, Herek, *The Context of Anti-Gay Violence: Notes on Cultural and Psychological Heterosexualism*, 5 J. INTERPERSONAL VIOLENCE 316 (1990). They are also used to justify other discrimination. *See, e.g.*, England v. State of Texas, No. 484697 (Dist. Ct. Travis Co. filed May 22, 1990) (Lambda challenge to state law criminalizing "homosexual conduct" on behalf of lesbian denied employment as Dallas police officer because of law's existence).

48. *See Sexual Orientation*, *supra* note 41, at 1587-95.

49. *See id. See also* Bozett, *Children of Gay Fathers*, in GAY AND LESBIAN PARENTS 39, 39 (F. Bozett ed. 1987) (at least one to three million gay men in the United States are natural fathers; there are an estimated six to fourteen million children of gay and lesbian parents, many from heterosexual marriages); Falk, *Lesbian Mothers: Psychological Assumptions in Family Law*, 44 AM. PSYCHOLOGIST 941 (1987) (one-and-a-half to five million lesbian mothers in United States); Hunter & Polikoff, *Custody Rights of Lesbian Mothers: Legal Theories and Litigation Strategy*, 25 BUFFALO L. REV. 691 (1976); Ricketts & Achtenberg, *The Adoptive and Foster Gay and Lesbian Parent*, in GAY AND LESBIAN PARENTS, *supra*, at 89, 92; *Sexual Orientation*, *supra* note 41, at 1643.

50. *See* NAT'L GAY & LESBIAN TASK FORCE ANTI-VIOLENCE PROJECT, FIFTH ANNUAL REPORT (1990); *see also Violence Against Lesbians and Gay Men: Issues for Research, Practice, and Policy*, 5 J. INTERPERSONAL VIOLENCE 3 (1990).

51. The funding restrictions imposed in 1989 on the National Endowment for the Arts aimed at censoring art with homoerotic or gay content illustrate the hostility engendered by works by or about lesbians and gay men, and the double standard in the portrayal of gay and non-gay lives. *See, e.g.*, Kastor, *NEA's "Clean-Art" Campaign; Writers Upset By New Grant Conditions*, Wash. Post, Mar. 9, 1990, at D1, col. 1. The restrictions were yet one more prominent example of the use of tax money and legal sanctions to promote non-gay sexuality and depictions of non-gay lives, while denying the voice and equal portrayal of lesbians and gay men and our sexuality and lives. *See also* V. RUSSO, *supra* note 30. And, of course, one need only look at television, billboards, advertising, or even the news to *not* see and hear lesbian and gay people presented in our breadth and diversity.

52. *See* Black, *The Humane Imagination in the Great Society*, *reprinted in* C. BLACK, THE HUMANE IMAGINATION 1-16 (1986).

53. M. KING, WHY WE CAN'T WAIT 152 (1963).

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William Allen is partly right; rights should not and do not come because we are members of minority groups.[54] Rather, minorities are entitled to vigilant protection as the most common and easiest victims of dehumanization that takes away our human rights, that robs us of our birthright of equal civil rights.

In his zeal to deny gay people meaningful protection of our rights, Allen mischaracterizes the purpose of civil rights laws. Civil rights laws do not create rights, nor do they award special benefits. Rather, they attempt to preclude the most frequent bases of discrimination that accompany such dehumanization, bases like race, religion, sex, ethnicity, and sexual orientation. Because gay people need such protection to assure our equal rights, as of March 1990, two states plus some eighty cities and counties nationwide have adopted protective civil rights legislation for those discriminated against on the basis of their sexual orientation.[55] As yet, the federal government has not.[56]

In *Yick Wo v. Hopkins*,[57] the Supreme Court invalidated a facially neutral law that was administered in a manner that discriminated against Chinese laundry owners. In so ruling, the Court correctly recognized that sometimes equality on its face is not equality in fact.[58]

Nearly a hundred years later, however, a less honest Supreme Court added to *Dred Scott* and *Korematsu* its decision in *Bowers v. Hardwick*.[59] The Court rejected as "facetious"[60] gay people's claim of an equal right to be left free of government

54. *See* Address by William B. Allen, *supra* note 1.

55. *See Sexual Orientation*, *supra* note 41, at 1582-83. Updated information may be obtained from Lambda Legal Defense & Education Fund.

56. *But see* Hate Crimes Statistics Act, Pub. L. No. 101-275, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 140 (requiring the compilation of statistics of crimes against people because of their race, religion, ethnicity, or sexual orientation). This is the first small step toward comprehensive federal protection of the equal rights of gay people.

57. 118 U.S. 356 (1885).

58. *See Yick Wo*, 118 U.S. at 373-74 (discretion provided by law allowed board to use legislation that was "fair on its face and impartial in appearance" to "make unjust and illegal discriminations between persons of similar circumstances").

59. 478 U.S. 186 (Georgia "sodomy" law does not violate federal constitutional right to privacy), *reh'g denied*, 478 U.S. 1039 (1986).

In *Hardwick*, a five-to-four majority voted to uphold Georgia's "sodomy" law and, by implication, the similar laws of 24 other states. *See Hardwick*, 478 U.S. at 196. These state laws make criminal an enormous amount of the private, consensual sexual activity engaged in by many American adults. *See, e.g.*, A. KINSEY, W. POMEROY & C. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 368-70 (1948); S. HITE, THE HITE REPORT: A NATIONWIDE STUDY ON FEMALE SEXUALITY 76 (1976). The Georgia statute, for instance, includes within its scope " 'any sexual act involving the sex organs of one person and the mouth or anus of another.' " *Hardwick*, 478 U.S. at 188 n.1 (quoting GA. CODE ANN. § 16-6-2(a) (1984)). Although the statute does not distinguish between homosexual

intrusion in important personal choices and our claim to an

and heterosexual sexual acts, the Court explicitly refused to discuss heterosexual sodomy. *See id.*

Hardwick challenged the law following his arrest for engaging in oral sex with another man in the privacy of his own home. The Court framed the question presented by such police action in the bedroom in such a way as to guarantee a negative answer: "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." *Id.* at 190.

As Justice Blackmun noted in his ringing dissent, however, *Hardwick* "is no more about 'a fundamental right to engage in homosexual sodomy,' than *Stanley* [*v. Georgia*] was about a fundamental right to watch obscene movies, or *Katz v. United States* was about a fundamental right to place interstate bets from a telephone booth." *Id.* at 199 (Blackmun, J., dissenting) (citations omitted). The majority's disingenuous formulation guaranteed defeat for Michael Hardwick's assertion of "the most comprehensive of rights and the right most valued by civilized men, [namely,] the right to be let alone." *Id.* (Blackmun, J., dissenting) (citing Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

Because the Georgia law on its face criminalizes certain common behavior whether between same-sex or heterosexual couples, the Court need not have addressed the issue of sexual orientation at all. It could have asked itself not what Michael Hardwick was doing in his bedroom, but what the police were doing there. *See* L. TRIBE, *supra* note 47, § 15-21, at 1428.

Unfortunately, however, because of its dehumanized view of gay people, the majority literally could not see the case that way, could not see through the eyes of Michael Hardwick with "humane imagination." *See supra* note 52 and accompanying text. The majority's hostility to gay people and "most willful blindness" to our human desire for equality in self-definition and intimate association led to its total distortion of the privacy line of cases. *See Hardwick*, 478 U.S. at 204-05 (Blackmun, J., dissenting).

Turning constitutional jurisprudence on its head, the Court actually invoked prior discrimination and intolerance of gay people as a justification for continued discrimination and criminal sanctions. *See id.* at 210-11 (Blackmun, J., dissenting) (contrasting the majority's approach with the Court's repudiation of miscegenation laws, supported by "tradition" and "religion," in Loving v. Virginia, 388 U.S. 1 (1967)). As Justice Blackmun wrote, "[n]either the length of time a majority has held its convictions [n]or the passions with which it defends them can withdraw legislation from this Court's scrutiny." *Id.* at 210 (Blackmun, J., dissenting); *see also id.* at 216 (Stevens, J., dissenting) ("[T]he fact that the governing majority in a state has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.").

In lieu of constitutional analysis, the Court indulged itself in a venomous and unreasoned attack on gay people and homosexuality, what the dissent characterized as an "almost *obsessive* focus on homosexual activity, [which] is particularly hard to justify" given the breadth of the Georgia statute and its applicability to both homosexual and heterosexual acts. *Id.* at 200 (Blackmun, J., dissenting). Writing for four justices, Justice Blackmun concluded: "The Court claims its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others." *Id.* at 206 (Blackmun, J., dissenting).

Critical response has not been kind to the majority's opinions in *Hardwick*; in fact, "[c]ommentators have been virtually unanimous in their criticism of *Hardwick*'s reading of the Court's privacy jurisprudence." *Sexual Orientation*, *supra* note 41, at 1523 n.30 (majority opinion's analysis departs from established privacy doctrine). *See, e.g.*, J. JOSEPH, BLACK MONDAYS: WORST DECISIONS OF THE SUPREME COURT 65-74 (1987) (including *Hardwick* among "worst" Supreme Court opinions); L. TRIBE, *supra* note 47, § 15-21, at 1421-35 (critique of decision by attorney who argued *Hardwick* in Supreme Court); Note, *Chipping Away at* Bowers v. Hardwick*: Making the Best of an Unfortunate*

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equal right to love, thus mangling the Constitution in its caricature of lesbians and gay men—a modern-day *Judensau*.

Gay people are, in this culture, a minority.[61] Our sexual orientation, our romantic attractions, our affectional preference appear to most of us, as to most humans, to be immutable, deeply rooted, beyond our conscious choice, part of our natural identity.[62] None of us created our fundamental sexual

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Decision, 63 N.Y.U. L. REV. 154 (1988) (criticizing *Hardwick* and suggesting ways to minimize its effect on future cases).

Moreover, former Justice Lewis Powell, the "swing vote" on the bitterly divided Court, recently declared that he "probably made a mistake" in voting to uphold the sodomy law. *See Powell Concedes Error in Key Privacy Ruling*, N.Y. L.J., Oct. 26, 1990, at 1, col. 3. Powell stated that, in retrospect, "the dissent had the better of the arguments." *Id.* Powell's reflections further undermine the validity of the reasoning and result in *Hardwick*.

One result of *Hardwick* has been the increased willingness of state courts to give teeth to state constitutional protections beyond those withheld under the federal constitution by current courts. *See, e.g., In re* T.W., 551 So. 2d 1186 (Fla. 1989) (Florida Supreme Court case striking down restrictive abortion law under express state constitutional privacy provision); Kentucky v. Wasson, No. 86-X-48 (Cir. Ct. Fayette Co. 5th Div. June 8, 1990); Mohr v. Kelley, No. 88-815820 CZ (Cir. Ct. Wayne Co. July 9, 1990) (striking down Missouri sodomy laws under state right to privacy); *cf.* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (noting the "independent protective force of state law [without which] the full realization of our liberties cannot be guaranteed"). The *Hardwick* opinion expressly acknowledged the "right and propriety" of state legislatures or state courts eliminating sodomy laws on state constitutional grounds. *Hardwick*, 478 U.S. at 190.

60. *Hardwick*, 478 U.S. at 194.

61. Little reliable data exist on the incidence of same-sex sexual activity or lesbian and gay sexual orientation, chiefly because criminal penalties, social stigma, and discrimination make research difficult. The best current data estimate that approximately six to ten percent of the adult American population consider themselves to be gay, while far more engage in sexual activity with those of the same sex on at least an occasional basis. *See* Fay, Turner, Klassen & Gagnon, *Prevalence and Patterns of Same-Gender Sexual Contact Among Men*, 243 SCIENCE 338 (1989); A. KINSEY, W. POMEROY & C. MARTIN, *supra* note 59; A. KINSEY, W. POMEROY, C. MARTIN & P. GEPHARD, SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953); *see also Sexual Orientation*, *supra* note 41, at 1511 n.1 (citing studies and statistics).

Another problem that makes counting gay people difficult is the artificiality of many of the categories and labels when applied to the lives led by real people: gay or non-gay, homosexual, heterosexual, or bisexual. Many people who engage in same-sex sex and relationships do not consider themselves gay or lesbian. Many gay people are not part of larger gay and lesbian communities. But as one expert has concluded:

> An obsession with numbers can divert our attention from the central issues: that women and men in our society are systematically harassed, persecuted, and bashed because they are perceived to be gay and that anti-gay prejudice is unacceptable whether it is directed against a handful of people or against millions. . . . The important question is not how many are gay. Rather it's how many Americans—whether gay, bisexual, heterosexual, or whatever—have a right to live free from heterosexism.

Herek, *The Tyranny of 10%: Does It Really Matter How Many Americans Are Gay?*, THE ADVOCATE, Aug. 1, 1989, at 46, 48 (evaluating the most common estimate, based on the Kinsey studies, that one in ten people are gay).

62. *See, e.g.*, Money, *Sin, Sickness, or Status? Gender Identity and Psychoneuroendocrinology*, 42 AM. PSYCHOLOGIST 384 (1987); Richards, *supra* note 12, at 957, 983-85 & nn.117-18

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"inwardness."

But because we are different from the present dominant heterosexist culture, we gay people have experienced discrimination, disenfranchisement, disfigurement, and dehumanization. And, of course, in holding us down, our society has also held itself down, harming millions of lives, gay and non-gay, for nothing. All Americans are injured by, and need protection against, sexual orientation discrimination and demands for gender and sexual conformity.[63]

Like non-gay people, our human need is to be free to make choices that all recognize as undeniably fundamental to a human's life plan and self-conception, such as the choice of a lover or a life partner.[64] We deserve protection so that we, too,

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(discussing psychological studies and concluding that homosexuality is normal part of human spectrum); *see also* McCombs, *Out of the Cloakroom—The Anti-Gay Crusade: On Capitol Hill, the Fight for the "Heterosexual" Ethic*, Wash. Post, Jan. 25, 1990, at B1, col. 3.

Even members of the Supreme Court have recognized that gay or lesbian sexual orientation is not "a matter of deliberate personal election" and that it "may well form a part of the very fiber of an individual's personality." *Hardwick*, 478 U.S. at 202 n.2 (Blackmun, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.). And, as Boswell points out in examining the opinions of other times, societies, and cultures:

> In regard to the question of etiology, it should be noted that what "causes" homosexuality is an issue of importance only to societies which regard gay people as bizarre or anomalous. Most people do not wonder what "causes" statistically ordinary characteristics, like heterosexual desire or right-handedness; "causes" are only sought for personal attributes which are assumed to be outside the ordinary pattern of life. Since very few people in the ancient world considered homosexual behavior odd or abnormal, comments about its etiology were quite rare.

J. BOSWELL, *supra* note 3, at 48-49.

63. Non-gay people, too, are injured by anti-gay prejudice and the drive for sexual labelling and conformity. *See, e.g.*, Herek, *On Heterosexual Masculinity: Some Psychical Consequences of the Social Construction of Gender and Sexuality*, 29 AM. BEHAVIORAL SCIENTIST 563 (1986). Anti-gay prejudice, the stigma against stereotyped or "gender-inappropriate" behavior, and ignorance about the reality and diversity of gay lives interfere with non-gay people's personal development, ability to form deep same-sex friendships, and sense of security. *See, e.g.*, Devlin & Cowan, *Homophobia, Perceived Fathering, and Male Intimate Relationships*, 49 J. PERSONALITY ASSESSMENT 467 (1985).

In addition, every gay person is someone else's child, sibling, friend, colleague, and so on. The pressure and pain inflicted on a gay man or lesbian takes its toll also on the lives of those around us, those who care about us, those who depend on us.

The elevated suicide rate among youth grappling with sexuality and possible gay sexual orientation provides a particularly telling example of the effects of sexual orientation discrimination. Gay and lesbian youth attempt suicide at a rate two to three times higher than that for other young people; these suicides represent up to 30 percent of all youth suicides each year. *See* Gibson, *Gay Male and Lesbian Youth Suicide*, in 3 U.S. DEP'T OF HEALTH & HUMAN SERVICES, REPORT OF THE SECRETARY'S TASK FORCE ON YOUTH SUICIDE 110, 111 (1989); *see also* Quintanilla, *Haven for Gay Teens*, L.A. Times, Dec. 7, 1989, at E1, col. 2 (noting that religious right-wing opponents of programs for gay and lesbian youth "help to hand down death sentences to teenagers").

64. *See, e.g.*, Richards, *supra* note 12, at 994, 1001-06; *see also Hardwick*, 478 U.S. at 205 (Blackmun, J., dissenting).

can be free to lead our lives, share our hearts, and participate fully in community life. We deserve to have our relationships recognized so that we can have the support and responsibility we want and now strive to build on our own. We deserve these inalienable civil and human rights, as equal citizens of a nation founded on freedom and esteeming equality, and as fully human beings.

Things can still change. It required a civil war for society to begin to include African-Americans into American citizenship, and to add equality to the goals in our Constitution. Other inclusions have been more peaceful. The "inwardness" of Jews and Japanese-Americans, for example, has become less "other," and their humanity is largely accepted.[65]

For lesbians and gay men, however, although we have made some strides in some places, dehumanization and discrimination persist.[66] In this civil democracy, which prides itself on the rule of law and equal justice under the law, the law must defend gay people's equal rights and equal humanity. When we have achieved these ends, we will make life better for all people, whether gay or not.[67]

To wage our struggle against dehumanization, we gay people must reclaim our history,[68] break the conspiracy of silence about our lives, demand our rights, and work to pierce the "willful blindness"[69] of others. Of course, for those who are *willfully blind*, there may not be much we can do. As Moritz

65. *But c.f.* Charen, *Why Pick on Asians and Catholics*, Newsday, Apr. 11, 1990, at 58, col. 1; Burress, *The Dark Heart of Japan-Bashing*, San Francisco Chron., Mar. 18, 1990, at 7Z, col. 1.

66. For a survey of public attitudes toward gay people, see Eckles, *Polls Reveal Many Changes in Public's Attitudes Towards Gays*, Wash. Blade, Oct. 27, 1987, at 23 (showing measured improvement but persistence of unfounded stereotypes). On the lingering power of stereotypes, despite repeated refutation, see Herek, *Stigma, Prejudice and Violence Against Lesbians and Gay Men*, in HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL, AND BIOLOGICAL ISSUES — (J. Gonsiorek & J. Weinrich 2d ed. forthcoming 1991) (evaluating the oft-refuted child molestation myth as regards gay people).

67. *See* M. KING, *supra* note 53, at 151-52 (1963) ("One aspect of the civil rights struggle that receives so little attention is the contribution it makes to the whole society.").

68. *See, e.g.*, J. BOSWELL, *supra* note 3, at 17-32; HIDDEN FROM HISTORY (M. Duberman, M. Vicinus & G. Chauncey eds. 1989); J. D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970 (1983); J. KATZ, GAY/LESBIAN ALMANAC (1983); L. FADERMAN, SURPASSING THE LOVE OF MEN: ROMANTIC PRESENT (1981); J. KATZ, GAY AMERICAN HISTORY (1976).

69. *Hardwick*, 478 U.S. at 205 (Blackmun, J., dissenting). Justice Blackmun accused the majority of "the most willful blindness" for its inability to recognize that "sexual intimacy is 'a sensitive key relationship of human existence, central to family life, community welfare, and the development of human personality.' " *Id.* at 205 (Blackmun, J.,

Goldstein wrote in *Deutsch-judischer Parnass*: "We can easily reduce our detractors to absurdity and show them their hostility is groundless. But what does this prove? That their hatred is *real*. When every slander has been rebutted, every misconception cleared up, every false opinion about us overcome, intolerance itself will remain finally irrefutable."[70]

Still, we need to reach out to each other's humane imagination, ideally civilly. For that reason, I am glad to have been invited here tonight. I hope we will all try harder to see our common humanity enriched, not diminished, by our differences.

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dissenting) (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973)). Justice Blackmun wrote:

> The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggest, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships will come from the freedom an individual has to *choose* the form and nature of these intensely person bonds.

Id. at 205 (Blackmun, J., dissenting) (citation omitted) (emphasis in original).

By speaking openly of our lives, and by demanding that the heterosexist culture take note of our existence, equality, and diversity, gay people can help reduce the blindness and increase the understanding of our "rightness." Indeed, studies have demonstrated that the single most important factor in improving even a hostile person's acceptance of gay people is knowing and engaging with an openly gay person. *See* Herek, *Heterosexuals' Attitudes toward Lesbians and Gay: Correlates and Gender Differences*, 25 J. SEX RESEARCH 451 (1988); *see also* Herek, *Beyond "Homophobia": A Social Psychological Perspective on Attitudes Toward Lesbians and Gay Men*, 10 J. HOMOSEXUALITY 1 (1984).

70. J. BOSWELL, *supra* note 3, flyleaf (quoting Moritz Goldstein (emphasis in original)).

PANEL II: THE ROLE OF GOVERNMENT IN CLOSING THE SOCIO-ECONOMIC GAP FOR MINORITIES*

THE IMPACT OF FEDERAL CIVIL RIGHTS POLICY ON THE ECONOMIC STATUS OF BLACKS

JOHN J. DONOHUE III**

I. INTRODUCTION

American civil rights policy is poised at a crossroads. The Supreme Court, reshaped by the perspectives of a new Chief Justice and three other Reagan appointees, appears convinced that the federal law against employment discrimination must be trimmed. This is evidenced by recent decisions[1] diminishing the impact of the major judicial expansions of civil rights law in *Griggs v. Duke Power Co.*[2] and *Runyon v. McCrary*.[3] At the same time, Congress, which is considering the Civil Rights Act of 1990,[4] has shown that it has little sympathy for the Court's latest outlook, and, if anything, would like to strengthen federal antidiscrimination law. The divisions within the legislative and

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* This panel was introduced by John Hart Ely, Robert E. Paradise Professor of Law, Stanford University.

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1. *See* Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989); Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989); Martin v. Wilks, 109 S. Ct. 2180 (1989); Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

2. 401 U.S. 424, 431 (1971) (holding that, under the adverse impact model, once plaintiff has shown that the employment practice in question operates to disqualify members of a protected group at a substantially higher rate than their counterparts in the workforce, the burden shifts to the employer to show that the practice or test "bear[s] a demonstrable relationship to the successful performance of jobs for which it was used").

3. 427 U.S. 160 (1976) (ruling that 42 U.S.C. § 1981 prohibits private, commercially operated non-sectarian schools from denying admission to prospective students because they are black).

4. H.R. 4000, 101st Cong., 2d Sess. (1990); S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. S1019-20 (daily ed. Feb. 7, 1990). The Civil Rights Act of 1990, as passed by Congress, was vetoed by President Bush on October 22, 1990, Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1632 (Oct. 22, 1990). It is likely that some version of the Civil Rights Act of 1990 will become law in 1991.

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judicial branches are symbolic of the conflict in the academic community over the effectiveness of Title VII of the Civil Rights Act of 1964[5] and the federal government contract compliance program.[6] Indeed, this academic debate assumes an importance beyond the already momentous issue of employment discrimination, because it goes to the heart of the entire debate over the wisdom of all government intervention in this area.

The collapse of centralized governments in Eastern Europe underscores the woeful consequences that are visited upon those who disregard the power of markets. Seeking to harness the momentum flowing from this powerful vindication of a central conservative tenet, the American right would like to roll back government regulation across the board. The American left, chastened over the years by the dreary results of many government initiatives, still sees the Civil Rights Act of 1964 as the shining star in the liberal firmament. If the left's star can be toppled, the case for government intervention, no matter how noble the objective, will be severely impaired. With so much at stake, it is not surprising that politics has seeped into the science of policy evaluation.

Incentive and opportunity have also conspired to allow virtually every conceivable position to be championed in the academic literature. The opportunity is afforded by the immense difficulty of determining the effect of a law that has nearly universal coverage. When objective truth is difficult to obtain, as is the case here, ideology often steps in to fill the void. The result is an astonishing cacophony of opinions. The law is said to have had no impact whatsoever,[7] or to have helped blacks immensely.[8] Indeed, these views are often expressed by the same individuals who hasten to add—as if this would cure the inconsistency—that some black progress has been undeserved, because preferences have enabled blacks to advance beyond the point where their skills would have taken them.[9] On the other hand, friends of Title VII have pointed to considerable black progress and attributed much or all of the success to the direct

5. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

6. *See* Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), *reprinted in* 42 U.S.C. § 2000e note (1988).

7. *See infra* note 14 and accompanying text.

8. *See* Freeman, *The Changing Labor Market for Black Americans, 1948-72*, in 1 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 67 (A. Okun & G. Perry eds. 1973).

9. *See* Posner, *The Efficiency and Efficacy of Title VII*, 136 U. PA. L. REV. 517 (1987).

and indirect effects of federal action, paying little heed to some of the alternative explanations for black economic progress.[10] This paper will draw upon my joint work with economist James Heckman of Yale to determine the effects of civil rights policy on the economic status of blacks.[11]

II. Has Title VII Helped Blacks?[12]

It is important to note at the outset of this discussion that the simple presentation of the black-white median earnings ratio, often the starting and ending point of analysis for those in policy positions, yields little conclusive evidence. Figures 1 and 2 show how this ratio has changed over time for black male workers vis-à-vis white male workers. The figures depict considerable economic progress for blacks nationally, and even greater gains for blacks in the South.[13] Having identified this progress, however, we are left little information about its cause. Conservative analysts have rushed to note that the progress appears to have begun before the passage of the 1964 Act. For example, Professors Smith and Welch assert:

> [T]he racial wage gap narrowed as rapidly in the 20 years prior to 1960 (and before affirmative action) as during the 20 years afterward. This suggests that the slowly evolving historical forces we have emphasized in this essay—education and migration—were the primary determinants of the long-term black economic improvement. At best, affirmative action has marginally altered black wage gains around this long-term trend.[14]

This evidence is important, but again not conclusive. Consider first the issue of migration: Enormous numbers of blacks fled

10. *See* Freeman, *Black Economic Progress After 1964: Who Has Gained and Why?*, in Studies in Labor Markets 247 (S. Rosen ed. 1981).

11. *See* J. Donohue & J. Heckman, Continuous versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks (1990) (unpublished manuscript) (available in office of *Harvard Journal of Law & Public Policy*).

12. This discussion focuses on whether Title VII has improved black employment levels and wages relative to white employment levels and wages. The law clearly has aided thousands of individual blacks (and others) who have received monetary judgments, but the most important objective of the law is to generate employment benefits for black workers through the elimination of discrimination, rather that monetary benefits through the pursuit of litigation.

13. The data presented in Figures 1 and 2 were derived from the Bureau of Labor Statistics annual *Current Population Survey*, which surveys the labor market experience of roughly 160,000 individuals across the nation.

14. Smith & Welch, *Black Economic Progress After Myrdal*, 27 J. Econ. Lit. 519, 555 (1989).

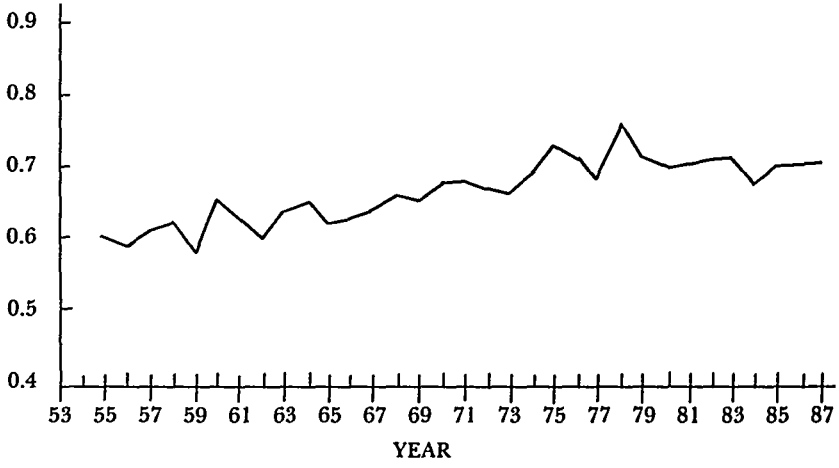


Figure 1. Ratio of Median Non-White Income to Median White Income, Year-Round Full-Time Male Workers, United States, 1955-1987.



Figure 2. Ratio of Median Non-White Income to Median White Income, Year-Round Full-Time Male Workers, Southern United States, 1955-1987.

the South between 1940 and 1960, and one would expect this massive exodus of young blacks to have a powerful effect in narrowing the racial wage gap for two reasons. First, blacks were largely leaving low-paying agricultural jobs in the South and securing higher-paying industrial jobs in the North. Second, the departure of so many black workers from the South represented a backward shift in the supply of southern black labor, thus contributing to an upward wage pressure for the blacks who remained in that region. In the 1940s and again in the 1950s, roughly a quarter of young black men living in the South migrated north. This amazing exodus grew at an even

faster pace in the first half of the 1960s, but then suddenly the outflow slowed to a trickle. Indeed, over the decade of the 1970s the flow was reversed, as the South experienced net black immigration.

Thus, while black migration is an important explanation of black progress in the period prior to the passage of the Civil Rights Act of 1964, it cannot serve as an explanation for the substantial black gains in the aftermath of the civil rights legislation. Indeed, rather than undermining the case that Title VII aided blacks, as Smith and Welch would suggest, the story of black migration powerfully buttresses it. The migration patterns suggest that something very dramatic occurred in the mid-1960s to encourage southern blacks to remain in the South. Two possible explanations are that things suddenly got much worse in the North, or that things suddenly got much better in the South. There is no evidence of the former, and quite a good deal of evidence of the latter: The federal government had embarked on a comprehensive effort, directed primarily at the South, to eliminate barriers to blacks in housing, voting, schooling, and employment.[15]

What of the other long-term trend that is offered as an explanation of black progress in the decade following passage of the 1964 Act? Smith and Welch state that the cause of the rapid movement toward the national norm in the southern racial wage gap during the 1970s may have been that

> black-white skill differences . . . converged in the South as the post-World War II cohorts entered the labor market. To illustrate this point, assume that Southern schools were effectively desegregated in 1960, six years after the Brown decision. The first class of Southern black children who had attended entirely desegregated schools would have first entered the labor market in the early to mid-1970s. Some of the improvement in black incomes during the 1970s may have been due to the skills acquired through this improved schooling. However, that is unlikely to be the whole story because there was a substantial erosion in racial wage disparities even among older workers in the 1970s . . . . *A more plausible explanation may well be that racial discrimination is waning*

15. The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.), the federal government contract compliance program, which commenced in 1965, and the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988)), were all important elements of the federal effort to dismantle southern racial segregation.

in the South.[16]

But if improved schooling quality is to explain black post-1964 progress, it will be necessary to look beyond desegregation to find it. In 1963, there was virtually no desegregation of southern schools. It was not until a very firm, activist Supreme Court called for immediate action in 1968 and 1969 that southern school desegregation became a reality.[17] Moreover, as even Smith and Welch concede, black progress after 1965 was not simply the product of better educated blacks entering the labor force. Indeed, poorly educated blacks who had entered the labor market years earlier suddenly started earning more in the post-1965 era.[18] This phenomenon of increased returns from completed education may have resulted from declining prejudice, as Smith and Welch suggest, but a far more likely explanation is that federal law opened up opportunities for blacks that discriminatory attitudes previously had kept closed. The law at first may not have changed attitudes, but it appears to have altered the behavior of discriminatory employers.

Of course, whenever one attempts to ascertain the impact of a law, one must confront the possibility that changes possibly attributable to the law actually reflect changes in the attitudes of the public that led to the passage of the law. While this possibility would indeed present a problem in assessing the impact of the law in the North, where support for the law was high, this is not a serious factor when examining the economic progress of blacks in the South. The South was overwhelmingly opposed to the Civil Rights Act of 1964. If ever a federal law served as an exogenous influence on a region, Title VII represented such a case.

It is useful to give one important illustration of how black employment levels rose dramatically in one industry in the South in 1965, when Title VII went into effect and the federal government contract compliance program was initiated. Figure 3 presents the share of black employment by sex in the textile industry of South Carolina during the period 1910 to 1977.[19]

16. Smith & Welch, *supra* note 14, at 543 (emphasis added).

17. *See* Alexander v. Holmes County, 396 U.S. 1218 (1969); Green v. Board of Educ., 391 U.S. 430 (1968).

18. *See* J. Donohue & J. Heckman, *supra* note 11.

19. The information presented in Figure 3 is taken from Heckman & Payner, *Determining the Impact of Federal Antidiscrimination Policy on the Economic Status of Blacks: A Study of South Carolina*, 79 AM. ECON. REV. 138 (1989). The textile industry has long been the

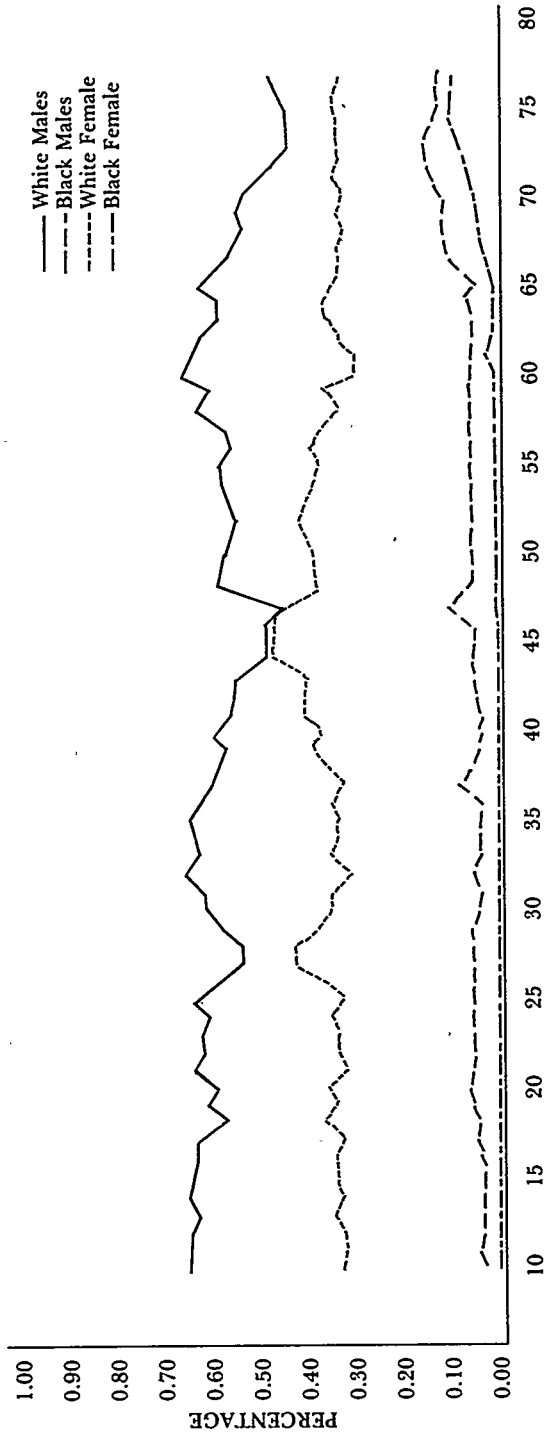


Figure 3. Employment in the South Carolina Textiles Industry, 1910-1977.

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Through two world wars, the Great Depression, and the Korean War, the share of blacks remained low and stable, despite the fact that this industry was expanding in employment throughout the period. Regardless of the degree of labor market tightness or slackness, one fact emerges with remarkable clarity: Virtually no black women, and few black men, were permitted to work in the textile industry in the fifty-five years before 1965. After that date, black male and female wages (relative to those of white males) suddenly accelerated in the industry.

Black progress was dramatic in the decade following 1965, particularly in the South, but virtually nonexistent thereafter.[20] Economists and sociologists have argued that one reason for the stagnation in black advancement after 1975 is the decline of demand for low-skilled labor.[21]

It is difficult to amass any evidence indicating that black gains were greater during the Carter presidency, an administration generally considered more sympathetic toward civil rights than its successor, than during the Reagan years, when the issue of civil rights was a low priority. This should give pause to those who believe that significant additional gains for blacks can be achieved through more vigorous enforcement by the Equal Employment Opportunity Commission or substantive strengthening of legal prohibitions against discrimination.

III. Predictions About the Impact of the Civil Rights Act of 1990

An examination of black economic progress over the last twenty-five years leads me to the following broad conclusions. First, federal antidiscrimination law is a powerful tool in attacking egregious forms of discrimination, such as that existing most conspicuously in the pre-1965 South. The process of breaking down these blatant labor market barriers to black advancement was completed by roughly 1975.[22] Second, once the egregious forms of exclusion have been eliminated, there is far less potential for black improvement under a law that is en-

major manufacturing employer in South Carolina, accounting for 80 percent of all manufacturing employment in 1940 and 40 percent in 1980. *See id.* at 140.

20. *See* J. Donohue & J. Heckman, *supra* note 11.

21. *See id.*; W.J. Wilson, The Truly Disadvantaged (1987); Kasarda, *Urban Change and Minority Opportunities*, in The New Urban Reality 33 (P. Peterson ed. 1985).

22. *See* J. Donohue & J. Heckman, *supra* note 11.

forced by complaints by alleged victims of discrimination. Third, administrative enforcement of hiring goals, such as those required of government contractors under the contract compliance program, has increased demand for black labor in the covered sector during the period since 1975,[23] but this benefit has not translated into aggregate black economic gains because: (1) Black workers tend to flow out of the non-covered sector, thereby reducing or eliminating the overall increase in black employment; and (2) adverse economic conditions for low-wage labor have offset any aggregate gains.

The question then becomes whether the strengthening of federal antidiscrimination law under the Civil Rights Act of 1990 will lead to any narrowing of the economic gap between blacks and whites. A number of points must be made. First, some have argued that the major purpose of the law is simply to reverse the five Supreme Court decisions of 1989[24] that cut back on the prior federal law of employment discrimination. To the extent that this is true, there would be no reason to hope for black improvement under the statute: The only possible goal could be to forestall black declines. The reason for this statement is that the recent Supreme Court decisions cut back on law that had been in effect for the previous fifteen years, during which time there was little or no relative economic advancement by blacks. Simply restoring the status quo ante is not likely to generate any significant gains for blacks. Second, it is clear that, in a number of respects, the Civil Rights Act of 1990 would go further than prior law. The most potent weapon in the Act would likely be the broadening of monetary remedies for victims of discrimination beyond the award of mere back-pay.[25] By permitting punitive and compensatory damages in certain instances, courts would effectively raise the threshold faced by employers attempting to justify a practice that has a disparate impact on minorities. Finally, the provision of the right to a jury trial could increase the monetary relief available

23. *See* Leonard, *Employment and Occupational Advance Under Affirmative Action*, 66 REV. ECON. & STATISTICS 377 (1984); Leonard, *The Impact of Affirmative Action on Employment*, 2 J. LAB. ECON. 439 (1984).

24. *See* Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989); Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989); Martin v. Wilks, 109 S. Ct. 2180 (1989); Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

25. *See* H.R. 4000, 101st Cong., 2d Sess. § 8 (1990); S. 2104, 101st Cong., 2d Sess. § 8 (1990).

to victims of discrimination.[26]

The conventional view is that this proposed legislation would induce greater hiring of blacks, because the penalties against discrimination would be even greater. The left is heartened by this prospect, as the perceived barriers to black progress are further dismantled. The right, dismayed at the prospect of elevating workers non-meritocratically, views the legislation as a further drag on American productivity. But if there were perfect decisionmaking by triers of fact under the Act, the higher penalties would likely lead to more individualized, meritocratic employment decisions generated at greater expense to employers.[27] This would result because white workers will not stand idly by if blacks who are perceived to be less qualified are hired or promoted above the white workers. In other words, if employers were to deviate from the straight and narrow path of pure productivity-based hiring, they would face discrimination suits by blacks on the one hand and whites on the other. Therefore, once again under the assumption of perfect decisionmaking by triers of fact, it is unlikely that the right's fears of undeserved black gains will be realized. Would the hopes of the left of deserved black gains be achieved? The answer is that, to the extent that blacks are still victims of discrimination, more meritocratic decisionmaking will aid them. If affirmative action has already pushed blacks beyond their productivity-based desserts, however—as some conservatives fear—then legislation similar to the Act would actually impair black economic opportunities.

Of course, we know that decisionmaking at trial would not be perfect. Indeed, there is even reason to think that, in addition to the inevitable random blunders, some systematic errors

26. Some qualification is necessary here, because in some areas juries will tend to favor whites and defendants, as opposed to blacks and plaintiffs. A good example of how jury decisionmaking can operate in favor of whites is well-illustrated by Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702 (1989), in which a white high school football coach in Dallas received an exorbitant award from a jury after being fired by a black principal.

27. While individualized meritocratic employment decisions are beneficial, they are costly to obtain. For example, a test may be a useful way of selecting workers, but it is obviously not perfect. If we force employers to abandon the test and require on-the-job testing of applicants, we may increase individual fairness and make better meritocratic decisions, albeit at the cost of expending more resources in selecting the work force. The issues entailed in a full cost-benefit analysis are complicated, because it is possible that this type of statistical discrimination can be privately profitable but socially inefficient. *See* Donohue, *Further Thoughts on Employment Discrimination Legislation: A Reply to Judge Posner*, 136 U. PA. L. REV. 523, 532-33 (1987).

would be present. Biased or culturally influenced juries might push employers to favor one group or another over their pure meritocratic position.[28] For example, employer behavior in Newark or Harlem may well generate punitive damage awards for black plaintiffs that would yield no relief in Dallas or Cincinnati. This could lead to increased hiring of blacks in areas that favor blacks, and increased hiring of whites in areas that favor whites. In the long run, however, capital would flow in response to these short-run changes. Specifically, if employers find that in certain areas they would be forced to hire some unproductive blacks, they would tend to shun these areas, thereby impairing black progress to some degree.

The effect on the "pro-white" areas is more complicated. Once again, employers would tend to shun areas where they must hire labor inefficiently, whether it is black or white labor that must be favored. On the other hand, if white labor is preferred because of the discriminatory tastes of white employers or fellow workers, then capital may flow into the "pro-white" area. Therefore, it is possible that both the short-run and long-run effects of decisionmaker bias might aid white advance in certain areas, while in "pro-black" regions, the short-run and long-run effects would likely conflict.

In general, then, there might be some changes in the relative economic condition of blacks from the passage of legislation similar to the Civil Rights Act of 1990, although much depends on factors about which there is considerable uncertainty. For example, the degree to which discrimination is currently a labor market barrier to black advancement, and the likelihood that juries will be biased in making decisions in employment discrimination cases, are difficult to predict. Certainly, legisla-

28. There are two possible effects in operation here. The first is the decisionmaker effect: Juries may differ from judges in their degree of bias. My assumption is that they are no less racially biased than federal judges, and possibly more biased. Because the Act would increase the use of juries—which at present is barred in Title VII cases, although permitted in Section 1981 cases—it would potentially increase the level of bias in decisionmaking. Second, even if the level of bias were unchanged, the higher damages afforded by the Act would exaggerate the effects of the existing level of bias.

These two effects are best illustrated by a numerical example. Assume that pure merit-based decisionmaking would lead to the hiring of 20 blacks out of a total of 80 workers. If decisionmakers favor blacks, then presumably more than 20 blacks would be hired by the firm, because the twenty-first black applicant would be able to prevail in an employment discrimination case. If, say, 25 blacks in this example would be hired owing to the existence of biased decisionmakers under one level of damages, then more than 25 blacks would be hired under a higher level of damages.

tion of this type would generate more lawsuits, because the deterrent effect of the enhanced penalties would almost certainly be out-weighed by the direct stimulus to file lawsuits.[29] The average cost to employers of settling these cases would rise, and the resources used in choosing workers would certainly rise, but it is unlikely that government interference in labor markets via this Act or similar antidiscrimination legislation will induce gains the size of those seen in the decade following the passage of the Civil Rights Act of 1964.

29. *See* Donohue & Siegelman, *The Changing Nature of Employment Discrimination*, 43 STAN. L. REV. — (forthcoming 1991).

ADDRESSING THE GAP: SOME THOUGHTS ON THE GOVERNMENT'S ROLE

JEFFREY ROBINSON*

I would like to suggest an outline supporting the proposition that there is a role for government in addressing the socio-economic gap between whites and minorities—specifically the gap between African-Americans and whites. To my mind, the general topic raises three subsidiary questions: (1) Should the government do anything? (2) If the government should do something, is it able to? (3) If the government should and can do something, what are the specific things that it should consider doing?

With respect to the first question, it is clear to me that yes, the government should do something. There is a moral as well as a practical obligation to do so. Furthermore, I believe that government *can* do something. The government may not be able to do everything, but there are specific things that it has done in the past that have helped to address these problems, and there are things that it can do in the future that will continue to help. Because the solutions are not simply legal mechanisms, I wish to answer the third question, what should the government do, by listing some possible policies that the government can adopt that have been suggested by specialists who bring to this topic a broader understanding than that of a lawyer.

Before discussing the case for the government's duty and ability to address the socio-economic gap between African-Americans and whites, I wish to make two things clear. First, what I am clearly not saying, and what I believe no reasonable person considering this situation says, is that government has sole or even primary responsibility for addressing the gap. It is clearly incumbent upon private organizations, individuals, and African-Americans and other minorities as groups to address the fact that there is a socio-economic gap between minorities and whites. These groups, private organizations, and the affected individuals can address many issues that the government cannot. By the same token, these non-governmental entities

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can neither perform some of the tasks nor create some of the programs that are necessary if the socio-economic gap is to be narrowed.

Second, I want to specify what I mean by the socio-economic gap between African-Americans and whites. Most commonly, that gap is framed in terms of economics; we look at economic factors in defining the socio-economic gap, considering differences of income among various groups and such factors as labor market participation. In short, we look at the set of problems that are commonly used to define the "black underclass," a term that I will use here for convenience but, as a matter of principle, refuse to adopt.[1]

These economic problems, I submit, constitute only part of the gap between African-Americans and other minorities and whites in this society. Indeed, other matters are equally important. For example, even as one moves up the economic ladder, segregation remains pervasive in this country.[2] Even after accounting for differences in income level, a cursory observation of the Washington, D.C., area, with which I am most familiar, will show African-Americans living with other African-Americans, and whites living with other whites. When one takes a survey to learn why this is so, one finds that an African-American who conducts a relatively modest search for housing by going to three separate apartment complexes faces a greater than sixty-percent chance of facing discrimination.[3] An increase in the number of visits to seven increases the probability of discrimination to ninety percent.[4] The African-American is typically quoted different terms or conditions, or is given different information concerning the availability of a house from that given a similarly situated white person.

When we speak about the gap between African-Americans and whites, we should consider not only economic factors but

1. I believe that by adopting the term "underclass," one is both deceptively incorrect and wrongly accepting the problems as permanent, leading to apathy about working for change.

2. *See generally* J. KUSHNER, APARTHEID IN AMERICA: AN HISTORICAL AND LEGAL ANALYSIS OF CONTEMPORARY RACIAL SEGREGATION IN THE UNITED STATES (1980).

3. *See* U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, GUIDE TO FAIR HOUSING LAW ENFORCEMENT 55 (1979). Evidence from the housing market is available because housing is one area in which studies controlling for economics have been performed. One persona is created for two people, one African-American and one white, who are sent out to meet rental agents or apartment managers. Accordingly, in these studies the different results for African-Americans and whites are attributable to race alone.

4. *See id.*

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also the blatant racism that expresses itself in hostility on the streets, in the form of racially motivated killings and other assaults. This same racism unfortunately expresses itself with increasing frequency on college campuses.[5] This trend is particularly disturbing given the populace at colleges—the "educated"—and their supposed purpose for being there—to obtain an education.

Finally, I present what is probably a trivial, but I submit enlightening, example of the kinds of racism and discrimination that are undeniable elements of the gap between whites and African-Americans. After dark in Washington, D.C., to hail a taxicab, I have to ask one of my white colleagues to flag down a taxi, because the taxi drivers refuse to stop for me. The purpose of offering all these examples is to point out that the gap consists of more than mere economics. Accordingly, when we consider whether there is a role for government in closing the socio-economic gap, we need to address these non-economic realities as well.

With that understanding in mind, I would like to outline briefly my views on why government should deal with the gap, the evidence that government can do so, and some programs that might be suggested. As to why government should, I start from the premise that, as a matter of morality, racism is one thing that is inherently evil, without regard to considerations of efficiency or any other principle. Therefore, government has an obligation, when it can, to eliminate racism. This is the case whether one views government as a social engineer attempting to achieve a particular ideal of the good society, or whether one views government as a neutral referee attempting to create a level playing field. It simply is not tolerable for that playing field to be skewed by racism. One could argue, and some have, that slavery is economically efficient. But no one would argue that it is right. The same holds true for apartheid.

Even if one does not accept a moral basis for stating that the government has a duty to combat racism, one will reach the same conclusion as a practical matter. The reality is that we live in a multi-ethnic society. African-Americans and other minorities make up an increasingly large part of our population.[6] If

5. *See generally* France, *Hate Goes to College*, A.B.A. J., July 1990, at 44.

6. In 1960, African-Americans comprised 10.6 percent of the American population. By 1988, this figure had increased to 12.3 percent. During the same time period, other

this country wishes to move forward as a single society, differences that appear to be attributable to, or that can be explained on the basis of racial distinctions, simply cannot be allowed.

As to whether government can do anything to address the gap, if we compare our society in 1960 with our society today, even with all of our problems, we must conclude that government intervention has had a positive impact in bringing African-Americans and whites toward parity with each other. Professor Donohue's remarks regarding the economic effects of Title VII, for example, support that point of view.[7]

The types of programs that I would suggest fall into two categories. The first is aggressive enforcement of the existing antidiscrimination laws. That enforcement has two effects. First, it keeps the gap from growing. Second, the aggressive enforcement of these laws by the government sends a message that has a beneficial effect beyond what the government achieves directly by enforcement. Enforcement of antidiscrimination laws makes clear that racism will not be tolerated by our government.

The second set of programs that I suggest are social programs that are designed specifically to help the underclass to participate fully in the economy. Such programs need not be race-specific. I agree with the point sometimes made that the persons benefiting the most from some race-specific programs are those blacks, or other minorities, who are better off already. The programs we need in this area are ones geared toward the economically disadvantaged, regardless of race.

In this regard, I note in particular the programs outlined in a publication by the Joint Center for Political Studies entitled *Black Initiative and Governmental Responsibility*.[8] As I stated at the outset, program design is not my primary expertise, but among the things suggested in that document, and among the types of things that government should consider are redesigning public assistance programs to eliminate inappropriate interference

non-white groups similarly grew from 0.9 percent of the American population to 3.4 percent. In the year 2000, the population is projected to include 13.1 percent African-Americans and 4.3 percent other non-whites. *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 17 (110th ed. 1990).

7. *See* Donohue, *The Impact of Federal Civil Rights Policy on the Economic Status of Blacks*, 14 HARV. J.L. & PUB. POL'Y 41 (1991).

8. *See* JOINT CENTER FOR POLITICAL STUDIES, BLACK INITIATIVE AND GOVERNMENTAL RESPONSIBILITY: A POLICY FRAMEWORK FOR RACIAL JUSTICE (1987).

with two-parent families and to provide incentives for training, education, and employment. Similarly, the Head Start program,[9] which has been widely praised, could, and should, be expanded to serve all who qualify.

Turning to education, we should address the issue of financial aid in ways that encourage minority participation, and that of others who are economically disadvantaged, rather than discourage it. We should carefully consider the effects of program structure and incentives. We should avoid, for example, shifting to a program that issues loans instead of grants to student applicants, thereby inadvertently discouraging African-Americans and other minorities from participating in the program, because of their historically justified different perspectives on the real value to their investment in education. In short, programs must be carefully designed to ensure that they will produce the intended effects.

In conclusion, I wish to thank you for hearing me out and express my hope that we can draw on some of the positive suggestions offered by this panel to narrow the socio-economic gap between whites and African-Americans.

9. *See* 42 U.S.C. §§ 9831-9852 (1988). The statute extends authority for the appropriation of funds for Project Head Start, "[i]n recognition of the role which [the program] has played in the effective delivery of comprehensive health, educational, nutritional, social, and other services to economically disadvantaged children and their families . . . ." 42 U.S.C. § 9831(a) (1988).

THE SEPARATION OF RACE AND STATE

JENNIFER ROBACK*

My approach will be somewhat different from that of many of the other contributors. As the title of the panel suggests, much of the discussion has focused on the role of government policy in narrowing socio-economic gaps among the races. My approach will differ from the position that has come to be associated with many conservatives, and indeed with many of the other contributors to this Symposium. Some conservatives argue against current strategies to improve the socio-economic status of African-Americans on the ground that the current policies do not actually help minorities. I must confess that I do not find this line of argument appealing, for surely we could devise *some* set of policies that would effectively transfer wealth to minorities. Rather, I prefer to address a more basic question: What are the consequences of having *any* governmental system of wealth transfers among ethnic groups?

This question arises regardless of the effectiveness of any particular means of making the transfers. Once I have discussed the consequences of having government ethnic transfer policies, I will briefly discuss two related questions: Why have governments intervened so frequently in the non-economic relationships among ethnic groups? And why is it that race is so consistently politicized, even in America, where Martin Luther King's dream of a color-blind society resonates so strongly?

What are the consequences of having any policy of government wealth transfers among ethnic groups? Once there is in place a system that permits redistribution to some ethnic groups from others, the incentives for groups to organize themselves politically in order to obtain such transfers dramatically increase. This follows from the more general principle, demonstrated time and again, that whenever the government announces that one group or another may possibly be eligible to receive some kind of transfer, people will invest effort to obtain the transfers.[1]

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1. The following discussion is based upon my article, *Racism as Rent Seeking*, 27 ECON. INQUIRY 661 (1989).

This general phenomenon is known as rent seeking. Governments often create situations in which select individuals or groups can receive returns in excess of normal market returns or opportunity costs. These excess returns are known as rents. Once such a situation has been created by the political process, people become willing to invest resources and to compete to obtain the privilege of earning rents.[2]

The study of public choice has shown that small and narrowly concentrated interest groups are more likely to be effective at organizing to compete for rents than larger and more diffuse groups. This is because no one individual is willing to make the effort and expend the resources to organize the group, even when all the members of the group would benefit from organizing.[3] Ethnic groups, however, have certain natural advantages in the rent-seeking process. Their members are easily identified. Ethnic groups are often already organized for religious or cultural purposes. These organizational structures that are already in place can be utilized for political purposes, often at a lower cost than would be required to organize a political coalition from scratch.

Thus, once government begins transferring wealth based on race or ethnicity, it becomes advantageous for people to define themselves more sharply as ethnic groups. From an economic standpoint, the very existence of ethnic transfer programs alters the costs and benefits of defining oneself ethnically. As people define themselves as members of an ethnic group, they correspondingly define others as outsiders. In this way, the government can create incentives for race consciousness, even among people who initially felt no antagonisms toward each other. In fact, the late Professor W.H. Hutt argued that this was the central feature of South African apartheid:

> We do not, however, find in colour prejudice as such the main origin—nor, perhaps, even the most important cause of economic colour bars. The chief source of colour discrimination is, I suggest, to be found in the natural determination to defend economic privilege, . . . non-whites simply happening to be the essentially underprivileged groups in

2. The classic articles on rent seeking are Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224 (1967); and Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974). For a survey of the enormous theoretical and empirical literature, see Tollison, *Rent Seeking: A Survey*, 35 KYKLOS 575 (1982).

3. *See* M. OLSON, THE LOGIC OF COLLECTIVE ACTION (1971).

South Africa.[4]

The presence of ethnic-based rents also creates a necessity for legally defining who is or is not eligible for obtaining the rents. So, not only do the ethnic groups themselves have an incentive to define their boundaries more sharply, but the government itself must develop standards of group membership that can be impartially applied. The matter of categorization became important during the Jim Crow era,[5] as shown by the high volume of litigation to determine whether certain persons met the legal definition of "black."[6] Each state developed its own rules to determine what mixture of black ancestry constituted being black, for example, for the purpose of deciding which students were entitled to attend schools set aside for whites only.[7] Parents pursued litigation if they thought that their children might be "white enough" to clear the hurdles to obtain the privileged position of attending the superior schools for whites only.[8]

Problems of categorization arose in other contexts, as well. In *Plessy v. Ferguson*,[9] for example, Homer Plessy was chosen as the litigant because he appeared to be white.[10] Plessy's counsel argued that Louisiana's separate coach law deprived him of the

4. W.H. HUTT, THE ECONOMICS OF THE COLOUR BAR: A STUDY OF THE ECONOMIC ORIGINS AND CONSEQUENCES OF RACIAL SEGREGATION IN SOUTH AFRICA 27 (1964).

5. The Jim Crow era refers to the period of legalized separation of the races, which corresponds roughly to the period between the Supreme Court's decisions in Plessy v. Ferguson, 163 U.S. 537 (1896), and Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954).

6. *See, e.g.*, Mullins v. Belcher, 142 Ky. 673, 134 S.W. 1151 (1911) (holding that, under Section 187 of the Kentucky Constitution, which provided for separate schools for white and "colored" children, that the latter were those children whose "proportion of negro blood is one-sixteenth").

7. *See* P. MURRAY, STATES' LAWS ON RACE AND COLOR (1950). The 12 southern states had definitions of "black," "negro," or "colored" in their constitutions or statutes, or developed such definitions through case law. For example, the Mississippi Constitution defined negro or mulatto as "a person having one-eighth or more blood." MISS. CONST. art. XIV, § 263 (1890). Although Louisiana had no statutes providing a definition of "negro," the Louisiana courts developed case-law definitions. *See, e.g.*, State v. Treadway, 126 La. 300, 52 So. 500 (1910). *See also* C. MAGNUM, THE LEGAL STATUS OF THE NEGRO (1940). The first chapter of this work is entitled "What Is a Negro?", and gives a state-by-state listing of the relevant statutes and case law.

8. For evidence of the quality difference between schools for whites and schools for blacks, see Margo, *Race, Educational Attainment, and the 1940 Census*, 46 J. ECON. HIST. 189 (1986); R. MARGO, DISENFRANCHISEMENT, SCHOOL FINANCE, AND THE ECONOMICS OF SEGREGATED SCHOOLS IN THE UNITED STATES SOUTH, 1890-1910 (1985); and Smith, *Race and Human Capital*, 74 AM. ECON. REV. 685 (1984).

9. 163 U.S. 537 (1896).

10. *See Plessy*, 163 U.S. at 541 ("The petition for the writ of prohibition averred that Petitioner was seven eighths caucasian and one eighth African blood; that the mixture of colored blood was not discernable in him. . . .").

valuable property right of being known as a white person.[11]

It is easy to see that a government structure that allows transfers among ethnic groups alters the incentives to define oneself ethnically. If the net transfers go from blacks to whites, people will have an incentive to be defined as white, at least officially, and probably for more informal purposes as well. If the net transfers go from whites to blacks, this fact increases the incentives for black nationalism and separatism.

One conclusion that might be drawn from this discussion is that governmental income transfers among ethnic groups should be prohibited. And this is a conclusion that I certainly support, believing as I do that government should not be in the business of encouraging ethnic divisiveness and separatism.[12] The problem is deeper and more general, however, than a simple prohibition on quotas or on ethnic set-aside programs, because the modern American state creates rents in a wide variety of areas, and provides transfers to numerous groups within society. I contend that these rents and transfers, too, need to be examined for their impact on the socio-economic gap between the races, and for their impact on the political relations among the races.

Why do I say this? First of all, many of the numerous forms of regulations, licensing requirements, quotas, and the like, provide rents to someone in the economy. The existence of these rents induces rent-seeking activity, as described above; that is, the existence of returns in excess of opportunity costs creates a queue of people trying to obtain those returns. The very existence of the queue often allows those with responsibility for allocating the rents the opportunity to indulge their private preferences.[13] That is, regulators who allocate scarce

11. *See id.* (petition stated that Plessy "was entitled to every right, privilege and immunity secured to citizens of the United States of the white race").

12. I argue elsewhere, however, that a more fundamental problem is to recognize that both separateness and integration are of value to people in different contexts. The more difficult question is how to determine the relative amounts of separation and integration that would be desirable, from the point of view of the participants themselves. For a preliminary attempt to address some of these issues, see Roback, *Plural but Equal: Group Identity and Voluntary Integration*, 8 SOC. PHIL. & POL'Y — (forthcoming 1991).

13. This argument has long been made with respect to the allocative effects of the minimum wage. For a survey of the literature regarding this issue, see Brown, Gilroy & Kohen, *The Effect of the Minimum Wage on Employment and Unemployment*, 20 J. ECON. LITERATURE 487 (1982). For an earlier, more focused treatment, see Welch, *Minimum Wage Legislation in the United States*, 12 ECON. INQUIRY 285 (1974).

political resources are probably more likely to allocate them to their friends, relatives, or neighbors—or, more generally, simply to people with whom they are familiar and comfortable. It would not be surprising if many of these people proved to be of the same ethnic background as the regulator. This type of bias could exist quite independently of anyone's conscious intention.

Similarly, regulations that are neutral on their face may prove to have a disparate impact on different groups. Something of this kind seems to have resulted from the maximum-hours restrictions for woman workers: These restrictions had a disproportionate impact upon immigrant women.[14]

Many conservatives disdain affirmative action and minority set-asides as nothing but income transfers to African-Americans. And indeed, these programs certainly can be viewed in that light. Blacks are not the only Americans to whom transfers flow, however. Blacks did not invent the rent-seeking process; in fact, it is not even clear that they are net beneficiaries, all rent transfers considered. So long as the timber companies are unwilling to give up the subsidized Forest Service, so long as the teachers' unions are unwilling to give up the taxpayer-supported Department of Education, why should African-Americans give up the Equal Employment Opportunity Commission? I can think of no particular reason why ethnic minorities should be the first groups in the economy to give up their rents.

The general problem is that the creation and seeking of transfers is deeply imbedded in modern American political life. In my view, this process has particularly devastating consequences when ethnic groups are among the rent seekers. But it is quite unrealistic, not to mention unfair, to expect ethnic groups to demure voluntarily from the process of seeking government transfers when so many other groups are engaged in the same process.

In this sense, the transfer society has the characteristics of a Prisoners' Dilemma problem.[15] If a system of transfer creation is in place, it is in each group's interest to try to obtain its

14. *See* Landes, *The Effect of State Maximum-Hours Laws on the Employment of Women in 1920*, 88 J. POL. ECON. 476 (1980).

15. The literature on the Prisoners' Dilemma problem is vast. For a textbook treatment of the problem, see D. KREPS, A COURSE IN MICROECONOMIC THEORY 503-50 (1990).

share. Groups that do not participate in the scramble for rents are left behind with what has been colorfully called the "sucker's payoff." On the other hand, everyone would be better off if the entire transfer process could somehow be stopped. No one, however, is willing to take a unilateral step toward ending the mutual destruction.

The problem of governmental intervention into race relations extends beyond the simple transfer of wealth and income. Often, governments have intervened in areas that are not usually associated with pure income transfers. For example, many of the segregation ordinances of the Jim Crow era do not appear to have transferred wealth, as ordinarily understood.

One obvious question is why these non-wealth transfer interventions arose. Why, for instance, did municipalities in so many southern states pass streetcar segregation laws? From my reading of the records of the introduction of streetcar segregation laws, I found that, in many cities, streetcar companies resisted these laws because providing separate cars and sections was too expensive.[16] The companies also feared the loss of revenue that might arise as irate black passengers boycotted the cars. In some cities, even the white passengers seemed almost indifferent to such ordinances.

Who, then, wanted these laws badly enough to work for their passage? The answer seems to be that ambitious politicians could appeal to a prejudiced white constituency that might want segregation, but not badly enough to bear its costs themselves. By passing a segregation law, the politicians could impose costs on groups that did not have much political impact: streetcar companies, which were regulated utilities that everyone loved to hate; and black passengers, who were by this time disenfranchised as voters.

Therefore, the reason that governments so often intervene in the non-economic relations among ethnic groups is very similar to the reason that they intervene in economic relations. So long as the political system is available to ethnic entrepreneurs to make their constituencies better off, the temptation to do so is almost irresistible. The streetcar segregation laws alluded to above were passed in the 1890s and early 1900s, after the Supreme Court had clearly ruled that politically created segre-

16. *See* Roback, *The Political Economy of Segregation: The Case of Segregated Streetcars*, 46 J. ECON. HIST. 893 (1986).

gation was permissible.[17] Not coincidentally, black voters had been disenfranchised by this time, as well.[18] In our own time, the government has made a commitment to ending the inequalities created in the Jim Crow period and thereafter. The difficulty with this commitment is that it makes the tools of politics available to a very broad class of ethnic entrepreneurs. Indeed, the availability of political mechanisms for realigning the relations among the races creates incentives for these entrepreneurs to broaden and expand the interpretation of the moral mandates of the civil rights movement.

The consistent politicization of race in the United States is somewhat astonishing, if one were to consider the loftiness of our founding documents, and the fact that Martin Luther King's dream of a color-blind society continues to resonate so deeply with us. But the politicization of race is not so astonishing once one considers the incentives we have unwittingly created for the process to continue. I repeat my earlier comment: African-Americans did not invent the game of American politics, with all of its transfer seeking and creation. African-Americans are simply playing by the rules that were created long before their active participation in American political life.

If we are ever to escape the cycle of one group being on top and the next group trying to catch up, we need to restrain ourselves in the ordinary course of politics. I do not believe that Congress or the Supreme Court can ever achieve this restraint independently of the people. Ultimately, all of the groups in society will have to agree that the costs of devouring one another are too high. I hope that, through forums like this, people will begin to think in these terms, and truly reach the ideal of the separation of race and state.

17. *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

18. *See generally* J. KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH; 1880-1910 (1974).

PANEL III: THE EFFECTS TEST—FORCED QUOTAS OR ELIMINATION OF RACISM?

INTRODUCTION: THE AGE OF AMBIGUITY

LAWRENCE J. SISKIND*

Please indulge me for a moment while I offer a quasi-autobiographical note. I was pleased to find in the Federalist Society brochure a section entitled "What People Are Saying About the Federalist Society," in which famous people speculated about the power and influence of the Federalist Society. A reference from *The New Republic* caught my eye: "The Federalist Society has evolved from a group of libertarian law students chatting over dinner into the right's primary instrument for capturing the legal establishment."[1] I regard myself as a relic of history. I was one of those libertarian law students chatting over dinner, before there was a Federalist Society, about how to capture the legal establishment or, failing that, how to secure high-paying jobs in the establishment. That was in 1978 when Spencer Abraham and about ten others of us in the Harvard Law School class of 1978 started the *Harvard Journal of Law & Public Policy*.[2]

Even then, in those pre-Evolutionary days, we perceived the need for an organization to supplement and strengthen the *Journal*. Yet we could not even agree on a name. Those of us chatting over dinner were actually a mixed group of traditional conservatives, judicial strict constructionists, and libertarian-objectivists. I suggested we become known as the Burke, Bork & Roark Society, but that was voted down as being too long for Harvard students to remember, let alone pronounce. Four years would pass before we could agree on a name, the Society could get started, and we could set about capturing the legal establishment.

The topic of this panel is the effects test. Let us move for a moment from the realm of the lawyer to that of the layman. To one unversed in legal theory, the history of the civil rights

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1. Coulson, *Federalist Pipers; Federalist Society*, THE NEW REPUBLIC, Dec. 1, 1986, at 23.
2. *See* Abraham & Eberhard, *Preface*, 1 HARV. J.L. & PUB. POL'Y v (1978).

movement might appear as follows. After World War II, in the late 1940s and 1950s, civil rights activism began to percolate just beneath the surface of public awareness. In the early 1960s, it erupted, becoming the focus of public attention. That decade marked a period of relatively easy moral identification. By that, I mean it was easy to distinguish the heroes from the villains. On the one hand, there were Martin Luther King, Jr., Rosa Parks, and Medgar Evers. On the other hand, there were Bull Connor, filibustering southern senators, and Klansmen. Some refer to this period in our history as the Romantic Age of Civil Rights. At some indiscernible point, however, the issues began to lose their sharp moral focus. Aligning the cast of civil rights characters into two camps became problematic. Before anyone realized it, the Romantic Age had passed into the Age of Ambiguity.

Returning now to the legal realm, I submit that the location for this pivot in civil rights history might well be the 1971 United States Supreme Court decision, *Griggs v. Duke Power Co.*[3] In *Griggs*, the Supreme Court for the first time held that there could be liability under a civil rights statute for conduct that was not intentionally discriminatory. Indeed, from what we can glean from the decision, some of the defendant's employment policies were benevolent and progressive.[4] Nonetheless, the Court unanimously held that where a company's employment practices operate to exclude a protected minority group, and where that company fails to show that the practices in question are significantly related to job performance, then good intentions or the absence of discriminatory intent will not shield the company from liability.[5]

By a process of social osmosis, issues decided at the judicial level filter down to public perception. After *Griggs*, the perception grew in the public mind that the Romantic Age of Civil Rights, if not over, was at least coming to an end. The villains were no longer easily identifiable. Instead, corporations or individuals following morally neutral practices might be held liable. In other words, liability had been divorced from immorality.

3. 401 U.S. 424 (1971).

4. *See Griggs*, 401 U.S. at 432 ("The Company's lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training.").

5. The actual vote was eight-to-zero. Justice Brennan did not participate.

Persuasive arguments can be made for and against the effects test that grew out of *Griggs*. A unanimous Supreme Court would not lightly adopt a test that some might think jettisoned the moral element of the civil rights movement. In presenting *Griggs* as a possible pivot, I do not personally take a position. That is not my role as moderator. Instead, I intend to lay a groundwork for the discussion that follows.

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964: FROM PROHIBITING TO REQUIRING RACIAL DISCRIMINATION IN EMPLOYMENT

LINO A. GRAGLIA*

The modern law of racial discrimination began with the Supreme Court's decision in *Brown v. Board of Education of Topeka*,[1] which prohibited compulsory racial segregation in public schools. It soon became clear that *Brown* stood for the principle that all racial discrimination by government is unconstitutional.[2] The principle that government should not discriminate on the basis of race—a principle strengthened by the Hitler experience—proved so appealing as to be irresistible. It led, against all odds, to a civil rights revolution, and to the enactment of the Civil Rights Act of 1964,[3] the greatest civil rights legislation in our history. In the 1964 Act, Congress adopted and ratified the *Brown* nondiscrimination principle and extended it to almost all areas of public life, including discrimination by private persons in places of public accommodation[4] and employment.[5]

The history of the law of racial discrimination since the 1964 Act, however, is the history of a Supreme Court-led counterrevolution. The Court has converted the *Brown* nondiscrimination principle and the various provisions of the Act that embodied it into essentially their opposites: authorizations or even requirements of racial discrimination. The Court has never admitted (indeed, it has always denied) that it was mak-

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1. 347 U.S. 483 (1954) (*Brown I*).

2. *See* Bolling v. Sharpe, 347 U.S. 497 (1954) (racial discrimination in public schools by the federal government violates the Due Process Clause of the Fifth Amendment). *See also* Holmes v. City of Atlanta, 223 F.2d 93 (5th Cir.), *rev'd per curiam*, 350 U.S. 879 (1955) (municipal golf courses); Mayor and City Council of Baltimore v. Dawson, 220 F.2d 386 (4th Cir.), *aff'd per curiam*, 350 U.S. 877 (1955) (public beaches and bath houses); Gayle v. Browder, 142 F. Supp. 707 (M.D. Ala.), *aff'd per curiam*, 352 U.S. 903 (1956) (buses).

3. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.).

4. *See* 42 U.S.C. § 2000a (1988) (Title II).

5. *See id.* § 2000e (Title VII).

ing such a change, always insisting that it was merely continuing to enforce the *Brown* principle. The result is that a regime of permissible or compulsory racial discrimination has been established by the Court in the name of enforcing constitutional and statutory prohibitions against such discrimination, a judicial feat without parallel in the history of law.[6]

Like the revolution itself, the civil rights counterrevolution began with the schools. With the 1964 Act, the era of "all deliberate speed"[7] was over. Compulsory school segregation quickly came to an end throughout the South and compliance with *Brown* was finally achieved. The end of compulsory racial segregation in the schools did not result, however, in a high degree of racial integration in the schools. Residential racial concentration meant that racial separation in the schools would continue to exist in the South as it had always existed in the North—one-race neighborhoods necessarily produce one-race neighborhood schools.[8] The triumph of *Brown*, therefore, was found dissatisfying, and the Supreme Court—widely perceived more as a moral leader than as a Court, as a result of *Brown*—succumbed to the urgings of many that it undertake a new crusade. The crucial move from prohibiting segregation to requiring integration—compulsory racial discrimination in the name of enforcing a prohibition against racial discrimination—was made in the 1968 case of *Green v. County School Board of New Kent County*.[9] The Court held that the complete elimination of racial discrimination from the operation of a school system no longer constituted compliance with *Brown* when all-white and, more significantly, all-black schools continued to exist. *Brown*, it appeared, was now to be understood not as prohibiting, but as *requiring* racial discrimination by government when necessary to achieve a high (though undefined) degree of school racial integration or "balance."

The Court's new requirement was not identified and justified as a requirement of integration for its own sake, however, which would have been applicable everywhere, but as a require-

6. *See* Graglia, *The "Remedy" Rationale for Requiring or Permitting Otherwise Prohibited Discrimination: How the Court Overcame the Constitution and the 1964 Civil Rights Act*, 22 SUFFOLK U.L. REV. 569 (1988).

7. Brown v. Board of Educ. of Topeka, 349 U.S. 294, 301 (1955) (*Brown II*).

8. *See* Bickel, *The Decade of School Desegregation: Progress and Prospects*, 64 COLUM. L. REV. 193 (1964).

9. 391 U.S. 430 (1968).

ment of "desegregation," which would presumably be applicable only in the South.[10] This enabled the Court to avoid the politically impossible task of qualifying *Brown* as prohibiting official racial discrimination only when it is used to separate the races, not when used to mix them. It also enabled the Court to avoid having to justify a constitutional requirement of integration in terms of expected benefits; the Court's justification—inaccurate as a matter of fact and senseless as a matter of policy—was, instead, that it was merely "remedying" (undoing) the compulsory segregation that was prohibited by *Brown*.

Three years later, the Court carried *Green* to its logical conclusion in *Swann v. Charlotte-Mecklenburg Board of Education*.[11] In *Swann*, the Court held, incredibly, that "desegregation" requires that public school children be excluded from their neighborhood schools because of their race and transported across large school districts to achieve a near-perfect racial balance. Title IV of the 1964 Act, however, defines "desegregation" as "the assignment of students to public schools . . . without regard to their race," and adds (just to be doubly sure) that desegregation "shall not mean the assignment of students to public schools in order to overcome racial imbalance."[12] The Act goes on to insist, still again, that it does not authorize federal courts to order the transportation of students for racial balance.[13] Despite these caveats, in *Swann*, a unanimous Supreme Court held that court-ordered assignment and transportation of children to schools by race to increase racial balance were not inconsistent with the Act. "Congress," the Court said, without citation and without the slightest basis in fact, "was concerned that the Act might be read as creating a right of action under the Fourteenth Amendment in the situation of so-called 'de facto segregation' . . . ."[14] If this brazen defiance of congressional intent did not constitute an impeachable offense—as indicated by the fact that the protests of Senator Sam Ervin and other representatives of the South got nowhere in Congress[15]—then the Court had nothing to fear as it turned its

10. *See* L. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS (1976).

11. 402 U.S. 1 (1971).

12. 42 U.S.C. § 2000c (1988).

13. *See id.* § 2000c-6.

14. *Swann*, 402 U.S. at 17.

15. *See* L. GRAGLIA, *supra* note 10, at 307 n.51.

attention to the Act's other titles. On moral crusades, morality is often the first casualty.

The Court then did to Title VI of the 1964 Act what it had done to Title IV in *Green* and *Swann*. In *Regents of the University of California v. Bakke*,[16] the Court held that Title VI's requirement that "no person" be discriminated against on grounds of race by institutions receiving federal funds did not apply to discrimination against whites. The Court similarly perverted Title VII in *Griggs v. Duke Power Co.*[17] and *United Steelworkers v. Weber*.[18] In *Griggs*, the Court held that Title VII's prohibition of racial discrimination in employment does not mean that employers must ignore race in setting employment qualifications, but that they must take race into account, and that they may be required to eliminate standard employment criteria that blacks as a group find difficult to meet, even though sufficient numbers of whites meeting the criteria are available. In *Weber*, the Court carried this "affirmative action" approach to its logical conclusion by holding that Title VII does not prohibit racial discrimination against whites.[19] In the tradition of *Swann* and *Bakke*, Justice Brennan explained for the Court that a ruling in direct conflict with the plain terms of the Act may nonetheless be required by its "spirit."[20]

Griggs established the "adverse impact" or "effects" test for prohibited racial discrimination, disallowing the use of employment criteria that proportionately more blacks than whites cannot meet, unless the employer can prove to the satisfaction of various administrative agencies and the courts that the criteria are "job-related."[21] Opponents of *Griggs* contend that racial discrimination cannot properly be found on the basis of the use of nonracial criteria unless a finding of a "racially discriminatory intent" is made. The distinction between the effects test and the intent test is not, however, as clear as it might seem at first glance.

A racially discriminatory act is, quite simply, an action taken on the basis of race. Racial discrimination is, of course, most easily found when it is explicit, that is, when the challenged act

16. 438 U.S. 265 (1978).
17. 401 U.S. 424 (1971).
18. 443 U.S. 193 (1979).
19. *See Weber*, 443 U.S. at 208.
20. *Id.* at 201.
21. *Griggs*, 401 U.S. at 431.

is based on a rule or requirement that "on its face" classifies on the basis of race. It is not reasonable to insist, however, that racial discrimination can properly be found only where it is explicit. An employer could not, for example, without good reason, refuse to hire all applicants living in a defined residential area that happened to be all black, even though the explicit discrimination would be solely in terms of geography. In such a case, an effects theorist would find prohibited racial discrimination on the basis of unjustified disparate impact. An intent theorist would undoubtedly also find racial discrimination, but only after first finding a racially discriminatory intent. That intent, however, could and should be found on the basis that the geographic discrimination has a disparate racial impact and apparently cannot be justified as a criterion for employment. This is, of course, the same as the effects test.

Purporting to make the legal consequences of acts turn on the actor's purpose or intent is, in this area as elsewhere, highly problematic. The issue is not whether the actor meant to do what he did (the setting of employment qualifications is always deliberate), but rather why he did what he clearly meant to do. The search is for the "subjective intent" or state of mind. This search raises serious questions about exactly what is being looked for, how to go about looking, and what the purpose of the search is. Modern psychology teaches that it is often difficult to know one's own motives, much less those of another individual or, even worse, of a group. The fact that the "philosophy of mind" is a major branch of philosophical study may be taken as a sufficient indication that it is a mysterious subject involving a possibly nonexistent entity.[22]

The law usually handles supposed issues of subjective intent by stating that rational adults are presumed to intend the natural and foreseeable consequences of their acts (indeed, in what sense can one be said not to intend consequences one knowingly brings about?). But this, of course, is to introduce the issue of intent only to eliminate it, to make legal consequences in fact turn only on conduct. *Personnel Administrator v. Feeney*[23] illustrates this difficulty. In *Feeney*, the Court attempted to give meaning to a supposed requirement of "discriminatory purpose" by stating that it "implies more than intent as volition or

22. *See, e.g.*, G. RYLE, THE CONCEPT OF MIND (1949).
23. 442 U.S. 256 (1979).

intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' and not merely 'in spite of,' its adverse effects upon an identifiable group."[24] In other words, the issue is not whether the actor deliberately brought about a particular result, but whether he desired or deplored (though obviously not enough to refrain from the act) the result that he caused. But why should a state of mind, whatever that may be, be determinative? The law has enough to do in regulating conduct on the basis of its objective effects without also seeking to regulate on the basis of "mental states." Why should an employer's use of an educational qualification that works to upgrade the work force, but also to exclude blacks disproportionately, be legal if the employer is a member of the NAACP, but not if he is a member of the Ku Klux Klan?

The true difference between an effects test and an intent test is the different level of justification proponents of the tests typically demand for employment criteria having disparate racial impact. The effects theorist would require justification of such criteria by the employer, and make justification difficult or virtually impossible. The intent theorist would find standard employment criteria presumptively valid, requiring no justification. Those who seek to expand employer liability under Title VII by expanding the definition of racial discrimination to include "unjustified disparate impact" will necessarily adopt a very restrictive view of justification. It is an inherent drawback of civil rights legislation that those who will want to enforce it will also want to expand its coverage, with the virtually invariable result that a needed social reform becomes a socially destructive force.[25]

The tragedy of the Civil Rights Act of 1964 is that it fell into the hands of bureaucrats and judges who saw the total aboli-

24. *Feeney*, 442 U.S. at 279.

25. *See* Glazer, *Is Busing Necessary?*, COMMENTARY, Mar. 1972, at 39, 39:

> It is the fate of any social reform in the United States—perhaps anywhere—that, instituted by enthusiasts, men of vision, politicians, statesmen, it is soon put into the keeping of full-time professionals. This has two consequences. On the one hand, the job is done well. The enthusiasts move on to new causes while the professionals continue working in the area of reform left behind by public attention. But there is a second consequence. The professionals, concentrating exclusively on their area of reform, may become more and more remote from public opinion, and indeed from common sense. They end up at a point that seems perfectly logical and necessary to them—but which seems perfectly outrageous to almost everyone else.

tion of racial discrimination by government and business as much too limited a goal, and saw proportional representation by race in all institutions and activities as a more desirable objective. One example of this attitude can be seen in the actions of the Equal Employment Opportunity Commission (EEOC), which is, among other government entities, responsible for administering Title VII. For some years, the EEOC was directed by Eleanor Holmes Norton, to whom attempts to justify employment criteria disparately impacting blacks were little more than devices by which employers sought to circumvent *Griggs* and deny blacks employment.[26] Unfortunately, the continued objective of the civil rights bureaucracy, aided and abetted by judges equally eager to improve on the work of Congress, is to make justification so difficult and expensive as not to be feasible or worthwhile, and to give employers no realistic choice except to hire a minimum quota of blacks in all positions. The objective, in other words, is not to *prevent*, as authorized by law, but to *require* the practice of racial discrimination.

On the other hand, intent theorists who are genuinely interested in preventing racial discrimination would hold that standard employment criteria, such as literacy, verbal and arithmetical skills, educational qualifications, and absence of a record of criminal convictions, are ordinarily so obviously justified as to require no further justification. There can be no doubt that employers reasonably may and usually will prefer literate to illiterate employees, for example, regardless of the duties of a particular job, and totally apart from any consideration of race. Literate employees may reasonably be assumed to

26. *See* Lerner, *Employment Discrimination: Adverse Impact, Validity, and Equality*, 1979 SUP. CT. REV. 17, 40 n.62 (quoting Eleanor Holmes Norton at an EEOC meeting on December 22, 1977):

> "It is clear that the employers around the country are increasingly sophisticated in the validation of tests. . . . We do not see, however, comparable evidence that validated tests have in fact gotten black and brown bodies, or for that matter, females into places as result of the validation of those tests. . . . So if the commission, in effect, says to employers, as long as you validate your tests we're really not concerned about you anymore, I believe, in effect, it is saying that the presence of real people who are not in the work force, is not as important as making sure that the tests have been validated. Therefore, I see some very positive advantages, I must say, in encouraging an employer to look at what the ultimate goal is. That is to say, did your work force have some minorities and females before the test was validated or does it have any appreciable number now that the test has been validated? And if you really don't want to go through that, but you are interested in getting excluded people in your work force, we would encourage you to do so."

be better employees, regardless of their particular positions, because, for example, it may make them eligible for advancement to higher positions. Such employment criteria, therefore, can never properly be held to constitute racial discrimination. A judge who holds otherwise is simply usurping the employer's power to set employment qualifications, and making a policy judgment that the employer's interest in efficiency should be sacrificed in the interest of increased employment opportunities for blacks. The *Griggs* decision permitting such a holding is the result not of a good faith effort to enforce Title VII, but of the determination of the Justices to convert Title VII into what Congress had explicitly assured the country it would not be, a requirement of racial preferences in employment.[27]

Although *Griggs* converts Title VII from a nondiscrimination to a compulsory discrimination measure, Congress has not acted to disavow that result. Instead, following the Court's lead, Congress in 1977 enacted for the first time an "affirmative action" racial quota measure of its own, requiring racial preferences in awarding federally funded public works projects.[28] Racial preferences, therefore, can no longer be condemned simply as the product of judicial misbehavior—although they almost surely would not exist except for judicial misbehavior, as in *Bakke*—they must be considered on their own merits.

America can be said to have been born not only in glory as a land of freedom, but also in sin as a land of slavery. Racial prejudice remains our most serious and intractable domestic problem, an ominous cloud overhanging American freedom and prosperity. Our peace and security, to say nothing of our ideals, require that we act to improve the situation of the black underclass. Doing so requires finding a means to improve their employment opportunities, because both blacks and whites must be given the opportunity to prosper. The granting of racial preferences in employment, however, will almost certainly hinder rather than advance that objective. Racial preferences necessarily make our industries less competitive in an increasingly competitive world. Increased employment opportunities for those at the bottom of the economic ladder require that we

27. *See* Cooper, Wards Cove Packing Co. v. Atonio*: A Step Toward Eliminating Quotas in the American Workplace*, 14 HARV. J.L. & PUB. POL'Y 84 (1991).

28. *See* Public Works Employment Act of 1977, 42 U.S.C. §§ 6701, 6705-6708, 6710 (1988). The Act was held to be constitutional in Fullilove v. Kluztnick, 448 U.S. 448 (1980).

remain competitive. More important, what blacks in lower economic classes require most, like everyone else, is respect: both self-respect and the respect of others. Granting racial preferences undermines the ability of blacks to attain such respect.

Perhaps the most serious consequence of racial preferences, however, is that their justification requires continuing insistence that America is a racist nation, and that blacks cannot expect or be expected to succeed on their own merits. This is not only untrue but is also the worst message society could convey. It teaches that ambition, self-discipline, responsibility, and effort are not relevant to black success, that the most important studies for blacks are studies insisting on their victimization, and that the skill they most need to acquire is skill in protest. Such teaching is a prescription for black self-destruction and for the incitement of racial conflict in which blacks cannot ultimately prevail.

I do not believe that racial preferences and quotas can ever be made acceptable to the vast majority of the American people. It may be an inherent defect of policy recommendations by professors of constitutional law that they tend, along with other academics, to be so high-minded and self-sacrificing—having abandoned pursuit of personal gain in the interest of public service—that they lose touch with the mass of their less elevated fellow citizens. I differ from my professional colleagues in accepting the propriety of the pursuit of self-interest, if for no other reason than that it is inevitable. Despite their insistence that America is a racist nation, proponents of racial preferences seem simultaneously to assume a level of altruism or, at least, of acceptance of racial guilt on the part of most Americans that I am sure does not exist. The imposition of racial preferences in employment, therefore, can serve only to create the interracial hostility that proponents of preferences assert already exists and use to justify such preferences. The result is a vicious and potentially disastrous cycle of racial hostility.

The only good news I can offer is that this problem is not really difficult to solve. As with so many of our problems, all that is necessary is the repeal of legislation. Nearly one million employment discrimination claims were filed with the EEOC between 1965 and 1983, more than 175,000 settlements were reached in the administrative process, nearly 60,000 lawsuits were filed, and these figures, it is said, "only begin to suggest

the social effects generated by Title VII."[29] What these figures most clearly suggest is that the principal social effect generated by Title VII, as revised by the Supreme Court in *Griggs*, is virtually endless employment opportunities for lawyers. If a better world is a world with fewer lawyers, to repeal Title VII would be to make a significant improvement in human welfare. Racial discrimination in employment is undoubtedly a very bad thing, but that does not establish that a law against it is needed or, on the whole, useful.

But the repeal of Title VII is, of course, entirely wishful and unrealistic. There is no possibility that Title VII (or any other "civil rights" measure) will be repealed. On the contrary, Congress and the President are moving to undo the Supreme Court's recent efforts to put modest limits on the racially discriminatory effects of *Griggs*.[30] The bad news is that there is no guarantee that this nation will survive, and if it tears itself apart in the near future, it will surely be because of the enhanced racial consciousness and conflict that is the inevitable result of our present course on "civil rights." Perhaps America will then finally have paid the full price for the terrible mistake of bringing in Africans in chains.

29. Blumrosen, *The Legacy of* Griggs*: Social Progress and Subjective Judgments*, 63 CHI.[-]KENT L. REV. 1, 2 (1987).

30. *See* Civil Rights Act of 1990, H.R. 4000, 101st Cong., 2d Sess. (1990); S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. S1019-20 (daily ed. Feb. 7, 1990). The Civil Rights Act of 1990, as passed by Congress, was vetoed by President Bush on October 22, 1990, Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1632 (Oct. 22, 1990). The Act's provisions would, *inter alia*, overrule several of the Court's decisions that attempt to place limits on the reach of *Griggs*, including Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989).

PROVING DISCRIMINATORY INTENT IN CONSTITUTIONAL LAW DISPARATE IMPACT CASES

WILLIAM COHEN*

I decided to prepare for this symposium by learning something about the Federalist Society, so I read its brochure. The brochure states emphatically that the province and duty of the judiciary is to say what the law is, not what the law should be. This dictum immediately reminded me—pardon the analogy—of the French Revolution.

One of the concerns of the French Revolution was to do something about the judges of the *Ancien Regime*.[1] The French revolutionaries saw the judges as tools of the ruling class who had distorted all legal decisions so that France no longer possessed a government ruled by law.[2] Consequently, the first French Constitution forbade French judges to interpret the law.[3] The constitution authorized the judiciary simply to apply the law. If any question arose as to what the law was, judges were to consult the legislature. This scheme, of course, was utopian. The body within the legislature designed to advise the judges, the Cassation, quickly became the Supreme Court of France.[4] This Eighteenth-Century controversy demonstrates

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1. *See generally* A. SOBOUL, THE FRENCH REVOLUTION, 1787-1799: FROM THE STORMING OF THE BASTILLE TO NAPOLEON (A. Forest & C. Jones trans. 1st ed. 1975).

2. *See id.* at 88-91.

3. The first French Constitution stated:

> When, after two cassations, the judgment of the third court is protested in the same manner as the first two, the question may not be discussed further in the Court of Cassation without having been submitted to the legislative body, which shall pass a decree declaratory of the law, to which the Court of Cassation shall be required to conform.

FR. CONST. tit. III, ch. V, § 21 (1791), *reprinted in* J. STEWART, A DOCUMENTARY SURVEY OF THE FRENCH REVOLUTION 256 (1951).

4. The first French Constitution commissioned the Court of Cassation in these words:

> A single Court of Cassation for the entire kingdom shall be established near the legislative body. Its functions shall be to pronounce:
>
> Upon petitions in cassation against judgments rendered in the last resort by the courts;
>
> Upon petitions for removal from one court to another because of legitimate suspicion;
>
> Upon rulings of judges and suits against an entire court.

FR. CONST. tit. III, ch. V, § 19 (1791), *reprinted in* J. STEWART, *supra* note 3, at 256.

the extreme difficulty in distinguishing what the law is from what the law should be.

When arguments exist on both sides of an issue, partisans often express their argument in the strongest terms and ignore any opposing position, regardless of its strengths and merits. The topic of this panel recalls the old story of the rabbi serving as a religious judge who listened to both sides' arguments. The plaintiff argued and the rabbi said, "You're right." Then the defendant argued and the rabbi said, "You're right." The two litigants then said, "But rabbi, we can't both be right," and the rabbi said, "You're right." Here, something *can* be said for both sides.

A sketch of the polar arguments will help. If courts examine all practices that cause a disparate racial impact and then require very difficult standards of justification, frequently racial allocations will result. Under such a regime, failure to achieve proportional racial representation will often be invalidated. The strongest argument against racial allocations is that ours is a society where people should be judged on individual merit. A system allocating goods or services on the basis of race, it is argued, moves us in exactly the wrong direction. The fact that the Civil Rights Act of 1990[5] carefully avoided any reliance on a theory of affirmative action indicates public acceptance of this side of the argument.

On the other hand, if courts require a finding of a formal racial classification or a subjective purpose to discriminate, a large number of instances of racial discrimination will pass undetected and remain uncorrected. Employers may indeed—consciously or unconsciously—use employment practices that discriminate. A law forbidding racial discrimination will be unenforceable if it always requires case-by-case proof of discrimination. An emphasis upon the bottom line—the results—is often necessary to eliminate discrimination.

When analyzing constitutional law on this topic, arguments can be drawn from the same doctrine to support both approaches. On the one hand, "suspect classification" doctrine is

5. H.R. 4000, 101st Cong., 2d Sess. (1990); S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. S1019-20 (daily ed. Feb. 7, 1990). The Civil Rights Act of 1990, as passed by Congress, was vetoed by President Bush on October 22, 1990, Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1632 (Oct. 22, 1990).

grounded in the notion that decisions ought to be based on individual attributes and not on group identifications.[6] A constitutional doctrine that requires proportional racial representation is inconsistent with this basis of the suspect classification doctrine.[7] On the other hand, suspect classification doctrine is also based on "smoking out" impermissible purposes by requiring some justification for decisions based on questionable criteria.[8] A results test may be the only practical method to detect hidden racial bias.

The Supreme Court has taken a mixed approach to this question. In *Washington v. Davis*,[9] the Supreme Court endorsed an "intent" test, refusing to extend the "results" approach of *Griggs v. Duke Power Co.*[10] to the equal protection context. Does that settle the controversy? Not really. Constitutional law is like a waterbed. If one pushes a lump down somewhere, it will come up somewhere else. Despite the fact that *Davis* seemingly decided against an impact or results test, the question of how to prove the requisite forbidden intent remains. A professor of evidence could not understand the crazy quilt of cases in the Supreme Court that have dealt with this issue. The requirements to prove discriminatory intent differ for different categories of cases.[11] These cases demonstrate a pattern that indicates that some truth lies on both sides of the equation.

The key to this mystery lies in one of the examples the Court used in *Davis*. In the opinion of the Court, Justice White described a wide range of situations in which one must prove in-

6. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-6, 16-13, 16-14, 16-23, 16-24 (2d ed. 1988). *See also* Graham v. Richardson, 403 U.S. 365, 371-72 (1971).

7. *See* L. TRIBE, *supra* note 6, § 16-22.

8. *See* J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 145-70 (1980).

9. 426 U.S. 229, 240 (1976) ("[T]he invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.").

10. 401 U.S. 424, 430 (1971) ("Under [Title VII], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.").

11. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279 (1987) (although murderers of white persons were more than four times as likely to receive the death penalty as murderers of black persons, plaintiff failed to show that imposition of the death penalty in his case was racially motivated); Hunter v. Underwood, 471 U.S. 222 (1985) (striking down provision of Alabama Constitution disenfranchising people convicted of crimes of moral turpitude, which provision had a racially disparate impact, on the basis that the 1901 Alabama Constitutional Convention, which adopted the provision, convened with the stated purpose "to establish white supremacy in this state"); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (refusal to rezone to permit racially integrated, low and moderate income housing did not demonstrate requisite racially discriminatory intent).

vidious intent to make out a prima facie case.[12] The exclusion of blacks from criminal trial jury panels was one example.[13] Justice White said that no constitutional violation could be shown unless blacks had been consciously and systematically excluded.

Interestingly, that was not—and is not—the law. The constitutional focus of courts on this issue has moved from the Fourteenth Amendment's Equal Protection Clause[14] to the Sixth Amendment's guarantee of trial by jury.[15] The Sixth Amendment requires, at least in terms of the trial jury panel, a representative jury. The constitutional right to a trial by jury is thus a right of representation. Hence, a failure of representation demonstrates that there has been a Sixth Amendment violation.[16]

A number of other rights that have been described as equal protection rights—although less clear than Sixth Amendment rights—also appear to be rights of representation. The cases that have focused on impact as sufficient proof of discrimination in violation of the Fourteenth Amendment involve rights that take on the appearance of representational rights.[17]

Some examples of cases that can be defended under a theory of a right to representation might be useful at this point. In *Dayton Board of Education v. Brinkman*,[18] the Supreme Court decided that a school system that had been segregated in 1954 carries a continuous presumption that the effects of that segregation still linger. In such school districts, the courts can impose a Fourteenth Amendment remedy largely upon proof of racial disproportion.

In *Castaneda v. Partida*,[19] a Texas county used a "key-man system" for picking grand jurors. Although strongly contested, statistical analyses arguably showed under-representation of Mexican-Americans on grand jury panels. The county contended, and the trial court found, that there was no invidious

12. *See Davis*, 426 U.S. at 239-43.

13. *See id.* at 239.

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

15. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .").

16. *See* Taylor v. Louisiana, 419 U.S. 522 (1975).

17. *See, e.g.*, Guardians Ass'n v. Civil Serv. Comm'n of New York, 463 U.S. 582 (1983).

18. 443 U.S. 449 (1979).

19. 430 U.S. 482 (1977).

intent, because the persons who chose the grand jurors were themselves Mexican-Americans. The Supreme Court, however, found sufficient proof of inappropriate intent and held that a prima facie case of discrimination in the selection of the grand jury had been made. Justice Powell's dissent provides some clues as to what underlay the Court's decision.[20] He argued that the Court had actually brought the standards of representation for grand jury selection close to the standards for petit jury selection. Thus, the Court essentially created a right of representation.

Finally, we should briefly examine political apportionment cases in which racial minorities claim that authorities either selected an at-large system so that minorities would not be able to elect representatives under it, or drew district lines in a manner to minimize minority representation.[21] In some of these cases, elections at large traced back to the turn of the century. In the case of southern cities, at-large elections were not chosen over elections by district for reasons of racial discrimination, because minorities at that time were not allowed to vote at all. The plaintiffs' claims in these cases thus turn on an argument not that the adoption of the system, but rather that its retention, is motivated by the purpose of minimizing the representation of minorities. Notice the difficult proof problem. It is hard enough to prove why a legislative body has done something—it is even harder to prove why a legislature did not do something. The legislative history is sparse, to say the least.

On the eve of the passage of federal legislation that provided a similar result, in *Rogers v. Lodge*[22] the Supreme Court developed a "modified effects" test for determining racial discrimination in political districting. For its part, Congress prescribed a similar "modified effects" test, borrowing from earlier decisions of lower federal courts.[23]

What ties all these cases together is that the central name of the game *is* representation, and the right to fair representation.

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20. *See Castaneda*, 430 U.S. at 508-09 (Powell, J., dissenting).

21. *See, e.g.*, Rogers v. Lodge, 458 U.S. 613 (1982); City of Mobile v. Bolden, 446 U.S. 55 (1980).

22. 458 U.S. 613 (1982).

23. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988)); Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973).

When such a right is at stake, a theory that considers the fair treatment of groups, and concentrates on effects, fits.

In closing, we as a public find ourselves in conflict regarding the basic polar arguments about group rights and individual rights—whether we should require fairness to all groups of people, or whether we should treat all individuals as individuals. Neither Congress nor the courts have a consistent vision; both vacillate. Maybe we, too, find ourselves in the position of the rabbi who must admit that both sides are right, but both cannot be right.

WARDS COVE PACKING CO. v. ATONIO: A STEP TOWARD ELIMINATING QUOTAS IN THE AMERICAN WORKPLACE

CHARLES J. COOPER*

Congress is currently debating the subject of the "disparate impact test" or "effects test" of liability under Title VII of the Civil Rights Act of 1964,[1] as a result of a recent Supreme Court decision. In *Wards Cove Packing Co. v. Atonio*,[2] the Court placed a greater burden on plaintiffs to prove racial discrimination in the workplace. Before *Wards Cove*, a court could use the "disparate impact test" to invalidate facially neutral business practices, even though the court found no evidence of an employer's subjective intent to discriminate.[3] The focus of a court facing a disparate impact claim was on whether the business practice had a significant and adverse effect on a certain class of employees. Once a plaintiff established a "disparate impact," the employer had to demonstrate that the selection devices used—for example, an aptitude test or a height and weight requirement—were necessary to the employer's business.[4] If the employer could not satisfy the test of business necessity, the employer had to discard those selection devices.

With *Wards Cove*, however, the Court has redefined the plaintiff's burden of proof and has abandoned the business necessity test. Rather than just needing to show a disparate racial impact, a plaintiff must now show which employment practice created the disparate impact. Once the plaintiff has established a prima facie case, an employer need demonstrate only that its policy significantly furthers or serves a legitimate business purpose. Gone is the "requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business."[5]

Wards Cove turns the clock back on the use of racial quotas in employment. Those who favor racial quotas contend that turning the clock back on the quota system is tantamount to turning

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1. 42 U.S.C. §§ 2000e to 2000e-17 (1988).
2. 109 S. Ct. 2115 (1989).
3. *See Wards Cove*, 109 S. Ct. at 2119.
4. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
5. *Wards Cove*, 109 S. Ct. at 2126.

the clock back on advances made in civil rights, and have moved quickly in Congress to rescue quotas from the threat of *Wards Cove*.

This ongoing congressional debate is not the first time Congress has considered the "disparate impact test." Congress debated the same matter in 1964 before it passed Title VII of the Civil Rights Act. Title VII was designed, in part, to preclude intentional discrimination, discrimination that the employer sought to achieve by using a test that would produce discriminatory results or by using other, more explicit methods. Title VII was aimed at employers and unions with twenty-five or more employees, which comprised approximately seventy-five percent of the American labor force.[6]

The thrust of the 1964 debate focused on the lack of a definition of discrimination in Title VII. Opponents of Title VII were worried that the executive branch, the administrative agencies, and the courts would enforce the title by inserting whatever definition of the term appealed to them. In particular, the opponents feared that racial discrimination would be equated with a lack of racial balance. They were concerned that the government would find discrimination whenever an employer's selection criteria produced a racial imbalance in its work force.

A minority report of the House Judiciary Committee illustrates the opponents' concern.[7] Because Title VII did not define discrimination, the report warned that the Johnson administration intended to use a construction of the term that would include racial imbalance.[8] To demonstrate how Title VII would operate in practice, the report posited several hypothetical employment situations. In each situation, the committee concluded that if the workplace was not racially balanced, federal agencies or bureaucrats would require the employer to hire whatever person was needed to satisfy the prescribed ratio.[9]

The supporters of Title VII responded to these concerns.

6. *See* Rodgers, *Fair Employment Laws for Minorities: An Evaluation of Federal Implementation*, in IMPLEMENTATION OF CIVIL RIGHTS POLICY 93, 96 (C. Bullock & C. Lamb eds. 1984). In 1972, Congress extended Title VII to govern employers with 15 or more employees. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(2), 86 Stat. 103, 103 (codified as amended at 42 U.S.C. § 2000e(b) (1988)).

7. *See* H.R. REP. No. 914, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2431-2519.

8. *See* 1964 U.S. CODE CONG. & ADMIN. NEWS at 2436.

9. *See id.* at 2437-43.

For example, Senator Humphrey, the moving force behind the 1964 Civil Rights Act, addressed the opponents' concerns in a speech on the Senate floor. Senator Humphrey emphasized that Title VII prohibited only deliberate discrimination against individuals: "[E]mployers may hire and fire, promote and refuse to promote for any reason, good or bad, provided only that individuals may not be discriminated against because of race, religion, sex, or national origin."[10] Moreover, Humphrey pointed out that "[t]he only standard which the bill establishes for unions and management alike is that race will not be used as a basis for discriminatory treatment."[11]

The chief experts in the Senate on Title VII were Senators Case and Clark, the bipartisan captains of the legislation. Case and Clark understood their opponents' concern regarding the possible construction of the term "discrimination," especially in light of *Myart v. Motorola, Inc.*,[12] a case decided earlier that year. *Motorola* was a little-known ruling rendered by a state hearing officer under the Illinois Fair Employment Practices Act.[13] Although the decision was obscure, the officer's holding was significant. He invalidated an employment test that was neutral and free of any intentional discrimination but had a disproportionate impact on minorities. He called the test "obsolete" and forbade the employer from using it until the employer could show that the test no longer caused a racial imbalance within its work force.[14] In other words, the hearing officer did exactly what the Supreme Court would later do in *Griggs*: He invalidated a facially neutral test because it resulted in a disproportionate impact on minorities.

Senator Case assured the Senate that a case like *Motorola* could not arise under Title VII. He said that neither the Equal Employment Opportunity Commission nor a federal court could "order an employer to lower or change job qualifications simply because proportionately fewer Negroes than white[s]

10. 110 CONG. REC. 6549 (1964) (statement of Sen. Humphrey).

11. *Id.* (statement of Sen. Humphrey).

12. No. 63C-127 (Illinois Fair Employment Practices Comm'n, Feb. 26, 1964), *aff'd sub nom.* Motorola, Inc. v. Illinois Fair Employment Practices Comm'n, No. 64-L-27747 (Ill. Cir. Ct. Apr. 30, 1965), *rev'd*, 34 Ill. 2d 266, 215 N.E.2d 286 (1966). *Myart v. Motorola, Inc.*, is reprinted at 110 CONG. REC. 5662 (1964); subsequent citations are to the reprinted version of the case.

13. The Illinois Fair Employment Practices Act, which was codified at ILL. REV. STAT. ch. 48, ¶¶ 851-867, was repealed in 1980.

14. *See Motorola*, 110 CONG. REC. at 5664.

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are able to meet them. Title VII says only that covered employers cannot refuse to hire someone simply because of his color."[15] Senator Case stated further that "whatever its merit as a socially desirable objective, title VII would not require, and no court could read title VII as requiring, an employer to lower or change the occupational qualifications he sets for his employees simply because proportionately fewer Negroes than whites are able to meet them."[16] In the Senator's opinion, Title VII expressly protected the employer's right to insist that prospective applicants, either black or white, meet the relevant job qualifications; "[i]ndeed, the very purpose of title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color."[17]

Senator Clark, the other bipartisan captain of Title VII, took the same view of the *Motorola* case. He contended that "the Civil Rights Bill would not make unlawful the use of tests such as those used in the *Motorola* case unless it could be demonstrated that such tests were used for the purpose of discriminating against an individual because of his race."[18] Explaining the difference between discriminatory intent and disproportionate impact, Senator Clark said: "It is not enough that the effect of using a particular test is to favor one group above another to produce a violation of the Act. An act of discrimination must be taken with regard to an individual because of such individual's race."[19]

To emphasize his point, Senator Clark expressed his preference for an earlier, stronger version of the bill that was before the Senate. The bill was competing with Title VII, and Clark preferred it because it defined discrimination as follows: "[Discrimination] shall include any act or practice which because of an individual's race results or tends to result in material disadvantage or impediment to any individual in obtaining employment or the incidence of employment."[20] The definition included those situations where race-neutral, nondiscriminatory tests had the unintended result of excluding a disproportionate number of minorities. Notwithstanding his preference

15. 110 CONG. REC. at 7246 (statement of Sen. Case).
16. *Id.* at 7246-47 (memorandum of Sen. Case).
17. *Id.* at 7247 (memorandum of Sen. Case).
18. *Id.* at 9107 (statement of Sen. Clark).
19. *Id.* (statement of Sen. Clark).
20. *Id.* (statement of Sen. Clark).

for this competing bill, Clark assured Congress that "the fact remains that the issues raised by the *Motorola* case have nothing to do with title VII of the pending Civil Rights Bill and are plainly beyond its scope."[21]

The congressional debates are filled with similar passages making it clear that no one, opponent or supporter, intended Title VII to reach unintentional discriminatory effects; even its supporters wanted it to reach only intentional discrimination. One additional passage is illustrative. It is drawn from a colloquy between Senator Robertson, an opponent of Title VII, and Senator Humphrey. Senator Robertson claimed that Title VII, by not defining discrimination, would yield results like those in the *Motorola* case.[22] In response, Senator Humphrey made Senator Robertson an offer: "If the Senator can find in title VII . . . any language which provides that an employer will have to hire on the basis of percentage or quota related to color, race, religion, or national origin, I will start eating the pages one after another, because it is not in there."[23]

The supporters of Title VII finally relented and agreed to amend its language to ensure that it could not be misconstrued. Section 706(g) as enacted prohibits only intentional discrimination: "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate . . . ."[24] Senator Humphrey explained the change: "Section 706(g) is amended to require a showing of intentional violation of the title in order to obtain relief. This is a clarifying change. Since the title bars only discrimination because of race, color, religion, sex, or natural [sic] origin it would seem already to require intent . . . ."[25] He went on to say that "[t]he express requirement of intent is designed to make it wholly clear that inadvertent or accidental discriminations will not violate the title or result in entry of court orders."[26] Stated simply,

21. *Id.* (statement of Sen. Clark).
22. *See id.* at 7419 (statement of Sen. Robertson).
23. *Id.* at 7420 (statement of Sen. Humphrey).
24. Civil Rights Act of 1964, § 706(g), 42 U.S.C. § 2000e-5(g) (1988).
25. 110 CONG. REC. 12,723 (1964) (statement of Sen. Humphrey).
26. *Id.* at 12,723-24 (statement of Sen. Humphrey).

an employer could violate Title VII only by intentional discrimination.[27]

In spite of the language and the legislative history of Title VII, the Supreme Court jettisoned discriminatory intent as an element of a Title VII violation when it adopted the "disparate-impact test" or "effects test" in *Griggs v. Duke Power Co.*[28] In so doing, the Court stuffed the pages of Title VII into Senator Humphrey's mouth, and the predictions of the opponents of Title VII were realized.

In *Griggs*, the Duke Power Company had adopted written aptitude tests and a high school diploma requirement to improve the general quality of its work force. The selection devices produced a racially disproportionate result in the work force, despite their apparent neutrality.[29] Although the true intent of Duke Power in using the tests is debatable, the lower courts found no discriminatory purpose on the company's part, and hence no violation of Title VII.[30] The Supreme Court also found no intentional discrimination by the company, but the Court invalidated the application of the facially neutral selection criteria, because they disproportionately excluded minority applicants and were not shown to be essential to job performance. The Court stressed that, in determining the propriety of racially disproportionate selection practices, "[t]he touchstone is business necessity."[31]

In the twenty years since *Griggs*, employers have been unable to meet the burden of showing a business necessity to justify certain employee selection methods that, although neutral on their face and free of invidious intent, cause a racial imbalance in the employer's labor force. Faced with such an impossible dilemma, employers have adopted means of employee selection that do not produce a disproportionate racial impact: racial preferences and quotas.

In addition to the voluntary use of quotas, courts have effectively imposed quotas on those employers who fail to prove

27. For an exhaustive examination of Title VII's legislative history on this point, see Gold, Griggs' *Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429 (1985).

28. 401 U.S. 424 (1971).

29. *See Griggs*, 401 U.S. at 427-28.

30. *See id.* at 428-29. The company had added the aptitude test requirement on July 2, 1965, the effective date of Title VII. *See id.* at 427-28.

31. *Id.* at 431.

that a certain test or device is both job-related and necessary to their businesses.[32] The imposition of quotas by the courts is a common practice. I am aware of no case in which a court has upheld a selection device having a disproportionate impact based on a business necessity rationale. Absent *Griggs* and its progeny, it is unlikely that we would have reached the current situation, in which race is a constant concern to most employers.

In *Wards Cove*, however, the Supreme Court abandoned the "business necessity" test as it has been applied since *Griggs* and redefined the employee's burden in proving disparate impact. To establish a prima facie case, an employee must now show more than "a racial *imbalance* in the work force."[33] He must " 'isolat[e] and identify[] the specific employment practices that are allegedly responsible for any observed statistical disparities.' "[34] After a plaintiff has set forth his prima facie case, a court will consider two components of business necessity claimed by the employer: "first . . . the justifications an employer offers for his use of these practices; and second, the availability of alternate practices to achieve the same business ends, with less racial impact."[35] In considering the business justifications for using the devices,

> [t]he touchstone of [the] inquiry is a reasoned review of the employer's justification for his use of the challenged practice. . . . [T]here is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business for it to pass muster . . . .
>
> In this phase, the employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate-impact plaintiff.[36]

Thus, " 'the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff *at all times*.' "[37]

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32. *See, e.g.*, United States v. Paradise, 480 U.S. 149 (1987).

33. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2124 (1989) (emphasis in original).

34. *Id.* (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) (plurality opinion)).

35. *Id.* at 2125.

36. *Id.* at 2126.

37. *Id.* (emphasis added by the Court in *Wards Cove*) (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 997 (1988) (plurality opinion)).

Even if a plaintiff fails to persuade the court that the employer's selection devices lack a business justification, the plaintiff can still prevail. To do so, a plaintiff must "persuade the factfinder that 'other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate [hiring] interest[s];' by so demonstrating, [the plaintiff] would prove that '[the employer was] using [its] tests merely as a "pretext" for discrimination.' "[38] The alternative devices must be as effective as the employer's current selection methods, and the substitution of the new devices must not overly burden the employer.[39]

The new standard in *Wards Cove* will be easier for employers to meet, and consequently plaintiffs will find it more difficult to prove that certain business practices unjustifiably discriminate against them. Because the supporters of job quotas believe that the new standard will relieve much of the pressure on employers to hire and promote by race, they are working in Congress to reinstate the "business necessity" test of *Griggs*.

As in 1964, today's advocates of the "business necessity" test maintain that their bill has nothing to do with quotas.[40] A recent editorial in the *Washington Post* describing *Griggs* and the "effects test" states that

> the courts have themselves been alert to this danger [that the use of statistics and the effects test will yield quotas] and have provided the necessary stopping places. In judging whether discrimination exists, they have generally been careful to use numbers only as loose guides. Even then, suspect numbers alone do not convict; there remains the defense of business necessity . . . .[41]

The editorial also states that "[t]he risk that numbers can turn into quotas is real, but that is not what has happened under *Griggs*."[42] The *Post*'s contention notwithstanding, *Griggs* and the "business necessity" test did indeed lead to racial preferences in the American workplace, despite the firm assurances of Title VII's supporters in 1964.

Through its decision in *Wards Cove*, the Supreme Court has

38. *Id.* (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)).
39. *See id.* at 2127.
40. *See, e.g.*, 136 CONG. REC. S10,287 (daily ed. July 23, 1990) (statement of Sen. Metzenbaum).
41. *The Quotas Question*, Wash. Post, Mar. 16, 1990, at A22, col. 1.
42. *Id.*

given this country its last clear chance to retreat from quotas in the workplace—from a legal regime in which skin color, far from being irrelevant, is an ever-present and critical employment criterion. For at least the past decade, quotas have pervaded the workplace. Despite the extent of the quota system and the arbitrary manner in which it rewards individuals—not on the basis of merit, but on the basis of gender or skin color—certain members of Congress are attempting to preserve it. If these politicians succeed and racial preferences survive this last clear chance, the quota system will remain a part of the American ethos and will likely be with us forever.

COMPETING CONCEPTIONS OF "RACIAL DISCRIMINATION": A RESPONSE TO COOPER AND GRAGLIA

RANDALL L. KENNEDY*

In his introduction to this panel on competing conceptions of racial discrimination, Lawrence Siskind remarks that the 1960s marked "a period of relatively easy moral identification."[1] Looking back at what he calls "the Romantic Age of Civil Rights," Siskind claims that "it was easy to distinguish the heroes from the villains. On the one hand, there were Martin Luther King, Jr., Rosa Parks, and Medgar Evers. On the other hand, there were Bull Connor, filibustering southern senators, and Klansmen."[2]

On which side would the Federalist Society and its allies have stood during the "Romantic Age of Civil Rights"? The great legal victories of the "heroes" stemmed from commitments, ideas, intuitions, and tendencies that the Federalist Society has been railing against throughout its institutional life: rulings that subjected increasingly large areas of social life to federal constitutional norms,[3] judgments that privileged protest over order,[4] legislation that empowered the federal government at the expense of state governmental prerogatives,[5] and a judicial methodology that rejected originalism,[6] overturned precedent,[7] and strained interpretations of statutes.[8]

Ronald Reagan and Robert Bork opposed the "heroes" on crucial issues during the Romantic Age of Civil Rights; both, for instance, objected to key aspects of the Civil Rights Act of

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1. Siskind, *Introduction: The Age of Ambiguity*, 14 HARV. J.L. & PUB. POL'Y 65, 66 (1991).

2. *Id.*

3. *See, e.g.*, Peterson v. City of Greenville, 373 U.S. 244 (1963); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Shelley v. Kraemer, 334 U.S. 1 (1948).

4. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536 (1965); Garner v. Louisiana, 368 U.S. 157 (1961).

5. *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988)).

6. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954).

7. *See, e.g.*, Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954).

8. *See, e.g.*, Boynton v. Virginia, 364 U.S. 454 (1960).

1964.[9] Their ideological kin, Charles Cooper and Lino Graglia, among others, are making a similar mistake again.[10] Cooper and Graglia seem to agree with the Reagan Justice Department that "the necessary element of an act of discrimination is a *mens rea* or discriminatory intent: the deliberate use or consideration (overtly or covertly) of a racial or other proscribed criterion in the decision-making of the alleged discriminator."[11] Their model for illegal racial discrimination is the employer[12] who, because of race, treats a prospective or incumbent employee less well than another employee: the employer who hires A rather than B solely because A is white and B is black.[13]

The first thing to be noted about this model of purposeful discrimination is that it does represent a leap forward in the moral life of our nation. When slavery was still alive, most areas of the United States permitted or required individuals to discriminate intentionally against blacks on the basis of race. After the abolition of slavery and until the 1960s, intentional racial

9. When he was Governor of California, Reagan opposed the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Open Housing Act of 1968. *See* R. DUGGER, ON REAGAN: THE MAN AND HIS PRESIDENCY 195-219 (1983). When he was President of the United States, Reagan continued to oppose civil rights measures of almost every variety. *See, e.g.*, Days, *Turning Back The Clock: The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 309 (1984). In 1963, in a now infamous article, Robert Bork opposed enactment of the then-pending public accommodations section of the Civil Rights Act. *See* Bork, *Civil Rights—A Challenge*, THE NEW REPUBLIC, Aug. 31, 1963, at 21. At the hearings preceding the Senate's refusal to confirm Bork as an associate justice of the United States Supreme Court, various witnesses cited that article as one indication, among several others, that he would fail to protect the rights of racial minorities against hostile action. *See Nomination of Robert H. Bork To Be An Associate Justice of the United States Supreme Court: Hearings before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 36, 37 (1987). For Bork's reflections on this aspect of his career, see R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 79-81 (1990).

10. *See* Cooper, Wards Cove Packing Co. v. Atonio*: A Step Toward Eliminating Quotas in the American Workplace*, 14 HARV. J.L. & PUB. POL'Y 84 (1991); Graglia, *Title VII of the Civil Rights Act of 1964: From Prohibiting to Requiring Racial Discrimination in Employment*, 14 HARV. J.L. & PUB. POL'Y 68 (1991).

11. OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL, REDEFINING DISCRIMINATION: "DISPARATE IMPACT" AND THE INSTITUTIONALIZATION OF AFFIRMATIVE ACTION 1 (Nov. 4, 1987).

12. Although the debate over defining discrimination touches on every aspect of social interaction, I shall focus my comments mainly upon the employment context.

13. Some observers see race-conscious affirmative action that prefers blacks to whites as yet another variant of intentional discrimination that ought to be outlawed. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520-28 (1989) (Scalia, J., concurring in judgment). I believe, however, that there is a compelling difference between racial discrimination that imposes or maintains pigmentocracy, and racial "discrimination" that subverts pigmentocracy. The latter is morally, politically, and constitutionally justifiable. *See* Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986).

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discrimination continued to be *the* salient feature of race relations in the United States despite the enactment of the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution. Only within the past twenty-five years has there emerged a national consensus that stigmatizes intentional invidious racial discrimination as illegal and immoral.

That salutary process of stigmatization, however, is far from complete; intentional racial discrimination is still a pervasive feature of American life.[14] One reason for this is the half-hearted way in which all too many people attack intentional racial discrimination. For instance, in the aftermath of *Patterson v. McLean Credit Union*[15]—in which the Supreme Court held that the Civil Rights Act of 1866 applies only to intentional discrimination in the formation of contracts and not to intentional discrimination in the performance of them—the Bush administration initially indicated that it did not see the necessity for legislation that would rectify the Court's egregious ruling.[16] Only to short-circuit legislation that it opposed did the administration finally evince any desire to undo the harm wrought by *Patterson*.[17] The same pattern of behavior is observable with respect to many who label themselves "conservatives," "strict constructionists," et cetera. They loudly proclaim their abhorrence of intentional racial discrimination when it is expedient to do so—for instance, when verbally attacking intentional discrimination is a mere prelude to bashing affirmative action or some other policy aimed at advancing aggressively the cause of racial equality. All too often, however, they suddenly become mute or even apologetic when they encounter naked racism or blatant prejudice in a context in which speaking up loudly on behalf of racial justice might incur a political cost—when they have encountered, for instance, Jesse

14. Nothing better indicates the pervasiveness of old-fashioned anti-Negro bigotry than the effect of racial considerations on electoral politics. *See, e.g.*, Edsall, Book Review, THE NEW REPUBLIC, July 30, 1990, at 35 (reviewing K. PHILLIPS, THE POLITICS OF RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE REAGAN AFTERMATH (1990)); Applebome, *The 1990 Elections: North Carolina; Helms Kindled Anger in Campaign, And May Have Set Tone for Others*, N.Y. Times, Nov. 8, 1990, at B3, col. 1.

15. 109 S. Ct. 2363 (1989).

16. *See Ruling Said to Spur Dismissal of Bias Claims*, Wash. Post, Nov. 20, 1989, at A6, col. 1.

17. *See Hill Coalition Aims to Counteract Court on Job Bias; Administration, in Reversal, Plans Alternative Legislation Addressing Civil Rights Issues*, Wash. Post, Feb. 8, 1990, at A10, col. 1; *Critics of Rights Law Fear a Flood of Suits Over Jobs*, N.Y. Times, May 28, 1990, § 1, at 8, col. 5.

Helms's appeals to racial bigotry.[18]

The second thing that needs to be noted about the model of discrimination championed by Cooper and Graglia is that it does not adequately capture the range of conduct pertaining to race relations that is and should be illegal. Consider an employer who decrees that he will only employ candidates who obtain a certain score on a standardized test that has no direct relevance to the employment at stake, or one who refuses to consider a candidate who has ever been arrested for a felony, or one who declines to consider candidates who live over a mile from the place of employment. Assume that none of these criteria reliably indicates whether a given applicant can efficiently perform the job at issue. But also assume that in each of these cases the employer applies his criteria evenhandedly to all individual candidates regardless of race and that he chose his criteria, not with the intent of excluding blacks, but rather on the basis of custom, intuition, or convenience. Finally, assume that as a result of imposing these criteria, a substantially larger percentage of blacks is excluded in comparison with whites.

The logic of Cooper and Graglia insists that the hypothesized employers be insulated from legal liability. After all, these employers are not engaged in intentional discrimination. Cooper and Graglia argue, in effect, that for the legal system to demand any more than lack of intent to discriminate would amount to, in Siskind's phrase, the imposition of "liability . . . divorced from immorality."[19]

Fortunately, Title VII of the Civil Rights Act of 1964[20] does require more, and because it does it has invalidated exclusionary practices of the sort mentioned above.[21] The disparate-impact prong of Title VII[22] requires that employers give justification for practices that impose a disparate impact upon a given group, even if the practice was instituted or maintained

18. *See, e.g., Bennett Assails Affirmative Action Plans as "Wrong"*, Wall St. J., Nov. 20, 1990, at A22, col. 1 (William Bennett endorsing Helms's campaign tactics).

19. Siskind, *supra* note 1, at 66.

20. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

21. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (invalidating test and educational credential requirements); Green v. Missouri Pac. R.R., 523 F.2d 1290 (8th Cir. 1975) (invalidating railroad's policy of refusing to consider for employment any person convicted of a crime other than a minor traffic offense).

22. Title VII has another prong, the "disparate-treatment" prong, that effectuates a prohibition against intentional discrimination. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

with no intent to discriminate against that group or any members of it. A practice imposes a disparate impact when it adversely affects a given group (for example, blacks) to a significantly greater degree than a relevant control group (for example, whites). The paradigmatic example would be a test which excludes from employment a significantly higher percentage of blacks than whites.

The seminal case is *Griggs v. Duke Power Co.*,[23] in which the Supreme Court ruled that a plaintiff may make out a prima facie case under Title VII by showing simply that an employment practice results in a disparate impact. That alone, according to the Court, shifts the burden to the defendant to justify its challenged practice. Without a justification, the defendant is said to "discriminate," even if the plaintiff has made no allegation of intentional discrimination. To negate the charge of discrimination once a disparate impact has been shown, the Court held that the employer must show that the challenged practice is justifiable in terms of "business necessity," by which the Court meant that the defendant would have to show that its practice is demonstrably "related to job performance."[24]

The defendant's burden of rebuttal has been the locus of intense controversy for obvious reasons: the heavier that burden, the more far-reaching the consequences of the disparate-impact conception of discrimination. An appropriate burden would impel many businesses to avoid litigation by changing their personnel policies. It would also lead to judicial invalidation of a broad array of standardized tests. Until relatively recently, an appropriately burdensome rebuttal standard governed Title VII jurisprudence. As Cooper approvingly notes,[25] however, the Supreme Court, in *Wards Cove Packing Co. v. Atonio*,[26] has now considerably lightened the defendant's rebuttal burden. The civil rights community believes, rightly, that the Court has erred, and seeks through legislation to restore the disparate-impact methodology to its former vigor. But even under *Wards Cove*, Title VII still requires a result that Cooper and Graglia resist as a matter of fundamental principle: the im-

23. 401 U.S. 424 (1971).
24. *Griggs*, 401 U.S. at 431.
25. *See* Cooper, *supra* note 10, at 91.
26. 109 S. Ct. 2115 (1989).

position of legal liability in the absence of intentional discrimination.

Why should we be in favor of imposing legal liability in the absence of intentional discrimination? The essential reason is that intentional racial discrimination is not the only form of conduct affecting race relations that is morally deficient and worthy of legal rebuke. There are other forms of conduct worthy of moral and legal condemnation: for instance, thoughtless practices that unintentionally burden historically disadvantaged groups when alternative, less burdensome practices could be pursued without undue cost; and complacent practices that show indifference towards the imposition of avoidable burdens on groups that suffer from injuries received from oppression in the past. Action—or inaction—of this sort is not as evil as intentional discrimination. But it is certainly morally tainted. Moreover, it is precisely such conduct that now constitutes the most important hindrance that our society faces in its struggle to transcend the gravitational pull of its racist history.

If Cooper and Graglia had their way, the employers hypothesized above might not even have to give an explanation for the practices they use, even if these practices have a racially disparate impact. They could thus freely allow racial discrimination in the realm of education (reflected perhaps in lower scholastic achievement by blacks), or racial discrimination in the administration of justice (reflected perhaps by higher rates of arrests and convictions for blacks), or racial discrimination in housing (reflected in lower rates of residence by blacks in desirable areas) to be translated into a new burden in yet another sphere of social life: the employment market. By contrast, the disparate-impact conception of discrimination can resist, to a significant degree, the process by which injuries inflicted by racial subordination in the past become the very basis on which black candidates for employment or promotion are excluded from opportunities in the present.

The disparate-impact approach is not a panacea for all of the injuries wrought by past oppression. If an employer can show that her business requires new hires to possess certain knowledge, then her demand that employees demonstrate such knowledge will be exempt from liability even under the most rigorous conception of disparate impact, even though her demand excludes far more blacks than whites, and even though

the absence of the knowledge required stems from racial oppression in the past. But disparate-impact analysis at least prompts employers and judges to ask whether the task of obtaining efficient workers can be fulfilled without unduly perpetuating racial inequalities. That is its virtue. Disparate-impact analysis disrupts "business as usual." It compels the employer to think anew about her business, its real needs, and her social responsibilities. It serves, in short, as a salutary antidote to complacency.

Cooper attacks the disparate-impact conception of discrimination because it makes race "a constant concern to most employers."[27] Under the disparate-impact analysis, it is not enough, he complains, for employers to be race-blind. To the contrary, to protect themselves from liability, or the risk of liability, employers will likely feel compelled to be race-conscious in at least two ways. First, employers will habitually pay attention to the racial consequences of the criteria they use for choosing, promoting, or discharging employees. Second, if the criteria used produce a racially disparate impact, many employers will either (1) substitute new criteria for the existing ones in the hope that the new criteria will have no, or at least less, racially disparate impact, or (2) use racial preferences—which Cooper refers to as "quotas"—to offset the disparate impact of the existing criteria. Thus, it is argued, instead of allowing race consciousness to wither away, the disparate-impact conception of discrimination entrenches race consciousness.[28]

This charge, which is of course part of a broader attack against *all* race-conscious affirmative action,[29] does contain a grain of legitimate concern. Applied simplistically, disparate-impact analysis—like *any* methodology—can lead to objectionable results. Making the defendant's burden of rebuttal too heavy could compel employers to institute inefficient and unwise personnel practices, including rigid racial quotas. Cooper, however, offers no basis (other than his own assertions) for believing that *Griggs* and its progeny actually subjected employers to such consequences on anything like the scale that he con-

27. Cooper, *supra* note 10, at 90.

28. For a careful elaboration and analysis of this and related points, see Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 UCLA L. REV. 305 (1984).

29. *See* Bartholet, *The Radical Nature of the Reagan Administration's Assault on Affirmative Action*, 3 HARV. BLACKLETTER J. 37 (1986).

cocts as a bogeyman.[30] By making suits more winnable for potential plaintiffs, disparate-impact analysis does force many[31] employers to examine seriously the racial consequences of their policies. But on balance this is a *good* development, not a bad one. Properly conceived and administered, disparate-impact analysis encourages awareness of the complex reality of racial subordination and its interaction with business practices that have an adverse racial impact, while still allowing businesses to fulfill their legitimate goals. This type of race consciousness, though not without potential difficulties, is surely more appealing than the race blindness that Cooper seems to favor—a myopia that would allow an employer to impose any criteria no matter how arbitrary, no matter how avoidable, and no matter how injurious to historically oppressed groups, just so long as the employer acted without intent to discriminate.

Thus far, I have defended the disparate-impact conception of discrimination on the ground that it is attentive to aspects of the race problem that will be left unaddressed if our legal system confines itself merely to rectifying instances of intentional racial discrimination. This alone is sufficient to warrant continued application of the disparate-impact analysis. But there is another strand of the disparate-impact conception of racial discrimination that deserves at least a mention: the meritocracy strand.

All too often in debates about racial policy, equality concerns are pitted against meritocratic claims as if the two are inevitably antagonistic.[32] But the struggle for racial equality has largely been a struggle to make authentic meritocracy possible. The prevailing norm of social life in the United States has been characterized not by meritocracy but by "pigmentocracy" and other forms of caste oppression that have privileged white men at the expense of individuals associated with other groups. The

30. *See* Cooper, *supra* note 10, at 89-90.

31. Title VII only applies to businesses with 15 or more employees. *See* 42 U.S.C. § 2000e(b) (1988). Nearly 15 percent of the national workforce is thus outside the protections of Title VII. *See* Eisenberg & Schwab, *The Importance of Section 1981*, 73 CORNELL L. REV. 596, 602 (1988).

32. *See, e.g.*, I. YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 192-225 (1990) (discussing "Affirmative Action and the Myth of Merit"); J. LIVINGSTON, FAIR GAME? INEQUALITY AND AFFIRMATIVE ACTION 153-67 (1979) (discussing "Meritocracy and Racism"). For an excellent exploration of the concept of merit in the context of race relations law, see Fallon, *To Each According to His Ability, From Each According to His Race: The Concept of Merit in the Law of Antidiscrimination*, 60 B.U.L. REV. 815 (1980).

Second Reconstruction and the various social movements that it helped to inspire have significantly altered this history. *Griggs* is part of this dramatic alteration. It strikes a blow not only for racial justice but for meritocracy as well. It recognizes that both can be smothered by complacent credentialism.[33] It prompts employers to be more careful in their process of evaluating individuals and cautions them against reliance on means of assessment that unjustifiably impose a disparate impact.

In the *Griggs* opinion, Chief Justice Burger articulated the meritocratic strand that has been minimized, unfortunately, by its friends and foes alike. The facts of the case demonstrated, he observed,

> the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees.[34]

The wisdom of that statement has enriched *all* persons living in the United States and not simply blacks and members of other historically oppressed groups. It is wisdom to which we should carefully attend as we continue to seek ways to advance our racially diverse nation towards a more just and productive future.

33. *See Griggs*, 401 U.S. at 433 ("Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.").

34. *Id.*

PANEL IV: THE LIMITS ON JUDICIAL POWER IN ORDERING REMEDIES*

CIVIL RIGHTS AND REMEDIES

FRANK H. EASTERBROOK**

I want to make a point so simple it's simple-minded: Most disputes over remedies in civil rights cases have nothing to do with remedies and everything to do with substantive entitlements. Remedies are designed to track entitlements, to give people their due. When we hear an objection to the remedy, it is almost always a disguised objection to the definition of what is due, and not to the methods used to apply the balm. To define appropriate remedies, then, we must examine our understanding of rights.

Because this point is *so* obvious that almost everyone will deny it, I will proceed by example through some contemporary remedial questions. In thinking about each subject, it will help to consider three questions. First, who holds the "rights": individual persons or groups of persons? Second, what does "equality" mean: equal treatment or equal outcomes? Third, what do we expect the government to teach us: the importance of disregarding the characteristics that often are chosen as a basis of private discrimination, or the worth of a society in which persons of diverse backgrounds appear side by side? The principle that race is irrelevant to public favor is exceedingly powerful and important, and it has sound constitutional footing, but many persons of good will who accept this principle believe that for now we must "rise above principle" to provide redress.

There are systematic differences in emphasis between those who think on the one hand that rights are personal, that the government should assure equal treatment, and that it should teach people the irrelevance of race (for example), and, on the other, those who believe that rights belong to groups, that equality of outcomes is most important, and that the govern-

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ment should assure diversity in many walks of life. I shall call the former set the individual-rights cluster and the latter the group-rights cluster. My purpose is not to discuss which set of substantive norms is correct—or whether, given the nature of public choice, it will be possible to restore the principle of color-blindness in the long run if we disregard it systematically in what has become an extended "short run"[1]—but to show that the conclusions we reach on these questions govern the choice of remedy.

1. Termination of school desegregation decrees. The objective of desegregation decrees is a unitary school system. Once that has been achieved, management is returned to political control. Agreement on this formula does not yield much agreement on concrete practices. What makes a school district "unitary"? Does the prospect of "resegregation" after the termination of a decree mean that the court should keep the injunction in force? Is a desegregation order a temporary expedient to blur the racial identity of schools, or is it a permanent revision of the way students are assigned, to be modified only to prevent some new wrong? These are among the most pressing problems in school cases, and they have divided the courts of appeals as they have divided the profession.[2]

Everything depends on distinguishing "discrimination" from "segregation." The latter is a multi-purpose term that includes (a) ongoing official discrimination, (b) the contemporary effects of yesterday's official discrimination, and (c) the outcome of private residential choices. Such a range of meanings makes the term useful in rhetoric but less useful in analysis. The only *constitutionally* objectionable kind of "segregation" is the kind the government creates, because the Constitution applies only to official action. Decisions that leave the private kind in place do not offend the Constitution even though they may offend ideas of equality.

To persons who hold the individual-rights cluster of views, a change in the ratio of student populations is irrelevant; the government's obligation is to ignore race rather than to achieve

1. Jennifer Roback's paper in this volume discusses this question insightfully. *See* Roback, *The Separation of Race and State*, 14 HARV. J.L. & PUB. POL'Y 58 (1991).

2. *Compare* Riddick v. Norfolk School Bd., 784 F.2d 521 (4th Cir. 1986) *with* Dowell v. Oklahoma Bd. of Educ., 890 F.2d 1483 (10th Cir. 1989), *cert. granted*, 110 S. Ct. 1521 (1990) *and* Brown v. Board of Educ., 892 F.2d 851 (10th Cir. 1989). *Cf.* Pitts v. Freeman, 887 F.2d 1438 (11th Cir. 1989).

a particular outcome. People who hold this constellation of substantive views will see nothing wrong with large changes in racial balance of particular schools when a decree is lifted, because none of the change may be attributed to official discrimination. Persons who hold the group-rights constellation of substantive views will try to prevent the lifting of decrees when racial imbalance would follow. There is nothing distinctly "remedial" about either position.

This debate is related to questions concerning the kinds of errors a court should accept in formulating plans in the first place. It is difficult to tell the genesis of racial imbalance in a school system. Was it discrimination over the years? Private choices unrelated to governmental action? Some mixture? Persons who define rights from the perspective of groups and emphasize results almost uniformly believe that courts should resolve against the government all debatable questions of causation. This means assuming that all racial imbalance needs extirpation. To a degree the assumption of causation by official acts has been embraced by all—when discrimination produces "racial identity" of schools that must be destroyed, fine questions of causation cannot be answered—but the question is of course to *what* degree?[3] Inevitable and desirable overbreadth in the initial remedy does not imply that the Constitution itself compels the government to create a school system that is "desegregated" in the secular as opposed to the legal sense.

2. "Tipping points" in school and housing desegregation. The mirror image is that holders of the individual-rights cluster conclude that claims about "tipping points" in school or housing discrimination should not affect a court's remedial choice. The judge's job is to get rid of governmental discrimination and its effects. If in a world without governmental discrimination, private choice (including bigoted choice) produces racial separation, or lower funding for schools as well-to-do flee the jurisdiction, this is not an objection to the remedy. Private discrimination neither increases nor reduces the entitlement: to have *the government* act without regard to race.[4]

The consent decree governing desegregation of the Chicago

3. *See* Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977); Keyes v. Denver School Dist. No. 1, 413 U.S. 189 (1973).

4. *See* Palmore v. Sidoti, 466 U.S. 429 (1984).

public schools posed a question of this sort. It was negotiated by litigants committed to the group-rights cluster of views, and it included provisions barring deviation in any direction from an approved racial mix. Black, Filipino, and Native American children who were turned down for admission to a magnet school on the ground that their admission would produce "too many" members of their race—perhaps lead to "tipping"—sought judicial relief. The decree said to persons who had heard this refrain too often: "We have enough of your kind." A majority of our court was unsympathetic to these claims; a minority argued, on individual-rights grounds, that the students were entitled to admission without regard to their race.[5] Nothing even remotely "remedial" underlay this dispute.

One thing that should trouble everyone is the interaction between racial-balance remedies and the willingness of the public to pay for education. Strong requirements of balance deny to residential communities—black and white—the option of increasing their own taxes to pay for better education. Many ethnic groups have poured extra resources into the education of their children. When judicial decrees break the link between residence and school, when no one has a "local" school (one overlapping the taxing jurisdiction), then no one has a strong reason to tax himself for education. Racial-balance remedies lead to pressure for equal statewide funding. Gains from "equal" funding are likely to be counterbalanced by a lower aggregate level, as local school districts lose the incentive (and sometimes lose the legal right) to enrich their schools. Neither the individual-rights cluster nor the group-rights cluster has much to say about this, one of the few distinctly "remedial" questions. Perhaps it is not surprising that this link has received correspondingly little attention. Disregard of "remedial" issues that are *not* driven by one's view of the merits is a telling sign of how little there is to the law of "remedies."

3. Judicially-imposed taxes. Whether a judge may order school officials to levy taxes depends on whether the Constitution creates a right to "quality" education. It is similar in spirit to the tipping-point dispute (is there a right to integrated education?). If the constitutional right is only to *e*quality, then courts

5. *See* Samayoa v. Chicago Bd. of Educ., 798 F.2d 1046 (7th Cir. 1986), *reh'g denied*, 807 F.2d 643, 647 (dissenting from denial of rehearing en banc), *cert. granted, vacated, and remanded*, 485 U.S. 951 (1988).

cannot justify directing school districts to raise more money. Available money, however little, can be shared equally; quality may diminish without federal objection based on equality. But if there is a right to quality education, perhaps on a "freezing" rationale,[6] then the judge must have the power to direct the raising of the necessary revenue. Whether he specifies the taxes or just directs that the money appear, leaving others to figure out how (perhaps by reducing expenses on roads), is the only "remedial" question.

The dispute about taxation to pay for the remedy in Kansas City illustrates the point.[7] The judge first required the school district to implement a very expensive remedial package, including more than $260 million in capital improvements: new schools, plus such improvements as swimming pools and air conditioning at existing schools. When a statute requiring voters' approval for capital expenditures blocked access to financing, the court ordered the state and local governments to raise taxes to supply the necessary money. The Supreme Court held that the direct imposition of taxes was an improper remedy, but it concluded that the court nonetheless could direct the school district to come up with the money, and to facilitate this could enjoin the application of the rule requiring the voters' approval. The upshot was that school officials obtained a taxing power that state law denied them, and they were obliged to use this power to fund the decree.

If the decree was proper—if indeed the Constitution *required* $260 million in capital improvements plus other expensive steps—then it follows almost inevitably that the court may override local laws blocking access to the money. If the Constitution requires states to pay for property they take, then a local law forbidding the levying of taxes for this purpose could not stand; the definition of the federal right implies an obligation to raise money. So, too, with desegregation, or the building of adequate prisons, or any of a hundred other subjects. But was the decree proper? The majority refused to consider the question, and Justice Kennedy's separate opinion, although nominally about the taxation, was directed squarely to the decree's specification of rights. The four justices for whom Justice Ken-

6. "Freezing" remedies give minorities the same benefits the majority provided for itself at an earlier time.

7. *See* Missouri v. Jenkins, 110 S. Ct. 1651 (1990).

nedy spoke did not believe that equal protection requires swimming pools and air conditioning, as opposed to equal sharing of existing schools.

What shines through about this case is that the school board chafed under the requirement of voters' approval; it believed that the voters were too stingy, and that it could not provide the quality of education that children ought to receive. The litigation offered it an opportunity to enlarge its powers. Recall that the school board *favored* the district court's remedy. This is frequent in litigation against local governments, and decrees of this kind simultaneously provide benefits for the plaintiffs and liberate public officials from constraints on their own power.[8] Should federal courts cooperate in this transfer of power? If so, does the Constitution compel new construction in Kansas City? Everything about this dispute turned on the identification of the federal right; debating the "remedy" was a distraction impeding accurate analysis.

4. Quotas in employment. It is possible to step quickly through other "remedial" questions, which pose variations on the themes I have discussed. Consider employment goals and quotas. Holders of the group-rights cluster uniformly support taking race into account when hiring or promoting workers, even if the beneficiaries of this relief have never been victims of discrimination. Holders of the individual-rights cluster regularly would limit consideration of race to identifying and compensating the victims of racial discrimination. Again, views about substance determine views about remedies.

The debate among the Justices in the case involving the Federal Communications Commission's preference for minorities when handing out broadcast licenses made this exceedingly clear.[9] Justice Brennan's opinion for five justices spoke approvingly of the value of a racially diverse group of broadcasters; the preference for minorities followed directly. Justice O'Connor's opinion for four justices emphasized the individual basis of rights and the fact that the beneficiaries of the preference were not victims of discrimination; the impropriety of the

8. *See* Bates v. Johnson, 901 F.2d 1424, 1426 (7th Cir. 1990); Dunn v. Carey, 808 F.2d 555 (7th Cir. 1986); Easterbrook, *Justice and Contract in Consent Decrees*, 1987 U. CHI. LEGAL F. 19, 30-41.

9. *See* Metro Broadcasting, Inc. v. Federal Communications Comm'n, 110 S. Ct. 2997 (1990).

preference followed directly. Nothing had to do with remedies from either perspective.

Only *Franks v. Bowman Transportation*,[10] and a few similar cases, present genuine remedial questions. At issue in *Franks* was the question whether Title VII of the Civil Rights Act of 1964 authorizes "rightful-place" or super-seniority remedies for identified victims of discrimination. The Court held that it does. Although employees displaced by such remedies did not themselves violate anyone else's rights, the question from an individual-rights perspective is what is necessary to honor the entitlements of the persons protected by Title VII. If providing this relief would violate contractual entitlements of other employees, then the employer must make them whole as well.[11] That there may be more than one victim of a violation, or the efforts to undo it, does not imply leaving the principal victim without effective redress.

5. Jail administration. Huge disputes have followed efforts by the judiciary to require state and local governments to provide humane conditions of confinement. Usually these take the form of claims that the judges are being "too intrusive" and should defer more to local authorities. This dispute has both a substantive and a remedial component, with the former dominating.

If the Cruel and Unusual Punishments Clause of the Eighth Amendment *really* requires prison cells to have 100 square feet, or *really* regulates the ratio of starch to protein in the prisoners' diet, then there is no "remedial" objection to an order requiring prisons to comply. The more detailed the constitutional command, the more detailed the order for its implementation. Most objections to "overly intrusive" decrees are claims that the Constitution cannot possibly impose such a level of detail—that it is silly to find in such generalities as "cruel and unusual punishments" a complete architectural and nutritional code. This is a substantive objection to the decree, masquerading as a claim about remedies.

The remedial question arises when the court's initial decree is general (in line with the level of specificity in the Constitution itself), and the defendants use the lack of precision to avoid its purport. They drag their heels; they resolve all ambi-

10. 424 U.S. 747 (1976).

11. *See* W.R. Grace & Co. v. Rubber Workers Local 759, 461 U.S. 757 (1983).

guities against the plaintiffs; when the judge directs them to improve one aspect of the prison (say, overcrowding), they retaliate by creating new problems ("The court says you must have sixty square feet all to yourself; very well, but now you will be all *by* yourself, because we are cutting out all recreation."). Recalcitrance presents the judge with a truly remedial question: How much control over detail must be sucked into federal court, even on the assumption that the Constitution has nothing to do with detail? By and large, it is best to deal with determined resistance not by ever-increasing levels of regulation, but by finding some other organ of government that will cooperate. Take control of the prisons from the Sheriff and transfer it to the County Board; in extreme cases, create a new institution and give it the responsibility of administration. If no branch of government will carry out the order in good faith, transfer responsibility to a master as an adjunct of the court, with the understanding that the master's decisions are not constitutional commands but are practical accommodations. Once the local government shows that it is willing to live by the rules, the court should return control to it, without requiring it to adhere to any picayune rules developed by the court in its role as administrator. Separating the substantive from remedial issues in this manner gives the best prospect for effective return to political governance of public institutions.

6. Judicially-directed voting. This leads straight to the sort of question (a genuine *remedial* question) that the Yonkers case[12] presented. The court ordered the construction of public housing in white neighborhoods. The city council refused to cooperate. The district judge then ordered the council members to vote favorably on implementation—as if the remedy depended on their votes rather than on the judge's earlier conclusion that the city's siting decisions violated the Constitution.

In the Yonkers case, the rights had been established, and the remedy had been decreed. Only putting the remedy into force remained. A majority of the Court concluded that a district judge ought not force the defendants to act as if they agreed with the remedy. They may choose to have the remedy carried out over protest. Rather than requiring the defendants to give public signs of assent, the court should direct their conduct

12. *See* Spallone v. United States, 110 S. Ct. 625 (1990).

substantively—and name others to act in their places if they will not.

So there are a few cases in which the goals are agreed and prudential questions of remedy dominate. By and large, however, the choice of remedy follows from the choice of objective. That choice is substantive, and the pretense that there is a distinct "remedial" question obscures the nature of the real question.

THE LIMITLESSNESS OF JUDICIAL CAPACITY TO RIGHT CONSTITUTIONAL WRONGS

MICHAEL H. SUSSMAN*

I would like to approach the topic of remedies from a different perspective than that of Judge Easterbrook.[1] Let me first state that I agree with Judge Easterbrook that much of the emotional debate about remedies is not in fact about the propriety of remedies as such, but rather about different definitions of underlying rights, different understandings of entitlements. For example, in the area of voluntary and involuntary busing, if one perceives the underlying entitlement to be an assurance of a desegregated education, then methods that ensure such an education become critical. If one believes the underlying entitlement is the opportunity for desegregated education and not the assurance that segregated school systems will in fact become desegregated, then more voluntary approaches can work to assure such an opportunity.

But the primary focus of this presentation is not involuntary versus voluntary remedies, but rather the limits of judicial authority. I will use *Spallone v. United States*[2] (the "Yonkers case") to examine that question. The issues that arose in *Spallone* are unique. In the original case that gave rise to *Spallone*, the United States brought suit against the City of Yonkers and its community development agency for intentionally creating racially segregated housing in violation of Title VIII of the Civil Rights Act of 1968[3] and the Equal Protection Clause of the Fourteenth Amendment.[4] The City of Yonkers and the Yonkers Board of Education were also sued for acts that had resulted in racial segregation of the city's public schools.

In November 1985, in the school desegregation branch of the case, Judge Sand found the City of Yonkers and the Yon-

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1. Judge Easterbrook asserts that most disputes over remedies in civil rights cases are actually disputes over the underlying substantive entitlements. *See* Easterbrook, *Civil Rights and Remedies*, 14 HARV. J.L. & PUB. POL'Y 103 (1991).

2. 110 S. Ct. 625 (1990).

3. 42 U.S.C. §§ 3601-3631 (1988).

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

kers Board of Education liable for segregative conduct.[5] The district court then asked defendants to devise remedies to enable them to comply with the Constitution. The Yonkers Board of Education devised remedies, and, with minor amendments by the Justice Department and the NAACP, the school remedies went into effect in September 1986.[6]

The court-approved remedy in the school desegregation case was a controlled choice plan—a mix between a mandatory and a voluntary plan. Parents of elementary school-aged children were required to choose to send their children to one of three schools that would eventually be desegregated. At the secondary school level, zone lines were altered and mandatory desegregative assignments made with transportation provided. The plan has been successfully implemented, and the school district's enrollment has been increasing without significant white flight.[7]

Ironically, in the public housing aspect of the case, the very same city refused at every turn to comply with the same court's order to desegregate. For example, the court ordered Yonkers to present a long-term housing plan by November 1986.[8] Instead of producing and presenting a plan, the city presented a one-page letter from its counsel indicating that the City Council was unwilling to submit any plan.[9] It flatly refused to comply.

Pending appeal, Judge Sand and the Justice Department were, perhaps understandably, hesitant to proceed with remedies against the city's contumacious conduct.[10] Finally, in late December 1987, a panel of the Second Circuit unanimously affirmed Judge Sand's decision on liability and remedy.[11] The parties then agreed to a consent decree setting forth actions the city would take to implement the remedial order, including

5. *See* United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

6. *See* United States v. Yonkers Bd. of Educ., 635 F. Supp. 1538 (S.D.N.Y. 1986).

7. *See* Report from Dr. Christine Rossell, Boston University, to Dr. Donald Batista, Superintendent of Yonkers Public Schools (Jan. 25, 1990).

8. *See Spallone*, 110 S. Ct. at 628-29.

9. *See id.* at 629.

10. *Cf.* Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982); New York Nat'l Org. of Women v. Terry, 886 F.2d 1339, 1349 (2d Cir. 1989) (noting that filing notice of appeal divests district court of jurisdiction to deal with matters raised for review), *cert. denied*, 110 S. Ct. 2206 (1990).

11. *See* United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1184 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

the passage of a legislative package ("The Affordable Housing Ordinance") within ninety days.[12] The district court approved the decree on January 28, 1988.[13]

In June 1988, the district court finally entered a long-term housing plan based on a draft prepared by city lawyers. The City Council was ordered under threat of contempt to comply with the consent decree by passing the package.[14] This gave rise to the issue of the court's authority to enforce the agreed-to remedy. Should Judge Sand simply have ordered the housing plan into effect? The consent decree had been subject to dispute; obviously, the City Council did not intend to pass the required ordinance. Thus, the question arose: What benefit derived from telling the City Council to pass the ordinance at pain of contempt?

As the NAACP's lawyer, I saw no benefit to such a route, and I argued that: (1) The judge should enter an order creating an independent structure with responsibility for getting integrated affordable housing constructed and vest that entity with the authorities possessed by the city over such matters as zoning, land use, and building codes; (2) the city should not be held in contempt for failure to proceed; and (3) the individual council members should not be held in contempt. Why not hold the city and its council members in contempt, particularly when their conduct was so clearly contemptuous of the court and the Constitution? Because such an action would only further polarize the situation, would make martyrs of these individuals whose contumacious conduct was absolutely plain, and would fail to further the remedial objective supporting the order's implementation.

At a July 5, 1988 hearing, the government's lawyer stated exactly the contrary position. The government believed it critical that Yonkers be made to follow the rule of law. The NAACP, on the other hand, believed that Yonkers could be made to follow the rule of law if the judge would appoint a commission, a master, or a czar to implement housing remedies in the city.

Though he had first proposed the creation of such an entity, Judge Sand ultimately rejected the NAACP's position. He imposed the contempt fines—first against the city and then, a few

12. *See Spallone*, 110 S. Ct. at 629.
13. *See id.*
14. *See id.* at 630.

days later, against the individual council members.[15] The fines against the city doubled each day in perpetuity until the Second Circuit later capped the fines at $1 million a day.[16] The fine against the council members was set at $500 a day with imprisonment on the tenth day.[17] Judge Sand had accepted the United States' proposed remedy.

The fines against the council members were stayed by the United States Supreme Court, pending review of the defendants' petition for writ of certiorari.[18] Finally, in September, as the fines on the city reached $832,000 a day, the city council voted, five-to-two, to pass the required ordinance.[19] The Supreme Court granted certiorari to review the case.[20]

This case is useful for examining the limits of judicial authority and how the Supreme Court set the limits. In seeking certiorari, the council members advanced several broad arguments. First, they asserted that, as local legislators, they enjoyed absolute legislative immunity that precluded any court from requiring them to vote in any way, even in a way which would secure a constitutionally required, long-term housing ordinance.[21] Notwithstanding the prior adoption of the consent decree of January 1988, which specifically required adoption of the long-term housing ordinance and enumerated its provisions, the four council members (including two who had supported the consent decree and two who had opposed its adoption) argued that a judicial order forcing their vote was an intrusion of their absolute legislative immunity.[22] Second, several of the council members argued that, as council members and as citizens, they had an absolute First Amendment freedom of speech right that proscribed judicial orders that would compel them to vote against their respective wills.[23]

The Supreme Court, though it invalidated the fines on other grounds, rejected both arguments. With respect to legislative immunity, the Supreme Court determined that, if other reme-

15. *See id.*
16. *See* United States v. City of Yonkers, 856 F.2d 444, 460 (2d Cir. 1988).
17. *See id.* at 450.
18. *See* Spallone v. United States, 487 U.S. 1251 (1988) (staying contempt fines against Yonkers City Council members).
19. *See* Spallone v. United States, 110 S. Ct. 625, 631 (1990).
20. Spallone v. United States, 109 S. Ct. 1337 (1989).
21. *See Spallone*, 110 S. Ct. at 630-31.
22. *See id.* at 631.
23. *See id.*

dies failed to force the city's compliance with the district court order, individual sanctions against the local legislators would be both proper and useful.[24] Second, with respect to the freedom of speech right, the Supreme Court intimated that this right was subsumed within legislative immunity and did not have independent juridical vitality.[25]

Although this case was perceived by some as a victory for the council members, I believe that it was not. Rather, it was a traditional, narrow exercise of Supreme Court supervision of a district judge's equitable authority. Furthermore, although I disagreed with Judge Sand in the district court, I believe that the Supreme Court's opinion is wrong and that it reflects rather strange hindsight, as opposed to a principled explication of why Judge Sand's judgment was incorrect. Indeed, Judge Sand's judgment could be perceived as correct if one believed city council compliance was critical, a value the Supreme Court embraced in *Spallone*. The difference, as I saw it, however, was that implementation of the order, which could have been accomplished without the the council members' compliance, was more important than forcing them to comply.

Spallone illustrates my view that there are no limits on judicial authority. Where there are adjudicated constitutional and perhaps statutory violations, as in *Spallone*,[26] I believe that the federal courts have plenary authority to remake underlying institutions in order to eviscerate the effects of the constitutional violations.

A recent example is *Missouri v. Jenkins*,[27] in which the Court required government entities to raise taxes if necessary to vindicate underlying constitutional rights. In *Jenkins*, the Supreme Court held that federal courts have the authority to set aside state-imposed limitations on local taxing authorities if such limitations hinder fulfillment of constitutional guarantees.[28] A contrary regime would allow a taxing authority to reduce or limit taxes—in a sense, strip itself of necessary public resources—as a means of frustrating achievement of basic constitutional rights. This seems to me a patently ridiculous outcome.

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24. *See id.* at 634-35.
25. *See id.* at 634.
26. *See id.* at 628-29.
27. 110 S. Ct. 1651 (1990).
28. *See Jenkins*, 110 S. Ct. at 1666.

I wish to place the *Spallone* case in context. It has long been held that the federal courts have the responsibility to tailor their remedial orders to the underlying violations.[29] Where those underlying violations relate to structural and systematic oppression of racial minorities, the judiciary's role is inherently and necessarily broad-based.[30]

For example, while working with the United States Department of Justice from 1978 to 1981, I was involved in the Cleveland school desegregation case, *Reed v. Rhodes*.[31] In *Reed*, Chief Judge Frank J. Battisti found historic and pervasive segregative conduct by the Cleveland Board of Education, and later by the State of Ohio.[32] The judge entered one of the most expansive remedial decrees ever issued in a school desegregation case,[33] seeking aggressively to undo the effects of discrimination and segregation.

The local authorities essentially refused to comply. As in *Spallone*, they argued that the district court, despite the affirmance of its orders by the Sixth Circuit,[34] had overstepped its judicial bounds.[35] Through institutional devices, the local officials effectively sabotaged the ability of the Cleveland School System to meet the requisites of the order.

I was the government's lawyer at that time. The United States argued that the federal district court had the power to appoint a special master to run the Cleveland School System so as to assure compliance with remedial orders. This tailored remedy was necessary to enforce the court order that would secure for Cleveland's minority school children the advantages of a desegregated and non-discriminatory public education.

In my judgment, in such a situation, the federal court has no alternative but to take over the non-compliant institution. As radical as this approach might seem, one must remember that

29. *See* Milliken v. Bradley, 418 U.S. 717 (1974).

30. *See* Griffin v. Prince Edward County School Bd., 377 U.S. 218, 233 (1964); Liddell v. Missouri, 731 F.2d 1294 (8th Cir.) (en banc), *cert. denied*, 469 U.S. 816 (1984); United States v. Missouri, 515 F.2d 1365 (8th Cir.) (en banc), *cert. denied sub nom.* Ferguson Reorganized School Dist. R-2 v. United States, 423 U.S. 951 (1975).

31. 422 F. Supp. 708 (N.D. Ohio 1976), *aff'd in relevant part*, 607 F.2d 714 (6th Cir. 1979), *cert. denied sub nom.* Cleveland Bd. of Educ. v. Reed, 445 U.S. 935 (1980).

32. *See Reed*, 422 F. Supp. at 796-97.

33. *See id.* at 797.

34. *See* Reed v. Rhodes, 607 F.2d 714 (6th Cir. 1979), *cert. denied sub nom.* Cleveland Bd. of Educ. v. Reed, 445 U.S. 935 (1980).

35. *See* Cleveland Bd. of Educ. v. Reed, 445 U.S. at 936-38 (Rehnquist, J., dissenting from denial of certiorari).

the Fourteenth Amendment is primarily directed to public officials. Where public officials refuse to discharge their duties in compliance with constitutional requirements, the federal judiciary is the only check on such recalcitrance. Our system has no other political apparatus to do the job.

In a democratic and majoritarian system, when the minority's rights are not vindicated through the political process, it necessarily becomes the structural role of the courts to defend those rights. This role may very well involve a change in the institutional structure and processes of the offending entity.

Courts should not shy away from their remedial role out of fear of infringing on "local autonomy." I believe that in the Supreme Court cases since *Milliken v. Bradley*,[36] there has been a troubling conception that deference to local autonomy constitutes a limitation on judicial authority in the remedial context. What is the local interest that places a constraint on judicial authority in a remedial context? I have not been able to identify it in any case where there was an independent constitutional violation that predicated the exercise of such authority.

It is interesting to try to decipher the Supreme Court's point of view in cases like *Milliken*. Clearly, in *Milliken*, there were suburban school districts that had never been found liable for segregative conduct.[37] These schools were initially included by Judge Stephen Roth in the school desegregation plan as the only means of desegregating the City of Detroit's public schools. Notwithstanding the segregative consequence of excluding them from the remedy order, the Supreme Court found that local autonomy, along with other due process principles, justified that remedy's reversal. But beyond the due process argument—which requires that to be included involuntarily in such a plan, a party must be found liable after trial—what else is meant by local autonomy? I am not prepared to venture a hypothesis.

Finally, I will briefly address the unitariness discussion that Judge Easterbrook introduced.[38] I litigated a case in Jacksonville, Florida, in which the Eleventh Circuit Court of Appeals reaffirmed its view that, so long as a school district is not unitary, that district has an ongoing affirmative obligation to en-

36. 418 U.S. 717 (1974).
37. *See Milliken*, 418 U.S. at 719.
38. *See* Easterbrook, *supra* note 1, at 104-05.

sure that its actions are maximally desegregative.[39] Apparently, this was in response to cases being argued and decided in the Fourth and Tenth Circuits.[40] In other words, the issue is not whether the school districts are unitary or not unitary in the abstract; rather, the issue is whether those districts, over time and before they became unitary, have taken the maximal steps to ensure racial desegregation. If they have not, then the issue of unitariness is reserved.

39. *See* Jacksonville Branch, NAACP v. Duval County School Bd., 883 F.2d 945 (11th Cir. 1989).

40. *See* Keys v. School Dist. No. 1, 895 F.2d 659 (10th Cir. 1990); Brown v. Board of Educ., 892 F.2d 851 (10th Cir. 1989); Dowell v. Board of Educ., 890 F.2d 1483 (10th Cir. 1989) (denying school board's request that injunction of injunction based on unitary status); School Bd. v. Baliles, 829 F.2d 1308 (4th Cir. 1987) (finding Richmond schools unitary and thus not ordering further funding of desegregation).

JUDICIAL REMEDIES: BRAKING THE POWER TO FIX IT

WILLIAM BRADFORD REYNOLDS*

It is my thesis that there are indeed some discernable limits to what judges can properly do at the remedial stage of a discrimination case. At the outset, let me note that there is, at least theoretically, much to Judge Easterbrook's thesis.[1] Clearly, the judicial definition of entitlements, or "rights," affects the way that remedies are drawn.

It is difficult, however, to see any meaningful limiting principle in the approach that utilizes the judge's definition of "entitlements" as the exclusive constraining influence on the scope of remedies. I noticed that Judge Easterbrook was careful to focus his remarks entirely on the entitlements side of the equation, as opposed to the remedial side. If judges adhere to the law as written rather than attempt to rewrite it, then the use of substantive legal definitions could well serve as a curbing influence on remedial abuses. But judicial activism is regrettably not yet a thing of the past and will, realistically, be with us for some time. This makes many of us shudder at the prospect of leaving remedies to the unfettered discretion of judges who have whimsical notions about the elastic nature of individual rights.

So where do we turn for objective curbs on remedial excesses by our courts? Obviously, the *written* laws that make up our federal and state codes form one general limitation on remedial authority. In this sense, the linkage between substantive liability and the nature of the relief awarded cannot be ignored any more than it should be the sole point of reference.

Beyond that benchmark, however, there are some independent limiting principles that I regard as constraining judicial remedial power. The doctrine that remedies must be "narrowly tailored" to fit the particular violation is one such constraining influence. This doctrine has gained considerable attention from the courts recently. Thus, the Supreme Court in 1989 used this "tailoring" test in examining the constitutionality of

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1. *See* Easterbrook, *Civil Rights and Remedies*, 14 HARV. J.L. & PUB. POL'Y 103 (1991).

legislative remedies for past discrimination.[2] The requirement of narrow tailoring imposes on the judiciary discipline to fashion relief that is both specific to the parties before the court and specific to the wrong to be cured.

Party-specific relief has reference to both sides of the dispute. From the plaintiff's perspective, to meet the narrow tailoring requirement a remedy must be sufficient to correct the injury or the wrong suffered by the victim, yet no more expansive. This victim-oriented relief attaches only to the complaining parties before the court who have been victimized by the proven wrongdoing. For the most part, victim-oriented relief can be applied in all areas of civil law; it therefore should serve as a remedial benchmark not only in cases involving civil rights, but also in those concerning, for example, contracts, torts, or products liability.

On the defendant's side, the limiting principle is much the same: Tailored relief reaches only the wrongdoer, not others, perhaps with "deeper pockets," who are untouched by the verdict. Judge Easterbrook made reference to the Chicago school desegregation case, which has been tied up in the courts for years on a number of legal issues.[3] In that case, the Seventh Circuit Court of Appeals twice considered the question whether the United States could be required to provide funding for the desegregation plan as a party to the consent decree, notwithstanding that it had never been charged with an offense.[4] On both occasions, the Seventh Circuit held that the district court could not require payment from the federal government. In addition, the Supreme Court has voiced support for the principle that the remedial authority of a court allows no discretion to visit penalties on those not adjudged responsible for the wrong at issue.[5] Just as those receiving redress must be the litigating parties who can demonstrate that they are victims of the unlawful conduct, so, too, those against whom the

2. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

3. *See* United States v. Board of Educ. of Chicago, 567 F. Supp. 272 (N.D. Ill.), *aff'd in part, vacated in part, and remanded*, 717 F.2d 378 (7th Cir. 1983), 588 F. Supp. 132 (N.D. Ill.), *vacated and remanded*, 744 F.2d 1300 (7th Cir. 1984), 621 F. Supp. 1296 (N.D. Ill. 1985), *vacated and remanded*, 799 F.2d 281 (7th Cir. 1986).

4. *See* United States v. Board of Educ. of Chicago, 799 F.2d 281 (7th Cir. 1986); United States v. Board of Educ. of Chicago, 744 F.2d 1300 (7th Cir. 1984).

5. *See* Milliken v. Bradley, 418 U.S. 717, 744 (1974) ("The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation.").

remedy is assessed must be the litigating parties guilty of that misconduct. Accordingly, in *Milliken v. Bradley*, the Court's majority made it clear that the remedial power of the judge in that case could not extend to neighboring school districts that were neither before the court nor implicated in the wrongdoing.[6]

These narrow-tailoring limitations on a judge's otherwise broad discretion to fashion relief apply without regard to the judicial definition assigned to the rights or entitlements that are in dispute. To be certain, the substantive definition of the entitlements might impact on the determination of which parties, or how many, are arguably within the remedial range of a particular case. The substantive definition of entitlements, however, should be construed so as to insure that the relief ultimately fashioned is tailored to the injured and guilty parties.

Overarching constitutional limitations also apply, in my view, to the courts' remedial powers. In *Spallone v. United States*,[7] the Yonkers housing discrimination case, a majority of the Supreme Court agreed with such a viewpoint. In *Spallone*, the Court set aside a district court's contempt orders against four members of the Yonkers City Council. The Court ruled that entry of the orders had been an abuse of judicial discretion because the district court had failed to allow sufficient time for a separate contempt citation against the city to work its intended effect.[8]

Chief Justice Rehnquist's majority opinion in *Spallone* does not rest on separation-of-powers reasoning, nor is it based upon legislative immunity or interference with First Amendment rights of association. The opinion is unmistakably concerned, however, with courts' exercise of their remedial powers in a manner that intrudes on the legislative domain.[9] The *Spallone* majority, at the very least, recognizes that there are constitutional limits that hold judges to the task of judging and do not permit them to step into the shoes of legislators, who alone under our Constitution have the task of legislating. To be sure, the Court found it unnecessary to state the principle so absolutely in *Spallone*, but its finding of "abuse of discretion" should not be misread as an indifference to the limited spheres of op-

6. *See id.* at 744-45.
7. 110 S. Ct. 625 (1990).
8. *See Spallone*, 110 S. Ct. at 632-35.
9. *See id.* at 633-35.

eration assigned to each of the three branches of government under our Constitution.

The Eighth Circuit Court of Appeals decision in the Kansas City school desegregation case highlights the point.[10] The district court in that case had entered a remedial order imposing an income tax and demanding a property tax increase throughout the State of Missouri in order to raise revenues to support a comprehensive magnet school program.[11] On appeal to the Eighth Circuit, the court-ordered income tax was invalidated as beyond the proper scope of judicial authority.[12] The lower court's direction that the property taxes be increased was upheld as within constitutional bounds.[13]

As presently drawn, the line etched by the Eighth Circuit between acceptable and unacceptable judicial relief is discernable, but just barely. Hopefully, the Supreme Court will clarify matters by barring judges from *directing* legislative adoption of tax increases (under a threat of judicial sanctions for non-compliance) in addition to barring them from actually *imposing* income tax increases. The taxing power is properly within the sphere of the legislative branch under our scheme of government; it is a constitutional misfit in the remedial hands of judges.[14]

The mischief lurking in *Jenkins* can be better appreciated if the Eighth Circuit's ruling is combined with the message in *Spallone*. Together these decisions seem to be saying that remedial steps the courts are barred from taking directly under the separation-of-powers doctrine, like imposing taxes, can still be accomplished indirectly. For example, rather than imposing its own tax, a lower court need only direct that legislative action

10. *See* Jenkins v. Missouri, 855 F.2d 1295 (8th Cir. 1988), *aff'd in part, rev'd in part, and remanded*, 110 S. Ct. 1651 (1990).

11. *See Jenkins*, 855 F.2d at 1301.

12. *See id.* at 1315.

13. *See id.* at 1310-15.

14. After I offered this view of the appropriate holding in the *Jenkins* case, the Supreme Court ruled that the distinction between judicial imposition of a tax and a judicial direction to the taxing authorities to increase taxes has constitutional significance. *See* Missouri v. Jenkins, 110 S. Ct. 1651 (1990). While not persuaded that such fine line-drawing skirts clear of the separation-of-powers concerns that loom large when judges undertake to fund their remedial orders by involving themselves in the business of "lay[ing] and collect[ing] Taxes," U.S. CONST. art. I, § 8, the *Jenkins* majority has made such arguments more difficult in the future, albeit still available in some circumstances.

be taken to increase taxes, and then hold the state or local legislative body in contempt if it fails to comply.

That is obviously not a happy result for constitutional purists. But *Spallone* is not a very satisfactory decision. It skirts a doctrinal rationale, and treats no differently the four councilmen who refused to vote for additional low-cost housing. A good argument could have been made for upholding the contempt order against two of the four (that is, the two in office who voted for the original consent order but then changed their position after it was entered), but not the other two (one of whom adamantly opposed the decree throughout and the other who was elected to the City Council after entry of the decree and took no part in its preparation or adoption).

The Supreme Court's recent decision in *Martin v. Wilks*[15] is worth reading to illuminate this point. In *Martin*, one issue was "court-access."[16] White firefighters in Birmingham, Alabama, sought to challenge a racial preference program ordered into place under a consent decree between the city and its minority firefighters.[17] The white firefighters' initial efforts to have their objection to the plan heard had been to no avail. When they sought in a separate action again to contest the fire department's preferential hirings and promotions under the decree, the lower courts held that they were barred from attacking the court-approved program because the motions they filed were untimely.[18] The Eleventh Circuit reversed the district court holding.[19]

In affirming the Eleventh Circuit, the Supreme Court focused on the fact that the complainants had not been parties to the suit by minority firefighters from which the consent decree emerged and thus were not parties to its settlement.[20] As such, the complainants were not bound by the terms of the preference program and could properly contest its operation on the basis that it was racially discriminatory against them.[21]

Applying the same logic to *Spallone*, the Yonkers City Council

15. 109 S. Ct. 2180 (1989).
16. *Martin*, 109 S. Ct. at 2184.
17. *See id.* at 2182-83.
18. *See id.* at 2183.
19. *See In re* Birmingham Reverse Discrimination Employment Litigation, 833 F.2d 1492, 1498 (11th Cir. 1987).
20. *See Martin*, 110 S. Ct. at 2187.
21. *See id.* at 2188.

member elected to office *after* entry of the consent decree, and adamantly opposed to it, should not have been cited personally for contempt. He, like the white firefighters in Birmingham, was not bound by the earlier court action. It may be, however, that council members in office at the time the decree was entered should be treated differently. If they initially voted for the decree, but after it was entered changed their position and sought to thwart its enforcement, the argument for reaching them personally in a contempt order—if the city persists in its refusal to respond to the court—has some appeal. On the other hand, contempt may not be an appropriate judicial response to a council member who at all times opposed entry of the consent decree, and continued after its entry to persist in his opposition.

Where such lines are drawn is relevant, of course, to the general boundaries on a court's remedial powers. As suggested above, one constitutional breakpoint is reached whenever a court steps out of its judicial role and into a legislative role. Beyond that, a court should not cross substantive constitutional lines in devising remedies for particular controversies. For example, in repairing discrimination suffered by the Birmingham minority firefighters, the court should not have been able to devise relief that produced racial discrimination against others. Uneven government treatment based on race, gender, religion, or ethnic background invades constitutionally forbidden territory, even if sponsored for benign reasons;[22] judges are as bound by this constitutional imperative as are legislators.

Even having stated the proposition so boldly, there is invariably at least one exception for every rule. Not even the command to public authorities to behave constitutionally is absolute. The rule has been required to yield when one can show that such a response is "compelled." Thus, the free speech protection gives way to a ban on certain speech in compelling circumstances; for example, one cannot falsely shout fire in a crowded theatre.[23] Similarly, recent Supreme Court civil rights decisions permit the possibility of "narrowly tailored" preferential relief when compelled as a last resort.[24]

22. *But cf.* Metro Broadcasting, Inc. v. Federal Communications Comm'n, 110 S. Ct. 2997 (1990); University of Cal. Regents v. Bakke, 438 U.S. 265 (1978).

23. *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

24. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); United States v. Paradise, 480 U.S. 149 (1987). Since these remarks were made, the Supreme Court

Chief Justice Rehnquist's opinion in *Spallone* can be read to convey a similar message. The contempt orders against the individual council members were held not yet to be compelled, because all other remedial efforts had not been exhausted.[25] But the door was clearly left open for the court to cross the line—to move into forbidden "legislative" or "quasi-legislative" territory—if it was ultimately compelled to do so as a last-resort judicial response.

There is always the risk that the exception will swallow the rule. If courts are given too much latitude in attaching the "compelled" label to the relief they fashion, that risk looms large. Some comfort can be derived from the fact that the "compelling circumstances" exception to constitutional mandates has been employed sparingly by our judiciary. And the present Supreme Court appears unprepared to give it wider latitude in the exercise of courts' remedial powers.[26]

It is equally important to make certain that judicial decrees are not allowed to outlive their usefulness. This consideration is especially significant in the school desegregation cases. Few court decrees have lasted longer than those entered in the 1960s and 1970s to achieve school desegregation. Those decrees imposed on public school boards a range of requirements—including forced busing, rezoning of districts, and closing and consolidating school facilities—all to desegregate the public school systems. At the time that each order was entered, it was anticipated that compliance would result in a

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decided Metro Broadcasting, Inc. v. Federal Communications Comm'n, 110 S. Ct. 2997 (1990). By a five-to-four majority, the Court fashioned yet another exception to the constitutional command that Congress not classify by race—albeit under circumstances unrelated to the panel's discussion of judicial *remedial* powers. Radio and television licenses could, in the majority's view, be distributed along racial lines by a federal agency, assuming evidence of congressional acquiescence, so long as the purpose for such a racially discriminatory distribution procedure was to diversify program content, a purpose labelled by the majority as wholly "benign." *Id.* at 3010. In reaching this conclusion, the Court's majority employed the standard that a "benign race-conscious program that is substantially related to the achievement of an important governmental interest is consistent with equal protection." *Id.* at 3026. This standard echoes ominously the "important governmental objective" reasoning that prevailed in Plessy v. Ferguson, 163 U.S. 537 (1896), and the separate-but-equal doctrine some 150 years ago.

25. *See supra* note 7 and accompanying text.

26. That comfort level has understandably dropped significantly since the Supreme Court's decision in *Metro Broadcasting*. *See supra* note 24. It is important to emphasize, however, that *Metro Broadcasting* did not concern an exercise of judicial remedial power, but involved only the power of Congress to enact a racial classification in a non-remedial context. *See Metro Broadcasting*, 110 S. Ct. at 3028 (Stevens, J., concurring).

school system no longer racially divided, but "unitary."[27]

Most of the school decrees have since been modified or dramatically altered in response to changing conditions and demographics. The district courts eventually began to declare some school systems unitary, finding that the racial segregation of students had come to an end. But extensive "white flight" in a number of areas made it impossible to accomplish the full measure of desegregation originally contemplated.

It was argued in at least one case that a school board that had fully complied for years with a desegregation decree, but had predictably failed to eliminate all one-race schools, should not be entitled to a declaration of unitariness, or, even if unitariness was declared, such a board should not be released from the decree. The Fourth Circuit rejected these arguments and ruled in favor of the school board on both these issues in *Riddick v. School Board of Norfolk*.[28] In *Norfolk*, the Fourth Circuit found that full compliance with the court decree for a number of years had eliminated all government-inspired segregation in Norfolk, and held that a declaration of unitariness was appropriate, notwithstanding the fact that there remained some one-race public elementary schools due to demographic changes within the system.[29] The Fourth Circuit further reasoned that unitariness signals the end of the court decree and the court's jurisdiction.

The finite nature of court decrees is important to underscore. The *Norfolk* decision recognizes that court orders do not last forever. After full compliance with remedial requirements and a curing of the wrong, the defendant should be released from the "penalty box." After all, even criminals are set free once they have served their sentence. Similarly, in a civil action, if a school board eliminates the discriminatory practices and successfully achieves unitariness, it should not continue to be the subject of a court order entered much earlier against other board members. Rather, the court's jurisdiction should come to an end. If new problems arise, the court is always available to receive new complaints in a subsequent lawsuit.

The Tenth Circuit recently took a different view. In *Board of*

27. *See, e.g.*, Green v. County School Bd., 391 U.S. 430 (1968).

28. 784 F.2d 521 (4th Cir. 1986).

29. *See Norfolk*, 784 F.2d at 535.

Education v. Dowell,[30] the Tenth Circuit appears to have held that a school board cannot escape the jurisdiction of the court even after a declaration of unitariness, but can forever be held answerable to the court of original jurisdiction to protect against "backsliding," or a reversion to the discriminatory behavior of old. The Supreme Court has granted certiorari to review this case.[31]

Just as a judge's power to fashion remedies is not open-ended, but must adhere to certain limiting principles as to parties, subject matter, and constitutional integrity, so too, his remedial jurisdiction does not survive in perpetuity. The judge's jurisdiction ceases once the remedial purposes have been achieved. To be sure, this still leaves plenty of open space for courts to roam in structuring appropriate relief, but it does not give them the *carte blanche* authority that others endorse.

30. 890 F.2d 1483 (10th Cir.), *cert. granted*, 110 S. Ct. 1521 (1990).
31. *Dowell*, 110 S. Ct. 1521 (1990).

PANEL V:
NEW FRONTIERS IN CIVIL RIGHTS

INTRODUCTION: A WALK THROUGH THE CIVIL RIGHTS WORLD

R. GAULL SILBERMAN*

This splendid Symposium has been a walk through the civil rights world—a world which is often polarized, contentious, and anything but civil. Covering many difficult and emotional issues, we started with the panel, "What Are Civil Rights and to Whom Do They Belong?" If neither of these two questions was directly answered, it was partly because we, as a society, do not wish to answer them specifically and permanently. The world of civil rights is an ever-evolving world.

The next panel addressed the role of government in closing the socio-economic gaps faced by minorities. Although the term "civil rights" was not mentioned in the title of this panel, the speakers very quickly began to address the consequences and efficacy of affirmative action. The following panel proceeded directly to the nitty-gritty of quotas.

When I first joined the Equal Employment Opportunity Commission (EEOC), "quota" was akin to a four-letter word not uttered in polite company. The Commission discussed prospective relief, formula relief, goals and timetables, affirmative discrimination, even employment opportunity enhancement, but never quotas. It is a sign of how far we have come, of how much the terms of discourse have changed, that the debate over the Civil Rights Act of 1990[1] is cast specifically and explicitly in terms of quotas. The battle cry of the Act's proponents—"this is not a quota bill"—is, for those of us old enough to remember, reminiscent of a similar political disclaimer by a president soon to resign.[2]

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* Vice Chairman, United States Equal Employment Opportunity Commission.

1. H.R. 4000, 101st Cong., 2d Sess. (1990); S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. S1019-20 (daily ed. Feb. 7, 1990). The Civil Rights Act of 1990, as passed by Congress, was vetoed by President Bush on October 22, 1990, Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1632 (Oct. 22, 1990).

2. *See Nixon Declares He Didn't Profit from Public Life*, N.Y. Times, Nov. 18, 1973, at A1, col. 6 (President Nixon stating that "I'm not a crook" at press conference). *But see*

The next panel covered the limits of judicial power, a subject in whatever form near and dear to the Federalist Society. After our panel, the Symposium will turn to what has been and will continue to be an increasingly important question in the area of civil rights: the intersection of free speech, civility, and civil rights. My job is to introduce and moderate this distinguished panel, which will tour the topic, "Frontiers in Civil Rights," which encompasses the future of civil rights—the subject of this entire Symposium.

As we have often heard during the Symposium, this is a propitious time to take this tour. The year 1989 saw the twenty-fifth anniversary of the Civil Rights Act of 1964,[3] an anniversary marked by a spate of decisions involving employment discrimination and civil rights law.[4] These decisions, depending on one's perspective, were seen as either felicitous or disastrously counter-revolutionary. Yet, however one views these decisions—and I believe that, like most things in life, they ranged from excellent to mediocre—the legislative activity they spawn will largely define the civil rights agenda for the next twenty-five years.

In closing, I would like to call attention to one piece of legislation at the frontier of civil rights, legislation that no one else is likely to mention. The Americans with Disabilities Act[5] extends civil rights protection to integrate twenty-seven million disabled citizens more fully into this nation. The EEOC will have responsibility for enforcing this law, and we will probably be hearing a great deal more about it in the future.

Proclamation No. 4311, 39 Fed. Reg. 32,601 (1974) (President Ford pardoning former President Nixon "for all offenses against the United States which he, Richard Nixon, has committed or may have committed or taken part in during the period from January 20, 1969 through August 9, 1974").

3. Pub. L. 88-352, 78 Stat. 241 (codified as amended at scattered sections of 28 and 42 U.S.C.).

4. *See* Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) (racial harassment in the course of employment held not actionable under 42 U.S.C. § 1981); Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989) (claim of discrimination regarding a facially neutral seniority system accrues when the seniority system is adopted); Martin v. Wilks, 109 S. Ct. 2180 (1989) (white firefighters can challenge employment decisions made pursuant to consent decrees in cases to which they were not parties); Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989) (burden of persuasion to prove lack of bona fide business purpose for allegedly discriminatory employment practices shifted to plaintiff); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (city's minority set-aside held not justified by a compelling governmental interest and not narrowly tailored to remedy the effects of prior discrimination, and thus unconstitutional).

5. Pub. L. No. 101-336, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 327.

ON THE RIGHT TO BE SHELTERED FROM THE "RIGHT TO DIE"

HADLEY ARKES*

They say that colleges are the nursing grounds for the jurists of the future, and the measure of the colleges can be found in that entertainment Professor Richard Lederer has been willing to offer to the public by giving us the history of the Western world as culled from the papers of his undergraduates.[1] To give you the flavor of these offerings, they contain passages of this kind: that Socrates was a Greek teacher who died from an overdose of wedlock . . . that David was a Hebrew king who did battle with the Philatelists . . . that the Revolution took place in America when the British put tacks in our tea . . . . And after the Revolution, we no longer had to pay for taxis.

There was also some material in this collection on technology, birth, and death: for example, that with the invention of the steamboat a whole network of rivers sprung up in the land. (These were the original "supply-siders," I think.) Lincoln's mother died in infancy. Lincoln himself was born into a log cabin he had built with his own hands. Louis Pasteur discovered a cure for rabbis. And of course, long before that, Sir Francis Drake had circumcised the world with a 100-foot clipper.[2]

A population constituted with sensibilities of this type can be a persistent source of what the philosophers call self-refuting propositions, as with the primate who runs up after class insisting that "There is no truth." When that mind turns to moral philosophy or jural matters, it produces a rich variety of incoherent rights-claims: for example, "I have a right to believe that I don't exist." Who is the bearer of that right? The one who does not exist? Imagine the character who tried to claim a "right to die" and do himself in on the strength of his convic-

* Edward Ney Professor of Jurisprudence, Amherst College. The argument condensed in this paper will be published in a fuller form in the collection of papers, edited by Gerard Bradley and Charles Barry, drawn from the conference on euthanasia at the College of Law of the University of Illinois in October 1989. Also, see the article by the author, *"Autonomy" and the "Quality of Life": The Dismantling of Moral Terms*, 2 ISSUES L. & MED. 421 (1987).

1. *See* R. LEDERER, ANGUISHED ENGLISH (1987).
2. *See id.* at 8, 10, 11, 13, 15.

tion that he does not exist. There are judges who are ready to honor his claim under the banner of his "autonomy" or privacy. And yet, the ground of his action, the basis of his rights-claim, remains incoherent. He may be *free* to kill himself, but that is quite separate from establishing the *rightness* or the *justification* for the act. His conviction that he "does not exist" simply cannot supply a coherent reason for anything; therefore, it cannot supply a "justification" and the ground of a "right."

In trying to explain this matter to my students, I imagined the case of a judge who said, "Smith, you've been acquitted; therefore, I sentence you to twenty years." The judge has violated the law of contradiction, and on the basis of that mistake he has inflicted a harm on Smith. Now, imagine that the judge says, "Smith, you've just been acquitted; therefore, I sentence *myself* to twenty years!" The basis of the wrong remains precisely the same. The judge has violated the law of contradiction and inflicted a harm. The nature of the wrong has not been effaced in any degree by virtue of the fact that he visits the punishment solely on himself. The point is that the ground of his judgment simply cannot supply a coherent reason for his act, regardless of whether he inflicts the punishment on others, or on himself.

If we had the time here, I think that I could show you that those propositions that really have standing as moral propositions find their anchor, in the same way, in the law of contradiction. And we could eventually explain, on that ground, just why we cannot draw moral conclusions about people on the basis of such attributes as the color of their hair, their height, or their infirmities. To know someone is deaf, for example, is not to know anything of moral consequence about him. From his deafness we cannot infer that he is destined to a life of criminality, that he has no prospects of leading a decent life, or that he *deserves* to be punished. We could understand, then, why it would be wrong to kill anyone because of his deafness; but then, for the same reason, we would understand why it would be wrong for any person to kill *himself* for that same, unjustified reason. Once we understand, in other words, that deafness cannot provide a reason or a justification for a homicide, it is a matter of moral indifference that the killing is visited on oneself rather than others.

I recall these rudimentary points in logic, or in the history of

moral reflection, in order to set them against the remarkable trends in which the courts have advanced some radical claims about the "right to die"—and then extrapolated from that so-called right, the right of people to end the lives of their relatives when they become burdensome. In just a few years, the courts have moved from the indefensible to the unthinkable: They have moved from a willingness to cut off food and water for comatose patients who were supposedly wanting in a "cognitive and sapient" state, and they have shown a willingness recently to cut off treatment for patients who are very much conscious—who are able to respond to directions, lift their arms, and follow people around the room with their eyes.[3] The courts think that they are honoring a claim of autonomy or privacy, a claim that had its sharpest expression in *Roe v. Wade*.[4] But what we have seen in these cases is a dramatic example of claims of autonomy *detached* from the moral ground that would give them any sense.

We don't respect rights of autonomy on the part of animals; we don't seek their informed consent before we govern them or practice surgery on them. Claims of autonomy arise only for *moral agents*, for those beings who have the capacity to deliberate about the grounds of their choice, or the uses of their autonomy, and they are drawn to reflect on the choices that would be good or bad, right or wrong. But then the paradox: The right to autonomy is a right that arises only for moral beings; but it is the nature of a moral being that he is capable of reflecting about the choices that are right or wrong, and *therefore he can understand the things he is not free to choose in the name of his own autonomy*. He can understand, for example, that he would have no "right" to kill himself because he has an ancestor of the wrong race, or because he has lost his hearing.

But then I'd invite you to follow me in filling in the rest of the implication: If we do not have a right of privacy that permits us to destroy ourselves when we are deaf, then it follows that we cannot delegate to other people a right of "substitute judg-

3. *See In re* Jobes, 108 N.J. 394, 529 A.2d 434 (1987). One physician who attended Nancy Jobes reported that "on four or five occasions he had said, 'Nancy, pick up your head,' and that, with only one exception . . . she obeyed." *Jobes*, 108 N.J. at 405, 529 A.2d at 439. But in response, Judge Garibaldi "explained" that these reports on the responsiveness of Mrs. Jobes were simply "inconsistent with the trial court's conclusion that Mrs. Jobes [was] in a persistent vegetative state." *Jobes*, 108 N.J. at 408, 529 A.2d at 441.

4. 410 U.S. 113 (1973).

ment," and permit them to order, in the name of *our autonomy*, a withdrawal of treatment that we would not be warranted in ordering, even for ourselves, even in the name of our own autonomy.

I spoke on this problem at the College of Law at the University of Illinois in October 1989, and a nurse from Seattle came up saying that she now understood the problem she was trying to explain to some patients with AIDS. They were claiming, in the name of their privacy, a right to refuse treatment because of their AIDS. What they didn't understand was this: To establish the rightness of removing treatment from them on that basis would be to establish the ground on which *anyone* may remove it, in their place, if they were not able to express their own preferences. And that same understanding, about the rightness of ending treatment, may establish the ground on which other people may then conclude, in a choice among patients, that the patients with AIDS are patients that may justly be allowed to die, in preference to other patients, with other kinds of maladies.

I've remarked to colleagues that it really isn't necessary to overrule *Roe v. Wade* in order to scale back abortions to the volume at which they were performed before 1973. The so-called right to an abortion can be placed on the same plane as those other rights from which it was supposedly derived, like the "right to marry"[5] or the "right to procreation."[6] Either of these freedoms may be subject to a host of restrictions, when the restrictions can be justified.[7] If *Roe v. Wade* were placed on the same plane, it would mean that people have a right to abortions in those situations in which these operations may be justified, but the state may impose restrictions in the cases in which there would be no compelling reason for the taking of a human life. Justice White has already suggested this point, with the effect of startling Justice Stevens,[8] but Justice Stevens has a mind immanently open to surprise. *Roe v. Wade* could remain a shell in our law, even after most of its substance is removed. But so

5. *See* Loving v. Virginia, 388 U.S. 1 (1967).

6. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942).

7. For an extended analysis of this point in *Loving*, *Skinner*, and the cases that were later summed up to create a "right to privacy," see H. ARKES, FIRST THINGS 341-57 (1986).

8. *See* Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 790-95 (1986) (White, J., dissenting); *id.* at 776 (Stevens, J., concurring).

long as the decision stands there, marking an unanchored right of privacy and autonomy, then it stands as the foundation of another branch of our law, in which it offers the most extravagant license for euthanasia, for the withdrawal of medical treatment from newborn, retarded infants, and the withdrawal of food and water from aged, infirm patients. *Roe v. Wade* will not have to be struck down in any case involving the restriction of abortion; the need to strike it down will probably arise in one of these other cases, where *Roe* supplies the necessary ground for euthanasia.

But when anything touches these days on the foundations of *Roe v. Wade*, we find judges who are willing to overturn the teachings of a lifetime on the bench for the sake of protecting this right of taking life—which now seems to be, for them, in Matthew Arnold's phrase, the one thing needful.

I happened to be in the courtroom on that memorable day when Justice Thurgood Marshall announced his sudden conversion to the cause of States' rights. The Reagan administration had been seeking access to the records of a hospital in order to protect newborn, retarded infants from the withdrawal of medical treatment.[9] Justice Marshall had committed his career as a lawyer to breaking down the barriers of federalism and privacy, which prevented the federal government from protecting civil rights. He had helped the law reach private hospitals in forbidding the racial segregation of patients. But now, when it came to vindicating the civil rights of the handicapped, Marshall asked, with an exquisite surprise and indignation, What happened to the rights of States? Charles Cooper was arguing the case for the government that day, and he had turned upon him now Marshall's newly summoned passion for the cause of States. When the case for the government was stripped of its shadings and complications, Marshall thought the plain "truth is that the Federal Government is just taking over the state's function. . . . The only thing that's involved here is the right of the Federal Government to move into what for centuries has been a state matter, namely how to operate a hospital."[10] Late in his seasons of experience, he had apparently

9. *See* Bowen v. American Hosp. Ass'n, 476 U.S. 610 (1986).

10. Complete Oral Arguments of the Supreme Court of the United States, 1985 Term, Bowen v. American Hosp. Ass'n, No. 84-1529, at 16, 23. For a fuller treatment of the oral argument and the issues raised in this case, see H. ARKES, BEYOND THE CONSTITUTION 232-45 (1990).

come to revere a federal government limited by the rights of States.

And in this, I suppose, there may be a lesson for us all. When some of these questions are put to us, in a demanding, jolting way, we may discover—as Justice Marshall discovered—that we have principles we haven't even used yet.

UNFINISHED BUSINESS: A CIVIL RIGHTS STRATEGY FOR AMERICA'S THIRD CENTURY

CLINT BOLICK*

My objective in these brief remarks is to make a case for a positive, forward-looking civil rights strategy, and to sketch the contours of that strategy, especially in the context of law. Those who advocate the traditional civil rights principles of individual liberty and equality under law have consigned themselves in the last half century or so to a marginal role in the civil rights debate. Most alarmingly, we have frequently ceded the moral high ground in matters of civil rights to the political left, limiting our role to that of an adversary or a passive bystander.

The results of our absence have been devastating, not the least for those in whose name the modern civil rights establishment purports to speak. The epitaph for more than two decades of social engineering disguised as civil rights has been pronounced not only by Charles Murray,[1] but by prominent scholars traditionally associated with the left like William Julius Wilson[2] and others. If one had wanted to craft a social policy that would relegate many blacks and other minorities permanently to a separate and subordinate caste, he could not possibly have woven a more debilitating tapestry of dependency and despair than that of racial quotas, set-asides, busing, criminal rights, and the welfare state. Millions of individuals in our society are more isolated from basic opportunities than ever before. Once again the culprit is the coercive apparatus of government, wielded today by those who feign benevolence but impose misguided policies with tragic results.

So the time is ripe for a new approach to civil rights. Such an approach will not, however, come from the left. Having debated such civil rights establishment luminaries as Ralph Neas, Benjamin Hooks, and Joseph Lowery in the past year, I have been astonished at their lack of vision. Lurking beneath Sena-

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1. *See* C. MURRAY, LOSING GROUND (1984).
2. *See* W. WILSON, THE TRULY DISADVANTAGED (1987).

tor Edward Kennedy's Civil Rights Act of 1990[3] is the dreaded "Q" word, from which the left cringes as a vampire from a crucifix: quota. Quotas, in one form or another, remain the centerpiece of the left's civil rights agenda, and that leaves us a whole lot of room to develop a positive alternative.

Before conservatives can plausibly promote such a strategy, we must surmount very serious obstacles of our own making. Conservatives have worked hard and, unfortunately, with great success during the past fifty years to destroy their credibility in matters of civil rights. We will have to work even harder to overcome that legacy. To do so, we must accept two core premises. The first is that the foundation of any forward-looking civil rights strategy is the vigorous enforcement of the civil rights laws. These laws have opened the doors of opportunity to millions who were previously excluded; properly enforced, they can continue to do so. As Clarence Thomas demonstrated while Chairman of the Equal Employment Opportunity Commission, vigorous enforcement does not have to mean quotas. It *does* mean, however, getting serious about civil rights. Instead of standing shoulder to shoulder with the white racist government in Yonkers, New York, conservatives should have been in Howard Beach, New York, condemning the racially inspired killing of a young black man—and we should have been there *before* Jesse Jackson.

The second hurdle is the pervasive notion that reverse discrimination is somehow the most compelling civil rights issue of our era. As Stuart Butler of the Heritage Foundation recently remarked, "[credibility] is not engendered by conservative attorneys chasing fire trucks to see if any members of the Teamsters Union are upset about affirmative action."[4] I do not mean at all to suggest that we should abandon our quest for a color-blind Constitution, but rather that a civil rights program that consists exclusively of opposition to reverse discrimination is patently inadequate.

Once we have surmounted these self-imposed obstacles, we can get about the task of charting a positive new direction for

3. H.R. 4000, 101st Cong., 2d Sess. (1990); S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. S1019-20 (daily ed. Feb. 7, 1990). The Civil Rights Act of 1990, as passed by Congress, was vetoed by President Bush on October 22, 1990, Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1632 (Oct. 22, 1990).

4. Butler, *Razing the Liberal Plantation*, NAT'L REV., Nov. 10, 1989, at 28, 28.

civil rights. The best strategy is one that returns to the original objective of civil rights: an empowerment strategy that secures for individuals the power to control their own destinies through economic liberty, educational choice, emancipation from dependency, and freedom from crime. Conservatives must implement a strategy in which "affirmative action" is not a racial spoils system for the most advantaged, but a program of human capital development and economic mobility for the least advantaged.

In the legal arena, this empowerment strategy translates into a sustained and methodical effort to reinvigorate the guarantees of individual liberty and equality under law as embodied in the Fourteenth Amendment.[5] As our ultimate goal, we should dedicate ourselves to bringing down the twin pillars of jurisprudential oppression in the area of civil rights: *Plessy v. Ferguson*[6] and the *Slaughter-House Cases*.[7] We talk so often of judicial activism that creates rights out of thin air, but these two cases illustrate vividly the even more pernicious judicial activism that reads precious liberties out of the Constitution.

With respect to *Plessy*, we must complete the work started in *Brown v. Board of Education of Topeka*.[8] The Equal Protection Clause is a limitation on the government's ability to make distinctions among individuals in an unequal or arbitrary fashion. In *Plessy*, the Court embraced the notion that race is a "reasonable" basis on which to make such distinctions.[9] Ironically, the left has kept the flickering flame of *Plessy* alive by embracing this profoundly defective notion, and in our jurisprudence we must discredit it until the Supreme Court finally and absolutely lays it to rest. An Equal Protection Clause restored to its full vigor can be a powerful restraint on those who would use the coercive power of government to redistribute rights and opportunities, and can thereby finally serve its intended function as a mighty bulwark for individual liberty.

The *Slaughter-House Cases* present an even more formidable challenge. In *Slaughter-House*, the Supreme Court read the Privi-

5. U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

6. 163 U.S. 537 (1896).

7. 83 U.S. (16 Wall.) 36 (1872).

8. 347 U.S. 483 (1954).

9. *See Plessy*, 163 U.S. at 550-51.

leges or Immunities Clause,[10] and the vital liberties it was intended to protect, out of the Constitution.[11] Foremost among the rights the amendment's framers intended to protect was economic liberty—the right to pursue a business or occupation free from arbitrary or excessive government interference. Today, economic liberty is the least protected freedom, making a mockery of America's reputation as a beacon of opportunity. The victims of this judicial abdication, like most victims of civil rights deprivations, are individuals outside the economic mainstream, predominately minorities and the poor.

All of our litigation at the Landmark Center for Civil Rights, from our successful challenge last year to the District of Columbia's Jim Crow-era ban on street corner shoe-shine stands on behalf of entrepreneur Ego Brown,[12] to our planned assault on the Davis-Bacon Act,[13] is designed to undermine, piece-by-piece, the foundations of *Plessy* and *Slaughter-House*, until they collapse once and for all.

Conservatives can make a difference in civil rights. Since the Landmark Center for Civil Rights opened its doors less than two years ago, we have built a client base among the disadvantaged whose pleas were ignored by the civil rights establishment. We have represented Ego Brown. We represent Demond Crawford, who, in shades of Adolph Plessy, was denied access to an I.Q. test by the State of California because he is one-half black.[14] We represent Junie Allick, a third-generation sea captain who is defending his right to sail for a living in St. Croix against a National Park Service regulatory scheme that has systematically destroyed the native Virgin Islander charter-boat industry.[15] We represent Joseph Price, a black schoolteacher who is challenging his involuntary transfer pursuant to a Prince George's County, Maryland, quota policy that seeks racial bal-

10. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .").

11. *See Slaughter-House*, 83 U.S. (16 Wall.) at 81.

12. *See* Brown v. Barry, 710 F. Supp. 352 (D.D.C. 1989).

13. *See* Davis-Bacon Act, 40 U.S.C. § 276a (1988). The Davis-Bacon Act, also known as the "prevailing wage law," provides that any federally funded construction contractor must pay the local prevailing rate for labor, as set by the Department of Labor. The Act has been criticized for its exclusionary effect on unskilled labor and on non-union contractors.

14. *See* Crawford v. Honig, No. C-89-0014 (N.D. Cal. filed May 20, 1988).

15. *See* Allick v. Lujan, No. 89-2269 (D.D.C. July 16, 1990) (LEXIS, Genfed library, Dist file).

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ance on every teaching staff.[16] We represent Alfredo Santos, whose efforts to provide jitney transportation services to the poor Hispanic residents of east Houston were curtailed under a 1924 law designed to protect the now-defunct streetcar industry.[17] We represent Mark Anthony Nevilles, a black kindergarten student who was excluded from the magnet school across the street by virtue of a racial quota that holds empty seats open for whites in the name of doing justice for blacks.[18]

The irony in Mark Anthony Nevilles's plight is remarkable: A youngster is being bused past his neighborhood school to an inferior school farther away solely because he is black, which is precisely the situation presented in *Brown v. Board of Education*. Have we traveled so far and so painful a distance in thirty-five years, only to find ourselves back where we started?

Beyond the practical reasons for a new strategy is an even more compelling one: Our nation's moral claim is staked in its doctrinal commitment to civil rights. The last twenty-five years have witnessed the tragic redefinition of civil rights from those fundamental rights we share equally as Americans into special benefits for some and burdens for others. This abandonment of traditional civil rights principles is tearing this nation apart and weakening its commitment to civil rights. We must restore the noble quest for individual liberty and equality of law that is the essence of civil rights. To achieve that goal will require imagination, passion, persistence, and an unyielding commitment to principle.

16. *See* Stone v. Board of Educ. of Prince George's County, 53 Fair Empl. Prac. Cas. (BNA) 785 (D. Md. 1990).

17. *See* Santos v. City of Houston, No. 89-1245 (S.D. Tex. filed Apr. 11, 1989).

18. *See* Jenkins v. Missouri, No. 77-0420-CV-W-4 (D. Mo., motion to modify on behalf of Ronika Newton, et al., filed July 13, 1989).

CIVIL RIGHTS AND THE NEW FEDERAL JUDICIARY: THE RETREAT FROM FAIRNESS

STEPHEN REINHARDT*

The future of civil rights law is grim. Given the current judicial climate, those who value civil rights should not be concerned about new frontiers, but rather the protection of the heart and core of the civil rights advances that were won only a generation or two ago. These advances cost the blood, sweat, and tears of blacks and whites, Southerners and Northerners, Christians and Jews, liberals, and even some conservatives. Important gains were made possible by the Supreme Court under the leadership of Earl Warren, one of the greatest justices of all time. Similar progress was initiated by the Executive Branch under Presidents Kennedy and Johnson, and by the Congress, with leadership from such diverse Senators as Everett Dirksen and Ted Kennedy. First among equals, however, were the courageous judges, guided by a sense of justice and fairness.

Sadly, if we are to avoid the rapid unraveling of the progress we have made over the past forty years, we can no longer rely on the federal judiciary. We will principally have to rest our hopes with the Congress. In five major decisions in 1989, the Supreme Court made it far more difficult for minorities to mount and win discrimination cases, while making it far easier for white males to challenge the legality of affirmative action consent decrees.[1] Although contrary arguments may be advanced, the Court clearly turned away from its historical role as the protector of the civil rights of minorities—those who need its protection the most. Instead, in a remarkable display of that dreaded quality—judicial activism—the Court perceived a need to rewrite our civil rights law and to concentrate its efforts on preserving the privileged status of the white majority.

These five opinions collectively signaled the most significant retreat in modern times from our commitment to equal justice

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1. *See* Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989); Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989); Martin v. Wilks, 109 S. Ct. 2180 (1989); Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

under the law. In case anyone is in doubt, civil rights laws were enacted to eradicate generations of invidious discrimination against minorities—discrimination that has left, still today, a searing scar of injustice across the face of America. Civil rights laws were not enacted because white males were in need of our help.

Let me now digress a moment while we are on the subject of the Supreme Court. It has been suggested at least three times in this Symposium that the Supreme Court, under Chief Justice Burger, committed an impeachable offense in rendering a unanimous decision in *Griggs v. Duke Power Co.*[2] The general tenor of the discussion constituted an extraordinary disservice not only to the judiciary, but to the very process of enlightened discussion. I will not discuss *Griggs* here, but I urge that before you come to the conclusion that it is not too late to impeach former Chief Justice Burger, you read the case carefully. You will find that the criticisms you have heard this morning are fully refuted by the text of the opinion.[3]

To return to the issue before us, statistics regarding disparate treatment of blacks in our society are staggering. Forty-five percent of black children live in poverty, a figure computed after family assistance and other governmental benefits are added to household income.[4] While white households have a median net worth of $39,000, that of black households is only $3,397—one-eleventh of the white median.[5] Contrary to the mistaken perceptions of those in the current administration, blacks are not doing well. The economic status of blacks compared to whites has deteriorated since the 1970s, despite the salutary effects of affirmative action programs.[6] As the gap increases, the continuing need for such programs becomes even greater.

We should support affirmative action programs for two main reasons. First, such support is the right thing to do. While this may sound overly simplistic, deep down these programs are

2. 401 U.S. 424 (1971) (holding that the requirements of a high school diploma and intelligence tests constituted a prima facie case of racial discrimination under Title VII of the Civil Rights Act of 1964 because they had a disproportionate impact on minority job applicants).

3. *See Griggs*, 401 U.S. at 433-34.

4. *See* Kondracke, *The Two Black Americas: Bush's Most Urgent Policy Problem*, THE NEW REPUBLIC, Feb. 6, 1989, at 17.

5. *See* Ellis, *The Black Middle Class*, BUS. WK., Mar. 14, 1988, at 62.

6. *See generally* Kondracke, *supra* note 4.

rooted in the fundamental moral conviction that all men and women are created equal. Because throughout much of our history our nation has violated this basic principle, we had no alternative but to take extraordinary steps to remedy the injustice of years past. We must now continue vigorously to enforce those measures until the effects of past discrimination are eradicated. All of us, even if we never owned a slave or thought evil thoughts, are beneficiaries of the system of discrimination. Those of us in the majority have advanced ahead of other Americans, not solely because of our intelligence, talent, or skills, but in part because of the color of our skin.

As a result of affirmative action programs, thousands have entered through doors previously closed, gaining new employment opportunities. Employers charged with discrimination have altered their personnel policies in response to lawsuits. Others have changed their procedures after observing such litigation. Private employers, as well as government at the federal, state, and local levels, have voluntarily designed and implemented equal employment policies and affirmative action plans. That is, until recently.

One of the saddest days in our nation's history occurred when the Justice Department switched from advocating the rights of the disadvantaged and oppressed to representing white males in reverse discrimination suits. In so doing, the Justice Department no longer sought to enforce civil rights law, but rather turned to undermining the legality of voluntarily adopted affirmative action plans set forth in consent decrees.[7] The moral fabric of our society suffered a grievous blow. Yet, even when the administration tried to tell us that black was white and white was black, deep down most Americans knew that the race problem, the great American dilemma, was still far from resolved.

Even the "Buppies," the black urban professionals, continue to confront serious barriers to career advancement. While we have witnessed limited improvement at the lower-level entry positions, racial minorities now confront the glass ceiling, which blocks access to the upper echelons of the corporate ladder. No matter how hard they work, they ordinarily remain mid-level managers rather than advancing to top management

7. *See* Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 897.

positions. The rest of the picture is also dismal. We are still far from a truly integrated society. Racial divisions and racial tensions remain strong, sometimes on the surface, but more frequently bubbling just beneath. Under these circumstances, we cannot remain morally indifferent to the gaping economic and social inequalities. We must persist in our efforts to close the gap and to provide greater opportunities through more vigorous and effective affirmative action programs.

Second, we must continue to support affirmative action programs because we simply have no alternative. Unless we choose to live in a society deeply divided between the "haves" and "have-nots," with the constant potential for explosive confrontations, we have no choice but to press forward. In this regard, a 1989 study by the National Research Council states: "We cannot exclude the possibility of confrontation and violence . . . . The ingredients are there: large populations of jobless youths, an extensive sense of relative deprivation and injustice, distrust of the legal system, frequently abrasive police-community relations, highly visible inequalities, extreme concentrations of poverty, and great racial awareness."[8]

The potential for a recurrence of the urban unrest and riots of the late 1960s is ever-present. A recent study by the Sentencing Project, reported in the *Los Angeles Times*,[9] found that almost one out of every four black men in their twenties is in jail, on probation, or on parole. This is not the place to assess why that is the case. For our purposes, it matters not whether blacks are singled out for arrest because of their race, or arrested because they commit a disproportionate number of crimes. What does matter, though, is that a whole generation of young blacks is being lost. The divisions between different groups in our society are widening. Unless we continue to make substantial efforts toward swift and full integration, we are headed toward disaster. We, as a society, must muster the national will to avert such a crisis. Providing more opportunities means allocating more resources to the black community—specifically, providing jobs at all levels of the employment spectrum. The unemploy-

8. NAT'L RESEARCH COUNCIL, A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 31 (1989).

9. *One in Four Young Blacks in Jail or in Court Control*, L.A. Times, Feb. 27, 1990, at 1, col. 1.

ment rate of blacks is twice as high as that of whites,[10] and the relative odds of a young black being employed continue to deteriorate. Affirmative action is the most effective means of helping to change that ratio.

What we do not need are courts that second-guess and undermine local governmental efforts to correct past discrimination through affirmative action programs. One Ninth Circuit opinion, authored by one of our ablest young judges, a favorite of the Federalist Society, demonstrates how absurd the results can be when such a course is pursued by courts. In *Associated General Contractors of California, Inc. v. City and County of San Francisco*,[11] our court struck down a preference for minority-owned businesses provided by a San Francisco ordinance, but upheld the preference in that same ordinance for women-owned businesses. In so concluding, the court applied a lower level of scrutiny to the female set-asides than to those for racial minorities. The court reasoned that because blacks are entitled to greater protection than women, discrimination against the white majority should be viewed under a stricter level of scrutiny than discrimination against men *or* women.[12] Thus, in a remarkable feat of prestidigitation, we elevated the white male to the highest possible level of protection—under a rule of law designed to protect racial minorities. This is just one illustration of how perverse judicial reasoning has become, as hostile courts seek to turn civil rights law on its head.

There are other issues that demonstrate the growing insensitivity of two of the three branches of our government to individual rights. Governmental and judicial officers who are insensitive to civil rights are frequently insensitive to other fundamental rights, including the right of women to control their own bodies,[13] and the right of homosexuals to engage in the most basic of human activities—consensual sexual conduct.[14] Our President and Attorney General even want to amend the Constitution so as to limit symbolic expression.[15] The basic constitutional rights of convicted criminals are similarly being

10. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Current Labor Statistics*, MONTHLY LAB. REV., Oct. 1990, at 49, 65.

11. 813 F.2d 922 (9th Cir. 1987).

12. *See Associated General Contractors*, 813 F.2d at 942.

13. *See* Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989).

14. *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

15. *See, e.g., President Soft-Pedals Flag Measure*, N.Y. Times, Oct. 19, 1989, at A20, col. 3.

eroded. Recently, for example, the Supreme Court eviscerated the right of federal habeas corpus for state prison inmates. In two death penalty cases, both decided by five-to-four votes, the Court essentially held that states can execute people even though their convictions were obtained, or their sentences imposed, in violation of the Constitution.[16] By denying inmates the right to base their appeals on constitutional decisions issued after their convictions became final, the Court deprived death-row prisoners in these cases of the opportunity to raise fundamental constitutional objections that might have entitled them to a reversal of their capital sentences. Even worse, the Court's characterization of any evolution in the law as a "new rule of federal constitutional law,"[17] has essentially frozen much constitutional law as of the date of the relevant decisions. Under this odd view, many of the greatest constitutional developments of our times would have been foreclosed.

Regrettably, in the criminal law field, courts have moved from an era of concern about individual rights to an era in which the dominating motive is a desire to uphold convictions at any cost. Starting at the top, courts regularly search out ways to circumvent constitutional protections. As I have suggested, however, decisions in this area are just part of a pattern of general disregard for individual rights, except, of course, when money or real property are at issue. To the extent that civilization judges a society by the manner in which it treats its most unfortunate members, we are clearly in for bad reviews. It is indeed ironic that just when Eastern Europe is returning to the democratic fold, just when human rights are at their zenith throughout the world, we in America are in retreat.

Since the judicial system seems determined to turn its back on minority rights, we must now look to Congress with the hope that one branch of the federal government, at least, will be true to the dictates of the Constitution. In February 1990, a bipartisan group in Congress introduced the Civil Rights Act of 1990[18] to correct the most egregious problems created by the

16. *See* Penry v. Lynaugh, 109 S. Ct. 2934 (1989); Teague v. Lane, 489 U.S. 288 (1989).

17. *Penry*, 109 S. Ct. at 2937.

18. H.R. 4000, 101st Cong., 2d Sess. (1990); S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. S1019-20 (daily ed. Feb. 7, 1990). The Civil Rights Act of 1990, as passed by Congress, was vetoed by President Bush on October 22, 1990, Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1632 (Oct. 22, 1990).

quintet of decisions last Term. Time does not permit a full discussion of the provisions of the Act here.[19] Let me only mention that the recent Court decisions have wrought such havoc with our civil rights law that even the Bush administration agrees that two of the five cases must be undone.[20]

In conclusion, I leave the esoteric new frontiers to others. I ask only that we resurrect our national spirit of compassion, of fairness, of obligation to others less fortunate, and that we end, once and for all, this ten year old era of selfishness, insensitivity, and smug self satisfaction—the "I got mine, and if you weren't so lazy or shiftless, you'd have gotten yours" mentality. Let us return to the time not so long ago when government

19. First, the bill would restore the reading of Section 1981 to its previous construction, which forbade all forms of intentional racial discrimination in contractual relations, including on-the-job racial harassment. Since the court held in Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989), that on-the-job racial harassment is not protected by Section 1981, nearly one hundred claims of federal fair employment litigation have been dismissed.

Second, the bill would specify that the clock on a Title VII claim begins to run from the time the unlawful practice occurs or when the practice is adversely applied, whichever occurs later. This rule is intended to ameliorate the harsh effects of Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989), which requires employees to file suit at the time a new seniority system is adopted, even if they could not have anticipated the potential negative consequences. These are the two provisions of the bill that are so necessary that even the Bush administration supports them.

Third, the bill would restore the *Griggs* disparate-impact test under Title VII that was undercut by Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989). The bill would restore the prior status quo by placing the burden of proof on the employer to demonstrate the business necessity of employment practices that have a disparate impact on protected groups.

Fourth, the bill would clarify that, in mixed motive cases, the employer will be liable if a discriminatory attitude was a motivating factor for an employment decision, even if other permissible factors also motivated the decision. This provision would correct the problem created by Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

Finally, the Civil Rights Act of 1990 would protect existing consent decrees in race discrimination cases. Through notice provisions and opportunities for interested parties to be heard, the legislation would provide a mechanism for achieving finality in a case. This would alleviate the need to relitigate the same challenge, a problem created by Martin v. Wilks, 109 S. Ct. 2180 (1989). Through these proposals and others that expand the Title VII remedial scheme, the legislation, if adopted, will help restore some of the protections previously accorded minorities.

20. Regrettably, but not surprisingly, President Bush vetoed the Civil Rights Act of 1990, notwithstanding his acknowledgment that portions of it were needed in order to correct unjust decisions by the Supreme Court. *See* Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1632 (Oct. 22, 1990). The Congress will undoubtedly attempt to remedy this injustice by reenacting the bill in the next session. Barring unforeseen changes on the political scene, however, there is little reason to believe that the President will change his position with respect to the legislation. The administration's recent performance with respect to minority scholarships offers little encouragement to anyone on either side of the issue. *See Struggle at White House; Mishandling of Scholarships for Minorities Reflects Search for a Civil Rights Agenda*, N.Y. Times, Dec. 20, 1990, at A1, col. 2.

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cared about people, and when society and the courts cared about justice, about equality, about ending our greatest national shame: the effects of generations of racial discrimination. Our legal system has gone through similar times of racial insensitivity before, such as the era of *Dred Scott*[21] and *Plessy v. Ferguson*,[22] and we have come out of those eras resilient. When one branch of government falters, others tend to take over. The job will not be done by one thousand—or even one million—points of light. It can be done, however, by a compassionate and fair-minded government with the help and support of a decent American people.

21. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).
22. 163 U.S. 537 (1896).

CIVIL RIGHTS, ECONOMIC PROGRESS, AND COMMON SENSE

EDWIN MEESE III*

From his comments, it certainly is evident that Judge Reinhardt disagrees with the people of the United States as they have conducted themselves in the last three presidential elections.[1] I believe that we have progressed considerably over the last decade in terms of a society that is fair to all of its people; we have significantly limited policies under which members of certain groups within society receive special privileges, whether or not there has been any harm visited on these individuals, at the expense of individuals who have committed no harm themselves. The panel topic of "New Frontiers in Civil Rights" indicates where we are: on the edge of some real opportunities. As Clint Bolick pointed out so eloquently,[2] the question, in terms of strategies and challenges, is whether we will move in a new and constructive direction, or whether we must remain mired in the controversies that were the basis of Judge Reinhardt's remarks. There is no question that what we really need, if we are truly interested in helping all Americans, is to provide the opportunity for everyone to become part of the American dream. Opening the doors of opportunity will require measures that focus on the positive, not on the negative divisiveness that has characterized too many of the policies of the administrations lauded by Judge Reinhardt.

It is interesting to note that there are groups in Washington—the Heritage Foundation, the Landmark Legal Foundation, and many others—that are working very hard to develop and implement the strategies mentioned by Clint Bolick.[3] This

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1. *See* Reinhardt, *Civil Rights and the New Federal Judiciary: The Retreat from Fairness*, 14 HARV. J.L. & PUB. POL'Y 142 (1991).

2. *See* Bolick, *Unfinished Business: A Civil Rights Strategy for America's Third Century*, 14 HARV. J.L. & PUB. POL'Y 137 (1991); *see also* C. BOLICK, CHANGING COURSE: CIVIL RIGHTS AT THE CROSSROADS 35 (1988).

3. Mr. Bolick presents a three-part strategy. First, he advocates both the rigorous enforcement of civil rights laws without enforcement of quotas and the extension of the civil rights program beyond mere opposition to reverse discrimination. Second, he supports the implementation of an "empowerment strategy" that is designed to secure for individuals the power to control their own destinies through economic liberty, educational choice, emancipation from dependency, and freedom from crime. Finally, he

is where the real future of civil rights must lie if we are to have an America that we can be prouder of, one in which all citizens have a greater share in the prosperity. All segments of America have fared better over the last decade because of the prosperity that accompanied the longest period of peace-time economic expansion in the history of our country.[4] There are some conditions, however, that present a real challenge to the new frontiers in civil rights.[5] In a better America, these conditions deserve our attention and should not be stifled by divisive debate.

The question of whether we can move on to new and more constructive frontiers has been answered by the Supreme Court. The Court has increasingly responded to the question put to our first panel, "To whom do civil rights belong?", by stating that civil rights in fact belong to everyone. Civil rights do not inhere within the limited province of any particular segment of society, nor should they inhere to the detriment of other segments of society. Increasingly, the courts have been telling us that discrimination against anyone is wrong, regardless of race, gender, or national origin. And the concept of a color-blind society, which is inherent in the Civil Rights Act of 1964[6] and was the principal theme of speech after speech by Martin Luther King, Jr.,[7] is today conceded by every member of the Supreme Court.[8] If you read the majority opinion in some

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calls for the reversal of the "twin pillars of jurisprudential oppression," Plessy v. Ferguson, 163 U.S. 537 (1896), and the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872), which, he argues, exhibit "pernicious judicial activism." Bolick, *supra* note 2, at 139.

4. *See, e.g.*, *The Distribution of Income*, NAT'L REV., Aug. 18, 1989, at 12.

5. *See* C. BOLICK, UNFINISHED BUSINESS: A CIVIL RIGHTS STRATEGY FOR AMERICA'S THIRD CENTURY 3 (1990).

6. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.).

7. The texts of Dr. King's speeches may be found in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. (J. Washington ed. 1986). For biographical information concerning Martin Luther King, Jr., see T. BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63 (1988); and D. GARROW, BEARING THE CROSS: MARTIN LUTHER KING JR. AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (1986).

8. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989) (O'Connor, J., for the Court, joined by Kennedy, J.); Johnson v. Transportation Agency, 480 U.S. 616, 676 (1987) (Scalia, J., dissenting); Fullilove v. Klutznick, 448 U.S. 448, 532 (1980) (Stevens, J., dissenting); United Steelworkers of America v. Weber, 443 U.S. 193, 219 (1979) (Rehnquist, J., dissenting); University of Cal. Regents v. Bakke, 438 U.S. 265, 324 (1978) (opinion of Brennan, White, Marshall, and Blackmun, JJ.) ("Color blindness must now be seen as an aspiration rather than a description of reality."). Since these remarks were delivered, Justice David Souter replaced Justice Brennan on the Court.

cases, and the dissents in others, you will find that each justice believes that the ultimate objective of civil rights law is to achieve a color-blind society. In a few cases, however, the minority, and sometimes even the majority, states that we are not quite ready to achieve this kind of society. As a result, certain types of discrimination have been allowed to persist, for a variety of reasons.[9] In general, though, it is clear that the Court is moving toward a color-blind society.

Congress and the civil rights establishment, however, are fighting what I would term a "retrograde battle" to preserve the racial spoils system discussed earlier in the Symposium.[10] I fear that the congressional deliberations over the so-called Civil Rights Act of 1990[11] will prove to be a continuation of an unproductive debate resembling interest-group politics, rather than a debate about applying civil rights equitably. Judge Reinhardt certainly removed any lingering doubts that I might have had about this by his remarks here.

One thing the present Supreme Court has not done, and specifically has refused to do, is to rewrite the law. For example, in *Patterson v. McLean Credit Union*,[12] a decision often criticized by some self-described civil rights advocates, the Court essentially stated, "If Congress wants racial harassment included in Section 1981, then let it write it in."[13] The Court refused to rewrite the statute, even though it agreed that there was probably

9. *See* Metro Broadcasting, Inc. v. Federal Communications Comm'n, 110 S. Ct. 2997 (1990) (upholding Federal Communications Commission's minority broadcasting program as effective in promoting broadcast diversity); Johnson v. Transportation Agency, 480 U.S. 616 (1987) (upholding affirmative action hiring program of county transportation agency as effective in improving representation of minorities and women); United States v. Paradise, 480 U.S. 149 (1987) (upholding affirmative action program used in hiring Alabama state troopers); International Ass'n of Firefighters v. Cleveland, 478 U.S. 501 (1986) (upholding affirmative action plan for Cleveland firefighters); Fullilove v. Klutznick, 448 U.S. 448 (1980) (upholding as valid the Minority Business Enterprise provision of the Public Works Employment Act of 1977); United Steelworkers of America v. Weber, 443 U.S. 193 (1979) (holding that Title VII prohibitions against racial discrimination do not condemn all private, voluntary, race-conscious affirmative action plans, including that promulgated by the United Steelworkers of America and Kaiser Aluminum and Chemical Corporation).

10. *See, e.g.*, Roback, *The Separation of Race and State*, 14 HARV. J.L. & PUB. POL'Y 58 (1991).

11. H.R. 4000, 101st Cong., 2d Sess. (1990); S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. S1019-20 (daily ed. Feb. 7, 1990). The Civil Rights Act of 1990, as passed by Congress, was vetoed by President Bush on October 22, 1990, Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1632 (Oct. 22, 1990).

12. 109 S. Ct. 2363 (1989).

13. *See Patterson*, 109 S. Ct. at 2379.

room for improvement in the statute. Instead, the Court left it to Congress to rewrite its statutes, thus rejecting the path of judicial activism followed too often in years past.

Indeed, if we must have the discussion whether the civil rights debate should remain focused on the problems of the 1960s, or whether we should move into the 1990s, then at least we should approach this new frontier with a more civil and more constructive tone. Perhaps then we can find a way, even while debating the old history and the old issues, to move toward the new strategies that Clint Bolick articulates so well. Such strategies present a real solution to the problems that Judge Reinhardt identified.

There are three principles that ought to guide us as we approach this new frontier in civil rights. The first is candor. One of the things that has characterized this Symposium, to a greater degree than any other I have attended on the topic of civil rights, is that people here have been willing to speak out and address the real issues, facts, controversies, and disputes in an honest and forthright way. It has been said that patriotism is the last refuge of scoundrels;[14] I might suggest that cries of racism are the first refuge of persons who would try to suppress any real debate on civil rights. Too often, in Washington one cannot present the evidence and arguments that have been discussed at this Symposium without being labelled a racist and being castigated in one of Washington's daily newspapers. It thus seems to me that the only way to grapple with these issues is to rely on the refreshing candor that has been exhibited here.

The second principle I wish to articulate is that fairness must be an integral part of any application of a law, if that law is to gain acceptance by the public. People have an inherent understanding of what is, and what is not, fair. We must therefore ensure that civil rights laws are applied in a fair and equitable manner.

The third important principle in this debate is the need for the refined definition of terms and improved analysis of the issues. For example, we need to understand the difference between state action, that is, where the government acts, and private action, where a private entity acts without being co-

14. Samuel Johnson was quoted as saying, "Patriotism is the last refuge of a scoundrel." J. BOSWELL, LIFE OF JOHNSON 615 (R.W. Chapman ed. 1953) (3d ed. 1799) (entry of April 7, 1775).

erced, based on reasons, values, and ideas that such an individual or institution thinks are important. Professor John Hart Ely believes that Stanford should provide additional opportunities for minority students, even though they may not meet traditional standards, so that the university may achieve diversity within its student body.[15] It is proper for a private institution to express its values in this way. It is entirely improper, however, for government to impose such a regimen upon any institution, business, or other group that it regulates.

While on the topic of state action, I submit that our ultimate goal should be a society that not only provides opportunity and is fair, but is also cognizant of the way in which these ends are attained. We desire a just society in which people are treated fairly and lawfully, in which their constitutional rights are protected and preserved, and in which they are allowed to enjoy these rights. This is why we need civil rights laws and why we need protection against crime—another important aspect of Clint Bolick's strategy.[16]

As a nation, we also desire an integrated society. Affirmative action is absolutely critical in order to attain such a goal. Along with Judge Reinhardt, I believe that affirmative action is extremely important and should be continued, and perhaps even enhanced. I suspect we differ as to how affirmative action ought to be implemented. The form of affirmative action I support does not include any element of discrimination on the basis of race or gender.

The affirmative action program I envision entails expanded outreach and increased opportunities. It involves training. Under the affirmative action-quota approach, persons who lack qualifications often land in uncomfortable situations. For example, students often enter universities under such programs with the prospect of failing or feeling uncomfortable. Does one devise a special grading system in order to get them through school? This is hardly an appealing outcome.

I would suggest that there is a better approach. Any true solution must have as its foundation the idea that everyone should start on an equal plane. The military has followed this

15. Professor Ely moderated the second panel of the Symposium. In the discussion following the panel members' presentations, Professor Ely endorsed the Stanford affirmative action policy.

16. *See* C. BOLICK, *supra* note 5, at 4.

concept with its system of academy preparatory schools, which potential students may attend if their educational background is weaker than that of their fellow students. Instead of imposing a mandatory twenty-point differential in the admissions process, a more productive policy would be to provide an opportunity for those who have the potential for higher education to attend a preparatory school *before* entering college. Students participating in this program would then enter college ready and able to compete on an equal basis.

There once was a model for this type of program right here at Stanford University. When I was attending college, some football players went to Menlo Junior College for a year so that they could compete equitably with their peers at Stanford. They then entered college just like everyone else. This is the type of remedy that would truly be effective in building an integrated society. The same thing is true for training programs. Of course, these programs should not be available on race-based criteria, but instead should be open to anyone who is considered to be disadvantaged.

We all want an economically prosperous society, and we want all people to share in it. That is why we need social policies of the type that Clint Bolick proposes.[17] We need social policies that will transform welfare into a program that empowers people to get out of poverty and that seeks to prevent children from being born into poverty. Under the welfare policies of the past generation or so, there has developed a social problem of generation after generation of people living on public assistance.[18] The economic principles followed by the United States in the 1980s have been demonstrably successful. These principles are now the hope of the rest of the world. Former proponents of socialism are now turning to market-oriented policies. By ensuring that economic benefits and opportunities are available to all of our citizens, we can promote the same principles in this country that we advocate for the Third World and Eastern Europe.

In a speech he delivered recently at the Heritage Foundation, Professor Glenn Loury eloquently summarized where the responsibility for this task lies.[19] Professor Loury explained that

17. *See* Bolick, *supra* note 2.
18. *See, e.g.*, C. MURRAY, LOSING GROUND (1984).
19. *See* Address by Glenn Loury, Heritage Foundation (Feb. 12, 1990).

placing greater emphasis on the personal responsibility of blacks would take a lot of pressure off political leaders from outside the black community. He noted that this would allow these leaders to pursue changes in the structures that constrain all poor citizens, including the black poor, in a way that effectively imposes responsibility on individuals—and provides the freedom for the disadvantaged to exercise their inherent and morally required capacity to choose. He argued further that there is an intrinsic link between these two sides of the responsibility coin—between acceptance among blacks of personal responsibility for their actions and acceptance among all Americans of their social responsibilities as citizens.

If we can get past the unproductive controversy over whether civil rights only pertain to a few or whether these rights should be available to all, if we can pursue new strategies as we enter the 1990s rather than re-fighting the battles of the 1960s and 1970s, if we can preserve the even-handed decisions through which the Supreme Court has moved us toward a color-blind society, then we really will have approached a new frontier in civil rights and in overall prosperity.

PANEL VI: CIVIL RIGHTS, CIVILITY, AND FREE SPEECH—WHAT TAKES PRECEDENCE?*

DISCRIMINATORY HARASSMENT AND FREE SPEECH

THOMAS C. GREY**

I want to say a few words on the problem of discriminatory verbal abuse on the American campus. This problem has engaged me in a practical way at Stanford University for the last few years. I was faculty co-chair of the campus disciplinary council when we had a serious racial insult incident. The problem might have come before our council, but ultimately no charges were brought. The incident led others on campus to formulate a set of regulations meant to handle these problems, and I later drafted my own version of such a proposal, which provided the basis for the regulation that the university finally adopted in June 1990.[1]

The title for this panel seems to capture the three clusters of values that overlap on this problem: values of civility, of civil liberty or free expression, and of civil rights or antidiscrimination. I want to start by largely setting the issue of civility to one side. Civility is an important value for universities, and civility and courtesy in manner of speech can be required in the classroom from teachers and students alike. But in my view, this value is not best pursued by coercive disciplinary regulations of campus-wide application.

That brings me to the clash between civil liberties and civil rights on the question of verbal harassment. Liberals of my sort are not used to having these two clusters of values collide with each other; we think of ourselves as supporting both equally. We are uncomfortable when they collide, and our natural im-

* This panel was introduced by Lois Haight Herrington, Attorney, Walnut Creek, California, and former Assistant Attorney General of the United States.

** Nathan Bowman Sweitzer and Marie B. Sweitzer Professor of Law, Stanford Law School. My thanks to the National Editors of the Federalist Society and to the Editors of the *Harvard Journal of Law & Public Policy* for supplying footnote citations.

1. Stanford University is a private university not technically subject to First Amendment restrictions. The draft proposal recommends that Stanford's "Fundamental Standard" for speech on campus be interpreted under the "fighting words" doctrine.

pulse is to try and wish (or pretend to reason) the conflict away. Nevertheless, I believe that conflict is inescapable here.

The civil-libertarian purist will tolerate no disciplinary regulation whatever of abusive or harassing speech on campus. A more moderate and common civil libertarian position, though, would call for prohibiting the most egregious forms of verbal abuse, as long as this is carried out by some narrowly-defined, content-neutral and viewpoint-neutral restriction of traditionally recognized exceptions to full First Amendment protection like "defamation,"[2] "fighting words,"[3] or speech that constitutes "intentional infliction of emotional distress."[4]

The civil rights approach to harassment regulation starts with the concept of "hostile environment discrimination" that has become familiar in employment law. The basic idea is that a private-sector employer violates Title VII of the Civil Rights Act of 1964[5] (and a public-sector employer violates the Fourteenth Amendment) if it fails to take reasonable steps to remedy a workplace environment that is differentially hostile to women[6] or minority employees.[7] If a woman or black employee is faced by a barrage of sexist or racist insults from fellow workers, the employer is not free to take a hands-off attitude.[8] The work environment, insofar as it is reasonably within the employer's control, is part of the terms and conditions of employment. If those terms and conditions are worse for black or women employees than for white or male employees doing the same work at the same pay, this constitutes illegal employment

2. *See, e.g.*, Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Beauharnais v. Illinois, 343 U.S. 250 (1952).

3. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

4. *See, e.g.*, Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

5. Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e to 2000e-17 (1988).

6. *See* Broderick v. Ruder, 685 F. Supp. 1269, 1277 (D.D.C. 1988) ("A hostile work environment claim is actionable under Title VII if unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature are so pervasive that it can reasonably be said that they create a hostile or offensive work environment.").

7. *See* Gilbert v. City of Little Rock, Ark., 722 F.2d 1390, 1394 (8th Cir. 1983) ("An employer violates Title VII simply by creating or condoning an environment at the work place which significantly and adversely affects the psychological well-being of an employee because of his or her race.").

8. *See* Ways v. City of Lincoln, 705 F. Supp. 1420, 1422 (D. Neb. 1988), *aff'd in part and rev'd in part*, 871 F.2d 750 (8th Cir. 1989) ("An employer may not . . . allow an employee to be subjected to a course of racial harassment by co-workers. Once an employer has knowledge of a racially hostile atmosphere in a place of employment, the employer has an affirmative duty to take reasonable steps to eliminate that hostile atmosphere.").

discrimination.[9] The hostile environment doctrine is not a controversial innovation of liberal judges; a unanimous Supreme Court has endorsed it,[10] and Judge Posner has written an interesting opinion applying the idea to hold a public employer liable.[11] It is well-established civil rights law.

Should this doctrine be applied to the campus? The notion is that students are deprived of equal educational opportunity if discriminatory harassment is prevalent and university administrators fail to take reasonable remedial steps. But direct transfer of the hostile environment discrimination concept to the campus, without any civil liberties check, can readily produce the kind of regulation that was enacted at the University of Michigan, and subsequently struck down by a federal district court, properly in my mind, as a violation of the First Amendment.[12]

The Michigan regulation simply prohibited conduct or speech that foreseeably contributed to an unequally hostile environment for racial minorities, women, gay and lesbian students, and the other groups already protected under the university's general antidiscrimination policy.[13] This rule is a classic example of the "bad tendency" test that modern First Amendment analysis so strongly disfavors.[14] Administrators straightforwardly applying this regulation could plausibly charge students with disciplinary violations for saying such things as that women are not naturally suited to the hard sciences, or that black people are genetically less intelligent than whites, or that homosexuality is a disease or a sin.

Statements like these, frequently repeated in the presence of members of the groups in question, simply *do* as a matter of common sense make the atmosphere more difficult for these

9. *See* 42 U.S.C. § 2000e-2 (1988); Bohen v. City of East Chicago, Ind., 799 F.2d 1180 (7th Cir. 1986).

10. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57, 65-67 (1985).

11. *See* Bohen v. City of East Chicago, Ind., 799 F.2d 1180 (7th Cir. 1986).

12. *See* Doe v. University of Mich., 721 F. Supp. 852, 863 (E.D. Mich. 1989) (a public university may not "establish an anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas or messages sought to be conveyed," and may not "proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people").

13. Under the Michigan rule, persons were subject to discipline for "any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status." *Id.* at 856.

14. For the modern position that discredits the Whitney v. California, 274 U.S. 357 (1927), "bad tendency" test, see Brandenburg v. Ohio, 395 U.S. 444 (1969).

individuals on a campus and hence deny them a level educational playing field with students not so stigmatized. At the same time, such statements are core examples of what the First Amendment is meant to protect. There can hardly be a free university, or a free society generally, without open public debate of such central issues of science, public policy, and social organization.

So we do have a conflict between civil rights and civil liberties, as both have come to be commonly (and relatively uncontroversially) understood. The Stanford harassment regulation offers a mediation of this clash. The basic idea is not original (though the regulation does differ from others in some of its details); the University of California at Berkeley has adopted a regulation roughly along these lines,[15] and a similar regulation has been adopted at the University of Texas at Austin.[16] What all these proposals share in common is the idea of *intersecting* one or more of the established exceptions to full First Amendment protection with the civil rights doctrine of hostile environment discrimination. The proposals prohibit speech that both amounts to "fighting words" or "intentional infliction of emotional distress" on the one hand, and discriminates on an otherwise prohibited basis on the other.

The Stanford regulation establishes a campus offense with three elements. First, the speaker must intend to insult or degrade an individual or small group of individuals on the basis of their race, sex, or other characteristic mentioned in the university's general antidiscrimination policy. This predicate protects insensitive but unintentional slurs, and also protects "group defamation" (as traditionally understood) from punishment as harassment. Second, the speech must be directly addressed to the individual or individuals. This caveat restricts the offense to the face-to-face or "I-thou" situation. Third, the speech must use "insulting or 'fighting' words," a requirement that quotes the Supreme Court's language from *Chaplinsky*.[17] In

15. *See* Office of the President, Univ. of Cal. at Berkeley, Addition to Section 51.00, Student Conduct, Policies Applying to Campus Activities, Organizations, and Students (Part A) (Sept. 21, 1989) (utilizing "fighting words" approach) (available in office of *Harvard Journal of Law & Public Policy*).

16. *See* Office of the President, Univ. of Texas at Austin, Policy Memorandum 4.120, Prohibition of Racial Harassment of Students (Aug. 1, 1990) (utilizing "intentional infliction of emotional distress" approach) (available in office of *Harvard Journal of Law & Public Policy*).

17. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).

the context of antidiscrimination policy, these words are defined as those that are "commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of their sex, race,"[18] and so on.

This formula is a lawyerly attempt to define a concept everyone intuitively understands: the basic gutter epithets of racism, sexism, homophobia, and the like. That requirement very much narrows the regulation. What might be called the speech of polite bigotry is not covered, even when it is addressed directly to the victim. And by virtue of the requirement of individual address, even gutter epithets, used with degrading intent, can be uttered with impunity in a general publication or a speech to a general rally; Klan speech, neo-Nazi speech, and Farrakhan-style speech do not violate the regulation.

The prohibition is thus quite narrow from a civil rights perspective, and it is narrow for civil libertarian reasons. But even moderate civil libertarians may not be satisfied because the regulation seems to violate *neutrality*. It is certainly not content-neutral. It addresses only speech that is discriminatory, that insults people on the basis of their race, sex, and the other "suspect classifications" of antidiscrimination law. You can say something horrible to someone's face about his or her mother without violating the campus disciplinary code.

An additional and still more difficult point, from many civil libertarians' perspective, is that the rule appears to lack viewpoint neutrality, and so to violate one of the core principles of free speech law. The rule covers only speech using terms or other symbols that are "commonly understood" as viscerally insulting on the basis of sex, race, and so on.[19] As I understand this requirement, it will be asymmetrical in practice because there *are* just no terms that are "commonly understood" to be viscerally insulting to white people as such, to men as such, or to straight people as such.

As a "framer" of the Stanford regulation, I do not claim any particular interpretive privilege for my understanding of its meaning. A judicial officer will have to apply the ordinance to the facts of a case and interpret it in that context. But if I were

18. Stanford Univ., Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment 1 (June 1990) (available in office of *Harvard Journal of Law & Public Policy*).

19. *Id.*

that judicial officer, I would not regard a term to be "commonly understood" as viscerally insulting to people having the trait to which the term refers in the absence of a widely shared, deeply felt, and historically rooted social prejudice against people with that trait. I do not even know what terms are current among blacks, Latinos, or gays to refer in a derogatory way to whites, Anglos, or straights. No sentient black, Latino, or gay person is in similar doubt about the standard gutter epithets that refer to their groups.

The result is asymmetrical in the following sense. In those unhappy moments when the contemporary campus becomes a multi-cultural armed camp, the Stanford regulation would prevent me from firing my most powerful verbal assault weapons across racial, sexual, or sexual preference lines. By contrast, people of color, women, and gays and lesbians can use all the words they have at their disposal against me. This result seems an impermissible failure of viewpoint neutrality to some civil libertarians.

In my view, the asymmetry revealed here already exists in the social world in which we live and is neither created nor enhanced, but rather combatted, by the harassment ordinance. My point is not original; I am merely applying the basic doctrine animating civil rights law from *Brown v. Board of Education*[20] onward. That doctrine makes the concept of stigma or insult central to civil rights analysis. *Plessy v. Ferguson*[21] stood for the proposition that so far as the law was concerned, the racial insult of separate-but-equal segregation did not exist except in the over-sensitive imaginations of black people. *Brown* settled the issue that Jim Crow's legal impact did *not* fall equally on blacks and whites.[22] In the same spirit, and on the same basis of knowledge of our society, we should recognize that the insults "nigger" and "whitey" are not equivalent.

Yet we still hear *Plessy*'s doctrine preached. Today it takes the form of the claim that asymmetrical restrictions of racial insults

20. 347 U.S. 483 (1954).
21. 163 U.S. 537 (1896).
22. *See Brown*, 347 U.S. at 494 ("Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.").

are patronizing to students of color.[23] Such restrictions imply, it is said, that whites can take care of themselves in verbal rough-and-tumble, while blacks as a "protected group" are weaker and need official protection. *Brown*'s answer to *Plessy* is also the answer to this argument. American society and its history have created the asymmetry; a regulation cannot attempt to redress that asymmetry without taking it into account.

On the issue of patronization, I should add that in my experience, most students of color support discriminatory harassment restrictions of the Stanford type or stronger ones. If these restrictions are somehow insulting to them, why do they not see it? Are they too dumb? Is it not patronizing to suppose that they do not see their true interests on this question?

The limitation of the harassment prohibition to *discriminatory* insults is actually supported by civil liberties considerations as well. It is constitutional to punish other (nondiscriminatory) fighting words, but the policy of keeping restrictions on free speech as narrow as possible counsels against doing so. Fitting the prohibition to the civil rights enforcement model justifies the restriction on its scope.

A number of students and colleagues have urged to me that if hurtful fighting words are to be banned, an evenhanded approach requires restrictions against using terms like "racist" against white conservatives when, for instance, they oppose affirmative action. These are, in current conditions on our campuses, said to be fighting words or words that inflict emotional distress.

I do not dispute the premise. The reason for not extending prohibition to such utterances again sounds in civil libertarian values. It can be hurtful and enraging to be called a racist, a Nazi, a terrorist, or a Stalinist when one is not. But these are legitimate terms applied, sometimes appropriately, in political debate. There *are* real racists, Nazis, terrorists, and Stalinists. The proper extension of these terms is an endlessly disputable political question, and I would prefer not to involve the disciplinary adjudicative process in deciding when the terms are applied appropriately and when not. The questions are too political to be settled in a judicial hearing.

23. *See* Keyes, *Freedom Through Moral Education*, 14 HARV. J.L. & PUB. POL'Y 165 (1991).

By distinction, no one is appropriately called one of the gutter insults of discrimination. No one is ever a "nigger" or a "faggot." The connotation of these terms is that persons of a certain race or a certain sexual orientation are less than human. To say that is what the terms are there for—it is all they are there for. When they are used against a fellow human being, face-to-face, in the posture of I to thou, these words can inflict injury worse than many a physical assault. To treat them as such is the minimum that a decent code of conduct can do.

FREEDOM THROUGH MORAL EDUCATION

ALAN L. KEYES*

The debate over the regulation of speech at universities often becomes a conflict between civil libertarians and civil rights advocates. Unfortunately, this conflict obscures the real issue and becomes an excuse to ignore what is really at stake. It does so, in part, because some participants in the debate like to think that knowledge can be conveyed in a value-neutral manner. Nevertheless, the debate is really about moral education—about how we establish, encourage, and maintain moral behavior.

The most intriguing aspect of seeing the problem in this light is that the very conduct restricted by campus speech regulation lies at the foundation of serious moral education. Moral education involves apportioning praise and blame to guide our conduct. It is not education of the mind, accomplished by sitting down and reading ethics. Rather, because personal sentiments are necessary to translate moral precepts into moral actions, moral education requires what might have been called at one time "sentimental education." We believe that some things are repugnant, nasty, or unacceptable, and thus we would not do them. Likewise, we believe that some things are attractive, wonderful, or acceptable, and thus we would do them. Therefore, to instill moral feelings we must be able to use the vocabulary of praise and blame, appreciation and opprobrium.

In this regard, insult is actually a very useful tool. Insults can attack immoral behavior by exposing it, by ripping off its mask and allowing us to see the corrupt for what they really are. As a result, we should not banish the vocabulary of insult from our society as long as it is effective in fighting emotionally those who engage in immoral conduct.

The distinction between using the tools of praise and blame, appreciation and opprobrium on the one hand, and using coercion on the other, may reflect the distinction between enforcing mores and enforcing laws. For example, in determining what constitutes an acceptable romantic overture, we do not have a

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formal code of conduct to prescribe acceptable and unacceptable behavior. Instead, this code develops largely on its own. Approach a person of the opposite sex in a certain way, and that person may respond favorably. Approach the same person in a different way, and that person may laugh or use derogatory names.

The second category of response has reduced many an inept lover to despair. Repeated often enough, it may even amount to a form of personal abuse. Still, we do not subject this sort of invidious discrimination to formal regulation. And yet, if the argument for campus speech restrictions depends on the harmful effects of certain words, why are inept lovers not a protected class? There are probably students wandering this very campus who are in the process of being emotionally destroyed. They will carry wounds with them for the rest of their lives. Despite this, however, most people would find my question humorous or ask how anyone could seriously propose to limit this sort of discrimination.

Similarly, we do not regulate the significant prejudice endured by the ugly. Society denies them many important things, including the chance of ever being ravishing movie stars or of engaging in many similar occupations. Yet, because the relevant distinctions do not appear to involve moral judgments on the order of "you are a bad person," few think that this discrimination should be regulated. Someone might be ugly, but that does not make him a bad person. Clearly, the debate over speech restrictions cannot turn solely on the discriminatory use of judgmental language or even on the effects of such language.

There is little disagreement that conduct, and even speech to a certain extent, should be regulated to maintain an acceptable moral atmosphere. This regulation occurs all the time, both in society at large and on college campuses. For instance, public fornication is illegal in most places. It is unacceptable, indecent behavior, and those who engage in it are punished in various ways. Now, for believers in sexual liberation, public fornication is arguably a type of free speech. It makes a statement about the acceptability, and even the beauty, of a particular human behavior. Society proscribes it nevertheless. Not even Charles Lawrence could convince us that public fornication is a message that should be protected under the First

Amendment.[1]

Therefore, reducing the debate to civil liberties versus civil rights misses the point. The debate is really about which moral standards we should enforce coercively, which moral standards we should not enforce coercively, and, ultimately, what these moral standards should be.

Although these questions are today most often raised and debated at universities, they are probably more easily resolved in society at large. There, a very easy principle emerges: the principle of politeness. Under ordinary circumstances we can set up rules that determine what kinds of conduct are becoming to citizens and what kinds of conduct are not. As long as we apply these rules without making invidious distinctions, we are reasonably safe.

Although couched in more lawyerly verbiage, courts apply an essentially similar principle when they consider fighting words and breaches of peace.[2] In permitting some degree of regulation, they look at the impact of disruptive speech or behavior on what is arguably a public good requiring protection: civility.

Universities face a harder problem because moral education, the real crux of this dispute, plays a different role in the context of campus life. Education prepares students for citizenship in a free society. Accordingly, politeness takes on a different meaning under these special circumstances—just as being polite in the court of the king is not the same thing as being polite in a democratic context. Yet, the suggested university codes of conduct go beyond the mere regulation of politeness. Instead, these regulations represent an effort to establish and teach new moral standards to replace older moral standards. Moreover, in their dependence on coercion, the new standards may run directly counter to the older ones.

The treatment of homosexuality is a very good illustration of this phenomenon. Homosexuality was, until recently, a taboo word on campuses and elsewhere. Parents taught their children that it was ugly and dirty. They did so in order to turn their moral conviction that homosexual conduct was bad into moral

1. *See, e.g.*, Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431.

2. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963); Feiner v. New York, 340 U.S. 315 (1951); Terminiello v. Chicago, 337 U.S. 1 (1949); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

actions by their children. Repugnance at homosexual behavior was seen as necessary to defend against whatever temptation it might present.

Some may claim that this method of teaching was discriminatory. Nonetheless, as I have argued earlier, this method has been commonly used to translate moral precepts into moral actions throughout human history. People point a finger at certain conduct and call it bad, ugly, shameful, dirty, or repugnant. They ridicule and revile it. Many books of the Bible, for instance, contain pages filled with invectives against the wicked.[3]

Significantly, however, we no longer think that invectives used in biblical times constitute fighting words. For example, if we singled out those people in this room who have engaged in any form of premarital sexual activity and called them fornicators and whoremongers, they would probably shrug off or pay no attention to the attack. Over time, then, fighting words may change along with our sense of what constitutes acceptable and unacceptable behavior.

At the same time, if we singled out people who engaged in homosexual acts and called them sodomites or other names, these would still be fighting words. Homosexual rights advocates argue that the use of such words is cause for the intervention of coercive force.[4] In fact, what they are really arguing for is the protection of a still-controversial moral judgment about homosexuality. Because heterosexual promiscuity is generally acceptable, it requires no such formal defense. We do not establish rules to punish its opponents. Homosexuality, by contrast, has not yet achieved the same accepted status. Nonetheless, its defenders seek to create rules to stigmatize its critics. They have even invented a word to convey this stigma: homophobia.

Actually, homophobia is not a good word for this purpose. If homophobia is a true phobia, then it is a neurosis for which people are not responsible. If this is the case, why punish them for it? After all, the fear of immoral behavior is, in many, an uncontrollable impulse. Such people reflexively remove them-

3. *See, e.g., Isaiah* 1:21-23, 19:11-15, 57:3-5; *Jeremiah* 5:7-9, 23:10-14; *Matthew* 23:1-33.

4. *See, e.g.*, Lawrence, *supra* note 1, at 452-56.

selves from the presence of what they believe to be evil. They involuntarily try to oppose and destroy immorality.

Furthermore, in some instances, we think such instincts are wonderful. For example, we would approve of the uncontrollable desire to prevent, by whatever means, a murder in our presence. Likewise, we would approve of the innate impulse to flee from the scene of a human sacrifice considered ugly and revolting. We think such instincts are normal and desirable because they reflect standards that are, in some sense, commonly agreed-upon.

By contrast, while everyone understands the general meaning of the term "sexual orientation," the fact remains that people have all kinds of odd sexual tastes. As a society, we are in basic agreement that some of these tastes, such as bestiality, are repugnant. Consequently, we should have the right to raise our children to regard certain behavior as worthy of opprobrium. Those who engage in bestiality, therefore, are rightly ridiculed and scorned in order to support the moral feelings we try to inculcate in our young. Yet, by broadly protecting "sexual orientation," are we not suppressing all forms of praise and blame directed at any sexual behavior whatsoever? Do we not thereby undermine the ability to impart any kind of moral education based on this or other standards?

This is just a general aspect of the problem, but we can only start dealing with it when we face the reality that the issue here is not one of minority rights versus free speech. Instead, the issue is one of identifying both the correct moral standards for universities to uphold and the proper methods for upholding these standards. In this regard, the question becomes whether rules against harassment on the basis of race, gender, or sexual orientation are desirable or justified.

Civil libertarians commonly approach this question, particularly with respect to universities, by talking about the need to preserve free speech as a marketplace of ideas.[5] In a way, this approach is good because it considers the impact of speech restrictions on the pursuit of truth. Yet, the interesting thing about truth is that, although we may seek it for a long time, we are not likely to find it. Nevertheless, the pursuit of truth, as Socrates argued long ago, should be an end in itself, to be val-

5. *See, e.g.*, J.S. MILL, ON LIBERTY 18-52 (D. Spitz ed. 1975). *See also* Abrams v. United States, 250 U.S. 616, 630 (Holmes, J., dissenting).

ued in and of itself.[6] Consequently, the ability to engage in this pursuit, and to engage in it with strength and courage, is also a benefit. It is, in fact, the chief benefit that should result from a liberal education. The results of liberal education are not necessarily measured by what goes into a student's mind in the form of information, but rather by what remains in a student's character in the form of the ability to seek and pursue truth despite difficulties. Thus, the basic problem with the speech restrictions meant to protect various minorities, including blacks, is that they weaken students' ability to seek and pursue truth.

These restrictions are, at the outset, based on patronizing and paternalistic assumptions. Telling blacks that whites have the moral character to shrug off epithets, and they do not, is an insult. Saying that whites have the innate capacity to defend themselves against verbal attack, and blacks do not, compounds the insult. Finally, building this imputed genetic weakness into codes of conduct for the protection of blacks makes perhaps the most insulting, most invidious, most racist statement of all.

These codes are more than insulting; they are ultimately incapacitating. Students come to a university to learn how to engage in the pursuit of truth, in the battle of ideas. This battle is like any other; it requires effective training. For example, the Army does not teach soldiers how to fight by establishing rules that prevent stronger conscripts from assaulting weaker ones with certain weapons. To be sure, such rules would permit weaker soldiers to complete their course of training comfortably insulated from certain forms of attack. Such soldiers may volunteer to go to war on the basis of such training, but they would surely be among the first to die.

In calling for speech restrictions, Charles Lawrence argues that certain insults scar or lead to debilitating anxiety.[7] Similarly, when a black student is called a racial epithet, all thoughts are supposedly removed from his mind and he immediately becomes unable to act.[8] Yet, isn't education supposed to prepare students to seek truth, to pursue it, and to persist in this endeavor despite the obstacles? Should students really be pro-

6. *See, e.g.*, PLATO, GORGIAS (W. Hamilton trans. ed. 1960).

7. *See* Gunther & Lawrence, *Good Speech, Bad Speech*, STAN. LAW., Spring 1990, at 4, 6, 8.

8. *See* Lawrence, *supra* note 1, at 452-53.

tected from these obstacles instead of preparing for them? If a black student steps out of Stanford University into his first argument with a gutter fighter over an important issue, gets called a racial epithet, and loses his mind, should he not go back to Stanford and seek a refund?

The most fundamental problem with campus speech restrictions is that in protecting certain students they ultimately make these students weaker. The restrictions institutionalize victimization by leaving the victimized unprepared to fight against it. This effect might be tolerable as long as minorities live underneath the paternalistic wing of universities such as Stanford. But it is likely to be devastating when they go into a world where no protection exists. That world is the real world, regardless of the laws we make.

Education must offer something more, particularly to those who wish to be free. Freedom is in essence the ability to defend oneself. It does not consist of seeking champions for one's defense—that is not freedom, but feudalism. Therefore, instead of looking for rulers and laws to defend us, we must be able to rule ourselves and make our own laws. This ability must be inside every individual. It should be the result of a liberal education that, true to its name, strengthens people and prepares them to be free.

ARTICLES

THE EXCLUSIONARY RULE AND THE MEANING OF SEPARATION OF POWERS

RUTH W. GRANT*

I. INTRODUCTION

The exclusionary rule forbids the introduction of evidence that law enforcement officers obtain by means of an unreasonable search and seizure.[1] The rule has occasioned considerable and continuing debate of a sort that offers little hope of a permanent resolution. For more than sixty years, the prototypical arguments on both sides of this debate have presented the issue as one whose resolution requires the balancing of directly competing values, with the disagreement arising as to the proper balance between them. The following remarks are typical:

> On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice.[2]
>
> We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.[3]
>
> Are we faced with a choice between police lawlessness and private lawlessness?[4]

Unfortunately, both the majority and the minority in the

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1. *See* U.S. CONST. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. People v. Defore, 242 N.Y. 13, 24-25, 150 N.E. 585, 589 (1926) (Cardozo, J.).
3. Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).
4. Barrett, *Exclusion of Evidence Obtained by Illegal Searches: A Comment on* People vs. Cahan, 43 CALIF. L. REV. 565, 567 (1955).

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most recent Supreme Court decision regarding the exclusionary rule, *James v. Illinois*,[5] continued in this same vein, their reasoning governed by the shared perception that their task in exclusionary rule cases is to strike the appropriate balance. The issue is framed as a problem of balancing the danger of letting guilty parties escape punishment against the danger of letting the government "get away with" unconstitutional invasions of personal privacy. Seen in this light, the question raised by the exclusionary rule is a particular example of a more general problem: the need to balance protection by government against protection from government, or more generally still, *the* problem of limited government.

I argue here that a proper understanding of constitutionally limited government *can* resolve the question of exclusion, but only if that question has been properly put. It is a mistake to view the question as a matter of determining where we ought to draw the line in limiting the conduct of the police and the prosecution in a criminal case. The question of exclusion is not one of defining what the constitutional limits are, but one of determining what ought to be done once those limits have been violated. In search and seizure law, line-drawing occurs when the courts define what constitutes an unreasonable search or seizure; in drawing that line, the claims of individual privacy must be weighed against the need for effective law enforcement. A balancing approach is perfectly appropriate when determining where the constitutional limit lies, and empirical studies of the costs and benefits of a particular determination may be highly dispositive of the question.

But there is no balancing involved when the issue is whether an admittedly unconstitutional search should be treated as valid by the courts. What ought the courts to do when confronted with unconstitutional executive action? This is the question raised by the controversy over the exclusionary rule. Here, the logic of "balancing" is inappropriate, and empirical studies are irrelevant. In fact, the exclusionary rule controversy illustrates the limits of an empirical approach to resolving constitutional questions.

5. 110 S. Ct. 648 (1990). *James* involved the impeachment exception to the exclusionary rule. The Court held that the prosecution cannot impeach the testimony of all defense witnesses with illegally obtained evidence; only the defendant's testimony may be impeached in this manner. *See id.* at 652, 656. *See also* Walder v. United States, 347 U.S. 62 (1954) (first case to recognize the impeachment exception).

I find guidance instead in a consideration of the meaning of limited government and particularly in the doctrine of separation of powers. The separation of executive from judicial power, like the separation of each from legislative power, is a means to enforce constitutional limits on government action. The rights of an accused person are safeguarded when the different branches of government must cooperate in the prosecution. Executive abuses can be checked by an independent judiciary, because the action of both branches is required to bring about an individual's punishment. If the courts treat the fruits of an unconstitutional search as valid, they allow the government as a whole to proceed against the individual in violation of the constitutional limits established by the Fourth Amendment. Thus, admission of unconstitutionally obtained evidence represents a failure of the separation of powers.

In this Article, I argue that the exclusionary rule as it applies to unreasonable searches and seizures is constitutionally required. In Part II, I outline the development of the four major positions on the exclusionary rule and their shifting impact on Supreme Court opinions. These positions are: (1) that the courts are constitutionally required to exclude unconstitutionally obtained evidence (the constitutional requirement rationale); (2) that exclusion is proper judicial policy because the courts ought not to be implicated in unconstitutional conduct (the judicial integrity rationale); (3) that exclusion is the only effective way for the courts to provide a remedy for the violation of the privacy rights of search victims (the deterrence rationale); and (4) that the courts are constitutionally required to admit unconstitutionally obtained evidence (the admissionist position). The history of the development of these positions shows how the Supreme Court has increasingly moved away from the constitutional requirement rationale toward the deterrence rationale. At the same time, the Court has increasingly undermined the logic of deterrence. Moreover, the deterrence rationale has kindled the false hope that empirical assessments of the effects of the rule on police behavior and criminal convictions can settle the question of whether the exclusionary rule ought to be retained. I argue that empirical research cannot settle the question, but a proper understanding of the role of the courts in the constitutional system can.

Consequently, in Part III, I consider two models of the role

of the courts, the fragmentary model and the unitary model.[6] The fragmentary model treats the proceedings of a trial court as constitutionally and morally separated from the actions of the executive in conducting a criminal prosecution. By contrast, under the unitary model, the judiciary is an integral part of the entire process of criminal prosecution and thus shares constitutional and moral responsibility for the government's conduct from start to finish. These models contain the premises of the four alternative positions on the exclusionary rule. I argue that the unitary model implies that the exclusionary rule is constitutionally required in three ways: by the Fourth Amendment directly, by the Constitution in a manner analogous to judicial review of unconstitutional legislative action, and as a requirement of due process.

In Part IV, I draw on the theory of separation of powers to argue that the unitary model correctly describes the role of the courts in a limited constitutional government, and that therefore the exclusionary rule is constitutionally required. In Part V, I apply this argument to the recently developed good faith exception to the exclusionary rule to show that the exception is not consistent with the constitutional mandate underlying the rule.

II. The Development of the Exclusionary Rule

A. *The Exclusionary Rule as a Constitutional Requirement*

The exclusionary rule in search and seizure was first announced in *Weeks v. United States*,[7] where the Supreme Court held that the defendant's Fourth Amendment rights had been violated by the failure to return unconstitutionally seized papers in response to his timely application for their return and by the use of the papers as evidence at trial.[8] The Court concluded that the Fourth Amendment limits the authority of the federal courts as well as that of the federal marshal; the Court made no distinction between the unconstitutionality of the seizure and the unconstitutionality of the use of the seized material.

The *Weeks* opinion provided two distinguishable constitu-

6. These models were first presented in Schrock & Welsh, *Up from* Calandra*: The Exclusionary Rule as a Constitutional Requirement*, 59 Minn. L. Rev. 251, 254-60 (1974).

7. 232 U.S. 383 (1914).

8. *See Weeks*, 232 U.S. at 398.

tional requirement rationales for exclusion. First, *Weeks* asserted the defendant's personal Fourth Amendment right not to be convicted on the basis of unconstitutionally obtained evidence. Admission of the evidence would be a direct violation of the Fourth Amendment restriction on the means by which the government, including the courts, can bring the guilty to punishment.[9] The Fourth Amendment was applied directly to the judiciary as well as to the executive.

Second, the language of the *Weeks* opinion lends itself to a quite different interpretation of the status of exclusion, one that became increasingly important as the rule developed. The Court established that the judiciary has the constitutional duty to give "force and effect"[10] to the Fourth Amendment by excluding unconstitutionally seized evidence:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. . . . To sanction such proceedings [(the U.S. Marshal's unconstitutional search)] would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.[11]

Under this reasoning, the exclusionary rule becomes a means for the judiciary to enforce Fourth Amendment guarantees in the face of the executive violation that occurs at the time of the search. Without this remedy there would be no effective right; therefore, the remedy itself is constitutionally required.

Almost three decades before *Weeks*, the Court had indicated that exclusion is required by the Fifth Amendment.[12] Justice Bradley, speaking for the Court in *Boyd v. United States*,[13] had implied that both the Fourth Amendment and the Fifth Amendment provide protection against personal incrimination:

> We have already noticed the intimate relation between the two amendments. They throw great light on each other. For

9. *See id.* at 391-93, 398.
10. *Id.* at 392.
11. *Id.* at 393-94.
12. U.S. CONST. amend. V ("nor shall any person . . . be compelled in any criminal case to be a witness against himself").
13. 116 U.S. 616 (1886).

> the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment.[14]

At another point, the Court declared: "[T]he Fourth and Fifth Amendments run almost into each other."[15]

In *Olmstead v. United States*,[16] the Supreme Court separated the two amendments by distinguishing between unconstitutional seizure of evidence and its use. *Olmstead* raised the question of whether illegally obtained wiretap evidence should be excluded because it was obtained during an unconstitutional search. Justice Taft, writing for the majority, concluded that "[t]here is no room in the present case for applying the Fifth Amendment *unless* the Fourth Amendment was first violated."[17] If the wiretap did not constitute an unconstitutional search under the Fourth Amendment, the evidence could be admitted.[18] In dissent, Justice Brandeis argued that an unconstitutional search violates the Fourth Amendment, while the use in a criminal proceeding of the material thus secured violates the Fifth.[19] Under this line of reasoning, exclusion itself is detached from any constitutional foundation in the Fourth Amendment. Instead, the rule is a *response*, required by the Fifth Amendment, to the violation, at the time of the search, of Fourth Amendment rights. This accords with the second interpretation of the *Weeks* doctrine: that the courts give force and effect to the Fourth Amendment by excluding unconstitutionally obtained evidence. With the eventual rejection of the Fifth

14. *Boyd*, 116 U.S. at 633. The *Weeks* opinion quoted portions of *Boyd* but did not adopt this line of reasoning. The *Boyd* case involved a statute permitting a court order to be issued that required production of an invoice containing information that would support the government's allegation that the defendant had violated the revenue laws. The information could then be used as evidence in the government's case. If the defendant refused to produce the invoice, the allegations would be taken as confessed. The case could have been decided as a self-incrimination case without introducing the question whether the process provided by the statute was equivalent to a search or seizure.

15. *Id.* at 630.

16. 277 U.S. 438 (1928).

17. *Olmstead*, 277 U.S. at 462 (emphasis added).

18. *See id.* at 452.

19. *See id.* at 477-78 (Brandeis, J., dissenting).

Amendment argument, exclusion was in danger of losing its constitutional ground altogether.[20]

B. *The Judicial Integrity Rationale*

The Holmes and Brandeis dissents in the *Olmstead* case present often-quoted nonconstitutional grounds for excluding illegally obtained evidence. Their arguments are characteristic statements of the judicial integrity rationale for the exclusionary rule: The court must protect itself from contamination; the government should not foster the criminal acts of its agents; when the court accepts illegally obtained evidence, it ratifies the illegal seizure and fails in its duty to teach obedience to the law.[21]

Use of the judicial integrity rationale would have expanded the application of the exclusionary rule in the *Olmstead* case to include illegally, but not unconstitutionally, obtained evidence. This rationale, however, is weaker than the argument of *Weeks*, precisely because it detaches the rule from any constitutional underpinnings. Exclusion on the basis of judicial integrity becomes a matter of judicial policy, a policy that balances the goal of apprehending criminals against the need to preserve the integrity of the judicial process.[22]

C. *The Deterrence Rationale*

The final justification for the exclusionary rule is that exclusion of unconstitutionally obtained evidence is an effective remedy for Fourth Amendment violations, because it deters unconstitutional searches. This rationale for the rule was accepted by both the majority and the dissenters (with the exception of Justice Rutledge) in *Wolf v. Colorado*.[23] In *Wolf*, the Court, departing from *Weeks*, held that the Fourth Amendment

20. The use of the Fifth Amendment together with the Fourth to justify exclusion of unconstitutionally seized evidence was not long-lived. For criticisms of the approach, see Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 COLUM. L. REV. 11 (1925); Comment, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. CHI. L. REV. 342, 353-54 n.62 (1967); and Grant, *Constitutional Basis of the Rule Forbidding the Use of Illegally Seized Evidence*, 15 S. CAL. L. REV. 60 (1941). Justice Black raised the argument in his concurring opinion in Mapp v. Ohio, 367 U.S. 643, 661-62 (1961) (Black, J., concurring).

21. *See Olmstead*, 277 U.S. at 469-71 (1928) (Holmes, J., dissenting); *id.* at 479-85 (Brandeis, J., dissenting).

22. *See id.* at 470 (Holmes, J., dissenting).

23. 338 U.S. 25 (1949).

protection against unreasonable searches and seizures applies to the states through the Due Process Clause of the Fourteenth Amendment,[24] but also held that evidence obtained as the result of an unconstitutional search is admissible in a state criminal proceeding.[25] The Court reasoned that exclusion of evidence in federal criminal proceedings is not a constitutional requirement but is rather a "judicially created rule of evidence which Congress might negate."[26] The states were left free to enforce the constitutional guarantees as they saw fit.[27]

After *Wolf*, empirical considerations grew more important in the debate: How well does the rule deter and at what cost? Would other, alternative remedies work as well or better? On the one hand, if the rule is understood as a personal Fourth Amendment right to be free from conviction on the basis of unconstitutionally seized evidence, the existence of other effective remedies is irrelevant. On the other hand, if exclusion is constitutionally required or is sound judicial policy only because there is no other way to give force and effect to the guarantees of privacy, the availability of an effective alternative matters a great deal. Moreover, what would count as an alternative remedy depends upon whether the aim of exclusion is deterrence or whether exclusion is seen as a remedy for the injury done to the accused. Under the deterrence rationale, exclusion is the court's method of providing a remedy in the absence of effective action by the political branches.[28]

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24. U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law").

25. *See Wolf*, 338 U.S. at 27-33. *Cf. Weeks*, 232 U.S. at 398:

> As to the papers and property seized by the policemen, it does not appear that they acted under any claim of Federal authority such as would make the amendment applicable to such unauthorized seizures. . . . [T]he Fourth Amendment is not directed to individual misconduct of [state and local] officials. Its limitations reach the Federal Government and its agencies.

26. *Wolf*, 338 U.S. at 40 (Black, J., concurring).

27. The dissenting justices disagreed with this holding, because they believed that exclusion of evidence was the *only* effective method of deterrence. *See id.* at 40-41 (Douglas, J., dissenting); *id.* at 41-47 (Murphy, J., dissenting); *id.* at 47-48 (Rutledge, J., dissenting).

28. If the deterrence rationale is adopted, the issue of courts' authority to provide remedies of this kind is necessarily raised. *Cf. id.* at 33:

> [A] different question would be presented if Congress under its legislative powers were to pass a statute purporting to negate the *Weeks* doctrine. We would then be faced with the problem of the respect to be accorded the legislative judgment on an issue as to which, in default of that judgment, we have been forced to depend upon our own.

See also United States v. Janis, 428 U.S. 433, 459 (1976):

> There comes a point at which courts, consistent with their duty to administer

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D. *Which Rationale?: A History of Confusion and the Rise of the Deterrence Rationale*

In *Elkins v. United States*,[29] the Supreme Court relied on both the deterrence rationale and the judicial integrity rationale in ruling that evidence illegally obtained by state officials could not be used in a federal criminal trial. By so holding, the Court closed the loophole that had come to be known as the "silver-platter doctrine."[30] Because the *Wolf* ruling had limited exclusion to evidence seized under federal authority, state officers could still give federal prosecutors admissible evidence that would have been inadmissible had federal officials obtained the evidence, or that might be inadmissible in a state court under that state's exclusionary rule. In putting an end to the unseemly cooperation that resulted from the silver-platter doctrine, the Court relied on its "supervisory power over the administration of criminal justice in the federal courts . . . ."[31]

The Court eventually asserted a constitutional requirement rationale for exclusion. In *Mapp v. Ohio*,[32] the Court overruled *Wolf*, and the exclusionary rule became mandatory in state criminal proceedings. The central argument of the Court's opinion, authored by Justice Clark, was that, if the Constitution requires exclusion of evidence under the Fourth Amendment in federal trials, then the Constitution requires exclusion under the Fourteenth Amendment in state trials, because the Fourteenth Amendment includes the rights guaranteed by the Fourth.[33] The Court stated that the exclusionary rule was not a mere rule of evidence derived from the Court's supervisory

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the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative branches. We find ourselves at that point in this case.

29. 364 U.S. 206 (1960).

30. *See* Lustig v. United States, 338 U.S. 74, 78-79 (1949) ("The crux of that doctrine is that a search is a search by a federal official if he had a hand in it: it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter.").

31. *Elkins*, 364 U.S. at 216. For a criticism of the supervisory power doctrine as an illegitimate extension of judicial power when used to support more stringent limits on the executive than those set by constitution or statute, see Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181 (1969). For an explication of the connection between the supervisory power and the judicial integrity rationale, see Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656, 1661-64 (1963).

32. 367 U.S. 643 (1961).

33. *See Mapp*, 367 U.S. at 655-57. This Fourth Amendment constitutional requirement rationale, however, did not have the support of a majority of the Court. *See id.* at 661-62 (Black, J., concurring); *id.* at 670 (Douglas, J., concurring).

power, but a constitutional guarantee.[34] Justice Clark wrote:

> In short, the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.[35]

This argument resembles the second rationale of *Weeks*, that the judiciary has the constitutional duty to give force and effect to the Fourth Amendment by excluding unconstitutionally seized evidence. The Court in *Mapp*, though, combined the various rationales, as if adding them up would strengthen the foundation for exclusion. The result was a confused conception of the status of the rule. This is demonstrated by the Court's statement that directly follows the text quoted above: "Only last year the Court itself recognized that the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' "[36] Citing Justice Holmes's opinion in *Silverthorne Lumber Co. v. United States*,[37] the Court also referred to the exclusionary rule as a "command which this Court has held to be a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to 'a form of words.' "[38]

The Court confused the deterrence rationale with a constitutional requirement rationale because several distinctions were not maintained. *Weeks* presented two possible constitutional requirement rationales: (1) The courts are prohibited by the Fourth Amendment from obtaining a conviction on the basis of unconstitutionally obtained evidence; and (2) the courts must enforce and effectuate Fourth Amendment guarantees by excluding unconstitutionally obtained evidence.[39] This second ra-

34. *See id.* at 655-57. In his dissent, Justice Harlan pointed out that the *Mapp* ruling could not have been reached on supervisory power grounds because the Court does not have supervisory authority over the state courts. *See id.* at 678 (Harlan, J., dissenting).

35. *Id.* at 656.

36. *Id.* (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

37. 251 U.S. 385 (1920).

38. *Mapp*, 367 U.S. at 648 (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)).

39. *See supra* notes 9-11 and accompanying text.

tionale is ambiguous, and the ambiguity allowed the Court to transform the meaning of exclusion without entirely losing touch with the original *Weeks* opinion. The rationale may mean that exclusion is the only way in principle to effectuate the Fourth Amendment rights of the defendant, or it may mean that admission of unconstitutional evidence would be an act of disrespect for the Constitution on the part of the courts that would render Fourth Amendment guarantees meaningless. These two alternative interpretations should be distinguished both from each other and from an understanding of exclusion as the only available and effective means of compelling law enforcement officials to respect the Constitution in their future activities.

After the *Mapp* ruling, the Court increasingly emphasized the deterrence rationale for the exclusionary rule. The question "Is the use of this evidence within the legitimate authority of the courts?" gave way to a balancing question: "Do the deterrent effects of exclusion outweigh the social costs in this case?" The answer to this latter question was frequently "no." The Court relied on the deterrence rationale in reaching the following holdings in subsequent cases: The *Mapp* decision could not be applied retroactively;[40] an accused does not have standing to introduce a motion to suppress evidence resulting from an illegal search unless his rights were violated by the search itself;[41] illegally obtained evidence can be admitted in grand jury proceedings;[42] evidence illegally obtained by state officials can be admitted in a federal civil proceeding;[43] and federal habeas corpus can be denied to prisoners, even though illegally obtained evidence was improperly used in a state trial, as long as the state allowed litigation of Fourth Amendment claims.[44] In limiting the application of the exclusionary rule, the Court has stated that the rule is not a personal constitutional right and that it is not meant to "redress the injury to the privacy of the search victim"[45] but instead is a deterrent remedy aimed at effectuating Fourth Amendment guarantees in the future.[46]

40. *See* Linkletter v. Walker, 381 U.S. 618 (1965).
41. *See* Alderman v. United States, 394 U.S. 165 (1969).
42. *See* United States v. Calandra, 414 U.S. 338 (1974).
43. *See* United States v. Janis, 428 U.S. 433 (1976).
44. *See* Stone v. Powell, 428 U.S. 465 (1976).
45. *Calandra*, 414 U.S. at 347-48.
46. *See id.*; *Stone*, 428 U.S. at 484-86.

Given this understanding of the rule, its application in new settings is dependent on whether the incremental deterrent effect can justify the impediments to law enforcement that may result.[47]

E. *The Good Faith Exception and the Admissionist Position*

This emphasis on the deterrence rationale eventually led the Supreme Court to adopt the "good faith" exception to the exclusionary rule. Because exclusion of evidence works as a deterrent only when police officers know that their conduct is illegal, there is no reason to exclude evidence obtained by an officer who believed "in good faith" that his search was legally valid. In *United States v. Leon*,[48] the Court ruled that evidence could be admitted if it had been obtained in objectively reasonable reliance on a search warrant that was later determined to be invalid. This exception was broadened in *Illinois v. Krull*[49] to allow admission of evidence obtained in objectively reasonable reliance on a statute that was later held to violate the Fourth Amendment. In both cases, the majority relied exclusively on the deterrence rationale, with the understanding that exclusion is a matter of judicial policy rather than a constitutional right.[50]

Justice White, writing for the majority in *Leon*, made it clear that the task of the court is to weigh the costs and benefits of invoking the exclusionary rule in any particular case. The cost is conceived not only in terms of allowing the guilty to escape punishment, but in terms of impairing the "criminal justice system's truth finding function."[51] This conception invokes the

47. *See Calandra*, 414 U.S. at 351. *See also* Harris v. New York, 401 U.S. 222 (1971); Walder v. United States, 347 U.S. 62 (1954).

48. 468 U.S. 897 (1984).

49. 480 U.S. 340 (1987).

50. The path to the good faith exception was cleared by Illinois v. Gates, 462 U.S. 213 (1983). Citing *Gates*, the Court in *Leon* denied that the exclusionary rule was a "necessary corollary of the Fourth Amendment," and stated that "[w]hether the exclusionary sanction is appropriately imposed in a particular case" is separable from the question of whether an individual defendant's Fourth Amendment rights were violated. *Leon*, 468 U.S. at 906. In *Krull*, the Court referred to the exclusionary rule as "judicially developed," "a remedial device" to be applied only when its deterrent purpose is advanced, and not every time a defendant's constitutional rights have been violated by an illegal search. *Krull*, 480 U.S. at 347.

51. *Leon*, 468 U.S. at 907. *See also* James v. Illinois, 110 S. Ct. 648 (1990), where Justice Brennan, writing for the Court, and Justice Stevens, concurring, endorsed the view that a court's truth-seeking function is to be balanced against the deterrent effects of exclusion when deciding whether to admit illegally obtained evidence. *See id.* at 651-52; *id.* at 656 (Stevens, J., concurring). The dissent used the same reasoning, though it struck the balance differently. *See id.* at 657-61 (Kennedy, J., dissenting).

most stringent critique of the exclusionary rule, best argued by John Henry Wigmore, who asserted that admission of unconstitutional evidence, far from abridging constitutional rights, fulfills the positive duty of the court.[52]

Wigmore argued that the rules of evidence can only be legitimately directed toward aiding the court in its proper function: determining the guilt or innocence of the accused. In general, according to Wigmore, admissibility is not affected by the illegality of the means of obtaining evidence. Whether evidence is secured illegally is a peripheral issue that is not relevant to the truth-seeking function of the court and thus cannot serve as legitimate grounds for suppression. Evidence secured through search and seizure can be distinguished from coerced confessions, for example, because the former is highly reliable.[53] When the court accepts unconstitutional evidence, it does not sanction the police officer's illegal act. Rather, the court simply ignores that act because it has no bearing on the only issue that commands the attention of the court: the presentation of all reliable evidence in an effort to determine the facts.

In response to the deterrence argument, Wigmore asserted that a court is derelict in its duty and uses the rules of evidence to pursue an incidental purpose when it indirectly punishes the police officer by letting the criminal escape punishment through exclusion of evidence. The calculus that weighs the loss of convictions against the deterrent effects of exclusion is simply misplaced. Instead, the erring police officer can be punished through tort remedies while the criminal is punished as well. According to Wigmore, there is no genuine balancing question when the values involved are protection of the right to

52. *See* 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2183-2184 (J. McNaughton ed. 1961); Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A. J. 479 (1922). *Cf.* Mapp v. Ohio, 367 U.S. 643, 681 (1961) (Harlan, J., dissenting); Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting); Plumb, *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337 (1939).

53. The analogy to coerced confessions is often discussed in the literature on the exclusionary rule. *See, e.g.*, Geller, *Enforcing the Fourth Amendment: the Exclusionary Rule and its Alternatives*, 1975 WASH. U.L.Q. 621, 646-49; Schrock & Welsh, *supra* note 6, at 337-45. *See also* Mapp v. Ohio, 367 U.S. 643 (1961). Speaking for the Court in *Mapp*, Justice Clark maintained that evidence obtained both by unconstitutional search and by coerced confession should be excluded, because exclusion is directed at the means of obtaining evidence, regardless of reliability. *See id.* at 656-57. In his dissent, Justice Harlan argued that admission of a coerced confession constitutes self-incrimination and is therefore distinguishable from admission of unconstitutionally seized evidence. The latter, he argued, is not itself a violation of the defendant's rights. *See id.* at 683-85 (Harlan, J., dissenting).

privacy and protection of the fact-finding process. Fourth Amendment privacy rights are not infringed by admission of unconstitutionally seized evidence in a court of law.

In *Leon*, Justice White did not carry the argument to reach Wigmore's conclusions. Justice White simply found that the benefit of deterring future police misconduct does not outweigh the cost of "preventing the use in the prosecution's case in chief of inherently trustworthy tangible evidence. . . ."[54] He thus introduced the premise of the admissionist position at the same time that he made the invocation of the exclusionary rule an empirical question. But, as Justice Blackmun stated in his concurring opinion, "any empirical judgment about the effect of the exclusionary rule in a particular class of cases necessarily is a provisional one."[55] A review of the empirical literature on the rule demonstrates how very true this is.

F. *Empirical Studies of Deterrence: A Critique*

Empirical studies cannot establish definitively the effects of the exclusionary rule. There are severe obstacles to devising a reliable study of the number of illegal searches that are prevented as the result of the exclusionary rule. Any such study is an attempt to measure a "*non-event* that is not observable."[56] Statistics on motions to suppress and arrest records are only rough indicia. No comparison can be made between states with and without the rule, because the *Mapp* ruling applies uniformly to all states. Moreover, no study has indicated what frequency of motions made or granted would be sufficient to indicate that the rule acts as a deterrent to unconstitutional law enforcement behavior.[57]

If the controversy were decided on empirical grounds, the party bearing the burden of proof would lose: It is impossible to prove that the rule does deter, and it is impossible to prove

54. *Leon*, 468 U.S. at 907.

55. *Id.* at 928 (Blackmun, J., concurring).

56. Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and* United States v. Calandra, 69 Nw. U.L. Rev. 740, 748 (1975) (emphasis in original).

57. *See* Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 Ky. L.J. 681 (1974); Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels: The Case of the Exclusionary Rule*, 5 Am. Pol. Q. 57 (1977); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. Legal Stud. 243 (1973).

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that it does not.[58] The empirical studies indicate that the rule probably does not have a major impact either in deterring illegal searches or in releasing criminals who would otherwise be convicted and sentenced. The rule does not prevent the large number of illegal searches that are conducted for purposes of harassment and confiscation of contraband.[59] Moreover, while a successful motion to suppress almost always results in the release of the defendant, it cannot be assumed that the defendant would otherwise be incarcerated. The rule most often comes into play for possessory offenses for which sentences are light and often suspended, and where a motion to suppress may be a means of weeding out low-priority cases. Motions to suppress are significantly less numerous when prosecutors screen cases, and when they do not, such motions are disproportionately granted to young offenders. When the offense is serious and the case has a high prosecution priority, the exclusionary rule does seem to increase police legality, judges are less likely to grant a motion to suppress, and the case consequently goes to trial.[60]

The deterrence rationale rests on two assumptions: Convictions are a major objective of law enforcement officers, and the law is sufficiently clear and well-known to provide adequate guidance for law enforcement officers' conduct. There is reason to doubt the validity of both assumptions,[61] but this alone

58. *See* Critique, *supra* note 56, at 763-64. *Compare* Canon, *The Exclusionary Rule: Have Critics Proven that It Doesn't Deter Police?*, 62 JUDICATURE 398 (1979) *with* Schlesinger, *The Exclusionary Rule: Have Proponents Proven that It Is a Deterrent to Police?*, 62 JUDICATURE 404 (1979). *See* White, *Forgotten Points in the "Exclusionary Rule" Debate*, 81 MICH. L. REV. 1273 (1983).

59. *See* W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY (1965); L. TIFFANY, D. MCINTYRE & D. ROTENBERG, DETECTION OF CRIME 183-99 (1967) [hereinafter DETECTION OF CRIME].

60. *See* Critique, *supra* note 56, at 774-76; W. LAFAVE, *supra* note 59, at 428; J. SKOLNICK, JUSTICE WITHOUT TRIAL 224-25 (1966); DETECTION OF CRIME, *supra* note 59, at 184. For assessments of the costs, see K. BROSI, A CROSS-CITY COMPARISON OF FELONY CASE PROCESSING 18-19 (1979); Davies, *A Hard Look at What We Know (And Still Need to Learn) About the "Costs" of the Exclusionary Rule: the NIJ Study and other studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611; Nardulli, *The Societal Cost of the Exclusionary Rule: an Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585; NATIONAL INSTITUTE OF JUSTICE, CRIMINAL JUSTICE RESEARCH REPORT—THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA (1982); U.S. GENERAL ACCOUNTING OFFICE, COMPTROLLER GENERAL, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS (1979).

61. *See* Goldstein, *Administrative Problems in Controlling the Exercise of Police Authority*, 58 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 160, 168-69 (1967); Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 580-82 (1960); LaFave & Remington, *Controlling the Police: the Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 994, 1002-11

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does not imply that the rule should be abolished. If the assumptions are invalid, the rule's deterrent effect can be enhanced by placing greater emphasis on convictions, relative to arrests, and improving law enforcement training.

Similarly, the availability of alternative remedies does not dictate abandonment of the rule without a showing that (1) the alternative is more effective and less costly and (2) the alternative is mutually exclusive of, rather than complementary to, the existing rule. For example, some have argued that to replace exclusion, rather than to supplement it, with a tort remedy, would make the law speak with two voices, punishing the errant officer but accepting the fruits of his misconduct.[62]

Clearly, if deterrence is *not* accepted as the basis for the rule, the assessment of costs and benefits undertaken in the studies is even less decisive. If deterrence is not the sole reason behind the rule, the "benefits" of exclusion include upholding constitutionally limited government and protecting individual rights, as well as deterring police misconduct. As with any equation, the results of Justice White's cost-benefit analysis will necessarily depend upon the values attributed to each variable.

In his dissenting opinion in *Leon*, Justice Stevens argued that exclusion is a constitutional right. He wrote that "it is the very purpose of a Bill of Rights to identify values that may not be sacrificed to expediency,"[63] and that the Constitution limits the courts to consideration of evidence obtained only in accordance with the Constitution. Relying on a constitutional requirement rationale for exclusion, Justice Stevens found empirical considerations concerning the deterrent effects of the rule to be immaterial.[64]

The confusion of rationales for the exclusionary rule found in the *Mapp* case has now been replaced with a clear debate. The Court's majority increasingly relies on the deterrence rationale, while the minority either asserts a constitutional right to exclusion, as in the *Leon* case, or invokes deterrence but with a different assessment of costs and benefits than that of the ma-

(1965); J. SKOLNICK, *supra* note 60, at 219-23, 227; Task Force on the Police, *Sources of External Control*, in WHO RULES THE POLICE? 1, 35-36 (L. Ruchelman ed. 1973).

62. *See* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1563 (1972); Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an Empirical Proposition?*, 16 CREIGHTON L. REV. 565, 594 (1983).

63. United States v. Leon, 468 U.S. 897, 980 (1984) (Stevens, J., dissenting).

64. *See id.*

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jority, as in *James v. Illinois*.[65] Yet at the same time that deterrence has become the rule's dominant rationale for the Court, the logic tying deterrence to the Constitution has been significantly weakened. Because of this weakened linkage to the Constitution, the Court's position on exclusion has come under increasing attack from both admissionists and exclusionists;[66] it is no longer clear what, and whose, rights are being vindicated by excluding evidence for the purpose of deterrence.

The majority of the present Court views exclusion as the only available effective response to the violation of privacy rights that occurs at the time of the unconstitutional search. Viewed as a deterrent remedy, though, the exclusionary rule is not a direct vindication of a personal right of the accused; it is an indirect, general, and future-oriented remedy. The rule indirectly protects all innocent citizens by deterring the police from engaging in unconstitutional searches in the future.[67]

This produces a rather odd result, of course. When an individual's privacy rights *are* violated, a "remedy" is provided that is intended to protect someone else's rights. The privacy rights of the accused do not receive any protection. Moreover, the indirect sense in which the rule provides a remedy for protecting the privacy rights of others is totally unsatisfactory to a criminally innocent victim of an unconstitutional search from which the police are not effectively deterred. Indeed, such a "deterrent remedy" can be said to be tied only ambiguously to the "rights-remedy" relationship that we desire under the Constitution. This remedy has become something much closer to policy instead.[68]

The development of the exclusionary rule has left the rule on a precarious footing and left the controversy apparently incapable of resolution. The empirical evidence that is dispositive of the question for deterrence-rationale exclusionists is irrelevant

65. 110 S. Ct. 648 (1990).

66. *See, e.g.*, Kamisar, *supra* note 62, at 565; Nelson, *The Paradox of the Exclusionary Rule*, 96 PUB. INTEREST 113 (1989); Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214 (1978).

67. *See* Illinois v. Krull, 480 U.S. 340, 368 (1987) (O'Connor, J., dissenting) ("No effective remedy is to be provided in the very case in which the statute at issue was held unconstitutional."); Elkins v. United States, 364 U.S. 206, 217-18 (1960).

68. As the exclusionary rule is defended more and more as a matter of judicial policy and less and less as a constitutional command, the justification for the authority of the federal courts to impose it on the states begins to disappear. *See supra* notes 28, 34 and accompanying text.

to admissionists and constitutional-rationale exclusionists. The contestants compete on the basis of fundamentally different premises: Either the Fourth Amendment violation extends only to the invasion of privacy involved in an unconstitutional search and seizure, which leads one to the deterrence rationale or an admissionist position, or the Fourth Amendment is also violated by the court's admission of unconstitutionally obtained evidence. How are we to decide among these alternative views?

III. Two Models of Judicial Responsibility

A. *A New Taxonomy*

Each of the major justifications for the exclusionary rule, as well as the major admissionist argument, has as its premise either the fragmentary or unitary model of judicial responsibility. Consequently, these models are extremely useful in clarifying the issues at stake in the exclusionary rule debate. The two models were first described by Professors Thomas Schrock and Robert Welsh in an article that influenced Justice Brennan's dissent in the *Leon* case.[69] According to the fragmentary model, the executive and judicial branches each bear the responsibility for distinct and specific functions; each is only concerned with doing its own job well. The fragmentary model is so called because "a trial is understood . . . as an inquiry constitutionally and morally unrelated to the governmental conduct that preceded it . . . ."[70] Consequently, according to the fragmentary view, "there are only two constitutional wrongs possible within the search and seizure context—judicial violation of a person's fair trial rights, or police violation of his privacy."[71] Admission does not violate fair trial rights, because it does not prejudice the determination of guilt or innocence. The fair trial doctrine is the basis of the admissionist position argued by Wigmore:

69. *See* Schrock & Welsh, *supra* note 6, at 289-307. Alternative models have been suggested but are less useful. *See* H. Packer, The Limits of the Criminal Sanction (1968) (articulating "Due Process" and "Crime Control" models). For a critique of the Packer approach, see Griffiths, *Ideology in Criminal Procedure or a Third "Model" of the Criminal Process*, 79 Yale L.J. 359, 364 (1970). Professor Anthony Amsterdam offers two models of the Fourth Amendment, one protecting isolated spheres of interest of individual citizens and the other regulating government conduct. *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 367-69, 430-37 (1974). The Fourth Amendment clearly achieves the objectives of both of these models, and either model provides grounds for the exclusionary rule.

70. Schrock & Welsh, *supra* note 6, at 256.

71. *Id.*

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The sole duty of the court is to hold a fair trial. Exclusion can only be "a means contrived by the judges to stop some *other* agency—the police—from violating *its* constitutional duty to respect the right of privacy."[72] Both the Wigmore admissionist position and the deterrence rationale are based on the fragmentary premise: Use of unconstitutionally seized evidence does not in any way implicate the court in the impropriety of the seizure. The court and the police inhabit distinct moral spheres.

According to the unitary model, by contrast, those spheres overlap:

> The trial is a part of the whole prosecution, just as the court is a part of the whole government that is investigating, charging, judging, and sentencing the individual. There is in the unitary model an incipient "fair prosecution" doctrine that is meant to challenge the responsibility-limiting "fair trial" doctrine of the fragmentary model.[73]

The judiciary shares responsibility for the conduct of the government as a whole in the prosecution of an individual. The unitary model assumes that the court cannot absolve itself of responsibility for the manner in which evidence is obtained. Exclusion is the way in which the court "refrains from doing a wrong itself. And by its forbearance the court stops the entire government, of which it is a part, from consummating a wrongful course of conduct—a course of conduct begun but by no means ended when the police invade the defendant's privacy."[74] The unitary model supports both the constitutional requirement rationale for the exclusionary rule and the judicial integrity rationale.[75]

There are clearly some difficulties with the taxonomy as Schrock and Welsh describe it. The judicial integrity rationale accepts the unitary model's premise that admission of unconstitutional evidence would implicate the court in the government's unconstitutional conduct, but the rationale demands that the court remain aloof. The court is concerned with keeping itself untainted rather than with maintaining any responsibility either to the injured party or to enforce constitutional

72. *Id.* at 256-57 (emphasis in original).
73. *Id.* at 258.
74. *Id.* at 257.
75. *See* United States v. Leon, 468 U.S. 897, 937-38 (1984) (Brennan, J., dissenting); Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

limits against the executive.[76] The judicial integrity rationale does not follow the full implications of its premise. If the court commits a wrong in admitting unconstitutional evidence, is it not a wrong done to the defendant? And if admission violates the defendant's rights, doesn't exclusion become a constitutional requirement rather than judicial policy? The logical consequence of adhering to a unitary premise is not a judicial integrity rationale, but a constitutional requirement rationale.

Similar difficulties arise with the deterrence rationale. The deterrence rationale accepts the fragmentary model's premise that admission would not involve the court in the government's wrongdoing, but it asserts the court's responsibility to regulate the police. In this respect, the deterrence rationale seems closer to the unitary model than does the judicial integrity rationale. But if it is in no way improper for the court to admit unconstitutionally obtained evidence, and if admission causes no violation of the defendant's rights, by what authority does the court exclude evidence for the purpose of influencing police behavior in the future? The deterrence rationale contains no convincing justification of the court's authority to exclude probative evidence. The logical consequence of adhering strictly to the fragmentary premise is not deterrence but the Wigmore admissionist view. Thus, neither the judicial integrity rationale nor the deterrence rationale is consistent and convincing.

The taxonomic problems with the Schrock and Welsh models can be overcome by incorporating a broader understanding of responsibility into the fragmentary-unitary dichotomy. Responsibility means not only moral implication in wrongdoing, but also authority to remedy the wrong. Taking this into account, we have a new taxonomy: Wigmore's admissionist position is a consistent fragmentary position. The court has no direct responsibility in either sense for the actions of the police. The deterrence rationale is an inconsistent position, because it combines the fragmentary view of responsibility for the wrongs done with a unitary view of responsibility for the remedy. The

76. Professors Schrock and Welsh recognize this point: "[J]udicial integrity seems a bootless and rarified essence." Schrock & Welsh, *supra* note 6, at 265 n.44. They also observe: "Instead of concern for the defendant's right to have the government proceed constitutionally throughout the whole prosecution, we find concern for the court's own integrity. 'The Court protects itself' . . . ." *Id.* at 367 (quoting *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting)).

judicial integrity rationale rests on a unitary premise with respect to the wrongs involved but responds in a fragmentary manner, and thus is also inconsistent. The only exclusionist position that is fully consistent with the premises of the unitary model is the constitutional requirement argument. The real contest over the exclusionary rule, then, is between Wigmore's admissionism on the one hand, and constitutionally required exclusion on the other. Stated differently, the issue is whether or not admission of unconstitutionally obtained evidence is wrong and unconstitutional because the admitting court furthers an unconstitutional course of government conduct. This is the moral-constitutional question at the heart of the exclusionary controversy.

B. *Three Constitutional Rights to Exclusion*

What is the argument that exclusion is constitutionally required? There are, in fact, three distinct positions, two argued by Schrock and Welsh and one argued by Professor Lane Sunderland.[77] Schrock and Welsh argue persuasively that the unitary model of judicial responsibility implies two distinct constitutional rights to exclusion: one drawn from the Fourth Amendment, the other from the role of the court.[78] First, they argue that there is a personal Fourth Amendment right to exclusion of unconstitutionally obtained evidence. Their argument draws on the opinion of the Court in *Weeks v. United States* and corresponds to what I referred to above as a right to be free from conviction on the basis of unconstitutional evidence. Their position rests on a unitary interpretation of the Fourth Amendment and can be described briefly as follows: The Fourth Amendment applies to the judiciary as well as to the executive;[79] the searches prohibited by that Amendment are almost always made for the purpose of seizing items to be used

77. *See* Sunderland, *The Exclusionary Rule: A Requirement of Constitutional Principle*, 69 J. CRIM. L. & CRIMINOLOGY 141 (1978) [hereinafter *Constitutional Principle*]; Sunderland, *Liberals, Conservatives, and the Exclusionary Rule*, 71 J. CRIM. L. & CRIMINOLOGY 343 (1980). *See also* Kamisar, *supra* note 62, at 623.

78. *See* Schrock & Welsh, *supra* note 6.

79. Incidental support for this view might be drawn from the order of the Bill of Rights, which appears to correspond to the order of constitutional articles: legislature (First Amendment), executive (Second and Third Amendments), and judiciary (Fourth through Eighth Amendments). Following this analysis, the Fourth Amendment may correspond either to the executive or the judiciary, but the inclusion of the warrant requirement, the relation between unreasonable and warrantless searches, and the colonial experience with writs of assistance all indicate that the Fourth Amendment ad-

as evidence;[80] and whenever the court is confronted with unconstitutionally seized evidence, it takes one step in an evidentiary transaction that begins at the time of the search or with instructions to the police.[81]

Under this line of reasoning, *search, seizure,* and *use* are entirely interdependent in their meaning, and the Fourth Amendment prohibition against unreasonable searches and seizures includes a prohibition against the *use* of unreasonably seized materials by the court. This unitary, transactional interpretation of the Amendment contrasts with the fragmentary interpretation of invasion of privacy articulated by Justice Powell in *Calandra*.[82] The contrasting interpretations correspond directly to the two distinct views that, on the one hand, introduction of unconstitutional evidence is an independent violation of the rights of the accused and, on the other hand, the only violation of personal rights is the invasion of privacy at the time of the search. As noted earlier, this distinction is critical to differentiating among the premises of the various rationales for exclusion.[83]

In addition to this Fourth Amendment exclusionary right, Schrock and Welsh argue that there is a second personal constitutional exclusionary requirement that is implicit in the unitary model of the role of the courts but not dependent upon the unitary interpretation of the Fourth Amendment. Here, they argue that the Fourth Amendment may be understood as addressed solely to the executive, but the courts nonetheless have a general duty to treat as invalid governmental violations of constitutional commands, a duty that corresponds to a personal right to due process and protection from unlawful government conduct. In this sense, exclusion can be described as an act of judicial review:[84]

> Exclusion as judicial review is the court's affirmation of the

dresses the judiciary at least in limiting the power of the magistracy to authorize searches and seizures.

80. "Evidentiary use is the end for which evidentiary search and seizure is the means." Schrock & Welsh, *supra* note 6, at 306.

81. "[T]here is no honest way to give the court a moral release for wrongful conduct on the part of the executive in a prosecution made possible only by the participation of both the court and the executive." *Id.* at 262.

82. *See id.* at 289-302.

83. *See supra* notes 9-28 and accompanying text.

84. *See* Schrock & Welsh, *supra* note 6, at 325-26, 335-72. Schrock and Welsh maintain that most judicial integrity arguments are truncated versions of the judicial review interpretation.

> defendant's personal due process right to have *this* rule of recognition—the fourth amendment—observed in his case. . . . If the court cannot ignore the manner in which the evidence has been obtained . . . then it is faced with the alternative of excluding the evidence and thereby rendering the fourth amendment meaningful as a "rule of recognition," or making it meaningless by admission. That is, it is faced with the alternative of respecting or violating the defendant's "due process" right to have the "law" of the fourth amendment observed in the government's prosecution of him.[85]

The judicial review interpretation of exclusion is thus compatible with the "force and effect" language contained in the *Weeks* opinion. The court effectuates the Amendment by its refusal to admit unconstitutional evidence. This presents an alternative to the interpretation of the *Weeks* language as requiring the courts to enforce Fourth Amendment guarantees against the executive by providing an effective remedy for their violation.[86] Whether exclusion is understood as a direct Fourth Amendment duty of the court, or as an instance of the court's lack of authority to sanction invalid government acts, it is clearly not about redress or deterrence. In other words, there are two distinguishable, if indistinctly articulated, rights in the *Weeks* opinion. And the second is not a right to a remedy; it is simply a right required by constitutionalism and the rule of law.[87]

A similar argument, elaborated by Professor Lane Sunderland, derives a right to exclusion directly from the Due Process Clause. Drawing on the history of due process, Sunderland maintains that Fifth Amendment protection means, among other things, that a person may not be deprived of life, liberty,

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85. Schrock & Welsh, *supra* note 6, at 325-26 (emphasis in original). For a discussion of rules of recognition, see *id.* at 350-66. The due process right is emphatically not a right to a fair trial. The trial is the time at which the right to a fair *prosecution*, including judicial invalidation of unconstitutional behavior on the part of the executive, is invoked. *See id.* at 339-43.

86. *See id.* at 309-12, 314-16.

87. *See* Baldwin, *Due Process and the Exclusionary Rule: Integrity and Justification*, 39 U. FLA. L. REV. 505 (1988); Cann & Egbert, *The Exclusionary Rule: Its Necessity in a Constitutional Democracy*, 23 How. L.J. 299 (1980); Ervin, *The Exclusionary Rule: An Essential Ingredient of the Fourth Amendment*, 1983 SUP. CT. REV. 283; Kamisar, *supra* note 62; Mertens & Wasserstrom, *The Good Faith Exception and the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365 (1981); Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development, and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365 (1983); Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984).

or property as a result of unconstitutional government action.[88] "Due process of law" includes the fundamental law, the Constitution. This argument portrays the Due Process Clause as a statement of the unitary model: The clause commands the government as a whole to proceed constitutionally whenever it threatens an individual with loss of life, liberty, or property. Admission of unconstitutionally obtained evidence violates that command.

IV. Separation of Powers and the Unitary Model

Does constitutional doctrine imply the unitary model, which in turn supports the defense of exclusion as constitutionally required? Or is the fragmentary model that grounds Wigmore admissionism equally appropriate to a limited government? In choosing one model over the other, one also chooses a position on the exclusionary rule, because the alternative positions on the rule rest on the premises of the alternative models. We must find "some nonarbitrary vantage point from which the two models or institutional premises can be judged."[89]

It is my contention that a proper understanding of separation of powers in a constitutionally limited government supplies that nonarbitrary vantage point. These models represent nothing other than alternative ways of understanding the relation between the executive and judicial branches. How ought that relation to be understood? The doctrine of separation of powers supports the unitary model's view of that relation and, consequently, supports the constitutional requirement rationale for exclusion.

At first glance, a unitary view seems to conflict with the doctrine that the powers of government should be carefully separated.[90] It might be said that separation of powers is a device for limiting government by dividing its functions and restricting each branch of the government to its own proper concerns: a legislature occupied exclusively with legislative functions, a president with exclusively executive functions, and a judiciary with exclusively judicial functions.[91] The government is delib-

88. *See Constitutional Principle*, *supra* note 77.

89. Schrock & Welsh, *supra* note 6, at 262.

90. This issue is taken up briefly by Schrock and Welsh. *See id.* at 261 n.33.

91. Professor Vile identifies a pure doctrine of separation of powers that resembles this. *See* M. Vile, Constitutionalism and the Separation of Powers 13 (1967).

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erately fragmented.

But this would be a misunderstanding, the very misunderstanding that Madison sought to dispel when he wrote *The Federalist Number 47* and *Number 48*. Antifederalist critics of the proposed Constitution had attacked its dangerous and improper mixture of the functions of government. For example, the functions shared by the President and the Senate seemed especially likely to be abused. For security against government abuses of constitutionally delegated power, the antifederalists wanted to rely on the traditional alternatives: elections, where leaders could be held accountable, and a mixed constitution incorporating the proper balance of aristocratic and democratic elements in the government.[92] The Federalists considered popular elections a necessary, but not sufficient, security.[93] But in the American situation, there was no option to supply additional security through a balance of aristocratic and democratic social orders. America simply did not have a true aristocracy to include in the balance.[94]

It was Madison's contention that the separation of powers itself could serve to maintain the constitutional limits on the government as a whole, even in an entirely popular government. This was a genuine theoretical innovation. In order for the institutional mechanism to work, Madison argued, each department must have a partial agency in the business of the others. Unless they are "so far connected and blended as to give each a constitutional control over the others, the degree of separation . . . essential to a free government" cannot be truly maintained.[95] For example, the executive veto gives the presi-

92. *See* Brutus, *Essays, XVI*, *reprinted in* THE ANTI-FEDERALIST 187-91 (H. Storing ed. 1985); Centinel, *Letter I*, *reprinted in* THE ANTI-FEDERALIST, *supra*, at 13-22; Henry, *Speeches in the Virginia State Ratifying Convention*, *reprinted in* THE ANTI-FEDERALIST, *supra*, at 293-327; *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents*, *reprinted in* THE ANTI-FEDERALIST, *supra*, at 201-23. *See also* H. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 53-63 (1981).

93. *See* THE FEDERALIST No. 51, at 322 (J. Madison) (C. Rossiter ed. 1961) (urging the necessity of "auxiliary precautions").

94. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 310 (M. Farrand ed. 1966).

95. THE FEDERALIST No. 48, at 308 (J. Madison) (C. Rossiter ed. 1961). *See also* Letter from James Madison to Caleb Wallace (Aug. 23, 1785), *reprinted in* 2 THE WRITINGS OF JAMES MADISON 169 (G. Hunt ed. 1906); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 77 (M. Farrand ed. 1966); Speeches by James Wilson, *reprinted in* 2 THE DEBATES OF THE STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 433-34 (J. Elliott ed. 1863).

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dent a share in the legislative function primarily, though not exclusively, for the sake of preventing the legislature from overreaching the limits of its constitutionally delegated powers. The executive veto is not an improper blend of legislative and executive functions, but a necessary blend to maintain the constitutional limits on legislative power. The system of checks and balances is combined with the institutional separation of powers to preserve limited government.

The separation of the powers of government is not absolute, because it is not an end in itself. It is a means for allowing the government to watch itself so that citizens need not be so watchful.[96] Separation of powers is an institutional solution to the problem of protecting citizens from government abuse. While the doctrine of separation of powers has many variations and a complex history, it has always been understood as an indispensable basis for the rule of law and the maintenance of legal, including constitutional, limits on the powers of government.[97]

If the fragmentary model were correct, the separation of powers between executive and judiciary would not operate as a means toward this end. By concentrating on their narrowly defined judicial duty, the courts would allow the government to proceed against the defendant in violation of constitutional limitations. This is a version of the antifederalist error, the error that was rejected with the adoption of the Constitution.[98] Separation of powers doctrine cannot support the view that the sole duty of the court is to seek the truth and to hold a fair trial. Those who argue in this way, Wigmore admissionists included, neglect the duty of judges to uphold the Constitution, as well.

The separation of governmental powers serves as the precondition for cooperation by the distinct branches in pursuit of the designated ends of government. Liberty is maintained in a

96. Madison's famous argument in *The Federalist Number 51* presents the separation of powers as an alternative to popular conventions as a device for controlling the government. *See also* THE FEDERALIST Nos. 49, 50 (J. Madison).

97. *See* W. GWYN, THE MEANING OF THE SEPARATION OF POWERS (Tulane Studies in Political Science No. 9, 1965); M. VILE, *supra* note 91. For a collection of additional primary source material, see 1 THE FOUNDER'S CONSTITUTION 311-35 (P. Kurland & R. Lerner eds. 1987).

98. *See supra* note 92 and accompanying text. Many opponents of the Constitution mistakenly believed that separation of powers required "that the legislative, executive, and judiciary departments should be wholly unconnected with each other." THE FEDERALIST No. 48, at 308 (J. Madison) (C. Rossiter ed. 1961).

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government of separated powers only when the cooperation of the several branches is required. When one branch exceeds its constitutional bounds, the others can check the proceedings before the government as a whole acts unconstitutionally. The judiciary performs this function when it excludes evidence that was obtained as the result of unconstitutional executive action. The unitary model presupposes that each participant in the proceedings is responsible for the constitutionality of the entire proceeding. The unitary model of judicial responsibility thus accords with the understanding of separation of powers as the means by which limits on government action can be maintained.

This line of argument directly opposes Gerard Bradley's vigorous attack on principled basis rationales for the exclusionary rule.[99] Professor Bradley argues that Schrock and Welsh's interpretation of the Fourth Amendment, by effectively substituting "unreasonable evidentiary transactions" for "unreasonable searches and seizures," threatens to eliminate separation of powers restrictions, bringing under judicial scrutiny all types of executive actions in gathering evidence and in prosecuting accused persons. Schrock and Welsh, however, always tie the right to exclusion to a prior determination that an "unreasonable search and seizure" has occurred; the court's responsibility for reviewing executive actions is thus limited to those circumstances where the executive has violated the Fourth Amendment. Even in its strongest form, Bradley's critique is applicable only to the conception of the right of exclusion as a personal Fourth Amendment right; his critique is inapposite to the judicial review conception of the right of exclusion.

According to Bradley, the government is deliberately fragmented. Conflict is possible among any of the branches, as in the cases of impoundment of funds, presidential failure to commit troops after a congressional declaration of war, or prosecutorial discretion in enforcing criminal statutes.[100] But no proponent of exclusion would deny that the government is fragmented in this sense. Indeed, exclusion itself is superficially similar to Bradley's examples. By invoking the exclusionary

99. *See* Bradley, *Present at the Creation? A Critical Guide to* Weeks v. United States *and Its Progeny*, 30 St. Louis U.L.J. 1031, 1052-57 (1986). The thrust of Professor Bradley's argument is that *Weeks* offers no support to principled basis rationales, and, indeed, that they are unsupportable.

100. *See id.* at 1057.

rule, the judiciary chooses not to accept into evidence the fruits of prior executive action. The question is rather what fragmentation means, or, more aptly stated, why governmental powers are separated.

Separation of powers is a method to limit the means by which the power of government can be directed toward certain limited ends. In this respect, it is similar to the concept of due process as applied to a judicial proceeding. The government may achieve its legitimate purposes only by following specified procedures designed to maintain limits and secure impartiality. The requirement of the concurrence of several distinct departments for the completion of government action provides checks on unlawful courses of conduct. From the point of view of the individual, there is no protection of liberty in a limited government of separated powers if each of those powers can operate autonomously, unchecked by the need for the concurrence of the others.

With respect to searches and seizures, the Fourth Amendment prohibition is a limitation on the means by which the government may apprehend criminals. If this end can be reached by exceeding the limitation on the means, the limitation is truly meaningless. The government will not in fact be limited by the constitutional command. The separation of powers will have failed.

V. The Good Faith Exception

If exclusion of illegally obtained evidence is a constitutional requirement, can an exception be made for cases in which a police officer acted in good faith, and the illegality was technical in nature? Recall that the good faith exception was originally grounded in the deterrence rationale, while the opposition to it rested on a constitutional requirement rationale.[101] Professor Sunderland, in a unique version of a constitutional requirement rationale, argues that exceptions may be permitted if the exclusionary rule is understood to be based on the Due Process Clause. In Sunderland's view, history, case

101. For additional critiques of the good faith exception, see Ingber, *Defending the Citadel: The Dangerous Attack of "Reasonable Good Faith"*, 36 Vand. L. Rev. 1511 (1983); LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. Pitt. L. Rev. 307 (1982); LaFave, *The Seductive Call of Expediency:* United States v. Leon*—Its Rationale and Ramifications*, 1984 U. Ill. L. Rev. 895; and McMillian, *Is There Anything Left of the Fourth Amendment?*, 24 St. Louis U.L.J. 1 (1979).

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law, and the purpose of due process protection all indicate that that protection is meant to guard against flagrant, willful violations of fundamental rights rather than technical violations of those rights.[102]

A court's determination that illegal police action is sufficient to constitute a violation of the Due Process Clause, however, is significantly different from a court's determination that although an illegal search is serious enough to be considered an unconstitutional violation of the Fourth Amendment, it is not sufficiently unconstitutional to require exclusion of evidence. The latter is equivalent to saying that the police officer's action was both constitutional and unconstitutional.[103] The proper analogy to judicial determination of what constitutes a violation of due process would be judicial determination of what constitutes an unreasonable search or seizure. Sunderland himself acknowledges that, in principle, a revision of search and seizure law might be an acceptable alternative to the good faith exception to the rule.[104] The good faith exception and the constitutional requirement to exclude unconstitutionally obtained evidence cannot be reconciled.

The good faith exception is appealing because it allows us to have our constitutional cake and eat it, too. But there are dangers to the exception as well—dangers made evident in *Illinois v. Krull*.[105] In that case, evidence obtained in accordance with a statute establishing procedures for warrantless administrative searches and later held to be unconstitutional was ruled admissible in court because the police acted in good faith reliance on what they believed to be legitimate statutory authority. In her dissent, Justice O'Connor stated that the statute in question resembled the general writs of assistance that the Fourth Amendment was designed to prevent.[106] The statute affected the public generally, and the Court, by allowing the fruits of such unconstitutional legislation to be admitted, created a grace period for unconstitutional action and an incentive for legislatures to promulgate unconstitutional laws.[107] The dissenters

102. *See Constitutional Principle*, *supra* note 77, at 150-58.

103. *See* United States v. Leon, 468 U.S. 897, 960 (1984) (Stevens, J., dissenting); Jochum, *I Come Not to Praise the Exclusionary Rule But to Bury It*, 18 CREIGHTON L. REV. 819 (1985).

104. *See Constitutional Principle*, *supra* note 77, at 158 n.136.

105. 480 U.S. 340 (1987).

106. *See Krull*, 480 U.S. at 362-63 (O'Connor, J., dissenting).

107. *See id.* at 366 (O'Connor, J., dissenting).

would have denied the exception on deterrence grounds. Sunderland's due process logic probably would have allowed the exception. But there can be no exceptions to an exclusionary rule grounded either in a direct Fourth Amendment requirement or in the constitutional duty of the judiciary to refuse to recognize unconstitutional action on the part of the other branches of government.

VI. Conclusions

Both the Schrock and Welsh right-to-exclusion argument and the Wigmore duty-to-admit argument have a certain appeal, because they simplify the problem of the admissibility of illegally obtained evidence. According to Wigmore, the court's duty to admit is not conditional. According to Schrock and Welsh (and Sunderland, for that matter) any single constitutional exclusionary right is sufficient to justify the rule. Furthermore, neither position relies upon an assessment of the practical effects of exclusion or admission. Exclusion is not the balancing question it appeared to be at the outset.

The balancing approach to exclusion has been fostered by the Supreme Court's increasing emphasis on the deterrence rationale. That rationale holds out the vain hope that an empirical test will finally resolve the issue. But a definitive empirical test is impossible in practice and irrelevant in principle. Moreover, the deterrence rationale serves only to muddy our understanding of the rights involved in the Fourth Amendment area and of the role of the courts in effectuating constitutional guarantees.

It is too often forgotten in the debate over the exclusionary rule that it is not the rule itself that handcuffs the police. Abandoning the exclusionary rule would not ease the legal restrictions on police behavior, nor does the existence of the rule increase those restrictions.[108] It is the Fourth Amendment itself that places limits on law enforcement.

One might expect vigorous, healthy debate between liberals and conservatives on the question of what those limits ought to

108. *See, e.g.*, Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. Crim. L. Criminology & Police Sci. 255, 255 (1961) ("The exclusionary evidence rule says nothing about the content of the law governing the police. . . . [T]he rule merely states the consequences of a breach of whatever principles might be adopted to control law enforcement officers."). *See also* Oaks, *supra* note 57, at 665; People v. Cahan, 44 Cal. 2d 434, 444, 282 P.2d 905, 911 (1955).

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be—that is, of how to define unreasonable searches and seizures. Answering this question does require balancing the need for effective law enforcement against the need to protect "the right of the people to be secure in their persons, houses, papers and effects . . . ." Ironically, liberals and conservatives have instead been sharply divided over a question about which one might expect unanimity: whether the constitutional prohibition against unreasonable searches and seizures can be circumvented by the government in a criminal prosecution.

Constitutional government is limited government only insofar as the principle is maintained that "*against the Laws there can be no Authority*."[109] As John Locke went on to explain:

> [It] is plain in the Case of him, that has the King's Writ to Arrest a Man . . . and yet he that has it cannot break open a Man's House to do it, nor execute this Command of the King upon certain Days, nor in certain Places, though this Commission have no such exception in it, but they are the Limitations of the Law, which if anyone transgress, the King's Commission excuses him not.[110]

For a court of law to incarcerate a person on the basis of the unauthorized use of the power of government is to make "parchment barriers"[111] of the protections afforded by the Constitution.

In this Article, I have not considered how Fourth Amendment restrictions are to be defined, but only whether government actions that are recognized as violations of those restrictions should be treated as valid by the courts. This is a matter that can be resolved only on the basis of the principles of constitutionalism. The analysis undertaken here has identified the opposing positions that directly address the issue of exclusion as a matter of constitutional principle. There is either a constitutional duty to admit or a constitutional duty to exclude unconstitutionally obtained evidence. At the least, one would hope that a serious consideration of the confrontation between these positions will replace the utilitarian calculus fostered by the deterrence rationale that has dominated much of the debate. At best, one would hope that the Court will resolve

109. J. LOCKE, TWO TREATISES OF GOVERNMENT 403 (P. Laslett rev. ed. 1988) (3d ed. 1698) (emphasis in original).

110. *Id.*

111. THE FEDERALIST No. 48, at 308 (J. Madison) (C. Rossiter ed. 1961).

the contest by reasserting the proper constitutional grounds for a right to exclusion of unconstitutionally obtained evidence.

As Justice Stevens remarked in *Leon*:

> Today, for the first time, the Court holds that although the Constitution has been violated, no court should do anything about it at any time and in any proceeding. In my judgment, the Constitution requires more.[112]

I concur.

112. United States v. Leon, 468 U.S. 897, 977-78 (1984) (Stevens, J., dissenting).

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THE SOCIAL COSTS OF POPULIST ANTITRUST: A PUBLIC CHOICE PERSPECTIVE

MICHAEL E. DEBOW*

I. INTRODUCTION

Microeconomic analysis has become increasingly important to the development of antitrust law.[1] Over the past decade, a number of antitrust decisionmakers—including enforcement bureaucrats and judges—have adopted an economic approach and moved toward a "minimalist" view of the proper scope of antitrust:[2] "[O]nly explicit [horizontal] price fixing and very large horizontal mergers"[3] are worthy of serious concern. Ac-

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1. This development is widely attributed to the work of "Chicago School" economists and lawyers. Useful discussions of the Chicago School approach include Posner, *The Chicago School of Antitrust Analysis;* 127 U. PA. L. REV. 925 (1979); Reder, *Chicago Economics: Permanence and Change,* 20 J. ECON. LITERATURE 1 (1982); *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970,* 26 J.L. & ECON. 163 (1983); and G. STIGLER, MEMOIRS OF AN UNREGULATED ECONOMIST 148-69 (1988).

2. Minimalist ideas were clearly reflected in the federal antitrust enforcement agenda under Ronald Reagan. *See* Pitofsky, *Antitrust in the Next 100 Years,* 75 CALIF. L. REV. 817, 818 (1987) ("The only matters that regularly attract the attention of the enforcement authorities are cartels, horizontal mergers tending to create a monopoly, and various forms of predation." Even in these areas, the federal "enforcement agencies have introduced various exceptions and qualifications into prior law and today tend to resolve most doubts in favor of nonintervention."). Minimalism has also had a significant impact on the Supreme Court and the lower federal courts, as evidenced by two statements by Robert Bork, separated by little more than a decade. In 1978, he described the "modern condition" of antitrust as one of "internal contradiction and intellectual decadence." R. BORK, THE ANTITRUST PARADOX 408 (1978). In 1989, he voiced the opinion that:

> The courts are deciding antitrust cases better. There are some doctrines I would like to see changed, but I don't know if that is practical. . . . There is always going to be room for improvement in any field of law, but antitrust has seen a remarkable regeneration after a period of being in a very decayed state.

Paradox Revisited: Interview with Judge Robert H. Bork, ANTITRUST, Summer 1989, at 16, 16-17.

3. Posner, *supra* note 1, at 933 (explaining the "orthodox Chicago position," which "had crystallized" by 1969). Similar formulations include R. BORK, *supra* note 2, at 405-06 (stating that antitrust should "strike[] at three classes of behavior," including nonancillary horizontal agreements to restrain competition, horizontal mergers that leave fewer than three significant competitors in a relevant market, and deliberate predatory behavior, economically defined); and Easterbrook, *Workable Antitrust Policy,* 84 MICH. L. REV. 1696, 1701 (1986) (Chicago School "seems to favor little other than prosecuting plain vanilla cartels and mergers to monopoly").

cordingly, antitrust oversight of a number of areas has decreased under the theory that most incidents involving alleged monopolization, vertical restraints, or questionable mergers (particularly of the vertical or conglomerate variety) do not pose a serious threat to consumer welfare.

Some observers have criticized these developments, arguing that the law should be used to advance such populist goals as the "fair" distribution of business opportunities and income and the dispersal of political and economic "power."[4] This Article questions the strengths of these populist criticisms. More specifically, the Article describes the substantial danger that populist antitrust doctrines would encourage "rent-seeking" behavior on the part of firms and other parties.[5] The Article shows that a populist antitrust regime would induce increases in rent-seeking behavior, including increases in antitrust litigation. It further demonstrates that the costs of rent seeking are social costs that should be included in the total cost of a populist antitrust regime. In so doing, the Article corrects the remarkable failure of contemporary populist critics to recognize, much less account for, these costs. To address this shortcoming in the literature, the Article applies a public choice perspective to the current debate over the proper scope of antitrust.

The Article is divided into four parts. Part II describes several populist writers' proposals for incorporating their ideological views into antitrust law. Part III outlines the theory of rent seeking and argues that populist antitrust doctrines would cause a significant increase in socially wasteful rent-seeking activity. Part IV offers the more general point that the potential for an increase in rent-seeking costs should be a factor considered in determining whether any proposed government intervention in the economy will yield, on balance, positive results.

II. Current Populist Blueprints for Antitrust

Populist commentators have argued recently that antitrust

4. Populist ideas are certainly not new to antitrust. Indeed, solicitude for "small dealers and worthy men" appeared early in antitrust jurisprudence. United States v. Trans Missouri Freight Ass'n, 166 U.S. 290, 323 (1897). This approach to antitrust reached something of a zenith during the Warren Court. *See* Kauper, *The "Warren Court" and the Antitrust Laws: Of Economics, Populism and Cynicism*, 67 Mich. L. Rev. 325 (1968).

5. "Rent-seeking" behavior is the effort by persons or groups to obtain government action that would confer on them legal or other rights, and associated benefits. *See infra* note 40 and accompanying text.

law should account for social and political factors in cases that deal, *inter alia*, with mergers,[6] vertical restraints,[7] and "exclusionary" behavior.[8] The scope and ambition of these proposals are striking, and deserve some discussion as a prelude to addressing the costs of implementing a populist antitrust regime.

First, it is interesting to note that some contemporary populists couch their arguments in economic jargon. Professor Herbert Hovenkamp, for example, frames one of his arguments for populism in terms of "market failure." His justification for populist antitrust is that markets in which competitive rigor is not blunted by populist doctrines will fall prey to a heretofore unnoticed "free rider" problem. He argues as follows:

> It seems clear from the literature and mystique surrounding the small business in America that many people and the legislatures they elect place a high value on the so-called "mom and pop" store. Likewise, many people appear to be quite uncomfortable about the large amount of political and economic power wielded by large firms. Many members of society value a regime in which businesses do not have so much influence. However, such a regime can be paid for only if each consumer individually agrees to do business with smaller stores, stores with lower productive efficiency (and higher prices) and no such power. If each consumer prefers to save money now, trusting others or the government to support the small firm, a substantial free rider problem exists.[9]

Apparently, Professor Hovenkamp's antitrust regime would consider social and political factors in reaching decisions that would correct for consumers' unwillingness to express their interest in "small dealers and worthy men" at some cost to themselves.

Professor Eleanor Fox also offers a nominally economic argument for her populist blueprint. She argues that protection of "the process of competition among a significant number of

6. *See* Barnes, *Nonefficiency Goals in the Antitrust Law of Mergers*, 30 WM. & MARY L. REV. 787 (1989); Cann, *Section 7 of the Clayton Act and the Pursuit of Economic "Objectivity": Is There Any Role for Social and Political Values in Merger Policy?*, 60 NOTRE DAME L. REV. 273 (1985).

7. *See* Cann, *Vertical Restraints and the "Efficiency" Influence—Does Any Room Remain for More Traditional Antitrust Values and More Innovative Antitrust Policies?*, 24 AM. BUS. L.J. 483 (1987).

8. *See* Fox, *Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness*, 61 NOTRE DAME L. REV. 981 (1986); Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213 (1985).

9. Hovenkamp, *supra* note 8, at 243.

rivals in free and open markets, with special regard for *long-run* consumer interests, is the most appropriate focus for antitrust economics."[10] This position implicitly assumes that consumers' short-run preferences will overpower their more important long-run interests, and that government action can correct these mistaken consumer decisions. Professor Fox's brand of antitrust, presented as "a proper regard for *long-run* consumer interests and a proper respect for producer autonomy,"[11] is thus packaged in "market failure" terms similar to those invoked by Professor Hovenkamp.

Professor Fox's regard for producer autonomy and the producer's concomitant "freedom and opportunity to compete on the merits"[12] may be read as suggesting that small businesses should be protected because they are small. She contends, however, that this is not the point. Rather, long-run consumer interests should trump the smallness protection goal. She does not explain, however, what constitute "long-run" consumer interests, other than the promotion of such populist goals as a larger number of competing firms, more locally-owned businesses, or smaller firms in general. Furthermore, it is difficult to envision an antitrust law that would adequately balance what she claims is the long-run consumer interest in advancing populist goals against the short-run consumer interest in unfettered market competition. In fact, it is difficult not to conclude that Professor Fox's protection of the competitive "process" would aim primarily at preventing the elimination of some of the smaller competitors from the process.

In a similar vein, Professor David Barnes has argued that antitrust evaluation of mergers should include a consideration of "the nonefficiency concerns [that] represent the texture, color, and taste of our society—the cultural ambiance."[13] He then contends that these concerns should be given some weight in the assessment of costs and benefits of proposed mergers by invoking the economic concept of market failure due to externalities:

> Political and social as well as allocative and productive efficiency effects of mergers are all identifiable as results of pri-

10. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1174-75 (1981) (emphasis added).
11. *Id.* at 1176 (emphasis added).
12. *Id.* at 1182.
13. Barnes, *supra* note 6, at 863.

> vate behavior, the benefits or costs from which are not all internalized by the private economic actor, the acquiring firm. When considerations other than size of the economic pie are relevant to policy formation, efficiency concerns have no greater inherent claim for priority.[14]

A comprehensive analysis of the substance of these three authors' arguments is beyond the scope of this paper. I include them here only to illustrate the extraordinary increase in the scope of antitrust regulation that these scholars desire. In view of this ambition, the question is raised: What are the substantive ends these scholars wish to achieve?[15]

Consider again Professor Fox's vision of populist antitrust. She has characterized antitrust as "high on the list [of] laws enacted to improve the quality of life for the less advantaged and . . . to give the less well-established person a greater opportunity to try."[16] She sees antitrust as an area in which "government regulation [has been produced] in the name of the alienated and the powerless,"[17] and views government intervention as a means "to tilt the economic system in favor of opportunity for 'the little man' and against exploitation by the powerful."[18] (Conversely, Professor Fox describes practitioners of "law and economics" as exhibiting an "ungenerosity toward those outside of the circle of advantage and power."[19]) Reaching its fullest potential, antitrust, according to Professor Fox, would be a vehicle for helping the "underclass"[20] and for enhancing the development of Third World countries.[21] In a

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14. *Id.* at 864-65.

15. I will focus here on what the populists offer as the "positive" aspects of their proposals—the good they wish to achieve. Perhaps as important to them, however, is the avoidance of the bad outcomes they associate with an economically-grounded minimalist approach to antitrust. For example, Professors Fox and Sullivan have described the current state of affairs in antitrust as "an Orwellian 1984." Fox & Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936, 944 (1987). *See also* Barnes, *Revolutionary Antitrust: Efficiency, Ideology and Democracy*, 58 U. CIN. L. REV. 59, 62 (1989) (contending that antitrust analysis based on economic efficiency concerns "leads to a decline in the democratic process and a diminution in the provision of tangible and intangible goods that can only be produced effectively in the political market"); Curran, *Beyond Economic Concepts and Categories: A Democratic Refiguration of Antitrust Law*, 31 ST. LOUIS U.L.J. 349, 361 (1987) (stating that economics-based analyses "destroy democratic values and subvert justice").

16. Fox, *The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window*, 61 N.Y.U. L. REV. 554, 587-88 (1986).

17. *Id.* at 588.

18. *Id.* at 574.

19. *Id.* at 588.

20. *Id.* at 559.

21. *See* Fox, *Harnessing the Multinational Corporation to Enhance Third World Develop-*

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similar vein, Professor Barnes asserts that "the characteristics of a good society come from political and entrepreneurial freedom, from community, and from individual control over our economic destinies."[22] According to Professor Barnes, antitrust rules can be used in a way that will foster the appropriate mix of these characteristics.

The populists' varied (and rather ambiguous) list of objectives is bound together by their preference for public over private-sector decisionmaking. In this sense, the populists appear generally to subscribe to what Professor David Vogel calls the "new conventional wisdom" in political science, that is, that "the large corporation's concentration of resources and wealth [is] an anomaly that upsets the balance between democracy and capitalism."[23] An important element of this "conventional" view is a strong distrust of the private exercise of discretion. This is most explicit in the writings of Professor Lawrence Sullivan. As he puts it:

> The existence of firms of great size and high levels of concentration make [sic] the presence of discretionary power inevitable. On countless questions involving product design, investment in research and development, plant location, levels and styles of advertising, and choice of legal and lobbying strategies, the profit maximizing solution will hardly ever be clear in an oligopolistic industry. The individual firm will have discretion about these and related matters.[24]

For Professor Sullivan, government intervention via antitrust is apparently preferable to the private exercise of discretion:

> [A]dherents to the liberal tradition are as suspicious of discretionary economic power as they are of discretionary political power. They are skeptical that markets adequately control economic power. Liberals do not accept as given the existing distribution of wealth. They insist that minimum levels of welfare be provided for all.[25]

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ment—The Rise and Fall and Future of Antitrust as Regulator, 10 CARDOZO L. REV. 1981 (1989).

22. Barnes, *supra* note 6, at 863.

23. Vogel, *Political Science and the Study of Corporate Power: A Dissent from the New Conventional Wisdom*, 17 BRIT. J. POL. SCI. 385, 387 (1987) (quoting Menninger, *Business and Politics*, 18 POL. SCI. 210 (1985)). A shortened version of Professor Vogel's article appeared as *The New Political Science of Corporate Power*, PUB. INTEREST, Spring 1987, at 63.

24. Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships*, 68 CALIF. L. REV. 1, 11 (1980). *See also* Cann, *supra* note 6, at 311-12 ("In addition to the growth in the political influence of large corporations, the tremendous discretion vested in the hands of a few powerful individuals is also problematic.").

25. Sullivan, *supra* note 24, at 5-6.

Similarly, Professor Fox has described a significant group of antitrust activists, herself apparently included, who,

> [p]ointing to an abundance of real world evidence . . . challenge the belief in the natural efficiency of business acts. . . . [They] worry about private as well as government power, the coercion and exclusion of the weak by the powerful, and the distribution of power and opportunity. They take seriously the imperfections of free market competition.[26]

In short, the populists wish to trade market decisionmaking for political and judicial decisionmaking.[27] A populist antitrust regime might mirror the "multivalued antitrust tradition" espoused by the Warren Court, under which multiple interests were supposedly balanced, and "[t]he lack of precise scales was not regarded as disabling."[28] Such a regime would certainly displace market-based decisions and outcomes to a much greater degree than the law does currently. No longer would antitrust be shackled by the view that "public intervention [is advisable] only when market failures can be explicitly diagnosed and efficiently corrected."[29]

There are two principal, long-standing objections to the populist agenda for antitrust: lack of support in the legislative history for such an open-ended set of goals, and the difficulty in knowing to what degree consumer welfare "should" be traded off against non-consumer welfare goals, such as protecting small businesses. In their classic rebuttal to populism, Professors Bork and Bowman argue that:

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26. Fox, *The Battle for the Soul of Antitrust*, 75 CALIF. L. REV. 917, 918 (1987). Elsewhere, Professor Fox has noted with dismay that "Chicago is fighting a war *for* private freedom of action." Fox, *Consumer Beware Chicago*, 84 MICH. L. REV. 1714, 1715 (1986) (emphasis in original).

27. For interesting empirical examinations of the consequences of choosing between highly regulated and more *laissez faire* regimes, see Scully, *The Institutional Framework and Economic Development*, 96 J. POL. ECON. 652 (1988) (during the period 1960 to 1980, politically open societies that subscribed to the rule of law, private property, and market allocation of resources grew at three times the rate of, and were two and one-half times as efficient as, societies in which these freedoms were abridged); M. OLSON, THE RISE AND DECLINE OF NATIONS (1982) (arguing, *inter alia*, that over time stable societies accumulate more collusive and rent-seeking organizations that reduce efficiency and aggregate income and make political life more divisive); and S. MAGEE, W. BROCK & L. YOUNG, BLACK HOLE TARIFFS AND ENDOGENOUS POLICY THEORY: POLITICAL ECONOMY IN GENERAL EQUILIBRIUM 111-21 (1989) (concluding that "the relationship between GNP growth rates and redistributive activity" is more subtle and harder to predict than suggested by the work of Olson and others, but nonetheless presenting empirical evidence that a large number of lawyers (compared to the number of physicians) in a society acts as an "invisible foot" braking GNP growth).

28. Sullivan, *supra* note 24, at 4.

29. *Id.* at 8.

> [I]f antitrust is to turn from its role as the maintainer of free markets to become the industrial and commercial equivalent of the farm price-support program, then we are entitled to an unequivocal policy choice by Congress and not to vague philosophizing by courts that lack the qualifications and the mandate to behave as philosopher kings.[30]

I wish to concentrate on a third objection to the populist agenda that has to date received relatively little attention. This objection focuses on the rent-seeking implications of populist proposals. In the next section of this Article, I outline public choice theory's explanation of rent-seeking behavior and conclude that it provides a strong reason to believe that a populist antitrust policy would prove to be a bad bargain for society.

III. Rent Seeking: The Social Costs of Privately-Interested Behavior Under Populist Doctrines

The theory of rent seeking is largely the product of the "Virginia School" of public choice theorists. Public choice is "the economic study of nonmarket decisionmaking, or simply the application of economics to political science."[31] It applies the basic behavioral postulate of economics, namely, "that man is an egoistic, rational, utility maximizer,"[32] to the study of human behavior in politics and government. Economics posits that markets are dominated by self-interested actions; "public choice holds that political processes are likewise dominated by self-interest."[33]

The self-interest or "private-interest" view of politics used by public choice scholars stands in direct conflict with "the alternative model, implicit in conventional welfare economics and widespread in conventional political science, that political agents can be satisfactorily modeled as motivated solely to promote the 'public interest,' somehow conceived."[34] Rather than treat the government as an autonomous scourge of market fail-

30. Bork & Bowman, *The Crisis in Antitrust*, 65 Colum. L. Rev. 363, 370 (1965).

31. D. Mueller, Public Choice II 1 (rev. ed. 1989). Far from a monolithic "movement," public choice comprises several groups of scholars whose work show differing emphases and methodologies. *See* Mitchell, *Virginia, Rochester, and Bloomington: Twenty-five Years of Public Choice and Political Science*, 56 Pub. Choice 101 (1988).

32. D. Mueller, *supra* note 31, at 2 (footnote omitted).

33. Wagner, *Morals, Interests, and Constitutional Order: A Public Choice Perspective*, 67 Or. L. Rev. 73, 77 (1988).

34. Brennan & Buchanan, *Is Public Choice Immoral? The Case for the "Nobel" Lie*, 74 Va. L. Rev. 179, 181 (1988). (James Buchanan, one of the chief architects of public choice theory, received the Nobel Prize in Economic Science in 1986.)

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ures and the benevolent protector and promoter of the common good, public choice theorists explain government activity as largely the product of the demands placed on the political system by self-interested groups. Public choice thus views "politics without romance,"[35] and embodies a strong skepticism about government action.[36] For purposes of evaluating public policy options, public choice provides a theory of "government failure" that can serve as a counterpoint to the theory of market failure.[37] Recently, public choice has attracted the attention of legal scholars. Some have used the theory in creative ways to discuss legal issues;[38] others have reacted to the approach quite negatively.[39]

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35. *See* Buchanan, *Politics without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications*, in THE THEORY OF PUBLIC CHOICE-II 11 (J. Buchanan & R. Tollison eds. 1984).

36. As Professor Buchanan puts it,

> [p]ublic choice theory has been the avenue through which a romantic and illusory set of notions about the workings of governments and the behavior of persons who govern has been replaced by a set of notions that embody more skepticism about what governments can do and what governors will do, notions that are surely more consistent with the political reality that we may all observe about us."

Id. at 11.

For a thorough survey of the public choice literature, see D. MUELLER, *supra* note 31. *See also* Tullock, *Public Choice*, in 3 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 1040 (J. Eatwell, M. Milgate & P. Newman eds. 1987) [hereinafter THE NEW PALGRAVE].

37. For an explanation of the need to consider both market and government "failure" in devising public policy, see Wolf, *Market and Non-Market Failures: Comparison and Assessment*, 7 J. PUB. POL'Y 43 (1987); and C. WOLF, MARKETS OR GOVERNMENTS: CHOOSING BETWEEN IMPERFECT ALTERNATIVES (1988).

38. *See* Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265 (1990); Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43 (1988); and several of the articles in *Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167 (1988).

39. *See* Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 106 (1990) (arguing that the "market for legislation" is "a competitive market, and it is presumptively as efficient as any other form of competition"); Kahn, *The Politics of Unregulation: Public Choice and Limits on Government*, 75 CORNELL L. REV. 280 (1990); Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.[-]KENT L. REV. 123, 145 (1989) (declaring studies that "demonstrat[e] first that one or another group has reaped a windfall from this or that piece of legislation and, then, conclud[e] explicitly or implicitly with a smirking, 'See there, rent-seeking again[]' " to be "annoying, to put it mildly," but then declaring "this approach to the study of legislation" to be "useful"); Farber, *Democracy and Disgust: Reflections on Public Choice*, 65 CHI.[-]KENT L. REV. 161 (1989); Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988) (prominent Critical Legal Studies professor finds public choice unacceptable "bashing"); Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 874 (1987) (worrying that "a simplistic reading" of public choice "threatens to distort public law"). The reader interested in these critiques may also wish to read DeBow & Lee, *Understanding (and Misunderstanding) Public Choice: A Response to Farber and Frickey*, 66 TEX. L. REV. 993

The public choice theory of rent seeking focuses on the processes by which government dispenses favorable treatment (for example, tax breaks, direct subsidies, or protection from competition) to private parties (for example, firm owners or employees). If a society's government is prone to dispense such prizes, one would expect that rational, self-interested individuals will attempt to organize and gain access to a share of this largesse. Public choice theorists refer to such expenditures of effort and resources as "rent seeking." In this sense, the term "rent" means "a return in excess of a resource owner's opportunity cost [that is] contrived artificially through . . . government action."[40]

Rent seeking is the purposeful pursuit, through the political process, of above-normal profits. By engaging in rent-seeking activities, private parties "compete for artificially contrived transfers."[41] The classic example of rent seeking is a domestic industry seeking protection under United States trade laws from foreign competition.[42] Possible forms of rent-seeking activity in this example include: illegal side payments to public

(1988); and Farber & Frickey, *Integrating Public Choice and Public Law: A Reply to DeBow and Lee*, 66 TEX. L. REV. 1013 (1988).

In his review of R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985), Professor Thomas Merrill offers one explanation of the aversion some legal scholars have to public choice generally, and rent-seeking theory in particular. Merrill describes Epstein's work as grounded in the view that governmental processes are dominated by rent seeking, and then observes:

> I believe there is a great deal of truth in Epstein's depiction of the modern American political process, more so than many law professors care to admit. This may account, at least in part, for the intensely hostile reaction to Epstein's book. Most academics retain a deep, abiding faith in government as an institution for social good. Epstein's model of politics threatens this faith, triggering strong emotions that often overcome the analysis.

Merrill, *Rent-Seeking and the Compensation Principle* (Book Review), 80 NW. U.L. REV. 1561, 1587 (1986).

40. Tollison, *Rent Seeking: A Survey*, 35 KYKLOS 575, 575 (1982). The confusion that may be generated by the term "rent seeking" has been noted by the economist most responsible for the development of the theory:

> [T]he term itself is an unfortunate one. Obviously we have nothing against rents when they are generated by, let us say, discovering a cure for cancer and then patenting it. Nor do we object to popular entertainers like Michael Jackson earning immense rents on a rather unusual collection of natural attributes together with a lot of effort on his part to build up his human capital. On the other hand, we do object to the manufacturer of automobiles increasing the rent on his property, and his employees increasing the rent on their union memberships, by organizing [to obtain] a quota against imported cars. All of these are economic rents, but strictly speaking the term "rent seeking" applies only to the latter.

Tullock, *Rent-Seeking*, in 4 THE NEW PALGRAVE, *supra* note 36, at 147, 148-49.

41. Tollison, *supra* note 40, at 576.

42. This discussion follows Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5

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officials; legal campaign contributions of cash, non-cash material support, or "volunteers" to influential officeholders; the employment of public relations specialists, lobbyists and lawyers in efforts to influence government actions; and the employment of lawyers to litigate over lack of compliance by foreign firms with the protection granted (such as dumping duties, or import quotas).[43]

Rent-seeking activities obviously entail out-of-pocket costs to those who engage in them. More importantly, public choice theorists characterize rent-seeking efforts as "wasteful," from society's point of view, for two reasons. First, *successful* rent seeking imposes costs on society that are quite similar to the social costs of monopoly (or price fixing). Consider Figure 1. If

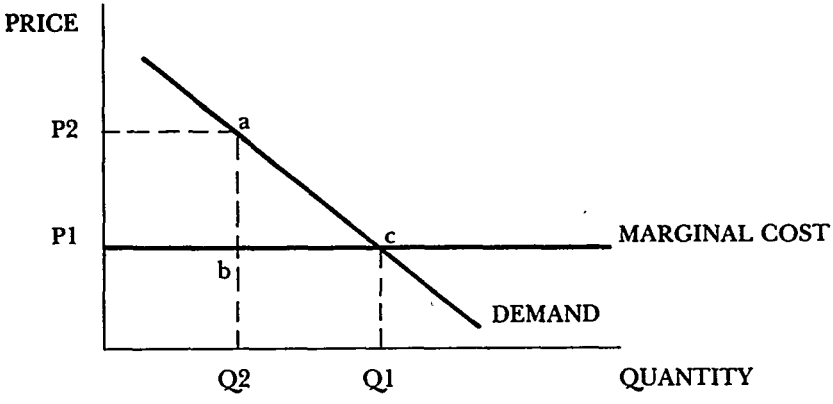


Figure 1

an industry secures governmentally-provided trade protection, then it may be able to charge higher prices (say, P2) and earn higher profits (represented by rectangle P2abP1). As a result, the quantity sold decreases to Q2, and society suffers a deadweight loss—represented by triangle abc—that is directly analogous to that imposed by a monopoly.

One might suppose that policymakers would resist decisions

W. ECON. J. 224 (1967). For further elaboration, see Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807 (1975).

43. "Legal proceedings sometimes are rent-seeking, e.g., a particular company attempting to enforce some kind of a restriction on its competition." Tullock, *Future Directions for Rent-Seeking Research*, in THE POLITICAL ECONOMY OF RENT SEEKING 465, 466 (C. Rowley, R. Tollison & G. Tullock eds. 1988). *See also* Formby & Millner, *"Comparable Worth" and Rent Seeking*, 7 INT'L REV. L. & ECON. 65 (1987) (treating litigation costs as rent-seeking costs).

that result in deadweight losses to society as a whole. However, public choice theorists argue that, even though such decisions result in net losses to society, private interests are successful in extracting rents through government processes because of the "rational ignorance" of voters in not following government actions closely. In the tariff example, the increased profits made possible by the tariff are enjoyed by a relatively small group of shareholders, managers, and employees of the advantaged firms, while the costs of the tariff in terms of higher prices and decreased product selection are spread over a much larger number of consumers and would-be consumers. As a result of this disparity between concentrated benefits and dispersed costs, the recipients of the benefits have a greater incentive to engage in rent seeking than the consumers, as voters, have to follow the complexities of government actions in hopes of holding their representatives accountable in the next election. Because the costs to the average voter of following complex government decisionmaking processes tend to outweigh the benefits to that voter of following these processes, public choice theorists believe that rent seeking is loaded in favor of the supplicants for government favors.[44]

Moving to the second source of social loss imposed by rent-seeking behavior, both *successful and unsuccessful* rent seeking consumes at least a part of the higher profit sought by the rent seeker and thereby causes a socially harmful diversion of the efforts of individuals who could otherwise be engaged in more productive work than "the negatively productive activity of creating a trade restriction of some sort."[45] That is, rent seeking involves the use of

> real resources to capture a pure transfer. Since expenditures to take a dollar from A and give it to B produce nothing, they are wasted from the point of view of the economy at large; they are zero-sum at best and are probably negative sum. A lawyer, for example, employed to transfer a dollar from A to B has an opportunity cost in terms of the lawyer output he or she could have produced alternatively. This op-

44. *See generally* Mitchell, *Interest Groups: Economic Perspectives and Contributions*, 2 J. THEORETICAL POL. 85 (1990).

45. Tullock, *supra* note 40, at 147. Professor Jagdish Bhagwati refers to such exertions as "directly unproductive" activities. *See* Bhagwati, *Directly Unproductive Profit-seeking (DUP) Activities*, 90 J. POL. ECON. 988 (1982).

portunity cost is the social cost of rent-seeking.[46]

Significantly, in many cases private parties will engage in defensive forms of rent seeking, actively seeking to convince the government to refrain from action that would strip them of a privately-created rent, or to deny the rent-seeking petitions of third parties that would adversely affect them. The costs of "rent protecting"[47] and "rent avoiding"[48] thus constitute further social costs of rent seeking.

This outline of rent-seeking theory is aptly concluded by recalling Oscar Wilde's remark that "[t]he trouble with Socialism is that it uses up too many evenings."[49] This observation conveys the key insight of rent-seeking theory: Real resources are spent in non-market decisionmaking. The politicization of decisions requires the investment of time and effort in the task of

46. Tollison, *Is the Theory of Rent-Seeking Here to Stay?*, in DEMOCRACY AND PUBLIC CHOICE: ESSAYS IN HONOR OF GORDON TULLOCK 143, 145 (C. Rowley ed. 1987).

Because of the costliness of rent seeking, public choice theorists claim that the supposed transfer to the rent-seeking producer(s) in the form of monopoly profits—illustrated by rectangle P2abP1 in Figure 1—will not (fully) materialize. Early research on rent seeking "assumed that profit-seeking businessmen would be willing to use resources in an effort to obtain a monopoly, whether it was privately or government sponsored, up to the point where the last dollar so invested exactly counterbalanced the improved probability of obtaining the monopoly." Tullock, *supra* note 40, at 147. In this model, each firm's investment in rent seeking "perfectly dissipates" the capitalized value of the rent sought. More recent work on "perfect dissipation" has led to something of an impasse. Depending on the institutional setting, "competitive" rent seeking—in which two or more actors compete for governmentally-created rents—can result in total investments in rent seeking equal to, greater than, or less than the value of the rent to the "winning" competitor. *Id.* at 148. In order to shed further light on the relationship between rent seeking and the value of the rent, "what is needed is empirical research, and an effort to measure the production functions appropriate to rent seeking." *Id.* at 148. *See also* Flowers, *Rent Seeking and Rent Dissipation: A Critical View*, 7 CATO J. 431 (1987); D. MUELLER, *supra* note 31, at 231-35.

47. *See* McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101, 102-03 (1987) ("Political office confers a property right, not just to legislate rents, but to impose costs. . . . A politician thus can gain by forbearing—for a price—from exercising his right to impose costs on private actors that would reduce rents from capital they have created or invested themselves.").

48. *See, e.g.*, Tullock, *supra* note 40, at 147.

49. Of course, as is clear to anyone who has spent time recently in a law school, a sizable number of legal academics do not share this view of politics or politicization. Indeed, many appear to prefer government precisely because it involves more verbal combat—or, to use the legal academy's vernacular, "dialogue"—than the market. Consider, for example, Professor Owen Fiss's plea for government subsidies and other actions to "put on the [political] agenda issues that are systematically ignored and slighted and allow us to hear voices and viewpoints that would otherwise be silenced or muffled." Fiss, *Why the State?*, 100 HARV. L. REV. 781, 788 (1987). This government action is necessary, Professor Fiss argues, because only government "has the power we need to resist the pressures of the market and thus to *enlarge and invigorate our politics*." *Id.* at 794 (emphasis added).

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arguing about how to divide the social "pie"—time and effort that could have been used to bake a larger pie in the first place.

Although the exact amount spent on rent-seeking, rent-protecting, and rent-avoiding activities in the American polity has not been precisely determined,[50] it is clear that such activities are widespread and the social costs are substantial.[51] Furthermore, *as the size and scope of government expands, the opportunities for rent seeking will multiply and, as a result, the social costs incurred will increase.* This prediction applies fully to an increase in the size and scope of antitrust policy, and it reflects not only the rent-seeking, rent-protecting, and rent-avoiding costs that increased antitrust litigation would impose, but also the deadweight losses that successful rent-seeking antitrust litigation would engender.

For example, less efficient firms might seek to have the government, through the judiciary, act to deprive more efficient firms of the rents they would otherwise earn. Such litigation would produce both rent-seeking and rent-protecting costs. The litigation could come in a number of forms, such as a firm's challenge to the merger of two of its competitors that would result in a stronger merged firm,[52] and a firm's challenge

50. Professor Tullock has stated that "the total amount spent in lobbying, etc., in Washington does not seem to be even close to the economic value of the favors dispensed by the government. Note that I say in Washington. I suspect that in Mexico City the two are in quite close agreement." Tullock, *supra* note 43, at 469.

In a landmark article, Professor Anne Krueger estimated that in 1964, governmentally-created rents, particularly in the form of import licenses, constituted approximately seven percent of Indian national income and 15 percent of Turkish gross national product. *See* Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291, 294 (1974). Professor Krueger noted dryly that "it would be surprising if competition did not occur for prizes that large," *id.*, and suggested that outright bribery constituted a significant form of competition for rents in the countries she studied. *See id.* at 292-94.

For interesting discussions of the burden of rent seeking in lesser-developed countries, see H. DE SOTO, THE OTHER PATH (1989); and Schuck & Litan, *Regulatory Reform in the Third World: The Case of Peru*, 4 YALE J. ON REG. 51 (1986). For a discussion of the burden of such behavior in "older," industrialized economies, see S. MAGEE, W. BROCK & L. YOUNG, *supra* note 27, at 225 (estimating that 10 to 20 percent of gross national product in such economies is "lost" through "overregulation, excessive redistributive lawyering, and inefficient conflict resolution").

51. "The realization that . . . the large scale lobbying industry is truthfully a major social cost is new although presumably, at all times, anyone who thought about the matter must have realized that these highly talented people could produce more in some other activity." Tullock, *supra* note 40, at 149.

52. *See* Werden, *Challenges to Horizontal Mergers by Competitors Under Section 7 of the Clayton Act*, 24 AM. BUS. L.J. 213, 242 (1986) (arguing in favor of denying standing to such firms, in part because such a rule would eliminate "suits that seek to block efficient, procompetitive mergers"). *See also* Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S.

to a competitor's introduction of a superior new product. Courts have in the past adjudicated cases that fall into these categories.[53] Such claims are consistent with populist rhetoric and would be encouraged under a populist antitrust regime. Such a development would make the antitrust laws an even more lucrative vehicle for firms that fail in the competitive arena and seek compensation through litigation.[54] In such a setting, the temptation of private parties to use "antitrust law[s] . . . in ways that are not desirable"[55] would be greatly reinforced, and the associated rent-seeking costs and deadweight losses would increase.[56]

Even populist-inspired government suits would generate at least rent-protecting costs on the defendants' side, and might produce deadweight losses if the government succeeds. Two examples suffice to illustrate the point: A government challenge to the "excessive" introduction and promotion of new products[57] and a challenge to a firm's policy of expanding its productive capacity in order to meet future demand growth[58] could both probably be justified under a populist policy of promoting small firms over large ones. Regardless of how one evaluates the policy, pursuing it would generate deadweight

104, 113-22 (1986) (discussing the problem, but refusing to adopt blanket denial of standing to competitors in merger cases).

53. *See* Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986); Werden, *supra* note 52 (collecting cases in which competitors challenged proposed mergers). *See also* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979) (relatively small plaintiff firm alleged that Kodak violated Section 2 of the Sherman Act by introducing new camera and film without first notifying plaintiff of its plans and giving plaintiff opportunity to market competing new camera simultaneously), *cert. denied*, 444 U.S. 1093 (1980).

54. Numerous antitrust scholars are concerned that the payment of treble damages and attorney's fees to successful plaintiffs provides an incentive for plaintiffs to bring, and defendants to settle, cases of dubious merit. *See* Breit & Elzinga, *Private Antitrust Enforcement: The New Learning*, 28 J.L. & ECON. 405 (1985) (surveying the literature, which is described as "almost uniformly critical" of the current structure of antitrust incentives). The introduction of populist doctrines would introduce more uncertainty into the law—recall that "[t]he lack of precise scales" would probably not be "regarded as disabling," Sullivan, *supra* note 24, at 4—and would make estimation of the chances of winning or losing at trial more difficult than at present. This would almost certainly exacerbate the problem of "overinvestment" in private antitrust actions.

55. *From Economic Theory to Harvard Don*, N.Y. Times, Apr. 1, 1984, § 3, at 4, col. 3 (quoting economist Michael Spence).

56. For excellent discussions of the problem of private abuse of antitrust, see Baumol & Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247 (1985); Miller, *Comments on Baumol and Ordover*, 28 J.L. & ECON. 267 (1985); M. GREENHUT & B. BENSON, AMERICAN ANTITRUST LAWS IN THEORY AND PRACTICE 145-222 (1989); and Hazlett, *Is Antitrust Anticompetitive?*, 9 HARV. J.L. & PUB. POL'Y 277, 319-29 (1986).

57. *See, e.g.*, Kellogg Co., 99 F.T.C. 8 (1982).

58. *See, e.g.*, E.I. du Pont De Nemours & Co., 96 F.T.C. 650 (1980).

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losses if the government prevailed in enforcing such a regime, and rent-protecting costs would be incurred by the defendant firms in any event. The important point is that, as the government expands the scope and aims of antitrust enforcement, private parties will invest larger sums in manipulating this greater government intervention in the economy to glean rents—or in resisting the extraction of rents by the government or competitors.

A populist, responding to the analysis of this Article, might argue that viewing populist antitrust through the lens of rent-seeking theory is inappropriate, because such an analysis treats the benefits conferred on small businesses (and others) by populist antitrust as a "pure transfer" (to borrow Professor Tollison's phrase) and thus overlooks the "public goods" generated by populism.[59] This counter-argument fails to address the point, however, that even if one agrees that the populists' goals are laudable, rent-seeking theory helps illuminate the social costs of populist antitrust doctrines in the form of rent-seeking costs and deadweight losses.

Despite these costs, populists appear eager to have taxpayers fund the types of government suits just described. Indeed, populists may be largely disinterested in the magnitude of resources diverted into populist antitrust litigation by private parties.[60] The amounts already spent on antitrust litigation, however, even under a "minimalist" regime, are substantial. Professor Robert Reich has estimated that public expenditures on antitrust prosecutors and judges, and private expenditures on antitrust litigation and counselling, totalled approximately $2.5 billion in 1979.[61] If these total annual expenditures have grown at a rate equal to the rate of inflation since 1979, direct expenditures on antitrust litigation in 1990 totalled approximately $4.3 billion. It follows that, if the adoption of a populist antitrust regime resulted in a fifty-percent increase in direct expenditures on antitrust litigation—which seems a conservative estimate, given the open-endedness and ambitious scope of populist doctrines—rent-seeking costs would increase by $2.2 billion *annually*. This estimate, of course, does not take account

59. *See supra* notes 9, 13-14 and accompanying text.

60. On this point, it should be remembered that populists seem to regard the politicization of decisions heretofore left to market determinations as an end in itself. *See supra* notes 23-29, 49 and accompanying text.

61. *See* Reich, *The Antitrust Industry*, 68 GEO. L.J. 1053, 1068-70 (1980).

of the associated deadweight losses that would accrue to society.[62]

It would be charitable to state that populists have devoted little attention to the costs that their programs would impose on the public. Indeed, Professor Fox has argued that such intervention might be costless, stating that "jurists may find that they can advance values of antitrust law—diversity, opportunity, fair process, choice, and fairer distribution—without also raising the costs of goods and services to consumers."[63]

Professor Hovenkamp has also failed to address the question of the social costs of a populist antitrust regime. He has expressed a strong enthusiasm for the "noneconomic, or political, content"[64] of antitrust. It is difficult to square this enthusiasm, however, with his repeatedly-expressed concerns about rent seeking. He has utilized the economic model of rent seeking, for example, in two leading law review articles on antitrust policy.[65] Furthermore, he has suggested that rent seeking is "the greatest social cost of monopoly."[66] Professor Hovenkamp is clearly aware of the concept of rent seeking; he simply fails to examine its implications for his proposals for antitrust enforcement. He accordingly fails to observe that his antitrust agenda would almost certainly increase the rent-seeking costs that rightly concern him. For example, he does not recognize that, to the extent that antitrust is transformed into a redistribution program, one can expect an increase in self-interested, rent-seeking behavior.[67]

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62. The $2.2 billion cost increase is approximately four times as large as the average annual budget authority of the Small Business Administration for fiscal years 1989 through 1991. *See* EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1991, at A-253 (1990). These additional outlays, of course, would be committed to hiring lawyers, retaining expert witnesses, paying court fees, et cetera, rather than to promoting small businesses. This analysis of rent-seeking behavior thus lends support to the long-standing criticism that populist antitrust would be a remarkably inefficient way to subsidize small businesses.

63. Fox, *supra* note 16, at 584. *See also id.* at 584 nn.146-48 (urging inclusion of harder-to-quantify "soft data" and "dynamic implications" in the cost-benefit analysis of intervention).

64. Hovenkamp, *supra* note 8, at 284.

65. *See* Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 15-17 (1989); Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1, 13 n.51 (1982) [hereinafter *Distributive Justice*]. The analysis also appears in the excellent casebook that Professor Hovenkamp coauthors. E. SULLIVAN & H. HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE 504-07 (2d ed. 1989).

66. *See* Hovenkamp, *Chicago and Its Alternatives*, 1986 DUKE L.J. 1014, 1028.

67. Professor Hovenkamp's lack of concern for the social costs of rent seeking induced by increased government intervention can be explained in part by his view that

Regardless of the position one takes regarding the substance of populist antitrust policies, the adoption of such an agenda for antitrust would expand the field of play for rent-seeking activity. It is reasonable to expect that, as more and larger government-provided rents are made available via populist antitrust policy, litigation and political and other government activity in search of these transfers will increase, as will the total social costs of rent seeking associated with antitrust. A reasoned choice between antitrust policies based on microeconomic theory and those based on vague populist ideals requires a weighing of the costs and benefits of the two, a balance that cannot accurately be struck without considering the social costs of rent-seeking behavior.

IV. Concluding Thoughts

In considering whether the government should intervene in the marketplace to correct a perceived market failure,[68] it is standard procedure in most policy areas to conduct a cost-benefit analysis of the intervention.[69] Unfortunately, this is often overlooked in the antitrust debate. The costs and benefits that would result from the extension of antitrust doctrine beyond

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"[t]he political process, whose purpose is to give effect to majority values, tends to produce policies that maximize wealth, as long as the process is working democratically." *Distributive Justice*, *supra* note 65, at 30. Such a claim is somewhat startling, in light of the public choice analyses described in this Article. *See supra* notes 31-37 and accompanying text. This claim, however, can be partially explained by Professor Hovenkamp's unique definition of "social well-*being*," which he claims "capture[s] significant aspects of social utility" that are not encompassed in economists' concept of "welfare." Hovenkamp, *supra* note 39, at 63-64 (emphasis in original). He has elaborated on this point in his recent critique of public choice theory. Using his concept of social "well-being," he argues that competition in political markets is "presumptively as efficient as any other form of competition," *id.* at 106, and takes issue with the public choice view that market exchange is generally preferable to government action:

> Everyone agrees that rent-seeking is a universal phenomenon. . . . But the attitude toward rent-seeking in economic markets is very different from that in political markets. . . . Why doesn't the public choice literature assume that [in political markets] self-interested actors produce products or offers to purchase designed to maximize their own welfare; that others come in with alternatives; and that the resulting give-and-take *generally results in optimal outcomes*?

Id. at 105 (emphasis added).

68. The classic treatment of this subject is Bator, *The Anatomy of Market Failure*, 72 Q.J. Econ. 351 (1958). For a survey of recent developments, see Stiglitz, *Information and Economic Analysis: A Perspective*, 95 Econ. J. 21 (1985 Supp.).

69. *See generally* S. Breyer, Regulation and Its Reform 15-35 (1982); DeMuth & Ginsburg, *White House Review of Agency Rulemaking*, 99 Harv. L. Rev. 1075, 1081 (1986) ("[C]entralized review of proposed regulations under a cost-benefit standard, by an office that has no program responsibilities and is accountable only to the president, is an appropriate response to the failings of regulation.").

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the present minimalist agenda should be thoroughly discussed before such an extension is adopted. This is particularly true in the case of the highly interventionist proposals advanced by populist critics of the present regime.

More broadly, it is regrettable that cost-benefit analyses—in antitrust and in other areas of government intervention—typically do not take into account the possibility that the intervention will induce additional, socially wasteful expenditures on rent-seeking activity. In an ideal world, the costs of increased rent-seeking activity would play a part in every decision whether to increase the government's role in the economy.

BOOK REVIEW

THE CLERISY OF POWER

THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW. By *Robert H. Bork*. New York, New York: The Free Press, 1990. pp. 432.

*Reviewed by David B. Sentelle**

Ever since the serpent persuaded Adam and Eve to eat the forbidden fruit in the Garden of Eden, unscrupulous marketers have tempted and seduced an unsuspecting and trusting public into purchasing their shoddy merchandise. In music, in movies, and in advertising, the sirens of contemporary culture shamelessly tempt and seduce us with images of explicit sex and graphic violence—euphemistically called "action." They have been so successful in their manipulation that we have come to ignore all warnings against them, warnings emanating from the very theological heart of our Western culture. Even when temptation and seduction are exposed to those who should know better, their dangers are all too often dismissed with a wave of the tenured hand. The notion of temptation, we are told, is derived from a naive tradition, long obliterated by events ranging from the French Revolution to the advent of relativity theory to the rise of literary deconstruction. Likewise, the term seduction has lost much of its meaning in today's sexually permissive society.

Robert H. Bork—a former professor at Yale Law School, a former federal appellate court judge, and currently the John M. Olin Scholar in Legal Studies at the American Enterprise Institute—understands temptation and seduction in their original and theological senses. In his book, *The Tempting of America: The Political Seduction of the Law*, he explores how constitutional interpretation has been tempted, seduced, and ultimately corrupted.

The "tempting" referred to in the title is the enticement to believe "that nothing matters beyond politically desirable re-

* Judge, United States Court of Appeals for the District of Columbia Circuit.

sults, however achieved."[1] The objects of this temptation are the Adams and Eves of the "[p]rofessions and academic disciplines that once possessed a life and structure of their own . . . ."[2] In the introduction, Bork argues that the pursuit of the "apple" of politically desirable results inevitably causes the tempted discipline—law, religion, literature, economics, science, or journalism—to betray its integrity and independence. In the context of constitutional law, judicial advocates attempt to justify their pursuit of politically desired results by appeals to natural law or moral philosophy. Bork points out, however, that the use of such amorphous concepts as natural law or moral philosophy in constitutional interpretation is highly problematic, because our written Constitution provides for an unelected, and thus politically unaccountable, federal judiciary. Because of this unaccountability, when judges are lured into interpreting the Constitution in a politically driven manner, the notion of self-government, the foundation of our governmental structure, is severely threatened.

The judicial "seduction" that Bork cautions against is the propensity of judges, when interpreting the Constitution according to natural law, to "confuse their strongly held beliefs with the order of nature."[3] Decisions based on this confusion dangerously infect constitutional law with politically charged doctrines. As Bork warns, "what begins as an attitude of 'Let's do it just this one time' grows into a deformation of constitutional government."[4] To avoid this deformation, Bork argues, the judge must be "bound by the only thing that can be called law, the principles of the text, whether Constitution or statute, as generally understood at the enactment."[5]

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1. R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 1 (1990).

2. *Id.*

3. *Id.* at 66.

4. *Id.* at 67. Judge Bork offers Justice Douglas's opinion for the Court in Skinner v. Oklahoma, 316 U.S. 535 (1942), as an example of the use of the Equal Protection Clause as a funnel through which the jurist pours his notions of natural law or abstract morality:

> [T]o justify *Skinner*'s approach the Court must decide that there are fundamental rights that the Court will enforce and that it knows how to identify them without guidance from any written law. This is indistinguishable from a power to say what the natural law is and, in addition, to assume the power to enforce the judge's version of that natural law against the people's elected representatives.

R. BORK, *supra* note 1, at 66.

5. R. BORK, *supra* note 1, at 5.

The book consists of 432 pages of text, notes and appendices. Contrary to the assertions of some journalists and reviewers, *The Tempting of America* is not a podium from which Judge Bork whines to the world that he was mistreated during his confirmation hearings.[6] The hearings and the surrounding events take up only eighty-three pages in Part III, and their description is designed not to evoke sympathy for Bork personally but rather, as Bork writes, to document "the wars that rage for control of our legal culture and our general culture, [to] suggest what is at stake as those wars continue, and [to] try to estimate what effects my experience may have on the future."[7] In Part I of the book, Bork describes the Supreme Court from its beginnings to the present. Part II considers leading liberal and conservative academic theoreticians of the Constitution and offers an exposition of Bork's argument that a sophisticated form of originalism (or intentionalism) is the only legitimate method of constitutional adjudication under our written Constitution. This second part also considers and rebuts the major objections to an originalist methodology, examines the roles of morals and moral relativism in constitutional decisionmaking, and argues that emphasizing desired results at the cost of sound constitutional reasoning imperils the separation of powers and, ultimately, the very structure of constitutional government.

As Bork points out, the bitter and shameless fight over his nomination to the Supreme Court "was simply one battle in [the] long-running war for control of our legal culture" in which "there are only two sides. Either the Constitution and statutes are law, which means that their principles are known and control judges, or they are malleable texts that judges may rewrite to see that particular groups or political causes win."[8] If

6. Academic reviews of Bork's *The Tempting of America* range from the thoughtfully critical, *see* Nichol, *Bork's Dilemma*, 76 VA. L. REV. 337 (1990); to the puerile and virtually ad hominem, *see* Book Note, *The Priest Who Kept His Faith But Lost His Job*, 103 HARV. L. REV. 2074 (1990); to the picayune and indignant, *see* Ackerman, *Robert Bork's Grand Inquisition*, 99 YALE L.J. 1419 (1990). Given Bork's withering assessment of the current state of the American legal academy, the unfavorable reaction of elite academics is hardly surprising.

7. R. BORK, *supra* note 1, at 13. One unfortunate effect of the disinformation campaign mounted against Judge Bork and his subsequent senatorial lynching is that a premium quality in judicial nominees today, especially those for the Supreme Court, is that they have no "paper trail," that is, no body of scholarly writings that opponents can distort and then cite as evidence of "insensitivity."

8. *Id.* at 2.

the latter formulation or some close variation of it is perceived as the correct description, then "a major heresy has entered the American constitutional system," specifically, "the denial that judges are bound by law."[9] This heresy is especially dangerous because federal judges are appointed for life and are thus largely unaccountable to the people. The heretics, Bork argues, are those theorists who find the written Constitution inadequate for their political purposes. Leftist heretics perceive our system of separated and federated powers as a stumbling block to their goal of remaking the Republic into a collectivist, egalitarian, materialist, race-conscious, hyper-secular, and socially permissive state that would never be approved by a democratically elected legislature. Conservative heretics, meanwhile, would look outside the Constitution in order to write into that document a wish-list of social or economic conservatism, and Bork spares them no criticism. By necessity, however, he trains most of his fire on left-wing constitutional theories inasmuch as their exponents control the academy and have a considerable number of sympathizers in the elite media and in Congress.[10]

The serpent of political temptation most clearly rears its ugly head when judges feel the impulse to "do justice," without regard to legal principle or precedent. To this temptation Bork invokes Justice Oliver Wendell Holmes's famous exhortation to Judge Learned Hand: It is the judge's job to apply the law, not to do justice.[11] Bork describes Holmes's approach as the "American orthodoxy," in contrast to the constitutional theorists' heresy "that the ratifiers' original understanding of what the Constitution means is no longer of controlling, or perhaps of any, importance."[12]

To a layperson, the essence of the act of judging is the judge's application of a set of legitimate, preestablished legal

9. *Id.* at 4.

10. During the 1988-89 academic year, for example, members of the Senate Judiciary Committee staff used a network of sympathetic liberal and left-wing faculty members at elite law schools, including Harvard and Chicago, to identify outstanding liberal students willing to do research. The students were each assigned a person, usually a judge, that the Democrat-controlled committee thought would be a likely Republican nominee for the Supreme Court. Each student then read all of the potential candidate's judicial opinions, law review articles, and public statements, and finished his assignment by writing a summary of his conclusions in memorandum form. The memos were turned in to the professors, who forwarded them to the Senate Judiciary Committee.

11. *See* R. BORK, *supra* note 1, at 6 (citing Sergeant, *Justice Touched With Fire*, in MR. JUSTICE HOLMES 183, 206-07 (F. Frankfurter ed. 1931)).

12. *Id.*

rules to the dispute before him. Otherwise, the judge ceases to be an umpire and instead becomes a player in the dispute. The bulk of contemporary commentators, however, scorn this common-sense approach to judicial decisionmaking, especially when one also argues that judges should apply legal rules in the fashion intended by the people who drafted them. A methodology of originalism or intentionalism is impossible, these critics argue, because no judge has ever done what Bork prescribes: Judges have always looked to a variety of components—perceptions of history, personal predeliction and bias, moral philosophy, economic theory, partisan politics, and religious, racial, or ethnic considerations—in order to arrive at a result they consider to be "correct" in any number of senses. Far from being heretical, the critics assert, this approach is entirely normal and eminently justifiable.[13] Held by the intellectual elites—in Bork's terms, the "knowledge class"—this view is certainly more radical than, and highly condescending toward, the common-sense understanding of the citizen who believes that a written document such as the Constitution contains specific, intended meanings apart from the interpretations that an appointed judge chooses to read into the text.

When judges *do justice*, rather than apply the law as written,[14]

13. Examples of constitutional theories relying on anything *but* an original understanding of the Constitution are as legion as they are unconvincing. As Bork notes, "[o]ne of the more entertaining features of the literature is that the revisionists regularly destroy one another's arguments and seem to agree only on the impossibility or undesirability of adherence to the Constitution's original meaning." *Id.* at 141. The stout of heart and eye may wish to consider the following, somewhat arbitrarily selected list: Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984); Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978); Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982); Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659; Moore, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 364 (1988); Parker, *The Past of Constitution Theory—and Its Future*, 42 OHIO ST. L.J. 223 (1981); Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957 (1979). The work of Professor Laurence Tribe of Harvard Law School has had a profound influence on constitutional theory. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988); *Laurence Tribe and the Politics of Constitutional Law*, 4 BENCHMARK 99 (1990). It is noteworthy that the revisionists generally seek to implement a social and political program more radical than any adopted to date in the American political system.

14. I do not intimate, nor does Bork, that an appeal for judges to "apply the law" implies that judges are to choose mechanistically the correct clause, amendment, or subsection; quote it; and then send the opinion to the printer. Such a process is not possible; any moderately sophisticated intentionalist would admit that words are susceptible of some indeterminacy. Such an approach would also make for very peculiar

the judge must take two steps of questionable legitimacy. First, he must claim for himself the power to determine in each case what justice *is*. Second, he must somehow make the determination of just what *doing justice* entails. This determination will invariably reflect the judge's personal beliefs on the nature of a good society. To make this claim of authority, and then to "do" his version of "justice," the judge must abandon the strictures that are both explicit and (to some degree) implicit in the Constitution (or statute). So liberated, the judge's conscience will burst forth, guided only by deeply held notions of the good, the just, the desirable, or the divinely mandated. This flowering of the unconstitutional conscience has taken many forms that range from Chief Justice Taney's discovery in the Fifth Amendment of a right to own another person as property,[15] to Justice Peckham's substantive use of the Due Process Clause to protect the prerogatives of business,[16] to the penumbrae that Justice Douglas found in the Bill of Rights, creating a previously unknown constitutional right to use contraceptives.[17]

Bork concedes that the presence of raw political, economic, and social considerations in the process of constitutional adjudication has ebbed and flowed almost from the founding of the Republic,[18] but he rejects the notion that a heretical doctrine's waxing and waning over a long period of history somehow diminishes its heretical quality.[19] As Bork points out, the struggle

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selection of judges; the most essential characteristic in a judge would be his power of literal recall. Therefore, a medium ground must be reached. As a judge of the Fourth Circuit has noted:

> To be a judge is to exercise judgment, and some measure of what Justice Frankfurter called "creative power" is a legitimate and necessary part of the job. That word "creative," however, must be closely watched. It implies the fashioning of new rules rather than the interpretation of existing ones. It conjures images of judges whose ideals and imaginings may get the better of them.

Wilkinson, *The Role of Reason in the Rule of Law*, 56 U. CHI. L. REV. 779, 780 (1989) (footnote omitted). This "interstitial" creation of meaning, however, is a far cry from the revisionists' conception of the relation between textual meaning and judging.

15. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

16. *See* Lochner v. New York, 198 U.S. 45 (1905). *See also* Adkins v. Children's Hosp., 261 U.S. 525 (1923); Adair v. United States, 208 U.S. 161 (1908).

17. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

18. *See* R. BORK, *supra* note 1, at 19 ("The Constitution was barely in place when one Justice of the Supreme Court cast covetous glances at the apple that would eventually cause the fall.").

19. *Cf.* Ackerman, *supra* note 6, at 1421:

> If the judicial expression of heresy extends backward before *Marbury v. Madison*, and unites such disparate sorts as [Laurence] Tribe and [Richard] Epstein, perhaps it is a mistake to think of it as a "heresy." Why isn't it better

between the judge's obligation to follow the Constitution and the temptation to follow his political instincts is an old one, going back to *Calder v. Bull*.[20] The undeniable fact that we shall always have judicial over-reaching, however, is hardly a normative argument for encouraging this type of jurisprudence.

In a constitutional democracy characterized by a judiciary that is empowered to invalidate legislative acts, the temptation judges face to follow their own political intuitions instead of applying the law as set down by someone else is inescapable. That temptation is a byproduct of the struggle between the values of majority rule and minority rights, the struggle between the dangers of tyranny of the majority and tyranny of the minority. Indeed, we even have a name for this struggle: the Madisonian dilemma. Bork describes the dilemma succinctly:

> The United States was founded as a Madisonian system, which means that it contains two opposing principles that must be continually reconciled. The first principle is self-government, which means that in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities. The second is that there are nonetheless some things majorities must not do to minorities, some areas of life in which the individual must be free of majority rule. The dilemma is that neither majorities nor minorities can be trusted to define the proper spheres of democratic authority and individual liberty.[21]

Bork's book represents an honest and largely successful effort to come to grips with that fundamental dilemma, to steer an

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> to view such an historically entrenched and politically diverse theme as part of the *main line* of American constitutional development?

Id. (emphasis in original). The fact that a notion is "historically entrenched," of course, in no way saves it from being fundamentally wrong: The Ptolemaic solar system, the divine right of kings, and slavery were all at one time quite entrenched. In addition, the fact that persons with dissimilar goals could invoke the same nonconstitutional premises is hardly surprising: When the attainment of the end is more important than the legitimacy of the process by which one arrives at that end, one will obviously be free to use whatever tools are at hand.

20. 3 U.S. (3 Dall.) 386 (1798). *See* R. BORK, *supra* note 1, at 19-20. Bork recalls the famous dispute between Justice Chase of Maryland and Justice Iredell of North Carolina concerning the scope and sources of judicial power. Justice Chase took an expansive, natural-law approach to the exercise of judicial power. As Justice Iredell noted, however, "[t]he ideas of natural justice are regulated by no fixed standard: the ablest and purest of men have differed upon the subject. . . ." Calder v. Bull, 3 U.S. (3 Dall.) at 399 (Iredell, J., concurring). The argument between Justices Chase and Iredell is a remarkable reflection of much of the current debate over judicial power and legitimacy. As Bork notes, "[i]t is somewhat disheartening, indeed, that, while the debate has grown increasingly complex, in almost two centuries the fundamental ideas have not been improved upon." R. BORK, *supra* note 1, at 20.

21. R. BORK, *supra* note 1, at 139.

even course between the dangers of tyranny of the majority and tyranny of the minority. Bork offers a principled and coherent effort to set the boundary between those areas where majorities should be entitled to rule and those areas where minority rights should be protected.

Bork's criticism of elite revisionist academics is also particularly useful. Through their writing and speaking, these academics influence not only judges but also legions of students, many who become clerks, government or public interest attorneys, journalists, and judges. This influence on students is no less profound for being indirect. Law professors devoted to infusing the Constitution with radical contemporary constructs each year may produce only a handful of committed revolutionaries; yet, as years pass, they anoint a growing number of law students with a fundamental disaffection for the American constitutional system. It has often been stated that the most powerful ideas are those that are half-baked. It is Bork's great gift to offer us a conception that is not half-baked, but rather intellectually clean and honest, unlike the offerings of most of his critics.

For example, one critic, Yale Professor Bruce Ackerman, attacks Bork for considering himself to be working within a Madisonian tradition. Ackerman asserts that Bork's conception "does not resemble anything Madison would find familiar."[22] Not surprisingly, Ackerman offers his own work as an example of a view with which Madison would be more comfortable.[23] Under this self-defined Madisonian vantage point, Professor Ackerman explains historical spates of judicial over-reaching as hyper-constitutional pow-wows that occur every so often in American history. During these periods, according to Professor Ackerman, an undescribed abstraction called "We The People" functions politically but on a constitutional dimension, producing amendments to the Constitution without resorting to the amendment procedure prescribed by Article V.[24] Not surprisingly, the results reached by the vote of "We The People" parallel the results desired by what might be termed "We The Faculty of Yale Law School." Though he may have appreciated Professor Ackerman's erudition, Madison would not have con-

22. Ackerman, *supra* note 6, at 1439.

23. *See* Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1019-31 (1984).

24. U.S. CONST. art. V. *See* Ackerman, *supra* note 23, at 1019-31.

sidered the professor's theory to describe any sort of law, much less constitutional law.

Bork's book is not flawless, of course. Bork's reading of the Ninth Amendment[25] as saying nothing that the Tenth Amendment[26] does not say better is debatable.[27] There is also the originalist's problem of what to do with what I call "venerable mistakes": those precedents that were erroneously decided but have become so thoroughly integrated into the fabric of American life that their reversal would engender real chaos. Bork's response is that at times we must simply tell the Supreme Court to "go and sin no more."[28] Though this may be the best practical approach, it is obviously less than satisfying from a theoretical point of view. Bork's critics see this reluctance to overrule past mistakes as inconsistent with his theory of originalism. They are largely attacking a straw man, however; Bork is simply not the hyper-pure intentionalist they hypothesize. Indeed, on the one hand, Bork's critics attack him as an inflexible purist placing intentionalism before the good of the Republic; on the other, they fault his inconsistency when he retroactively accepts the "venerable mistakes" that have woven themselves into the American political fabric.[29]

Another difficulty with Bork's book lies in his conspicuously

25. U.S. CONST. amend. IX ("The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."); *see* R. BORK, *supra* note 1, at 183-85.

26. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

27. *See* Ackerman, *supra* note 6, at 1430-34.

28. R. BORK, *supra* note 1, at 158-59.

29. *See, e.g.*, Nichol, *supra* note 6, at 346-48; Book Note, *supra* note 6, at 2078-79.

Professor Ackerman also charges that "Bork's ignorance of the secondary literature is ecumenical—he fails to cite historians who might support him just as he fails to confront those who make his confident judgments seem problematic." Ackerman, *supra* note 6, at 1422 (footnote omitted). First, Ackerman fallaciously attacks the author for the book he did not write. *The Tempting of America* is not designed to be a tenure-piece on, say, popular views in Ohio concerning the Black Codes, or on the rhetorical distinctions between the North Carolina and Virginia ratifying conventions. This book is designed to reach the educated general reader without a law degree. Because Bork knew that he was unlikely to sway Ackerman and his allies, Bork attempted to reach the lay citizen. For that purpose he needed to write a book that reads as an indictment, not a cross-examination or a war of footnotes.

Second, the research and citation in *Tempting* is substantial: In 28 pages of endnotes, Judge Bork cites 150 books and articles and 135 cases. Among many others, Bork cites or discusses Ackerman, Akil Amar, Raoul Berger, Alexander Bickel, Allan Bloom, William Brennan, Paul Brest, John Ely, Richard Epstein, Charles Fairman, Mary Ann Glendon, Louis Henkin, Sanford Levinson, Leonard Levy, Michael McConnell, Frank Michelman, Michael Perry, John Rawls, Laurence Tribe, and Mark Tushnet.

belabored treatment of *Brown v. Board of Education*.[30] While he succeeds in demonstrating that the result in that landmark opinion can be reconciled with an originalist understanding, Bork does not explain why that decision requires such a protracted defense in the first place. That Chief Justice Warren and his colleagues were able in 1954 to produce a unanimous opinion supporting a result so necessary to the attainment of the ideal of equal justice, the goals of the framers of the Fourteenth Amendment, and the preservation of the nation, while preserving respect for the Supreme Court and the rule of law, requires no justification three-and-a-half decades later. The *Brown* decision certainly does not need a belabored attempt to square it perfectly with a hyper-pure originalism that makes Bork appear to be a straw man he is not.

Shortly before I read *The Tempting of America*, a young college student of my acquaintance who was struggling with some version of the revisionists' constitutional gnosticism asked me for a list of works on originalism. Before I was able to compile a list for him, I read this book. I called him and said that there need be no list. *The Tempting of America* is in one volume a succinct and thorough examination not only of originalism but of the broader context of the American constitutional struggle.

In Laurence Sterne's *Tristam Shandy*,[31] one of the characters insists that it is impossible to curse another person without intentionally or unintentionally quoting—or borrowing from—the medieval excommunication writ of the church. In my personal experience, I have become convinced that it is similarly difficult to make a wise observation on human affairs without at least paraphrasing the Book of Ecclesiastes. I am now convinced that, in the future, it will be difficult to make a wise observation concerning the proper interpretation of the Constitution (or the confirmation process for federal judges) without citing or paraphrasing *The Tempting of America*. I am accordingly compelled to offer the following observations on the Senate's rejection of Judge Bork:

> I returned, and saw under the sun, that the race is not to the swift, nor the battle to the strong, neither yet bread to the

30. 347 U.S. 483 (1954). *See* R. BORK, *supra* note 1, at 74-78; Nichol, *supra* note 6, at 343-44.

31. L. STERNE, THE LIFE AND OPINIONS OF TRISTAM SHANDY, GENTLEMAN (I. Ross ed. 1983).

> wise, nor yet riches to men of understanding, nor yet favor to men of skill . . . .[32]

Finally, in *The Tempting of America*, "that which was written was upright, even words of truth."[33]

32. *Ecclesiastes* 9:11.
33. *Ecclesiastes* 12:10.

RECENT DEVELOPMENTS

ABORTION PARENTAL NOTIFICATION STATUTES: *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990) and *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990).

Whether there exists a constitutionally protected right to abort a pregnancy has received more public attention during the past decade than any other area of Supreme Court jurisprudence. Until the Court's decision in *Webster v. Reproductive Health Services*,[1] continued attempts by states to regulate the abortion process had been thwarted by a Supreme Court intent on interpreting the Constitution as protecting rights and values based only upon the individual justices' conception of general principles of political morality.[2] In *Webster*, however, the Court signalled a new willingness to tolerate at least minimal regulation of the availability of an abortion.

In the October 1989 Term, the Supreme Court considered the constitutionality of two parental notification statutes,[3] both

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1. 109 S. Ct. 3040 (1989).

2. *See generally* Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981). Professor Monaghan states that the Supreme Court is plainly committed to an endeavor of nullifying

> the results of the political process on the basis of general principles of political morality not derived from the constitutional text or the structure it creates . . . in the sex-marriage-child area, where some fifty written opinions order these relationships ostensibly in the name of securing due process and equal protection. Indeed, the court seems well on its way to 'constitutionalizing' the entire subject of family law, which two short decades ago was bereft of constitutional restraints.

Id. at 353 (footnotes omitted). Professor Monaghan coined the phrase "due substance" in this article, which concludes that the Supreme Court's use of substantive due process is an abuse of the judicial power assigned to the Supreme Court by the Constitution. *See id.* at 355.

3. The Minnesota statute, MINN. STAT. § 144.343 (1988), provides that no abortion shall be performed on a woman under 18 years of age until 48 hours after both of her parents are notified. The statute provides exceptions from the notification requirement in cases in which (1) the attending physician certifies that an immediate abortion is required to prevent the death of the woman; (2) both of her parents have consented in writing; or (3) the woman claims that she is a victim of parental abuse or neglect and notice of such is given to the proper authorities, as statutorily defined. The statute also includes a judicial bypass procedure, which provides that if a pregnant woman under 18 years of age does not wish to notify both of her parents, she can petition a court for a hearing to authorize a physician to perform the abortion if the judge determines that "the pregnant woman is mature and capable of giving informed consent." *Id.* § 144.343(c)(i). If the pregnant woman is not found to be mature, or does not claim to be so, the judge shall determine whether the abortion without notification of her parents is in her best interests. *See id.*

The Ohio parental notification bill, which amended OHIO REV. CODE ANN. § 2919.12 (1987) and created Sections 2151.85 and 2505.073 of the Ohio Revised Code, OHIO REV. CODE ANN. §§ 2151.85, 2505.073 (Supp. 1988), makes it a criminal offense, ex-

of which would require notification of one or both parents before a doctor can perform an abortion upon a minor.[4] In *Hodgson v. Minnesota*,[5] a five-to-four majority held that a two-parent notification requirement is unconstitutional; however, a different five-to-four majority held that such a two-parent notification is constitutional when supplemented with a judicial bypass procedure that provides a means for a minor to avoid the notification requirements.[6] In *Ohio v. Akron Center for Reproductive Health*,[7] a six-to-three majority held that a one-parent notification requirement with a bypass procedure is constitutional.[8]

In both cases, the Court considered the claim that the parental notification statute violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[9] With such an attenuated constitutional textual basis for the rights allegedly

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cept in specified circumstances, for a physician to perform an abortion on an unemancipated minor. Unlike the Minnesota statute, however, the Ohio statute requires the notification of only one parent; an exception is provided in the case of feared parental abuse, in which case an adult brother, sister, step-parent, or grandparent can be notified. *See id.* § 2919.12. The bypass procedure in the Ohio statute allows three cases in which notification can be judicially waived: (1) The woman proves she is mature enough and has sufficient information to make an intelligent decision; (2) the woman's parents have engaged in abuse against her; or (3) notice is not in the woman's best interests. *See id.* § 2151.85.

4. The Supreme Court had previously considered the constitutionality of parental notification or consent statutes in six cases: Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft, 462 U.S. 476, 490-93, 505 (1983); Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 439-42 (1983); H.L. v. Matheson, 450 U.S. 398 (1981); Bellotti v. Baird, 443 U.S. 622 (1979) (*Bellotti II*); Bellotti v. Baird, 428 U.S. 132 (1976) (*Bellotti I*); and Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 72-75 (1976).

5. 110 S. Ct. 2926 (1990).

6. Justice O'Connor held the position that two-parent notification is constitutional only if accompanied by a judicial bypass procedure. Justice Kennedy, joined by Chief Justice Rehnquist and Justices White and Scalia, concluded that a two-parent notification requirement is constitutional with or without a judicial bypass procedure. Justices Stevens, Brennan, Blackmun, and Marshall considered a two-parent notification requirement unconstitutional even with a judicial bypass procedure.

7. 110 S. Ct. 2972 (1990).

8. In *Akron*, Justice Kennedy wrote for the majority, joined by Chief Justice Rehnquist and Justices White, Stevens, and O'Connor. Justice Scalia filed a concurring opinion. Justice Blackmun was joined in dissent by Justices Brennan and Marshall.

9. U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"). The Due Process and Equal Protection Clauses provide the constitutional textual bases for nearly all "due substance" claims. *See* Monaghan, *supra* note 2. The "open texture" of these clauses provide them with "a sponge-like quality capable of absorbing any subject matter analytically outside the boundaries of other constitutional limitations." *Id.* at 364. Neither of these clauses, although drafted broadly, was intended to be interpreted in such a manner. *See* Curtis, *Review and Majority Rule*, in SUPREME COURT AND SUPREME LAW 177 (E. Cahn ed. 1954) (due process is limited to procedure); R. BERGER, GOVERNMENT BY JUDICIARY 20-51 (1977); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1,

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violated by parental notification statutes, the primary focus of the Court's analysis sets a precedent that is constitutionally suspect,[10] and fundamentally supported by political considerations. Such an approach naturally leads to divided results, depending upon the political views of the individual justices. The holding in *Hodgson* is an especially clear illustration of this; sharp political divisions on the Court produced a deeply divided opinion.

In *Hodgson*, the majority, in an opinion written by Justice Stevens, first summarily dismissed several cases of possible precedential value in resolving this case.[11] The majority went on to hold, based upon the extensive findings of the district court,[12] that the two-parent notification requirement is overly burdensome[13] and that Minnesota failed to prove that the statute is reasonably related to any legitimate state interest.[14] In actuality, the same findings that led the court to find the statutory requirements unreasonably burdensome led it to conclude that the state interest in the welfare of the minor was not served by the statute.[15] Justice Stevens also dismissed the state interest in

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56-59 (1955) (discussing the Equal Protection Clause's design to extend political equality to black Americans).

10. *See, e.g.*, *Hodgson*, 110 S. Ct. at 2961 (Scalia, J., concurring in judgment in part and dissenting in part) ("I continue to dissent from this enterprise of devising an Abortion Code, and from the illusion that we have authority to do so."); R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 169 (1990) ("*Roe* became possible only because *Griswold* had created a new right, and anyone who reads *Griswold* can see that it was . . . the creation of a new principle by *tour de force* or, less politely, by sleight of hand.").

11. Two of the parental notification or consent cases previously reviewed by the court actually required two-parent notification; however, the majority dismissed these on the basis that "none of the opinions in any of those cases focused on the possible significance of making the consent or the notice requirement applicable to both parents instead of just one." *Hodgson*, 110 S. Ct. at 2938.

12. *See* Hodgson v. Minnesota, 648 F. Supp. 756 (D. Minn. 1986).

13. The two-parent notification requirement was found to be particularly burdensome in dysfunctional family structures, in which violence is often present. In cases where the parents are separated and one parent has ceased to remain in contact with the family, a loss of privacy is also a concern to the remaining parent and the pregnant minor. "[T]he two-parent notification requirement had particularly harmful effects on both the minor and the custodial parent when the parents were divorced or separated." *Hodgson*, 110 S. Ct. at 2938-39.

14. In a portion of the opinion joined only by Justice O'Connor, Justice Stevens indicated that "[t]hree separate but related interests—the interest in the welfare of the pregnant minor, the interest of the parents, and the interest of the family unit—are relevant to our consideration of the constitutionality of . . . the two-parent notification requirement." *Id.* at 2941-42 (Stevens, J.). Although divided over the question of what constitute legitimate state interests in this context, the majority was united in holding that, whatever the state interest, it was not reasonably furthered by the Minnesota statute. *See id.* at 2945-46.

15. According to the majority's opinion, no state interest is furthered because in

protecting a parent's interest in "shaping a child's values and lifestyle"[16] and, in addition, questioned the legitimacy of "a state interest in standardizing its children and adults, making the 'private realm of family life' conform to some state-designed ideal."[17] The test of constitutionality that Justice Stevens employed is at best ambiguous;[18] the majority, however, obviously considered sufficient for a ruling of unconstitutionality the district court's findings that the statute is both unreasonably burdensome and fails to further a legitimate state purpose.[19]

Although joining the opinion of Justice Stevens, Justice Marshall, in a separate opinion, found the statute unconstitutional under a seemingly stricter standard of review. Justice Marshall stated that "most exacting scrutiny" is the standard of review necessary for minors[20] as well as adults[21] because "[n]either the scope of a woman's privacy right nor the magnitude of a law's burden is diminished because a woman is a minor."[22]

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dysfunctional families, the two-parent notification requirement can be "positively harmful to [both] the minor and her family." *Id.* at 2945. This is essentially the same finding that was made regarding the burden on the minor. *See supra* note 13.

16. *Id.* at 2946 (citing *Bellotti II*, 443 U.S. 622 (1979); *Bellotti I*, 428 U.S. 132 (1976); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 75 (1976) ("Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right to privacy of the competent minor mature enough to have become pregnant.")).

17. *Id.* (citing Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923)).

18. Justice Stevens stated that "the Minnesota statute unquestionably places obstacles in the pregnant minor's path to an abortion. . . . *Under any analysis*, [therefore,] the . . . statute cannot be sustained if the obstacles it imposes are not reasonably related to legitimate state interests." *Id.* at 2937 (Stevens, J.) (emphasis added) (citing Turner v. Safley, 482 U.S. 78, 97 (1987); Carey v. Population Serv. Int'l, 431 U.S. 678, 704 (1977) (Powell, J.); Doe v. Bolton, 410 U.S. 179, 194-95, 199 (1973)).

19. Ambiguity in abortion cases finds its roots in Roe v. Wade, 410 U.S. 113 (1973), where, as Robert Bork states, the majority did not even bother to

> settle the question of where the right of privacy or the subsidiary right to abort is to be attached to the Constitution's text. The opinion seems to regard that as a technicality that really does not matter, and indeed it does not, since the right does not come out of the Constitution but is forced into it.

R. BORK, *supra* note 10, at 114.

20. *Hodgson*, 110 S. Ct. at 2952 (Marshall, J., concurring in part, concurring in judgment in part, and dissenting in part).

21. According to Justice Marshall, strict scrutiny of statutes regulating adult conduct in this area is necessary because "[o]nly such strict judicial scrutiny is sufficiently protective of a woman's right to make the intensely personal decision whether to terminate her pregnancy." *Id.* (Marshall, J., concurring in part, concurring in judgment in part, and dissenting in part) (citing Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 772 (1986); Roe v. Wade, 410 U.S. 113, 155 (1973); Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 420 n.1 (1983)).

22. *Id.* (Marshall, J., concurring in part, concurring in judgment in part, and dissenting in part).

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Justice Marshall also wrote separately because he disagreed with Justice Stevens's conclusion as to the constitutionality of one-parent notification procedures.[23] Indeed, Justice Stevens's analysis of whether the Minnesota statute reasonably furthered a state interest admitted the constitutionality of a one-parent notification requirement; the holding that the two-parent notification requirement was unconstitutional was based on the finding that a two-parent notification requirement is substantially more burdensome than a one-parent notification requirement but no more effective in furthering the state interest.

Addressing the constitutionality of the two-parent notification requirement in his opinion, Justice Kennedy indicated that he viewed the statute as effectively serving two state interests: the welfare of the pregnant minor and the interest of the parents. He observed that precedent supports the notion that notification of parents serves the interests of a pregnant minor.[24] Justice Kennedy stated that the statutory exceptions allowing a minor to avoid the notification requirements by reporting parental abuse to the appropriate authorities were an effective statutory response to the majority's concern about any potentially harmful effects the notification requirement might have on a minor. Finally, Justice Kennedy summarized constitutional and statutory differences between the legal treatment of minors and adults. Noting the fact that "[a]ge is a rough, but fair approximation of maturity and judgment,"[25] he observed that legislation restricting the rights of minors in many contexts is both constitutional and based upon sound policy. Justice Ken-

23. *See id.* at 2953 (Marshall, J., concurring in part, concurring in judgment in part, and dissenting in part).

24. Justice Kennedy relied heavily on Justice Stevens's concurring opinion in H.L. v. Matheson, 450 U.S. 398 (1981), for the proposition that "[i]t is beyond dispute that in many families" two-parent notification is in the pregnant minor's best interest and that deference to the judgment of a state legislature is necessary in such cases. *Hodgson*, 110 S. Ct. at 2965 (Kennedy, J., concurring in judgment in part and dissenting in part). Justice Kennedy addressed the main concern of the majority by citing Justice Stevens in *Matheson*:

> The possibility that some parents will not react with compassion and understanding upon being informed of their daughter's predicament or that, even if they are receptive, they will incorrectly advise her, does not undercut the legitimacy of the State's attempt to establish a procedure that will enhance the probability that a pregnant young woman exercise as wisely as possible her right to make the abortion decision.

Id. at 2966 (Kennedy, J., concurring in judgment in part and dissenting in part) (quoting *Matheson*, 450 U.S. at 423-24 (Stevens, J., concurring)).

25. *Hodgson*, 110 S. Ct. at 2962 (Kennedy, J., concurring in judgment in part and dissenting in part).

nedy provided support for the state's interest in protecting parents' participation in the upbringing of their children by appealing to common-law notions, history and culture, common sense, precedent, and other aspects of state legislation that advance similar policy goals.[26]

Even though a majority of the Court found the two-parent notification requirement unconstitutional, a different majority considered the judicial bypass procedure sufficient to save the statute as a whole. In a series of precedents,[27] the Court had addressed the concern that parental consent statutes granted a parent, in the form of a veto power, an absolute limitation on the minor's right to obtain an abortion. The majority in *Hodgson*, according to Justice Kennedy, considered the judicial bypass section of the Minnesota statute to do "nothing other than . . . fit . . . into the framework that we have supplied in our previous cases."[28] As such, Justice O'Connor observed, the Minnesota statute "passes constitutional muster because the interference with the internal operation of the family . . . simply does not exist where the minor can avoid notifying one or both parents by use of the bypass procedure."[29]

Justice Stevens indicated that the judicial bypass procedure does not save the statute as a whole because, regardless of the constitutionality of the bypass procedure, the State is still not furthering a legitimate interest.[30] Justice Marshall, in his opinion, stated "that a judicial bypass procedure of this sort is itself unconstitutional because it effectively gives a judge 'an absolute veto over the decision of the physician and his patient.' "[31] In other words, Justice Marshall saw no constitutional signifi-

26. *See id.* at 2962-65 (Kennedy, J., concurring in judgment in part and dissenting in part).

27. *See Bellotti II*, 443 U.S. 622 (1979); *Bellotti I*, 428 U.S. 132 (1976); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976).

28. *Hodgson*, 110 S. Ct. at 2970 (Kennedy, J., concurring in judgment in part and dissenting in part).

29. *Id.* at 2951 (O'Connor, J., concurring in part and concurring in judgment in part).

30. Justice Stevens stated:

> A judicial bypass that is designed to handle exceptions from a reasonable general rule, and thereby preserve the constitutionality of that rule, is quite different from a requirement that a minor—or a minor and one of her parents—must apply to a court for permission to avoid the application of a rule that is not reasonably related to legitimate state goals.

Id. at 2948-49 (Stevens, J.).

31. *Id.* at 2957 (Marshall, J., concurring in part, concurring in judgment in part, and dissenting in part) (quoting Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft, 462 U.S. 476, 504 (1982) (Blackmun, J., concurring in part and dissenting in part)).

cance in the distinction between allowing such veto power to reside with a judge, as opposed to a parent. Even admitting the facial constitutionality of a bypass procedure, Justice Marshall would still find this particular procedure unconstitutional because it is "far too burdensome to remedy an otherwise unconstitutional statute."[32]

Justice Marshall also dedicated a portion of his opinion to express concern about the forty-eight hour delay required before an abortion can be performed, after notice is given to the parents. The purpose of the delay, according to the State, is to provide time for family consultation.[33] Justice Marshall's analysis, however, primarily focused on health risks associated with delaying the abortion.[34]

In *Ohio v. Akron Center for Reproductive Health*,[35] in an opinion authored by Justice Kennedy, the majority held that the judicial bypass provision of the Ohio statute requiring one-parent notification is consistent with the requirements set forth for such procedures in parental-consent precedent.[36] The majority found the Ohio statute to conform with the requirements for a bypass procedure set forth in *Bellotti II*; those requirements include allowing the minor to show she is sufficiently mature to make the decision herself, allowing the minor to show that an abortion would be in her best interest regardless of her maturity, assuring anonymity, and expediting the judicial process.[37] The Court refused to extend the *Bellotti* criteria by imposing additional requirements on bypass procedures.[38] Finally, the

32. *Id.* at 2958 (Marshall, J., concurring in part, concurring in judgment in part, and dissenting in part). In essence, Justice Marshall's concerns centered on the delay inherent in the bypass procedure, which would "significantly increase the health risk to the minor." *Id.* (Marshall, J., concurring in part, concurring in judgment in part, and dissenting in part). Justice Marshall also stated that travel expenses, as well as the trauma of appearing in court before strangers regarding such a personal matter, were significant burdens imposed by the bypass procedure on the pregnant minor.

33. *See id.* at 2944 (Stevens, J.).

34. "The District Court specifically found as a matter of fact that '[d]elay of any length in performing an abortion increased the statistical risk of mortality and morbidity.'" *Id.* at 2954 (Marshall, J., concurring in part, concurring in judgment in part, and dissenting in part) (quoting Hodgson v. Minnesota, 648 F. Supp. 756, 765 (D. Minn. 1986)).

35. 110 S. Ct. 2972 (1990).

36. Justice Kennedy explicitly reserved the question of whether a notice statute without a bypass procedure would be constitutional. *See Akron*, 110 S. Ct. at 2978.

37. *See generally Bellotti II*, 443 U.S. 622 (1979).

38. *See Akron*, 110 S. Ct. at 2981-82. The Court rejected contentions that the constructive authorization provisions would deter the physician from acting without express judicial approval, that the clear and convincing evidence standard required is

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Court summarily rejected the contention that the bypass procedure violates the procedural guarantees of the Due Process Clause and dismissed the notion that requiring the physician to provide the parental notice, thereby subjecting him to potential liability for failure to comply with the statute, is unconstitutional.[39]

Justice Stevens concurred, arguing that because the statute was challenged facially, he was unwilling "to reach [the] conclusion before the statute has been implemented and the significance of its restrictions evaluated in the light of its administration" that the bypass procedure "is so obviously inadequate that the entire statute should be invalidated."[40]

Writing in dissent, Justice Blackmun first equated notice with consent by stating, "[a]s a practical matter, a notification requirement will have the same deterrent effect on a pregnant minor seeking to exercise her constitutional right as does a consent statute."[41] Thereafter, he expressed concern regarding whether the pleading procedures amount to an "obstacle course,"[42] whether the statute effectively assures anonymity,[43] whether the delay inherent in the procedure excessively increases health risks,[44] whether the constructive notice provision would be efficacious,[45] and whether the clear-and-convincing standard of proof is excessive.[46]

These two cases illustrate that four coalitions are forming on the Court in which differing political views of the wisdom of parental notification provide the bases for distinguishing among the various holdings of these cases. One of the four groups staunchly supports the legitimacy of *Roe* and resolutely opposes any legislation that even minutely interferes with the

overly burdensome, and that the pleading requirements are an unconstitutionally "tortuous maze." *Id.* at 2985 (Blackmun, J., dissenting).

39. *See id.* at 2982-83.

40. *Id.* at 2993 (Stevens, J., concurring in part and concurring in judgment).

41. *Id.* at 2985 (Blackmun, J., dissenting) (citing Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 441 n.31 (1983); H.L. v. Matheson, 450 U.S. 398, 420 n.9 (1981)).

42. *Id.* at 2985 (Blackmun, J., dissenting).

43. *See id.* at 2986-87 (Blackmun, J., dissenting).

44. *See id.* at 2988 (Blackmun, J., dissenting).

45. *See id.* at 2989 (Blackmun, J., dissenting).

46. *See id.* at 2989-91 (Blackmun, J., dissenting). The majority considered the clear-and-convincing standard appropriate, in view of the ex parte nature of the proceedings. The alternative would have been a preponderance of the evidence standard, under which, if the minor presented any evidence at all, the burden would be satisfied. *See id.* at 2981-82.

process of obtaining an abortion.[47] At the other extreme is Justice Scalia, who has explicitly called for overruling *Roe*.[48] Between these two extremes are two groups, one apparently unwilling to call into question the constitutional legitimacy of *Roe* until such time as judicial restraint will allow,[49] and the other apparently accepting the legitimacy of *Roe* but nevertheless finding constitutional justification for at least minimal restrictions on the exercise of the abortion right.[50]

Analysis of the composition of these coalitions provides insight into how the court would currently decide a direct challenge to *Roe*. Justice O'Connor, in recent years considered the swing vote in abortion cases, further illuminates her position with her analysis in *Hodgson*, which implicitly relied upon abortion as a constitutionally protected right. Logically, it would be impossible to find a two-parent notification statute unconstitutional without accepting the premise that the right to an abortion is constitutionally protected. Because Justice O'Connor now seems to be aligning herself with the liberal wing of the Court in this regard, newly seated Justice Souter may displace Justice O'Connor as the perceived crucial swing vote in future cases addressing abortion as a constitutional right. The Senate confirmation hearings for Justice Souter, however, yielded little insight into his inclinations on the matter.[51]

Although the Court appears to be striking a relatively conservative pose by upholding the constitutionality of the two statutes, this is, in large part, merely a manifestation of the conservative political views of a majority of the justices. While serving the goals of judicial restraint and stare decisis, the position of the conservative majority in these cases is inappropriate.[52] By refusing to address the constitutionality of the right to an abortion, which is the ultimate foundation upon which the analysis of the liberal minority rests, the conservative majority actu-

47. This group is composed of Justices Blackmun, Brennan, and Marshall.

48. *See Hodgson*, 110 S. Ct. at 2960-61 (Scalia, J., concurring in judgment in part and dissenting in part); *Akron*, 110 S. Ct. at 2984 (Scalia, J., concurring).

49. This group is composed of Chief Justice Rehnquist and Justices Kennedy and White.

50. This group is composed of Justices O'Connor and Stevens.

51. *See, e.g., Souter Deflects Senators' Questions on Abortion Views*, N.Y. Times, Sept. 14, 1990, at A1, col. 6 (Souter "would not provide even an indirect hint of his views on the constitutional right to an abortion.").

52. *See generally* Crain, *Judicial Restraint and the Non-Decision in* Webster v. Reproductive Health Services, 13 HARV. J.L. PUB. & POL'Y 263 (1990).

ally plays the same activist political game as the liberals, effectively engaging in political debate through the guise of constitutional analysis. Such an activist analysis is forced upon the conservative majority when it chooses not to address the constitutionality of the precedent with which the statutes are found to be consistent. Because that analysis is fundamentally "due substance," even the conservative majority is undemocratically usurping the power constitutionally assigned to the States.[53]

Justice Kennedy closed his opinion in *Akron* eloquently, with several compelling arguments for the wisdom of the Ohio statute.[54] Unfortunately, such conclusions are legitimately drawn by a legislature, not the Supreme Court. Because a majority of the Court possesses similar political views as those held by the state legislatures in Minnesota and Ohio, *Hodgson* and *Akron* largely upheld the results of the political process in those two states. Although Justice Kennedy expressly recognized a distinction between the legislative and judicial function,[55] his analysis goes no further than recognizing the wisdom of deference to the legislature; it does not acknowledge that, as a constitutional matter, such deference is absolutely required.

At a minimum in these cases, the approach of finding legislation consistent with *Roe*'s progeny, though prudent from a standpoint of judicial restraint, avoids the constitutional issue of whether a fundamental right to an abortion exists. Although

53. The undemocratic nature of substantive due process has been well argued. *See, e.g.*, Monaghan, *supra* note 2.

54. *See Akron*, 110 S. Ct. at 2983-84 (Kennedy, J.):

> A free and enlightened society may decide that each of its members should attain a clearer, more tolerant understanding of the profound philosophic choices confronted by a woman who is considering whether to seek an abortion. Her decision will embrace her own destiny and personal dignity, and the origins of the other human life that lie within the embryo. The State is entitled to assume that, for most of its people, the beginnings of that understanding will be within the family, society's most intimate association. It is both rational and fair for the State to conclude that, in most instances, the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature.

55. "[W]e must keep in mind that when we are concerned with extremely sensitive issues, such as the one involved here, 'the appropriate forum for their resolution in a democracy is the legislature. We should not forget that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." ' "

Hodgson, 110 S. Ct. at 2966-67 (Kennedy, J., concurring in judgment and dissenting in part) (quoting Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) (O'Connor, J., dissenting) (quoting Maher v. Roe, 432 U.S. 464, 479-80 (1977) (quoting Missouri, K&T R.R. Co. v. May, 194 U.S. 267, 270 (1904)))).

not explicitly supporting such a right as constitutional, the Court's approach indirectly lends credibility to the precedent and the questionable constitutional right upon which that precedent is based.

Only Justice Scalia, in illustrating the various distinctions between the different holdings, called for an end to " 'constitutionalizing' the entire subject of family law":[56]

> One will search in vain the document we are supposed to be construing for text that provides the basis for the argument over these distinctions; and will find in our society's tradition regarding abortion no hint that the distinctions are constitutionally relevant, much less any indication how a constitutional argument about them ought to be resolved. The random and unpredictable results of our consequently unchanneled individual views make it increasingly evident, Term after Term, that the tools for this job are not to be found in the lawyer's—and hence not in the judge's—workbox. I continue to dissent from this enterprise of devising an Abortion Code, and from the illusion that we have authority to do so.[57]

As Judge Bork has written, "[t]here is no room for argument about the conclusion that the decision [in *Roe v. Wade*] was the assumption of illegitimate judicial power and a usurpation of the democratic authority of the American people."[58] In engaging in its analysis in these cases, the Court lends legitimacy to the assumption of judicial power to determine the validity of legislative decisions not infringing upon any express or logically implied constitutional mandates. The longer the court waits to adopt the position advocated by Justice Scalia, and consequently the more the court engages in political determinations, the more entrenched will become the notion that the court actually has such authority. Such a scenario only erodes the role of the Supreme Court as contemplated by the Constitution.

J. William Goodwine, Jr.

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56. Monaghan, *supra* note 2, at 353.

57. *Hodgson*, 110 S. Ct. at 2960-61 (Scalia, J., concurring in judgment in part and dissenting in part).

58. R. BORK, *supra* note 10, at 115-16.

CONSTITUTIONAL PROTECTION OF THE "REFUSAL-OF-TREATMENT": *Cruzan v. Director, Missouri Department of Health*, 110 S. Ct. 2841 (1990).

Advances in medical science may enable some individuals to recover from illness or accident and resume productive, meaningful lives. For others, however, technological assistance is not so clearly beneficial. An individual who survives a medical crisis may be left in a profoundly debilitated condition that, until recently, would have resulted in death. With modern medical technology, however, the physiologic functions of an individual's body may be artificially maintained for an indefinite period.[1] Choices regarding medical treatment are difficult when life may be continued beyond the point where most people would want to continue living. The question whether a patient has the right to refuse such medical treatment is further complicated when the patient is incompetent and unable to express any preference.

Cruzan v. Director, Missouri Department of Health[2] placed this troubling social issue squarely before the United States Supreme Court in its first consideration of whether the Constitution protects a "right to die." Nancy Beth Cruzan suffered serious injury in an automobile accident on January 11, 1983. By the time she received medical attention, her injuries had been complicated by a significant interval of oxygen deprivation, and, for approximately three weeks following the accident, she remained in a comatose state.[3] In February 1983, at which time it was still hoped that she might eventually recover, doctors surgically implanted a gastrostomy tube to serve as a conduit for food and water into her stomach.[4] Despite attempts at rehabilitation, Nancy Cruzan did not improve and was subsequently diagnosed as having permanent, irreversible brain degeneration.

At the time of the trial and appellate proceedings, Nancy Cruzan existed in a persistent vegetative state. She was bedridden in a Missouri state hospital unaware of her environment.

1. *See* Spencer & Palmisano, *Specialized Nutritional Support of Patients—A Hospital's Legal Duty?*, 11 QUALITY REV. BULL. 160, 160-61 (1985).
2. 110 S. Ct. 2841 (1990).
3. *See Cruzan*, 110 S. Ct. at 2845.
4. *See id.* This procedure was performed with the consent of her then-husband. *See also* Cruzan v. Harmon, 760 S.W.2d 408, 431 (Mo. 1988).

She did not speak or make any spontaneous movements, although she appeared to respond reflexively to sound and noxious or painful stimulation.[5] Her limbs were contracted and stiff, she could not chew or swallow, and she received all of her nutrition and hydration through the gastrostomy tube. Ironically, in other respects, she was healthy. Her respirations were not artificially maintained, and her heart and other vital organs functioned normally. In fact, her life expectancy was relatively normal; twenty-five years old at the time of the accident, her doctors estimated that she could continue to live another thirty years or more if artificially supplied with nutrients and hydration.[6]

When it became clear that Nancy Cruzan would never improve, her parents requested that the state hospital remove the gastrostomy feeding tube. Because removing the gastrostomy tube would result in Nancy Cruzan's death, hospital employees refused to comply without a court order.[7] At trial, evidence was offered that Nancy Cruzan, in a "somewhat serious conversation," had made statements to a housemate about a year before the accident indicating that, if sick or injured, she would not want to continue living unless she could do so "halfway normally."[8] The trial court held that a fundamental right exists under the Missouri and United States Constitutions to refuse medical treatment.[9] The court found further that the evidence presented was sufficient to show that Nancy Cruzan would not have desired to continue receiving food and water.[10] Accordingly, the trial court granted her parents' request, issuing an order that medical treatments, including the gastrostomy tube feedings, be discontinued.[11]

On appeal, however, the Missouri Supreme Court reversed the trial court's decision. The Missouri high court indicated that Missouri's policy in this context, as embodied in its living will statute, strongly favors the preservation of life.[12] The court found that Nancy Cruzan's statements, upon which the trial

5. *See Cruzan*, 110 S. Ct. at 2845 n.1.
6. *See* Cruzan v. Harmon, 760 S.W.2d at 432.
7. *See Cruzan*, 110 S. Ct. at 2846.
8. Cruzan v. Harmon, 760 S.W.2d at 411.
9. *See id.* at 410.
10. *See id.*; *see also Cruzan*, 110 S. Ct. at 2846.
11. *See* Cruzan v. Harmon, 760 S.W.2d at 411-12.
12. The Missouri living will statute is found at Mo. Rev. Stat. §§ 459.010-459.055 (1986). *See also Cruzan*, 110 S. Ct. at 2846; Cruzan v. Harmon, 760 S.W.2d at 419-20.

court relied to determine her intent, fell short of the "clear and convincing" standard Missouri requires for proof of a decision to forego life-sustaining treatment.[13] Under these circumstances, the court held, no one could assume the choice for the incompetent patient.[14]

In a five-to-four decision, the United States Supreme Court affirmed, upholding the constitutionality of Missouri's rigorous procedural scheme for substitute decisionmaking. Writing for the Court,[15] Chief Justice Rehnquist found that the Constitution does not forbid Missouri either from having such a law regarding substitute judgment or from requiring the application of a "clear and convincing" standard.[16]

Chief Justice Rehnquist acknowledged that the problem the Court confronted was "perplexing" and had "unusually strong moral and ethical overtones."[17] Specifically at issue was "whether the United States Constitution grants what is in common parlance referred to as a 'right to die' "[18] that would prohibit the rule of law embodied in the Missouri scheme.

Chief Justice Rehnquist began by surveying previous state and federal court opinions concerning the right of incompetent individuals to refuse medical treatment, including the seminal case involving Karen Ann Quinlan.[19] Although these cases have almost uniformly found a "right to die," courts alternatively have based their decisions on a constitutional right to privacy,[20] on a common-law right to informed consent to medical treatments,[21] or on both a constitutional privacy right and a right of informed consent.[22] Courts have also relied on the stat-

13. *See* Cruzan v. Harmon, 760 S.W.2d at 424.

14. *See id.* at 425.

15. Justices White, O'Connor, Scalia, and Kennedy joined the majority opinion. Justices O'Connor and Scalia filed concurring opinions. Justice Brennan, joined by Justices Marshall and Blackmun, dissented. Justice Stevens filed a separate dissent.

16. *See Cruzan*, 110 S. Ct. at 2852-53.

17. *Id.* at 2851.

18. *Id.*

19. *See In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (allowing respirator to be disconnected from patient in persistent vegetative state), *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976).

20. *See, e.g., id.*

21. *See, e.g., In re* Storar, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266 (refusing to prevent blood transfusions for 52-year-old man with incurable bladder cancer who had been profoundly retarded for most of his life), *cert. denied*, 454 U.S. 858 (1981).

22. *See, e.g.*, Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977) (allowing chemotherapy to be withheld from profoundly retarded 67-year-old man suffering from leukemia).

utory law of their own states to decide these cases.[23] The Chief Justice pointed out that none of these statutory sources is available to the Supreme Court, which must instead base its decision on the Constitution.[24]

The Court declared that previous Supreme Court decisions established that the Due Process Clause of the Fourteenth Amendment[25] protects a competent person's "liberty interest" in refusing unwanted medical treatment.[26] The *Cruzan* majority did not decide, however, whether this liberty interest extends to the refusal of lifesaving hydration and nutrition. In a carefully worded passage, the majority assumed only "for the purposes of this case" that this constitutionally protected liberty interest for competent persons includes the "right to refuse lifesaving hydration and nutrition."[27] A constitutionally protected liberty interest, however, is not absolute. To determine whether the Missouri mechanism comports with the United States Constitution, Chief Justice Rehnquist wrote, the Court must perform a balancing test, weighing the constitutionally protected interest of the individual against the relevant countervailing state interests.[28]

The majority found that the state has a general interest in "protecting and preserving life."[29] This interest is demonstrated by the fact that homicide is treated as a serious crime and that one who helps another commit suicide is subject to criminal penalties.[30] Furthermore, this interest may be asserted by a state without any judgment about the quality of life that is being preserved.[31]

The Court found that a state may legitimately seek to safeguard the personal element of a patient's choice to withhold treatment and stated that Missouri had permissibly advanced

23. *See, e.g.*, Conservatorship of Drabick, 200 Cal. App. 3d 185, 245 Cal. Rptr. 840 (authorizing removal of nasogastric feeding tube from 44-year-old man in persistent vegetative state), *cert. denied*, 488 U.S. 958 (1988).

24. *See Cruzan*, 110 S. Ct. at 2851.

25. U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law").

26. *See Cruzan*, 110 S. Ct. at 2851.

27. *Id.* at 2852.

28. *See id.*

29. *Id.* In addition to this general interest, the Court observed that the state also has a particular interest in protecting an incompetent from representation that may not promote her interests and in guaranteeing the accuracy of the fact-finding process in a judicial proceeding in which an incompetent's wishes are determined. *See id.*

30. *See id.*

31. *See id.* at 2853.

the state's interests by adopting the "clear and convincing" standard of proof to govern proceedings to determine an incompetent patient's wishes.[32] This heightened standard, the Chief Justice explained, reflects both the importance of the interest at stake as well as a judgment by society as to how the risk of error should be distributed.[33] Noting that an erroneous decision to withdraw life-sustaining treatment is final and irrevocable, the Court found that Missouri had permissibly placed "the risk of an erroneous decision"[34] on those seeking to terminate an incompetent individual's life-sustaining treatment.

The Court did not find support for the assertion that an incompetent person possesses the same right to refuse treatment as a competent person.[35] The Chief Justice pointed out that an incompetent person is unable to make her wishes known and may not exercise a "right" that requires informed consent; any right to refuse treatment would have to be exercised by another.[36] The State of Missouri adopted a substituted judgment procedure, the Court noted, in which a guardian may make decisions in accordance with the prior expressed wishes of the patient. The Court found nothing wrong with this scheme or the requirement that the patient's wishes must be established by evidence that meets the "clear and convincing" standard.[37] The Court rejected the argument that Missouri must accept the "substituted judgment" of Nancy Cruzan's parents in the absence of substantial proof that their views reflect the views of the patient and determined that the state could require that the statements be those of Nancy Cruzan herself.[38] Finally, the Court held that the Supreme Court of Missouri did not err within this scheme in finding that Nancy Cruzan's statement to a housemate did not constitute clear and convincing evidence.[39]

In her concurring opinion, Justice O'Connor agreed with the

32. *See id.*
33. *See id.* at 2854.
34. *Id.*
35. *See id.* at 2852.
36. *See id.*
37. *See id.*
38. *See id.* at 2855. While a state may rely on family decisionmaking, the Court noted, it is certainly not a constitutional requirement.
39. *See id.* at 2855. The Court acknowledged that Missouri's requirement of proof may have frustrated the effectuation of Nancy Cruzan's desires in this case, but asserted that the Constitution does not require general rules promulgated by the state to work faultlessly. *See id.* at 2854.

result reached by the majority but went further, specifically recognizing a patient's liberty interest in rejecting the "artificial delivery of food and water."[40] Concerned that there be means available to protect an individual's liberty interest to refuse medical treatment, she pointed out that the Court had decided "only that one state's practice does not violate the Constitution" and that the ruling "does not preclude a future determination that the Constitution requires states to implement the decisions of a patient's duly appointed surrogate."[41]

In his concurring opinion, Justice Scalia indicated that he approved of the Court's analysis but would have preferred that the Court "announce, clearly and promptly, that the federal courts have no business in this field."[42] The justices of the Supreme Court, he asserted, can be expected to know no more about these matters "than nine people picked from the Kansas City telephone directory."[43] Rather, he indicated, it is "up to the citizens of Missouri to decide, through their elected representatives,"[44] whether a wish to refuse life sustaining treatment should be honored.

Justice Brennan dissented.[45] In his view, Nancy Cruzan "has a fundamental right to be free of unwanted artificial nutrition and hydration,"[46] and Missouri's rule of decision impermissibly burdens the patient and family by requiring clear and convincing evidence of an incompetent individual's wishes. The state's general interest in the preservation of life "must accede to Nancy Cruzan's particularized and intense interest in self-determination in her choice of medical treatment."[47] Consequently, the state should assert its interest only "if and when it is determined that Nancy Cruzan would want to continue treatment."[48] Although Justice Brennan agreed that states should be able to fashion procedural protections to safeguard the interests of incompetents, he argued that "accuracy"[49] must be the touchstone. Justice Brennan expressed his doubt that the

40. *Id.* at 2856 (O'Connor, J., concurring).
41. *Id.* at 2858-59 (O'Connor, J., concurring).
42. *Id.* at 2859 (Scalia, J., concurring).
43. *Id.* (Scalia, J., concurring).
44. *Id.* (Scalia, J., concurring).
45. Justices Marshall and Blackmun joined Justice Brennan's dissenting opinion.
46. *Cruzan*, 110 S. Ct. at 2864 (Brennan, J., dissenting).
47. *Id.* at 2870 (Brennan, J., dissenting).
48. *Id.* at 2871 (Brennan, J., dissenting).
49. *Id.* (Brennan, J., dissenting).

state, a stranger to the patient, would be more likely than close family members to make a choice that the patient would have made.[50] Instead, he argued that a state should merely "ensure that the person who makes the decision on the patient's behalf is the one whom the patient would have selected to make that choice for him."[51]

In a separate dissent, Justice Stevens asserted that the critical question is not the standard of proof for the controlling facts, but rather "what proven facts should be controlling."[52] In his view, the Constitution requires Missouri "to care for Nancy Cruzan's life in a way that gives appropriate respect to her own best interests."[53] He objected to the majority's decision, which he characterized as permitting "the State's abstract, undifferentiated interest in the preservation of life to overwhelm the best interests of Nancy Beth Cruzan."[54]

Cruzan was decided narrowly; the Court held simply that the Constitution does not forbid a state from establishing a procedural requirement that evidence of an incompetent's wishes regarding the withdrawal of treatment be proved by a "clear and convincing" standard.[55] The penumbral "right of privacy," in which many commentators and courts have found a right to refuse treatment, did not enter the Court's analysis.[56] Indeed, the majority explicitly declined to find a right to refuse treatment "encompassed by a generalized constitutional right to privacy," indicating that "this issue is more properly analyzed in terms of the Fourteenth Amendment liberty interest."[57] Because a ruling based on the right of privacy was not necessary to reach a judgment, the Court may have wished to avoid creating precedent that would restrict it in future rulings. Alternatively, the Court's opinion may signal that, for the time being, the law re-

50. *See id.* at 2877 (Brennan, J., dissenting).

51. *Id.* (Brennan, J., dissenting).

52. *Id.* at 2889 (Stevens, J., dissenting).

53. *Id.* at 2889 (Stevens, J., dissenting).

54. *Id.* at 2879 (Stevens, J., dissenting).

55. *See id.* at 2852.

56. The Court had previously "recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." Roe v. Wade, 410 U.S. 113, 152 (1973). In its most recent major "privacy" decision, however, the Court resisted expansion of the privacy right. *See* Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-11 (2d ed. 1988).

57. *Cruzan*, 110 S. Ct. at 2851 n.7.

volving around the controversial privacy right is not going to be developed further.

Chief Justice Rehnquist acknowledged that the Court would not attempt to address all situations in its analysis.[58] Consequently, it is essential to identify with specificity the type of case the Court did consider, because what has "in common parlance" been "referred to as a 'right to die' "[59] does not have a precise definition. For example, the phrase has been used to refer to situations in which a physician administers an intentionally lethal overdose to a patient who is in excruciating, intractable pain, a competent patient who is terminally ill and wishes to have medical treatments stopped so that the disease may take its natural course, or a patient who has no brain wave activity and is removed from the equipment that artificially maintains her circulation, respiration, and feeding.[60] Nancy Cruzan's case did not fall into any of these categories. She was not "dead" by any of the accepted criteria,[61] she was not terminally ill, and she was not thought to be in pain. Rather, she was an incompetent individual in a debilitated condition with no hope of improvement. She was kept alive by feedings through a surgically implanted gastrostomy tube. When these feedings were eventually withheld,[62] Nancy Cruzan died from starvation and dehydration, not the progression of any disease.

In reaching its result, the Court implicitly rejected any categorical distinction between medical treatments and the artificial administration of nutrition by noting that the logic of the cases that implicate a liberty interest in refusing medical treatment would also implicate an interest in refusing artificially delivered

58. *See id.* at 2851.

59. *Id.*

60. *See generally* D. HUMPHRY & A. WICKETT, THE RIGHT TO DIE: UNDERSTANDING EUTHANASIA (1986) (discussing the complex moral and legal issues associated with dying).

61. The relevant Missouri statute provides that, for legal purposes, "death shall not be determined to have occurred unless . . . there is an irreversible cessation of spontaneous respiration and circulation." MO. REV. STAT. § 194.005 (1986).

62. After the Supreme Court handed down its decision in *Cruzan*, which had the effect of preventing Nancy Cruzan's parents from obtaining a court order instructing the hospital to withhold nutrition and hydration, the parents petitioned the Jaspar County, Missouri Probate Court for a second hearing to present additional evidence of their daughter's wishes. Based on the testimony offered at that hearing, Judge Teel found "clear and convincing" evidence that Nancy Cruzan would not have wished to continue the artificial nutrition and hydration. Accordingly, on December 14, 1990, the court authorized the hospital to remove Nancy Cruzan's gastrostomy feeding tube. She died 12 days later. *See Nancy Cruzan Dies, Outlived by a Debate Over the Right to Die*, N.Y. Times, Dec. 27, 1990, at A1, col. 1.

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food and water. The dramatic consequences involved in withdrawing nutrients and hydration essential to life would merely 'inform the inquiry' as to its constitutional permissibility.[63] This stance accords with an opinion recently issued by the American Medical Association that explicitly rejects a distinction between artificial feeding and other medical treatments.[64] This issue, however, has been the source of much disagreement among courts and commentators.[65]

Although the Court's determination merely involved the constitutionality and not the desirability of Missouri's scheme, the Court's decision may have some unfortunate policy implications. In view of the ever-increasing costs of medical care, "erring on the side of life" will certainly place additional strains on the already limited resources of our health care system. In its analysis of risk allocation resulting from the imposition of a "clear and convincing" evidence standard, the Court considers only the direction and magnitude of a potential error, not the frequency of an erroneous judgment.

There is a cost associated with the Court's determination that a state may elect to prolong life without regard to its quality. Because funds are finite, this policy may lead to a misallocation of limited medical resources. Disproportionate amounts may be expended to maintain people in vegetative states who have no prospect of cure or recovery. In the case of Nancy Cruzan, the State of Missouri is bearing the cost of care. In other situations, extended medical care may cause serious economic burdens for the family that bears the cost.

Individuals who are concerned that there may come a time when they are no longer able to make decisions regarding their medical treatment may wish to avoid a fate like that of Nancy Cruzan. The Court's decision encourages these individuals to make their wishes known in advance, either by executing living wills or by appointing someone to make treatment decisions for them.[66] It is noteworthy, however, that had Nancy Cruzan exe-

63. *See Cruzan*, 110 S. Ct. at 2852. Other members of the Court explicitly acknowledged that there is no analytical difference between withholding sustenance and any other "life-sustaining" therapy, such as artificial respiration or circulation. *See id.* at 2856-57 (O'Connor, J., concurring); *id.* at 2866-67 (Brennan, J., dissenting).

64. *See* Council on Ethical and Judicial Affairs, Am. Medical Ass'n, Ethical Op. 2.20, Withholding or Withdrawing Life-Prolonging Medical Treatment (1989), *reprinted in* 263 J. AM. MED. A. 426 (1990).

65. *See* L. TRIBE, *supra* note 56, § 15-11, at 1364-65.

66. Indeed, within days of the announcement of the Court's decision, requests for

cuted a living will under the Missouri living will statute, it would not have been sufficient to cause the hospital to remove her gastrostomy tube. This is because the Missouri statute does not apply to the withdrawal of nutrition and hydration or to those patients who are not terminally ill.[67] A living will might have provided "clear and convincing" evidence, however, that Nancy Cruzan's parents were acting according to her wishes—the crucial evidence the Missouri Supreme Court found lacking.[68]

In 1985, the Uniform Law Commissioners drafted the Uniform Rights of the Terminally Ill Act (Uniform Act),[69] which provides a mechanism for patients to leave instructions regarding their medical care prior to when they are incapable of participating in these decisions. This model legislation allows a patient to draft a declaration specifying that life-sustaining medical treatment, including food and water, be withheld if the patient has reached the last stages of a terminal condition.

Versions of the Uniform Act have been substantially adopted in eight states, including Missouri.[70] Thirty-three other states and the District of Columbia have adopted some form of "Living Will" or "Natural Death Act."[71] These statutes differ significantly, however, among states and may not be applicable if the individual is in a persistent vegetative state, or is seeking the withdrawal of nutrition and hydration but is not in immediate danger. Thus, even a patient who executes a living will may not be protected from the imposition of some unwanted medical treatments if she becomes incompetent.

Another problem associated with living wills is their limited use. It is estimated that "only 8 to 15 percent of the general population has put its health-care wishes in writing."[72] Further-

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living wills at health agencies increased significantly. *See, e.g., In Leaner Health Budget, Programs Lose Ground*, N.Y. Times, Aug. 19, 1990, § 12NJ, at 1, col. 4.

67. *See* Mo. Rev. Stat. §§ 459.010-459.055 (1986); Cruzan v. Harmon, 760 S.W.2d 408, 442 (Mo. 1988) (Welliver, J., dissenting).

68. *But see supra* note 62.

69. 9B U.L.A. 609 (rev. 1989).

70. Other states adopting the Uniform Act include Alaska, Arkansas, Iowa, Maine, Montana, North Dakota, and Oklahoma.

71. *See* 9B U.L.A. 609 (Supp. 1990).

72. Chauvin & Pickering, *Living, Dying and the Written Word*, Tex. Law., July 23, 1990, at 25. *See also* Am. Medical Ass'n, Surveys of Physician and Public Opinion on Health Care Issues 29-30 (1988) (finding that only 15 percent of those surveyed had completed a living will specifying their wishes concerning the use of life-sustaining treatment if they entered an irreversible coma).

more, it may be unreasonable to expect people to be aware of the capabilities of modern medicine and to choose intelligently the treatment options that they would forego before the specific circumstance arises. Certainly, few physicians discuss these choices with patients beforehand. If, as some have suggested, living wills were provided along with other forms to be completed during a patient's admission to the hospital, it would be unlikely that the declaration would be truly representative of a patient's informed decision to forego certain treatments.[73]

As an alternative to a living will, a patient may execute a durable power of attorney. This option was endorsed by Justice O'Connor in her concurrence as "a valuable additional safeguard of the patient's interest in directing his medical care."[74] Through a durable power of attorney, a patient can designate family members, a friend, or any other person to make decisions regarding health care should she become incompetent. A durable power of attorney also has the advantage of being flexible enough to adapt to a situation that the patient might not have specifically contemplated. Because it allows for a decision by someone other than the patient herself, however, the durable power of attorney carries with it the potential for abuse.

For the purposes of deciding this case, eight of the nine justices recognized what might be termed a conditional "right to die" protected by the Constitution.[75] Only four justices, however, believed that the "right to die" was broad enough to override the state interest in prolonging the lives of incompetent individuals who have not left clear instructions. Missouri's

73. *See, e.g., Hospitals Confronting the "Right to Die" Issue*, Chicago Tribune, July 26, 1990, News Section, at 1, col. 5 (suburban Chicago hospitals to "include forms for drawing up living wills and assigning medical power of attorney in every admissions packet given to patients").

The Patient Self-Determination Act was introduced in the United States Senate in 1989 by John C. Danforth (R-Mo.) and Daniel P. Moynihan (D-N.Y.), S. 1766, 101st Cong., 1st Sess. (1989), and in the United States House of Representatives in 1990 by Sander M. Levin (D-Mich.), H.R. 5067, 101st Cong. 2d Sess. (1990). The bill would require hospitals and nursing homes to provide information regarding living wills to patients and residents or risk losing Medicare and Medicaid benefits. *See* Levin, *So That There Will Be No More Nancy Cruzans*, Wash. Post, July 6, 1990, at A23, col. 5.

74. *Cruzan*, 110 S. Ct. at 2858 (O'Connor, J., concurring). The most recently revised edition of the Uniform Act contains additional provisions authorizing the appointment of a proxy or surrogate of the patient to make the necessary medical care choices that would permit a physician, in the absence of an effective declaration by the patient, to obtain consent from a patient's closest relatives to withhold or withdraw treatment. *See* UNIF. RIGHTS OF TERMINALLY ILL ACT § 7, 9B U.L.A. 609 (Supp. 1990).

75. This qualified "right to die" was unequivocally recognized by at least five justices: Justices O'Connor, Brennan, Marshall, Blackmun, and Stevens.

procedural scheme, which the Court upheld as constitutional, is one of the most stringent nationwide. Most states permit a patient to withdraw life-sustaining treatment on terms that are less demanding. Consequently, the debate over the "right to die" will likely shift to the courts and legislatures of the States, where an individual's right to refuse treatment may be afforded greater protection under state constitutions, statutes, and common law.

William L. Leschensky

EQUAL PROTECTION AND AFFIRMATIVE ACTION IN BROADCAST LICENSING: *Metro Broadcasting, Inc. v. Federal Communications Commission*, 110 S. Ct. 2997 (1990).

As the Supreme Court's 1989 Term reached its conclusion, observers expected the Court to follow *City of Richmond v. J.A. Croson Co.*[1] and invalidate two Federal Communications Commission (FCC) minority preference policies aimed at promoting broadcast diversity. Instead, in one of the major surprises of the Term,[2] the Court upheld both FCC racial preference programs in *Metro Broadcasting, Inc. v. Federal Communications Commission*.[3] Finding no equal protection violation, the Court ruled that "benign" race-conscious programs designed by Congress to "serve important governmental objectives" are constitutional if they are "substantially related to [the] achievement of those objectives."[4] The Court's application of an intermediate-scrutiny test to evaluate the FCC's race-conscious measures, in direct contradiction of *Croson*, has destabilized affirmative action jurisprudence. The intermediate-scrutiny test does not require that programs be narrowly tailored to remedy identified past discrimination. Thus, this standard of review will justify

1. 488 U.S. 469 (1989). In *Croson*, the Court, applying a strict-scrutiny test, invalidated a Richmond, Virginia ordinance that required construction firms receiving city contracts to set aside 30 percent of the value of a contract for minority-owned or controlled subcontractors.

2. *See, e.g.*, *Vacancy of the Court: An Activist's Legacy*, N.Y. Times, July 22, 1990, § 1, at 22, col. 3.

3. 110 S. Ct. 2997 (1990). The decision addressed two cases before the Court that had been consolidated, Winter Park Communications, Inc. v. Federal Communications Comm'n, 873 F.2d 347 (D.C. Cir. 1989), and Astroline Communications Co. v. Shurberg Broadcasting of Hartford, Inc., 876 F.2d 902 (D.C. Cir. 1989).

4. *Metro Broadcasting*, 110 S. Ct. at 3008-09.

many suspect uses of racial classifications merely because the government claims that the created programs serve an important governmental interest.

Since gaining exclusive authority to license broadcast stations, the FCC has attempted to increase minority involvement in the broadcast industry. Minorities owned only ten of the approximately 8,500 American radio and television stations in 1971; as of 1986, they owned only 2.1 percent of the country's 11,000 stations.[5] Concluding that audience interests were under-served by the lack of minority participation in the industry,[6] the Commission promulgated new employment rules in the hope that increased minority employment would promote programming diversity.[7]

Although these rules initially enjoyed some success, the FCC soon determined "that the views of racial minorities continue[d] to be inadequately represented" and decided that "ownership . . . is another significant way of fostering the inclusion of minority views in . . . programming."[8] The Commission then developed two methods to increase minority ownership. First, it revised its comparative hearing proceedings. When issuing a new license in a particular area, the Commission now evaluates competing companies based on certain factors and awards licenses through a weighted lottery system.[9] Aiming to increase minority participation in the industry, the FCC added minority ownership or involvement in station management to the list of relevant factors considered in the comparative hearings.

Second, the Commission enacted new measures to increase the likelihood that licenses of existing stations would be transferred or reassigned to minorities. Previously, when an existing license-holder's qualifications were questioned, a transfer or assignment could not occur until the FCC held a hearing.[10]

5. *See id.* at 3003.

6. *See id.* (citing MINORITY OWNERSHIP TASK FORCE, FEDERAL COMMUNICATIONS COMM'N, REPORT ON MINORITY OWNERSHIP IN BROADCASTING 1 (1978)).

7. *See id.* at 3003 & n.3.

8. *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 42 Rad. Reg. 2d (P & F) 1689, 1691 (1978) [hereinafter *Statement on Minority Ownership*].

9. *See Metro Broadcasting*, 110 S. Ct. at 3004-05. The six factors include: "diversification of control of mass media communications, full-time participation in station operations by owners . . . , proposed program service, past broadcast record, efficient use of the frequency, and the character of the applicants." *Id.*

10. *See id.* at 3005.

The Commission now gives station owners the option to avoid a hearing by engaging in a "distress sale" to "an FCC-approved minority enterprise."[11]

In 1983, Metro Broadcasting, Inc. (Metro) and several other companies applied for an FCC license to construct and operate a new television station in Orlando, Florida.[12] The Commission initially awarded Metro the license because its primary competitor, Rainbow Broadcasting (Rainbow), an Hispanic-owned company, was disqualified. The FCC's review board reinstated Rainbow's application, however, and after a comparative hearing granted Rainbow the license because "Rainbow's minority credit outweighed Metro's local residence and civic participation advantage."[13]

Metro appealed to the United States Court of Appeals for the District of Columbia Circuit. At the FCC Commissioner's request, the court of appeals remanded the case for further consideration in light of an ongoing FCC investigation into the validity of minority preference policies. Before the study was completed, however, Congress passed appropriations legislation prohibiting the use of appropriated FCC funds to evaluate minority ownership policies.[14] The FCC curtailed its investigation and reaffirmed its grant of the license to Rainbow. Citing circuit precedent and Congress's desire to increase minority representation in the broadcasting industry, the court of appeals affirmed Rainbow's license grant.[15]

In the other case considered in *Metro Broadcasting*, Faith Center, Inc. (Faith Center) twice sought FCC approval, in February 1981 and again in September 1983, to transfer its Hartford, Connecticut station's license in a distress sale. Both

11. *Id.* The three criteria necessary for a "distress sale" are: (1) Minority ownership of the buyer must exceed 50 percent or be controlling; (2) the license must be purchased before the start of the hearing; and (3) the price for the license must not exceed 75 percent of fair market value. *See id.*

12. The facts of the consolidated cases are drawn from the Court's opinion in *Metro Broadcasting*. *See id.* at 3005-08.

13. *Id.* at 3005-06.

14. *See* Continuing Appropriations Act for Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329, 1329-31 (1987). The Act stated in pertinent part: "[N]one of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the [FCC] with respect to comparative licensing [or] distress sales . . . ." *Id.*

15. *See* Winter Park Communications, Inc. v. Federal Communications Comm'n, 873 F.2d 347, 353 (D.C. Cir. 1989) (quoting West Michigan Broadcasting Co. v. Federal Communications Comm'n, 735 F.2d 601, 613 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985)), *cert. granted*, 110 S. Ct. 715 (1990).

attempts, however, proved unsuccessful. Meanwhile, in December 1983, Shurberg Broadcasting of Hartford, Inc. (Shurberg) applied for a license to construct a new television station in Hartford. Shurberg sought a comparative hearing when Faith Center, unable to transfer its license, filed for a license renewal. In June 1984, Faith Center again requested approval for a distress sale—this time to Astroline Communications Company, Limited Partnership (Astroline), another minority-owned applicant. Although Shurberg claimed that the distress sale violated its right to equal protection, the FCC permitted the license transfer to Astroline.[16]

Shurberg appealed to the United States Court of Appeals for the District of Columbia Circuit, but the appeals court similarly delayed deciding this case until the FCC completed its minority preference study. When Congress prohibited further use of appropriated funds for the investigation, the FCC reaffirmed the distress sale. A divided court of appeals invalidated the distress sale policy, however, holding that it unconstitutionally "denies [Shurberg Broadcasting] equal protection under the due process clause of the Fifth Amendment."[17]

By a five-to-four vote,[18] the Supreme Court affirmed the District of Columbia Circuit's decision upholding the use of race as a factor in comparative hearings and reversed the same court's invalidation of the distress sale program. Writing for the majority, Justice Brennan maintained that neither FCC policy violated notions of equal protection.

After discussing FCC efforts to increase programming diversity through minority involvement in the broadcast industry, the Court noted that "[i]t is of overriding significance in these cases that the FCC's minority ownership programs have been specifically approved—indeed, mandated—by Congress."[19] This comment underscored the important role that deference

16. *See Metro Broadcasting*, 110 S. Ct. at 3000.

17. Shurberg Broadcasting of Hartford, Inc. v. Federal Communications Comm'n, 876 F.2d 902, 934 (D.C. Cir. 1989). The court found an equal protection violation because "the program [was] not narrowly tailored to remedy past discrimination or to promote programming diversity . . . ." *Id.*

18. Justice Brennan filed the opinion of the Court, in which Justices White, Marshall, Blackmun, and Stevens joined. Justice Stevens delivered a brief concurring opinion. Justice O'Connor filed a dissenting opinion, in which Chief Justice Rehnquist and Justices Scalia and Kennedy joined. Justice Kennedy, joined by Justice Scalia, filed a separate dissent.

19. *Metro Broadcasting*, 110 S. Ct. at 3008.

to Congress played in the opinion. Justice Brennan opined that while evaluating racial classifications normally demands a high level of scrutiny, *Fullilove v. Klutznick*[20] required that "a program employing a benign racial classification . . . adopted by an administrative agency at the explicit direction of Congress" be viewed "with appropriate deference."[21] More importantly, Justice Brennan noted that benign race-conscious programs may be constitutionally acceptable even if they are not specifically aimed at remedying the effects of past discrimination.[22]

Deeming the FCC minority ownership policies benign, the Court applied a two-part test to determine whether the programs were constitutionally permissible.[23] The Court first examined whether the race-conscious measures served important governmental objectives. Although the Court recognized that societal discrimination is primarily responsible for the lack of minority involvement in broadcasting, it accepted the conclusion of Congress and the Commission that programming diversity is itself an important governmental objective because the public has a "right to receive a diversity of views and information over the airwaves."[24] Justice Brennan concluded that preference programs designed to augment minority ownership will diversify the limited number of broadcasters on the airwaves, just as "a diverse student body" will encourage "a robust exchange of ideas"[25]—a constitutionally acceptable justification for including race as a factor in university admissions decisions.

The second prong of the Court's test consisted of evaluating whether the programs substantially relate to fulfilling the government's objective. The Court examined whether there is a nexus between minority ownership and broadcast diversity. Justice Brennan noted that both Congress and the Commission

20. 448 U.S. 448 (1980). In *Fullilove*, the Court rejected a challenge to the minority business enterprise (MBE) provision of the Public Works Employment Act of 1977. The Act dictated that at least 10 percent of federal funds for local public works projects be set aside to acquire services or supplies from MBEs, unless an administrative waiver is granted. Congress justified this provision with a finding of past discrimination in the construction industry nationwide.

21. *Metro Broadcasting*, 110 S. Ct. at 3008 (quoting *Fullilove*, 448 U.S. at 472 (plurality opinion)).

22. *See id.* at 3008-09.

23. The test that the Court applied was the same one advocated by Justices Brennan, White, Marshall, and Blackmun in their opinion in University of Cal. Regents v. Bakke, 438 U.S. 265, 359 (1978) (opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part).

24. *Metro Broadcasting*, 110 S. Ct. at 3010.

25. *Id.* (citing *Bakke*, 438 U.S. at 311-13 (Powell, J.)).

had found a correlation between the two,[26] and that such a finding should be accorded "great weight."[27] To avoid the appearance of simply deferring to the dictates of Congress and the FCC, however, Justice Brennan recounted the numerous acts and reports that had concluded that minority ownership polices were necessary to achieve broadcast diversity.[28]

The Court worried that the finding of such a relationship would be perceived as based on stereotyping.[29] To dispel such notions, Justice Brennan noted that "[c]ongressional policy does not assume that in every case minority ownership and management will lead to minority-oriented programming or to . . . a discrete 'minority viewpoint' . . . ."[30] Instead, he said, the programs will lead to diversity "in the aggregate."[31] He buttressed this conclusion by citing various studies and the Court's reasoning in *Bakke*.[32]

The final section of the Court's opinion served two purposes: to show that the FCC had rejected more extreme actions to achieve programming diversity and to prove that the methods chosen would not unduly burden non-minorities. The Court noted that although the Commission had concluded that race-neutral methods such as equal employment rules were unsuccessful, it was unwilling to invoke more extreme policies such as set-asides.[33] Justice Brennan also insisted that consideration of race as a factor is fair to minorities and non-minorities alike for two reasons. First, companies competing for licenses through the lottery system have no guarantee of receiving one; thus, no legitimate expectations have been dashed.[34] Second, the FCC has a responsibility to license in the "public interest, convenience, or necessity," and because there are a limited number of electromagnetic frequencies, "[n]o one has a First Amendment right to license."[35] Thus, the FCC was fulfilling its

26. *See id.* at 3011.
27. *Id.* (quoting Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973)).
28. *See id.* at 3011-16. *See, e.g., Statement on Minority Ownership, supra* note 8, at 1692-93.
29. *See Metro Broadcasting*, 110 S. Ct. at 3016.
30. *Id.*
31. *Id.*
32. *See id.* at 3017-18 & n.33.
33. *See id.* at 3022-23.
34. *See id.* at 3026.
35. *Id.* (quoting Red Lion Broadcasting Co., Inc. v. Federal Communications Comm'n, 395 U.S. 367, 389 (1969)).

mission to support the "public interest."

In a brief concurring opinion, Justice Stevens emphasized that affirmative action policies should not aim to remedy past wrongs, but instead should "focus on future benefit."[36] He stressed, however, that racial distinctions should rarely be used, and then only for "clearly identified and unquestionably legitimate"[37] purposes.

Justice O'Connor dissented, recalling that last Term the Court required that a strict-scrutiny test be applied when evaluating racial classifications.[38] In contrast to the majority view, she argued that the congressional actions involved in *Metro Broadcasting* should be judged with this same level of review.[39] Justice O'Connor warned that by failing to strike down the FCC's policies, the Court was "[endorsing] race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict."[40]

A significant portion of Justice O'Connor's dissent attacked the Court's reliance on *Fullilove* to justify "benign" race-conscious policies. First, she pointed out that Congress's remedial powers under Section Five of the Fourteenth Amendment were central to the decision in *Fullilove*;[41] they were not at issue in *Metro Broadcasting*.[42] Second, *Fullilove* insisted "that careful review was essential to ensure that Congress acted solely for remedial rather than other, illegitimate purposes."[43] Broadcast diversity, she noted, is obviously a forward-looking, not remedial, purpose. Finally, in *Fullilove* the Court had already rejected the intermediate-scrutiny approach adopted by the Court in *Metro Broadcasting*.[44]

After rejecting the Court's approach, Justice O'Connor ana-

36. *Id.* at 3028 (Stevens, J., concurring).

37. *Id.* (Stevens, J., concurring) (quoting *Fullilove*, 448 U.S. at 535 (Stevens, J., dissenting)).

38. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

39. *See Metro Broadcasting*, 110 S. Ct. at 3030 (O'Connor, J., dissenting).

40. *Id.* at 3029 (O'Connor, J., dissenting).

41. *See id.* at 3031 (O'Connor, J., dissenting). Section Five of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

42. *See Metro Broadcasting*, 110 S. Ct. at 3030-31 (O'Connor, J., dissenting) ("Section 5 empowers Congress to act respecting the States, and of course this case concerns only the administration of federal programs by federal officials.").

43. *Id.* at 3031 (O'Connor, J., dissenting). *See Fullilove*, 448 U.S. at 486-87 (plurality opinion).

44. *See Metro Broadcasting*, 110 S. Ct. at 3032 (O'Connor, J., dissenting).

lyzed the case using a strict-scrutiny test. She found that the FCC programs failed to satisfy the test's first prong—that there be a compelling government interest—because "[m]odern equal protection doctrine [recognizes] only one such interest: remedying the effects of racial discrimination."[45] Broadcast diversity did not qualify as a compelling interest because she viewed the concept as "too amorphous, [and] too insubstantial."[46] Compelling interests must be "specific and verifiable,"[47] according to Justice O'Connor, and cannot be based on generalized notions of remedying societal discrimination.[48]

Justice O'Connor determined that the FCC policies also did not satisfy the test's second prong because they were not narrowly tailored to achieve the governmental interest. The FCC's programs are premised on the notion that different racial groups possess distinct viewpoints.[49] These policies do not guarantee that a license grant to a minority firm would increase the expression of minority viewpoints, however, because many factors, such as market forces, affect programming decisions.[50] Moreover, she noted that in *Bakke*, the Court rejected the supposition that there are distinct racial viewpoints.[51] Finally, Justice O'Connor indicated that race-neutral approaches exist that would more effectively further the FCC's goal of programming diversity.[52]

In a scathing dissent, Justice Kennedy compared the Court's reasoning in *Metro Broadcasting* to the rationale used in *Plessy v. Ferguson*[53] and a quotation from a publication of the South African government.[54] With these analogies he sought to demon-

45. *Id.* at 3034 (O'Connor, J., dissenting).
46. *Id.* (O'Connor, J., dissenting).
47. *Id.* (O'Connor, J., dissenting).
48. *See Croson*, 488 U.S. at 505; *see also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (plurality opinion). In *Wygant*, the Court held unconstitutional the layoff provision of a collective-bargaining agreement between the teachers' union and the board of education. Under the layoff provision, teachers with the most seniority would be retained, except that the percentage of minority teachers laid off could not exceed the percentage of minority teachers employed at the time of the layoff. In so holding, the Court rejected the theory that the minority teachers were needed as role models to remedy past societal discrimination.
49. *See Metro Broadcasting*, 110 S. Ct. at 3037 (O'Connor, J., dissenting).
50. *See id.* (O'Connor, J., dissenting).
51. *See* University of Cal. Regents v. Bakke, 438 U.S. 265, 310-11 (1978) (Powell, J.).
52. *See Metro Broadcasting*, 110 S. Ct. at 3039 (O'Connor, J., dissenting).
53. 163 U.S. 537 (1896).
54. "The policy is not based on any concept of superiority or inferiority, but merely on the fact that people differ, particularly in their group associations, loyalties, cultures, outlook, modes of life and standards of development." *Metro Broadcasting*, 110 S. Ct. at

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strate how policies that are justified as benign invariably harm someone.[55] He concluded by observing that the Court has shifted from endorsing *Plessy*'s "separate but equal" standard to *Metro Broadcasting*'s "unequal but benign."[56]

The Court's holding in *Metro Broadcasting* has placed affirmative action jurisprudence in conflict. Had the Court followed the precedent of *Croson*, it would have applied a routine strict-scrutiny analysis and struck down the FCC programs. Instead, by employing an intermediate-scrutiny test because the programs were deemed "benign," a term the Court never bothered to define, the outcome of future cases seems likely to be determined by the personal opinion of the judge hearing the case as to whether the program in question is invidious or benign. In other words, the fate of affirmative action programs may now turn on the personal whims of judges.

Applying a strict-scrutiny test to racial preference programs requires that some minimal level of objectivity be maintained in a court's decision. As Justice O'Connor noted, only remedying the effects of past racial discrimination would serve as an adequate compelling interest to satisfy the first prong of a strict-scrutiny analysis.[57] Speaking for the Court in *Croson*, she recognized that "the purpose of strict-scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant the use of a highly suspect tool."[58] Thus, a court must first make an objective determination of whether a minority preference program was designed to remedy specific past discrimination. Then, it can analyze whether the program is narrowly tailored to achieve that goal.

To the extent that a finding of specific past discrimination is no longer required under *Metro Broadcasting*, courts will be asked to judge a program in the context of generalized, societal discrimination. The Supreme Court itself, however, has rejected this approach on numerous occasions for two persuasive

3046 (Kennedy, J., dissenting) (quoting SOUTH AFRICA AND THE RULE OF LAW 37 (1968)).

55. *See id.* (Kennedy, J., dissenting).

56. *Id.* at 3047 (Kennedy, J., dissenting).

57. *See id.* at 3034 (O'Connor, J., dissenting).

58. *Croson*, 488 U.S. at 493.

reasons.[59] First, as Justice Powell commented in *Bakke*, societal discrimination is "an amorphous concept of injury that may be ageless in its reach into the past."[60] It simply would justify too many suspect uses of race classifications. Similarly, in *Croson*, the Court concluded that a claim of societal discrimination "provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It 'has no logical stopping point.' "[61]

The second and related reason for rejecting a societal discrimination justification is that its use will increase the need for racial classifications. Benign race-conscious measures necessitate dividing people into racial blocs: victim blocs and oppressor blocs. When remedying identified, particular discrimination, the beneficiary of such a policy can point to the specific wrong to highlight the obstacles to his achievement. The beneficiary of a program based on societal discrimination, however, cannot do the same. Instead, the program will "only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."[62]

The Court in *Metro Broadcasting* attempted to avoid the societal discrimination dilemma by labelling the programs "benign" and by noting that *Congress* had created them. Thus, the Court asserted that only intermediate scrutiny need be applied when evaluating the FCC measures. In failing to define what constitutes "benign race-consciousness," however, the Court has left no guidelines for lower courts to follow in determining what is a legitimate race-based decision. For example, suppose a school district, alarmed by the high attrition rate and the low sense of self-esteem of its black male students, decides to create special schools for these youths to combat these problems.[63] A judge may conclude that under the intermedi-

59. *See id.* at 498-506; *Wygant*, 476 U.S. at 274-76 (plurality opinion); *Bakke*, 438 U.S. at 307-10 (Powell, J.).

60. *Bakke*, 438 U.S. at 307 (Powell, J.).

61. *Croson*, 488 U.S. at 498 (quoting *Wygant*, 476 U.S. at 275 (plurality opinion)).

62. *Bakke*, 438 U.S. at 298 (Powell, J.).

63. *See Schools Segregate Black Male Pupils*, Wash. Times, Oct. 19, 1990, at A1, col. 5. Milwaukee has established separate facilities for black male students, although the schools will be open to all students. Chicago has a program that takes black boys in the fourth-through-eighth grades out of their classrooms two or three times a week. In Baltimore, three elementary schools have separate classes for black males. New York City is considering establishing separate schools for black boys. *See* Jordan, *Segregation Won't Work*, N.Y. Times, Oct. 21, 1990, § 4, at 19, col. 5.

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ate-scrutiny standard of *Metro Broadcasting*, the program is valid because the district's benign and sincere approach supports an important governmental interest and is substantially related to the achievement of that interest. If the school district never stated its reason for establishing the separate schools, though, would intermediate or strict scrutiny be applied?[64] Such difficulties could arise for all sorts of programs, regardless of whether such programs were created by Congress or by a local governmental unit.

In addition, the Court's reliance on *Fullilove* to support the application of intermediate scrutiny in this case is misplaced. *Fullilove* stands for the proposition that when Congress identifies specific discrimination within an industry, Congress can exercise its "unique remedial powers . . . under § 5 of the Fourteenth Amendment."[65] Unlike the discrimination identified in the construction industry in *Fullilove*, Congress found no specific discrimination in the broadcast industry. Because Congress here merely seeks to enhance programming diversity and not to remedy particular discrimination, the Court cannot invoke *Fullilove* to justify the FCC policies.

The Court analogized the FCC's goal of broadcast diversity to the classroom diversity it sought to attain in *Bakke*. This analogy seems premised on the belief that there are a limited number of broadcast frequencies, just as there are a limited number of admissions slots. This comparison fails for two reasons, however. First, Justice Powell explicitly stated in *Bakke* that "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake."[66] Instead, the uniqueness of the academic environment and academic freedom associated with it permits a "university to make its own judgments as to education includ[ing] the selection of its student body."[67] Second, advances in technology have removed most practical limitations on the number of broadcast frequencies.[68] Thus, the Court has no real justifica-

64. How should a judge evaluate a program that has a benign stated purpose that may actually benefit the minority group, but in fact was created for an invidious reason?

65. *Croson*, 488 U.S. at 488.

66. *Bakke*, 438 U.S. at 307 (Powell, J.).

67. *Id.* at 312 (Powell, J.).

68. The Court's adherence to the view that there are a limited number of broadcast frequencies follows the approach of such cases as Red Lion Broadcasting Co. v. Federal Communications Comm'n, 395 U.S. 367 (1969). Because the Court has attached importance to this limitation, the broadcast industry has been treated differently than

tion for endorsing these FCC diversity efforts.

In conclusion, *Metro Broadcasting* conflicts with the Court's prior affirmative action decisions because it lowers the standard of review necessary for evaluating racial preference programs. If it continues to apply intermediate scrutiny to affirmative action programs, the Court will severely weaken contemporary notions of equal protection. With the retirement of Justice Brennan and the elevation of Judge Souter to the Supreme Court, however, *Metro Broadcasting*'s influence may be quite limited—and quite short-lived.

Michael B. Bressman

FEDERAL JUDICIAL AUTHORITY TO INCREASE LOCAL TAXES: *Missouri v. Jenkins*, 110 S. Ct. 1651 (1990).

Ever since the Supreme Court in *Brown v. Board of Education of Topeka*[1] gave the federal courts a broad mandate to desegregate public school systems "with all deliberate speed,"[2] federal judges have struggled to do so.[3] Because the management of public schools was formerly considered to be the province of state and local governments,[4] judges faced a controversial and unfamiliar task. In their efforts to desegregate schools, they ex-

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other press media in First Amendment analysis. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-25, at 1001-10 (2d ed. 1988). The Court has permitted content-based restrictions in the broadcasting context. *See Red Lion*, 395 U.S. at 389. In *Metro Broadcasting*, the Court essentially allowed a viewpoint restriction—the FCC is permitted by the Court's holding to enhance the speech of certain racial groups by restricting the speech of others. This sort of orchestration is "wholly foreign to the First Amendment." Buckley v. Valeo, 424 U.S. 1, 49 (1976) (per curiam). With the advent of such technological advances as cable and satellite dishes, the Court should reconsider its differential treatment of broadcasters and other press media in its First Amendment jurisprudence. *See, e.g.*, Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982). Under a more unified approach, the Court would not need to endorse the parcelling out of channels at the cost of the First Amendment.

1. 349 U.S. 294 (1955) (*Brown II*). The first Supreme Court decision in the *Brown* case, Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954) (*Brown I*), declared that segregated schools were unconstitutional. *Brown II* implemented a desegregation remedy.

2. *Brown II*, 349 U.S. at 301.

3. *See, e.g.*, 4 H. ABRAHAM, FREEDOM AND THE COURT 328-46 (1982). One of the best-known examples is Judge Garrity's management of the Boston public schools. For a popular account of his efforts, see J. LUKAS, COMMON GROUND (1985).

4. *See* J. HOGAN, THE SCHOOLS, THE COURTS, AND THE PUBLIC INTEREST 10 (1985). The *Brown* decision spurred an explosion of education litigation in the federal courts. Between 1789 and 1956, the federal courts heard 398 cases on education issues; between 1956 and 1984, they heard at least 6,299. State courts heard 31,527 cases on

perimented with various remedies, including forced busing,[5] redistricting,[6] remedial measures in public housing programs,[7] and voluntary desegregation plans involving magnet schools.[8] The Supreme Court has not always been supportive of these efforts.[9] The Court restricted the options available to federal judges as the hidden costs and seeming futility of many desegregation remedies became apparent.[10] When remedies seem to go beyond the traditional equitable powers of the courts, the Court has been appropriately cautious.[11]

Last Term, the Supreme Court became much less cautious. In *Missouri v. Jenkins*,[12] the Court broadened the power of federal courts to implement desegregation plans. The Court held that a federal district court may order a local government to impose taxes and may enjoin the operation of state law in order to finance a court-designed desegregation remedy.[13] The decision departed from recent trends in the Court's jurisprudence and surprised many observers.[14] The decision was particularly perplexing because the Court used flawed reasoning to justify its broad grant of taxation authority, failed to indicate how judicial taxation could be reconciled with traditional separation-of-powers principles, and neglected to explain how the federal

education issues between 1789 and 1956; between 1956 and 1984, they heard 13,873. *See id.* at 11.

5. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

6. *See, e.g.*, School Bd. of Richmond v. State Bd. of Educ., 412 U.S. 92 (1973).

7. *See, e.g.*, Hills v. Gautreaux, 425 U.S. 284 (1976).

8. *See, e.g.*, Milliken v. Bradley, 433 U.S. 267 (1977). Magnet schools are "public schools of voluntary enrollment designed to promote integration by drawing students away from their neighborhoods and private schools through distinctive curricula and high quality." Missouri v. Jenkins, 110 S. Ct. 1651, 1657 n.6 (1990).

9. Some commentators believe that the Court's shifting attitude toward desegregation remedies reflects its frustration with the issue. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-19, at 1501 (2d ed. 1988).

10. Busing led to community upheavals and the phenomenon of "white flight." Other school integration remedies raised property taxes dramatically. Occasionally, voluntary remedies became so costly that school districts abandoned them in favor of involuntary remedies. Seattle officials, for example, concluded in 1977 that the city's magnet school program was too expensive and discarded it in favor of a mandatory program. *See* W. HAWLEY, R. CRAIN, C. ROSSELL, M. SMYLIE, R. FERNANDEZ, J. SCHOFIELD, R. TOMPKINS, W. TRENT & M. ZLOTNICK, STRATEGIES FOR EFFECTIVE DESEGREGATION 33 (1983) [hereinafter STRATEGIES FOR EFFECTIVE DESEGREGATION].

11. Only three months before *Missouri v. Jenkins*, the Court ruled in Spallone v. United States, 110 S. Ct. 625 (1990), that a federal district court in New York abused its discretion when it imposed contempt fines on local elected officials who refused to vote for an ordinance implementing a remedy for housing discrimination.

12. 110 S. Ct. 1651 (1990).

13. *See Jenkins*, 110 S. Ct. at 1666.

14. *See, e.g., High Court Backs U.S. Judge's Authority to Order Funds for School Desegregation*, Wall St. J., Apr. 19, 1990, at A16, col. 1.

judiciary was better equipped than state and local legislatures to make decisions about the imposition and allocation of taxes.

The case arose out of a 1977 complaint brought by several Kansas City students and the Kansas City, Missouri School District (KCMSD) against the State of Missouri and thirty-four other defendants, to desegregate the Kansas City school system.[15] The plaintiffs alleged that the defendants had turned the KCMSD into a minority school district, thereby causing "white flight" and impairing the district's ability to raise adequate tax revenues.[16] The district court found that both KCMSD and the state had operated a segregated school system within the Kansas City school district.[17] As a remedy, the district court ordered KCMSD and the state to make curriculum improvements, reduce class size, implement various special programs, rehabilitate the physical facilities of the school system, and encourage students from outside the district to enroll voluntarily in KCMSD schools.[18] The district court ordered KCMSD to study the possibility of operating "magnet schools" within the district,[19] and KCMSD later convinced the district court to approve a massive expansion of its magnet school program.[20]

The district court concluded that the cost of the remedy was beyond the means of KCMSD because the Missouri Constitution contained a cap on property taxes; that cap could only be exceeded with the specific approval of the voters.[21] Voters, however, refused to approve tax increases to cover the cost of the remedy, and the school district was unable to secure fund-

15. *See* School Dist. v. Missouri, 460 F. Supp. 421 (W.D. Mo. 1978).

16. *See id.* at 428.

17. *See* Jenkins v. Missouri, 593 F. Supp. 1485, 1505 (W.D. Mo. 1984). KCMSD was realigned as a party defendant and cross-claimed against the state. *See id.* at 1485.

18. *See* Jenkins v. Missouri, 639 F. Supp. 19 (W.D. Mo. 1985).

19. *See id.* at 34-35.

20. *See* Missouri v. Jenkins, 110 S. Ct. 1651, 1657 (1990). The cost of the remedy was estimated in 1985 to be at least $500 million, but later estimates revised that figure upward to more than $700 million. *See Test of Power: High Court to Consider if a Judge Can Raise Taxes to Pay for a Desegregation Plan*, Wall St. J., Oct. 2, 1989, at A9, col. 4.

21. The Missouri Constitution limits property taxes to $1.25 per $100 of assessed valuation. If a majority of voters in the relevant subdivision approve, the rate can be raised to $3.75 per $100 of assessed valuation. If two-thirds of the voters approve, the levy can be raised above $3.75. *See* MO. CONST. art. 10, § 11(b), (c). In 1969, KCMSD voters approved an increase in the levy to $3.75 per $100 of assessed valuation; this rate was effectively reduced to $2.05 per $100 of assessed valuation through the operation of "Proposition C," a statewide property tax roll-back referendum passed in 1982. *See* MO. REV. STAT. §§ 163.087, 164.013 (Supp. 1989); Brief for Respondents at 27-28, *Jenkins* (No. 88-1150).

ing from either the city council or the state legislature.[22] The district court held that the state and KCMSD were jointly and severally liable for the cost of the plan but that the state should pay seventy-five percent of the cost and KCMSD should pay twenty-five percent.[23] When the district court determined that KCMSD had "exhausted all available means of raising additional revenue,"[24] it refused to increase the state's share of the cost. Instead, the district court ordered an income tax surcharge, the issuance of capital improvement bonds, and an increase in the property tax beyond that permitted by the Missouri Constitution.[25]

The state appealed, claiming that the tax increase was unconstitutional, the desegregation remedy was too broad in scope, and the allocation of the cost between the state and KCMSD was in error.[26] A panel of the Eighth Circuit Court of Appeals reversed the imposition of the income tax surcharge but upheld the allocation of costs and the property tax increase.[27] The court of appeals rejected the state's argument that a federal court does not have the power to impose a tax increase, holding that the state law limitation on tax increases "must fall to the command of the Constitution."[28] The court of appeals "affirm[ed] the actions that the [district] court has taken to this point,"[29] but cautioned the district court in the future to use less obtrusive methods than direct imposition of a tax, such as enjoining the operation of state laws that barred a tax increase and ordering KCMSD to set the levy itself.[30]

Upon the denial of the state's petition for a rehearing, the state filed a petition for certiorari, arguing that the tax increase violated Article III of the United States Constitution,[31] the

22. *See Jenkins*, 110 S. Ct. at 1657.

23. *See id.* Previously, the Eighth Circuit Court of Appeals had, for the most part, affirmed the district court's decision; the appellate court, however, had ordered the district court to divide the cost of the remedy equally between the state and KCMSD. *See* Jenkins *ex rel.* Agyei v. Missouri, 807 F.2d 657, 685 (8th Cir. 1986) (en banc), *cert. denied*, 484 U.S. 816 (1987).

24. Jenkins v. Missouri, 672 F. Supp. 400, 411 (W.D. Mo. 1987).

25. *See id.* at 412, 413. The court set the property tax levy at $4.00 per $100 of assessed valuation.

26. *See* Jenkins *ex rel.* Agyei v. Missouri, 855 F.2d 1295 (8th Cir. 1988).

27. *See id.* at 1301-08, 1315-16.

28. *Id.* at 1313.

29. *Id.* at 1314.

30. *See id.*

31. Section One of Article III provides in part that "[t]he judicial Power of the

Tenth Amendment,[32] and principles of federal-state comity.[33] The state also argued that the desegregation remedy was excessive in scope.[34] The Supreme Court granted certiorari on the question whether the tax increase was within the district court's authority but not on the question whether the actual remedy was excessive in scope.[35] In a five-to-four decision, the Supreme Court concluded that the district court had the authority to suspend application of state law and order KCMSD to levy taxes in order to fund its desegregation remedy.[36] All nine justices agreed that the district court had abused its discretion when it imposed the tax increase directly;[37] only four of the justices concluded that the district court had no authority whatsoever to order a tax increase.[38]

Justice White, writing for the majority,[39] agreed with the state's argument that the tax increase the district court had imposed violated principles of federal-state comity. Acknowledging that the "imposition of a tax increase by a federal court was an extraordinary event,"[40] Justice White stated that the district court should not have imposed the tax unless "no permissible alternative would have accomplished the required task."[41] Justice White noted that there were two options: (1) ordering KCMSD to levy property taxes at an adequate rate and enjoining the operation of state laws that prevented KCMSD from

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United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

32. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

33. Principles of comity find expression in the philosophy of "judicial federalism," the idea that federal courts should respect the institutional autonomy of state governments. *See* L. TRIBE, *supra* note 9, § 3-28, at 197.

34. *See* Missouri v. Jenkins, 110 S. Ct. 1651, 1659 (1990).

35. *See id.* at 1659-60.

36. *See id.* at 1666.

37. *See id.* at 1655. The district court had also ordered an income tax surcharge and the issuance of $150 million-worth of capital improvement bonds. *See* Jenkins v. Missouri, 672 F. Supp. 400, 412-13 (W.D. Mo. 1987). Neither of these orders was at issue in the appeal to the Supreme Court. The income tax surcharge had been reversed by the Eighth Circuit Court of Appeals. *See* Jenkins *ex rel.* Agyei v. Missouri, 855 F.2d 1295, 1315-16 (8th Cir. 1988). The district court had directed that the revenues from the property tax increase be used to retire the bonds. *See Jenkins*, 110 S. Ct. at 1658.

38. *See Jenkins*, 110 S. Ct. at 1667 (Kennedy, J., concurring in part and concurring in judgment). In addition to Justice Kennedy, Chief Justice Rehnquist and Justices O'Connor and Scalia held the view that the district court was unauthorized to order a tax increase.

39. Justice White was joined by Justices Brennan, Marshall, Blackmun, and Stevens.

40. *Jenkins*, 110 S. Ct. at 1663.

41. *Id.*

raising taxes on its own; and (2) directly imposing a tax increase.[42] He asserted that the difference between the two actions was not merely formal. "Authorizing and directing local government institutions to devise and implement remedies not only protects the function of those institutions but, to the extent possible, also places the responsibility for solutions to the problems of segregation upon those who have themselves created the problems."[43]

Justice White upheld the modifications by the court of appeals to the district court's order, thereby allowing the district court to indirectly impose taxes.[44] Noting the limited grant of certiorari, he refused to address the state's contention that the scope of the remedy ordered was excessive and focused only on the manner in which the remedy was to be funded.[45]

Justice White explained that *Milliken v. Bradley*[46] did not hold that a district court could never set aside state laws that barred local governments from raising taxes to satisfy constitutional obligations.[47] Rather, he stated, Section 1983[48] requires each tortfeasor to pay its share of the remedy if it can, and "apportionment of the cost is part of the equitable power of the district court."[49] Justice White rejected any claim that the Tenth Amendment had been violated, asserting that the Fourteenth Amendment "permits a federal court to disestablish local government institutions that interfere with its commands."[50] In response to the state's argument that Article III had been

42. Another alternative, which was mentioned in the dissenting opinion of the court of appeals, *see* Jenkins *ex rel.* Agyei v. Missouri, 855 F.2d 1295, 1318 (8th Cir. 1988) (Lay, C.J., dissenting), was to hold KCMSD and the state jointly and severally liable and leave the state to determine how to pick up the tab if KCMSD could not.

43. *Jenkins*, 110 S. Ct. at 1663.

44. *See id.* at 1664. The court of appeals had suggested that the district court should, in the future, authorize KCMSD to submit a levy to state tax authorities and should enjoin the operation of state laws that would reduce the levy below the required amount. *See* Jenkins *ex rel.* Agyei v. Missouri, 855 F.2d at 1314.

45. Justice White rejected the state's argument that the district court should have placed responsibility for funding the remedy on the state when it determined that KCMSD could not afford its portion. *See Jenkins*, 110 S. Ct. at 1664. This would have been the result under general principles of tort law because the district court had found the state and KCMSD jointly and severally liable. Justice White rejected this reasoning because the state had until now resisted any attempts to make it pay more than its share. Justice White noted that implementing the remedy would be delayed even further "if the State resisted efforts by KCMSD to obtain contribution." *Id.*

46. 433 U.S. 267 (1977).

47. *See Jenkins*, 110 S. Ct. at 1664-65.

48. 42 U.S.C. § 1983 (1988).

49. *Jenkins*, 110 S. Ct. at 1665.

50. *Id.*

violated because the judiciary had no power to tax, Justice White stated that a federal court has the power to order a local government to levy taxes.[51]

Although concurring in the judgment that the district court should be reversed, Justice Kennedy wrote a separate opinion criticizing the majority's reasoning and result.[52] Calling the majority holding "an expansion of power in the federal judiciary beyond all precedent,"[53] Justice Kennedy stated that "[t]oday's casual embrace of taxation imposed by the unelected, life-tenured federal judiciary disregards fundamental precepts for the democratic control of public institutions."[54]

Justice Kennedy decried the formalistic distinction between a court order increasing taxes and an order commanding local government officials to increase taxes. Noting that KCMSD had no authority to impose any taxes except that derived from the sovereign State of Missouri, he accused the majority of refusing to confront the real question in the case: "whether a district court possesses a power to tax under federal law, either directly or through delegation to the KCMSD."[55]

Justice Kennedy noted that Article III places an absolute ban on the power of the judiciary to tax. The intent of the framers of the Constitution was to give the power to tax to the legislature, and previous case law confirmed this separation of power. "[T]he judiciary is not free to exercise all federal power; it may exercise only the judicial power."[56]

Justice Kennedy disagreed with the Court's reliance on dicta in *Griffin v. School Board of Prince Edward County*.[57] In *Griffin*, a school board had refused to operate public schools for minority students while at the same time providing financial support to private schools for white students. Justice Kennedy noted

51. *See id.* Justice White cited a number of cases to support this proposition, including Griffin v. Prince Edward County School Bd., 377 U.S. 218 (1964), and "a long and venerable line of cases in which this Court held that federal courts could issue the writ of mandamus to compel local governmental bodies to levy taxes adequate to satisfy their debt obligations." *Jenkins*, 110 S. Ct. at 1665.

52. Justice Kennedy was joined by Chief Justice Rehnquist and Justices O'Connor and Scalia. Justice Kennedy also read his opinion from the bench, indicating the strength of his feelings about the case. *See Judges May Order Tax Rise to Remedy Bias, Court Says*, N.Y. Times, Apr. 19, 1990, at A22, col. 1.

53. *Jenkins*, 110 S. Ct. at 1667 (Kennedy, J., concurring in part and concurring in judgment).

54. *Id.* (Kennedy, J., concurring in part and concurring in judgment).

55. *Id.* at 1670 (Kennedy, J., concurring in part and concurring in judgment).

56. *Id.* at 1672 (Kennedy, J., concurring in part and concurring in judgment).

57. 377 U.S. 218 (1964).

that the Court in *Griffin* ordered the school board to exercise the taxing power it already had; it did not give the school board new taxing power. Because there was no allegation that Missouri state tax limitations were themselves unconstitutional, wrote Justice Kennedy, the Court in *Missouri v. Jenkins* was forced to rely on a vague constitutional justification for overriding state law.[58] Moreover, according to Justice Kennedy, the long line of cases the Court cited in support of its opinion was misapplied.[59]

Justice Kennedy accused the Court of departing from its holding in *Milliken v. Bradley*,[60] where the Court was careful not to mandate the method of financing a school desegregation plan. If the state tax limitation violates the Constitution, then the specific remedy ordered by the district court is required; however, "a failure to fund this particular remedy would [not] leave constitutional rights without a remedy."[61] Noting that the Court had in the past approved many inexpensive remedies for desegregation, he argued for a requirement that, before a court may impose taxation, there be a finding that there was no less costly a remedy to rectify the constitutional violation.[62]

Emphasizing the "friendly adversary" nature of the suit, which students and the KCMSD originally brought together, Justice Kennedy wondered if the plaintiffs and KCMSD might have joined forces in the beginning in order to extract funds from the state treasury.[63] KCMSD had shown no concern for the financial consequences of the proposed plan and had in fact added increasingly expensive features.[64] Justice Kennedy noted that the final plan was the most expensive desegregation remedy ever proposed in any school district nationwide.[65]

Noting that Missouri taxpayers, the people whom the major-

58. *See Jenkins*, 110 S. Ct. at 1674 (Kennedy, J., concurring in part and concurring in judgment).

59. *See id.* (Kennedy, J., concurring in part and concurring in judgment).

60. 433 U.S. 267, 291 (1977).

61. *Jenkins*, 110 S. Ct. at 1677 (Kennedy, J., concurring in part and concurring in judgment).

62. *See id.* (Kennedy, J., concurring in part and concurring in judgment). Justice Kennedy also noted that the district court in this case had looked at funding alternatives but not at alternative, less costly remedies.

63. *See id.* at 1676 (Kennedy, J., concurring in part and concurring in judgment).

64. Justice Kennedy mentioned a 25-acre farm, planetariums, and a model United Nations wired for language translation, among other items. *See id.* at 1676-77 (Kennedy, J., concurring in part and concurring in judgment).

65. *See id.* at 1668 (Kennedy, J., concurring in part and concurring in judgment).

ity's decision most affected, were not even before the Court, Justice Kennedy criticized the Court for violating due process by denying the taxpayers notice and the opportunity to be heard.[66] Justice Kennedy thought that the Court's decision blurred the lines of accountability by cloaking judicial orders in the guise of decisions of local officials.[67] Reminding the Court of the lessons of the American Revolution, which was in part triggered by unrepresentative taxation, Justice Kennedy warned that "imposition of taxes by an authority so insulated from public communication or control can lead to deep feelings of frustration, powerlessness, and anger on the part of taxpaying citizens."[68] Justice Kennedy noted that the judiciary was not equipped to administer a tax system, and giving the court the authority to do so detracted from its dignity and independence.[69]

Justice Kennedy acknowledged that eliminating racial discrimination in the public schools is essential, but he asserted that implementing desegregation did not require the federal judiciary to overstep its traditional authority.[70] In conclusion, he noted that the majority's holding would allow federal judges to order taxation to remedy constitutional violations in prisons, hospitals, or other public institutions, and "could threaten fundamental alteration of the form of government our Constitution embodies."[71]

Justice Kennedy's rejoinder exposes several weaknesses of the majority's opinion. The majority declined to address Justice Kennedy's argument that it was necessary to examine the scope of the remedy before approving the district court's holding. Instead, the majority based its decision to uphold the district court's indirect imposition of taxes upon faulty and inconsistent reasoning. This reasoning failed to justify the broad and unprecedented expansion of judicial power. The majority also ignored the fact that its decision might have an adverse impact

66. *See id.* at 1670-71 (Kennedy, J.. concurring in part and concurring in judgment). The taxpayers could have intervened in the suit but failed to do so. They did file an amicus brief. *See* Jenkins *ex rel.* Agyei v. Missouri, 855 F.2d 1295, 1316-17 (8th Cir. 1988).

67. *See Jenkins*, 110 S. Ct. at 1673 (Kennedy, J.. concurring in part and concurring in judgment).

68. *Id.* at 1672 (Kennedy, J., concurring in part and concurring in judgment).

69. *See id.* at 1673 (Kennedy, J., concurring in part and concurring in judgment).

70. *See id.* at 1678 (Kennedy, J., concurring in part and concurring in judgment).

71. *Id.* at 1679 (Kennedy, J., concurring in part and concurring in judgment).

on the viability of local governments or might ultimately fail to alleviate the real problem, segregation. In general, the Court failed to articulate why every court-designed remedy for unconstitutional segregation supersedes the constitutional right to representative taxation. When constitutional rights clash, as they did in this case, the role of the court is to draw the lines between them, using sound reasoning. The *Jenkins* Court failed to draw such lines; in fact, it simply ignored the clash of rights that it faced.

The Court also used inconsistent reasoning to support its final result. The majority stated that "[t]he very complexity of the problems of financing and managing a . . . public school system suggests that 'there will be more than one constitutionally permissible method of solving them . . . .' "[72] The majority further stated that "[b]efore taking such a drastic step [as circumventing local taxing authority] the district court was obliged to assure itself that no permissible alternative would have accomplished the required task."[73] Inexplicably, however, the majority only applied this test to the formalistic question of whether the court should itself impose the court-ordered tax increase or instead order local officials to do so. The substantive decision to impose the tax by judicial order was completely overlooked. By ignoring the substance of the issue, the Court ventured outside the area of the traditional judicial function without a demonstrated necessity for doing so and without an articulated theory for why it must do so.

In its analysis, the majority assumed that the possible presence of less expensive, less intrusive remedies sufficient to cure the constitutional violations had no bearing on the propriety of court-ordered taxation. By virtue of the limited grant of certiorari, the Court declined to consider the scope of the remedy, and thus insulated from review a remedy of unprecedented magnitude and cost. In this way, the Court avoided answering the key question of whether a far-reaching plan like the one designed for Kansas City was really the only remedy available to rectify constitutional violations. Without analysis or explanation, the Court implicitly concluded that the scope of the remedy (even if itself insulated from review) was not a factor in

72. *Id.* at 1663 (quoting San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1, 42 (1973) (quoting Jefferson v. Hackney, 406 U.S. 535, 546-47 (1972))).

73. *Id.*

determining whether the lower court had properly invoked the "extraordinary" and "drastic" power of court-ordered taxation.[74]

The Court's opinion embraced an unprecedented expansion of judicial power. In effect, the majority affirmed the power of a federal judge to determine what remedies for a constitutional problem are available, select one of those remedies, and order state and local officials to implement those remedies, no matter how costly the remedies might be and without any input by the other branches of government. This form of judicial decision-making calls to mind Montesquieu's warnings of judicial oppression.[75] It also raises troubling questions of how well the courts are equipped to allocate tax revenues without input from the legislature, the only branch of government with the broad perspective and accountability needed to make resource-allocation decisions.[76]

The Court's decision is likely to hinder the viability of local governments. The accountability of local officials is necessarily reduced if local officials, unable to mobilize community support for expensive projects, can run to the nearest federal judge for funding. Nor is accountability enhanced if local officials can blame the federal courts for resulting tax increases. Federal judges will no doubt bear the brunt of community anger, making local officials even less responsive to their constituents.[77] The decision is also likely to aggravate voter apathy;

74. The majority also suggested that state-imposed tax limitations barred local efforts to raise the necessary taxes. The Court stated that "here, those [local government] institutions are ready, willing, and—but for the operation of state law curtailing their powers—able to remedy the deprivation of constitutional rights themselves." *Id.* The majority concluded that "the State cannot hinder the process by preventing a local government from implementing that remedy." *Id.* at 1666. The local government referred to, however, was the school board. Kansas City voters, along with the Kansas City Council, rejected the tax increases necessary to pay for the court-imposed remedy. *See id.* at 1657.

75. "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*." THE FEDERALIST No. 47, at 303 (J. Madison) (C. Rossiter ed. 1961) (emphasis in original) (quoting Montesquieu).

76. The Court's approach is particularly ironic because the Court has traditionally faulted the other branches of government whenever they reach decisions without devoting adequate attention to the costs, benefits, and other alternatives; such decisions are often labelled "arbitrary and capricious." Here, the Court did no cost-benefit analysis, and did not require the district court to perform such an analysis, either.

77. After the district court decision was announced, some Missouri citizens threw "tea parties" to symbolize their anger. *See Test of Power: Can a Federal Judge Raise Property Taxes? One in Missouri Did*, Wall St. J., Oct. 2, 1989, at A1, col. 1.

most voters will see little point in voting for their preferred allocation of public revenues when a federal judge may override their votes.

Missouri v. Jenkins represents a broad and unprecedented expansion of the power of the federal courts; unfortunately, it also probably represents a futile one. The remedy the Court affirmed is not likely to be efficacious. Numerous studies have shown that voluntary school desegregation plans simply do not result in integrated schools.[78] Magnet school plans unaccompanied by mandatory desegregation remedies are particularly ineffective.[79] This was borne out in August 1989, when several black parents in KCMSD filed another lawsuit, alleging that the school desegregation plan was victimizing their children rather than eradicating illegal discrimination.[80] The KCMSD Superintendent acknowledged that despite the creation of expensive magnet schools, the district had been unable to attract enough white students.[81]

Traditional separation-of-powers doctrine would hold that a federal judge could not impose a tax increase, directly or indirectly, absent a showing that a tax increase was the only possible remedy for a constitutional violation. This criterion was not met in *Jenkins*. No one can fault the justices' intentions, and Kansas City can surely use a state-of-the-art school system. But the manner in which this result has been achieved is alarming. In American democracy, the power to tax and distribute public revenues has always rested in the hands of our elected legislators; after *Missouri v. Jenkins*, federal judges have the power of the purse as well.

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78. *See* STRATEGIES FOR EFFECTIVE DESEGREGATION, *supra* note 10, at 9, 27.
79. *See id.* at 31.
80. *See Suit Says Magnet Schools Bar Black Children*, N.Y. Times, Aug. 3, 1989, at A10, col. 4. The lawsuit alleges that the children are being denied the benefit of the new magnet schools. Many minority children have been turned away from the magnet schools, while slots for white students go unfilled.
81. *See id.*

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FREE EXERCISE OF RELIGION: *Employment Division, Department of Human Resources v. Smith*, 110 S. Ct. 1595 (1990).

In the constitutional realm of religion, citizens often look to the courts for protection against governmental encroachments upon their religiously motivated behavior. Obviously, the courts cannot countenance every claim of religious liberty. If they did, our system of generally applicable laws would cease to function under the weight of exceptions. Equally obvious, however, is that a society that purports to value religious liberty must countenance at least some of those claims. *Employment Division, Department of Human Resources of Oregon v. Smith*[1] provides the most recent indication of how the Supreme Court perceives its role in this area, and what it considers to be the guarantees safeguarded by the Free Exercise Clause of the First Amendment.[2]

Unfortunately for religious practitioners, the Court neither perceives itself as a guardian of religious liberty nor considers the safeguards of the Free Exercise Clause to extend very far. This ruling, which has the unsavory effect of relegating the first liberty protected in the Bill of Rights to a decidedly second-class status, has left even conservatives troubled and wondering about the ramifications of the precedent the Court has set. One commentator has speculated that under *Smith*,

> [l]abor-relations laws [might] apply to clergy and church workers, including those who take a vow of poverty. State regulations [might] turn religious schools into clones of public schools. Anti-discrimination laws [might] make illegal the exclusion of homosexuals, and for that matter atheists, from positions of religious leadership. [And] "discrimination" that prevents women from being ordained in some churches [might] be unlawful.[3]

Smith involved a religious liberty claim by practitioners of the Native American religion. Respondents Alfred L. Smith and Galen W. Black were employees of a private drug and alcohol rehabilitation organization. They were fired when their em-

1. 110 S. Ct. 1595 (1990) (*Smith II*).

2. The First Amendment's Free Exercise Clause guarantees that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend. I. The Free Exercise Clause was made applicable to state governments through the Fourteenth Amendment. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

3. Neuhaus, *Church, State, and Peyote*, NAT'L REV., June 11, 1990, at 40, 40.

ployer learned they had ingested peyote, a hallucinogenic drug, during religious ceremonies of the Native American Church.[4] The Employment Division of Oregon's Department of Human Resources subsequently refused to grant unemployment benefits to the respondents because their discharges were considered the result of misconduct connected with their employment at the rehabilitation center.[5] The Oregon Court of Appeals reversed the Employment Division's rulings, holding that the denial of benefits infringed upon the respondents' First Amendment right to the free exercise of their religion.[6] The Oregon Supreme Court affirmed.[7]

The case first came before the United States Supreme Court in 1988.[8] The Court vacated the judgment below and remanded for a determination as to whether the sacramental use of peyote was proscribed by Oregon's controlled substance law.[9] On remand, the Oregon Supreme Court determined that the respondents' acts fell within the prohibitions of the state's statutes but concluded that the statutes, as applied, violated the Free Exercise Clause of the United States Constitution.[10]

The United States Supreme Court again granted certiorari,[11]

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4. *See Smith II*, 110 S. Ct. at 1597.

5. *See id.* at 1598. Under Oregon law, "[a]n individual shall be disqualified from the receipt of [unemployment] benefits . . . if . . . the individual . . . [h]as been discharged for misconduct connected with work." OR. REV. STAT. § 657.176(2)(a) (1989). "Misconduct" is defined as "a wilful violation of the standards of behavior which an employer has a right to expect of an employee. An act that amounts to wilful disregard of an employer's interest . . . is misconduct." OR. ADMIN. R. 471-30-038(3) (1988). The employer in this case, ADAPT, "views its counselors as role models for the persons they treat and therefore enforces a policy of abstinence from alcohol and mind altering drugs." Smith v. Employment Division, Dep't of Human Resources, 301 Or. 209, 210, 721 P.2d 445, 446 (1986).

6. *See* Smith v. Employment Div., Dep't of Human Resources, 75 Or. App. 764, 709 P.2d 246 (1985); Black v. Employment Div., Dep't of Human Resources, 75 Or. App. 735, 707 P.2d 1274 (1985).

7. *See* Smith v. Employment Div., Dep't of Human Resources, 301 Or. 209, 721 P.2d 445 (1986); Black v. Employment Div., Dep't of Human Resources, 301 Or. 221, 721 P.2d 451 (1986).

8. *See* Employment Div., Dep't of Human Resources v. Smith, 485 U.S. 660 (1988) (*Smith I*).

9. Oregon's statute makes it a Class B felony to knowingly or intentionally *possess* certain "controlled substances." OR. REV. STAT. § 475.992(4) (1987). The drug peyote is included among the controlled substances the possession of which is proscribed by that statute. *See* OR. ADMIN. R. 855-80-021(3)(s) (1988). The Oregon Court of Appeals had previously ruled that the ingestion of a controlled substance into the bloodstream *did not constitute possession* within the meaning of a more restrictive predecessor statute. *See* State v. Downes, 31 Or. App. 1183, 572 P.2d 1328 (1977).

10. *See* Smith v. Employment Div., Dep't of Human Resources, 307 Or. 68, 763 P.2d 146 (1988).

11. Employment Div., Dep't of Human Resources v. Smith, 109 S. Ct. 1526 (1989).

ostensibly to decide "[w]hether the Free Exercise Clause of the First Amendment permits the State of Oregon to [criminalize] religiously inspired peyote use . . . and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use."[12] The Court's analysis of the issue was based on the assumption that "if a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it certainly follows that it may impose the lesser burden of denying unemployment compensation benefits to persons who engage in that conduct."[13] Consequently, even though *Smith* was a civil suit for the collection of unemployment benefits, the focus of the Court's decision was a determination of whether Oregon could criminalize the respondents' use of peyote without violating the First Amendment.[14]

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12. *Smith II*, 110 S. Ct. at 1597. The first time the Court had addressed the respondents' claims, it had held that "if Oregon . . . prohibit[s] the religious use of peyote, and if that prohibition is consistent with the Federal Constitution, there is no federal right to engage in that conduct in Oregon . . . [and] the State is free to withhold unemployment compensation from respondents for [using peyote], despite [their] religious motivation." *Smith I*, 485 U.S. at 672. The rationale behind this analysis is intuitively appealing insofar as it is difficult to justify rewarding criminal activity that results in discharge from work with unemployment benefits. This analysis rests on the assumption, however, that benefits may be denied on the basis of *any* illegal conduct—something that the Oregon statute itself declines to do.

In this respect, the Oregon statute provides: "If the authorized representative designated by the assistant director finds an individual was discharged for misconduct because of the individual's commission of a felony . . . *in connection with the individual's work*, all benefit rights based on wages earned prior to the date of the discharge shall be cancelled . . . ." OR. REV. STAT. § 657.176(3) (1989) (emphasis added). Hence, the Employment Division conceded that "the commission of an illegal act is not, in and of itself, a ground for disqualifying a discharged employee from benefits." Smith v. Employment Div., Dep't of Human Resources, 301 Or. 209, 219, 721 P.2d 445, 450 (1986). Because the case at bar did not concern Smith's peyote ingestion at work or while working, the Employment Division relied on the theory that the greater power to criminalize the conduct includes the lesser power to deny unemployment benefits.

13. *Smith II*, 110 S. Ct. at 1598. While it is true that the State of Oregon certainly may impose a lesser burden *in lieu of* a greater one, it does not necessarily follow that it may impose a lesser burden *in addition to* a greater one. Hypothetically, a thief statutorily deprived of his left hand would legitimately be deprived also of the fingers on that hand. But that statute would not license the taking of the fingers on his right hand as well. The right hand's fingers might legitimately be taken in lieu of the left hand, but not in addition to it. In *Smith*, the Court sanctioned the denial of unemployment benefits as a mechanism, in addition to the criminal law, to discourage the ingestion of peyote. But by imposing a lesser burden in addition to a greater one, it simply begged the question of at what point additions of "lesser burdens" become intolerable. To answer "When the conscience is shocked," or "When the total amount is cruel and unusual," only worsens epistemological problems insofar as "knowing" when either threshold is crossed raises complex philosophical issues.

14. While the Supreme Court found constitutional significance in the fact that the respondents' "misconduct" was a criminal act, the State of Oregon had not found that

The majority, in an opinion authored by Justice Scalia,[15] held that criminal laws of general applicability that have the incidental effect of burdening the free exercise of religion do not violate the First Amendment. Unless the free exercise burden is magnified by the correlative burdening of another constitutional right, such as that of free speech, the State need not justify its regulation by demonstrating that it promotes a compelling governmental interest by narrowly tailored means. Regarding the Court's putative role as the guardian of religious liberty, the majority took the position that if a criminal law of general applicability has the incidental effect of burdening the free exercise of religion, that is a concern of the body politic, and not of the courts.

It is ironic that a Court that is routinely characterized as "conservative" should turn such a thoroughly deaf ear to pleas for religious liberty. To be sure, the ruling has its conservative elements: it rebuffs a back-door threat to the administration's war on drugs,[16] and it allows a popular majority to insulate itself from demands for special accommodation. The decision also marks a further retreat from the practice of scrutinizing statutes for a "compelling governmental interest" *solely* on the basis of those statutes' impact—a favorite device of activist courts.[17] But whatever conservative triumphs the decision might contain, *Smith* could prove a Pyrrhic victory—at least for

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distinction significant to the application of its unemployment benefits law. *See infra* text accompanying note 23.

15. Justice Scalia was joined by Chief Justice Rehnquist and Justices White, Stevens, and Kennedy.

16. Had the Court constitutionally exempted religiously motivated peyote use from general drug use proscriptions, any subsequent efforts to restrain other purportedly "religious" uses of drugs would likely have proven awkward since "[i]t is [an] overriding interest [to keep] the government—whether it be the legislature or the courts—out of the business of evaluating the relative merits of . . . differing religious claims. . . ." United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring). *See also* Hobbie v. Unemployment Appeals Comm'r, 480 U.S. 136 (1987) (establishing that the fact of recent conversion to a faith does not alter a claimant's eligibility for an otherwise valid free-exercise exemption to regulations); United States v. Ballard, 322 U.S. 78 (1944) (holding that courts may inquire into the sincerity of putatively religious beliefs, but not into their accuracy or truthfulness).

17. *Compare* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (finding that disparate impact without any accompanying showing of business justification established the existence of remediable discrimination in violation of Title VII) *with* Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986) (declining to apply compelling-interest scrutiny under the First Amendment to a statute that required the closure for one year of any building in which public health violations had occurred, under which statute an adult bookstore was closed).

religiously minded conservatives—if its ultimate consequence is an emasculated Free Exercise Clause.

In *Smith*, Justice Scalia promulgated a narrow interpretation of the Free Exercise Clause, describing its provisions as protecting only "[t]he right to believe and profess whatever religious doctrine one desires . . . ."[18] He noted that the Court has "[n]ever held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[19] Though Justice Scalia noted that other decisions had applied the First Amendment to require the exemption of religiously motivated conduct from the provisions of a neutral, generally applicable law,[20] he distinguished those cases as "hybrids" that "involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunc-

18. *Smith II*, 110 S. Ct. at 1599. If the Free Exercise Clause protects only belief and profession, however, it is redundant. No law, however ubiquitous, can compel belief, and professions of belief are separately protected under the Free Speech Clause. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech").

19. *Smith II*, 110 S. Ct. at 1600. *See* Hernandez v. Commissioner, 109 S. Ct. 2136 (1989) (rejecting a free-exercise challenge to income tax provisions alleged to deter adherents from engaging in certain church-related activities); United States v. Lee, 455 U.S. 252 (1982) (granting no relief to an Amish employer who failed, for religious reasons, to contribute to the social security tax system); Gillette v. United States, 401 U.S. 437 (1971) (sustaining the military selective service system against the claim that it violated the Free Exercise Clause by conscripting persons who opposed a particular war on religious grounds); Braunfield v. Brown, 366 U.S. 599 (1961) (plurality opinion) (upholding Sunday-closing laws against the claim that they burdened the religious practices of persons whose religions compelled them to refrain from work on other days); Prince v. Massachusetts, 321 U.S. 158 (1944) (holding that a mother could be prosecuted under child labor laws for using her children to dispense religious literature in the streets); Reynolds v. United States, 98 U.S. 145 (1879) (finding that criminal laws against polygamy could be constitutionally applied to those whose religion compelled the practice).

Also cited and quoted in support of the proposition was Minersville School Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586, 594-95 (1940) (announcing that conscientious scruples do not relieve the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs). *But see* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (expressly overruling *Gobitis* in invalidating a compulsory flag-salute statute challenged by religious objectors).

20. *See* Follett v. Town of McCormick, 321 U.S. 573 (1944) (invalidating a tax on solicitation as applied to the dissemination of religious materials); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (holding the same); Cantwell v. Connecticut, 310 U.S. 296 (1940) (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (acknowledging the right of parents to direct the education of their children in accordance with their religious beliefs).

. In Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court invalidated a compulsory school-attendance law as applied to Amish parents who refused on religious grounds to send their children to school. "[T]here are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability." *Id.* at 220.

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tion with other constitutional protections, such as freedom of speech and of the press."[21] Hence, the majority concluded that since there was "no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs,"[22] the First Amendment was not violated, and the State of Oregon was free to criminalize religiously inspired peyote use. Consequently, three previous unemployment compensation decisions, holding that a state could not condition its benefits on an individual's willingness to forego conduct required by his religion, were distinguished on the ground that the religiously motivated conduct at issue in those earlier cases was not criminal.[23]

The Court then addressed the appropriate standard of review for generally applicable criminal laws that incidentally burden the free exercise of religion. The respondents had argued that the Court's decision in *Sherbert v. Verner*[24] required the government to demonstrate an interest sufficiently compelling to justify the burden this statute placed on the free exercise of religion. The majority responded that in recent years it had abstained from applying the *Sherbert* test.[25] The Court stated

21. *Smith II*, 110 S. Ct. at 1601. *But cf. id.* at 1609 (O'Connor, J., concurring) (arguing that both *Cantwell* and *Yoder* "[e]xpressly relied on the Free Exercise Clause" and that the Court "[h]as consistently regarded those cases as part of the mainstream of [its] free exercise jurisprudence").

22. *Id.* at 1602.

23. *See* Hobbie v. Unemployment Appeals Comm'r, 480 U.S. 136 (1987) (Seventh-Day Adventist, whose religion precluded work between sundown on Friday and sundown on Saturday, discharged because she could not work during all of her scheduled shifts); Thomas v. Review Bd. of Ind. Employment Secur. Div., 450 U.S. 707 (1981) (Jehovah's Witness who quit his job because it was contrary to his religious convictions to work in a weapons production unit); Sherbert v. Verner, 374 U.S. 398 (1963) (Seventh-Day Adventist discharged by her employer for refusing to work on Saturday, the Sabbath day of her faith).

24. 374 U.S. 398 (1963).

25. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (declining to apply *Sherbert* analysis to the government's logging and road construction activities on sacred Indian lands); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (sustaining, without mentioning the *Sherbert* test, a prison's refusal to excuse inmates from work requirements in order to attend worship services); Bowen v. Roy, 476 U.S. 693 (1986) (plurality opinion) (declining to apply *Sherbert* analysis to a federal statutory scheme requiring benefit applicants and recipients to obtain social security numbers); Goldman v. Weinberger, 475 U.S. 503 (1986) (rejecting the application of the *Sherbert* test to military dress regulations that forbade the wearing of yarmulkes).

But see Smith II, 110 S. Ct. at 1611 (O'Connor, J., concurring) ("Recent cases have instead affirmed [the compelling-interest] test as a fundamental part of our First Amendment doctrine."). Justice O'Connor pointed out that *Roy* and *Lyng* involved the government's management of its own internal affairs, while *Smith* involved governmental restrictions on the conduct of individuals. She further argued that *Goldman* and

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that "the approach in accord with the vast majority of our precedents . . . is to hold the test inapplicable . . . ."[26] Accordingly, a state need not justify an incidental burden on the free exercise of religion by demonstrating a compelling governmental interest promoted by narrowly tailored means. Such a requirement, the Court stated, would result in religious exemptions from an impermissibly broad spectrum of laws.[27] The Court ended its opinion by counseling that the appropriate forum through which to seek redress is the legislature, noting that "[v]alues that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process."[28]

Justice O'Connor concurred in the judgment but vigorously criticized the majority's analysis.[29] The core of her disagreement with the majority is her belief that a burdensome "effect"

O'Lone arose in "narrow, specialized contexts"—that is, military and prison—in which the Court "ha[s] not traditionally required the government to justify a burden on religious conduct by articulating a compelling interest." *Id.* at 1612 (O'Connor, J., concurring).

26. *Smith II*, 110 S. Ct. at 1602-03. *But cf. id.* at 1611 (O'Connor, J., concurring) (quoting United States v. Lee, 455 U.S. 252, 257-58 (1982); Thomas v. Review Bd. of Ind. Employment Secur. Div., 450 U.S. 707, 718 (1981)):

> Once it has been shown that a government regulation or criminal prohibition burdens the free exercise of religion, we have consistently asked the Government to demonstrate that unbending application of its regulation to the religious objector "is essential to accomplish an overriding governmental interest" or represents "the least restrictive means of achieving some compelling state interest."

27. *See Smith II*, 110 S. Ct. at 1605-06. Justice O'Connor pointed out that Justice Scalia's "parade of horribles," a listing of prior cases in which untenable consequences might have been reached had compelling-interest scrutiny been applied and not been satisfied, merely serves to illustrate "that courts have been quite capable of applying [the Supreme Court's] free exercise jurisprudence to strike sensible balances between religious liberty and compelling state interests." *Id.* at 1613 (O'Connor, J., concurring). Justice Scalia rejoined that "[t]he cases [the majority] cite[s] have struck 'sensible balances' only because they have all applied the general laws, despite the claims for religious exemption." *Id.* at 1606 n.5. Justice O'Connor rebutted: "It is surely unusual to judge the vitality of a constitutional doctrine by looking to the win-loss record of the plaintiffs who happen to come before [the Court]." *Id.* at 1610 (O'Connor, J., concurring).

28. *Id.* at 1606. *But cf.* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943):

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to . . . freedom of worship . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

29. Justices Blackmun, Brennan, and Marshall joined in Justice O'Connor's method of analysis, but reached a different conclusion. *See infra* notes 33-38 and accompanying text.

on religious conduct, whether intentionally or incidentally caused, triggers strict First Amendment scrutiny. She pointed out that because "few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such,"[30] limiting the protections of the Free Exercise Clause to situations where a statute is intentionally aimed at religiously motivated conduct will rob the clause of its significance.[31] Applying the strict-scrutiny test to the respondents' claim, however, Justice O'Connor concluded that allowing "a religious exemption in this case would be incompatible with the State's interest in controlling use and possession of illegal drugs."[32]

Justice Blackmun's dissent[33] also advocated a strict-scrutiny analysis, but proposed a balancing of the "[r]espondents' clear interest in the free exercise of their religion against . . . the State's narrow interest in refusing to make an exception for [it]."[34] Not surprisingly, Justice Blackmun found no government interest sufficiently compelling to deny the respondents unemployment benefits. His opinion is noteworthy for its vacillation of principle. First, Justice Blackmun concurred with Justice O'Connor that statutes with a burdensome *effect* on religious practice should be subject to strict-scrutiny, even where those statutes have been consistently *applied*.[35] Conversely, he dismissed the concern that exempting peyote use but not other purportedly religious drug uses would violate the Establishment Clause[36] by arguing that consistency in the *application* of the strict-scrutiny test—and not in the resulting *outcome* or *effect* of the test's application—is all that is necessary to satisfy claims of a violation based on the disparate treatment of various religions.[37] Finally, Justice Blackmun shifted focus

30. *Smith II*, 110 S. Ct. at 1608 (O'Connor, J., concurring).

31. Presumably, a law designed to prohibit a particular religious practice, as such, would be a violation of the Equal Protection Clause, which states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

32. *Smith II*, 110 S. Ct. at 1615 (O'Connor, J., concurring).

33. Justice Blackmun was joined in dissent by Justices Brennan and Marshall.

34. *Smith II*, 110 S. Ct. at 1616-17 (Blackmun, J., dissenting).

35. *See id.* at 1616 (Blackmun, J., dissenting).

36. "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

37. "Though [the Establishment Clause requires that] the State must treat all religions equally, . . . this obligation is fulfilled by the uniform application of the 'compelling interest' test to all free exercise claims, not by reaching uniform results as to all claims." *Smith II*, 110 S. Ct. at 1621 (Blackmun, J., dissenting).

But see County of Allegheny v. American Civil Liberties Union, 109 S. Ct. 3086, 3105

again to assert that, in cases involving Native Americans, the actual harmful *effect* or "impact" of the disputed governmental action on them is the relevant factor to consider—not the equal *application* of judicial scrutiny.[38] Thus, to Justice Blackmun, "effect" or "impact" is *constitutionally* significant at some times, but not at others. In either case, we are left without a consistent or coherent rule to justify the differentiation.

Smith will undoubtedly revive accusations of discrimination against Native Americans by the "dominant" Christian culture.[39] Ultimately, however, it will not be Native Americans who suffer the most from this decision. Accommodation of religiously motivated peyote use is not uncommon,[40] and one might imagine that Oregon, a putatively liberal state, will "[b]e solicitous of [accommodating religious belief] in its legislation . . . ."[41] In any event, as Justice Blackmun notes, because it is rarely enforced, the Oregon law is a law in name only.[42]

(1989) (Blackmun, J.) (holding that a crèche displayed on the grand staircase of the county courthouse violated the Establishment Clause):

> [G]overnment may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine. Here, Allegheny County has transgressed this line. It has chosen to celebrate Christmas in a way that has the *effect* of endorsing a patently Christian message . . . . *[N]othing more is required to demonstrate a violation of the Establishment Clause.*

Id. (emphasis added).

38. Justice Blackmun stated:

> Th[e] potentially devastating impact [of the Oregon statute] must be viewed in light of the federal policy—reached in reaction to many years of religious persecution and intolerance—of protecting the religious freedom of Native Americans . . . . [T]his Court must scrupulously apply its free exercise analysis to the religious claims of Native Americans, however unorthodox they may be.

Smith II, 110 S. Ct. at 1622 (Blackmun, J., dissenting).

39. *Cf. The Supreme Court, 1987 Term—Leading Cases*, 102 HARV. L. REV. 143, 241 n.62 (1988) (commenting on *Lyng v. Northwest Indian Cemetery Protective Association*):

> The harshness of the Court's decision raises the disturbing question whether familiarity with the infringed religion breeds more accommodating first amendment treatment. If, for example, the government pursued some policy of questionable value that, as an incidental effect, rendered the production of alcohol impossible, it seems likely that a court would be more sympathetic to a free exercise challenge from the Catholic Church, which has for thousands of years used wine in the Eucharist, than was the Supreme Court to the challenge of the Native American respondents in *Northwest Indian*.

40. "Almost half the States, and the Federal Government, have maintained an exemption for religious peyote use for many years . . . ." *Smith II*, 110 S. Ct. at 1620 (Blackmun, J., dissenting).

41. *Id.* at 1606.

42. Oregon case law reflects only one reported case in which the State of Oregon sought to prosecute a person for religious peyote use. *See id.* at 1617 n.3 (Blackmun, J., dissenting). Additionally, the Oregon Supreme Court reserved for itself the prerogative to protect religious peyote use under the Oregon Constitution. *See* Smith v. Employment Div., Dep't of Human Resources, 307 Or. 68, 73 n.3, 763 P.2d 146, 148 n.3 (1988) ("Because no criminal case is before us, we do not give an advisory opinion on

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The role of the Oregon Supreme Court in *Smith* cannot be overlooked. The Supreme Court remanded the case in 1988 for a determination of whether Oregon's controlled substance law encompassed sacramental peyote use.[43] Oregon precedent suggested that the peyote *use* involved in a Native American eucharistic ceremony was readily distinguishable from the *possession* that Oregon's statutes proscribe. Hence, this case could easily have been disposed of in favor of Smith and Black upon remand to the Oregon Supreme Court. The Oregon court, however, eschewed that moderate and simple approach to protecting Native Americans' religious liberty and instead needlessly reached constitutional issues of enormous significance to the proscription of drugs in general.[44] Thus, one explanation for the harshness of the second *Smith* opinion might simply be the Court's loss of patience with an activist Oregon court.[45] Be that as it may, *Smith* was an egregious overreaction.

In *Smith*, the Court entertained a question of doubtful relevance, rendered a highly strained reading of precedent, and announced what appears to many to be a radically altered version of free exercise jurisprudence—all purportedly to escape the evils of "[a] system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[46] One glaring risk of the decision is that of discrimination against unpopular "traditional" religions by the truly dominant secular culture, as legislatures enact facially neutral, generally applicable laws that "incidentally" burden religion, while courts turn a deaf ear to pleas for constitutional protection. *Smith* forces members of unpopular religions to look to a secularized polity for protection against encroachments by that same polity, and for the guarantee of their religious liberty. Neither conservatism, majoritari-

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the circumstances under which prosecuting members of the Native American Church under ORS 475.992(4)(a) for sacramental use of peyote would violate the Oregon Constitution.").

43. *See supra* notes 8-9 and accompanying text.

44. *See supra* note 16 and accompanying text.

45. *But cf. The Supreme Court, 1989 Term—Leading Cases*, 104 HARV. L. REV. 129, 208-09 (1990) ("*Smith's* distortion of precedent and evisceration of religious liberty thus accomplishes nothing except the advancement of cultural hegemony. . . . [It] destroys an entire faith . . . [and] portends an ominous era of constitutional jurisprudence by the new, activist Rehnquist Court.").

46. *Smith II*, 110 S. Ct. at 1606.

anism, the drug war, adherence to precedent, nor intellectual consistency required such a result.

Maximilian B. Torres

POLITICAL PATRONAGE AND THE FIRST AMENDMENT: *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729 (1990).

In *Rutan v. Republican Party of Illinois*,[1] the United States Supreme Court extended the rule set forth in *Elrod v. Burns*[2] and *Branti v. Finkel*[3] that the patronage practice of dismissing public employees on the basis of their political affiliation violates the First Amendment. In *Rutan*, the Court held that the rule applies also to patronage practices involving promotions, transfers, recalls, and hiring decisions. Even so, the strict-scrutiny approach adopted by the majority in *Rutan* fails to define and protect adequately the First Amendment rights of public employees.

The dispute in *Rutan* arose from the issuance of an executive order by the Republican Governor of Illinois, James Thompson, proclaiming a hiring freeze for every state agency, bureau, board, or commission subject to his control.[4] No exceptions to this hiring freeze were allowed without the Governor's "express permission."[5] Requests for permission became routine, and a special agency, the Governor's Office of Personnel (Governor's Office), was organized to screen these requests.[6] After this office was established, an agency with personnel needs screened its applicants in accordance with Illinois civil service practices, made its personnel choices, and forwarded them to the Governor's Office for approval.[7]

The five plaintiffs in *Rutan* filed suit in United States district court, alleging that the Governor had been using the Governor's Office to operate a political patronage system in which new jobs, beneficial transfers, and promotions were reserved

1. 110 S. Ct. 2729 (1990).
2. 427 U.S. 347 (1976).
3. 445 U.S. 507 (1980).
4. *See Rutan*, 110 S. Ct. at 2732.
5. *Id.*
6. *See id.*
7. *See id.*

for supporters of the Republican Party.[8] Furthermore, the plaintiffs alleged that they had suffered discrimination with respect to state employment opportunities because they had not been supporters of the Illinois Republican Party, and they alleged further that their First Amendment right to associate with the political party of their choice had been violated.[9]

The district court dismissed the complaint under Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief could be granted.[10] The United States Court of Appeals for the Seventh Circuit initially issued a panel opinion,[11] and then reheard the appeal en banc and affirmed in part and reversed in part.[12] Noting that the Supreme Court in *Elrod* and *Branti* had determined that the practice of discharging public employees on the basis of their political affiliation violated the First Amendment, the Seventh Circuit held that other patronage practices violated the First Amendment only when they "could *reasonably* be thought to be the substantial equivalent of dismissal."[13] The court ruled that an employment decision was equivalent to dismissal when it would "le[ad] a reasonable person to quit."[14] The court remanded the case for further proceedings, but affirmed the dismissal of Moore's claim because it found that basing hiring decisions on political affiliation did not violate the First Amendment.[15]

Rutan, Taylor, and Moore petitioned the Supreme Court to review the constitutional standard set forth by the Seventh Cir-

8. *See id.* The plaintiffs alleged that, in reviewing an agency's request, the Governor's Office only approved the applications of candidates who had voted in Republican primaries, had provided support to Republican candidates or the Party, had promised to support the Republican Party in the future, or had the support of Republican Party officials at the state and local levels. *See id.*

9. *See id.* The plaintiffs were state employees or prospective state employees holding or seeking non-policymaking positions. Rutan worked for the state as a rehabilitation counselor and claimed that she had been denied supervisory positions because she did not support the Republican Party. Taylor, a road equipment operator for the Illinois Department of Transportation, claimed he was denied a promotion because he lacked the support of the local Republican Party and that he was denied a transfer to an office nearer his home because of opposition from the local Republican Party chairman. Moore claimed that he had been denied employment as a prison guard because he did not have the support of local Republican officials. Standefer and O'Brien claimed that they were not recalled after layoffs because they had supported the Democratic Party. *See id.* at 2733.

10. *See* Rutan v. Republican Party of Ill., 641 F. Supp. 249 (C.D. Ill. 1986).

11. *See* Rutan v. Republican Party of Ill., 848 F.2d 1396 (7th Cir. 1988).

12. *See* Rutan v. Republican Party of Ill., 868 F.2d 943 (7th Cir. 1989) (en banc).

13. *Id.* at 956 (emphasis in original).

14. *Id.* at 956.

15. *See id.* at 954.

cuit and the dismissal of Moore's claim. The Supreme Court granted certiorari and held, five-to-four, that the First Amendment's proscription of patronage dismissals, as recognized in *Elrod* and *Branti*, extended to promotion, transfer, recall, and hiring decisions involving non-policymaking public employment positions.

The majority opinion, authored by Justice Brennan and joined by Justices White, Marshall, Blackmun, and Stevens, reasoned that the practice of basing the employment decisions implicated in this case on political affiliation had the same coercive effect on employees' First Amendment freedom of political association that dismissal decisions so based were found to have in *Elrod* and *Branti*. In *Elrod* and *Branti*, the Court determined that conditioning continued public employment on the provision of support for the favored political party "unquestionably inhibits protected belief and association."[16] Similarly, the *Rutan* majority relied upon the doctrine of unconstitutional conditions, which prohibits the state from "deny[ing] a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."[17] Because the Republican administration in Illinois was conditioning the receipt of employment benefits upon the employees' waiver of their First Amendment right to associate, the government was attempting to "produce a result which [it] could not command directly."[18]

Addressing first the claims of the four plaintiff employees, the majority rejected the respondents' argument that *Elrod* and *Branti* were inapplicable because the patronage dismissals in those cases were different from failure to promote, transfer, or recall after layoff.[19] The respondents argued that the employees' First Amendment rights had not been infringed because they had no entitlement to promotion, transfer, or rehire. This argument, however, had already been rejected in *Elrod* and *Branti*, because the employees in those cases had no entitlement to continued employment.[20] The employees in *Rutan* who refused to compromise their political beliefs stood to lose the considerable increases in pay and job satisfaction associated

16. *Rutan*, 110 S. Ct. at 2734 (quoting Elrod v. Burns, 427 U.S. 347, 359 (1976)).
17. *Id.* at 2736 (quoting Perry v. Sindermann, 408 U.S. 593, 597 (1972)).
18. *Id.* (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).
19. *See id.* at 2735.
20. *See id.*

with promotions or transfers and even their jobs if they were not recalled after being laid off.[21] The majority found that these were significant penalties for the exercise of rights guaranteed by the First Amendment, and that such practices could be justified only if they were narrowly tailored to further vital government interests.[22]

The majority found that the employees' First Amendment rights had been violated under this standard, because of the availability of less restrictive alternatives to denying employment benefits on the basis of political affiliation that would still meet the respondents' interests in maintaining efficient government and nurturing the political parties. For example, the State could simply deny employment based on deficient job performance, and thus affect only those employees whose political beliefs actually contribute to inefficient government, and not those performing adequately in spite of their political differences with the administration.[23] Implementation of the administration's policies could also be accomplished with less infringement on employees' First Amendment rights by choosing or dismissing only certain high-level employees on the basis of their political views.[24] Because patronage impairs the political process by discouraging free expression by public employees, the majority determined that the patronage system practiced by the Republican administration in Illinois served no vital government interest that could not be met with less intrusion on the First Amendment rights of state employees.[25]

Finally, the majority rejected the "substantial equivalent of dismissal" test set forth by the Seventh Circuit. The Court found this test unduly restrictive because it failed to recognize that "there are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy."[26] The Court concluded that this interference by the government with employees' freedom to believe and associate is not allowed by the First Amendment except in the most compelling

21. *See id.* at 2736.
22. *See id.*
23. *See id.* at 2737.
24. *See id.*
25. *See id.*
26. *Id.*

circumstances.[27]

With respect to Moore's claim that the state's refusal to hire him because of his political beliefs violated his First Amendment rights, the majority reversed the Seventh Circuit's dismissal of the claim.[28] The Court stated that the denial of a government job was a serious deprivation and found that the loss of a job opportunity for failure to compromise one's convictions supported a constitutional claim.[29] Under *Elrod*, "conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so."[30] In *Branti*, the Court had stated that the State demonstrates a compelling interest in infringing First Amendment rights only when it can show that "party affiliation is an appropriate requirement for the effective performance of the public office involved."[31] As it found for patronage promotions, transfers, and recalls, the majority found that, in this case, no vital government interest was served by the refusal to hire.[32]

The Court avoided the issue of whether denying employment for political reasons could be distinguished under the First Amendment from firing employees for political reasons. In this regard, the majority found it "unnecessary here to consider whether not being hired is less burdensome than being discharged because the government [was not forced] to do *either* on the basis of political affiliation."[33] The Court saw the proper question not to be which denial is more acute, but rather whether the government, without sufficient justification, has pressured employees to discontinue the free exercise of their First Amendment rights.[34]

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27. *See id.* at 2738.

28. *See id.* at 2739.

29. *See id.* at 2738. *See also* Keyishian v. Board of Regents of Univ. of New York, 385 U.S. 589 (1967) (holding law affecting appointment and retention of teachers invalid because it unconstitutionally restricted political belief and association); Elfbrandt v. Russell, 384 U.S. 11 (1966) (striking down loyalty oath requirement for public employees); Torcaso v. Watkins, 367 U.S. 488 (1961) (holding that appointment to a notary public position could not be based on declaration of belief in God); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947) (holding that federal employment cannot be denied on the basis of political party affiliation).

30. *Rutan*, 110 S. Ct. at 2739 (citing *Elrod*, 427 U.S. at 362-63; *Branti*, 445 U.S. at 515-16).

31. *Branti*, 445 U.S. at 518.

32. *See Rutan*, 110 S. Ct. at 2739.

33. *Id.* (emphasis in original).

34. *See id.*

Justice Scalia, joined by Chief Justice Rehnquist and Justice Kennedy, and joined in part by Justice O'Connor, filed a lengthy dissent in which he argued that the constitutional restrictions on the government as employer are not the same as the restrictions on the government in its capacity as lawmaker.[35] Justice Scalia cited *Connick v. Myers*[36] and *United Public Workers v. Mitchell*[37] to support the proposition that public employees may be dismissed or punished for private speech or for partisan political activity when private citizens may not.[38] Once it is clear that the government is treated differently in its capacity as employer, it is difficult to assess which employment practices are permissible and which are not.[39]

Justice Scalia would resolve this ambiguity in favor of patronage employment practices where there is no express prohibition in the Bill of Rights, and where there is a long tradition of open, widespread, and unchallenged use of patronage as a basis for government employment.[40] Justice Scalia argued that the Court should look to such traditions when trying to determine the constitutional legitimacy of a government practice:

> When it appears that the latest "rule" or "three-part test" or "balancing test" devised by the Court has placed us on a collision course with such a landmark practice, it is the former that must be recalculated by us, and not the latter that must be abandoned by our citizens.[41]

In the absence of tradition, Justice Scalia would use a rational-relationship test to examine the government's interest in promoting efficient government, instead of the strict-scrutiny test applied by the majority. When the government operates not in its capacity as regulator or lawmaker, but as manager of its internal affairs, Justice Scalia argued that the Court has consistently applied a lower level of scrutiny.[42] The government may not deal with its employees in an arbitrary or capricious manner, but its regulations are valid if they bear a "rational

35. *See id.* at 2747 (Scalia, J., dissenting).
36. 461 U.S. 138 (1983).
37. 330 U.S. 75 (1947).
38. *See Rutan*, 110 S. Ct. at 2748 (Scalia, J., dissenting).
39. *See id.* (Scalia, J., dissenting).
40. *See id.* (Scalia, J., dissenting).
41. *Id.* (Scalia, J., dissenting).
42. *See id.* at 2749 (Scalia, J., dissenting) (citing Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961)).

connection"[43] to the governmental end sought to be served.

Although Justice Scalia was confident that strict scrutiny was not the proper test, he was uncertain about the correct standard to use, because the Court had used various formulations in the past.[44] He asserted that, based on *Public Workers*, the test of whether the practice could be "reasonably deemed"[45] by the government to further a legitimate goal was the most meritorious test. To remain in closer accord with the majority's general balancing test, however, he chose to apply a less permissive test: Can the governmental advantages of this employment practice reasonably be deemed to outweigh its coercive effects?[46]

Applying this test, Justice Scalia noted the great benefits to the political parties provided by the practice of patronage hiring; these benefits include maintaining the interest of the "rank-and-file" members between elections by offering employment rewards, maintaining party discipline and loyalty, and fostering the two-party system by encouraging workers to work for the major parties instead of parties that they philosophically may favor more.[47] He expressed fear that the majority's decision would make politicians more susceptible to capture by special-interest groups, because they would be unable to rely on support from party members.[48] Justice Scalia also claimed that a primary beneficiary of the patronage system, traditionally excluded minorities, would have more difficulty achieving power in the absence of patronage. He argued that the political in-roads made by blacks in recent times through their support of "a particular party 'machine,' " would be damaged as politicians were forced to seek support from the monied interest groups "downtown."[49]

Although the patronage system "influences or redirects, perhaps to a substantial degree, individual political expression and political association,"[50] Justice Scalia did not consider it to be a significant impairment of free speech or free association.[51] In

43. *Id.* (Scalia, J., dissenting) (quoting Kelley v. Johnson, 425 U.S. 238, 247 (1976)).
44. *See id.* at 2751-52 (Scalia, J., dissenting).
45. United Pub. Workers v. Mitchell, 330 U.S. 75, 101 (1947).
46. *See Rutan*, 110 S. Ct. at 2752 (Scalia, J., dissenting).
47. *See id.* at 2752-54 (Scalia, J., dissenting).
48. *See id.* at 2754 (Scalia, J., dissenting).
49. *Id.* at 2755 (Scalia, J., dissenting).
50. *Id.* (Scalia, J., dissenting).
51. *See id.* at 2755-56 (Scalia, J., dissenting).

essence, Justice Scalia argued not that patronage is the best system for government hiring, but only that it may be a reasonable choice for elected representatives to make.[52] Unlike the majority, he found it impossible to say that all possible uses of patronage hiring fail the "balancing test" that should be used to judge such systems.[53]

In the final portion of his opinion, Justice Scalia concluded that *Elrod* and *Branti* should not be extended to prohibit patronage practices other than dismissal, but rather that *Elrod* and *Branti* should be overruled.[54] He observed that, although it has been unwilling to allow political bodies to draw a line between permissible and impermissible patronage hiring practices, the Court has been equally unwilling to rule that no such line exists—and unable to draw a predictable line itself that judges, lawyers, and public employees can understand.[55] Uncertainty about the application of the *Branti* rule, argued Justice Scalia, undermines the very purpose of the rule: preventing coercion of public employees' political beliefs.[56] He stated that, if employees cannot be confident that their job is not one for which party affiliation is an appropriate requirement, then they may succumb to pressure to conform their political beliefs to those of the ruling party rather than risk an adverse ruling in the courts.[57] The political parties, on the other hand, will be unwilling to fire those in jobs for which political affiliation may be an appropriate consideration, for fear of exposing themselves to potential liability. Consequently, less efficient government will be the result of unenthusiastic implementation of administration policies. Because of the chaos and confusion the *Rutan* decision is likely to cause, Justice Scalia prophesied that the majority's decision ultimately may be the first step on the road to overruling *Elrod* and *Branti*.[58]

Justice Stevens filed a concurring opinion in which he denied Justice Scalia's charge that the majority was, in effect, instituting a civil service system in Illinois that grants de facto tenure to all public employees.[59] Justice Stevens noted the clear dis-

52. *See id.* at 2756 (Scalia, J., dissenting).
53. *See id.* (Scalia, J., dissenting).
54. *See id.* (Scalia, J., dissenting).
55. *See id.* (Scalia, J., dissenting).
56. *See id.* at 2757 (Scalia, J., dissenting).
57. *See id.* (Scalia, J., dissenting).
58. *See id.* at 2758-59 (Scalia, J., dissenting).
59. *See id.* at 2740 (Stevens, J., concurring).

tinction between the grant of tenure to an employee and the prohibition of discharge for a particular impermissible reason.[60]

Justice Stevens responded to Justice Scalia's argument that the Court should look to the long tradition of patronage hiring to determine its constitutionality by noting that racial discrimination could be upheld under a similar standard.[61] Furthermore, he argued that when patronage was widely accepted, it was assumed that there was no valid constitutional objection to an employee's summary removal because there was no constitutional right to the job.[62] Justice Stevens argued that the Court's line of "unconstitutional condition" cases has rejected that fundamental assumption under which patronage prospered for so many years.[63]

Justice Stevens then criticized Justice Scalia's balancing test, which would weigh the state's interest in patronage hiring against the aggregated interests of the many public employees affected by the practice, because it embodies the assumption that "governmental power and public resources—in this case employment opportunities—may appropriately be used to subsidize partisan [political] activities even when the political affiliation of the employee or the job applicant is entirely unrelated to his or her public service."[64] Justice Stevens likened this assumption to using public funds to compensate party members for campaign work or to a legislative enactment denying employment to members of the minority party—acts that would be clearly unconstitutional.[65] Justice Stevens ended his concurrence by stating that although patronage is defended in the name of democratic tradition, its true impact on the body politic is to inhibit or manipulate the political choices of public servants by the selective award of public benefits; it represents a "paternalistic impact on the political process at war with the

60. *See id.* (Stevens, J., concurring) (quoting Illinois State Employees Union, Council 34 v. Lewis, 473 F.2d 561, 567-68 (7th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973)).

61. *See id.* at 2741 (Stevens, J., concurring) (quoting *Lewis*, 473 F.2d at 568 n.14).

62. *See id.* (Stevens, J., concurring).

63. On this point, Justice Stevens quoted an opinion written by Justice Marshall when he was a United States Court of Appeals judge, in which then-Judge Marshall stated that " 'the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.' " *Id.* at 2742 (Stevens, J., concurring) (quoting Keyishian v. Board of Regents of Univ. of New York, 45 F.2d 236, 239 (2d Cir. 1965) (Marshall, J.)).

64. *Id.* at 2744-45 (Stevens, J., concurring).

65. *See id.* at 2745 (Stevens, J., concurring).

deeper traditions of democracy embodied in the First Amendment."[66]

Patronage hiring at *some* level is both necessary and desirable in government. The Court accepted this fact when it promulgated the "appropriate requirement" test in *Branti*, and the policymaking test in *Elrod*.[67] Both of these tests imply acceptance of the notion that there are some governmental positions for which political affiliation is an appropriate consideration. Congressional staff jobs and Cabinet positions are obvious examples. The majority and the dissent differ in their characterizations of where the line between patronage and non-patronage jobs should be drawn and in their determinations of who should draw the line.

The majority, using strict scrutiny, favors a case-by-case approach in which the courts will examine each patronage dismissal or denial of public employment to determine whether political affiliation is an "appropriate requirement" for that particular job, and whether there is an alternative to dismissal or denial that would be less restrictive of First Amendment rights. Because of the test's manifest indeterminacy, however, this approach fails to prevent the chilling effect on public employees' First Amendment rights that it is designed to correct.

In clear-cut cases, the test may prevent state and local governments from instituting patronage practices for some clearly non-political, non-policymaking jobs, and, at the same time, allow newly elected governments to fill policymaking posts with party members. In many borderline cases, however, the test will provide little guidance to either the public employee or to the government. As Justice Scalia pointed out, prior to adjudication, the employee will not know whether his job will be found to meet the "appropriate requirement" test.[68] Consequently, the employee will often be unwilling to risk losing his job by exercising his First Amendment rights. The government, on the other hand, will be uncertain whether it will incur substantial liability for dismissing an employee for political reasons and thus may not replace some employees whose jobs actually meet the "appropriate requirement" test, thereby making im-

66. *Id.* at 2746 (Stevens, J., concurring) (quoting Illinois State Employees Union, Council 34 v. Lewis, 473 F.2d 561, 576 (7th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973)).

67. *See supra* notes 30-31 and accompanying text.

68. *See Rutan*, 110 S. Ct. at 2756 (Scalia, J., dissenting).

plementation of the incoming administration's program more difficult. Additionally, courts in various jurisdictions will apply the "appropriate requirement" test differently, producing inconsistent decisions for similar jobs—as Justice Scalia argued, a problem in political dismissal cases ever since the *Elrod* and *Branti* cases were decided.[69]

The state legislatures appear to be in a much better position than the courts to determine the political requirements of the endless array of jobs in a particular state's government. State legislatures are better able to classify jobs as suitable or unsuitable for patronage hiring and to codify such determinations, so that both employees and the government may know their respective rights.[70] Only a system in which determinations are made in advance, and are ascertainable by all parties involved, will serve the dual purposes of maintaining optimal First Amendment protection for public employees and promoting efficient government.

Such determinations made by state legislatures should be subject to a relaxed level of judicial review. Challenged determinations should be subjected to a rational-relationship review, one that would require that government regulation of its employees must not be "patently arbitrary or discriminatory,"[71] and must bear a "rational connection"[72] to the governmental end sought to be served. This process would protect public employees from such flagrant abuses of patronage hiring as occurred in *Rutan*.

Applying this proposed test to the facts in *Rutan*, it is difficult to see how patronage hiring for such positions as rehabilitation counselor, road equipment operator, prison guard, garage worker, and dietary manager are rationally connected to efficient government. Justice Scalia argued that the governmental interest involved is the promotion of the two political parties

69. *See id.* at 2756-57 (Scalia, J., dissenting).

70. The federal government has adopted this approach. The Office of Personnel Management has composed Schedule C, which lists positions of a "confidential or policy-determining character" that are excepted from the competitive civil service system. 5 C.F.R. § 213.3301 (1990).

71. Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 898 (1961) (upholding denial of continued employment for cook at naval base so long as reason for denial was not "patently arbitrary or discriminatory").

72. Kelley v. Johnson, 425 U.S. 238, 247 (1976) (upholding county regulation limiting length of policemen's hair against Fourteenth Amendment challenge so long as regulation had "rational connection" to legitimate government interest in promoting public safety).

and that patronage hiring even for such politically neutral positions promotes that goal.[73] As Justice Stevens pointed out, though, patronage has not been shown to have played a meaningful role in the preservation of the two-party system.[74] Moreover, while maintaining a two-party system is arguably a desirable goal, it is clearly not a constitutional mandate like the protection of an individual's freedom of political association and speech. Indeed, even if a rational relationship were established in this case, it seems entirely improper to sacrifice public employees' freedom of political expression in the interest of fostering the two political parties' well-being.

The government jobs at issue in the *Rutan* case should certainly lie outside the appropriate reach of any patronage hiring system, even under rational-relationship review. The majority reached the correct result, but in doing so, they extended the reach of *Elrod* and *Branti*—decisions that had already created a hopelessly inconsistent and unpredictable jurisprudence in this area that fails to protect the very interests *Elrod* and *Branti* rightly seek to uphold. The test chosen by the majority in *Rutan* has proven impossible to apply in a consistent and logical manner, because determining whether a particular government job is appropriately a "political" appointment is an inherently political question—one poorly suited for judicial determination. First Amendment rights of public employees would be better protected by allowing state legislatures to determine which jobs are appropriate for patronage practices, subject only to rational-relationship review by the courts. This approach would most effectively serve the dual purposes of allowing patronage hiring for those jobs in which political partisanship is desirable and of minimizing the chilling effects on public employees' political associations by apprising employees whether their job is one in which they may be dismissed for not supporting the party in power.

Steven G. Heinen

73. *See Rutan*, 110 S. Ct. at 2754 (Scalia, J., dissenting).
74. *See id.* at 2742 n.4 (Stevens, J., concurring).

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SYMPOSIUM

WHAT'S WRONG WITH OUR UNIVERSITIES?

DEREK BOK*

I. INTRODUCTION

Looking back on the 1980s, I am struck by a remarkable contrast in the views expressed about American universities. Throughout this decade, we have repeatedly heard from foreign sources that our system of higher education is the best in the world in quality of scientific research, inventiveness of educational programs, accessibility to all segments of society, and flexibility in adapting to the differing needs of a vast student population.[1] In international opinion surveys, our leading universities invariably dominate.[2] We are the country of choice for students around the world seeking to pursue their education abroad.[3] Business leaders and government officials from overseas extol the quality of our academic science and admire its stimulative effects on the economy.

At a time when America's ability to compete is being challenged in many spheres, these achievements should be a cause for celebration. Yet surprisingly, far from praising our universities, critics in this country have attacked them more savagely during the past ten years than at any time in my memory. Higher education has been termed "under-accountable and under-productive"[4] and "a national disgrace."[5] Undergraduate education has been accused of "wind[ing] downward toward mediocrity"[6] with a curriculum alternately described as "cha-

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1. *See* Rosovsky, *Highest Education: Our Universities Are the World's Best*, THE NEW REPUBLIC, July 13, 1987, at 13.

2. *See id.*

3. *See id.*

4. Bennett, *Our Greedy Colleges*, N.Y. Times, Feb. 18, 1987, at A31, col. 1.

5. Glidden, *Teaching of the Timeless Virtues to a People of Rampant Pluralism*, L.A. Times, Mar. 26, 1989, § 5, at 3, col. 3.

6. Amberg, *Higher (-Priced) Education*, 1989 AM. SCHOLAR 521, 532.

otic,"[7] a "disaster area,"[8] or "rotten to the core."[9] Faculties too have had their fair share of criticism. According to one recent book: "[T]he professors—working steadily and systematically—have destroyed the university as a center of learning and have desolated higher education, which no longer is higher *or* much of an education."[10]

These harsh indictments have not been culled from fly-by-night journals or obscure newsletters. The fact that they have appeared so often in reputable publications and have attracted the attention of so many readers compels us to take them seriously. What merit do the criticisms possess and how can we reconcile them with higher education's outward signs of success? These questions seemed intriguing, important, and especially appropriate for an Article written at the close of one eventful decade and the beginning of another.[11]

II. Origins of the Recent Criticism

The international reputation of American universities owes much to a remarkable consensus that emerged after World War II. For twenty-five years, the White House, Congress, and the American public were united in their resolve to develop the highest quality of scientific research and to open higher education to ever larger fractions of the nation's youth.[12] In pursuit

7. *E.g.*, Yoder, *Yes, There's Intelligent Life Outside Harvard*, Wash. Post, Sept. 9, 1986, at A25, col. 1; *Three Academics Debate: What Is Great?*, Christian Science Monitor, Apr. 22, 1988, at B6, col. 4.

8. *E.g.*, Stone, *Common Sense in College*, U.S. News & World Rep., Jan. 23, 1978, at 84; *Harvard Education: A Matter of Coping, Not Facts*, Wash. Post, Sept. 21, 1979, at A3, col. 1.

9. De Paulo & Mundy, *Why Higher Education Is Neither: America's Rotten to the Core Curriculum*, Wash. Monthly, Oct. 1989, at 31.

10. C. Sykes, ProfScam: Professors and the Demise of Higher Education 4 (1988) (emphasis added). A partial list of books and articles exemplifying the criticism of the 1980s would include A. Bloom, The Closing of the American Mind: How Higher Education Has Failed Democracy and Impoverished the Souls of Today's Students (1987); P. Smith, Killing the Spirit (1990); W. Bennett, To Reclaim a Legacy (1984); Bennett, *Address at Harvard's Anniversary Celebration Symposium, reprinted in* Chron. Higher Educ., Oct. 15, 1986, at 27, col. 2; Amberg, *supra* note 6; Brimelow, *The Untouchables*, Forbes, Nov. 30, 1987, at 140; De Paulo & Mundy, *supra* note 9; Finn, *Ignoble and Self-Serving Practices Subvert the Moral Authority of Higher Education*, Chron. Higher Educ., Dec. 13, 1989, at B1, col. 3; and Cheney, *Humanities in America, Report to the President, the Congress, and the American People, reprinted in* Chron. Higher Educ., Sept. 21, 1988, at A17, col. 2.

11. In this single Article, I cannot cover all of the criticisms made of higher education. For example, I will not try to respond in detail to the radical critique, prominent in the late 1960s and early 1970s, which condemned universities for being too much the servants of the established order. My primary concern is with a somewhat different list of complaints that commanded attention in the 1980s.

12. This resolve resulted in the passage of such legislation as the National Science

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of these goals, government agencies, foundations, corporations, and private donors all gave vast sums to improve and enlarge our colleges and universities.

This postwar consensus lasted in full vigor until the late 1960s. Since then, it has gradually eroded. Not that the public has lost interest in universities; America still wants education and research of high quality. But trust in established institutions fell sharply after Vietnam and Watergate, and universities were not immune from the trend. Following the student protests and political battles that erupted on many campuses, the public's confidence in higher education plummeted, and has recovered only moderately since then.

Support for higher education continued to weaken in the 1980s. Deficits and tax cuts limited Washington's capacity to pay for its programs, causing federal officials to quarrel increasingly with universities over how to share the costs of educating students and conducting research. The contentious spirit of the 1970s persisted, spawning a host of sour complaints about almost every kind of institution. In education, the political climate of the 1980s gave prominence to public figures and intellectuals of a conservative bent who saw universities as liberal strongholds populated by cocksure, opinionated professors. Emboldened by receptive audiences, these critics were outspoken in expressing their views.

Society's confidence has been further shaken by the growing number of disgruntled academics willing to vent their spleen in the most unflattering terms. It is commonplace today to come across articles by tenured professors referring to higher education as "ignoble," "decadent," "a desert," or words to that effect.[13] A recent best-seller on the subject written by a scholar at a prominent university is subtitled: *How Higher Education Has Failed Democracy and Impoverished the Souls of Today's Students*.[14] If faculty members speak so harshly and repeatedly accuse their colleagues of everything from sabotaging affirmative action to destroying intellectual standards, the public is bound to wonder whether something is not badly amiss.

Foundation Act of 1950, ch. 171, 64 Stat. 149 (codified as amended at 42 U.S.C. §§ 1861-1875 (1988)); and the Servicemen's Readjustment Act of 1944 (G.I. Bill of Rights), ch. 268, 58 Stat. 284 (codified as amended in scattered sections of United States Code).

13. *See, e.g.*, Finn, *supra* note 10.

14. A. BLOOM, *supra* note 10.

For these reasons, the wide support for higher education, so evident until the late 1960s, has fallen under the shadow of a long list of complaints. Many observers condemn the quality of undergraduate education for its formless curriculum, its lack of personal attention from senior professors, its huge classes broken into smaller sections taught by inexperienced graduate students.[15] Another series of charges, aimed at the tenured faculty, includes such items as reduced teaching loads, the flight from classrooms to research, and the penchant of some professors for high-priced consulting, starting businesses, or even hosting talk shows and arguing legal cases for large fees. The public has been equally incensed by the rapid rise in college costs that occurred throughout the 1980s, when tuitions often jumped by amounts more than double the rate of inflation.[16] Still other critics point to gross materialism on the part of universities, typified by endless capital campaigns, lucrative research contracts with private companies, heavy lobbying for government appropriations, and periodic scandals in big-time athletic programs.[17]

These complaints are often spiced with flamboyant rhetoric to seize the reader's attention. Some make assertions of fact that are flatly wrong, and many cite the behavior of a few institutions or professors to damn the entire enterprise. It is tempting, therefore, to launch into a point-by-point refutation of the charges. But that would be a tedious exercise, bogging us down in a long, inconclusive recitation of familiar arguments and forgettable statistics. In the process, we would lose sight of the elements of truth imbedded in most of the criticisms, truths that even successful universities need to ponder for their own improvement.

A detailed rebuttal might also deflect us from looking beyond the charges to consider whether we possess a reasonable set of standards for evaluating American higher education. This is a matter of great importance. In the past twenty-five years, we have all grown used to attacks on almost everything and everyone with any power, influence, or visibility. Battalions of commentators have acquired a vested interest in the use of

15. *See* Amberg, *supra* note 6, at 528.

16. *See* Brimelow, *supra* note 10, at 140.

17. *See, e.g.*, Sheler, Toch, Morse, Heupler & Linnon, *A New Era On Campus*, U.S. NEWS & WORLD REP., Oct. 16, 1989, at 54.

eye-catching prose to rouse the public's ire about the foibles and misadventures of every kind of public leader and organization. While much of this criticism is undoubtedly deserved, the temptations for exaggeration and excess are very strong. By now, all of our important institutions and their leaders have fallen sharply in the public's estimation. Continued attacks of a careless nature could needlessly deplete society's trust even more and impair the work of organizations on which our welfare ultimately depends. To forestall this danger, we must lay the foundations for a more responsible critique. In the case of higher education, we might begin by discovering what society seems to be asking of its universities. Only after we have analyzed these demands and arrived at a reasonable, realistic set of expectations can we build adequate standards by which to judge our universities and hold them accountable.

A. *Basic Principles*

Despite all the controversies that swirl around higher education, a broad consensus exists about fundamental ends and means. We want our universities to produce research of a quality second to none so that we can enlarge our knowledge, renew our culture, and produce new insights to help us conquer disease, promote technological progress, and overcome our social problems. Everyone wishes to give young people an education that will prepare them to live productive lives; to be knowledgeable, critical members of our democratic society; and to appreciate, as fully as possible, the human experience and the world around them. We are also united in wanting colleges and universities accessible enough that all who seek education after high school can find opportunities appropriate to their talents.[18] Finally, because universities represent our principal source of expert knowledge and highly trained people, we would like them to offer the kinds of education, advice, and critical analysis that society needs in order to prosper and move forward.

Different segments of higher education pursue these objectives in different ways. Research universities, the principal focus of this Article, contribute to all of the ends just described. Other segments, such as community colleges or liberal arts in-

18. *See, e.g.*, RESEARCH & POLICY COMM., COMM. FOR ECON. DEV., CHILDREN IN NEED, INVESTMENT STRATEGIES FOR THE EDUCATIONALLY DISADVANTAGED 1 (1987).

stitutions, pursue more specialized, though important, aims. Taken as a whole, the entire decentralized system, with more than 3,500 separate colleges and universities, serves our interest extremely well. It offers many points of initiative and widely varying educational experiences to satisfy the demands of a huge, heterogeneous student population. It produces a striving for success that spurs institutions to innovate and to recruit talented students and faculty with attractive programs and facilities. In diffusing authority, it minimizes the consequences of mistaken decisions. These are not trifling advantages. By all accounts, the government-controlled systems that predominate in Western Europe have not functioned nearly as effectively in providing quality, adaptability, and innovation.[19] Indeed, I cannot recall a single commentator who has suggested that another form of organization might be superior to our own.

Good as our diverse system is, however, it hardly works perfectly. Occasionally, competition arouses such a desire to succeed that individuals and institutions resort to improper behavior. Some intercollegiate varsity teams cheat in recruiting athletes in an effort to gain national prominence.[20] Some colleges try to increase enrollments by pandering to applicants in frivolous ways ("Club Med with books").[21] Some universities avoid merit-based review and employ lobbyists to talk Congress into appropriating money on political grounds for new science facilities. A few researchers even stoop to fraud in an effort to promote their careers.[22]

It is right to criticize the individuals responsible for such behavior. It is also right to condemn their institutions if they endorse the questionable practices or fail to take proper measures to prevent such misdeeds and to penalize those responsible. But until these actions cease to be exceptions and become the rule, it is wrong to blame all of higher education. Occasional transgressions of this kind are an inevitable result of the form of organization that we have chosen to follow and that has given us much benefit. Unless we are prepared to recommend another system, it makes little sense to condemn the one we have for shortcomings intrinsic to its very nature.

19. *See, e.g.*, Rosovsky, *supra* note 1.
20. *See, e.g.*, Sheler, Toch, Morse, Heupler & Linnon, *supra* note 17, at 56-57.
21. *See id.*
22. *See* Greenberg, *Publish or Perish—or Fake It*, U.S. NEWS & WORLD REP., June 8, 1987, at 72.

A second defect of decentralized competition is that it provokes a certain amount of wasted or misguided effort in the struggle to get ahead. Colleges (like commercial advertisers) will spend more money trying to attract good students than can be justified by the need to inform applicants about their options. In an attempt to enhance their reputations, many institutions will push their professors to give more time to research than their likely contributions to knowledge could possibly warrant.[23] Similar motives may lead universities to found more institutes and programs in particular fields than the country actually needs.[24] These excesses are costly, and we should look for ways to reduce them. On balance, however, the losses incurred are a price worth paying for the energy and initiative that friendly rivalry engenders.

A third drawback of our system is that students (and their parents) cannot easily judge the quality of the education they will receive in different colleges and universities. It is difficult for applicants to find the relevant information or to know what information they need.[25] And even if all the pertinent facts were known, judgments of educational quality would still be highly subjective and imprecise.

The effects of this problem can be best understood by comparing education with a tangible product such as the automobile. Because buyers can readily discover which models have the greatest mileage per gallon, the best safety record, or the fewest repairs, manufacturers strive mightily to improve the performance of their products in all these respects. The effects of educational programs, on the other hand, cannot be measured so precisely. Colleges cannot supply reliable data about the quality of teaching and learning on their campuses. Worse yet, many students do not care enough to ferret out the scraps of information that are available. For these reasons, student applicants do not exert an informed pressure on universities to make determined, comprehensive efforts to improve their educational programs.

While this is a significant drawback, there are good grounds for preferring our competitive system to the existing alternatives. Many students and their parents do pay attention to the

23. *See* C. SYKES, *supra* note 10, at 101-07.
24. *See* Sheler, Toch, Morse, Heupler & Linnon, *supra* note 17, at 54-55.
25. *See id.* at 57.

reputation of the faculty, the range of courses offered, the adequacy of the facilities, and the quality of the student body. Their concern encourages universities to improve in these important respects. Granted, such pressures do not suffice to produce a constant, systematic effort to enhance teaching and learning, and they operate especially weakly in institutions with less demanding clienteles. Still, the desire to attract good students, particularly in selective colleges and in graduate and professional schools, does more to benefit education than any incentives found in state-controlled systems abroad, where improvements depend entirely on the conscience of the faculty and the prescriptions of a remote government bureaucracy.

Even with the qualifications, then, everyone agrees not only on the basic ends of American higher education, but also on the methods of organization we have chosen to achieve our goals. That being so, what is the public asking of universities, especially research universities, in the areas where criticism has been so sharp in recent years? Are these expectations realistic and internally consistent, and can we use them to build sound criteria for judgment?

III. The Quality of Education

The quality of education is a subject that has always aroused spirited debate, and opinions on the subject have varied widely.[26] Nevertheless, certain minimum standards command broad acceptance. We can all agree that universities should use careful methods of selecting faculty that will insure reasonable competence in instruction. Every administration should insure that its academic programs meet appropriate standards of intellectual content and rigor. Each university should try to create incentives for good teaching and help instructors to improve their pedagogic skills. And all faculties should base their programs on a curriculum reflecting a carefully considered educational philosophy or rationale that justifies course requirements and connects them to goals appropriate for the students and their future needs.

It is the curriculum, especially the undergraduate curriculum, that has provoked the bitterest complaints about the quality of education. The most frequent, most vehement attacks

26. *See, e.g.*, A. Bloom, *supra* note 10.

have come from conservative sources, such as Allan Bloom, William Bennett, Lynne Cheney, and others who deplore the failure of our colleges to direct more attention to the history and cultural traditions of Western civilization.[27] In Bennett's words: "Although more than 50 percent of America's high school graduates continue their education at American colleges and universities, few of them can be said to receive there an adequate education in the culture and civilization of which they are members."[28] To those who share this opinion, the failure to require undergraduates to study our cultural heritage and its greatest texts is symptomatic of a broader decay of standards among the faculty and a general laxity and permissiveness on American campuses today.

Criticisms of this kind suffer from two underlying difficulties. To begin with, although Bennett, Bloom, Cheney et al. have attracted a great deal of public attention, theirs is by no means the only complaint about the undergraduate curriculum. Many writers have been pleading eloquently for colleges to do more to emphasize foreign languages and international studies to prepare students for an interdependent world. Others press for increased attention to quantitative literacy and science to prepare undergraduates for a highly technological, science-driven world. Still others have stressed the need to learn more about other cultures in order to prepare for an ethnically diverse world. A few writers have urged colleges to pay more attention to civic education to prepare citizens for a world in which the quality of government will be ever more important to their lives. Added to these proposals are further demands for compulsory courses on worthy subjects such as expository writing, ethics, environmental problems, and racial awareness.

By confining their argument to one or another of these suggestions, critics conceal the true dilemma that confronts the curriculum committee. In fact, there is a long and growing list of subjects that one can plausibly propose as indispensable. For those who must actually make curricular decisions, it is impossible to consider any one of these claims without deciding what to do about the others.

Beyond this problem lies a deeper contradiction in the conservative critique of the college curriculum. Proponents of this

27. *See* A. BLOOM, *supra* note 10; W. BENNETT, *supra* note 10; Cheney, *supra* note 10.
28. W. BENNETT, *supra* note 10, at 1.

view would be among the first to applaud the existence of a competitive, decentralized system of higher education and to reject a monolithic structure controlled by the state. At the same time, they condemn the whole of higher education for refusing to adopt their ideal curriculum as the standard model for all colleges and universities.

These positions are not easy to reconcile. A decentralized system will produce a common result only when there is one set of courses that all reasonable educators feel compelled to accept. Such unanimity is not unknown. No sensible medical school would fail to offer courses in anatomy, nor would any law curriculum omit the study of contracts. But no such consensus has prevailed in undergraduate education for over one hundred years. Charles William Eliot, Harvard's greatest president, was long the champion of a totally elective curriculum, believing that students would learn best by being free to take the subjects that interested them the most.[29] Other educators—including the the present Harvard faculty—believe that in a civilization marked by constant change and vast accumulations of knowledge, students most need a familiarity with the basic methods of learning about the world and understanding human experience. Still other faculties have long preferred some form of distribution requirement to insure that all students spend at least a portion of their undergraduate years in courses divided among a variety of fields. Only a minority of colleges have opted for the great books curriculum favored by critics such as Bennett and Bloom, although the idea has been discussed for generations.[30]

29. *See* C. SYKES, *supra* note 10, at 159.

30. Curricula based on great works of Western culture have undoubted advantages. In particular, they cause all undergraduates to gain an acquaintance with texts that contain some of the deepest insights into the human condition. They also provide a common basis for discourse among all students while renewing in each new generation a sense of our common cultural heritage. Yet there are objections to such a curriculum that explain its failure to gain universal support. Among them are the following. Because of other pressures on the curriculum, treatment of the great texts is often relegated to survey courses that are likely to be superficial. If all students must take them, they will have to be taught by instructors who are not themselves masters of all the material assigned and hence will not be able to deal with the subject matter as deeply or insightfully as they could if they were allowed to teach in their own field. Courses based on the Western cultural tradition may also neglect other cultures at a time when they are becoming more important to the country and to many of our undergraduates. Finally, students forced to take prescribed curricula with prescribed texts do not normally study with the same interest and enthusiasm that they display in courses of their own choosing.

When educators disagree this strongly about the curriculum, the differences are typically so subjective and value-laden that no one can prove convincingly that only one answer is correct. In such situations, our decentralized system is calculated to allow every plausible view to find its way into the catalogues of at least a few institutions, leaving to students and their parents the ultimate right to choose. Thus, it is unrealistic and inconsistent to support a decentralized form of organization while also criticizing higher education for refusing to adopt a single preferred curriculum.[31] One cannot have it both ways.

The point of this analysis is surely not that we should stop arguing about curricular matters. There are programs at both the graduate and the undergraduate levels without any structure whatsoever. There are others that are incoherent and have no thoughtful rationale to justify their requirements. All undoubtedly merit condemnation. In addition, even carefully constructed curricula need continuing discussion to bring about renewal and improvement. But it is one thing to carry on the debate by arguing that a particular conception is better, on balance, than the others. It is quite another to argue as if only one solution were acceptable and to imply that all institutions and their faculties must be irresponsible if they fail to agree.[32]

IV. The Behavior of Faculty

A. *Teaching v. Research*

Next to the college curriculum, no aspect of university education has provoked more complaints than the faculty's preoccupation with research at the expense of teaching.

31. To the extent that they even notice this contradiction, critics tend to avoid it by impugning the motives of those who disagree with their views. In their opinion, a curriculum based on the great Western texts is so obviously superior that faculties failing to vote for it must be balking for ignoble reasons. The usual explanation is that professors support another model only because it makes fewer demands on their time or because it is necessary to mollify protesting students. Such explanations are unfortunate. Although faculties do occasionally make decisions for unworthy reasons, critics who leap to assume such motives are treading on thin ice. Their charges are particularly suspect if the curriculum they attack has a long history and if distinguished educators have argued thoughtfully on its behalf. In such circumstances, it would surely be better if critics refrained from accusations of this kind except when they have direct and convincing evidence that a faculty has acted improperly.

32. *See, e.g.*, Bennett, *supra* note 10. Stressing that students "deserve a good general education—at a minimum, a systematic familiarization with our own, Western tradition of learning," Bennett observes that "I would fault Harvard and other universities for this: there's not much effort to see to it, systematically and devotedly, that real education occurs." *Id. See also* De Paulo & Mundy, *supra* note 9, at 31.

Interestingly, no one has yet proved that professors who publish a lot are less successful teachers than their colleagues who devote little time to scholarly pursuits.[33] Nevertheless, it is widely believed that institutions slight their students when they emphasize research in making appointments and refuse to promote unproductive professors even though they are highly successful classroom teachers.

As is so often the case, this concern has emerged against the backdrop of two contradictory messages that society has sent to its universities. One signal comes from all the critics who deplore the neglect of teaching and the stress that universities place on published work. The other makes the opposite point through a system of powerful incentives and rewards that offers fame, fortune, and ample funding to successful scientists and scholars.[34]

In the face of these conflicting demands, it would be useful to consider what universities might do to create rewards for teaching strong enough to achieve a proper balance between instruction and research. Oddly enough, however, discussions of this kind are rare outside of specialized education journals.

33. In fact, some studies have found that the most prolific scholars have slightly higher student ratings as teachers than their unproductive colleagues. These studies are sometimes taken to show that universities that stress research do not thereby sacrifice the quality of teaching. On reflection, this conclusion seems questionable. To prove that productive scholars teach better than professors who have failed to publish in a research university is not to show that they teach better than instructors in colleges where teaching is stressed and professors are promoted for their pedagogic ability. Similarly, the studies fail to prove that universities could not achieve even better instruction without sacrificing research by strengthening the rewards for good teaching. Finally, surveys show that large fractions of the faculty in all types of universities believe that the pressure to publish does detract from the quality of teaching in their own institutions. *See Professors Are Upbeat About Profession but Uneasy About Students, Standards*, Chron. Higher Educ., Nov. 8, 1989, at A1, col. 3 [hereinafter *Professors Are Upbeat*] (reporting results of recent Carnegie Faculty Survey).

34. The rewards for research are multiple and impressive. Prizes, publicity, and fame await the most successful scientists and scholars. Universities are ranked for the reputations of their graduate faculties, and results are featured in magazines and newspapers throughout the country. (Although the actual surveys include evaluations of graduate teaching programs, it is significant that the media tend to emphasize only those that record the reputations of departments for research.) The federal government supplies the best investigators with large sums of money for their work according to strict meritocratic criteria. Through this process, universities with successful faculties receive substantial amounts of money to help defray their overhead expenses while institutions that lack such faculties do not. While successful scientists continue to be supported, those who do not fare so well lose graduate students, their self-confidence, and often have to close their laboratories altogether. Humanists do not often qualify for federal grants, but it is still true that lectures, honoraria, foundation funding, and trips to conferences in exotic places come much more frequently to those with distinguished publication records.

Those who speak for research seldom consider such matters to be their proper concern and hence are silent on the subject. For their part, those who speak up for teaching tend to dismiss research with hardly a word about the reasons that have led society to devote so many billions of dollars to its pursuit. Little is said about its importance to society or its potential benefits for teaching. Instead, critics condemn the bulk of scholarly writing either as a sterile product of requirements imposed by philistine administrators or as a form of private pleasure that selfish professors enjoy at the expense of their students.[35] In this way, supporters of teaching and research talk past one another without trying to reconcile their views.

A serious attempt to balance the legitimate claims of teaching and research must begin by understanding something of the incentives that inspire each type of activity. Both pursuits hold great intrinsic interest, just as both can entail much drudgery and frustration. In contrast, the *extrinsic* incentives and rewards are almost always more powerful for research than they are for teaching. Part of the explanation lies in the potent effect produced by the financial support, the prizes, and the wide recognition that society bestows on successful scientists and scholars. Equally important is the fact that research can be studied carefully and communicated to a very wide audience. Because of this visibility, faculty members who are outstanding scientists and scholars are much better known outside of the university and thus attract more invitations to speak, more opportunities to consult, and more job offers (which in turn drive up their salaries). In much the same way, a university's reputation will depend much less on the quality of its teaching than on the strength of its research, because the latter is so much better known to the outside world. In a competitive environ-

35. *See, e.g.*, P. SMITH, *supra* note 10, at 177-98; C. SYKES, *supra* note 10, at 101-30. Such critics typically attack research by finding pretentiously obscure titles or passages that they use as objects of derision. While seizing on a single sentence or title in this fashion is a most unreliable way of judging research, it may well be true that much published work is of little quality. There are steps that universities can and should take to reduce the amount of trivial scholarship without any real threat to the progress of human knowledge and understanding. See *infra* pp. 318-19. Nevertheless, even these steps cannot insure that a high percentage of research will possess real quality. The most intelligent observers will disagree widely on which young scholars are talented enough to deserve encouragement or which methods of inquiry have intellectual merit. Moreover, however one defines the standards of quality, many promising scholars will eventually fail in the effort to meet them. It is simply in the nature of the enterprise that much research must be done to achieve a few contributions of lasting value.

ment—where high reputations mean an ability to attract better students, abler professors, and more government grants with overhead—this fact is bound to affect the behavior of the faculty and administration.[36]

Because such strong incentives for research come from sources outside the institution, it is neither helpful nor entirely fair to condemn a university merely because the quality of its instruction is less highly valued than its research. The critical question is whether the administration is doing what it can to develop incentives and rewards for good teaching that will help to restore a healthier balance. Contrary to much outside opinion, the proper remedy is not to promote popular teachers who are undistinguished scholars. A vital part of a professor's job in a research university is to expand knowledge and train graduate students. Neither task is likely to be done well by individuals who have failed to show real talent for research by the time they reach the point of tenure. Besides, professors who publish little are unlikely to thrive in the atmosphere of a research university and often have less to communicate and less enthusiasm for doing so as time goes on.

Fortunately, there are other things that an institution can do to encourage good instruction. Certainly, the administration should consider the quality of teaching as well as the publication record in making appointments. In addition, the university should take pains to devise appropriate criteria for evaluating research. At present, more than forty percent of the faculty in research universities believe that reviewing authorities consider only the quantity of publications, rather than the quality, in judging faculty promotions.[37] Perhaps these professors are misinformed. If they are correct, however, the universities involved are clearly guilty of encouraging trivial scholarship at the expense of teaching.

While promotion criteria are important, they merely fix the quality of teaching at the time the appointment is made. A conscientious administration must do more to create an environment that will continuously support good instruction. Various possibilities spring to mind. The university can offer seed money to assist professors who wish to improve their courses or experiment with new methods of instruction. It can provide

36. *See* Rosovsky, *supra* note 1.
37. *See Professors Are Upbeat*, *supra* note 33.

for student evaluation to make sure that faculty members receive feedback about their teaching. It can use voice mail to help students communicate with their instructors about questions and confusions arising from course lectures. It can offer opportunities, such as videotaping of classes, to help professors improve their pedagogy. Even more important, it can ask all graduate students to undergo serious training to develop pedagogic skills and include tapes and other evidence of their teaching in the dossiers they send in applying for academic posts at other universities. While none of these measures may fully offset the powerful incentives favoring research, their cumulative effect should go a long way toward keeping a healthy balance.

The problem is more serious in universities that lack distinguished research faculties. According to nationwide surveys, a large majority of professors at these institutions believe that their administrations impose publication requirements for promotion that are mechanical and out of proportion to the value of any research that their faculties are likely to produce.[38] In addition, teaching assignments at many of these universities are kept at low levels, although the scholarly contributions of their faculty are meager. Such practices are hard to defend, because they beggar instruction to promote research of dubious worth. Granted, scholarly work can help a teaching faculty to renew its intellectual capital, and there is no reason not to encourage it. But that is no excuse for making publication a requirement for tenure in every case or for basing promotions on the quantity rather than the quality of research. Nor does it justify lowering teaching loads to levels out of keeping with the real scholarly contributions of the faculty. Instead, every administration should avoid attaching greater importance to published work than the likely abilities of its faculty seem to warrant. This is the special obligation of academic leaders, who are ultimately responsible for setting goals that accurately reflect the special strengths and limitations of their institutions.[39]

38. *See id.*

39. Admittedly, this standard is difficult to achieve in a competitive system where the rewards are so heavily skewed toward success in research. In the end, universities that lack distinguished scholars are likely to stop putting undue emphasis on publication only when there are credible, attractive models of excellence other than that of the research university. This is a formidable challenge, the more so because new models depend on incentives and rewards that come in part from the larger society. Except in

B. *Outside Activities*

One can readily understand why people are upset about the time the faculty spends away from the university. It is bad enough, they grumble, when professors neglect their teaching to perform research. But how can one possibly excuse leaving the campus to do consulting or to give speeches?

If all such activities were motivated by private gain, the issue could easily be resolved by imposing arbitrary limits. But most outside activity has much worthier intellectual or social purposes. Scientists need to go to meetings to keep up with new developments. Medieval historians and logicians may have to attend conferences to find colleagues in their special field with whom to discuss common interests. Social scientists travel to Washington to offer advice eagerly sought by government officials, while chemists talk with their counterparts in industry to speed the application of new discoveries to industrial uses. Studies have repeatedly failed to show that these outside activities interfere with the academic work of the university.[40] On the contrary, professors who consult frequently seem to publish more, teach as much, and carry out as many campus chores as their less peripatetic colleagues.[41]

In the face of these complexities, the public is clearly ambivalent. As corporate executives, public officials, foundation officers, and law partners, people in the outside world actively seek expert advice from professors and often pay high prices to get it. As parents, on the other hand, the same individuals complain about the lack of personal attention that senior faculty give to their children. Similarly, students enjoy the stream of interesting visitors who come to the campus to talk about their work. But they are displeased if their own professors are lecturing somewhere else when they are needed to give advice or to sign study cards.

Such complications make it difficult to draft sensible limits on outside activity, let alone devise methods of implementation that are not insufferably bureaucratic. Attempts to resolve

certain segments of higher education, such as community colleges and private liberal arts colleges, the challenge has not yet been met effectively.

40. *See, e.g.*, C. BOYER & P. LEWIS, AND ON THE SEVENTH DAY: FACULTY CONSULTING AND SUPPLEMENTAL INCOME (ASHE-ERIC Report No. 3, 1985); Patton & Marver, *Paid Consulting by American Academics*, 60 EDUC. REC. 175 (1979).

41. *See* Patton & Marver, *supra* note 40, at 180.

these issues quickly encounter the deeper questions of how best to nurture the intellectual growth of scholars and how to allocate the time of experts in a world increasingly in need of their knowledge. To muddy things further, no single university has unlimited freedom to deal with the problem. If its rules are too strict, it may do itself more harm than good by causing able professors to leave and join some other, less demanding institution.

In principle, the best way around this dilemma would be to build a sense of loyalty and collegial responsibility among the faculty strong enough to withstand the temptation to neglect campus duties. This is a task of great subtlety and importance, and every administration needs to work hard at it. Still, the enterprise is difficult and cannot possibly succeed in every case. Hence, it is only reasonable to expect each university to devise thoughtful rules, backed by adequate means of implementation, that will respect the social and intellectual value inherent in much outside work but insure that professors continue to meet their campus duties.

This prescription is admittedly vague. But it does suggest that the most common rule, allowing one day a week for outside activities, is simply too primitive to cope with the vast array of extramural pursuits.[42] Clearly, universities need some way of distinguishing between work that merely brings in added income and efforts that serve the public interest or the intellectual growth of the scholar. Probably, in order to take proper account of the many types of outside activity and the varying justifications they present, it will be necessary to look case-by-case at each professor with external pursuits that exceed a basic minimum of time. It is also fair to expect all universities to set clear rules specifying the types of remunerative activity that create unacceptable conflicts of interest. Finally, whatever its regulations, an administration is probably derelict if it does not require professors to report their off-campus activities or find some other means of insuring that its rules are actually followed.

V. Tuitions

To a public grown accustomed to complaints about the cur-

42. *See id.* at 183.

riculum and the quality of teaching, it must be galling to watch tuitions rising at rates substantially greater than inflation. The reactions are sometimes colorful. "At last President Bush has faced up to General Noriega," said one citizen over National Public Radio. "Now perhaps he'll have the guts to do something about tuitions."

One can readily appreciate the economic pressures that provoke these feelings. Now that tuitions at high-priced institutions are approaching $14,000 per year and total expenses exceed $20,000, families wealthy enough not to qualify for financial aid often find that college costs eat up a large fraction of their after-tax income. If they must educate two or three children simultaneously, the total bill may well seem overwhelming.

It is important to note, however, that most of the hostile publicity focuses on the tuitions charged by only a handful of institutions, such as Harvard, Stanford, Yale, or Princeton. In fact, eighty percent of all undergraduates attend public universities where tuitions average less than $2,000 per year. Another fourteen percent go to private colleges with tuitions under $10,000. Barely six percent of all college students attend institutions charging more than $10,000, and up to two-thirds of these receive scholarships or subsidized loans, or both.[43] In the end, therefore, most of the public outcry involves tuitions that are paid in full by barely two percent of the nation's undergraduates, many of whom come from families with high incomes. Be that as it may, each new round of tuitions from the high-priced schools provokes disapproving news stories in daily papers and magazines across the nation.

To understand this problem, one must recognize that any system with many hundreds of autonomous colleges will provide a great variety of undergraduate experiences. This is one of the signal virtues of American higher education and is particularly useful in serving a huge student population of widely differing abilities and needs. In such a system, some institutions will offer more costly programs and charge higher prices for those who wish to pay more in return for qualities they consider important. Students attending such institutions, and parents who pay the bills, typically seek an eminent faculty, more

43. *See* EDITORS OF CHRONICLE OF HIGHER EDUC., THE ALMANAC OF HIGHER EDUCATION, 1989-90, at 4, 23, 53 (1989).

individual attention, a wide variety of courses, extensive facilities and extracurricular activities, and the reputation that often accompanies these advantages. With such a demanding clientele, these colleges not only have higher costs; they are particularly likely to face a steady stream of requests for more computers, more individualized instruction, more counselling, more athletic facilities, and other new opportunities and programs. Campus officials often raise tuitions rapidly in order to provide more of these services. If they failed to make these improvements, students would feel increasingly dissatisfied, and applicants would eventually begin to move to other schools willing to provide the desired opportunities, albeit at a higher price. On the other hand, if tuitions rose to the point that students no longer considered the added benefits worth the cost, applicants would begin to apply to other, lower-cost schools, and higher-priced colleges would soon have to moderate their charges.

Although most people understand all of this, the complaints go on. Are the criticisms justified? To answer this question, we must first discover what expectations the public has with regard to tuitions and what notion of a fair price informs their concerns.

To begin with, all of the interested parties seem to accept one fundamental principle. When former Secretary of Education Bennett accuses private colleges of "charg[ing] whatever the market will bear"[44] and university presidents issue heated denials, everyone is agreeing that supply and demand should not dictate results. Nor do they. Even at the most expensive institutions, applicants far outnumber the places available, yet tuitions are kept well below the true cost of educating students (after carefully allocating appropriate portions of library, laboratory, and faculty costs for research). If ordinary commercial principles offer no guide, then, what criteria can we put in their place?

Some commentators urge that tuitions be set low enough to keep the higher-priced colleges accessible to students from low- and middle-income families. *The Washington Post* has recently emphasized this point.[45] In fact, however, such a test is useless, because there is no necessary connection between what

44. Iosue, *How Colleges Can Cut Costs*, Wall St. J., Jan. 27, 1987, at 34, col. 3.
45. *See Those Tuition Increases*, Wash. Post, Aug. 15, 1989, at A18, col. 1.

colleges charge and how accessible they are. Higher tuitions can either drive away poor applicants or provide more money to help fund the scholarships and low-interest loans that allow such students to attend.[46] That is one reason why many of the most expensive universities have financial aid policies sufficient to guarantee that every needy student admitted can actually afford to enroll.

A few critics claim that tuitions are too high because universities insist on unnecessary expenditures, such as maintaining counselling services or elaborate sports facilities.[47] The implication is that colleges should provide a "no-frills" education and lower their tuitions accordingly.[48] The problem is that "frills" usually turn out to be activities such as career guidance, psychiatric counselling, or athletic programs that undergraduates value and use heavily. One can hardly condemn universities for making such services available and including their cost in the tuition. In a decentralized, competitive system, we should expect colleges to offer students the services they want and are willing to pay for. So long as the activities are not frivolous or against the public interest, such responsiveness to student needs is more a virtue than a vice of our particular way of organizing higher education. It is ironic to find publications that champion the free market, such as *Forbes* and the *Wall Street Journal*, providing the forum for questioning these principles.[49]

It is likely that much of the public's concern stems from the fact that tuitions during the 1980s rose faster than the cost of

46. Some critics seize on statements of this kind to assert that universities are using tuitions from middle-class families to pay the cost of educating poorer students. But this is rarely true of the high-priced schools. In these institutions, because of endowments and current gifts, even students who receive no financial aid do not pay nearly the full cost of their education. Hence, while higher tuitions may help to maintain high levels of financial aid, they do so only by reducing the ample subsidies given to wealthier students, not by actually taxing them to help their poorer classmates.

47. One sometimes hears the argument that students come to high-priced colleges for the prestige of their degree and the advantages it supposedly confers in later life. Hence, such colleges are allegedly free to waste money, add unnecessary programs, and raise their tuitions without risk of losing students. This argument overlooks the fact that there are many colleges with high reputations so that students who feel that one is overpriced or slipping in quality can readily apply to others. Since these colleges are highly sensitive to small shifts in enrollment, even a minor loss of highly talented students to other institutions can provoke scrutiny and corrective action. Moreover, student services compete for limited funds with other pressing needs. Universities are not likely to forgo larger salary increases for faculty or added investments in their libraries and laboratories to finance new programs and services of marginal value to students.

48. *See* Amberg, *supra* note 6; Brimelow, *supra* note 10.

49. *See* Brimelow, *supra* note 10; Iosue, *supra* note 44.

living. But there is no obvious reason why the cost of living should provide a standard for setting tuitions any more than it does for other goods and services. In fact, independent colleges have raised their prices approximately two points faster than inflation since statistics were first compiled many decades ago. Although tuitions grew more rapidly than that during the 1980s, they also failed to keep up with inflation in the 1970s. Hence, increases over the entire two decades averaged about two percent above the cost of living, in line with the historical average.[50] It is also worth noting that federal scholarship grants fell steadily in the 1980s, so that private colleges needed to find extra revenue or risk closing their doors to poor but deserving applicants. Buildings were deteriorating from deferred maintenance, and faculty salaries had lost almost twenty percent of their purchasing power due to the rapid inflation of the 1970s. With all these problems, it is far from clear that colleges breached some obvious norm by temporarily raising their tuitions much faster than the rate of inflation.

In sum, while almost everyone agrees that a decentralized, competitive system of higher education is a good thing, no one has suggested viable criteria to determine what a proper tuition should be. Lacking a consensus on what policies are justifiable, colleges find themselves in a quandary, caught between a public that dislikes any tuition increases and a student body (and faculty) constantly asking for more services, more facilities, more computers, and more programs.

In order to resolve this dilemma, it is useful to consider the stakes on both sides of the issue. Suppose that independent colleges continue their historic course of raising tuitions faster than the cost of living. Parents who feel that the cost of attending such institutions has become too great can readily turn to a variety of lower-cost alternatives, some of them heavily subsidized state universities with excellent reputations. If substantial numbers of students exercise this option, higher-priced colleges will soon moderate their tuitions, because they are intensely concerned with attracting applicants of exceptional ability and promise.

On the other hand, suppose that these colleges hold down their tuition to avoid hostile publicity. For a while, they may

50. *See* K. HALSTEAD, HIGHER EDUCATION TUITION 20-21 (1989).

offset their lost revenue by economies that have no immediate visible effect. Over time, however, either the quality of education will gradually suffer through lower faculty salaries, fewer computers, decaying facilities, and diminished services, or worthy applicants of modest means will be kept out by shrunken financial aid budgets.[51] In this way, holding down tuitions will give even greater subsidies to relatively affluent families, who could and would pay more, while excluding poor but worthy applicants, or impairing the quality of educational programs, or both. These results are undesirable for the country, for needy applicants, even for students from affluent families who would prefer to pay for better programs. They are certainly harder to justify than the current level of Ivy League tuitions, burdensome as they seem. After all, even Harvard, Yale, and Princeton charge at rates no greater than those of a moderately priced hotel (less than ninety dollars per night) or a decent summer camp—not a bad bargain considering all of the courses, professors, meals, library books, computers, athletic facilities, and other extracurricular opportunities made available for the price. All things considered, then, if a university charges a tuition, based on its own programs and needs, that does not exceed the cost of the education it provides, one cannot fairly condemn the result as excessive. In the end, the ability of students to shift to other institutions that charge less is the best restraint against unreasonable prices.

VI. The Need for Resources

Rising tuitions are only one manifestation of higher education's preoccupation with money. Through annual appeals, capital campaigns, congressional lobbying, and petitioning foundations, the search for funds goes on continuously.

Two forces drive this ceaseless quest. One is the heavy pressure of costs, not only the costs occasioned by rising prices generally, but the growing outlays required to keep up with such expensive items as new computer technology and laboratory equipment, the expanding teams of investigators needed

51. In the 1980s, the erosion of federal scholarship funds caused the colleges' own financial aid budgets to soar. By now, therefore, among the many hundreds of independent colleges, the number that truly admit all deserving applicants regardless of means has probably declined to 10 or 20. Further pressure on revenues is very likely to result in the exclusion of even more poor applicants.

to explore many scientific fields, and the swelling flood of new books published every year. The other force that drives up costs is the constant, competitive desire to achieve high quality and distinction by attracting talented faculty and able students and by maintaining first-rate libraries and laboratories.

Once again, the public is of two minds about this process. On the one hand, it applauds the new discoveries and many intellectual achievements that come from major investments in research and education. On the other, it often expresses a desire for greater restraint in university spending. This ambivalence was strikingly apparent in the recent issue of *U.S. News & World Report* ranking the nation's undergraduate programs.[52] The lead article emphasized the need for economizing in higher education. Yet the ratings that followed were largely based on achievements, such as the eminence of an institution's faculty and the quality of its students, that require heavy expenditures of funds.[53]

In recent years, the search for money seems to have become more intense, the capital campaigns much larger and more frequent.[54] This too reflects an ambivalence about the quality of higher education we wish to maintain. The government and the general public continue to want universities to do research of a quantity and quality that will keep our businesses competitive, our health care improving, our armed forces technologically superior. Yet deficits and tax reductions, along with the spiralling costs of first-rate science, have forced federal officials to chip away continuously at the share of research costs they will pay. In much the same way, Washington (like most members of the public) wants talented students from all walks of life to have the chance to enter the best colleges and professional schools. Once again, however, fiscal pressures caused the real value of federal scholarship aid to decline throughout the 1980s, forcing universities to scramble harder than ever for new funding sources.

In short, there is a gap between public expectations and public resources that leaves universities in an awkward position. They cannot satisfy the nation's desire for first-rate research and offer scholarships to all who need them without pushing

52. *See* Sheler, Toch, Morse, Heupler & Linnon, *supra* note 17, at 54.
53. *See id.* at 58.
54. *See* Amberg, *supra* note 6, at 523-24.

hard for funds. In doing so, however, they are driven to forms of lobbying and fund raising that fit uneasily with traditional notions of an academy free of the more materialistic habits of the outside world. Rather than outright condemnation, their predicament merits a careful, understanding effort to decide where resourceful fund-raising ends and inappropriate behavior begins.

However grasping universities seem with their constant appeals for money, there is nothing intrinsically wrong with seeking support for worthwhile activities such as education and research. But this general rule has important exceptions. As previously noted, if an institution is wasting money by lax administration, it should satisfy its financial needs through cost-saving measures before asking others to foot the bill. Similarly, if even a well-run university tries to raise money for a frivolous or unworthy purpose, criticism is obviously merited.

It is tempting to make more of these exceptions than the record truly warrants. For example, critics often complain of large increases in administrative costs since 1970, but much of this is due to added personnel and paperwork associated with new federal regulations in areas such as affirmative action, environmental health and safety, pensions, access for the handicapped, and many more. Although some writers criticize the ample fund-raising staffs on many campuses, universities would scarcely maintain such offices if they did not attract much more in gifts than their cost to the institution. Still another familiar object of ridicule is the student recruiting budget. But institutions must persuade students to enroll or they will suffer a loss in quality and may even have to close down entirely. In an era when the number of eighteen- to twenty-four-year-olds is declining,[55] it is only natural that colleges will spend what they must to avoid such harsh results.

One also hears that universities could save more money by weeding out poor or outmoded programs. Yet, there is surely nothing wrong with mounting a broad array of educational activities if they are all of good quality. The public may refuse to support them all, but that is no reason not to try to get them funded.[56] The problem arises only when an institution seeks to

55. *See* Brimelow, *supra* note 10, at 142.

56. One can argue that universities should do away with centers or programs if there are more of them in a particular field than the nation needs. But if there are, say, eight

do more than available resources permit and cannot maintain acceptable standards. In this event, if money can truly be saved by closing down inadequate or unimportant activities, it is clearly better to prune selectively than to spread resources so thinly that many good programs suffer.

Finally, one can legitimately object to efforts to raise funds whenever the methods used are inappropriate. The examples encompass a wide variety of situations—accepting art objects of uncertain provenance, naming buildings for unsavory donors, holding stock in companies engaged in questionable practices, taking gifts that impose dubious restrictions based on race or religion.[57] The issues raised can be extremely difficult, and reasonable people often differ on where to draw the line. What *is* clear, however, is that universities must do their best to avoid acquiring funds in ways that seriously endanger academic values, aid in the furtherance of immoral purposes, or violate other generally accepted ethical principles. Campus officials deserve criticism whenever they fail to make a conscientious effort to meet these tests.

The problems that arise in defining such standards are neatly illustrated by the controversies over university efforts to seek cooperative research agreements with industry. Once again, society's wishes are not easy to reconcile. The public clearly wants to have the fruits of university research translated quickly and efficiently into useful goods and services. That is why the National Science Foundation has funded university-industry consortia, why Congress has allowed tax write-offs for corporate contributions to academic laboratories, why the government has allowed universities to obtain patents and receive royalties on discoveries made under federal research grants. At the same time, the public also has misgivings about any relationships with industry that risk compromising the quality and integrity of academic research. No one wants universities to make arrangements with corporations that will impose requirements of excessive secrecy or divert scientists from important

centers on Middle Eastern Studies and the nation arguably needs only six, it is unrealistic to expect any one university to decide that its center deserves to die. Such decisions can be made in monolithic systems by some central agency. In a decentralized system like ours, however, centers are normally dropped only when funding sources will not support them and the university decides that it can no longer afford to keep them alive.

57. I have dealt with these subjects in much greater detail in my earlier book, D. BOK, BEYOND THE IVORY TOWER (1981).

experiments to ones that merely promise short-term commercial gain.

The situation plainly calls for discussions of how universities and industry can cooperate to speed the utilization of new discoveries without making arrangements that will corrupt academic science. But this is not the sort of debate that has occurred. Government agencies have continued to encourage businesses and universities to cooperate without paying much attention to the effects on the integrity of research. In contrast, the media, along with a number of academic critics, have shown little concern for the public interest in the efficient exploitation of new knowledge but have concentrated on the risk of corruption and greed. "University presidents, it seems, can resist everything except money,"[58] proclaims a *New York Times* editorial. "It's the function of corporations, not universities, to bring new products to market,"[59] the editorial continues, never pausing to tell us how corporations can effectively ferret out all of the promising new ideas developed in university laboratories. "For Stanford or Harvard to usurp the entrepreneur's role risks compromising their independence and misdirecting their research."[60] Such simple formulations may reduce the risk of corruption, but they do nothing to insure the efficient use of new ideas. Hence, they perpetuate conflicting expectations instead of helping to effectively reconcile them.

Rather than more criticism of this kind, we need a thoughtful discussion that proceeds from a recognition that universities have a dual obligation. Clearly, universities should help to perfect the process of bringing their discoveries to the marketplace. After all, the reason why taxpayers allow Congress to spend billions of dollars each year for research is to gain new knowledge to improve health, obtain better products, or achieve higher productivity. If closer cooperation also brings more private money for research, that too is a public gain, because it bolsters science at a time when federal support is limited and provides alternative funding sources that minimize the risk of overlooking promising ideas.

At the same time, universities owe a duty not only to themselves but also to the long-term vitality of science to avoid rela-

58. *Pure Knowledge vs. Impure Profit*, N.Y. Times, Sept. 19, 1988, at A22, col 1.
59. *Id.*
60. *Id.*

tionships that could erode the vitality of basic research. This obligation entails a variety of prohibitions, among them, not to agree to restrictions on communication among scientists, not to accept terms that delay the time required to publish new ideas, not to allow the exploitation of graduate students for commercial gain, and not to permit companies to dictate the choice of research projects. Preserving these principles requires constant vigilance and continuing discussion to adapt existing rules to cope with new problems. Nevertheless, several years of experience with arrangements of this kind gives reason to hope that the principles themselves can be maintained.

VII. Conclusion

I began this Article with a paradox: How can our system of higher education be regarded so highly abroad and still encounter such biting criticism at home? Part of the answer is easy. Many of our universities are excellent and deserve our admiration. Yet they lead the world, not because they are above reproach, but because their counterparts abroad possess still greater failings. Even in the most advanced countries, universities are typically overcrowded, overregulated, undercompetitive, and underfunded. Hence, it is possible for American higher education to be preeminent in the world and still be open to serious criticism.

Another explanation for the paradox lies in our heterogeneous mixture of colleges and universities. We are fortunate in having many of the leading institutions of research and higher learning in the world. We also have many institutions of a far less imposing quality. The latter often perform in ways that open the entire system to severe attack.

In the end, however, much of the answer to the puzzle must be ascribed to deficiencies in the criticism itself. The difficulty goes far beyond the rhetorical overkill, the errors of fact, the indictments by anecdote. Most of the charges are also flawed because they ignore basic conflicts and contradictions in the demands society makes on universities and hence oversimplify the problems they seek to discuss.[61]

61. There are more contradictions than I have been able to cover in this Article. Athletics is a good example. The public and newspaper writers believe (with good reason) that big-time sports have undermined academic standards, engendered petty corruption, and given rise to unfair treatment of athletes. Yet the same public, aided again

Continued criticism of this kind will be unfortunate on several grounds. It threatens to do needless damage to the public confidence so important to maintaining a strong system of colleges and universities. In addition, by ignoring the conflicts that underlie so many of the complaints, the debate will remain superficial, overlooking deeper problems that urgently need discussion. The issues that most deserve attention are not whether faculties are derelict in failing to require certain texts or refusing to promote popular teachers. The real challenge in a competitive culture such as ours is to create incentives that will produce the results we want. How can we construct more compelling models of excellence so that different types of institutions pursue a diversity of important goals instead of seeking inappropriately to emulate research universities? How can we develop measures to evaluate the quality of learning that will encourage universities to improve their educational programs and motivate professors to improve their teaching? How can we create positive incentives and provide appropriate limits to keep faculty members from spending too much time away from the campus while respecting the need to share their talents with the rest of society?

Beyond these questions lie still more basic issues of a kind quite different from the ancient chestnuts that dominated discussion in the 1980s. If America is to prosper as a nation, it will place heavy demands on education and research. These demands will not be met automatically, for competition by itself cannot guarantee us the sort of universities that society needs, only the ones that the public will pay for. The two are not necessarily the same. As a result, we need to step back and ask whether our universities are doing all they might to help the country address its most important problems—lagging competitiveness, poverty, inadequate public education, environmental hazards, and many more. There is reason to believe that higher education is doing less than it should in this regard.[62] And yet,

by the media, clearly wants athletic spectacles and has created enormous excitement over intercollegiate sports accompanied by hundred-million-dollar television packages and intense pressure to oust losing coaches. Critics may reply that all they seek is firm campus leadership that will continue high-visibility athletics without the abuses. After two years of concentrated work on the reform of intercollegiate sports, I am convinced that while continued effort may produce improvements, academic integrity and big-time college athletics are bound to conflict and can never be wholly reconciled.

62. This is a topic far too complicated to be discussed here. It is the subject of my

amid all of the criticism and debate of the past decade, surprisingly little attention has been paid to this topic.

In the end, therefore, what is needed most in the next decade is not an end to criticism but criticism that is less given to rhetorical excess, more careful with its criteria for judgment, and better attuned to what truly matters in the performance of higher education. As in all advanced societies, our future depends to an ever increasing extent on new discoveries, expert knowledge, and highly trained people. Like it or not, universities are our principal source of all three ingredients. For our own well-being, therefore, we need to subject these institutions to a scrutiny that is as enlightened as it is exacting.

book, D. BOK, UNIVERSITIES AND THE FUTURE OF AMERICA (1990). The book is based on the Terry Sanford Lectures, which I delivered at Duke University in April 1988.

WHAT'S WRONG WITH OUR UNIVERSITIES?—AN ADDITIONAL VIEW

A. KENNETH PYE*

I. INTRODUCTION

Few people are as qualified to comment on the strengths and weaknesses of higher education in America as Derek Bok—a distinguished teacher; scholar; dean; university president; chair of numerous task forces, committees, and councils; and leader of major national educational associations for over thirty years. As his term as President of Harvard University draws to a close, it is appropriate that he speak on the broader subject of education.

In his article, *What's Wrong With Our Universities?*,[1] President Bok's purpose is to address the seeming paradox that American commentators have subjected our colleges and universities to strident criticism in recent years, while scholars abroad have continued to hold these institutions in high esteem. He attributes the contrast in views to several causes: (1) United States higher education, with all of its shortcomings, is superior to its foreign counterparts, which possess even greater failings; (2) United States higher education is characterized by heterogeneity and includes some institutions that are undistinguished and that perform imperfectly, opening the entire system to attack; and (3) many criticisms reflect basic contradictions in the demands that society makes upon universities, or such criticisms are not based on the application of sound criteria for evaluation.[2]

In reaching his conclusions, Bok examines the origins, nature, and validity of current criticisms of higher education. The decline in people's confidence in all established institutions during the last two decades; a changing intellectual climate, giving prominence to conservative political and intellectual leaders who view universities as liberal strongholds; and intemperate attacks by disgruntled academics have combined to pro-

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1. Bok, *What's Wrong With Our Universities?*, 14 HARV. J.L. & PUB. POL'Y 305 (1991).

2. *See id.* at 331.

duce the criticisms.[3] Bok asserts that, although it would be possible to refute the charges point-by-point, to do so "would be a tedious exercise, bogging us down in a long, inconclusive recitation of familiar arguments and forgettable statistics" and, in the process, "we would lose sight of the elements of truth embedded in most of the criticisms . . . ."[4]

In lawyer-like fashion, Bok first formulates criteria for evaluating the primary complaints: the quality of undergraduate education, the behavior of tenured faculty, the rapid rise in college costs, and the apparent materialism reflected in actions by universities to increase their revenue. He argues that appropriate criteria are found in what society asks of its universities. An analysis of societal expectations leads him to conclude that society wants universities to produce research of a quality second to none; to educate young people well; to be sufficiently accessible to those who are qualified; and to be able to offer the kinds of education, advice, and critical analysis needed by society.[5]

After addressing criticisms of contemporary higher education, Bok shifts his focus to the issues that he believes need further discussion. In his judgment, the real challenges are: (1) to create incentives to construct alternative models of excellence so that fewer institutions try in vain to replicate research universities; (2) to develop measures to evaluate the quality of learning that will encourage universities to improve their educational programs and will motivate professors to improve their teaching; and (3) to create positive incentives and provide appropriate limits to keep faculty members from spending too much time away from the campus, while respecting the need to share their talents with the rest of society.[6]

In summary, President Bok's discussion reveals an extraordinary grasp of contemporary criticisms of higher education and the extent of their validity. He provides a thorough and reasoned analysis of this subject, especially when compared with the vitriolic outbursts of many who write in the field.

3. *See id.* at 306-09.
4. *Id.* at 308.
5. *See id.* at 309.
6. *See id.* at 332.

II. Observations

Bok's general conclusions clearly seem correct. His explanation of the reasons for the apparent paradox—the difference between American education's esteem in this country and abroad—is that higher education in the United States is better than that which exists in the rest of the world, but it is heterogeneous. Thus, some criticisms are valid for some institutions and not for others. The criticisms, however, are frequently overstated in their rhetoric and without a basis in sound criteria. Bok reminds us once again of what Sir Eric Ashby observed two decades ago—American higher education is distinctive in three ways: size, access, and diversity.[7] What is remarkable is not that deficiencies exist, but that United States education has been able to combine a generally high level of quality, with some institutions equal or superior to the best in the world, and a high level of accessibility, as evidenced by the highest percentage of young people attending college of any nation in the world.

Too often we forget that approximately 12.5 million Americans attend institutions of higher education and that over sixty percent of high school graduates will enroll in college at some time. Each year, the country's colleges and universities award one million baccalaureate degrees, almost one-half million associate degrees, 300,000 master's degrees, 70,000 professional degrees, and 39,000 doctorates. Higher education is a $100 billion enterprise, in which almost half of the institutions of higher education are private and approximately one-fifth of our students attend private colleges and universities.[8] Uniform high quality, even if we could agree on what that means, is simply unattainable in a system as large and heterogeneous as that in the United States.

While Bok's analysis is generally correct, some minor points are open to criticism. The primary deficiency in Bok's analysis is the criteria that he selects for evaluating the merits of current criticisms: public expectations of research "of a quality second

7. *See* Ashby, *Any Person, Any Study: An Essay on Higher Education in the United States*, *reprinted in* L. Mayhew, The Carnegie Commission on Higher Education: A Critical Analysis of the Reports and Recommendations 278-82 (1973).

8. *See* Hauptman & Anderson, *Background Paper on American Higher Education*, in Comm'n on Nat'l Challenges in Higher Educ., Memorandum to the 41st President of the United States 16, 17 (1988).

to none";[9] effective education of young people to prepare them to live productive lives; accessibility of higher education to those who are qualified; and the ability of institutions to provide the education, advice, and critical analyses that society needs. These criteria do not address the greater issue of whether universities are doing what they should to help the country meet the problems it will face in the next decade. For instance, universities may be generally accessible, and research and teaching may be excellent, but they properly should be criticized, however, if that teaching and research is not related to the serious issues that will face the nation in a rapidly changing world.[10]

Of equal concern is Bok's failure to recognize that very few universities will be viewed as performing well if judged by all of his criteria. Bok believes that research universities successfully perform the functions outlined in his criteria, but in reality, fewer do than he suggests. Many research universities, like other institutions, are required to set priorities and sacrifice, to some degree, one or more of the functions Bok lists. Some sacrifice undergraduate education in an effort to produce "research of a quality second to none," either because of faculty desire to conduct research, the importance of institutional self-esteem or reputation, or the supposed contribution to economic development of a region, or for other reasons.

The problem for most institutions is not acceptance of Bok's criteria in the abstract, but knowing where and how to seek an appropriate balance with the finite resources available. Stipends to graduate students, need-based financial aid to minorities, start-up costs for laboratories for new faculty, release time for faculty members to conduct research, student counseling, reduction of teaching loads to permit faculty to serve as staff of public agencies or committees—these all compete for scarce funds. Although most universities would readily ascribe to Bok's criteria if adequate funds were available, balance and priorities are the real issues for most universities. Thus, much of public criticism reflects a failure to understand that most uni-

9. Bok, *supra* note 1, at 309.

10. Bok undoubtedly omitted a discussion of this problem intentionally because he dealt with these issues in his recently published book, D. BOK, UNIVERSITIES AND THE FUTURE OF AMERICA (1990).

versities cannot do all that the public wishes without sufficient funding.

A related issue that Bok fails to explain adequately is the use of university funds to reduce the tuition of poorer students. Bok comments that it is rarely true that high-priced schools use tuition from middle-class families to pay the cost of educating poorer students because, "[i]n these institutions, because of endowments and current gifts, even students who receive no financial aid do not pay nearly the full cost of their education."[11] He concedes that higher tuitions may help to maintain higher levels of financial aid, but that they do so only by reducing ample subsidies given to the wealthier students, not by actually taxing them to help their poorer classmates.

Upon analysis, one questions whether there is an element of sophistry in Bok's approach here. A significant amount of financial aid at many institutions is funded from current unrestricted funds, in addition to income from endowments and gifts. If these funds were not used for financial aid, presumably they could be used to improve the quality of the education provided to students paying full tuition, or to reduce costs for these students. Although endowment income and gifts undoubtedly go toward subsidizing such students, those funds also pay for graduate education and research in many institutions, with the result that some financial aid is provided from tuition paid by wealthier students.

In institutions with smaller endowments, need-based financial aid is necessarily financed from tuition. Candor requires admitting that there is often a "Robin Hood" element in charging higher tuition and recycling that tuition to enable disadvantaged students to attend institutions that they could not otherwise afford. Public concern about this practice may well be one of the reasons motivating the United States Justice Department's recent investigation of allegations of price fixing by a number of distinguished universities.[12]

Recycling part of tuition to provide financial aid to disadvantaged students is not necessarily wrong. There is a public responsibility to broaden the base of education in order to avoid

11. Bok, *supra* note 1, at 324 n.46.

12. *See Justice Department's Antitrust Investigation Focuses on Elite Colleges*, Chron. Higher Educ., Jan. 30, 1991, at 1, col. 2; *Price-Fixing Inquiry at 20 Elite Colleges*, N.Y. Times, Aug. 10, 1989, at A1, col. 2.

excluding students of talent who have inadequate means. Also, the opportunity for more affluent students to study with students who bring socio-economic perspectives to the classroom that are different from those normally acquired in upper middle-class families improves the education of the more affluent students. These explanations may justify imposing higher tuitions to provide more financial aid for disadvantaged students. The issue, however, is not answered adequately, as Bok suggests, by merely saying that middle-class students are only receiving less of a subsidy from endowment and gifts than would otherwise be the case.

Bok's discussion of the ways in which faculties can be induced to place more emphasis on good teaching and less emphasis on research also merits comment. He concludes that undue emphasis on research to the detriment of good teaching is "more serious in universities that lack distinguished research faculties."[13] Unquestionably, faculties at many less distinguished research institutions believe that the heavy publication requirements imposed by administrations for promotion are disproportionate to the value of the research that they are likely to produce. Certainly, there is little reason to lower teaching loads in order to encourage scholarly productivity when the research produced is of dubious worth, and even less reason to emphasize quantity rather than quality. Likewise, no administrator should attach greater importance to published work than the true abilities of a faculty seem to warrant. These observations, however, do not justify the conclusion that emphasis on research poses greater dangers to teaching in universities "that lack distinguished research faculties" than in research universities.

I suspect that few "less distinguished" universities—assuming that Bok is referring to universities that would rank from roughly seventy-fifth to 200th in research productivity—sacrifice research for teaching to a greater degree than do research universities. While the research coming out of a great research university may be of higher quality, the cost to teaching may be even greater. Competition for research status in such universities may breed university policies that sacrifice good teaching to research opportunities. This may not be true at Harvard, but

13. Bok, *supra* note 1, at 319.

then again, viewing research universities from a Harvard perspective may involve the use of rose-colored glasses. At many research universities, it is not unusual for professors to teach classes of several hundred students, and then to divide the classes into discussion groups taught by teaching assistants, some of whom may not speak English well. At some research universities, it is common to entrust complete courses to graduate students. A first-semester student may end up with as many as three graduate student teachers.[14] It is also not unusual for a faculty member in upper-level courses to refrain from grading papers. They entrust the chore to graduate students who may not apply a common standard, with the result that a student's grade may depend as much on the teaching assistant who grades the paper as on the tested student's performance. In some institutions, the limited use of research faculty in the core curriculum and the frequent assignment of such faculty to very small and often informal classes reflecting their research interests may make some student unable to obtain the courses necessary to graduate within four years. All of these conditions tend to be as prevalent in some research universities as in universities aspiring to that status.

A significant omission in Bok's recommendations for good teaching is that full-time faculty should offer undergraduate classes. A possible explanation for this omission is that such a rule would be inconsistent with the maximum utilization of the talents of such persons for research and graduate instruction. Bok argues with considerable justification that "[a] vital part of a professor's job in a research university is to expand knowledge and train graduate students."[15] This certainly is a function of the faculty of a research university, but it does not follow necessarily that it should be the role of every professor on the faculty of a research university. Although in most institutions specialization is the order of the day, it is conceivable that, even in a research university, there is a role for someone

14. Statistics are sometimes misleading. A high percentage of total classes may be smaller than 25 or 50 while a significant number of basic classes for first year students may be taught by graduate students or may be large. Thus, at one distinguished university, while more than one-half of undergraduate classes had an enrollment of no more than 25 (out of almost 4,000 courses offered each semester) and three-fourths had no more than 50 students, graduate students taught more than 18 percent of all classes, and, in one semester, 37 classes enrolled more than 300 students. *See* Cunningham, *Where Only the Best Will Do*, ALCALDE, Sept.-Oct. 1990, at 22, 23.

15. Bok, *supra* note 1, at 318.

whose principal forte is good teaching, accompanied by only modest research. Some people might be uncomfortable functioning as "second-class citizens," but others might be happy to spend their time with bright undergraduates and would do a better job educating them than some of the absent researchers might do.

Just as external incentives emphasize research, the internal rewards structure within many universities does so as well. It is not unusual for scientists to be granted teaching loads lighter than humanists during the regular academic year in order to pursue grants from external sources that will compensate them during the summer. In addition, research productivity is the primary key to appointment, promotion, and tenure. Bok suggests that we use careful methods in selecting faculty to ensure "reasonable competence in instruction";[16] that we develop motivation for good teaching (the nature of which he does not describe);[17] and that the administration consider the quality of teaching as well as publication records in making appointments.[18] Bok, however, refuses to abandon scholarship as the dominant factor in judging faculty. He states that the proper remedy to encourage good teaching is not to "promote popular teachers who are undistinguished scholars."[19] Presumably, a "popular teacher" is one who teaches well but has not distinguished himself in research and publication. In addition, there is no suggestion in Bok's discussion that a distinguished researcher who is unpopular because he cannot or does not teach well should not be promoted.

While Bok's discussion of the problem of absent faculty is refreshing, he fails to provide any suggestions for dealing with the problem.[20] Obviously, it does not make much difference how well a faculty member can teach if he or she is not present to do so. Bok is clearly correct in stating that the traditional one-day-off-a-week model is not flexible enough to deal with the complexities that many universities face today. The differences among teaching a class at another university, participating in a learned symposium, arguing a case, and advising a multi-national corporation, make it infeasible to impose the

16. *Id.* at 312.
17. *See id.* at 332.
18. *See id.* at 319.
19. *Id.* at 318.
20. *See id.* at 320-21.

same rules on faculty in business, law, medicine, and arts and sciences. This does not mean, however, that it is "difficult to draft sensible limits on outside activities, let alone devise methods of implementation that are not unsufferably bureaucratic."[21] An institution could implement a rule that permits some absences from the campus each semester for attendance at learned symposia or lectures at other universities but imposes a rebuttable presumption that faculty activities that take place in a non-campus or in a non-government setting, and that generate significant income, are not intellectually inspired. An institution could mandate that faculty who supplement their income from outside sources must submit a copy of a W-2 form annually. In fairness, such a policy would have to be integrated with other policies governing forgiveness of normal teaching loads to permit faculty to obtain grants for summer research. Faculty members are no more or less absent from the classroom if they are away consulting or at home conducting important research.

Turning to Bok's discussion of the need to move away from the research model of excellence, one of the challenges Bok mentions is to persuade fewer institutions to try to replicate research universities.[22] Bok's discussion omits some factors that make it more difficult for universities to refrain from this process. Viewed in one way, Bok's attempt to persuade universities that are not now regarded as elite to abstain from trying to become members of the club could be seen as an attempt to assure that the oligarchy is unchallenged. Nevertheless, there is much sense to Bok's suggestion. Most universities with varying resource bases, faculty quality, applicant pools, and traditions should not rationally attempt to emulate Harvard, a goal beyond their capacity. They should instead attempt to carve out a special niche in which they can perform better than older, larger, richer competitors. Such a suggestion, however, presumably would have hardly been attractive to Duke University or the University of Texas at Austin in the middle 1920s, or to UCLA in the late 1940s. Nor does it have much appeal today to many universities that aspire—reasonably or unreasonably—to a higher level of quality when the sole yardstick of quality is research productivity. Bok recognizes it will be difficult to con-

21. *Id.* at 320.
22. *See id.* at 319 n.39, 332.

vince universities not to compete in a system where rewards are so heavily skewed toward success in research.[23] Institutions are unlikely to adopt such an approach unless it proves to be a model for excellence that offers a credible, attractive alternative to the research institution model.[24] Bok admits that the viability of new models will depend on the incentives and rewards that come in part from the broader society.[25] Thus far, only community colleges and liberal arts colleges have found alternatives to the research model.[26] Unfortunately, he does not suggest how other institutions can develop alternative, credible models.

The difficulties of moving away from the research model of excellence are compounded by the use of research quality as a criterion for ranking undergraduate institutions. In a recent issue, *U.S. News & World Report* emphasized the need for economizing in higher education in the same article in which it rated undergraduate institutions primarily on the basis of such criteria as eminence of faculty and quality of students, both of which cost money to maintain.[27] The same ratings of undergraduate institutions could have been based upon amount and quality of research. I know of no ranking of undergraduate institutions in which size of class or quality of teaching is considered in evaluations, much less time spent by faculty in advising and counseling students. One of the few objective factors used as a basis for evaluation relevant to undergraduate quality is quality of students, as measured by board scores. This is normally assessed on the basis of "input" (for example, SAT scores) with little or no attention to improvement that takes place as a result of the collegiate experience as measured by "output" (for example, a comparison between SATs and GREs, MCATs, LSATs, et cetera). Instead, many such rankings rely upon external evaluations by faculty or presidents, few of whom are qualified to evaluate all of the institutions on the lists submitted to them, and many of whom rank on the basis of the research reputations of the institutions.

Even research productivity and publication, the real bases for

23. *See id.* at 317.
24. *See id.* at 319 n.39.
25. *See id.*
26. *See id.*
27. *See* Sheler, Toch, Morse, Heupler & Linnon, *What's Behind the Rankings*, U.S. NEWS & WORLD REP., Oct. 16, 1989, at 58.

most evaluations, are commonly misunderstood by those ranking undergraduate institutions. Most universities with high levels of research activity have medical centers. The Department of Health and Human Services provides roughly half of federal government-sponsored, university-based research.[28] Not surprisingly, most universities with medical centers have a higher volume of sponsored research than most universities without medical centers. Therefore, a clear relationship is frequently seen between the level of research in the life sciences and the quality of undergraduate education in the rankings that appear in popular periodicals.

It would be easy to ignore such rankings if they did not have a significant impact upon students' choices of where best to study. It could be that many undergraduate students will receive the weakest undergraduate education at some institutions with the highest research productivity because experienced faculty are less likely to teach them, either as a result of commitment to research or because the research standing of the university is based in large part on its medical school faculty who usually do not teach undergraduates. Although this is obviously stretching the point, this argument is no less logical than arguing that students will necessarily receive the best undergraduate education at institutions with the greatest research productivity.

The important point is that a university's decision to forego emphasis on research in an environment where it cannot, by itself, create alternative external standards of excellence, and where none are likely to develop in the foreseeable future, would hinder that institution's recruitment of students, deter many able young faculty from joining its ranks, and significantly impair the self-esteem of existing faculty. In such an environment, seeking "alternative models of excellence," as Bok proposes, is unlikely to be an attractive course of action no matter how wise.

Bok fails to pose an equally challenging question: Should much of the research now conducted in universities be done in federal and state laboratories? As the percentage of American graduate students in our universities declines, one of the major reasons for government-sponsored research in universities

28. *See* L. GLADIEUX & G. LEWIS, THE FEDERAL GOVERNMENT AND HIGHER EDUCATION: TRADITION, TRENDS, STAKES AND ISSUES 12 (1987).

rather than federal laboratories is weakened.[29] This in itself might help move universities away from the research institution model.

Another topic that Bok mentions, though only in passing, is diversity, which has become a major subject of controversy at most institutions. He reports that diversity has flourished at Harvard and that each racial minority is better represented today than it was in the early 1970s.[30] This is a notable accomplishment. Representation, however, is hardly the test. Graduation rates are the test, and retention continues to be a major problem and a proper source of concern in most institutions. Minority participation in higher education, with the exception of Asian-Americans, has declined proportionally since its peak in the 1970s. African-Americans, who constitute seventeen percent of elementary and secondary school enrollments, represent only ten percent of college and university undergraduates, receive only seven percent of bachelor's degrees, and earn four percent of doctoral degrees. Hispanic students constitute nine percent of elementary and secondary school students and five percent of undergraduates. They receive three percent of bachelor's degrees and two percent of doctoral degrees.[31]

Absence of diversity is also a problem in the composition of faculty and staff, thus engendering significant criticism. Today, only about 900 doctorates are awarded to African-Americans annually, a twenty-five percent decrease since 1976.[32] The number of Hispanics earning doctorates has increased since 1980, but Hispanics were the only ethnic group to experience a decline in graduate enrollment between 1986 and 1988.[33] The problems associated with these low numbers are exacerbated by concentration in certain fields. African-Americans and Hispanics, for example, are more likely to specialize in sociology, anthropology, and education, and are less likely to be found in

29. *See* GOVERNMENT-UNIVERSITY-BUSINESS ROUNDTABLE, WHAT RESEARCH STRATEGIES BEST SERVE THE NATIONAL INTEREST IN A PERIOD OF BUDGETARY STRESS 2 (1988).

30. *See* D. BOK, THE PRESIDENT'S REPORT, 1988-89, at 34 (1990).

31. *See* Hauptman & Anderson, *supra* note 8, at 32.

32. *See* Am. Council on Educ., *Facts in Brief: Nine Percent of Doctorates Earned by Minorities*, HIGHER EDUC. & NAT'L AFF., Feb. 1, 1988, at 3.

33. *See* Am. Council on Educ., *Hispanic Educational Attainment Low, ACE Status Report Shows*, HIGHER EDUC. & NAT'L AFF., Jan. 28, 1991, at 3, 8 (citing AM. COUNCIL ON EDUC., NINTH ANNUAL STATUS REPORT ON MINORITIES IN HIGHER EDUCATION (1990)).

science and engineering.[34] In conclusion, the question of diversity cannot be addressed simply by pointing out that minority enrollments have increased.

In a footnote, Bok also discusses briefly the role of athletics in the university. Bok's observation that "academic integrity and big-time college athletics are bound to conflict and can never be wholly reconciled"[35] may well be correct, but it may also be misleading. No one can question that the risk to academics is greater in "big-time" programs that are expected to break even or earn a profit while carrying the costs of Title IX compliance, but an intercollegiate athletic program does not have to be "big-time" to pose challenges to academic integrity. Much depends on what is meant by "academic integrity." Schools that engage in "big-time athletics" annually lose student athletes receiving grants-in-aid to schools that do not award grants-in-aid but that do award "minority" or "diversity" scholarships to applicants. Such students then can be found on football fields or basketball courts rather than in the library. Students in aerobic sports such as swimming may practice several hours every day. While they may meet or surpass minimal academic requirements, they may perform more poorly in their academic work than those who are able to spend time in libraries and laboratories, rather than on tracks and in pools and weight rooms. At some institutions, prospective student athletes may be admitted with admission profiles significantly below those required for applicants who are not sought for intercollegiate competition.

In summary, Bok's arguments and conclusions are well reasoned; however, a number of them are open to criticism. The criteria by which he judges current criticisms of higher education fail to include the need for higher education to address the problems facing society in the future. He also fails to recognize that financial constraints may force many institutions, even research universities, to concentrate on some of the criteria he lists at the expense of others. Bok argues that more emphasis should be placed on good teaching and less on research, yet he fails to acknowledge that the problem is serious at research institutions as well as at "less distinguished" institutions. Faculty unwillingness to offer undergraduate classes, the external and

34. *See* Hauptman & Anderson, *supra* note 8, at 32.
35. Bok, *supra* note 1, at 332 n.61.

internal emphasis on research as the basis for rewards and promotions, and faculty absences because of outside activities all hinder the improvement of undergraduate teaching. In addition, the emphasis and prestige placed upon research, especially in ranking the quality of undergraduate institutions, makes it even more difficult for universities to move away from the research model of excellence. Finally, Bok's discussion of diversity ignores problems that still exist, and he fails to recognize that athletics, whether they be "big-time" or not, can have a detrimental impact on academic integrity.

III. Other Issues

Several issues not discussed by President Bok also deserve mention. First, one should consider the impact of competition from public universities on private institutions. Research subsidies, costs, and tuition levels reflect this competition, which in turn provokes public criticism of private institutions. These issues may have little significance to Harvard, but they are of crucial importance to many other private institutions.

Public institutions have significant cost advantages over their private rivals. For example, a public university is able to build a science facility with state funds without diminishing the university's operating budget. Authorization of the new construction may be a part of a "package deal" by which a donor endows chairs in exchange for the state's construction of facilities. The creation of specialized laboratories in this fashion permits principal investigator-researchers to obtain an advantage in the quest for federal grants because such individuals have been endowed with superior facilities in which to conduct research. The state will be reimbursed for the initial expenditures by the indirect cost recovery on federal grants. Principal investigator-researchers have an additional advantage over private institutions in competing for grants from such agencies as the National Science Foundation (NSF) because the university can recover indirect costs less than those actually incurred, if such costs will ultimately go to the state treasury rather than the university. Private institutions will thus find it increasingly difficult to compete.

Other factors contribute to the disadvantages that private universities face in obtaining funds to build research facilities. Because relatively little money is available from the NSF for

construction of science facilities for any institutions except the largest research universities, many private institutions seek either to borrow money or to obtain contributions to fund these projects. The federal cap on tax-exempt bonds, however, precludes some major private universities from borrowing, and the application of the alternative minimal tax to gifts of appreciated gains[36] significantly limits major gifts for such purposes. The result is that increasing impediments are placed in the paths of private universities seeking to raise money for research, while significant state subsidies are given for the same purpose. Private universities must accordingly rely on tuition, smaller gifts, and endowment income to compete.

The increase in tuitions of private universities and colleges has widened dramatically the gap between the costs of attending private institutions and public institutions. Consequently, an increasing percentage of students are attending public institutions.[37] Additionally, as Bok notes, the number of high school graduates is decreasing, serving to increase further the competition between public and private institutions. A confounding factor, one that is reinforced by poorly informed counselors, is that students and parents tend to dwell on the amount of tuition, not the net cost of attending a private institution after financial aid is considered. The low tuition rates of public universities, with students receiving an across-the-board subsidy without regard to need, serve as the basis for comparison with the "high" tuition of private schools.

A related aspect of this problem is the fact that some large state universities are able to accumulate significant surpluses from the operation of auxiliary enterprises. They can then use the interest generated from these reserves to subsidize such activities as women's athletics. Smaller private institutions do not have such an option. The ultimate impact of this competition on students, as well as the competition for research subsidies, is to create many of the conditions, such as over-emphasis on research and high tuitions, that result in public criticism of private institutions.

A second issue that is not mentioned by Bok but should be discussed is the subject of tenure. The tenure system continues to generate serious criticism. No other profession, besides the

36. *See* 26 U.S.C. § 1201 (1988).
37. *See* Hauptman & Anderson, *supra* note 8, at 20-21.

priesthood, provides lifetime employment on the basis of a decision made about someone who is not yet forty. Anyone who has been in higher education can provide examples of teachers who, for one reason or another, have lost their ability or ambition to teach or research effectively. These people nevertheless have a lifetime job within the academy, in many cases benefitting from annual across-the-board, cost-of-living salary increases. The problem may be exacerbated when compulsory retirement is no longer allowed.[38]

Certainly, there is a need to protect academic freedom. Tenure has, in general, contributed toward achieving this goal. It may not be unreasonable, however, with the end of compulsory retirement at age seventy, to ask whether academic freedom can be achieved by other means. One such method might be for universities to extend initial, short-term contracts, to be followed by more lengthy contracts, which gradually diminish in length as the faculty member reaches advanced age. Periodic review by peers at regular intervals could also be instituted.

An important issue that underlies much of Bok's discussion, but he does not address directly, is the inability of presidents or other senior officials at universities to make changes, such as the ones Bok suggests, to their universities. Efforts to motivate professors to improve their teaching will fall on deaf ears if such improvements do not have any realistic impact on appointment, promotion, tenure, or mobility. As noted earlier, Bok suggests several measures that a university might adopt to improve teaching effectiveness,[39] but there is little reason for faculty to respond to such initiatives unless there is some potential payoff. A president or dean does not determine whether a faculty member will receive tenure or promotion. On occasion, he or she may be able to block a decision to grant tenure or to promote an individual, but I know of few circumstances when a president has been so courageous as to insist that tenure be awarded over the vote of a department. Thus, the level of motivation to sacrifice research production in the interest of improved teaching is likely to be low so long as young professors—except for those few who have an inner urge to do everything well without regard to reward—believe that their

38. *See* 29 U.S.C. § 631 (1988).

39. *See* Bok, *supra* note 1, at 318-19.

departments accord more weight to research excellence than to teaching capability.

The power of departments emphasizes the limited capacity of the president, provost, and deans to manage an academic institution. Universities have become complex. Authority is shared. Harvard, for example, has thousands of faculty members, students, and staff, and a $5 billion endowment.[40] In any comparable business enterprise, the chief executive officer would be able to take the steps deemed appropriate to manage the institution effectively and to implement those decisions through subordinates, subject to policies established by a board of trustees. This is not the case in an educational institution. I have, on occasion, facetiously commented that the difference between a CEO of an educational institution and a CEO in the business sector is that in the business sector, a direct order and pointed suggestions are taken seriously, while at a university, a direct order is viewed as an agenda for debate, and pointed suggestions may be regarded as the desultory ramblings of a madman.

A major challenge for the future may be whether we can manage our complex institutions of higher education without rethinking the authority of those responsible for their operation. It may be possible to maintain the current authority structure in an institution with $5 billion in endowment; it may be impossible in an institution with a lower level of resources and more intense competition from the public sector.

Two fundamental changes that are occurring in higher education with relatively low visibility may become the subjects of more vocal criticism. The first is the financing of higher education by students through the assumption of large debts, related in some institutions to the higher levels of tuition. In recent years, federally financed student loans have become the most common form of financial assistance.[41] No longer does a student routinely finance a college education by working in the summer, holding a part-time job during the school year, and receiving support from parents' savings, supplemented occasionally by a modest scholarship or loan from the university. Obtaining a college education to many has now become much more like purchasing a home—it is an asset that can be ac-

40. *See.* D. Bok, *supra* note 30, at 37.
41. *See* L. Gladieux & G. Lewis, *supra* note 28, at 8.

quired only by borrowing, with the expectation that it will be paid for in depreciated dollars over the productive life of the borrower. Meanwhile, much rhetoric is spent in the higher education field on the need for additional scholarships and the need to limit the level of loan dependency. In short, heavy debt is becoming the rule rather than the exception.

In this regard, more and more Americans are becoming concerned not only about student-loan defaults, but more importantly, about the impact of large student loans on the mobility of the next generation. The problem may be less significant for a university such as Harvard than for other institutions where graduates facing fewer job prospects may be forced to make significant sacrifices to repay their loans. Even at Harvard, heavy student borrowing may affect the ability or willingness of students to enter the public sector or to accept lower-paying jobs that they prefer. I do not suggest that loan programs are bad. Federal loan programs make education possible for many who would not otherwise have the opportunity, and loans greatly facilitate attendance at higher-cost, prestigious schools that may open doors to promising careers. Nevertheless, the risks of over-borrowing must be explained to students, and the value of the program must be explained to the public, which normally hears nothing except media coverage of defaults.

The second ongoing change that must be addressed relates to the relative equality of compensation among faculty.[42] At one time, faculty received compensation that was determined primarily by seniority rather than by field of expertise, with the exception of physicians and lawyers, who received higher rates of compensation. Business faculty were then added to the preferred list, and now faculty in computer science, engineering, and economics provide another tier. To these must be added the scientists who enhance their basic pay with external summer grants and the external consulting undertaken by many, particularly in the professional schools. At the low end of the totem pole remain the humanists for whom there are few government grants and fewer opportunities for external consulting. At the same time, universities repeatedly speak to the importance of the liberal arts. Universities cannot, of course, be oblivious to market forces. This problem must be faced if uni-

42. *See Universities Awarded Record Number of Doctorates Last Year; Foreign Students Thought to Account for Much of the Increase*, Chron. Higher Educ., Apr. 25, 1990, at 1, col. 2.

versities truly mean what they say about the importance of the humanities both in understanding the ideas and cultures that have shaped our world and in equipping students with the perspectives and abilities they will need to shape their world.

IV. Conclusion

Everyone in higher education should be indebted to Derek Bok for answering the criticisms voiced by colleagues, by the media, and by the government during recent years. There is much that is wrong in higher education, but there is also much that is right. Certainly none of us will meet our responsibilities to the public if we sit on the sideline while Chicken Little screams that the sky is falling.

BECOMING PREEMINENT IN EDUCATION: AMERICA'S GREATEST CHALLENGE

AUGUSTUS F. HAWKINS*

I. INTRODUCTION

As we embark on the last decade of the Twentieth Century, a broad national consensus has formed around the critical importance of ensuring a well-educated citizenry. From the President of the United States to local elected officials, from the boardrooms of Fortune 500 companies to the living rooms of American families, quality and excellence in education have been discussed as a top priority on the nation's agenda. Despite this widespread interest, however, the nation's commitment to action is weak, and the will of the people is disregarded in policymaking circles. Our educational foundations are rapidly being eroded beyond repair.

The most influential warning that we are drifting into disaster came from the landmark 1983 report, *A Nation At Risk: The Imperative for Educational Reform*.[1] Commissioned during the Reagan administration and the tenure of Terrell H. Bell as Secretary of Education, *A Nation At Risk* contained a warning that "for the first time in the history of our country, the educational skills of one generation will not surpass, will not equal, will not even approach, those of their parents."[2] The report continued, "[o]ur once unchallenged preeminence in commerce, industry, science, and technological innovation is being overtaken by competitors throughout the world."[3]

International comparisons of student achievement confirm that the United States is falling behind in virtually all subject areas, particularly in the immensely important fields of mathematics and the sciences—areas that are critical to addressing the challenges of the ever more technological world. The achievement of American pupils in science and mathematics,

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1. NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983).

2. *Id.* at 11.

3. *Id.* at 5.

especially among high school seniors, is substantially below that of pupils from virtually every other developed nation.[4] Employers have documented a gross inadequacy in the educational and skills levels of their entry level employees, and warn of an increasing shortage of an adequate pool of workers capable of handling higher-order, complex tasks.[5] The business community has, in fact, become extremely vocal in calling for increased investment in the education of America's children.[6] The Committee for Economic Development, a research group comprised of over 200 business executives and educators, stated that

> [t]his nation cannot continue to compete and prosper in the global arena when more than one-fifth of our children live in poverty and a third grow up in ignorance. And if the nation cannot compete, it cannot lead. If we continue to squander the talents of millions of our children, America will become a nation of limited human potential. It would be tragic if we allow this to happen. America must become a land of opportunity—for every child.[7]

Interest in reform has been sparked by the low performance level of American elementary and secondary education. At the same time, national economic, demographic, and political trends have caused greater problems in the schools. Most notably, the disparity between achievement of children from affluent families and their less advantaged peers has increased, while the number of so-called at-risk children has risen.

The recession at the beginning of the 1980s left more poor and near-poor people in the United States.[8] Because many of these people lacked adequate education, skills, and training,

4. *See* K. REDD & W. RIDDLE, COMPARATIVE EDUCATION: STATISTICS ON EDUCATION IN THE UNITED STATES AND SELECTED FOREIGN NATIONS 64-65 (Congressional Research Service Report No. 88-764 EPW, 1988).

5. The Business Council for Effective Literacy reports that about 14 million workers read at a fourth-grade level and 23 million, or 20 percent of the nation's workers, read at no better than an eighth-grade level. *See* Daniels, *Illiteracy Seen as Threat to U.S. Economic Edge*, N.Y. Times, Sept. 7, 1988, at B8, col. 3.

6. *See, e.g.*, COMM. FOR ECON. DEV., CHILDREN IN NEED: INVESTMENT STRATEGIES FOR THE EDUCATIONALLY DISADVANTAGED 17 (1987). Reports in a similar vein have been issued by the Business Roundtable, the Business-Higher Education Forum, and other groups.

7. COMM. FOR ECON. DEV., *supra* note 6, at 1.

8. "[F]rom 1978 to 1983, the poverty rate increased by one-third, from 11.4 percent to 15.2 percent, and the number of [persons below the poverty level] increased from 24.5 million to 35.3 million." *See* U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-60, No. 168, MONEY INCOME AND POVERTY STATUS IN THE UNITED STATES: 1989, at 15 (1990) (advance data from the March 1990 *Current Population Sur-*

and because few or no programs existed to ease their entry or re-entry into an economy that had shifted toward service industries, many workers and their families slipped from the comfortable middle class to the expanding ranks of the working poor. They struggled to meet monthly obligations, delayed or abandoned college plans, and sharply cut back on all family endeavors. Families came face-to-face with limited options, reduced expectations, and restricted opportunities. The burgeoning of the so-called underclass—the underemployed who lack the skills and proper education to obtain better paying jobs, the long-term unemployed, the documented and undocumented immigrants who have come to the United States from nations with weak educational and economic systems, the adolescent parents, the people who have become caught in the cycle of drugs and despair that poverty can cause—has served to create a monumental challenge for society in general, but particularly for our schools.

Young children are now the fastest growing group among the poor. Presently, one in five children is raised in a poverty-level household.[9] Additionally, for certain groups, such as African-Americans, almost one of every two children grows up in an environment characterized by limited opportunities, substandard housing, inadequate schools, and improper nutrition and health care.[10] Illiteracy in America is again on the rise. One study estimates that twenty-three to twenty-seven million adults cannot read and write well enough to meet basic demands of everyday life.[11] The 1980s also again saw an increase in the number of high school dropouts. Thirteen percent of all eighteen-to-twenty-one year-olds lacked a high school diploma in 1987. Among all poor youths, the proportion was 28.5 percent.[12]

Our nation's future is inextricably tied to finding the best way to increase the achievement of all students and to providing a quality education for those children who suffer enormous

vey). While the number of poor persons and the poverty rate have declined since that time, both remained above their 1978 levels in 1989. *See id.*

9. *See* CHILDREN'S DEFENSE FUND, A VISION FOR AMERICA'S FUTURE—AN AGENDA FOR THE 1990S: A CHILDREN'S DEFENSE BUDGET 16 (1989).

10. *See* U.S. BUREAU OF THE CENSUS, *supra* note 8, at 9.

11. *See* Daniels, *supra* note 5. The United States Department of Education estimates that 17 to 21 million persons are functionally illiterate. *See* U.S. DEP'T OF EDUC., ADULT LITERACY ESTIMATES FOR STATES 6 (1986).

12. *See* CHILDREN'S DEFENSE FUND, *supra* note 9, at 71.

economic and social disadvantage. It is the mark of a moral and humane society to assist all human development to its fullest potential; it is a virtual economic necessity to properly educate and train all of society's members.[13] Our nation's refusal to assist these citizens adequately in gaining the education and skills necessary to enter the mainstream of American society tears away at the very foundations of our democratic way of life, threatening our living standards at home, in terms of economic viability, and our national security abroad.

If we were "a nation at risk" in 1983, then the trends of the remainder of the decade, hardly indicating tangible improvement, bring us to the declaration of a genuine crisis of enormous proportions for the 1990s. While increased national attention to educational achievement has led to a variety of school reforms in states, localities, and individual school districts across the country, their fragmented and limited scope have failed to make a dent in the overall condition of education in America. The missing ingredient has been a comprehensive and coordinated approach. To achieve our objectives within a certain timeframe, we need clearly articulated goals and a pledge of adequate resources to implement specific policies and programs. Nothing short of a major national commitment of the three "R's"—resources, reforms, and results—will have the required impact needed to ensure a quality education for all children in the American school system. Herein lies not only America's ultimate challenge, but also a reservoir of opportunity for our nation's future.

This Article provides an overview of the American public educational system and the economic, political, and social developments that have impacted it. By looking at the current status of education, the need for a far more comprehensive approach, encompassing all levels of government and the private sector, coordinated and stimulated by the federal government, becomes evident.[14]

Part II presents a review of the historical development of public education in the United States, showing over 200 years

13. *See* W. JOHNSTON, WORKFORCE 2000: WORK AND WORKERS FOR THE TWENTY-FIRST CENTURY 116 (1987). This report projects that the workforce will grow more slowly and will have fewer young people; more minorities, women, and immigrants; and larger numbers of disadvantaged persons. All these groups suffer disproportionately from lack of quality educational experiences and poor skills. *See id.* at 75-76.

14. Federal coordination should not be confused with federal control.

of governmental commitment to expanding educational opportunity and increasing educational excellence. Part III examines the convergence of a variety of economic, demographic, social, and political trends during the 1980s that resulted in retrenchment in the drive for universal educational quality. The analysis demonstrates how an increase in the number of economically disadvantaged children in the schools, inadequate resources, and a shift in emphasis to rewarding the few as opposed to encouraging achievement for all resulted in a benign neglect of education weaknesses and inequities. Part IV reviews the emergence of public awareness, the resultant political attention to the education crisis today, and the building of a consensus for additional investment in education. Finally, Part V proposes federal legislative remedies and associated state and local actions for achieving the historically accepted goals of equity and excellence for the greatest number of people possible. A comprehensive agenda for public education is proposed to make America first in education among its international competitors.

II. Equity and Excellence in Public Education in the United States—An Historical Perspective

Today, the federal government has a relatively limited role in the public and private systems of education serving almost fifty-eight million students in about 16,000 local school districts and 3,000 institutions of higher education.[15] Federal financial support represents approximately nine percent of the more than $300 billion spent annually on all levels of education (six percent for elementary and secondary education, thirteen percent for higher education).[16] Despite the limited role of the federal government and the lack of educational guarantees in the Constitution, the influence of the federal government on the necessity and quality of public schools is historically well-documented.[17]

The federal role in education is not a recent phenomenon. Even before the Constitution was ratified, the Land Ordinance Act of 1785 and Northwest Ordinance of 1787, both passed by

15. *See* Nat'l Center for Educ. Statistics, U.S. Dep't of Educ., Digest of Education Statistics 9, 90, 166 (1989).

16. *See id.* at 32.

17. *See, e.g.*, Tyack & James, *Education for a Republic: Federal Influence on Public Schooling in the Nation's First Century*, This Constitution, Winter 1985, at 17; Unks, *The Illusion of Intrusion: A Chronicle of Federal Aid to Public Education*, 49 Educ. Forum 134 (1985).

the Congress established under the Articles of Confederation, linked the drawing of property lines to inclusion of schools. That Congress also established a land allocation to promote schooling for the territory northwest of the Ohio River.[18] The Northwest Ordinance, in particular, became the model for rules relating to schools, governing the organization of almost all of the other territories. Beginning with the admission of Ohio into statehood in 1803, Congress required that new states provide for education in their constitutions as a condition for admission to statehood.[19]

The overall pattern of governmental interest in education has been clear throughout our history, as evidenced by the desire for achievement of the common welfare and the view that an educated citizenry is essential to the success of democracy. James Madison, in a letter dated August 4, 1822, wrote: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both."[20] Thus, although the United States Constitution did not mention education per se, the States established education as a major governmental function. As Thomas Jefferson wrote: "Preach, my dear Sir, a crusade against ignorance: establish [and] improve the law for educating the common people."[21]

From the beginning of our country, however, education has not been an equal-opportunity endeavor. As had been the case in the European countries of the founding fathers, education was primarily available as an opportunity only for the children of the wealthy landholders. Jefferson's "common people," along with women and slaves, were not recipients of quality educations.

18. *See* Tyack & James, *supra* note 17, at 17. The Land Ordinance Act of 1785 provided that "[t]here shall be reserved the lot No. 16, of every township, for the maintenance of public schools, within the said township." Two years later, the Northwest Ordinance of 1787 stated that "religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever by encouraged." *See id.*

19. *See* Unks, *supra* note 17, at 136.

20. P. PADOVER, THE COMPLETE MADISON: HIS BASIC WRITINGS 346 (1953) (quoting James Madison). It is interesting to note, however, that no southern state, including that of Messrs. Madison and Jefferson (Virginia), had a comprehensive public education system until after the Civil War. *See* C. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS IN AMERICAN SOCIETY, 1780-1860, at 182-217 (1983).

21. Tyack & James, *supra* note 17, at 22 (quoting Thomas Jefferson).

The federal Morrill Act of 1862[22] began to change that, however, because it set a major precedent by creating land grants for agricultural colleges and the study of military tactics and required states to document the establishment of the colleges and to make annual reports to the nation's capitol. While not leading to universal public elementary and secondary education in all of the states, the Morrill Act was based on population, thus demonstrating that the federal government had begun to respond specifically to national educational needs on a somewhat more egalitarian basis.[23] Through other actions, the federal government continued to wade into the waters of ensuring equity in its promotion of educational opportunity. At the end of the Civil War, the newly formed Freedmen's Bureau, which had been set up to assist recently freed slaves assimilate into society, helped to establish schools and other educational and vocational opportunities for former slaves.[24]

Until the early part of the Twentieth Century, the federal government was involved mainly in promoting higher education. This focus changed with the passage of the Smith-Hughes Vocational Education Act of 1917,[25] which was closely tied to the perceived defense needs of World War I and which authorized money for vocational education and home economics training in high schools.[26] The federal interest in educating all children, regardless of class, was gaining a firmer foundation.[27]

During World War II, the Lanham Public War Housing Act[28] financed the construction of schools in federally-affected areas and helped women working in the defense industries by funding nursery schools and child care centers. The Servicemen's

22. Morrill Act of 1862, ch. 130, 12 Stat. 503 (codified as amended at 7 U.S.C. §§ 301-308 (1988)).

23. *See* Unks, *supra* note 17, at 138-40.

24. *See* 2 S. MORRISON & H. COMMAGER, THE GROWTH OF THE AMERICAN REPUBLIC 81-82 (1969). Congress created the Freedmen's Bureau of the War Department on March 3, 1865, Act of Mar. 3, 1865, ch. 90, 13 Stat. 507, and for four years, as part of its general relief work, it helped to establish over 4,000 schools for black children. *See* Act of June 25, 1864, ch. 156, §§ 17-18, 13 Stat. 187, 191 (providing for education of black children).

25. Smith-Hughes Vocational Education Act of 1917, ch. 114, 39 Stat. 929 (codified at 20 U.S.C. § 11 (1988)).

26. *See* Unks, *supra* note 17, at 141.

27. *See, e.g.*, S. TIEDT, THE ROLE OF THE FEDERAL GOVERNMENT IN EDUCATION 23 (1966).

28. Act approved Apr. 29, 1941, ch. 80, 55 Stat. 147.

Readjustment Act of 1944[29]—more commonly known as the G.I. Bill of Rights—is arguably the most comprehensive federal legislation from this time period. Providing $14 billion in education, job training, and other loan benefits for 7.8 million veterans, this measure opened the door to the American dream of opportunity for advancement to an entire generation of young Americans.[30] According to one analysis prepared recently by the Joint Economic Committee of the Congress, for every dollar the government invested in education under the G.I. bill, the nation received between $5.00 and $12.50 of benefits.[31]

In the eighty-two years between enactment of the Morrill Act and enactment of the G.I. Bill of Rights, the federal government's promotion of equity moved from ensuring that each state offered education to its citizens to addressing the educational needs of particular groups within our society, such as the young veterans whom our nation wanted to compensate for national service and lost time. The equity assurances became more interwoven with the drive for meeting national priority needs as the century progressed. The National Science Foundation was created in 1950 to provide support to struggling scientists and to increase support for research projects deemed to be of national importance.[32] The National Defense Education Act of 1958 (NDEA)[33] provided financial support for an increased emphasis on science, mathematics, and foreign languages in order to address the perceived weakness of the United States in science, industry, government, and military capability. There were also several failed attempts to authorize general education assistance programs during the Truman and Eisenhower administrations.[34] It was not until the 1960s, however, that the equity movement was to move forcefully ahead.

29. Servicemen's Readjustment Act of 1944 (G.I. Bill of Rights), ch. 268, 58 Stat. 284 (codified as amended in scattered sections of United States Code).

30. *See* STAFF OF JOINT ECONOMIC COMM., SUBCOMM. ON EDUCATION AND HEALTH, 100TH CONG., 2D SESS., A COST-BENEFIT ANALYSIS OF GOVERNMENT INVESTMENT IN POST-SECONDARY EDUCATION UNDER THE WORLD WAR II GI BILL 1 (1988), *reprinted in Future of Head Start: Hearing Before the Subcomm. on Education and Health of the Joint Economic Comm.*, 101st Cong., 2d Sess. 93, 94 (1990).

31. *See id.*

32. *See* National Science Foundation Act of 1950, ch. 171, 64 Stat. 149 (codified as amended at 42 U.S.C. §§ 1861-1875 (1988)).

33. Pub. L. No. 85-864, 72 Stat. 1580 (codified as amended at 20 U.S.C. §§ 401-602 (1988)).

34. *See* GOVERNORS' CONFERENCE, IS EDUCATION THE BUSINESS OF THE FEDERAL GOVERNMENT? (1964).

The Civil Rights Act of 1964[35] codified the mandate for the desegregation of public schools determined to be a constitutional necessity by the Supreme Court ten years earlier in *Brown v. Board of Education of Topeka*.[36] The culmination of the civil rights movement of the 1950s, and the commitment of Lyndon B. Johnson to enacting equity-based legislation, gave enormous and unstoppable impetus to efforts to broaden the concept of equity in virtually all aspects of American society. As a result, education programs received a dramatic increase in federal resources.[37]

With the enactment of the Elementary and Secondary Education Act of 1965 (ESEA),[38] the federal government firmly cemented its already established role in striving to ensure a quality education for all children. Targeted at increasing the basic skills achievement of children from low-income families, the ESEA and its subsequent amendments have succeeded in raising the reading and mathematics achievement of millions of elementary and secondary school children.[39] The Higher Education Act of 1965,[40] which established a broad array of financial assistance and other supportive programs for college students and higher education institutions; the Education Amendments of 1972,[41] which greatly expanded the student assistance programs of the Higher Education Act and included prohibitions on discrimination against women in education programs; and the Education for All Handicapped Children

35. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.). Title VI of the Act prohibits the use of any federal funds for the institution or perpetuation of segregation and discrimination. *See* 42 U.S.C. § 2000d (1988).

36. 347 U.S. 483 (1954).

37. The Elementary and Secondary Education Act of 1965 (ESEA), Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C. §§ 2701-3386 (1988)), was funded at almost $2 billion by 1970. *See ESEA 25th Anniversary Hearing: Hearing Before the Subcomm. on Elementary, Secondary, and Vocational Education, House Education and Labor Comm.*, 101st Cong., 2d Sess. 25 (1990) (statement of Jule M. Sugarman, Executive Director, Special Olympics, International). By 1990, funding for Chapter One of the ESEA alone exceeded $5 billion. *See* Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-166, 1989 U.S. CODE CONG. & ADMIN. NEWS (103 Stat.) 1159, 1179.

38. Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C. §§ 2701-3386 (1988)).

39. *See* OFFICE OF EDUC. RESEARCH AND IMPROVEMENT, U.S. DEP'T OF EDUC., NATIONAL ASSESSMENTS OF CHAPTER ONE: THE EFFECTIVENESS OF CHAPTER ONE SERVICES 17-44 (July 1986).

40. Pub. L. No. 89-329, 79 Stat. 1219 (current version at 20 U.S.C. §§ 1001-1146a (1988)).

41. Pub. L. No. 92-318, 86 Stat. 235.

Act of 1975,[42] which committed the federal government to ensuring equal educational access to disabled children, all followed the path of federal action geared to expanding educational opportunity. While critics claim such federal action was misguided,[43] federal attempts during the 1960s to eradicate poverty, racism, and inequality were some of the finest national initiatives.

III. RETRENCHMENT

While great strides have been made through the broadening of educational opportunity in the last twenty-five years, the convergence of negative economic trends, demographic changes, and a more restrictive political environment have resulted in the retrenchment of earlier gains in educational achievement.

A. *Poverty*

The single most significant factor in the backslide of education has been the ever-widening income gap between the "haves and have-nots" over the last decade. Deficient and imbalanced economic performance in the economy, from which government revenues are derived, has resulted in insufficient public outlays and inadequate private economic activity to meet the essential domestic needs of our people and the economy.[44] During the 1980s, family income grew more slowly; while the upper one percent income group experienced significant income growth, the bottom forty percent experienced a decline in income.[45] Middle-class family income grew, but mainly because of the earnings of a second wage-earner, usually a wife. For those families, two or more people had to be actively engaged in the labor force to maintain the standard of living to which they had been accustomed.[46] The United States Bureau

42. Pub. L. No. 94-142, 89 Stat. 775 (codified as amended at 20 U.S.C. §§ 1400-1485 (1988)).

43. *See, e.g.*, J. COLEMAN, EQUALITY OF EDUCATIONAL OPPORTUNITY 297 (1966); C. JENCKS, INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA 3 (1972). These critics argue that school resources have less measured effect on student achievement than do family background characteristics.

44. *See Hearings on the 1987 Economic Report of the President Before the Joint Economic Committee*, 100th Cong., 2d Sess. 485 (1988) (statement of Leon H. Keyserling, President, Conference on Economic Progress).

45. *See* L. MISHEL & D. FRANKEL, THE STATE OF WORKING AMERICA 24 (1991).

46. *See id.* at 40-41.

of the Census reports that 31.5 million Americans were living in poverty in 1989.[47] The income gap between rich and poor was the widest since the Census Bureau began collecting such data in 1947.[48] In the last decades of the Twentieth Century, being poor has become an intractable way of life for many people. It has become increasingly more difficult for individuals and families to pull themselves up by the bootstraps as so many of their predecessors had done.[49]

Children have been the greatest losers in this tragic scenario. Due primarily to the recession at the early part of the decade, the poverty rate for children rose from 16.0 percent in 1979 to 21.8 percent in 1983.[50] Importantly, family poverty has been found to be correlated with failure in school.[51]

B. *Demographics*

At the same time that poverty was increasing, the demographics of the student population in the United States shifted. Increases in the number of children in poverty and in the number of children of immigrants from non-English speaking countries, scores of whom were also educationally and economically disadvantaged, have combined to place enormous strains on the school systems attended by many of those children. Conservative estimates show that disadvantaged students constitute thirty percent of the school population.[52]

Additionally, the number of educationally and economically disadvantaged school children receiving Chapter One compensatory educational assistance[53] fell from 5.2 million in 1980 to

47. *See* U.S. BUREAU OF THE CENSUS, *supra* note 8, at 2. The preliminary 1990 poverty level for a family of four was $13,360 annually; for a family of three, it was $10,419 annually. Telephone interview with Eleanor Baugher, Statistician, Housing and Household Economics Statistics Division, U.S. Bureau of the Census.

48. *See* CHILDREN'S DEFENSE FUND, *supra* note 9, at 17.

49. *See* Comer, *Poverty, Family and the Black Experience,* in GIVING CHILDREN A CHANCE: THE CASE FOR MORE EFFECTIVE NATIONAL POLICIES 109 (G. Miller ed. 1989).

50. *See* CHILDREN'S DEFENSE BUDGET, *supra* note 9, at 16.

51. *See* L. SCHORR & D. SCHORR, WITHIN OUR REACH, BREAKING THE CYCLE OF DISADVANTAGE 7 (1988). *See also* Webb, *The Public Economic Benefits of a High School Education,* in EDUCATIONAL NEEDS IN THE PUBLIC ECONOMY 79 (K. Alexander & K.F. Jordan eds. 1976).

52. *See* H. LEVIN, EDUCATIONAL REFORM FOR DISADVANTAGED STUDENTS: AN EMERGING CRISIS 9 (1988).

53. Chapter One of the Educational Consolidation and Improvement Act of 1981, which amended the original Title I of the Elementary and Secondary Education Act, provides funds, through the States, to local education agencies, for reading and mathematics basic skills supplemental assistance to economically and educationally at-risk students. *See* 20 U.S.C. § 2701 (1988).

4.9 million in 1987.[54] In the 1989-90 school year, only approximately one-half of the children eligible for Chapter One reading and mathematics instruction received the compensatory assistance to which they were entitled.[55] School systems have therefore attempted to address the special educational needs of increased numbers of disadvantaged and non-English speaking children, or both, through existing instructional programs not designed for those purposes. Many school systems across the country, already struggling with tight budgets, worsening teacher-to-student-ratios in the classroom, and crumbling facilities, were unable to obtain the financial or human resources necessary to meet the special compensatory and support needs of the larger numbers of economically disadvantaged children.[56]

C. *Social and Political Trends*

As the demographic and economic hardship factors throughout the decade took hold, equally revolutionary social and political changes occurred. Beginning in 1981, the Reagan Revolution brought an end to an activist federal government. Swept into office on anti-federal government sentiment,[57] and on the tail of recession with double-digit inflation rates, the Reagan administration reduced the central debates of the day to the quest for less for and from the federal government: less government involvement, less government regulation, less money for federal programs, and less implementation and enforcement of federal laws, particularly those safeguarding civil rights. In word and deed, a deliberate and successful effort was undertaken to redistribute income and wealth.[58] The intent

54. *See* U.S. DEP'T OF EDUC., A SUMMARY OF STATE CHAPTER 1 PARTICIPATION AND ACHIEVEMENT INFORMATION FOR 1987-88, at 9 (1990).

55. *See* COMM. FOR EDUC. FUNDING, EDUCATION BUDGET IMPACT ALERT FOR FISCAL YEAR 1991—A COMPILATION OF FEDERAL EDUCATION PROGRAMS 3 (A. Sumberg ed. 1990).

56. Such support needs to include more one-on-one instruction geared to the individual student's abilities, more substantial and wide-ranging parental support and involvement, greater bilingual education assistance, more comprehensive social, health, and nutritional services, and increased development of educational programs appropriate for at-risk children.

57. This sentiment actually began with the election of Reagan's predecessor, Jimmy Carter.

58. *See* K. PHILLIPS, POLITICS OF RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE REAGAN ADMINISTRATION xvii, xxiii (1990) ("The 1980s were the triumph of upper America—an ostentatious celebration of wealth, the political ascendancy of the rich, and a glorification of capitalism, free markets, and finance. . . .

could not have been more clearly stated: Make the wealthy richer in order to help the less fortunate through economic growth initiated by the spending of the wealthy.

Between 1962 and 1980, spending for federal domestic programs as a percentage of gross national product (GNP) rose from less than eight percent to about fifteen percent.[59] From 1980 to 1989, domestic program expenditures fell to 14.3 percent, with domestic discretionary spending, which includes education, falling from 5.9 percent to 3.7 percent of GNP.[60] In the years 1979 and 1980, 11.4 percent of all education spending, and 9.1 percent of spending for elementary and secondary schools, was federal. By mid-decade, the federal share was 8.7 percent of all spending, and 6.1 percent of spending for elementary and secondary schools.[61] Funding for Chapter One, which like Title I of the original Elementary and Secondary Education Act of 1965 sought to help poor children at risk of falling behind in school, fell by an estimated eleven percent from fiscal year 1980 through fiscal year 1990.[62] These actions, taken with the acquiescence of a politically weakened Congress, were without subterfuge, and unfortunately, without calculation of the enormous costs that inadequate funding would bring about in future years. For instance, Terrell Bell, who served as Secretary of Education from 1981 to 1984, said that

> the President intended to push for [the Department of Education's] abolition. . . . [The President] was also going to insist on . . . deep budget slashes. There was simply no commitment to a federal leadership role to assist states and their local school districts in carrying out the recommendations of *A Nation at Risk*.[63]

At the same time that poverty was increasing and the clientele of the nation's public school system was becoming more economically disadvantaged, more diverse, and more needful of special services, cuts in educational resources targeted to en-

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Not only did the distribution of wealth quietly intensify, but the sums involved took a megaleap."). *See also* Lekachman, *The Economy*, in WHAT REAGAN IS DOING TO US 197 (A. Gartner, C. Greer & F. Riessman eds. 1982).

59. *See* A. RIVLIN, ECONOMIC CHOICES 1984, at 47 (1984).

60. *See* CONGRESSIONAL BUDGET OFFICE, THE ECONOMIC AND BUDGET OUTLOOK: FISCAL YEARS 1991-1995, at 127 (1990).

61. *See* U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS 32 (1986) (reporting statistics for the 1985-86 school year).

62. *See* CONGRESSIONAL RESEARCH SERVICE, U.S. DEPARTMENT OF EDUCATION: MAJOR PROGRAM TRENDS, FISCAL YEARS 1980-1990, at 11 (Report No. 89-144 EPW, 1989).

63. T.H. BELL, THE THIRTEENTH MAN 160 (1988).

sure equity and excellence for those very children were proposed at the federal level.[64] Even though there were more children in need of compensatory education, vocational education, health, social services, and job training, the funds for those programs were nonetheless drying up. As a result, educational weaknesses were not addressed. As the at-risk children became at-risk adolescents and teenagers, the problems of the schools were compounded. Not only were there more children coming into the schools ill-prepared and developmentally unready for the rigors of learning, these children—in light of their early achievement difficulties—were unable to equal their peers' educational results. Resources that previously had been available to assist the basic skills attainment of those children were no longer available; as a result, millions of potential scientists, doctors, lawyers, teachers, skilled technicians, and engineers have been lost because of our unwillingness to address our economic, social, and moral problems.

To make matters even more complex, during this same period of restrictive funding of equity programs, efforts to bolster the talented few and to tighten school standards, evidenced in the school "reform" movement,[65] took funding and programmatic resources away from programs addressing the needs of so-called average and disadvantaged students. For example, the 1980s saw great experimentation with so-called "open enrollment" schemes, such as magnet schools. Intended to foster desegregation in the schools, de facto segregated because of housing patterns, a few selected schools located in predominantly minority communities received massive influxes of resources.[66] Concentrating on these few schools, the best teachers in the system were brought in, the latest technological educational tools were utilized, and specialized curriculums were promoted (for example, math and sciences, foreign lan-

64. For example, for fiscal year 1983, the Reagan Administration proposed an overall budget cut of 33 percent for the Department of Education and, for fiscal year 1988, a 29-percent cut. Congress, however, appropriated 55 percent more than requested for 1983 and 45 percent more in 1988. *See* CONGRESSIONAL RESEARCH SERVICE, *supra* note 62, at 3.

65. The school reform movement has promoted excellence in general education without necessarily showing concern for equity. This approach assumes that lumping the problems of any special class together with the general education of all eventually would yield benefits.

66. *See, e.g.*, R. BLANK, R. DENTLER, D. BALTZELL & K. CHABOTAR, SURVEY OF MAGNET SCHOOLS: ANALYZING A MODEL FOR QUALITY INTEGRATED EDUCATION (1983).

guages, the arts, et cetera).[67]

Parents from within an entire school district can attempt to enroll their children in magnet schools, even if they are located outside the schools' normal enrollment areas. While these schools are unquestionably successful in improving the achievement of the children who are able to take advantage of these programs,[68] and somewhat successful in achieving the desired racial and ethnic integration,[69] questions of equity have begun to surface. Not all children are accepted in such schools because of lack of space or the effort to maintain racial balance. Indeed, parents sometimes camp out on school grounds overnight to try to get their children a slot in successful magnet schools. Minority children from low-income families living in the communities where the magnets are located may be unable to register in their own local schools, and if they are lucky enough to get in, some may remain segregated if they are unable to participate in the accelerated programs.[70]

The question of equity arises in the popular movement known as "parental choice" as well. Like magnet schools, choice programs are based on offering parents an opportunity to choose among the various public schools in the school district.[71] Proponents of this "market approach" to education believe that competition among schools for students will result in schools offering a better product. "Bad" schools would lose their clientele and close, with only the "good" schools surviving.[72]

Officials of the Bush administration have not only expressed support for the concept of parental choice, but have allocated scarce federal resources to its promotion. The administration has also supported efforts to codify choice as a federal educational option.[73] Many criticisms of the choice policy exist, how-

67. *See* D. MOORE & S. DAVENPORT, THE NEW IMPROVED SORTING MACHINE 6-7 (presentation to Education Writers Association, April 15, 1988) (available in office of *Harvard Journal of Law & Public Policy*).

68. *See* R. BLANK, R. DENTLER, D. BALTZELL & K. CHABOTAR, *supra* note 66, at 27.

69. *See id.* at 32.

70. Such problems may occur in "school within a school" magnets. *See, e.g.*, Norris, *P.G. Not Alone with Racial Trends Hurting Magnet Strategy*, Wash. Post, Jan. 25, 1990, at D1, col. 2.

71. In at least one city, Milwaukee, Wisconsin, private schools are available as a choice as well. In addition, in some areas, choice allows parents to choose public schools in other districts.

72. *See* J. CHUBB & T. MOE, POLITICS, MARKETS AND AMERICA'S SCHOOLS 190 (1990).

73. The Department of Education sponsored several regional meetings promoting

ever. Choice has had little significant evaluation, is based on a selection rather than on an instructional process, and can result in a two-tiered local educational system. Under choice programs, students, as well as money and other education resources, may be drained from less viable schools and districts to be channelled to the more sought-after schools.[74]

Parental choice, without federal authorization, is already a legitimate local option. The determination of school attendance zones has traditionally been viewed as a local matter[75] and therefore an inappropriate activity for federal involvement. If local school districts decide to experiment with choice, they should use non-federal resources. All such programs should provide adequate attention to nondiscriminatory admission policies, parent involvement and information, opportunities for educators to create unique instructional programs, and support for transportation costs for all students.

Those who are proponents of parental choice as the national answer to our educational problems would have us see choice as a cheap, quick-fix program with public relations appeal.[76] In reality, however, choice per se is an idea that does not address improvement of instruction and will not lead to equity and excellence for all public school students. More importantly, choice should not be used as a diversionary tactic to shift the focus away from real school improvement and caring for the needs of the vast majority of children.

Other proposals, touted as choices for parents, include government-funded educational vouchers and tuition tax credits. These ostensibly give parents increased choice over school enrollment decisions.[77] Vouchers and tuition tax credits, however, pose even greater threats to quality public education than

choice throughout the country in 1989 and 1990. During congressional consideration of H.R. 5115, the Equity and Excellence in Education Act of 1990, the Bush Administration supported an amendment by Representative Steve Bartlett (R-Texas) that would have authorized the use of federal funds for open enrollment plans. *See* 136 CONG. REC. E3521 (daily ed. Oct. 26, 1990) (statement of Rep. Goodling).

74. *See* Snider, *School Choice: New, More Efficient "Sorting Machine"?*, Educ. Week, May 18, 1988, at 1, col. 1.

75. The major exception to local zone determination is federal desegregation requirements.

76. *See* Finch, *The Claims for School Choice and Snake Oil Have a Lot in Common*, AM. SCHOOL BD. J., July 1989, at 31.

77. Vouchers in this context refer to direct federal distributions of funds to parents to be used to pay for, or supplement, their child's attendance at non-public schools. Tuition tax credits are similar, except that the parents would be reimbursed by receiving an income tax credit for such educational expenditures.

does simple parental choice. These schemes threaten the very continuation of public education as we know it in our country today. Their wide-spread implementation would transfer public money to private schools at the very time a consensus of opinion supports greater federal resource investment in public education.[78] By their nature, private schools are reluctant to match requirements, submit to regulations, open admissions policies, and meet the non-sectarian demands made of public schools. Otherwise, they would not be private. They have a proper place in the scheme of education in America, but not at the expense of public education and equity.

Vouchers and tax credits for education are not comparable to products in the marketplace. Policies that work to encourage consumers to purchase durable goods efficiently do not necessarily translate into policies to invest in the education of human beings. They ignore the social value of common schools in an increasingly diverse, pluralistic society. The amount of buying power the vouchers would provide parents, and the small credits that would accrue to parents from tuition tax credits, are inadequate to provide genuinely the same school enrollment choices for low-income parents that more affluent parents already have.[79]

In addition to spawning a plethora of quick-fix schemes as a byproduct, the school reform movement of the 1980s called for the requirement of higher standards and expectations for all students and increased performance expectations of teachers. This push for excellence, while welcome in its own right, came simultaneously with reductions in programs to assist individuals unable to meet those standards without compensatory or additional assistance. This combination has brought us to a crossroads in our educational policy. Focusing on the achievement of the so-called best and brightest has its place in seeking excellence. Increased standards for all students are both important and necessary. But if we are going to require these objectives, then students who are already struggling to meet inadequate standards must be helped to meet the higher ones.

78. *See* Gallup & Clark, *19th Annual Gallup Poll of the Public's Attitudes Towards the Public Schools*, PHI DELTA KAPPAN, Sept. 1987, at 23.

79. *See* STAFF OF SUBCOMM. ON ELEMENTARY, SECONDARY, AND VOCATIONAL EDUCATION OF HOUSE OF REPRESENTATIVES COMM. ON EDUCATION AND LABOR, 101ST CONG., 2D SESS., PROBLEMS CONCERNING EDUCATION VOUCHER PROPOSALS AND ISSUES RELATED TO CHOICE 2-3 (Comm. Print 1990).

Failure to do so will result in a two-tiered system. The "forgotten half,"[80] already inadequately served by the traditional instruction in schools and by current compensatory, vocational, and basic skills programs, will continue to grow.

IV. Support for Educational Investments

Ignited by *A Nation at Risk*, the decade of the 1980s was marked by an explosion of analyses and calls for action to address these many documented educational weaknesses. From chief executive officers of major corporations to the halls of academia, America was clamoring for attention to the country's educational deficits.[81] This monumental change in climate, supporting educational investment and creative attempts to meet the needs of all children, brought forth a blossoming of educational activity at the federal, state, and local levels. In 1988, the first effort to expand and strengthen the federal role in elementary and secondary education in over fifteen years was undertaken with the enactment of the Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988 (School Improvement Amendments).[82]

Drawing on the strengths of the experiences documented in evaluations and assessments of the Chapter One program,[83] the School Improvement Amendments are focused on ensuring that all of America's youngsters will be educationally prepared for the Twenty-First Century.[84] It mandates increased effectiveness and accountability for programs aimed at helping educationally disadvantaged children to succeed in their regular classroom programs, attain grade-level proficiency, and improve achievement in basic and more advanced skills. In addition to reauthorizing virtually every elementary and secondary

80. *See generally* William T. Grant Found. Comm'n on Work, Family and Citizenship, The Forgotten Half: Pathways to Success for America's Youth and Young Families (1988). This report documents the educational, economic, and social plight of the 20 million non-college-bound 16-to-24 year-olds.

81. *See, e.g.*, Carnegie Found. for Advancement of Teaching, An Imperiled Generation: Saving Urban Schools xi (1988); Comm. for Econ. Dev., *supra* note 6, at 4; Quality Educ. for Minorities Project, Education That Works: An Action Plan for the Education of Minorities i (1990).

82. Pub. L. No. 100-297, 102 Stat. 130 (codified as amended in scattered sections of 20 U.S.C.).

83. *See, e.g.*, 1983 Amendments to the Educational Consolidation and Improvement Act of 1981, Pub. L. No. 98-211, § 22, 97 Stat. 1412, 1418-19 (requiring the Secretary of Education to conduct a national assessment of Chapter One).

84. *See* 20 U.S.C. § 2701 (1988).

education program through 1993, the School Improvement Amendments outline strict requirements for increased parental involvement in the planning, design, and implementation of Chapter One programs and required consultation and review of programs both before and after execution.[85] Reports on children's progress, and incentives for parents to participate in classrooms, are also required.[86] In contrast to the misguided "parental choice" schemes, the parental involvement requirements of the School Improvement Amendments are intended to involve parents in the instructional program of their children's education and to increase the accountability of the program. While parental choice is based upon open enrollment and transportation, parental involvement emphasizes interaction between the home and school and all phases of academic performance and school improvement.

The 1988 amendments address some of the weaknesses highlighted by the various studies.[87] New provisions address targeting of additional funds to high-poverty areas through concentration grants, greater flexibility in high-poverty schools through schoolwide plans, and greater accountability provisions to identify and improve unsuccessful school programs.[88] Funding from the federal level is further conditioned upon the maintenance by state and local education agencies of current efforts, the prohibition on using Chapter One funds and services to supplant local efforts, and assurance of comparability of services throughout all schools in a local district.[89]

While a decade of reports and studies broadened support for educational reform and investment measures, the School Improvement Amendments helped to translate this popular consensus into appropriate programmatic efforts to strengthen equity and excellence in education. The passage of this law, with broad bipartisan support, should have made it easier for all politicians to support additional educational investment. Additionally, this law gave the United States Department of Ed-

85. *See id.* § 2726.

86. *See id.*

87. *See, e.g.*, W. RIDDLE, EDUCATION FOR DISADVANTAGED CHILDREN: MAJOR THEMES IN 1988'S REAUTHORIZATION OF CHAPTER 1, at 1 (Congressional Research Service Report No. 89-7 EPW, 1989).

88. *See* 20 U.S.C. §§ 2712, 2725, 2731 (1988).

89. *See id.* § 2728. This last condition, as it relates to the broader inequalities in school financing, obviously has not been monitored or enforced effectively. *See infra* text accompanying notes 105-07.

ucation an opportunity to strengthen its implementation and enforcement role.[90]

In September 1989, President Bush courageously called an education summit with the nation's governors, the first such national summit on the subject. Solidifying and building upon the historic federal education role, President Bush and the nation's governors developed six national goals for education.[91] Propounded by a conservative President and the fifty governors, representing all components of the political spectrum, the proposed national education goals, if approved through congressional action, could signal this country's intent to focus public attention on equity and excellence in education as a national priority. The challenge for the last decade of this century, however, is to provide the resources and programmatic implementation necessary to reach our national goals in education.

V. A Comprehensive Education Agenda for the 1990s

National objectives are necessary in setting an agenda for achievement, but they ring hollow without adequate resources and commitment to implementation. Unfortunately, this is where our country stands in the 1990s. The United States has given itself less than ten years to ensure a quality education for every child, but it has yet to produce the necessary resources and programmatic capabilities with which to accomplish this objective.[92] It is therefore imperative that we move beyond the

90. The United States Department of Education, however, has been lax in this regard. The Department delayed issuing regulations and was late in publishing its Chapter One policy manual. *See, e.g.*, Staff of Subcomm. on Elementary, Secondary, and Vocational Education of House of Representatives Comm. on Education and Labor, 101st Cong., 2d Sess., Chapter 1 Survey of the Hawkins-Stafford School Improvement Amendments 1 (Comm. Print 1990).

91. The goals for the year 2000 are: (1) All children in America will start school ready to learn; (2) the high school graduation rate will increase to at least 90 percent; (3) American students will leave grades four, eight, and twelve having demonstrated competency over challenging subject matter including English, mathematics, science, history, and geography, and every school in America will ensure that all students learn to use their minds well so they may be prepared for responsible citizenship, further learning, and productive employment in our modern economy; (4) United States students will be first in the world in mathematics and science achievement; (5) every adult American will be literate and will possess the knowledge and skills necessary to compete in a global economy and to exercise the rights and responsibilities of citizenship; and (6) every school in America will be free of drugs and violence and will offer a disciplined environment conducive to learning. Nat'l Governors' Ass'n, National Education Goals (Feb. 25, 1990).

92. On the state level, the submission of specific legislative proposals to state legisla-

commendatory rhetoric associated with the national education goals to a forthright discussion and action strategy of how to fully implement the programs and policies that will achieve those objectives by or before the Twenty-First Century. Basic prerequisites for achieving the goals include: (1) resources—full funding of proven, cost-effective federal education, health, and nutrition programs that promote equal educational results for all children in the country;[93] (2) reforms—innovative educational strategies and techniques that have shown promising results to facilitate school improvement and student achievement, as well as greater recruitment, retention, and professional development of teachers; and (3) results—appropriate assessment tools to measure progress in meeting the national goals and improvement in each child's educational achievement.

A. *Resources: Full Funding of Cost-Effective Programs*

As discussed earlier, the 1980s were characterized by funding restraints on proven, cost-effective programs that have made substantial improvements in the educational achievement and lifetime success of millions of children. Research has shown that the failure to invest adequately in the education of America's children is penny-wise and pound-foolish.[94] The private sector spends $30 billion annually on employee "training."[95] Illiteracy costs our nation over $237 billion annually in welfare checks, crime costs, incompetence on the job, remedial

tures to meet these goals has been elusive, and a comprehensive strategy and adequate resources for such achievement have been lacking. On the federal level, the Equity and Excellence in Education Act of 1990, H.R. 4379, 101st Cong., 2d Sess. (1990), which would have codified the six national goals plus two additional ones dealing with teacher development and post-secondary education, and would have provided the programmatic means for implementation, failed to be enacted at the end of the 101st Congress, due to conservative opposition.

93. *See, e.g.*, Head Start, 42 U.S.C. §§ 9831-9852 (1988); Even Start, 20 U.S.C. §§ 2741-2749 (1988); Education of the All Handicapped Children Act, 20 U.S.C. §§ 1400-1485 (1988); Bilingual Education Act, 20 U.S.C. §§ 3281-3283 (1988); Special Supplement Food Program for Women, Infants and Children, 42 U.S.C. § 1786 (1988).

94. For instance, had we invested $30 billion in cost-effective education programs instead of the defective supply-side economic policy embodied in the Economic Recovery and Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172, we would have saved the costs of illiteracy, "in terms of lost production, reduced wages (incomes), industrial and military accidents, welfare programs, crime and other related problems," estimated at $237 billion a year. CENTER FOR COMMUNITY CHANGE, AMERICA'S THIRD DEFICIT: TOO LITTLE INVESTMENT IN PEOPLE AND INFRASTRUCTURE 9 (1990).

95. *See* A. CARNEVALE & L. GAINER, THE LEARNING ENTERPRISE 17 (1989).

education, and lost revenues.[96] The fact that 800,000 students drop out of high schools per year reduces government revenues by $68 billion over those students' lifetimes, and those students will lose $228 billion in lifetime earnings.[97] By contrast, full investment in effective, preventive programs that benefit children can save billions of dollars in long term costs. For each dollar invested in quality preschool education, six dollars are returned in reduced costs of special education, public assistance, and crime.[98] An investment of $700 in one year of compensatory education can save $5,600 in the cost of one child repeating a grade level.[99] Early educational intervention has saved school districts $1,560 per disabled pupil. Remedial education, training, and well-structured work experience, such as that offered under the Federal Job Corps program, returned $7,400 per participant, compared to $5,000 in program costs.[100] All of these proven, effective programs are grossly underfunded and serve only a small number of the children and teenagers eligible.[101]

The United States has not made a full commitment to adequately fund its education initiatives. A 1990 study by the Economic Policy Institute in Washington, D.C., found that the United States public and private per capita spending on preprimary, primary, and secondary education ranks fourteenth out of sixteen industrialized countries.[102] The authors of the

96. *See* J. CATTERALL, ON THE SOCIAL COSTS OF DROPPING OUT OF SCHOOL 9 (Stanford Education Policy Institute Paper No. 86-SEPI-3, 1985) (citing H. LEVIN, THE COSTS TO THE NATION OF INADEQUATE EDUCATION (1972)).

97. *See id.* at 12.

98. For testimony on the effectiveness of the Head Start program, see SELECT COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES OF THE HOUSE OF REPRESENTATIVES, 100TH CONG., 2D SESS., OPPORTUNITIES FOR SUCCESS: COST EFFECTIVE PROGRAMS FOR CHILDREN, UPDATE, 1988, at 7 (Comm. Print 1988) [hereinafter OPPORTUNITIES FOR SUCCESS]; *The Economic and Social Benefits of Early Childhood Education: Hearings Before the Subcomm. on Education and Health of the Joint Economic Comm.*, 101st Cong., 1st Sess. 1 (1990).

99. *See* OPPORTUNITIES FOR SUCCESS, *supra* note 98, at 7.

100. *See id.*

101. Head Start serves one in five eligible economically disadvantaged preschoolers. Chapter One serves approximately one-half of the eligible school children nationwide. Under the Education for All Handicapped Children Act, all eligible children must be served. However, the federal share of the costs of serving them is currently only seven percent of the excess costs, and fewer than four percent of the eligible at-risk 16-to-21 year-olds are able to enroll in the Job Corps program. *See* COMM. FOR EDUC. FUNDING, EDUCATION BUDGET IMPACT ALERT: FOR FISCAL YEAR 1988—A COMPILATION OF FEDERAL EDUCATION PROGRAMS 83 (1988).

102. *See* ECON. POLICY INST., SHORTCHANGING EDUCATION: HOW U.S. SPENDING ON GRADES K-12 LAGS BEHIND OTHER INDUSTRIAL NATIONS 2 (1990).

report stated that, if the United States were to match the average level of spending for primary and secondary schools in the other fifteen countries in 1985, we would need to increase education spending by some $25 billion annually.[103] While money alone will not assure excellence and quality, to call for the achievement of such worthy objectives as the national education goals while denying increased resource investment is ludicrous and irresponsible.[104]

For those funds that are available, attention must be given to the method of distribution of the investment. The funding inequities and enormous spending disparities that exist among and between school districts throughout the States must be simultaneously addressed.[105] Wealthy school districts are able to hire more qualified teachers, offer better-equipped facilities, and maintain lower teacher-student ratios. Financially strapped school districts suffer from teacher shortages, lack of science, mathematics, foreign language, and art resources, crumbling school facilities, and over-crowded classrooms.[106] Parents and school advocates have filed constitutional court challenges to disparate systems of financing in thirteen states.[107] Inequities have been documented in school districts throughout the

103. It should be noted that the authors' methodologies were challenged by the United States Department of Education. *See Hearing on Education Funding: Hearing Before the House Comm. on Education and Labor*, 101st Cong., 2d Sess. 2 (1990) (statement of Dr. Charles Kolb, Deputy Undersecretary for Planning, Budget, and Evaluation, United States Department of Education). The authors responded, however, that comparing expenditures expressed as a share of national income provided the most accurate comparison of education effort and resources provided to students. Further, an analysis prepared by Wayne C. Riddle, Specialist in Education Finance, Congressional Research Service, United States Library of Congress, points out that several methods have been used to compare education expenditures in the United States and other countries, and each method has significant limitations. Riddle ranked the United States third in elementary and secondary education spending. *See* Memorandum to Honorable Rudy Boschwitz, Subject: Comparisons of Elementary and Secondary Education Expenditures in the United States With Those of Other Nations (Feb. 12, 1990).

104. While methodologies and appropriate rankings may be debated, levels of spending on education continue to be central to discussions pertaining to increasing the achievement and performance of United States students.

105. *See* A. WISE, RICH SCHOOLS, POOR SCHOOLS: THE PROMISE OF EQUAL EDUCATIONAL OPPORTUNITY 4 (1966). *See also The Fair Chance Act: Hearings on H.R. 3850 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor*, 101st Cong., 2d Sess. 7 (1990).

106. *See generally* A. WISE, *supra* note 105, at 5-6.

107. Cases are pending in Alaska, Connecticut, Indiana, Massachusetts, Michigan, Minnesota, North Dakota, Oregon, and Tennessee. Cases in Kentucky, Rose v. The Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989), and New Jersey, Borough of Sea Bright v. State Dep't of Educ., 242 N.J. Super. 225, 576 A.2d 331 (1990), were decided recently, and the suit in Texas is still active. *See* Newman, *Legal Challenges to Finance Formulas On Court Dockets in at Least 12 States*, Educ. Week, May 2, 1990, at 14,

United States, but progress has been excruciatingly slow. The federal government should require all states to equalize educational resources among school districts as a condition for receipt of federal aid. This is necessary to allow comprehensive improvement efforts to benefit all children and to provide poor districts with the resources necessary to meet state mandates and recommendations. A full discussion of the inequities and their impact on at-risk students is contained in a recent report issued by the United States House Education and Labor Committee.[108]

An additional note of concern must be mentioned at this juncture. Eleventh-hour action by the 101st Congress and the President of the United States to place spending limitations on all federal domestic spending programs as part of the so-called Budget Summit agreement will undoubtedly place restraints on the ability to secure adequate additional funding for education programs.[109] This runs directly counter to the broad consensus of support which exists for fully funding programs such as Head Start, Chapter One, teacher development, and student aid.

We risk a return to the status quo characterized by the 1980s, where increased spending at the close of the decade was still attempting to make up for ground lost to cuts incurred earlier.[110] Faced with at least three years of little growth in services, followed by two years where education programs will continue to be in competition with other worthwhile domestic spending (for example, health, housing, economic and community development), it is incumbent upon us to continue efforts to secure full funding and redouble attempts to find alternative funding sources for educational equity and excellence. For example, an education trust fund financed through federal contract assessments or long-term bonds could ensure expansion

col. 1. Cases are reportedly also being considered in Alabama, Illinois, Pennsylvania, Virginia, and Wyoming.

108. W. TAYLOR & D. PICHÉ, A REPORT ON SHORTCHANGING CHILDREN: THE IMPACT OF FISCAL INEQUITY ON THE EDUCATION OF STUDENTS AT RISK (prepared for Committee on Education and Labor, United States House of Representatives, 101st Cong., 2d Sess., Dec. 1990). The provisions of The Fair Chance Act, H.R. 3850, 101st Cong., 2d Sess. (1990), would have addressed these concerns. It was not enacted.

109. Actual spending for federal elementary and secondary education programs is expected to increase approximately 14.5 percent in fiscal year 1991, but future growth remains questionable.

110. *See* CONGRESSIONAL RESEARCH SERVICE, *supra* note 62.

of services. If the nation was able to find billions of dollars to bail out failed savings and loans institutions, surely we can double our efforts to educate our children. This would bring federal education financial efforts to approximately $50 billion annually.

B. *Reforms: Implement Innovative Strategies and Techniques*

In addition to funding fully and implementing properly the proven, cost-effective programs already statutorily mandated, all levels of government, in conjunction with the private sector, must greatly expand the availability of the wide array of promising innovative strategies that increase the educational achievement of all children. Efforts to restructure and reorganize schools—such as school-based management, shared decisionmaking, effective schools programs, cooperative learning, parental involvement in all levels of educational decisionmaking, and encouragement of partnerships between private industry and the school systems—hold enormous promise for providing some of the means for achieving our national educational objectives.[111]

While it is enormously important to focus attention on the educational achievement of the children, we must not forget to address adequately the recruitment, retention, and professional development of the people who are paid to educate the students. "Teachers are a critical linchpin of educational survival, not to mention improvement."[112] Many aspects of education reform, such as innovation, instructional development, appropriate school-based decisionmaking, and improved quality and achievement, cannot be accomplished without teachers who are competent, experienced, and representative of a broad cultural, ethnic, and racial cross-section. Teachers are the educators who directly affect student learning, achievement, and success. Therefore, greater attention must be given to their needs.

The federal government should assist the improvement,

111. *See, e.g.*, COMM. FOR ECON. DEV., *supra* note 6, at ix; Edmonds, *Effective Schools for the Urban Poor*, 37 EDUC. LEADERSHIP 15 (1979); J. GOODLAD, A PLACE CALLED SCHOOL: PROSPECTS FOR THE FUTURE 272, 318 (1983); T. SIZER, HORACE'S COMPROMISE: THE DILEMMA OF THE AMERICAN HIGH SCHOOL 1 (1984).

112. *Status of Education in America and Directions for the Future: Hearings Before the House Committee on Education and Labor*, 101st Cong., 1st Sess. 111 (1989) (statement of Linda Darling-Hammond, Professor, Teacher's College, Columbia University).

preparation, supply, and distribution of teachers. First and foremost, we must attract and retain highly motivated and qualified people in the teaching profession. The federal government can create financial incentives to encourage students to enter the teaching profession, support efforts to restructure the requirements of traditional undergraduate education degrees, and target the recruitment of people with expertise under-represented in the overall teacher workforce.[113] With a teacher shortage projected nationwide, especially in the critical fields of mathematics, science, foreign languages, and special education, as well as a dearth of minority teachers,[114] the federal government must not only assist in making teaching a viable career option for today's young people, but also must support current teachers in developing further their skills through the establishment of teacher institutes and increased access to educational researchers and their peers.

Although the level of teacher pay is a locally determined issue, government at all levels and the private sector, which has the most to gain from creative, motivated teachers in the classroom, should work in a coordinated fashion to provide greater compensation for such highly valued work. All efforts should be made to increase society's view of the value of the teaching profession. As former Secretary of Education William J. Bennett said in comments about the success of Japanese education:

> [C]ompetent, dedicated teachers make for good schools. And a society that offers its teachers reasonable remuneration, respected status in the community, an orderly school environment, a substantial measure of collegiality and responsibility, and opportunities to recharge their intellectual and professional batteries—such a society can attract a surfeit of eager, qualified people to the classroom, and can retain them in the teaching profession.[115]

If the United States is serious about educating all of its citizens to their greatest potential, this description should fit the view of teachers in America.

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113. For recommendations on strengthening the teacher profession, see THE HOLMES GROUP, TOMORROW'S TEACHERS 4 (1986); and CARNEGIE FORUM ON EDUC. AND THE ECONOMY, A NATION PREPARED: TEACHERS FOR THE 21ST CENTURY 55 (1986).

114. *See* J. STEDMAN, TEACHERS: ISSUES FOR THE 101ST CONGRESS 33-45 (Congressional Research Service Report No. 90-117 EPW, Feb. 23, 1990).

115. W. BENNETT, JAPANESE EDUCATION TODAY 71 (1987).

C. *Results: Assessment Systems that Develop and Encourage Human Talent*

The overall requirement for accomplishing our national education objectives is to ensure that the methods of assessment accurately measure achievement and promote school improvement. Many institutions in American society rely on test performance as an indicator of knowledge and ability rather than as an indicator of where improvements are needed. The educational reform movement has resulted in increased pressure for accountability. Therefore, testing, in the form of multiple choice, norm-referenced and standardized tests (Nrsts), has become the cornerstone of this movement[116] in part because it is less expensive and easy to implement. Accountability through testing, however, becomes invalid if the benchmarks used are faulty, inadequate, or inappropriate. Because they are not related to the curriculum, these tests do not measure what has actually been taught. Consequently, the results do not provide direct or specific guidance for school improvement.[117]

Comprehensive assessment systems should provide data to address two distinctly different purposes: (1) the need for information to improve student learning, teacher performance, and program design, which derives from diagnostic sets of assessment that are curriculum-referenced; and (2) the need for describing existing levels of student, teacher, or program performance, which derives from evaluative sets of test information that usually are norm-referenced and standardized. Results from Nrsts are used to compare similar individuals, groups of individuals, or institutions. When used over a succession of years, they can trace the major trends in the educational attainment of students within a particular district. On the other hand, results from curriculum-referenced assessments are used to analyze and assess the strengths and weaknesses of students and programs and to prescribe corrective measures. Tests can be extremely well suited for one or the other functions, but rarely, if ever, are they appropriate for both.[118]

Another major limitation of Nrsts is their construction, which

116. *See* EDUC. TESTING SERV., THE EDUCATION REFORM DECADE 5-7 (1990).

117. In a 1990 survey of 47 states by the Educational Testing Services (ETS), only 20 states reported using tests for remediation, the quality of which was not clearly documented. *See* EDUC. TESTING SERV., STATE TESTING PROGRAMS AND PURPOSES, 1990, at 2 (1990).

118. *See* LeMahieu, *The Effects on Achievement and Instructional Content of a Program of*

practically guarantees that many students will score poorly on them. These tests ensure a bell-shaped distribution of the scores of any representative population of students by selecting deliberately certain items that ensure that approximately half the students will always score below average.[119] This process also produces rankings that are not directly influenced by school learning.[120] Nrsts have traditionally been used to sort and rank students on a normal, bell curve; however, the purpose of education is to educate all students. Because important decisions are made based upon the results of Nrsts, educators and policymakers at all levels must decide whether such tests are consistent with the purpose of education. More importantly, both students and administrators of the tests should be well informed about their functions and limitations. The National Commission on Testing and Public Policy has concluded that America must rethink how it develops and utilizes human talent and potential, arguing that educational and employment testing must be restructured.[121] Every child is educable, and it is our duty to look for ways to evaluate properly educational achievement.[122]

VI. Conclusion

Accomplishing the momentous task of focusing our national resources and energies on preparing America's young people for the rigors of the Twenty-First Century is our nation's premiere challenge. There is no cheap, quick fix available to accomplish such an important goal. As this Article has attempted to show, it will take the commitment of full resources, a coordinated and comprehensive effort on the part of federal, state, and local governments and the private sector, and broad-based coalitions,[123] to put forth the necessary investment to bring about educational equity and excellence.

Student Monitoring Through Frequent Testing, 6 Educ. Evaluation & Pol'y Analysis 185 (1984).

119. *See* D. Archbald & F. Newman, Beyond Standardized Testing: Assessing Authentic Academic Achievement in the Secondary School 54 (1988).

120. *See id.*

121. *See* Nat'l Comm. on Testing and Public Policy, From Gatekeeper to Gateway: Transforming Testing in America ix (1990).

122. *See* Edmonds, *supra* note 111, at 15-24.

123. For a discussion of formation of broad-based coalitions in this area, see Business Roundtable, Participation Guide: A Primer for Business on Education 5-10 (1990).

We are now faced with an inevitable choice: Do we undertake a costly "catching-up" process of overcoming educational deficits, or do we face the consequences of falling further behind in national literacy and leadership in global markets, in science and technology, and in diplomatic fields? Derek Bok, President of Harvard University, expressed it well: "If you think education is expensive, try ignorance."[124] Unfortunately, most politicians have failed to recognize that the American people do not want to try ignorance.

Obsessive over-reliance on balancing budgets in the wrong way has led Congress and the administration to ignore vital domestic programs, particularly education, for which cost-benefit ratios clearly favor the investment.[125] As a result, the nation is in a quagmire of debts, deficits, and declining revenues without the promise of increased productivity.[126] Events now force us to choose to be among the first or last—to act now or lose forever the opportunity. As the French writer and philosopher Albert Camus once wrote, "Real generosity toward the future consists in giving all to what is present."[127] We must be committed to doing whatever must be done, to making whatever sacrifices are needed, and to investing whatever it may cost to ensure that our children's future is second to none. The people have evidenced the will; it remains for our nation's leaders to demonstrate the courage.

124. Cordtz, *Dropouts: Retrieving America's Labor Lost*, FINANCIAL WORLD, Apr. 4, 1989, at 36, 46 (quoting Derek Bok).

125. Estimated "average rates of return on our investment in schooling range from 7 to 11 percent after inflation . . . . Schooling returns more to the economy than it takes out," even after the costs of providing education, and exclusive of the noneconomic benefits. COMM. FOR ECON. DEV., INVESTING IN OUR CHILDREN 39 (1985).

126. While part of the problem is low investment in plant and equipment and low investment in research and development, "the most important investment we can make is in our children. . . . Functional illiteracy costs the United States over $25 billion a year, from lost productivity, accidents in the workplace, damage to equipment, and government support payments." BUSINESS ROUNDTABLE ON INT'L COMPETITIVENESS, AMERICAN EXCELLENCE IN A WORLD ECONOMY 25-26 (1987).

127. *Thoughts on the Business of Life*, FORBES, Mar. 20, 1989, at 224 (quoting Albert Camus).

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THE VALUE OF PRIVATE PROPERTY IN EDUCATION: INNOVATION, PRODUCTION, AND EMPLOYMENT

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I. INTRODUCTION

America's system of public schools must be changed. The 1983 report of the National Commission on Excellence in Education cautioned that "while we can take justifiable pride in what our schools . . . have historically accomplished . . . the educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and as a people."[1] Pride in the past accomplishments of our public schools gives many a false impression that the basic structure of public school systems is sound and that reform is needed only in the details: more math and English courses, more or longer school days, stricter requirements for teachers and students, and lower student-teacher ratios. Such proposals are not new. In fact, the problems identified and solutions proposed in the National Commission's report were virtually identical to those in a school study report published ninety years earlier.[2] The striking similarity between the two studies suggests that the issues they address are really symptoms of larger, more fundamental problems, and that a complete restructuring of our current system of education instead may be necessary. In this Article, we argue that the educational system in America can be greatly improved if government is removed from the supply side of the education market, leaving schools privately owned and operated.

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1. NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM 5 (1983).

2. *See* T. SERGIOVANNI, M. BURLINGAME, F. COOMBS & P. THURSTON, EDUCATIONAL GOVERNANCE AND ADMINISTRATION 13 (2d ed. 1987) [hereinafter EDUCATIONAL GOVERNANCE] (citing Edson, *Risking the Nation: Historical Dimensions on Survival and Educational Reform*, 1 ISSUES EDUC. 171, 171-84 (1983) (comparing the National Commission's 1983 report to that of the Committee of Ten on Secondary School Studies, published in 1893)).

The current structure of education policy in the United States has been dictated, at least in part, by an appreciation of the societal benefits that education confers. Education provides tremendous opportunities for personal growth, and Americans, faithful to the principle of equality of opportunity for all, are loath to see bright minds wasted because of lack of funds for education. With the efforts of leaders like Horace Mann and Henry Barnard, America launched a system of free public schools and sowed the seeds of today's educational problems.[3]

At the time that public schools were founded in the United States, demand-side subsidies, that is, subsidies to needy students, might have been impractical. The country was predominantly rural, the government small, and governmental contact with individual citizens limited. Accordingly, a demand-side subsidy to each citizen for the purchase of education would have been so costly to administer that many of those eligible for such subsidies would have been overlooked. Today, however, with urbanization, advanced communication, and the already sophisticated network of government services, the information problem is easily managed. In a system of privately owned schools, demand-side subsidies will ensure every citizen the right to an education; at the same time, the effects of competition will promote vigorous improvement and innovation in our schools.

A few decades ago, America's public school system was a success story despite its structure. Its primary accomplishment was to uncover an enormous amount of talent, as educational opportunities were expanded. Each generation's educational achievement had surpassed that of the last, as more people entered school and stayed longer. This success masked the system's shortcomings, however, as the past few decades have demonstrated. During this period, each generation has been afforded full educational opportunities, but the economic and cultural growth resulting from newly uncovered talent is no longer forthcoming. The stalled progress exposes the Achilles' heel of the system: Our public education system is wrapped tight in a bureaucracy that stifles innovation, fails to put qualified teachers in the classroom, and generally fails to meet the needs of its students.

3. *See, e.g.*, H. MANN, *The Necessity of Education in a Republican Government*, in LECTURES ON EDUCATION 117 (reprint ed. 1969) (1855).

The argument for private schools with direct public subsidies of *students* rests on two pillars. First, students and their parents, empowered with direct subsidies, must be able to make efficient choices regarding both the quantity and types of education. Second, privately owned schools must be able to supply education more efficiently than a system of public schools. We cannot overemphasize that demand-side and supply-side reform must be undertaken together. Unless we abandon the policy of government provision of education, demand-side reforms like the use of vouchers will lead to only a marginal improvement.

This Article presents a comprehensive case for the replacement of today's public education system with a privatized system. In Part II of the Article, we analyze the demand side of the education market by asking whether government needs to intervene to support education at all and, if so, how the necessary support can be supplied in the least intrusive way. As an introduction to analyzing the supply side, in Part III we investigate the political economy of public provision. Because understanding the decisionmaking processes of public and private school systems is crucial to a comparison of the alternative systems, in Part IV we explicate the economist's notion of the private firm and market competition. In Part V, we contrast the model presented in Part IV with the current system of publicly owned schools. Conclusions are presented in Part VI.

II. Private Demand and Public Support

Any thorough discussion of limiting the role of government in the provision of education must address the claim that the private demand for education will be inadequate; that is, individual parents and students will be unable to choose the appropriate type and quantity of education. We have identified four aspects of this claim for review: (1) Education generates positive externalities and, in the absence of government support, consumers will demand too little education; (2) because capital markets are imperfect, children from poor families will be unable to purchase an optimal quantity of education without government intervention; (3) individual consumers of education lack the knowledge and expertise to select the optimal type and quantity of education; and (4) public education indoctrinates children with socially beneficial values and promotes the social

interaction of culturally diverse children.[4]

A. *Human Capital as an Externality*

That the acquisition of human capital through education yields a surplus is not a valid rationale for subsidizing education. It is true that a medical degree raises the income of the doctor and that the doctor's patients receive a benefit greater than the fees they pay, but this is true of all the products we buy. Food and water clearly yield benefits in excess of the price we pay for them. The same is true of television sets and automobiles.[5] With limited budgets, we purchase each good until the value we receive for the last dollar spent on each (the value at the margin) is equal.

Because subsidies given in one market require taxes in some other market(s), subsidies granted because a particular surplus is compelling will necessarily reduce aggregate welfare. In our example, subsidizing medical students will increase the supply of doctors and thereby reduce the number of workers in other fields (say, farmers). The price of medical care will fall, and the price of food will rise. At the margin of use, where the values of the last dollars spent on medical care and food were once equal, people will now consume more, but marginally less valuable, medical care, and poorer, but marginally more valuable, diets. While at the margins these effects are subtle, in the extreme this kind of cross-subsidizing would result in a society where (in the example developed here) splinters were surgically removed by medical specialists from patients who could ill afford adequate diets.[6]

A more sophisticated version of the externality argument relies on the notion that in acquiring education, individuals also acquire certain socially desirable characteristics. For example,

4. *See* West, *The Political Economy of American Public School Legislation*, 10 J.L. & ECON. 101, 103-09 (1967) (identifying two principles for government intervention: "state protection"—the special obligation of the state to protect children—and "neighborhood effects"—the notion that education produces positive externalities that benefit not only its consumer, but the greater society as well); Lott, *An Explanation for the Public Provision of Education: The Importance of Indoctrination*, 33 J.L. & ECON. 199 (1990) (emphasizing the importance of the public school system in indoctrinating students with socially desirable values and beliefs).

5. For an explanation of the concept of consumer surplus, see S. MAURICE & O. PHILLIPS, ECONOMIC ANALYSIS: THEORY AND APPLICATION 71-75 (5th ed. 1986).

6. This basic economic argument was first hinted at by Adam Smith in *The Wealth of Nations* and is part of every principles text in basic economics. *See, e.g.*, R. EKELUND & R. TOLLISON, ECONOMICS 156-58 (3d ed. 1991).

it is often said that literacy produces a better informed voter and the increased earnings capacity provided by an education raises the opportunity cost of crime.[7] Education undoubtedly produces benefits to others. To justify subsidies, however, the external benefits arising from subsidized education must extend beyond the margin of education that individuals would acquire without subsidy. In that case, an individual who chose a quantity of education to maximize his own welfare would fail to recognize *additional* benefits inuring to society, and a subsidy would be justified. If the external benefits of education are all within the margins of private education—that is, if the better informed voter and the less likely criminal would be fully molded by private educational expenditures—subsidies that encourage additional education would not produce additional social benefits.[8]

It may well be true that encouraging investment in human capital does yield externalities at the margin. If so, public *support* for education is justified. Public *provision* of education is, however, a separate question. Because direct subsidies to students in a system of privately owned schools would have the desired effect of increasing the level of human capital that an individual would purchase, the mere existence of positive externalities from education is not necessarily an argument for public provision of education.

B. *Capital Market Failures, Equity, and Public Schools*

It is often said that public schools are necessary to give children from poor families the same opportunities available to children from wealthier backgrounds.[9] Although equality of opportunity is usually viewed as an issue of equity, arguments for equality of opportunity can be recast as arguments of efficiency, the basic premise being that no human potential should be wasted for lack of adequate educational opportunities. Public schools, however, with uniform education for all, favor those students best suited to the type of education provided and

7. *See* Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 177 (1968).

8. For a discussion of infra-marginal externalities, see R. HOLCOMBE, PUBLIC SECTOR ECONOMICS 56-57 (1988).

9. *See, e.g.*, T. RIBICH, EDUCATION AND POVERTY 2-8 (1968).

place students better suited for alternative instruction at a disadvantage. This is not only inefficient, it is less than fair.

For purposes of this analysis, we begin by assuming that parents who wish to transfer wealth to their children can do so by purchasing bonds for them (financial capital) or by providing them with education (human capital). Either type of capital will produce a future return. Parents with sufficient wealth purchase both assets in quantities that result in an equivalent marginal rate of return to each.[10] If a child lacks the mental capability to acquire human capital, or his abilities are quickly exhausted, extensive expenditures on his education will not be a wise investment. The child will be better off if his parents buy bonds rather than education. Similarly, if parents lack the resources to purchase adequate education for a gifted child, their child will be better off if they borrow money—the functional equivalent of *selling* bonds—and purchase education.[11] If human capital could suffice as collateral for loans, poor parents would purchase the same amount of education that wealthy parents do: the amount that equates the rate of return on education with the rate of interest on bonds.

Unfortunately, capital markets do not function well enough to solve all the problems of parents seeking to educate their children. The return on education is uncertain, and its financing entails unusual risks.[12] The security on such loans is inadequate if the courts will not require an individual to pay debts incurred by his parents to supply him with educational opportunities. The argument for equality of opportunity is, then, di-

10. This analysis depends on an economic principle known as the law of diminishing marginal returns on investment. The basic premise, as applied here, is that the marginal benefit from each additional dollar invested in education decreases as more dollars are invested. At some point, the marginal return on an additional dollar invested in education will drop to a level no greater than the return available from investment in bonds. Any additional funds available will be invested in bonds, because further investment in education would produce a lesser return. *See generally* R. EKELUND & R. TOLLISON, *supra* note 6, at 199 (discussing diminishing marginal returns).

11. *See supra* note 10. Parents without sufficient resources to provide education for their children will borrow money to provide their children with education only to the extent that the return on the investment in education exceeds the interest rate on the borrowing. At some point, the marginal return on an additional dollar invested in education will drop below the additional interest cost associated with borrowing the additional dollar. The result is that the poor family, like the wealthy one, will invest in education to the extent that the marginal return on that investment exceeds the prevailing market rate of return (the interest rate) on bonds.

12. *Cf.* Porter & Scully, *Potential Earnings, Post-Schooling Investment, and Returns to Human Capital*, 4 ECON. EDUC. REV. 87, 91 (1985) (estimating the return to schooling to be 6.6 percent with a high variance).

rected to these inefficiencies of capital markets and the resulting waste of bright minds from poorer families.

Arguments of fairness and equity cannot provide a clear answer to the problem of determining the optimal system of education. This is not to say that equity is unimportant, but promoting equity through the direct provision of education may itself be unfair because the benefits are not equally distributed. Some children are more adapted to traditional public school settings than others. Providing relatively homogeneous educational opportunities gives children who can better capitalize on this particular form of education a distinct advantage over children better suited for some other type of schooling. More creative and diverse educational offerings will ameliorate some of these differences, but the return on the investment will never be the same for every child.

Consider two children of poor families, identical except that the first child is more intellectually gifted than the second. Even in the absence of public support for education, one expects that the first child will be wealthier than the second—the higher return on investment in education for the gifted child will more easily overcome the imperfections of the capital markets and raise the first child's income above that of the second. Public support of education simply lowers the cost of investing in the particular type of human capital that the first child utilizes best. It thus magnifies the inequality that arises from the fundamental differences in the two children's inherent abilities. Thus, public provision of education would seem to result in greater inequality. With direct subsidies, however, students can match their needs and abilities with the offerings provided by the competitive market rather than trying to coax a centralized bureaucracy into providing differentiated service. The goal of equality is better served by direct transfers than by payments in kind.[13]

13. To illustrate this point, consider two youth, one fabulously gifted in the use of his hands (who is ideally suited to be a mechanic or a cabinet-maker), and the other equally gifted in language and mathematical skills (who is ideally suited to be a teacher of math or language). After 12 years of traditional school, the latter is well on the way toward his career goals, and the former has not yet begun. Subsidizing education of this limited type (traditionally only math and language skills) moves the one student ahead on the path to career earning (and even provides possible employment), while the other student must personally pay for his own education and cannot expect to work in the public education system teaching the basic skills he possesses. This consequence is unfair.

C. *Consumer Information and Choice*

Even if externalities and capital market failure exist in the market for education, their presence comprise arguments for subsidizing education, not for its direct provision. If parents are so poorly informed about education that they are unable to make intelligent choices, though, direct provision of education may be justified to allow the government to ensure both acceptable quality and efficient allocation of resources.

Education is not a simple commodity for consumers to analyze. In determining the type and amount of education they should acquire, individuals must forecast how it will affect their future earnings and what other benefits, such as appreciation of art or understanding of world events, the education will provide. The problem of forecasting is exacerbated by the fact that parents typically make education choices for their children. Parents clearly know less about their children than the children know about themselves, and parental interests in the child's future are unlikely to coincide precisely with the best interests of the child.

Decisions regarding education, however, are really no more complicated than many of the other choices that people make for themselves or their children. Parents regularly make choices for their children concerning medical care—a complicated and expensive service, the precise benefits and consequences of which are often highly uncertain. Parents choose the neighborhood in which their children will grow up, what food they will eat, and what religion, if any, they will practice—all with only minimal direction from the government. Those who argue that education is so significantly different as to require direct public intervention bear the burden of proving that assertion. We find no serious empirical support for the proposition.[14]

14. Consider, for example, Henry Levin's argument opposing the implementation of school voucher systems. *See* Levin, *Educational Vouchers and Social Policy*, in SCHOOL FINANCE POLICIES AND PRACTICES 235 (J. Guthrie ed. 1980). Professor Levin asserts that vouchers will exacerbate inequality because poorer parents will systematically choose a type of education that perpetuates their poverty. He cites psychological research indicating that poorer parents tend to encourage more conformity in their children. *See id.* at 252-53. Levin concludes that "research on behavior of working class parents suggests that they will select highly structured schools for their children that emphasize a high degree of discipline, concentration on basic skills, and following orders," *id.* at 252, factors that he contends will lead to lower income. This leap from psychological studies to predicting behavior and projecting resultant ill effects is mere guess work. If

Private markets for education would provide parental decisionmakers with low-cost information about schools in the form of reputation. Professor Henry Levin, an opponent of school privatization, has admitted as much in his hyperbolic argument that

> [e]ach school would connote a different breeding or charter that would have a certification value in preparing individuals for further educational opportunities or positions in the labor market. Even without identifying actual proficiencies of students as individuals, information connoted by the class orientation of schooling would tend to serve a stratification role for further opportunities.[15]

Stripped of its provocative language, Levin's claim is simply that under a voucher system, schools will develop reputations that employers or advanced educational institutions will find to be useful sources of information. Parents will avail themselves of the same information, and will serve their children's interests by responding to this market signal and encouraging their children to attend schools with better reputations.[16]

Those who claim that consumers lack the information or

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poor parents *do* systematically make such choices, it seems likely that they are acting in the best interests of their children. Empirical studies show that poor and minority parents are willing to make enormous sacrifices to secure private education for their children. *See, e.g.*, J. COLEMAN, T. HOFFER & S. KILGORE, HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC AND PRIVATE SCHOOLS COMPARED 37-43 (1982).

15. Levin, *supra* note 14, at 253.

16. The significant capital investment in facilities required to operate a school would give private school owners a strong incentive to preserve the school's reputation. This incentive would guarantee that the private schools deliver what they promised to parents and students, thus increasing the reliability of information that the schools provide parents.

Because schools sell services that promise future benefits, the purchase of education presents ordinary problems of contract enforcement. In Klein & Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615 (1981), the authors identify three methods for assuring performance in a market transaction: "(a) explicit contractual or regulatory specification with third-party enforcement, (b) direct (two-party) enforcement of implicit contracts, and (c) one-party organization or vertical integration." *Id.* at 635. All of these enforcement mechanisms are viable options in private education. For example, explicit contractual specification subjects promises made by a school to verification by some third party. While such promises would perhaps be awkward to enforce in court, private institutions now offering preparatory courses in law and accounting achieve the same objective by guaranteeing that if their graduates fail to pass the relevant licensing examinations, they may retake the course at no charge. Such promises are easily enforced. Concerns for reputation and the threat of terminating future exchange are sufficient inducements for private education providers to meet the terms of their implied contracts. On-the-job training is probably the most common example of vertical integration in education. In on-the-job training situations, the employer-educator has a direct financial interest in ensuring that the employee receives quality training.

ability to participate intelligently in a private market for education should bear the burden of showing that this is so. We have demonstrated mechanisms by which markets and consumers reduce information problems. Even if there are some information dissemination problems that survive institutional remedies, government could intervene in a way far less intrusive than by actually operating the schools. In particular, government could gather and disseminate information about educational institutions in much the same way that the federal government provides information about automobile safety and gas mileage.[17] If still more intervention were required, the government could mandate licensing and impose minimum standards, as it does in medicine and construction. Public provision of education is not the only solution to informational problems.

D. *Public Provision and Public Indoctrination*

Perhaps the most shocking argument for public provision of education is the contention that public schools inculcate certain socially beneficial values. These include "a common language, set of values, and knowledge necessary for appropriate political functioning in our democratic society."[18] This view was shared by many of the economists who laid the intellectual foundation for democratic capitalism, including Adam Smith, Thomas Malthus, and John Stuart Mill.[19] Nevertheless, indoctrination is a valid justification for public provision of education only if: (1) Public education institutions inculcate the desired values more effectively than do private education institutions; (2) private institutions, including religion and families, fail to teach the desired values; and (3) public education institutions do not spread values contrary to the common interest.

First, the available empirical evidence suggests that private schools may be more successful than public schools in teaching appropriate social values. Take, for example, the values that dissuade students from crime. At least one recent study reports a positive relationship between the rate of juvenile delinquency

17. Of course, private entities might emerge that would perform much the same function for educational institutions that such publications as *Consumer Reports* presently perform for many other products.

18. Levin, *supra* note 14, at 250.

19. *See, e.g.*, High, *State Education: Have Economists Made a Case?*, 5 CATO J. 305, 306-15 (1985).

and the proportion of children attending public schools.[20] Another commentator anticipated this result:

> It seems reasonable . . . to conclude that the popular belief . . . that state education makes the public less crime prone is unsupported by the available evidence. Beyond this, [one] could argue, but with less certainty, that the evidence showed a prima facie relationship in the opposite direction, i.e., that state education involved adverse external effects and aggravated or even helped to cause the prevailing trend towards increased criminal behavior.[21]

Second, family and religious institutions have shown themselves to be very capable of teaching values. These institutions serve as mechanisms for internalizing some of the economic benefits from the development of desirable values that would otherwise be lost to the individual. For example, if the Jones family or the Mormon Church devotes special efforts to teaching honesty, others will give preference in business transactions and social relations to members of these groups because of their known honesty. These added benefits provide an incentive, in addition to concern for the well-being of the child, for family and religious groups to place a special emphasis on the teaching of socially desirable values.[22] This, of course, is not to argue that all externality problems related to the teaching of values can be solved by voluntary arrangement. It does, however, cast doubt on arguments that *only* the government can properly and adequately teach socially desirable values.[23]

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20. *See* Lott, *Juvenile Delinquency and Education: A Comparison of Public and Private Provision*, 7 INT'L REV. L. & ECON. 163, 169 (1987). The study attempted to correct for the effects of such factors as family income, juvenile unemployment rates, spending per pupil, and urban residence, all which tend to influence the rates of juvenile delinquency. *See id.* at 168.

21. West, *supra* note 4, at 19.

22. Private schools would have similar incentives to encourage positive social values in their students. If parents believe that alumni of a particular school have an advantage in the market because of their perceived level of honesty, they will be more likely to send their children to that school, even if that school charges a higher tuition, to give their children that advantage.

23. In this regard, it is interesting to note the positive contempt that some advocates of public provision of education hold for voluntary arrangements. Consider this statement: "What makes the voucher system unique is that parents will be able to send their children to schools that will reinforce in the most restrictive fashion the family's political, ideological and religious views." Levin, *supra* note 14, at 251. Professor Levin values "the importance of being exposed to conflicting positions," *id.*, and fears that parents may prefer schools that shelter children from viewpoints that might challenge the parents' own values. His reference to "conflicting positions" hints that the values that would be taught in his ideal public school might not be those that parents consider desirable.

Finally, it is not clear that public schools will inculcate the socially desired set of views.[24] Scholars have long recognized that government intervention often promotes special interests over the general interest. Publicly provided education is not likely to be free of special-interest pressure. For example, certain forms of indoctrination, like promoting the virtue of income equality, may reduce opposition to a government policy advocating income transfers.[25] If indoctrination of this type benefits politicians by lowering the political cost of transferring wealth among constituent groups, the possibility for abuse of politically controlled education must be considered a realistic threat.

III. The Political Economy of Public Provision

Given the need for reform in education, the real debate is between those who believe that the current institutional structure of public provision can be adjusted to improve its performance and those who believe that the problems are endemic to the current system. In this Part, we consider the public choice model of government and its relationship to education policy.

The public choice model treats government policies as being majoritarian and holds that majorities can be formed as coalitions of non-majority special interests.[26] Acting alone, and without the resources to build a coalition, a single individual has little influence on government. Thus, the cost of forming a coalition to manipulate the instruments of government is a critical factor in any effort to shape policy. A group with relatively low costs of organizing for political action will, all other things being equal, have a greater influence on public education policy than its private benefits would otherwise warrant. Conversely, a group with relatively high costs of organizing will have less influence due to the difficulties inherent in forming such a group into a political coalition. This is not a cynical view of special-interest government. Indeed, the fairest and most compassionate representative listens to his constituents, and

24. Perhaps an obvious related question is whether there is *one* set of values that is "right" for everyone. This issue is addressed in the discussion of output differentiation, *infra* pp. 419-22.

25. *See* Lott, *supra* note 4, at 201.

26. *See generally* R. Holcombe, *supra* note 8, at 130, 147.

his decisions on questions of policy often reflect what he hears. Low organization costs merely serve as amplifiers for the pleas that interested individuals make as a group.

The suppliers of educational inputs, especially teachers and other education professionals, have relatively low organization costs among groups with a special interest in education. Because teachers and administrators typically belong to the same social class, receive similar training, are members of the same professional organizations, and interact on a daily basis, their costs of organizing are relatively low. By contrast, parents, aside from their general interest in the quality of their children's education, may have very little in common. It is therefore much more difficult and costly for them to organize.[27] Because their costs of influencing education policy are lower, teachers' and administrators' influence on policy disproportionately exceeds their numbers or the relative importance of their interests.[28]

Low organization costs are crucial to effective political influence. Thus, groups are often led to support policies that promote their solidarity even when the policy imposes some cost on the group's members. For example, many teacher organizations oppose merit pay and efficient procedures for dismissal of incompetent teachers, preferring instead lock-step pay increases and nearly automatic tenure.[29] The former policies are more efficient, would result in better schools, and would presumably benefit many, if not most, teachers, but such policies would undermine the very cohesion that makes effective political action possible. The same reasoning underlies the teacher associations' opposition to higher pay for scarce science and math teachers and support for certification requirements.[30] If

27. Parents have much more influence at the local school level, where neighborhood proximity and organizations like the parent-teacher association bring them together.

28. The special role of educators in the political market for education policy is well documented. *See, e.g.*, Toma, *Institutional Structures, Regulation, and Producer Gains in the Education Industry*, 26 J.L. & ECON. 103, 105-15 (1983); West, *supra* note 4, at 108-27. One study found that teachers' associations were, by far, the most effective interest group in gaining legislative influence over education policy. *See* R. CAMPBELL, L. CUNNINGHAM, R. NYSTRAND & M. USDAN, THE ORGANIZATION AND CONTROL OF AMERICAN SCHOOLS 60-61, 264 (1985) [hereinafter ORGANIZATION AND CONTROL] (reporting results of unpublished Ph.D. dissertation by J. Alan Auferheide).

29. *See* Urban, *Old Wine, Old Bottles?: Merit Pay and Organized Teachers*, in MERIT, MONEY AND TEACHERS' CAREERS: STUDIES ON MERIT PAY AND CAREER LADDERS FOR TEACHERS 25 (H. Johnson ed. 1985) [hereinafter STUDIES ON MERIT PAY].

30. *See id.* at 33-35.

teachers viewed one another as competitors, they would be less able to organize.

Other well-organized groups benefit disproportionately, if indirectly, from their influence on education policy. Examples include conservatives who object to the provision of vocational education as nothing more than an attempt by businesses to pass their training costs on to taxpayers, politicians who wish to inculcate certain values that minimize opposition to government activity, and civil rights groups that use the public education system to heighten awareness of their cause.

Organizational advantages of public education advocates make it difficult to gauge the actual popular support for public provision of education in this country. Almost every group and every facet of life is affected in some way by education. As discussed above, those who have a special advantage in influencing government policy have an incentive to support public education in spite of its shortcomings. An elected representative who asks his constituency whether they favor the public provision of education may be deafened by the amplified voices of a minority of self-interested respondents.

IV. Private Property, Firms, and Market Competition

If government quit the business of operating schools and limited itself to providing subsidies to students, the resulting system would be composed of private firms supplying educational services in a competitive market. Thus, to analyze the relative desirability of privately-supplied education, we first must consider the nature of the firm and market competition.

A. *The Nature of the Firm*

A firm may best be viewed as a nexus of contracts linking productive inputs.[31] As such, it is a center of productive activity. The owner of the firm gathers productive inputs with the promise of remuneration, organizes their productive efforts, and undertakes the task of monitoring and gauging their performance. The return for the obligation of payment and the effort of management is the claim to the final product.[32]

31. *See* Jensen & Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. Fin. Econ. 305, 311 (1976).

32. *See* Alchian & Demsetz, *Production, Information Costs, and Economic Organization*, 62 Am. Econ. Rev. 777, 779-83 (1972).

The firm arises when the costs of using explicit contracts and markets to coordinate economic activity become too high.[33] This occurs when the organization demands more flexibility than explicit contracts permit and when the marginal product of individual inputs, particularly workers, is difficult to monitor.[34] The owner's right to the residual is a key aspect of the firm, because this right provides the incentive to seek ways to increase performance by monitoring the contributions of the various inputs and by continually adjusting relationships within the firm. Altering the membership of the team of inputs is a method to measure and monitor the contribution of individual inputs to team production.[35] In order to maximize output or to reduce the costs for a given level of output, owners must be able to revise the contract terms and incentive structures for individual inputs without the obligation to alter similarly the terms for other inputs.

The survival of the owner depends on the quality of his entrepreneurial decisions and how effectively he performs the monitoring and control functions of management. If the owner is not an efficient manager, the residual flow will be less than it could be, and the owner's right to the flow will bring a lower price than if the firm were efficiently managed. The potential gain from increasing the efficiency of economically inefficient firms will result in the emergence of specialized agents who ferret out such prospects.[36] Inefficient owners will be induced to sell their firms to these specialists, whose return depends on the degree to which efficiency can be improved.

B. *Market Competition*

Competition has two basic elements: a large number of consumers and producers, and relative ease in entering or exiting a market.[37] When these two conditions are met, the self-interested behavior of individuals vested with private property produces the most efficient allocation of resources. Private ownership of property assures that individual exchange activities enrich the participants, because individuals do not volunta-

33. *See generally* Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937), *reprinted in* READINGS IN PRICE THEORY 335-38 (G. Stigler & K. Boulding eds. 1952).
34. *See id.* at 336.
35. *See* Alchian & Demsetz, *supra* note 32, at 779-81.
36. *See* Jensen & Meckling, *supra* note 31, at 308.
37. *See* R. EKELUND & R. TOLLISON, *supra* note 6, at 67.

rily trade their resources unless the exchange results in a net benefit. Competition for sales reduces prices and assures the production of the types of products consumers demand. Easy entry and exit guarantee that cost-saving innovations and demand-enhancing product designs will quickly spread throughout the market. Ease of movement in the labor market and competition for labor skills give workers leverage to influence wages and working conditions.[38]

Information is valuable in a competitive market whenever decisionmaking by market participants is imperfect. Competition in the trade of information leads to specialized firms and information networks that sample products and provide reliable, low-cost information about quality and price. Reputation and brand name recognition are market signals of product quality and value. The informed decisions of consumers perform a policing function in competitive markets: Favorable information about a good or service increases demand for that product, and unfavorable information decreases demand.[39]

Competition leads to efficient adjustments in the allocation of resources in response to changes in technology, consumer preferences, and supplies of inputs.[40] When such changes occur, markets temporarily generate prices higher or lower than cost. This provides the signal to reallocate resources. The prospect of economic profits and the fear of losses associated with competition lead to innovation in production technology and in the composition of the goods and services produced. A new means of production that is less costly than existing technology or a new product that is more appealing to consumers results in short-term profits to the innovator because of lower cost of production or enhanced demand for his product. Over time, others mimic the successful innovator and spread the efficient innovation through the market. Conversely, inefficient technologies and unwanted products are unprofitable, and competition will drive them from the market.

When competitive entry is limited by physical or institutional constraints, market prices will exceed average production cost.[41] Instances of physical barriers to entry, such as sole own-

38. *See* Bator, *The Simple Analytics of Welfare Maximization*, 47 AM. ECON. REV. 22 (1957).

39. *See* Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961).

40. *See* R. EKELUND & R. TOLLISON, *supra* note 6, at 217.

41. *See id.* at 253-54, 263.

ership of a necessary input, are rare in the domestic economy.[42] Most often, domestic monopolies are created by legislation denying the right to compete in an industry or, as in the case of public schools, by special subsidies given to certain governmentally-favored producers that make it much less costly for them to do business.[43] The residual claimant to a legislated monopoly expends resources in vote-gathering, campaign contributions, and lobbying efforts in order to maintain his monopoly position.[44] When there is no clearly defined residual claimant (again, as in the public school system), the excess return is captured by a bloated bureaucracy[45] and those factors of production that are most scarce.[46]

V. Comparing Public and Private Schools

A. *The Nature of Public Schools*

The approximately 80,000 public elementary and secondary schools in the United States provide a sharp contrast to the model of private firms and private competition outlined in Part IV. If organized as private, for-profit firms, these schools would compete for student tuition dollars. Private owners would strive better to serve their clientele because buyers (parents) would be free to transfer their children to another school if they were not satisfied with the school's service or performance. A wide array of educational offerings would arise as indi-

42. *See id.* at 252.

43. *See* Stigler, *The Theory of Economic Regulation*, 2 Bell J. Econ. & Mgmt. Sci. 3, 4-5 (1971). *See generally* Posner, *Theories of Economic Regulation*, 5 Bell J. Econ. & Mgmt. Sci. 335 (1974) (analyzing theories explaining government intervention in the economy).

44. *See* Tullock, *Efficient Rent Seeking*, in Toward a Theory of the Rent-Seeking Society 97, 98-99 (J. Buchanan, R. Tollison & G. Tullock eds. 1980); Tullock, *The Transitional Gains Trap*, 6 Bell J. Econ. & Mgmt. Sci. 671, 671-78 (1975). *See also* Posner, *The Social Costs of Monopoly and Regulation*, 83 J. Pol. Econ. 807, 815-21 (1975) (estimating the costs incurred to achieve monopoly positions in a number of industries). *See generally* Tollison, *Rent Seeking: A Survey*, 35 Kyklos 575 (1982) (a survey of research on rent seeking).

45. *See generally* W. Niskanen, Bureaucracy and Representative Government 45-71 (1971). For a general overview, see P. Jackson, The Political Economy of Bureaucracy (1983). It is interesting to note that the absence of the disciplinary features of market competition is often used to justify an extensive government bureaucracy to supply the necessary discipline of an industry. *See* 2 A. Kahn, The Economics of Regulation: Principles and Institutions 12-13 (1971).

46. *See* C. Ferguson, Microeconomic Theory 436-39 (3d ed. 1972). Unions, for example, serve to create labor scarcity and, not surprisingly, have proven most effective in the public sector. *See* D. Martin, An Ownership Theory of the Trade Union 58-61 (1980). Additionally, unionization provides a convenient vehicle for political activity on the part of labor. *See* McChesney, *Rent Extraction and Interest-Group Organization in a Coasian Model of Regulation*, 20 J. Legal Stud. 73 (1991).

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vidual schools attempted to find their niche in the demand for education. The system would create a vast laboratory for experimentation by the schools, with the forces of market competition, directed on the demand side by parental choice and on the supply side by accountable entrepreneurs, judging the results.

Competition in the education market has not occurred in the United States. Each state has chosen to provide education directly, using government employees and facilities, and to fund the agencies directly from tax revenues. In a public school system, power over schools is vested in the legislatures of the various states. Legislatures delegate authority over the day-to-day functions of state education to a state education agency headed by a chief state school officer and a state school board. Forty-nine states delegate some power over the operation and maintenance of public schools to local independent school districts or to school systems that are part of general-service local governments.[47] This power is exercised, however, under the scrutiny of the state legislature.[48] Relatively little power is delegated beyond the local school districts to the individual schools, their principals, or their teachers.[49]

Traditionally, most decisionmaking authority in education rested with local school boards.[50] Today, however, because funding, and thus discretionary power, generally originates at the state and district levels, decisions affecting public education systems are mostly made at the top, with decreasing local influence.[51] The success of legal challenges in several states to the practice of financing public education through taxes levied and retained at the district or county level has also heightened the role of state governments in public education.[52]

47. Hawaii alone utilizes a public school system that is wholly operated and controlled by the state. *See* HAW. REV. STAT. § 27-1(1) (1990).

48. *See, e.g.*, Buck v. McLean, 115 So. 2d 764, 765 (Fla. Dist. Ct. App. 1959) ("[C]ounty school boards are a part of the machinery of government operating at the local level as an agency of the State in the performance of public functions. The character of their functions, and the extent and duration of their powers rests exclusively in the legislative discretion.").

49. *See, e.g.*, R. GORTON, SCHOOL ADMINISTRATION: CHALLENGE AND OPPORTUNITY FOR LEADERSHIP 65 (1976) (listing the roles of an elementary or secondary school principal as: "(1) manager, (2) instructional leader, (3) disciplinarian, (4) human relations facilitator, (5) change agent, and (6) conflict mediator").

50. *See* ORGANIZATION AND CONTROL, *supra* note 28, at 77-78; EDUCATIONAL GOVERNANCE, *supra* note 2, at 241-42.

51. *See* EDUCATIONAL GOVERNANCE, *supra* note 2, at 249-50.

52. The basis for these challenges centers around the claim that local funding does

The ability and willingness of local school boards to delegate authority to individual schools has also eroded, largely due to several court decisions. In one such decision, the court ruled that a school board's delegation of discretionary power to a subordinate school will not absolve the school district of the consequences of exercising the power.[53] Accordingly, to protect themselves, school boards find it increasingly necessary to retain primary control. Other courts have focused on school districts as the relevant unit of activity in resolving school-related cases. For example, judicial efforts to achieve desegregation in public schools focused attention on the actions of school districts and required that remedial action be taken at the district level.[54]

Major policy decisions regarding instructional programs, minimum course loads and content, attendance requirements, approval of textbooks, certification of personnel, standards for school facilities, and funding are typically made at the state level.[55] The duties of the local school board are more administrative, including such matters as selection of a chief administrator, establishment of policies and procedures to administer educational programs and to facilitate planning and accountability, preparation of budgets, acquisition of property and supplies, establishment of personnel policies and the approval of collective bargaining agreements, and appraisal of the work of individual schools.[56]

If schools were privately owned, decisionmaking authority

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not equalize educational opportunity, but rather makes educational quality dependent on the wealth of the individual school district. *See, e.g.*, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); Serrano v. Priest, 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971). *But see* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (holding that such systems do not violate the Equal Protection Clause of the United States Constitution). *See generally* Annotation, *Validity of Basing Public School Financing System on Local Property Tax*, 41 A.L.R.3d 1220 (1972).

In the past three decades, the role of state government in financing education has increased significantly. In 1960, state funding for education averaged 39.1 percent and local funding 56.5 percent. By 1987, the state contribution was 49.8 percent, and the local share was 43.9 percent. A small federal component has contributed the remainder. *See* NAT'L CENTER FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS 148 (1989).

53. *See* Herbert v. Livingston Parish School Bd., 438 So. 2d 1141, 1143-45 (La. Ct. App. 1983).

54. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (mandatory bussing implemented on district-wide basis); Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954).

55. *See* ORGANIZATION AND CONTROL, *supra* note 28, at 87.

56. *See* E. MORPHET, R. JOHNS & T. RELLER, EDUCATIONAL ORGANIZATION AND ADMINISTRATION 248-49 (1982) [hereinafter EDUCATIONAL ORGANIZATION].

would reside at the level of the school, instead of at the state or district level. School-based initiatives would be implemented to meet whatever demands legislatures placed on schools to effect racial balancing. Busses and other ancillary equipment would be under the control of the school and its owner, not the state. Finally, decisions over funding would directly affect appropriations to students, and students and their parents would determine the allocation of these funds among schools.

B. *The Impact of Public Supply on Production: Innovation and Diversity*

1. *Innovation*

Political control of the supply of education retards technological progress. The pace of innovation and change is slow because the cost of innovation increases with greater need to seek approval and accommodate divergent interests. More importantly, the motivation for innovation is diminished because the return to innovation cannot be captured by the potential innovators. In the public school system, the decision to innovate is made by authorities at the district, state, or federal level. A potential innovator in the public school system bears none of the direct cost of an experiment and can claim none of the financial rewards of successful innovation. Instead, returns to the individual, if any, are confined to perquisites and indirect benefits associated with the experiment. Experiments are often altered in response to pressures from teacher associations, civil rights groups, administrators, parents, and the general community; not surprisingly, such "reguided" experiments often fail in their mission.[57]

Can successful innovation be achieved within the current publicly supplied structure of education? The question can be answered in part by determining whether changes in educational inputs affect educational output, that is, scholastic performance. A recent report surveyed the results of 147 separate studies of "educational production functions." These studies attempt to determine the effect of such factors as teacher-to-pupil ratios, teacher education, teacher experience, teacher salary levels, and average expenditure per pupil on scholastic

57. *See* Boyd, *The Politics of Curriculum Change and Stability*, in THE DYNAMICS OF ORGANIZATIONAL CHANGE IN EDUCATION 232 (J. Baldridge & T. Deal eds. 1983).

achievement.[58] The survey showed that these studies produced curiously similar results.[59] While most would probably accept without question the value of these factors in furthering educational achievement, as Table 1 indicates,[60] in the overwhelming majority of studies these factors were found not to make a statistically significant contribution or were found to have adverse affects.

TABLE 1. SUMMARY OF ESTIMATED RELATIONSHIPS BETWEEN SELECTED INPUTS AND SCHOLASTIC ACHIEVEMENT FROM 147 STUDIES OF EDUCATIONAL PRODUCTION FUNCTIONS

Input	Number of Studies	Statistically Significant (+)	Statistically Significant (−)	Statistically Insignificant
Teacher-to-Pupil Ratio	112	9	14	89
Teacher Education	106	6	5	95
Teacher Experience	109	33	7	69
Teacher Salary	60	9	1	50
Expenditures per Pupil	65	13	3	49

Why are these inputs ineffective? The New York City Schools' Experimental Elementary Programs (EEP), which began in 1969, provides a revealing case study.[61] The result of a compromise among the board of education, the teachers' union, and civil rights leaders, EEP was designed to test the effects of various programs and inputs on the scholastic achievement levels of the schools' students.[62] The four-year experiment was implemented in eleven schools at a cost of $40

58. *See* Hanushek, *The Economics of Schooling*, 24 J. ECON. LITERATURE 1141, 1159-73 (1986).

59. Some of the studies may be affected by problems of measurement, specification, experiment design, et cetera. Nevertheless, the consistent results of the tests indicate a reasonable level of reliability.

60. The information presented in Table 1 is drawn from Hanushek, *supra* note 58, at 1161.

61. *See* Warren, *The Nonimplementation of EEP: "All That Money for Business as Usual"*, in MAKING CHANGES HAPPEN? 150, 150-52 (D. Mann ed. 1978).

62. *See id.* at 150-51. Specific policies that were to be implemented under EEP included longer school days, individualized instruction, special classes for children with unusual needs or problems, tutorial clinics, an earlier start for formal education, school and community councils, and health programs. *See* COMM. ON EXPERIMENTAL PROGRAM TO IMPROVE EDUC. ACHIEVEMENTS IN SPECIAL SERVICE SCHOOLS, FINAL REPORT (June 20, 1968).

million.[63] Each of the programs and inputs failed: The students' academic achievement was virtually unaffected.[64]

The failure of the experimental programs is not, in and of itself, especially troubling. Failed experiments can provide valuable information. The manner in which the public authorities conducted this experiment, however, renders useless any information that EEP's failure might have provided. As one commentator has observed:

> Essentially, EEP utilized a role change model to foster innovation in an organization with a strong built-in resistance to change—without sufficient sanctions to overcome these barriers. While naivete about the nature of the organization might be blamed for this lack in the beginning of the experiment . . . [w]hat appears more likely is that neither the administration nor the union wanted EEP to succeed, and they made this clear by not acting forcefully to encourage better implementation.[65]

Factionalism diluted the original proposal, and politics, along with the lack of proper incentives, hindered its implementation. In short, we have no information whether the policies of EEP are beneficial or not.

The same frustrations are evident throughout the literature on educational innovation. "[E]ducational innovation and reform has emerged as a big business involving a broad array of public and private foundations and R&D organizations. Yet, after more than two decades of systematic efforts at reform . . . little really has changed."[66] The succinct explanation given for this lethargy is that "all too often innovative policies . . . were at best only partially *implemented*"[67] because the political process of change in education must confront and reconcile "contradictory pressures [from] curriculum policymakers [whose] positions will have some bearing upon who gets what, when, and how."[68]

In a private market for education, decisions to experiment would be made by the school's owner. The potential profits generated by successful innovation would provide entrepreneurs with the incentive to identify and implement potentially

63. *See* Warren, *supra* note 61, at 151.
64. *See id.*
65. *Id.* at 152.
66. Boyd, *supra* note 57, at 232.
67. *Id.* (emphasis in original).
68. *Id.* at 233.

beneficial programs. If the EEP experiment discussed above had been conducted by the owner of a private school, the experiment clearly would have been conducted differently. Certainly, the $40-million price of the study would have given the owner a strong incentive to police the experiment to ensure that it was properly implemented.[69] Because funding from a political agency would have been unnecessary, the design and control of the experiment would have remained in the hands of its creators—or at least in the hands of individuals with a direct incentive to make it work. A study conducted by a private firm would not have been subject to the political factionalism that plagued EEP. In particular, parent groups, whose children were captives of the public schools used in the experiment, would have had less incentive to meddle. If they were unhappy with the experimental program, they could have moved their children to a different school. Similarly, teachers would have realized that some of the benefits of a successful experiment would accrue to them in the form of higher salaries, and thus would have been much more helpful in its implementation. While the same policies might well have failed in a private school, the school's owner would at least learn from the failure and avoid repeating the same mistakes in the future.[70]

2. *Diversity*

Central political control of the production of education creates a tendency toward uniformity of output and stifles consumers' ability to match their needs with available offerings. This results from several policies unique to public schools. First, attendance zones deny students any choice among schools. Second, district and state school boards are constrained by court rulings that dictate uniformity of schools.[71] Attempts to differentiate schools in separate attendance zones

69. Indeed, such an expensive undertaking would almost certainly have been preceded by a smaller pilot study designed to highlight potential problems. In the EEP experiment, the first year of the project was to serve this purpose. When problems of implementation were revealed, however, no corrective measures were taken, and the experiment, flawed as it was, proceeded. *See* Warren, *supra* note 61, at 151-52.

70. EEP was actually an extension and modification of an earlier program by the New York schools that was similarly unsuccessful. *See id.* at 150-52. Had the prior program been adequately implemented, the information derived from its failure would have made EEP—and the related $40 million expenditure—unnecessary.

71. *See supra* note 52 and accompanying text (equal funding required for public schools within a state); *supra* note 54 and accompanying text (comparable racial mix required in the public schools within a given district). Plans to differentiate schools

pose the risk of court challenge, because students in one zone would be deprived of the services provided to students in another. Third, public funding is often earmarked for certain educational functions, limiting the choices available to local school administrators.[72] Fourth, legislative and administrative bodies often impose specific requirements,[73] or mandate uniform curricula or evaluation schemes, for teachers and students.[74] Uniform testing produces a tendency toward uniform education, particularly if teacher and school ratings are based on student performance on these tests.[75] Finally, diversity in the decisionmaking process is, in part, a function of the number and variety of decisionmakers. Centralized decisionmaking reduces the number of individuals with the authority to implement decisions; at the same time, political influences tend to encourage conformity of views among the governing leadership and inhibit conflicting and controversial styles and philosophies.

So long as the offerings of our schools are uniform, the information provided by the expression of choice will be lost. Parental monitoring of school performance through choice is efficient and virtually cost-free.[76] Its substitute is high-cost, inefficient monitoring by the state board of education. Although a good program or school is not difficult to identify, objective standards that can be used by a state agency to identify a good school are quite difficult to develop. A good school

through magnet school programs and tracking have been viewed with skepticism as attempts at segregation. *See, e.g.*, ORGANIZATION AND CONTROL, *supra* note 28, at 131.

72. *See, e.g.*, Elementary and Secondary Education Act, Pub. L. No. 89-10, 79 Stat. 27 (1965) (codified as amended in scattered sections of 20 U.S.C.). The Act provides supplemental federal funding for special programs in schools. The funding cannot be used to offset funding from other sources. The Act provides funding for low-income and disadvantaged pupils; libraries, textbooks, and instructional materials; supplementary education centers and services; basic skills improvement programs; and special services and programs for handicapped children and other children with special needs.

73. *See, e.g.*, Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400-1485 (1988)). The Act mandates placing handicapped children in regular classrooms and programs to the extent possible. Federal statute also mandates equal treatment of males and females in public education, thus constraining course offerings aimed uniquely at men or women (for example, shop or home economics), and greatly impacts physical education offerings and athletics. *See* 20 U.S.C. §§ 1681-1688 (1988).

74. Many state boards of education prescribe a "common school" curriculum, impose standardized tests of student achievement and teacher competence, and restrict the selection of textbooks. *See* ORGANIZATION AND CONTROL, *supra* note 28, at 65.

75. *See* Darling-Hammond & Wise, *Teaching Standards, or Standardized Teaching?*, 41 EDUC. LEADERSHIP 66 (1983).

76. Presumably, most parents monitor their children's schooling to a reasonable extent even in a public system. The difference is that parents of students in public schools have few, if any, options if they find the teaching or programs unsatisfactory.

provides not only adequate and appropriate subject matter, but also a compassionate, enthusiastic atmosphere that motivates students to learn. Designing standardized programs and testing teacher competence address only the subject matter. Testing the atmosphere of a program would require a bureaucracy large enough to visit every classroom. Alternatively, parents, if given the choice, could provide much more reliable evaluative information simply by selecting the schools that their children will attend.

Uniformity also prevents the tailoring of school programs to meet individual students' needs. The value of differentiated programs is subjective in nature and can only be revealed by the choice of the consumer. A world with uniformly white shirts, brown shoes, and four-door green sedans would offer products with the same general functions as the diverse offerings of our competitive market, but the value to consumers clearly would be less. The willingness of consumers to pay for diversity and of producers to risk losses in attempting to provide it makes this point obvious. The same principles apply to education. Some students need more discipline; others would excel if given more freedom. Some need college preparatory courses, while others would profit from vocational training. Some students and parents want biology teachers to teach creationism and avoid human sexuality. Others do not. The value lost by forcing students into a uniform curriculum is unknowable, but if the diversity of shirts, shoes, and cars in our society is an indicator, it is significant.[77]

Privately supplied education would provide a range of educational options to students and their parents. The education entrepreneur, motivated by the potential for increased profits resulting from the unique market appeal of his school, would attempt to design a school program that attracts a segment of the market. Students would benefit from the availability of services more closely tailored to their individualized desires, while excessive prices would be prevented by the threat of competition. Poor programs would be eliminated by the absence of willing consumers, and inefficient school administrator-owners

77. Even in education, the value of diversity is illustrated by the differentiation among colleges and universities. Because students are free to select a college with programs more suited to their individual needs, undergraduate, graduate, and vocational programs are available that focus on virtually any discipline or vocation that a prospective student would want to pursue.

would be bought out by specialized agents with fresh ideas and program designs upon which they would be willing to risk their investment.

C. *The Impact of Public Ownership on Teachers and Teaching*

In most public school systems, employment contracts originate at the school district level, while licensing or certification is controlled by the state. Because monitoring the productivity of individual teachers in the educational setting is difficult, teachers have extensive discretion and can therefore engage in opportunistic behavior. Though the shortage of public school teachers is consistently offered as a rationale for pay increases, merit or differential pay scales are rare.

Economists attribute shortages to a failure of market price to allocate resources properly.[78] In a private market, a shortage of teachers would signal that the wages of teachers are too low to attract sufficient numbers to fill demand. Competitive bidding among employers for the scarce supply of available teachers would raise wages and attract an increased number of teachers into the market. At the same time, higher wages would encourage employers to find alternative teaching methods and technologies that conserve scarce teaching talent. The independent and opposing forces generated by workers' desires for higher wages and employers' wishes to minimize labor costs are balanced by the prevailing market wage rate.

In the market for public school teachers, political considerations obscure both supply and demand. The demand for teachers reflects not only the trend in school-age population, but also the teacher-to-student ratio, the number of teachers per classroom, the number of special courses, and the daily work load of each teacher—all factors controlled by the government. Political forces also influence the supply of teachers, through the government's control of colleges of education and the process of certification.[79] In this environment, the very notion of a "teacher shortage" is problematic. Given the tremendous political clout wielded by teachers' unions and others whose incomes depend on the decisions made by government

78. *See, e.g.*, R. EKELUND & R. TOLLISON, *supra* note 6, at 99-100, 107-08.

79. There are numerous projections of teacher supply and demand. *The Condition of Education*, published annually by the National Center for Educational Statistics, United States Department of Education, contains the most frequently cited figures.

authorities, there can be no reasonable expectation that an increase in wages for teachers would suffice to eliminate shortages. Were there no shortage, political forces could align to create one by changing the parameters that determine teacher need and availability. In public schools, teachers' wages reflect not the forces of the market, but rather the political strength of teacher interest groups in comparison to taxpayers and other interest groups. Indeed, a survey of the recent literature reveals much dispute as to whether teachers as a group are in shortage or surplus.[80] There is also much evidence to suggest that, in general, the wages of teachers are comparable to those of other professions requiring similar educational backgrounds.[81] There does, however, appear to be a genuine shortage of math and science teachers.[82] To meet recently increased math and science requirements that have been imposed in many states, school systems have been forced to use teachers outside their areas of certification.[83] In a private market, such an inefficient result would never occur; consumers of education would demand properly qualified personnel, and school owners would offer higher wages to attract more math and science teachers into the market.

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80. *Compare* CARNEGIE FORUM ON EDUC. AND THE ECONOMY, A NATION PREPARED: TEACHERS FOR THE 21ST CENTURY 26-32 (1986) [hereinafter A NATION PREPARED] (predicting shortages) *with* E. FEISTRITZER, TEACHER CRISIS: MYTH OR REALITY? 90 (1986) *and* Hecker, *Teachers' Job Outlook: Is Chicken Little Wrong Again?*, OCCUPATIONAL OUTLOOK Q., Winter 1986, at 12, 17. *See generally* D. GERALD, P. HORN & W. HUSSAR, PROJECTION OF EDUCATION STATISTICS TO 2000 (1985) (offering projections of primary and secondary school enrollment and numbers of classroom teachers).

81. In 1985, public school teachers' average earnings were $24,559 for nine- or ten-month contracts, while persons in other jobs requiring comparable education earned an average of $28,497 for twelve months' work. Among females, the difference was even smaller ($23,543 versus $25,370). *See* E. FEISTRITZER, PROFILE OF TEACHERS IN THE U.S. 25 (1986). One study estimates that public school teachers place a value on their summer leisure time equal to approximately 13 percent of their salary. *See* R. MABRY, C. LINDSAY, M. MALONEY & B. MABRY, FRINGE BENEFITS AND THE VALUE OF SUMMER LEISURE FOR PUBLIC SCHOOL TEACHERS IN THE SOUTHEAST 41 (1989) [hereinafter FRINGE BENEFITS]. At least one other study has indicated that the earnings potential of those who choose to be teachers may be less than the earning power of others. The average Scholastic Aptitude Test (SAT) scores of freshman education majors were 70 points (7.3 percent) lower than the average scores of all other college freshmen. *See* E. FEISTRITZER, THE CONDITION OF TEACHING: A STATE BY STATE ANALYSIS 72 (1985). *See also* A NATION PREPARED, *supra* note 80, at 29-32 (reporting significantly lower SAT scores for high school students intending to major in education, as compared to all other college-bound students).

82. *See* Vetter, *Supply and Demand for Science and Mathematics Teachers, summarized in* T. GOOD & G. HINKEL, TEACHER SHORTAGES IN SCIENCE AND MATHEMATICS: MYTHS, REALITIES, AND RESEARCH 2 (1983).

83. *See* T. GOOD & G. HINKEL, *supra* note 82, at 4.

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Turning to another source of teacher supply manipulation, colleges of education generally support teacher certification requirements that restrict the supply of teachers. On average, general courses in educational methodology and theory required for certification take more than one academic year to complete.[84] This requirement all but eliminates one potential supply of interested and qualified science and math teachers. Among professional scientists and mathematicians, there are, no doubt, a number of young parents who regret the incompatibility of their own schedules with those of their children, and who would be willing to sacrifice some income to secure jobs that were more compatible.[85] When a full year's wages must be sacrificed in order to obtain the necessary certification, however, relatively few professionals who might otherwise make valuable contributions to the teaching profession during their children's school years find it practical to do so.

It is a principal axiom of economics that incentives guide individual behavior.[86] In the employment relationship, this principle underlies the general practice that more productive employees are paid higher wages. The potential reward of higher wages encourages employees to put forth greater effort, and the higher output of the more productive workers encourages employers to offer higher wages in order to retain their services. When this principle operates smoothly, labor markets efficiently allocate individuals to vocations in which the value of their contribution is highest.

In the market for public school teachers, the link between productivity and pay has not been established. Periodic attempts to implement teacher incentive programs in public schools have failed.[87] Unions have historically denounced merit

84. *See* M. BURKS, REQUIREMENTS FOR CERTIFICATION FOR ELEMENTARY AND SECONDARY SCHOOLS (45th ed. 1989) (listing certification requirements for all 50 states). In general, there is one "education" course required for each substantive "subject-area" course. Only in New Jersey is it possible to be certified without having taken any special courses in education. *See id.* at 159.

85. Teachers with children appear to value a schedule that is compatible with that of their children. *See* FRINGE BENEFITS, *supra* note 81, at 11.

86. *See, e.g.*, R. EKELUND & R. TOLLISON, *supra* note 6, at 10, 12.

87. *See* Urban, *supra* note 29 (reviewing history of performance-based pay proposals in the United States). There are two major types of programs that have attempted to reward teaching excellence: merit pay, which rewards exemplary teaching by either a bonus or an increased annual salary; and the career ladder, which rewards qualified teachers by promoting them to higher paying jobs with greater responsibility and influence. *See generally* STUDIES ON MERIT PAY, *supra* note 29.

pay as an attempt to reduce wage scales.[88] In a public school environment, merit pay systems may be susceptible to bias, because the evaluators have no financial responsibility to discipline their decisions and because there is no hard evidence of merit on which to base these decisions.[89] Finally, establishing merit pay criteria to divvy a *legislatively predetermined* salary appropriation among teachers might result in counter-productive, opportunistic behavior on the teachers' part.[90] For example, teachers might profit from hoarding resources or refusing to cooperate with other teachers in order to gain a relative advantage in securing their piece of the finite appropriations pie.

Need we accept an educational "market" in which monetary incentives for teachers to excel are not implemented, and the best teaching goes largely unrewarded? In a government-operated school system, there may be no other option, because teaching ability, beyond a basic understanding of the subject matter, cannot be measured objectively:

> A compelling reason why there are no blueprints for effective teaching is that the effectiveness of particular instructional techniques depends critically on the characteristics of the children in the class, on the personality of the teachers, and the nature of the interaction of students and teacher. The critical characteristics of students and teachers that influence the effectiveness of particular instructional techniques may be very subtle and, consequently, cannot be documented through even detailed research.[91]

Perhaps the kernel of an idea for measuring teacher performance is contained in the above quotation: Students know the quality of interaction with their teacher, and parents can sense the enthusiasm for learning that a teacher imparts to their children.[92] In public schools, however, parental input is difficult to obtain, especially when those parents believe that their input is unlikely to bring about significant change. A private market for schools would provide this information automatically. Parents

88. *See* Urban, *supra* note 29, at 25-26, 35.

89. *See* EDUCATIONAL GOVERNANCE, *supra* note 2, at 29.

90. *See* R. MCKENZIE, ECONOMIC ISSUES IN PUBLIC POLICIES 142-57 (1980) (discussing merit pay systems and departmental discord).

91. Murnane, *The Rhetoric and Reality of Merit Pay: Why Are They Different?*, in STUDIES ON MERIT PAY, *supra* note 29, at 57, 64.

92. *See* Epstein, *A Question of Merit: Principals' and Parents' Evaluations of Teaching*, 14 EDUC. RESEARCHER 3, 4 (1985).

dissatisfied with a teacher's performance would spend their education dollars elsewhere, and profit-minded school owners would instantly be aware of the loss of customers. Parents pleased with the performance of a teacher would likely spread the word in the community, and talented teachers, like hairdressers and mechanics, would develop a loyal following. Because a loyal clientele would be valuable to the school's owner, the rewards provided to the effective teacher would reflect the positive appraisals of parents.

VI. Conclusion

Much has been gained from the public provision of education. Millions have received an education that otherwise might not have been available. Our system of public schools made great strides toward providing everyone with educational opportunities, and the dividends were handsome. As a vehicle for bringing education to the people when communication was slow and communities were small, public schools served admirably. Today, however, most children live near several schools. If schools were made private, and parents were allowed a choice of where to spend their child's education dollar, our schools could be made competitive—competitive with each other, and, because competition brings out the best, competitive with the best educational systems anywhere. Private property and market competition would provide both the incentives and discipline that are absent in our present educational system; enhancing their roles would produce tremendous gains in the performance of American education.

WHAT IS A TEACHER'S JOB?: AN EXAMINATION OF THE SOCIAL AND LEGAL CAUSES OF ROLE EXPANSION AND ITS CONSEQUENCES

JUDITH H. COHEN*

I. INTRODUCTION

As the needs of society have changed, so too has the role of the school. Schools now provide services to children that traditionally were not within their responsibility. From day care centers to school breakfast programs, from school-based health clinics to after-school "latchkey kid" care, school services have taken on expanded dimensions to provide for children when either the family or the community has failed to do so. Reforms and expansions have transformed our schools into "a vast social service agency."[1] One commentator has stated that we demand not just education from our schools, we also expect schools to "cure society's ills."[2]

As the functions of the school systems have undergone transformation, so too has the role of the teacher in today's schools. While the primary role of the teacher has been that of educating children, societal needs and other external mandates for change have significantly altered the work of teachers. In the past, the family and other professionals assumed primary responsibility for the well-being of children. Today, however, much of this work falls within the purview of teachers in a new "catch-all" role.

Recently, a group of teachers enrolled in a graduate course was asked this question: "Are there roles that you have undertaken as a teacher that you did not expect when you began your career?" There were many nods of acknowledgement and when

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1. M. KIRST, WHO CONTROLS OUR SCHOOLS? 49 (1984).

2. D. RAVITCH, THE TROUBLED CRUSADE, AMERICAN EDUCATION, 1945-1980, at xii (1983).

asked to describe some of these unexpected roles, these were among the responses:

> As a special education teacher (elementary) I have found myself counseling parents almost as much as I teach their children. I also feel that I work on children's self esteem and confidence as much (or more than) I teach academics.
>
> I meet a girl every [morning] at 7:30 to supervise the locker room door and locker room while she showers. Her parents own a store and have her out of the house to help work by 6:00 A.M.
>
> Last year I found myself playing the role of a psychologist. I had a child with severe emotional and behavioral problems. He took up alot of time which was precious time taken away from my main role as teacher.
>
> Playground babysitter, mother role, cleaner, fixer, counselor.[3]

When questioned further about their personal reactions to assuming these "nontraditional" teaching roles, the teachers' replies revealed lack of preparation to take on some of the new roles, confusion about role priorities, and feelings of often being overburdened. Most significantly, the replies demonstrated the teachers' genuine concern about being expected to help children in ways that go beyond their traditional instructional role:

> [Counseling parents] is a big responsibility and one that I do not feel I am qualified for. I do it, however, despite possible ramifications, because I feel that the parents really need this and it makes a difference.
>
> I was never trained to have to aid children in personal hygiene. Luckily, my principal got permission from the superintendent and parents to allow this [showering] to happen. This child could not continue to come to school in the condition she had been in and someone had to do something.
>
> It's a good feeling to see the smiles. It saddens me to see them cry. [Being a mother-counselor] is very tiring and draining, but also an awakening and enlightening experience.
>
> I don't want *all* the responsibility *all* the time . . . . [It] causes problems, because it interferes with teaching.[4]

This Article examines the social and legal causes of the ex-

3. These are written comments from students enrolled in one of my graduate education courses at Adelphi University, Fall 1990.

4. *See supra* note 3.

pansion of the role of teachers in our schools and in our society, and describes several of the consequences. The analysis indicates that if teachers are going to be called upon to take on responsibilities that previously had been within the realm of other professionals, their roles need clarification. The Article also provides suggestions for modifying the preparation of teachers for today's schools and for creating the support systems that teachers need to be both effective and secure in their new roles.

II. The Expansion of the Teacher's Role

A. *Societal Pressures*

For many children today, the teacher may be the only stable and continuing adult presence in their lives. It is therefore not surprising that the teaching role has had to take on many new dimensions. Those dimensions are determined by the varying needs of the children in a teacher's class. But who are the "typical" children in our schools, and what needs do they present?

From the time of "The Great War on Poverty" of the 1960s to the present day, there has been a "chronicle of growing concentrations of students with less of what is required to benefit fully from public schooling."[5] These students suffer from poverty, family instability, drug and alcohol abuse, and neglect. They often are of minority membership, have handicapping conditions, or are immigrants who have just arrived in this country. Additionally, the children frequently are not well-motivated, have poor literacy skills, and show little respect for authority.[6]

Many of the special needs of today's children are a function of the fact that children are often the victims of severe poverty.[7] This problem is particularly acute with regard to minority children. While the national statistics are alarming, those that per-

5. D. Duke, Teaching: The Imperiled Profession 45 (1984).

6. *See id.*

7. *See* Brazelton, *Why Is America Failing Its Children?*, N.Y. Times, Sept. 9, 1990, § 6 (Magazine), at 40, 42:

> Children are the poorest group in society, with more than one in five living in a household whose income is below the poverty level, $12,700 for a family of four. Despite medical advances, the United States infant mortality rate is worse than in some third world countries, and every *day* more than 100 American babies die before their first birthday. About one million teen-agers become pregnant each year, and as many as 18 percent of newborns in some city hospitals are born exposed to alcohol, crack and other hard drugs.

tain to children of the inner city and extreme rural areas, and to children of minority populations are shocking. Forty-five percent of black children and thirty-nine percent of Hispanic children were poor in 1987, compared with fifteen percent of whites.[8]

Children who are born in poverty make special demands on our school system because they have the most health problems but the least access to care.[9] Recent reports on child health in America have concluded that "[a]ll is not well with America's children."[10] T. Berry Brazelton, a prominent pediatrician, in a recent *New York Times Magazine* cover story asked the poignant question, "Why Is America Failing Its Children?"[11] He succinctly put the problem in these terms:

> As a pediatrician with 40 years' experience with 25,000 children, mostly middle class, I have begun to regard the growing neglect and poverty of the young as the biggest threat to the nation's future. I also see evidence that we could start preventing this terrible waste, with remedies available right now—but we seem to have lost the will even to think about it.[12]

Additional burdens have been placed on our schools by the huge movements of immigrants, often bringing to our country impoverished children from Southeast Asia and Central and South America. These children often speak foreign languages, come from vastly different cultures, and also suffer from poverty. While acculturating members of minority groups into the mainstream of American life has always been a role of schools, the other social needs of these children, and the inability of the family and social service professionals to provide care, accentuate this role in today's schools. "Public schools have been given

8. *See id. See also* Henry, *Child Poverty Up: Blacks Hit Hardest*, YOUTH LAW NEWS, July-Aug. 1985, at 12:

> The 1980's have not been a good time for children in the United States, particularly those who are black. Poverty among all children now exists at the highest rate in 20 years, since before the "War on Poverty." And black children are three times as likely to be poor as are white children.

9. *See* Brazelton, *supra* note 7, at 42.

10. G. SILVER, CHILD HEALTH, AMERICA'S FUTURE 61 (1978).

11. Brazelton, *supra* note 7.

12. *Id.* at 42. The statistics relating to child abuse and neglect are as startling as are those regarding poverty. In 1976, slightly more than one-half million cases of child abuse and neglect were reported. In 1988, that number jumped to almost 2.5 million. *See* Barden, *Foster Care System Reeling, Despite Law Meant to Help*, N.Y. Times, Sept. 21, 1990, at A18, col. 5. In 1986, more than half the children in foster care were placed there to protect them from their own parents or guardians. *See id.*

the task of socializing these students, often a task that must precede educating them."[13]

Even the children of the "typical story-book" American family of the 1950s today have very serious needs. From the years 1960 to 1972, the annual number of divorces increased by eighty percent to over 800,000 per year,[14] with the result that "by 1980 12 million school-age children or one-fifth of the school population were living with one parent."[15] Living in a one-parent family has been found to be a significant factor in decreased cognitive development and decreased success in adult life, caused by a lack of educational achievement, bleak occupational and economic attainment, dependence on welfare, and poor self-esteem.[16] These children are more likely than those who have two parents to fail their classes, pose discipline problems, abuse controlled substances, and drop out or be absent from school.[17]

Teachers are also encountering problems created by the increasing frequency with which children leave for school in the morning hours without parental supervision and then return to their homes after school hours, again without any supervision. A 1982 study found that 5.2 million school aged children under thirteen are "latchkey" children.[18] The lack of parental supervision has been linked to behavior problems and delinquency.[19]

Possibly the neediest children, and the ones who make the most demands of our schools, are those whose lives are confounded by drug abuse. As the large population of children born to drug-addicted mothers reaches the schools,[20] teachers

13. D. DUKE, *supra* note 5, at 46.

14. *See id.* at 47.

15. *Id.*

16. *See* I. GARFINKEL & S. MCLANAHAN, SINGLE MOTHERS AND THEIR CHILDREN: A NEW AMERICAN DILEMMA 1, 11-14 (1986).

17. *See id.*

18. *See* D. DUKE, *supra* note 5, at 47.

19. *See id.* The startling statistics of juvenile delinquency clearly illustrate the magnitude of these behavioral problems. In 1987, more than 53,305 children were confined in publicly-run detention facilities, the highest number since such data were first collected in 1971. *See* Marcotte, *Criminal Kids*, A.B.A. J., Apr. 1990, at 61. Although the data reveal that the number of youths being held for murder, manslaughter, robbery, and aggravated assault have declined, the number being held for alcohol or drug offenses, truancy, and neglect and abuse have increased by 50 percent since 1985. *See id.* at 63.

20. A legal commentator brings the problem into focus by saying that "[i]f cocaine use during pregnancy were considered a disease, its impact on children would be considered a national health care crisis." Fink, *Effects of Crack and Cocaine Upon Infants: A Brief Review of the Literature*, L. GUARDIAN REP., 1990, No. 2, at 1, 1 (published by the

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are more frequently finding problems with low-range intelligence, neuro-behavioral deficits, growth disorders, and the whole range of problems associated with premature birth.[21] Children from drug-abusive families often come to school poorly fed, improperly clothed, and tired. Additionally, they suffer from a host of behavioral and emotional problems that make them less able to succeed in the classroom. These children lack the stability and support necessary to develop positive self-esteem.

All of these statistics and observations mean but one thing: The "typical" child in today's classroom is more likely to suffer from poverty, abuse, and neglect than ever before. This reality has forced teachers—often the only stable, adult presence in the lives of these children—to take on the responsibilities of social-service providers and to care for children in ways never before expected. Consequently, the role of our teachers has been transformed from one primarily concerned with educating children to one that focuses first on meeting the basic needs of children that must be provided before they can be successfully educated.

B. *Legal Pressures*

The social plight of today's children has not been the only factor contributing to the transformation of the role of teachers in today's schools. Equally dramatic pressures for change have originated from the courts. The environment of the school has been significantly changed by judicial decisions. A well-respected sociologist of education has written that "the most potent source for change [in education] has come not from within the school system, or from state and federal policymakers, but from the courts."[22]

Judicial decisions that affect teachers and their jobs have involved such broad areas as educational equity, professional

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Appellate Divisions of the Supreme Court of the State of New York) (quoting Revkin, *Crack in the Cradle*, DISCOVER, Sept. 1989, at 63).

21. *See id.* at 5, 6.

22. S. SARASON, THE CULTURE OF THE SCHOOL AND THE PROBLEM OF CHANGE 9 (1982). *See also* L. FISCHER, D. SCHIMMEL & C. KELLY, TEACHERS AND THE LAW xxv (1987):

> Today's schools exist and function in the midst of a complex legal environment, and it is difficult not to be aware of a wide range of legal issues that influence the lives of teachers, students, parents and administrators. It is increasingly clear that educators ignore the law at their own peril.

malpractice, and students' rights.[23] It has been observed that "the collective impact of these decisions has been to inhibit teacher discretion."[24] Schools and teachers have had no choice but to assimilate and accommodate these dramatic changes.[25]

Probably the most significant of these changes resulted from the 1954 desegregation decision, *Brown v. Board of Education of Topeka*,[26] which has been described as a major revolution in American education.[27] This and other decisions[28] forever changed the composition of students in the American classroom. By bringing students from a range of backgrounds together into one classroom, these decisions forced teachers to raise their awareness of a myriad of social and legal issues that they previously had largely ignored.[29]

With the passage by Congress of the Education for All Handicapped Children Act (EAHCA),[30] another major revolution in American education occurred.[31] This legislation significantly increased the number of children with handicapping conditions placed in mainstream classrooms. Teachers are accordingly required to serve a much broader range of students who, as a result of their handicapping conditions, have diverse educational and psychological needs. The EAHCA also imposes due process requirements on teachers and school systems, thereby impacting teachers' day-to-day functions.[32]

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23. *See* D. DUKE, *supra* note 5, at 61.

24. *Id.*

25. *See* S. SARASON, *supra* note 22, at 9.

26. 347 U.S. 483 (1954).

27. *See* S. SARASON, *supra* note 22, at 6. The recent national debates on equity, equal opportunity, and educational funding have increased awareness that court decisions alone have not created educational equity by race or ethnic group. The disparate impact of educational funding is readily observable by a comparison of inner-city and suburban school systems. "White flight" has left minority students disproportionately represented in inner-city public schools, which cannot compete for highly qualified teachers with the resources, working conditions, and salaries offered by affluent suburban schools.

28. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954).

29. While population of students continues to become more racially and ethnically diverse, the population of their teachers (outside urban and poverty areas) has remained predominantly white despite efforts to recruit and keep more minority teachers. *See* Loehr, *The "Urgent Need" for Minority Teachers*, Educ. Week, Oct. 5, 1988, at 32, col. 1. Minority students outside urban and poverty areas most often do not have role models of minority teachers and do not see a teaching faculty representative of our pluralistic society.

30. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400-1485 (1988)).

31. *See* S. SARASON, *supra* note 22, at 6.

32. *See id.* (citing 20 U.S.C. § 1415).

The courts have visited a further impact on our schools through the relatively recent students' rights cases. These cases have created a heightened awareness of the protection of civil liberties and constitutional rights in the school environment.[33] Such issues as student dress codes, free speech, discipline and suspension, sensitive curriculum topics, and book choices are being approached with increased sensitivity. While teachers vehemently support the need to uphold individual rights and to respect the rights of students, this support is not without reservation. As one commentator has noted:

> In schools beset by chronic student misconduct, according students their due process rights and completing the paperwork required by various regulations may tax personnel, retarding their ability to maintain a reasonable degree of order. When dismissed students who have behaved in a blatantly disrespectful or dangerous way are reinstated because of procedural technicalities, teachers fear reprisals and worry about classroom control. Teachers also are concerned that overemphasis on student rights may undermine respect for authority and encourage students to challenge any teacher action.[34]

More and more, teachers are also becoming aware of the potential legal ramifications of their everyday actions. Is it "legal" to celebrate religious holidays? Can a teacher restrict student-run publications? Does a teacher have free choice in assigning books to be read or choosing a textbook? These are issues about which teachers traditionally were never concerned. Today, while they long for past levels of academic freedom, teachers work in the fear of litigation.[35]

These social and legal pressures, which have transformed the nature of our schools, have thrust teachers today into a position of being much more than just educators. Teachers have assumed responsibilities as surrogate parents, health providers, psychologists, counselors, nutritionists, care-givers, and social workers. As public school funding is cut and resources scaled

33. *See, e.g.*, Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

34. D. DUKE, *supra* note 5, at 62.

35. *See* Stelzer & Banthin, *Teachers Do Have Rights*, UPDATE ON LAW-RELATED EDUC., Spring 1982, at 41. The most recent report of the Carnegie Foundation found that only 55 percent of the teachers surveyed were satisfied with the degree of control over their jobs, as compared to 75 percent in 1987. *See Poll Finds Drop in Teacher Satisfaction With Degree of Control Over their Jobs*, Educ. Week, Sept. 5, 1990, at 9, col. 1.

back, already underpaid and over-extended teachers will surely find themselves filling even more roles.

A good example of the pressures teachers face at work is the present climate within the New York City schools. When the school year began in September 1990, a newspaper headline read: "New York Schools Open, Facing Test: Do More With Less."[36] The accompanying story noted that, at the same time that New York City students are acknowledged to be "poorer and . . . perhaps more troubled than ever before, the schools are required to meet their needs with less money than they had the previous year."[37]

The calls to raise the quality of education and simultaneously reduce educational funding, along with the other social and legal pressures discussed above, place an unfair burden on our teachers.[38] Unfortunately, few have acknowledged either the expansion of teachers' roles or their exemplary performance in fulfilling the nontraditional roles they have assumed.[39]

III. Consequences of Expanding the Teacher's Role

As teachers' roles have expanded, adverse consequences have arisen. All too often, teachers are finding themselves poorly trained for their new roles and confused about role priorities. "[T]he job of teaching has undergone a complex series of changes, changes leading to increased task ambiguity and insecurity."[40] As teachers take on more and different responsibilities, concern has grown that teachers may become unsure of what their primary purpose is, or even what may be done "legally" as part of a teacher's job.

Furthermore, many teachers complain that as the schools

36. N.Y. Times, Sept. 10, 1990, at A1, col. 2.

37. *Id.*

38. Much of the blame for the declining quality of education today has been focused on the competence of those who teach. To increase that level of competence, many are advocating changes in what had been an automatic process of teacher certification. The certification process now often includes testing for pre-service teachers and variations in a teacher's course of study. A particularly troubling consequence of testing for teacher certification is the adverse impact on minority candidates. Teachers have brought legal challenges against such tests in many states, on the bases that the tests produce invalid results and violate due process rights. *See* Cohen, *Legal Challenges to Testing for Teacher Certification: History, Impact and Future Trends*, 18 J.L. & Educ. 229, 230 (1989).

39. *See* D. Duke, *supra* note 5, at 122 ("Without teachers, it would be difficult to locate a group of comparable size which is so disposed to work for the benefit of the young.").

40. *Id.* at 119.

and their roles have undergone expansion and transformation, the "paperwork" dilemma and chain of command have become all the more intrusive and burdensome. School bureaucracies, with their expanding regulatory tendencies, threaten the autonomy of teachers. As two commentators have observed, loss of autonomy causes a "serious threat to teachers' sense of efficacy,"[41] where efficacy is defined as "teachers' situation-specific expectation that they can help students learn."[42]

Whenever teachers do not believe that they can positively affect student learning, their personal sense of competence is diminished, and their behavior changes. This in turn adversely affects student behavior and learning.[43] Much has been written about job "burnout" and job-related stress in all occupations. Nevertheless, teacher dissatisfaction, problems with recruitment, and exit from the profession show that the problem is particularly acute within the educational community.[44]

Seven major causes of job burnout have been documented in the literature: lack of control over one's destiny; lack of occupational feedback and communication; work overload or underload; contact overload; role conflict or ambiguity; individual factors; and training deficiencies.[45] Many, if not all, of these causes stem from the increasingly common situation in which a teacher is ill-prepared for the multi-dimensional tasks entailed in today's teaching job. Such a teacher often is confused and overwhelmed by the role ambiguity and ultimately sees few positive or long-term results. One commentator has observed: "No individual can be all things to all people, especially today. Because of societal demands, increased technology, changes in the family, and a lack of trust in institutions, the typical job in today's industrial society has become more complicated, technical, political, and tenuous than ever before."[46]

Their multiple roles often force teachers to attempt to please

41. P. ASHTON & R. WEBB, MAKING A DIFFERENCE—TEACHERS' SENSE OF EFFICACY AND STUDENT ACHIEVEMENT 23 (1986).

42. *Id.* at 3.

43. *See id.* at 145-46.

44. The Carnegie Foundation has documented this problem using data collected from a recent survey of 21,000 elementary and secondary public school teachers. The survey concluded that "teachers are increasingly unhappy with their lack of authority, with their working conditions and with the movement for better schools itself . . . ." *Broad Teacher Dissatisfaction is Pointed Up in National Poll*, N.Y. Times, Sept. 2, 1990, § 1, at 24, col. 5.

45. *See* A. CEDOLINE, JOB BURNOUT IN PUBLIC EDUCATION 40 (1982).

46. *Id.* at 50.

varying and sometimes opposing constituencies, including school administrators, fellow teachers, parents, children, and their own family members. If teachers cannot resolve their conflicting role priorities, tension invariably results.

The increase in school-related litigation in recent years further evidences the consequences of teachers' role expansion and the resulting uncertainty. Litigation involving teachers has increased substantially in the past two decades.[47] The issues over which teachers litigate as plaintiffs have also changed. Job security has replaced teacher certification and teacher conduct as the principal issue in litigation involving teachers.[48] Whether role expansion and the resulting role ambiguity have created the impetus for this increased level of litigation has yet to be determined, but the pattern that consistently appears in school litigation is clear. Although power in the schools still resides with the school board, today's teachers are more likely than ever to seek legal redress when they perceive that their interests have been adversely affected.[49] Such litigation thus may represent a new form of teacher empowerment.[50]

As the responsibilities of teachers have expanded, so too have their needs for information and support to assist them in executing those responsibilities. Today, when teachers assume additional responsibilities within the school environment, or when they teach subjects that are particularly controversial, they are often required to operate without guidelines. Because schools do not provide teachers with role definitions, and teachers are not given sufficient guidelines, it is not surprising that teachers sometimes unintentionally overstep unknown boundaries.

The lack of sufficient guidelines in combination with the expansion of teachers' roles bring to light an even more fundamental issue: defining the mission of schooling. Without a clear definition of the school's mission, how can teachers know what their job entails? The debate continues to rage about the primary purposes of public education. Amazingly, the answer to

47. *See* Hooker, *Commentary—Teachers and the Courts, 1965-1986,* 48 EDUC. L. REP. 7, 7 (1989) (analyzing litigation involving teachers in public schools during the years 1965 to 1986).

48. *See id.* at 10.

49. *See id.*

50. Unfortunately, the education community has not been able to redress many of the significant problems without the expense and delay of litigation.

the question "What are schools for?" has been given little attention both within schools and within institutions that prepare teachers.[51] It is not surprising, therefore, that some of the most dramatic changes in schools have been the unintended consequences of social pressures and not the outcome of a well-articulated philosophy of education or well-delineated role definition for teachers.[52]

Although the mission of American education is ambiguous, new demands for excellence in American education abound. A superintendent of schools commented that "the nation's schools are searching for concrete goals so that they may get on with the work of attaining them; but they cannot develop their own mission by themselves. Schools will need guidance from the rest of society."[53] If schools are to be the "cornerstone of American democracy,"[54] a realistic and attainable mission must be formulated.

What should be taught in the schools is an important aspect of the definition of education's mission. School curricula today consist of a variety of topics that are often the result of which fad is "hot" and which lobbying group has the greatest influence, rather than being the product of thoughtful choices and weighing of priorities. The inclusion of controversial, politically charged topics within the school's curriculum raises further the issue of what should be taught in schools and what is appropriately taught at home and through religion. Some believe that the teacher should share responsibility for training youth by teaching such moral precepts as respect, generosity, and intellectual honesty.[55] Others believe that the schools should teach more about religion in order to ensure that students receive a complete understanding of how history, literature, and the arts have been influenced by faith.[56] It is unlikely, however, that a heterogeneous community would ever agree that teaching about morality and religion are public school teachers' responsibilities.

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51. *See* S. SARASON, *supra* note 22, at 261.

52. *See id.* at 186.

53. Hess, *The Dynamics of Change in American Society: Implications for School Teachers*, GOV'T UNION REV., Fall 1986, at 11, 11.

54. *Id.*

55. *See* Delattre, *Teaching Integrity: The Boundaries of Moral Education*, Educ. Week, Sept. 5, 1990, at 56, col. 1 (calling for an increase in the teaching of morality as part of the school's mission).

56. *See* N.Y. Times, Aug. 5, 1990, § 4A, at 25, col. 1.

IV. Legal Problems Created by Role Expansion and Role Ambiguity

As teachers are asked to assume responsibilities that go beyond their traditional roles, especially when the responsibilities involve controversial matters, teachers must be educated about the associated legal ramifications. If we expect teachers to be effective, we must provide them with policies and procedures to accompany their new roles.

A recent incident involving two teachers who worked as advisers to a high school yearbook vividly illustrates both the changing nature of the role of today's teachers and the need for better guidelines. The publication of the yearbook that these two teachers advised created national attention when it was found to contain obscenities, anti-Semitic remarks, and racial slurs.[57] As a result of the Supreme Court's 1988 decision in *Hazelwood School District v. Kuhlmeier*,[58] schools have an increased responsibility for the content of student publications. Perhaps unaware of this precedent, the teachers mentioned above may not have understood their potential power—and obligation—to abridge the students' free speech rights if the speech threatened to disrupt materially school work or to violate the rights of others.[59] The controversial language, therefore, was left in the yearbook. Even though the teachers may not have been informed of the extent of their editorial prerogative, the superintendent of the school district placed responsibility for the problem on the two advisers and called for their termination.

The advisers agreed to accept a ten-day suspension and to issue public apologies. While it is most regrettable that any student was demeaned by the contents of the yearbook, it is also troubling that only after this incident did the school district "consider[] a set of standards for student publications."[60] Teachers should not be held solely responsible for an error when the school district permitted them to operate without appropriate procedures.

A recent incident in a Long Island school sparked further de-

57. *See Yearbook Incidents Spark Debate on Advisers' Role*, Educ. Week, June 13, 1990, at 6, col. 1.

58. 484 U.S. 260 (1988).

59. *See* Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368 (8th Cir. 1986).

60. *Update*, Educ. Week, Sept. 12, 1990, at 3, col. 2.

bate over the proper role of today's teacher. In spring 1988, Janet Morgan, a tenured, middle-school social studies teacher, gave her class an essay assignment in which the students were asked to react to a statement made by Jimmy (the Greek) Snyder about the role of blacks in sports that resulted in his firing by a television network. As part of the assignment, Ms. Morgan, who is black, gave the students copies of an editorial cartoon and letters to the editor published in a daily newspaper. One of the published letters was written by Ms. Morgan herself.[61]

When parents complained that Ms. Morgan should not have expressed her opinion to the students, the superintendent asked that she retract the assignment. Ms. Morgan refused to do this and also refused to turn over her lesson plan and grading sheet as requested. The refusal led to Ms. Morgan's suspension and a very bitter controversy that ultimately has been reviewed by the New York State Commissioner of Education.[62]

The incident resulted in a lively debate over academic freedom and the teacher's role in the classroom. The community in which Ms. Morgan taught is racially divided, with a large number of poor, black families living on one side of a major avenue, and more affluent, non-minority families living on the other side. The community contains all the elements of tension that could easily divide families and educators along racial lines, irrespective of the teaching issue under debate.

Ms. Morgan has claimed that her choice of teaching procedures is an aspect of academic freedom. The school district disagreed and claimed that Ms. Morgan has refused to acknowledge their rightful authority to supervise her actions. New York State Commissioner of Education Sobol ruled that Ms. Morgan was guilty of insubordination by not submitting the grade book as requested, but more importantly, he rejected the school district's request that Ms. Morgan be dismissed. Dr. Sobol's remarks on academic freedom clearly reflect his interpretation of the teacher's role in today's classroom:

> School administrators play an important role in overseeing curriculum, but teachers must be given latitude to enable them to teach the curriculum in the most effective manner.

61. *See Sobol: Malverne Erred*, Newsday, Apr. 21, 1990, at 3, col. 1. *See also* Address by Terence O'Neil, Annual School Law Conference, Suffolk and Nassau Academies of Law (Dec. 5, 1990).

62. *See Sobol: Malverne Erred*, *supra* note 61; Address by Terence O'Neil, *supra* note 61.

> Within the broad parameters of curriculum, a teacher must be free to engage in classroom discussion and debate in order to stimulate the exchange of ideas and critical thinking. Teachers are not neutral conduits of information from some external source to pupils' minds; they are active participants in the process of inquiry, raising questions, stimulating thought, and modeling commitment by expressing their own views.[63]

Unfortunately, the controversy has not yet come to an end. The school district has filed an appeal to the New York State Supreme Court. The district contends that Commissioner Sobol did not follow previous case law in rendering his opinion, and, moreover, if the decision is upheld on the basis of academic freedom, school administrators will be unable to influence either the content of classroom teaching or the methodologies that teachers employ.[64]

Another example of the problems created when teachers are expected to perform without clear guidelines is the debate regarding how to teach the mandated "hot potatoes" of the new school curriculum: sex education and AIDS.[65] Here, the debate has focused on whether the purpose of teaching these subjects is to instruct students that "certain behaviors are simply wrong and must be avoided or whether children should be educated to make their own informed decisions."[66]

As this debate continues, teachers are understandably uncomfortable with their role in teaching these subjects. A private conversation with an official of the United Federation of Teachers (UFT) confirmed that the UFT is very aware of teachers' insecurity in their role as instructors of family life and sex education.[67] Teacher complaints to the UFT have focused on inadequate preparation to teach these topics and the lack of textual materials. Teachers obviously need training, support, and role clarity when they are asked to assume responsibility for teaching these and other controversial subjects.

The State of New York has started the process of providing its teachers guidelines in some of these nettlesome areas by

63. Board of Educ. of the Malverne Union Free School Dist. v. Janet Morgan, No. 12320, slip op. at 4 (Comm'r, Educ. Dep't of State of N.Y. Apr. 17, 1990).

64. *See* Address by Terence O'Neil, *supra* note 61.

65. *See* Suro, *Family Feuds*, N.Y. Times, Aug. 5, 1990, § 4A, at 26, col. 1.

66. *Id.*

67. Telephone interview with official of the United Federation of Teachers, New York City (Aug. 1990).

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universally defining teachers' responsibilities to report child abuse.[68] The legislature has also enacted legislation that requires school districts to provide specific training for teachers in this area.[69] Accordingly, each school district in New York is now required to educate teachers about the signs and symptoms of child abuse and to establish procedures for reporting child abuse. These procedures are intended to ensure confidentiality for the reporting teacher and to protect the child.

These guidelines, however, are just the first step. Comparable guidelines need to be developed in all states to address the full range of legal and social issues with which today's teachers are faced. Only with such guidelines will teachers know and understand their rights, their responsibilities, and, even more significantly, their roles.

V. Summary and Conclusions

Current research on educational reform has led some to claim that teaching is a profession in jeopardy. Two experts have concluded that "our research indicates that the psychosocial conditions in the schools—the isolation of teachers, their uncertainty, their lack of support and recognition, and their sense of powerlessness and alienation—make it difficult for teachers to maintain a high sense of efficacy."[70]

The transformation of the role of our teachers and the uncertainties that have resulted are undoubtedly primary reasons for why the teaching profession has been so jeopardized. Today's teachers are as much providers of social services as they are educators. Their roles today are very different from the "traditional" teacher of past generations, yet their training remains largely the same. Teachers are often unaware of and still ill-prepared for the legal and social ramifications of their new responsibilities.

But while the expansion of the role of our teachers has undoubtedly had many adverse consequences, there are some positive aspects to the expansion. The multiplicity of psychosocial needs of children are better addressed by many segments of the education establishment. Support services for children, not only academic but psychological and medical services as

68. *See* N.Y. Soc. Serv. Law § 413 (McKinney 1990).
69. *See* N.Y. Educ. Law § 3004 (McKinney 1990).
70. P. Ashton & R. Webb, *supra* note 41, at 150.

well, are being built into school programs.[71]

In addition, new programs are being created in which schools are truly working in partnership with other community institutions and are involving parents as part of the school team, thereby building trust relationships among parents, teachers, and school administrators.[72] Such concepts as "school-based management" and joint decisionmaking are being incorporated into the operation and management of schools, giving teachers more ownership in the programs in which they work. The concept of "teaching as a profession" has been used to elevate the stature of the work that teachers do and thus to attract and keep well-qualified teachers. Teacher preparation has been expanded to include new dimensions to equip teachers with the skills and knowledge that they will need to be effective professionals in today's environment.[73] Teaching internships, which provide more "on the job" training, have been reemphasized. It appears that teachers also are less compliant in passively accepting regulations or conditions that make their jobs untenable, more active in their professional unions, and more willing to become litigants against school districts if they feel their rights are being usurped.

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71. *See* Schwartz, *Making the Grade*, NEW YORK MAG., June 11, 1990, at 36, 39.

72. *See* Brazelton, *supra* note 7, at 90. As a Law Guardian for children in Nassau County Family Court, I have had the opportunity to participate in multi-disciplinary team meetings held by school districts to monitor and ensure the well-being of students in their districts. One such team with which I work is composed of teachers, school administrators, school psychologists, school district social workers, hospital-based child-study team members, community counseling personnel, grandparents, and the law guardian. This unique partnership helps to coordinate efforts and provide for the multiple needs of a pre-school, developmentally-delayed child born prematurely to addictive parents, and to the child's two school-aged siblings who are also in special education programs.

73. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 8, § 80.14 (amendment proposed Apr. 6, 1990):

> An approved teacher education program is one which prepares the teacher to create a developmentally appropriate learning environment; to work effectively with children from minority cultures, children from homes where English is not spoken, children with handicapping conditions, and gifted and talented children; to provide appropriate opportunities for children to engage individually and cooperatively in self-initiated, group-initiated, and teacher-initiated activities that will enable them to construct their own understandings of social relationships, relationships in the physical environment, and the use of linguistic, numerical, and artistic symbols and tools for increasing understanding and communicating; to record and assess children's progress; to collaborate effectively with co-workers; to communicate, plan, and work effectively with children's families; and to use community resources, programs, and services appropriately. . . .

In spite of these positive developments, more needs to be done, including the following:

1. Strengthen pre-service and in-service teacher education programs to inform teachers about the roles they will be expected to fulfill and to equip them with the necessary skills to perform effectively in those roles.
2. Create support systems in the school so that teachers have both referral networks and access to assistance when they discover students with unmet needs and when they themselves require assistance to address the problems of very needy children.
3. Improve the job security, monetary compensation, and status of teachers, and work to elevate public opinion regarding the value and expertise of teachers' roles in the lives of children.
4. Clarify teacher roles in the school system and provide guidelines for teaching controversial subject areas. Teachers should be included in the development of district guidelines and procedures, and new teachers should become well acquainted with this information.

While these specific suggestions should be implemented, more broad-based concerns should be addressed as well.[74] Many recognize that teachers' jobs have changed dramatically to meet the needs of a our nation's youth, but there has been no general public acknowledgement of the complex work that teachers do.

The priorities of education must be made clear. How can this nation strive for excellence in the world marketplace and produce well-educated and technologically sophisticated citizens when so many children are lacking the basics of a decent life? If social service systems cannot address the needs of today's youths, and if the schools are to continue to be providers of more than education alone, educational priorities and the work of teachers need to be reconceptualized by public policymakers.

School personnel should be trained to become "resource locators and coordinators, constantly scanning school and community in order to match needs in a mutually productive manner."[75] The job of teaching must also be made exciting, rewarding, and enjoyable. Teachers must be chosen based upon criteria that will distinguish them as professionals; they

74. *See, e.g.*, D. DUKE, *supra* note 5, at 134-49.
75. S. SARASON, *supra* note 22, at 276.

must be trained as professionals; and they should be acknowledged and compensated as professionals. Schools should be reorganized both to meet the needs of children and to remove the bureaucratic constraints that presently demean teachers.

For the good of our youth, it must be acknowledged that teachers are composed of a group of dedicated individuals who are ready, willing, and able to tackle the demands of the classroom and the needs of the children in their charge. Until it is fully acknowledged, however, that the role of teaching has been dramatically changed by the dynamics of societal needs and legal dictates, and until systems are created to educate and support teachers for these new responsibilities, many teachers will remain frustrated, confused, overburdened, and ultimately less able to educate our children.

IS LOCAL CONTROL OF THE SCHOOLS STILL A VIABLE OPTION?

CHARLES F. FABER*

Public education in the United States is primarily a function and responsibility of the States. The Constitution of the United States provides that powers not delegated to the national government nor prohibited to the states are reserved to the states or to the people;[1] education, nowhere mentioned in the Constitution, is assigned by implication to the states. Education is, therefore, a state responsibility, and control of the educational system within each state is legally a function of state government.

State legislatures have full power to determine the scope and organization of the public school system and the agencies that make the system effective. Most states assign general leadership, supervisory, and regulatory functions to a state board and department of education. Much of the responsibility for actually conducting educational programs has historically been delegated to local school districts, governed by local boards of education. Legally, these local school districts are agents of the state, created in accordance with state law for the purpose of implementing the state's responsibility. In practice, however, direct local control of education has had a long historical tradition in the United States. As we enter the 1990s, the continued viability of this tradition is being called into question.

I. AN HISTORICAL PERSPECTIVE ON SCHOOL GOVERNANCE

A. *The Emergence of Local Boards of Education*[2]

Local control of education manifests itself in an American invention, the local school board. The evolution of school boards accompanied the emergence of the district system of education,

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1. *See* U.S. CONST. amend. X.

2. Much of the historical information presented in this Section is drawn from N. EDWARDS & H. RICHEY, THE SCHOOL IN THE AMERICAN SOCIAL ORDER 84-127 (1947).

which first developed in the New England colonies. The district system evolved from the special geographical and ideological circumstances of the colonial experience. Geographic isolation and transportation and communication difficulties in the early colonies contributed to the development of local districts, but the chief reasons that this structure emerged were an intense belief in the value of local control and opposition to centralized authority. Committees of selectmen, the early forerunners of school boards, were appointed in colonial town meetings to study and supervise the town schools. At first, the school committee was an agency of town government, but gradually, school districts became separate from municipal government, and the school committee became a distinct governing body. By the early Nineteenth Century, boards of education in Massachusetts were separate and distinct from other governing bodies of a city or town. Other states adopted this system of educational governance, and eventually it became universal throughout the United States.

Has this system served us well? Some critics believe that its time has come and gone. They question whether local control of schools is still a viable concept in the 1990s, and whether higher levels of governance should constrain or supersede local control.

Such questioning is not new. Horace Mann described the Massachusetts Act of 1789, which granted legal rights to school districts, as the most unfortunate legislation regarding common schools enacted in Massachusetts.[3] Historian Edwin Dexter stated: "The really disastrous legislation came, however, in 1801, granting the district the power to raise moneys by taxation, a right which had heretofore been vested in the larger social unit, the town. In actual practice, the district proved too small to be entrusted with final legislation in money matters."[4] Most people must have thought the system worked, though, because local districts were established across the country. Roald Campbell, however, suggests that local control was more folklore than fact.[5] Writing in 1959, he pointed out that the public

3. *See* R. CAMPBELL, L. CUNNINGHAM, R. NYSTRAND & M. USDAN, THE ORGANIZATION AND CONTROL OF AMERICAN SCHOOLS 110 (6th ed. 1990) [hereinafter ORGANIZATION AND CONTROL].

4. *Id.* at 110-11 (quoting E. DEXTER, A HISTORY OF EDUCATION IN THE UNITED STATES 184 (1922)).

5. *See* Campbell, *The Folklore of Local School Control*, 67 SCH. REV. 1, 15 (1959).

schools "have always operated within a framework established by the various states and that federal influences of some kind have always been prevalent."[6] He suggested that, as of that time, state controls had strengthened and federal activities had multiplied in recent years. The decades since 1959 have surely witnessed an intensification of the trends Campbell noted.

Perhaps the most outspoken of the critics of local control several decades ago was Myron Lieberman, who wrote in 1960: "Local control of education has clearly outlived its usefulness on the American scene. Practically, it must give way to a system of educational controls in which local communities play ceremonial rather than policy-making roles. *Intellectually,* it is already a corpse."[7]

B. *The Growth of State Control*[8]

A brief historical review of legislation in the area of education provides convincing evidence of the trend toward increased state control. All states have had compulsory school attendance laws throughout most of the Twentieth Century.[9] Pupil admission standards, including age, residence, and immunization requirements, are established directly by statute in most states. In all states, the local district must offer a curriculum approved by the state. States differ in the degree of control exercised, but even in states where local districts retain some discretion, course offerings must meet state guidelines. Most states permit local school districts to select their own textbooks, but these districts usually must choose books from state-approved lists. Virtually every state requires certification of public school teachers. Most states have teacher tenure statutes and laws that govern the employment, transfer, dismissal, and demotion of teachers. State laws authorizing or requiring collective negotiations proliferated during the 1960s and early 1970s. The first such law was enacted in Wisconsin in 1959; by 1975, a majority of the states had enacted negotiation

6. *Id.*

7. M. LIEBERMAN, THE FUTURE OF PUBLIC EDUCATION 34 (1960) (emphasis in original).

8. Much of the historical information presented in this Section is drawn from ORGANIZATION AND CONTROL, *supra* note 3, at 76-104.

9. Some states repealed the laws during the school desegregation period of the 1950s and 1960s; most have since reinstated them.

statutes.[10]

Except for negotiation legislation, state control in the areas of compulsory attendance, curriculum, certification, and employment did not increase greatly at the expense of local control during the decades immediately preceding 1980. The decade of the 1980s, however, witnessed a surge in state control of education under the banner of reform. During the years 1982 to 1986, eleven states passed omnibus reform laws.[11] Most of these acts imposed more rigorous academic standards for students and higher standards for teachers. Between 1980 and 1986, forty-five states altered their requirements for earning a standard high school diploma.[12] These alterations have almost invariably entailed increases in required courses. Since 1980, the age span of compulsory school attendance has been increased in fifteen states,[13] and since 1983, eleven states have increased the length of the school year.[14] Although the length of the school day has not been changed significantly as a result of new state mandates, some states have reinterpreted existing regulations to ban certain nonacademic activities during the school day. Restrictions on students' athletic participation ("no pass, no play") have been imposed in fourteen states,[15] and restrictions on students' driving privileges have been imposed in five states, usually in the form of revoking driver's licenses of school dropouts.[16]

In the realm of stiffening teacher requirements, the most usual course of states has been to require prospective teachers to pass a state-mandated competency examination prior to initial certification. Between 1975 and 1986, legislation mandating teacher testing was enacted in thirty-three states.[17] By 1989, passing a competency examination was required in forty-five states.[18] Career ladder plans have not been nearly so pervasive. Two states, Florida and Tennessee, have such plans in

10. *See* W. VALENTE, LAW IN THE SCHOOLS 240 (2d ed. 1987).
11. *See* Pipho, *States Move Reform Closer to Reality*, 68 PHI DELTA KAPPAN K1, K2-K4 (Dec. 1986).
12. *See id.* at K5.
13. *See* Educ. Comm'n of the States, *Some Indications of State Education Reform Activity*, ECS CLEARINGHOUSE NOTES, Oct. 1989, at 1 [hereinafter *Some Indications*].
14. *See id.*
15. *See* Educ. Comm'n of the States, *Statewide Mandates on Extracurricular Eligibility*, ECS CLEARINGHOUSE NOTES, Dec. 1989, at 1.
16. *See Some Indications*, *supra* note 13.
17. *See* Pipho, *supra* note 11, at K6.
18. *See Some Indications*, *supra* note 13.

place, and several other states have enacted legislation or field-tested such plans.[19]

Perhaps the most intrusive state intervention in local school district affairs arises in the context of "academic bankruptcy," or situations in which schools are performing poorly. Nine states now have provisions for state intervention in the operation of school districts that are performing poorly.[20] New Jersey's law is probably the best known; it permits state officials to take complete control of a district and to dismiss school board members and top administrators.[21] The state's takeover of the Jersey City school district was widely publicized.[22]

Similarly, Kentucky's statute permits the state superintendent to intervene in the operation of local school districts and to limit the authority of the local superintendent and local board when identified deficiencies are not corrected.[23] The state's use of this authority to intervene in the Whitley County, Kentucky system, however, was invalidated because the implementing regulations were vague and were applied in an arbitrary manner.[24]

Recent court cases challenging the constitutionality of state school aid formulas have also led to some diminution of local control. Beginning with the 1971 California decision, *Serrano v. Priest*,[25] formulas have been challenged across the country

19. Career ladders are means by which teachers can receive differential pay by advancing step-by-step up a "career ladder," such as instructor, professional teacher, and master teacher. *See* ORGANIZATION AND CONTROL, *supra* note 3, at 319.

20. *See* Educ. Comm'n of the States, *Academic Bankruptcy*, ECS CLEARINGHOUSE NOTES, Oct. 1989, at 1, 1-4. These provisions use a variety of measurement tools to gauge a school district's performance and to determine whether intervention is necessary. Most states rely on one or more student performance indicators including basic skills testing programs, graduation rates, and dropout rates. Other criteria reviewed in some states include educational program content, management and fiscal operations, average class size, pupil-teacher ratio, pupil-administrator ratio, and operating expenditure per pupil.

21. *See* Public School Education Act of 1975, N.J. STAT. ANN. §§ 18A:7A-15, 18A:7A-34 to 18A:7A-52 (West 1989).

22. *See generally School Takeover: Gentle Words, Tough Action*, N.Y. Times, Mar. 25, 1990, § 12NJ, at 1, col. 1; *Nation: N.J. Takes Over Jersey City Schools*, L.A. Times, Oct. 4, 1989, at A1, col. 1.

23. *See* KY. REV. STAT. ANN. §§ 158.650-158.750 (Baldwin Supp. 1990). The Kentucky Board of Education is authorized to declare a school district "educationally deficient when, in any school year, the district fails to meet minimum student, program, service, or operational performance standards." KY. REV. STAT. ANN. § 158.685 (Baldwin Supp. 1990).

24. *See* Whitley County Bd. of Educ. v. Brock, No. 89-CI-0302 (Franklin Cir. Ct., Div. II Jan. 5, 1990).

25. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (holding that the Califor-

under equal protection, "uniform system," or "thorough and efficient system" clauses of state constitutions.[26] In at least eight states, constitutional violations requiring remedial legislative action have been found.[27] In some cases, courts have required states to enact legislation to prohibit local districts from raising more than a given amount of local revenue for their schools, even if the local citizenry wants to levy more taxes. Local control is not always denigrated by such court rulings, however; providing additional funding at the state level for poor districts increases the programming options such districts can afford and, for them, enhances local control, assuming the increased funds are made available without strings attached.

A far-reaching decision in the area of school reform was the Supreme Court of Kentucky's 1989 declaration that not merely the finance plan but the entire school system of Kentucky was constitutionally deficient because it did not meet the mandate of an efficient system of common schools throughout the state.[28] The court was outspoken and adamant:

> The sole responsibility for providing the system of common schools is that of our General Assembly. . . . The General Assembly must not only establish the system, but it must monitor it on a continuing basis so that it will always be maintained in a constitutional manner. The General Assembly must carefully supervise it, so there is no waste, no duplication, no mismanagement, at any level.[29]

The court went on to state that the obligation to provide an adequate education to every child in the Commonwealth "cannot be shifted to local counties and local school districts."[30]

C. *The Changing National Role*

At the same time that the states have been increasing their

nia public school financing system, based primarily on local property taxes, violates the Equal Protection Clause of the Fourteenth Amendment).

26. *See generally* Underwood, *School Finance Litigation: A New Wave of Reform*, 14 HARV. J.L. & PUB. POL'Y 517 (1991).

27. *See id.*

28. *See* Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989).

29. *Id.* at 211.

30. *Id.* The Kentucky General Assembly has accepted the Court's mandate to recreate and reestablish a system of common schools within Kentucky that will provide substantially uniform schooling throughout the state. The governor and legislative leadership created a Task Force on Education Reform, with committees on curriculum, finance, and governance, which presented recommendations to the 1990 session of the General Assembly, many of which were designed to strengthen state control over the schools. *See infra* notes 88-95 and accompanying text.

control over local schools, the role of the national government has been changing as well. Despite the United States Constitution's reservation of education as a state responsibility, the federal government has always had some involvement in and influence upon the educational affairs of the nation. The federal government's early participation in education ranged from land grants and distribution of surplus funds for the establishment of common schools to special purpose grants for the establishment of land grant colleges in the 1800s.[31] In the early 1900s, federal funds were provided for vocational education.[32] Numerous significant initiatives followed, including the federal school lunch program,[33] impact aid,[34] the National Defense Education Act of 1958,[35] and the Elementary and Secondary Education Act of 1965 (ESEA).[36] This and similar legislation did not deprive school systems of local control as a legal matter because, in most instances, states and local districts were free to accept or reject federal funds. Acceptance of funds, however, was contingent upon acceptance of the conditions imposed by federal guidelines. As a practical matter, states and local districts simply could not afford to turn down the federal funds, so they accepted the loss of control that accompanied the funds.[37]

In certain policy matters, states and local districts have had no option but to accept federal control. Since the Supreme Court's desegregation decisions of 1954,[38] the federal courts

31. *See* Act of July 2, 1862, ch. 130, 12 Stat. 503 (codified as amended at 7 U.S.C. §§ 301-308 (1988)).

32. *See* Act of Feb. 23, 1917, ch. 114, 39 Stat. 929 (codified as amended at 20 U.S.C. §§ 11-28 (1988)).

33. *See* National School Lunch Act, ch. 281, 60 Stat. 230 (1946) (codified as amended at 42 U.S.C. §§ 1751-1769 (1988)).

34. *See* Act of Sept. 23, 1950, ch. 995, 64 Stat. 967 (codified as amended at 20 U.S.C. §§ 631-647 (1988)); Act of Sept. 30, 1950, ch. 1124, 64 Stat. 1100 (codified as amended at 20 U.S.C. §§ 236-244 (1988)).

35. Pub. L. No. 85-864, 72 Stat. 1580 (codified as amended at 20 U.S.C. §§ 401-602 (1988)).

36. Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C. §§ 2701-3386 (1988)).

37. Federal initiatives do not always diminish state and local control. For example, the availability of federal capacity-building funds from Title V of the original ESEA were intended to strengthen state departments of education. *See* Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, §§ 501-510, 79 Stat. 27, 47-55 (repealed 1982). Discretionary funds included in federal grants may enhance state or local capacity. Today, however, Title V has been eliminated, and the federal share of financial support of public education dropped during the 1980s from about 9.8 percent to approximately 6.3 percent. *See* F. LUNENBERG & A. ORNSTEIN, EDUCATIONAL ADMINISTRATION: CONCEPTS AND PRACTICES 420 (1991).

38. *See* Bolling v. Sharpe, 347 U.S. 497 (1954); Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954); Hernandez v. Texas, 347 U.S. 475 (1954).

have been heavily involved in enforcing constitutional rights of students, particularly under the Fourteenth Amendment and to a lesser extent under the First and Fourth Amendments. Congress has also passed civil rights legislation that outlaws discrimination based on race, religion, sex, age, national origin, handicap, and similar characteristics.[39] The requirements of the Education for All Handicapped Children Act[40] are particularly burdensome, in the view of some school administrators. Local school districts must abide by many of these requirements whether they accept federal funds or not.

In addition to the official actions of the federal government as represented by legislation and federal court decisions, there have been many other nationalizing influences on education. Professor Elmore asserts that "contrary to conventional wisdom, education is neither a state or local function nor a federal one but a 'national' one."[41] According to Elmore, the educational system that emerged in this country during the period 1840 to 1900 "was remarkably homogeneous, in curriculum content, grade structure, staff credentialling, financing, and governance."[42] State systems did not differ greatly, nor were there tremendous variations in local districts. "A kind of national agreement began to emerge on the form and content of public schooling. Yet this was a period of little formal policymaking . . . and even less intervention from federal and state levels on local decisions on curriculum, finance, and organization."[43] Even in the absence of federal and state control, local districts were not greatly different from one another, because of the nationalizing influences of the leaders of the common-school movement. Since 1900, these nationalizing influences have greatly increased in number.

A study conducted in 1961 and 1962 by the Midwest Admin-

39. *See* Education of the Handicapped Act, Pub. L. No. 91-230, §§ 601-662, 84 Stat. 121, 175-88 (1970) (codified as amended at 20 U.S.C. §§ 1400-1485 (1988)); Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 401-410, 78 Stat. 241, 246-49 (codified as amended at 42 U.S.C. §§ 2000c to 2000c-9 (1988)); Education Amendments of 1972, Pub. L. No. 92-318, §§ 901-907, 86 Stat. 235, 373-75 (codified as amended at 20 U.S.C. §§ 1681-1688 (1988)).

40. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400-1485 (1988)).

41. Elmore, *Education and Federalism: Doctrinal, Functional, and Strategic Views*, in SCHOOL DAYS, RULE DAYS: THE LEGALIZATION AND REGULATION OF EDUCATION 166, 179-80 (D. Kirp & D. Jensen eds. 1986).

42. *Id.* at 179.

43. *Id.* at 179-80.

istration Center identified more than fifty organizations that have the power to influence schools nationwide, including governmental agencies, religious institutions, foundations, professional associations, accrediting bodies, business organizations, and others.[44] The administrators and teachers of the Illinois high schools participating in the study identified four programs, including two nationwide testing systems (the College Entrance Examination Board and the National Merit Scholarship Program), one quasi-governmental program at the federal level (the National Science Foundation), and one federal program enacted by Congress (the National Defense Education Act of 1958), as the influences most affecting their schools.[45]

These specific programs are only manifestations of more pervasive national phenomena; the programs certainly did not spring full-blown into existence on their own volition. Such reports as the Conant study of the American high school,[46] the Rockefeller report on education,[47] the White House Conference on Education,[48] and the intensive lobbying that accompanied passage of the National Defense Education Act surely had a major impact on the content of these programs. Philanthropic foundations, such as Carnegie, Ford, and Kellogg; professional educational organizations, such as the National Education Association and the American Association of School Administrators; and other organized special interest groups were influential, as well. An even more basic contributing factor was the political and technological competition of the Cold War with the Soviet Union.

Reflecting on the national situation some thirty years ago, Roald Campbell wrote that "[s]chools, like other institutions in our culture, are affected by basic social, economic, political, and technological developments. . . . These basic forces are not local in character; they are national or worldwide in scope."[49]

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44. *See* Stephens, *The Problem*, in NATIONALIZING INFLUENCES ON SECONDARY EDUCATION 1, 3-4, 14 (R. Campbell & R. Bunnell eds. 1963).

45. *See id.* at 4.

46. J. CONANT, THE AMERICAN HIGH SCHOOL TODAY: A FIRST REPORT TO INTERESTED CITIZENS (1st ed. 1959).

47. ROCKEFELLER BROTHERS FUND, THE PURSUIT OF EXCELLENCE: EDUCATION AND THE FUTURE OF AMERICA (1958).

48. COMM. FOR THE WHITE HOUSE CONFERENCE ON EDUC., A REPORT TO THE PRESIDENT (1956).

49. Campbell, *Processes of Policy Making Within Structures of Educational Government: As Viewed by the Educator*, in GOVERNMENT OF PUBLIC EDUCATION FOR ADEQUATE POLICY MAKING 59, 59-60 (W. McLure & V. Miller eds. 1960).

In response to these forces, political activity occurs. Participants in this activity include not only educators and government officials but also members of the lay public and special-interest groups. The role of the mass media may be very important. Eventually, these political activities culminate in an official expression of policy, such as the passage of a National Defense Education Act.

Campbell depicted his views in a flowchart, reproduced in Figure 1.[50] Campbell's flowchart is as apt in the 1990s as it was in 1960. Substitute economic competition with Japan for the Cold War; replace the reports of the late 1950s with those of the 1980s, including and following *A Nation at Risk*,[51] change the names of some of the individual actors (but note that some of the foundations, professional organizations, and special interest groups remain the same), and the parallel between 1960 and 1990 is clear. The major difference is that under the new federalism of Reagan and Bush, we no longer look to the federal government for the formal enactment of new national policy but to extra-legal groups, such as the Carnegie Forum or the Holmes Group.

In summary, there has been an increase in both state and national control of our schools, and a corresponding decrease in local control, during the past forty years. Most notably, there has been a surge in state control during the reform era of the last decade. Federal and state involvement in the control of schools are not new, however; the involvement goes back to the nation's very beginnings. What is new is the changed balance of control among the three levels, with the local level exerting an ever-decreasing amount of control. Certain nationalizing influences on education, plus the necessity for the federal government to enforce anti-segregation and anti-discrimination policies, insure that the federal government will remain involved in our schools, despite some decline in activity during the Reagan and Bush administrations.

50. *See id.* at 73.

51. NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983).

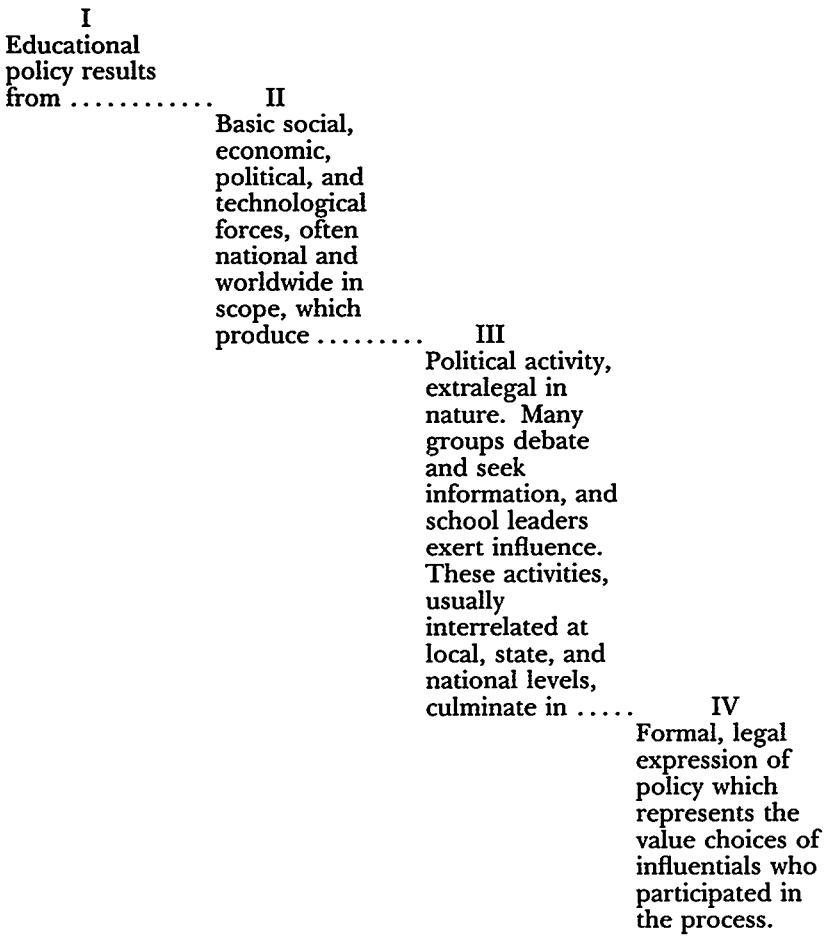


Figure 1. A Flowchart on Policymaking in Education.

Meanwhile, as states have assumed a larger role in financing public schools, the role of the states in policymaking has also grown. The most intrusive encroachment of state control upon local school districts has been through the requirements of accountability imposed by the school reform movement. In this process, the states have mandated reforms and closely monitored implementation. In light of these forces of change, the continued viability of local control of schools is being severely challenged.

II. Locus of Control and School Improvement Research

Policymakers would be well-served if researchers could pro-

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vide them information regarding the relative effectiveness of local, state, and federal authorities in controlling schools. Unfortunately, such information does not exist. We cannot compare the overall effectiveness of total state control versus total local control, because elements of all three types of control are mixed together in all public school systems in the United States. It is true that states can be classified according to the amount of state control,[52] but any such categorization is bound to involve a certain amount of subjective judgment. Quality of schools in each category could be computed, based on whatever measures of education quality one wished to use. For example, my research shows that, based on such traditional measures of school success as graduation rate and Scholastic Aptitude Test scores, students in states that Van Geel has classified as "decentralized" tend to do much better than students in "moderately decentralized" states, while the latter outperform students in "centralized" states by a wide margin.[53] So many intervening variables exist, however, that no reputable researcher would be willing to assert a cause-and-effect relationship between the degree of state control and school quality.

A. *Factors Related to the Effectiveness of Schools*

Some commentators believe that the viability of local control depends on the size of local school districts. Districts that are too small to offer a variety of educational services may not have the capacity to exercise meaningful control. A great deal of research has been performed on school district size that indicates that the optimum size of a school system is from 10,000 to 20,000 pupils.[54] Districts with less than 10,000 pupils may need to join an educational cooperative or receive services from an intermediate unit to serve effectively the needs of their pupils. Districts with pupil populations larger than 20,000 (and certainly those larger than 50,000) may need to develop internal decentralizing arrangements to avoid becoming too unwieldy and cumbersome. In view of these tendencies, states should perhaps encourage the consolidation of small districts or the

52. *See, e.g.*, T. VAN GEEL, AUTHORITY TO CONTROL THE SCHOOL PROGRAM 74-83 (1976).

53. *See* C. Faber, Relationship Between School Success and Centralization of School Control (1990) (unpublished manuscript) (available from Department of Administration and Supervision, University of Kentucky).

54. *See* Faber, *The Size of a School District*, 48 PHI DELTA KAPPAN 33, 35 (1966).

establishment of intermediate units. This having been achieved, however, the resulting districts can operate with whatever mix of state and local control deemed appropriate.

Because of the view that the appropriate unit for analysis of successful educational practices is neither the state nor the school district, but rather the individual school, researchers have devoted considerable effort toward identifying and describing effective schools. Research has shown that the most tangible and indispensable characteristics of effective schools are strong administrative leadership, expectation of high achievement by all students, a positive school climate, an emphasis on basic skills, devotion of school energy and resources to fundamental objectives, and frequent monitoring of pupil progress.[55] Parental involvement in the school is also sometimes viewed as an indicator of an effective school. Research has not demonstrated a nexus between these characteristics and the locus of control. Their presence is more likely to be related to the presence or absence of school-site management, which can be either facilitated or impeded by the local school system or the state. In fact, Professors Purkey and Smith, after an extensive review of the literature, listed school-site management as the most important organization-structure determinant of school effectiveness, followed by instructional leadership, staff stability, curriculum articulation and organization, school-wide staff development, parental involvement and support, school-wide recognition of academic success, maximized learning time, and district support.[56]

Purkey and Smith also listed four process variables that define schools' general culture and climate: collaborative planning and collegial relationships, sense of community among students and staff, clear goals and high expectations commonly shared, and a seriousness of purpose communicated by order and discipline.[57] While these positive characteristics can create an atmosphere conducive to increased student achievement,[58] administrative fiat from either the state or the school district level cannot command these factors into existence.

55. *See* Edmonds, *Effective Schools for the Urban Poor*, 37 EDUC. LEADERSHIP 15, 22 (1979).

56. *See* Purkey & Smith, *Effective Schools: A Review*, 83 ELEMENTARY SCH. J. 427, 443-44 (1983).

57. *See id.* at 444-45.

58. *See id.* at 445.

How, then, can changes be brought about in schools that are less effective than desired? An enormous amount of research has been performed on planned change in educational and other organizations.[59] A synthesis of a number of these studies has identified seven elements of the change process:

1. School improvement takes place over two or three years.
2. The initial stages always produce anxiety and uncertainty.
3. Ongoing assistance and psychological support are crucial to help people cope with anxiety; the assistance must focus on the precise nature of the concern.
4. Change involves learning new skills through practice, feedback, and coaching; change is incremental and developmental.
5. Breakthroughs occur when people understand why a new way works better.
6. Organizational conditions within the school (peer norms and administrative leadership) and outside it (central office support and external facilitators) make change more or less likely.
7. Successful change requires pressure—but pressure through interaction.[60]

Based upon his study of effective schools and effective change processes, Odden draws some implications for state policymakers:

> States cannot mandate effective schools: the essence of an effective school is a strong culture, which derives from a strategic independence. Yet, states can help create and sustain effective schools in at least seven ways: (1) providing symbolic leadership to raise the status of education; (2) articulating clear state educational goals; (3) building awareness of the school effectiveness research; (4) developing system incentives that recognize and reward school effectiveness; (5) providing technical assistance to schools; (6) altering training and certification requirements; and (7) strengthening state data gathering.[61]

The state is in a far better position than local districts to im-

59. One bibliography lists 915 entries for the period 1960 to 1985. *See* E. VAN METER, EDUCATIONAL CHANGE, INNOVATION, AND SCHOOL IMPROVEMENT: A SELECTED BIBLIOGRAPHY 1960-1985 (2d ed. 1986).

60. Odden, *State Level Policies and Practices Supporting Effective School Management and Classroom Instruction*, in REACHING FOR EXCELLENCE: AN EFFECTIVE SCHOOLS SOURCEBOOK 131, 134 (1985) (citing M. FULLAN, CHANGE PROCESSES AND STRATEGIES AT THE LOCAL LEVEL (1983)).

61. *Id.* at 136.

plement most of the improvements Odden lists. The state must take a more pro-active stance but can accomplish these objectives without diminishing local control. Local school districts can and should take actions on their own to encourage effective schools; our history is replete with examples of "lighthouse" districts and successful schools within undistinguished school districts. Effective schools need freedom to develop some of their own strategies for growth while meeting uniform state standards. These individual strategies can best be developed under a system of enlightened state leadership.

B. *State Educational Reform Strategies*

In the fervor for educational reform following the publication of *A Nation at Risk*, most states were unwilling to wait for individual schools to become effective on their own. Instead, almost all states have engaged in some type of statewide reform effort. States have used approaches ranging from giving aid and encouragement to local districts with no usurpation of local control to transferring most decisionmaking from the local to the state level. Does research reveal anything about the most desirable approach for states to take in the reform of local schools?

Professor Timar has studied three possible strategies to manage the substance and process of education reform, as those strategies were implemented in Texas, California, and South Carolina.[62] He identified the Texas approach as rational planning, based on the assumption that there are single, best policy solutions that can be discovered through rational planning. This strategy relies on top-down mandates, centralized authority and decisionmaking, and standardization and uniformity in substance and process. Obviously, this approach removes much autonomy from local districts and increases state control. Because increased state regulation and rational planning are insensitive to the complexities of schools as social and political organizations, they are crude policy instruments for effecting change.

California, on the other hand, has employed a market incentive strategy that concentrates policy *development* at the state

62. *See* T. TIMAR, EDUCATIONAL REFORM: THE NEED TO REDEFINE STATE-LOCAL GOVERNANCE OF SCHOOLS 17 (1989).

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level, but allows *implementation* to be determined at the local level. Although rules and regulations are proclaimed by the state, adherence is a matter of local choice. Timar observed that organizationally competent schools in California may take advantage of the state's proposed reforms, but organizationally weak schools do not have the capability to integrate them into their own programs. His research on the implementation of the California reform measure led him to conclude that "it is difficult to point to changes in the structure and organization of schooling that will substantially improve the quality of the state's educational system."[63] Centralized policy formulation combined with a laissez-faire implementation strategy, it appears, may lead nowhere.

The third approach identified by Timar is the political interaction model, exemplified by South Carolina. In contrast to the other strategies studied, this approach shifts the policy perspective from reliance on formal control and regulation by a central authority to informal devices that rely on delegation, discretion, and dispersal of authority. The interactive model of decisionmaking establishes a process for problem-solving instead of proposing single, best solutions. The state mandates certain programs, but permits the local schools to determine the best way to organize those programs. Although the state does not allow the local districts to decide *whether* to adopt specified reforms, it does allow them to determine *how* to adopt them. Timar's research shows that this reform strategy has been more successful than the other two approaches studied. He concluded that the interactive model works not because it relies on local control or state control, but because it recognizes the need for balance between accountability to the state and local autonomy.[64] This finding suggests that authority and responsibility for education are best distributed among the various levels of government.

Timar's account of the relatively successful school reform movement in South Carolina demonstrates the validity of Fullan's seven elements of the change process cited above. The question that remains, however, concerns the efficacy of the reforms. Given that South Carolina has been successful in securing adoption of the reform package, what difference has it

63. *Id.* at 19.
64. *See id.* at 20.

made? Are South Carolina's schools more effective than before? Are South Carolina's students learning more? Are goals for schooling in South Carolina being met to a greater degree?

A review of studies of South Carolina's education reform shows mixed results.[65] The State of South Carolina's own analysis of the effects of the reform legislation indicates that achievement test scores have improved; services for preschool, remedial, gifted and talented, and vocational students are better; and salaries for teachers are higher.[66] Although a national study reported that teachers throughout the nation are frustrated with much of the recent reform effort, teachers in South Carolina were less dissatisfied than others. Even so, forty-three percent of South Carolina teachers stated that morale had declined as a result of reform, while only forty percent indicated that morale had improved.[67] Scholars at the South Carolina Educational Policy Center concluded that "many teachers and principals feel overwhelmed by the sheer volume of the mandates. . . . Despite their support for the reform initiatives, these educators are crying out for changes in education policies."[68]

Even though districts are allowed wide latitude in determining how to implement reforms, many South Carolina educators perceive the spirit of the reforms as too prescriptive. This point has been recognized by the state's leading policymakers, including the governor and state superintendent, both of whom have called for looser state regulation of certain districts.[69]

Although surveys show that South Carolina educators support the concept of reform, its implementation troubles many of them.[70] This conclusion is derived from two studies authorized by the South Carolina Educational Policy Center. The first study, an assessment of the state's Principal Evaluation Program, found solid support for the concept of evaluating principals.[71] The principals were quite dissatisfied, however, partly

65. *See* Ginsberg & Berry, *Experiencing School Reform: The View from South Carolina*, 71 PHI DELTA KAPPAN 549 (1990).

66. *See id.* at 549 (citing SOUTH CAROLINA STATE BD. OF EDUC., WHAT IS THE PENNY BUYING FOR SOUTH CAROLINA? (1988)).

67. *See id.* (citing CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, REPORT CARD ON SCHOOL REFORM: THE TEACHERS SPEAK (1988)).

68. *Id.* at 549-50.

69. *See id.* at 550.

70. *See id.*

71. *See id.* at 550-51.

because they felt that the program's application of preset criteria in evaluating principals' performance does not adequately account for situational factors, contingencies, or context.[72] The second study focused on working conditions of teachers, teacher burnout, and the impact of reform in South Carolina.[73] The results of this study reinforced the concerns raised in the Carnegie study, which concluded: "We are troubled that the nation's teachers remain so skeptical. Why is it that teachers, of all people, are demoralized and largely unimpressed by the reform actions taken?"[74]

The findings of these South Carolina studies are indeed discouraging. More than sixty percent of the teachers believe morale is worse as a result of reform, nearly eighty-five percent find the burden of paperwork greater, nearly seventy percent said that they must handle things differently than they believe is appropriate, and over two-thirds said that they must work on unnecessary tasks.[75] Moreover, a scale used to measure teacher burnout yielded emotional exhaustion scores for South Carolina teachers about fifty percent higher than the national average.[76]

Individual interviews with teachers indicate that some of them feel degraded by the collective impact of curriculum mandates, testing, paperwork, and evaluation—all aspects of the reform legislation.[77] Consider some quotations from individual teachers:

> "We teach to the test now, but there are so many things we are leaving out."
> "It seems like we don't care about children anymore."
> "We just want passing scores. . . . The tests make a lot of teachers lie."
> "I am being made into a machine, and my students are being made into machines."[78]

Obviously, a great deal of frustration exists among South Carolina teachers. Is this important? The purpose of public schools is not to provide easy, pleasant employment for teach-

72. *See id.* at 551.
73. *See id.*
74. *Id.* (quoting CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, REPORT CARD ON SCHOOL REFORM: THE TEACHERS SPEAK 10 (1988)).
75. *See id.* at 551.
76. *See id.*
77. *See id.* at 552.
78. *Id.*

ers. If teacher dissatisfaction reflects normal resistance to change, an unwillingness to work harder, or rejection of accountability, should policymakers be concerned about teachers' feelings? Although South Carolina has made a great deal of progress as a result of its reform movement, is teacher dissatisfaction too high a price to pay? Do negative reactions by teachers and principals mean that reform is not working? Ginsberg and Berry assert that improvements, based on such indicators as test scores, have begun to level off in South Carolina.[79] They posit that the initial momentum of the reform movement may be beginning to decline and suggest that perhaps the teachers' feelings of frustration may be beginning to take their toll.[80] If this is true—if the reforms in fact become counterproductive—teacher frustration may indeed be too high a price to pay.

By contrast, Professors Timar and Kirp, who analyzed the reform movement in several states, give South Carolina high marks for its approach. They state: "The most important conclusion we can draw from state reform efforts is that a major shift in policy needs to occur. Policymakers must focus their attention on making schools better places in which to work and generally more satisfying places for those who are associated with them."[81]

Judged by this criterion, however, the South Carolina reform effort can hardly be deemed a success. Professors Ginsberg and Berry found that South Carolina teachers are tired, frustrated, and unhappy, and feel that much of the joy of teaching is gone.[82] Teachers complain that the reforms have made schools in South Carolina much more rigid and demanding places in which to work.[83] Consequently, Ginsberg and Berry raise the question: "Can emotionally exhausted teachers and principals provide the energy, wisdom, and spirit needed to continue with the reforms and develop organizationally mature schools?"[84]

If Ginsberg and Berry are correct in their assessment of the atmosphere of South Carolina schools, the reform effort has not established the positive school climate identified by the

79. *See id.*
80. *See id.*
81. Timar & Kirp, *Education Reform in the 1980s: Lessons from the States*, 70 PHI DELTA KAPPAN 504, 510 (1989).
82. *See* Ginsberg & Berry, *supra* note 65, at 552.
83. *See id.*
84. *Id.*

South Carolina Department of Education as one of the components of effective schools.[85] Consequently, the state may be undermining its own reform efforts by failing to deal with the concerns of teachers and principals.

The South Carolina experience serves as a reminder of the difficulty of achieving improvement by top-down mandates. Policymakers and leaders who impose change cannot ignore the people most vitally affected by reform efforts.

C. *Public Support for Local Control*

There appears to be no real possibility that the local school district will disappear completely from the American educational scene within the foreseeable future. It is too entrenched by tradition and too well accepted by American culture. A 1986 study by the Institute for Educational Leadership concluded that strong support exists for maintaining the institutional role and structure of the school board.[86] If schools are to maintain public and political support, however, they must remain responsive at the local level. To achieve this responsiveness, local school boards must continue to serve as effective mechanisms of representative democracy.[87]

Local school districts will remain intact even in Kentucky, where the entire system of common schools was ruled unconstitutional in 1989.[88] As part of the process of restructuring the Kentucky state system of public schools, the governor and legislature appointed a Task Force on Education Reform, consisting of committees to address governance, curriculum, and finance issues.[89] The consultants to the committee on governance presented six preliminary models for the committee's consideration.[90] Among the models proposed were radical departures from present practice, such as adopting a unitary district plan (one school district for the entire state), creating larger operating districts, and combining educational services

85. *See* SOUTH CAROLINA STATE DEP'T OF EDUC., AN IMPLEMENTATION GUIDE FOR THE LEGISLATIVE MANDATED SOUTH CAROLINA SCHOOL IMPROVEMENT PROCESS 2 (1986).

86. *See* INST. FOR EDUC. LEADERSHIP, SCHOOL BOARDS: STRENGTHENING GRASS ROOTS LEADERSHIP 10 (1986).

87. *See id.* at 11.

88. *See supra* notes 28-30 and accompanying text.

89. *See* LEGISLATIVE RESEARCH COMM'N, A GUIDE TO THE KENTUCKY EDUCATION REFORM ACT OF 1990, at 4 (1990).

90. *See* Leadership Dev. Assocs., Memorandum to Committee on Governance, Task Force on Education Reform 1 (Nov. 2, 1989).

with other types of human services into districts of "well-being." Ultimately, the committee preferred the "Fine Tuning the Present System" model, which called for only minimal adjustments from the status quo and proposed no changes in the number or classifications of school districts.[91]

The committee did recommend restructuring educational governance at the state level, creating regional service centers, and restricting the power of local school boards.[92] Furthermore, the committee recommended modifications of the process for declaring a district educationally deficient, an action that became necessary in light of the decision in *Whitley County Board of Education v. Brock*.[93] Other committee recommendations addressed perceived problems relating to lack of accountability, undue political influence in personnel decisions, and nepotism.[94] After a brief but spirited debate, the General Assembly adopted all of these recommendations in the Kentucky Education Reform Act of 1990.[95]

In summary, research on effective schools and reform management indicates that leadership is more effective than regulation in achieving improvements in practice. Yet, swept up in the fervor of the reform movement, states have mandated changes from the top down, sometimes with counterproductive results, because they have lost faith in the will or capacity of local districts to improve by themselves without state direction. Nevertheless, local school districts will not disappear, because they are too firmly entrenched and too well accepted by American culture.

III. The Future of Local Control

Some amount of local control of the schools will survive. The precise nature of the federal-state-local allocation of control, however, will continue to evolve, as the nature of local communities changes and as national and state interest in education increases.

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91. *See id.* at 25-30.

92. *See* Comm. on Governance, Task Force on Educ. Reform, The Governance Committee Makes the Following Recommendations 1-4 (1990).

93. No. 89-CI-0302 (Franklin Cir. Ct., Div. II Jan. 5, 1990).

94. One recent study has shown that the extent of kinship among school employees is not as pervasive as some critics have suggested. *See* T. Mowery, A Descriptive Study of the Extent of Kinship in Kentucky's Public Schools (1989) (unpublished dissertation, University of Kentucky).

95. 1990 Ky. Acts 476.

A. *Changing Communities*

Local communities are changing. At one time in this nation's history, communities were small, simple, and of the type that sociologists call *Gemeinschaft*. A *Gemeinschaft* society is one characterized by (1) personal ties being largely a matter of kinship; (2) little division of labor; (3) a general absence of special-interest groups; (4) each person knowing most of his neighbors; (5) conformity achieved mainly through informal controls; (6) a self-sufficient community; and (7) a strong sense of community identity.[96] In *Gemeinschaft* cultures, appropriate behavior is usually well-defined for the individual and for those with whom he comes into contact. General agreement on mores and manners, with limited outside influences, leads to a high degree of integration. The different segments of the community tend to be consistent and to reinforce one another. In the United States today, there are still small, isolated, rural communities that fit this description, but they grow fewer as the years go by.[97]

The local school system is an integral part of a *Gemeinschaft* community. Indeed, in some instances, the superintendent of schools may be the dominant figure in all aspects of community life. In many rural counties, where the school system is the largest single employer, a superintendent can build a power base by controlling the relatively large number of jobs in the school system. Besides controlling employment in the schools, the superintendent may gain power to control other jobs in the county. Moreover, even if school board members are nominally elected by the voters, they may, in fact, be selected by a local power structure headed by the superintendent. In some communities, the superintendency has been virtually a hereditary office, with father passing the fiefdom along to his son upon retirement. Situations like this are extremely rare, and they are very unlikely to continue.

Indeed, *Gemeinschaft* societies will cease to exist. Communities no longer will remain homogeneous, as new residents move to the community and people are exposed to outside influences by the mass media. Different viewpoints must be accommodated. Isolated rural communities are not going to

96. *See* AM. ASS'N OF SCHOOL ADM'RS, EDUCATIONAL ADMINISTRATION IN A CHANGING COMMUNITY 36 (1959).

97. *See id.*

acquire all of the characteristics of a *Gesellschaft*[98] society overnight, but there is an inevitable movement in Western culture toward such a pattern.

B. *Making Schools Responsive to Communities*

If local control is to remain viable, it must accommodate changing communities. Local school officials must learn to recognize and acknowledge differing values and the cultural diversity of modern society to survive in the years ahead. All members of the community, especially parents, must feel that the schools are responsive to their demands regardless of their backgrounds. In very large cities with diverse populations, such as New York and Chicago, the need to be responsive to the people has led to the transfer of some decisionmaking authority from central authorities to smaller geographical areas within the city, from professional educators to community councils.

Some districts have transferred authority to the local school by establishing a system called site-based management. In 1989, Hawaii became the first state in the nation to move toward statewide use of site-based management.[99] Local schools in Hawaii are allowed to set their own timetable for adoption of the plan, but all schools are expected to participate within the next few years.[100] Similarly, in Kentucky, the Education Reform Act of 1990 requires, with certain exceptions, that at least one school within each district implement school-based decisionmaking by July 1991.[101] The law provides that, during the 1991-92 school year, any school may implement school-based decisionmaking if two-thirds of the faculty vote to do so.[102] In such schools, a council would be established, consisting of three teachers, two parents, and the principal (with the option

98. A *Gesellschaft* society, in contrast to the *Gemeinschaft*, is characterized by: (1) union of people territorially rather than by kinship; (2) marked division of labor with great specialization of function; (3) proliferation of societies and organizations, each with special membership and interests; (4) a general lack of acquaintance with others, sometimes including next-door neighbors; (5) formalized social controls set up by law and enforced by police; (6) high interdependence with other communities even for basic necessities; and (7) anonymity of many persons even to the point that they do not associate themselves with community life but go wherever their jobs or opportunity takes them. *See id.* at 36-37.

99. *See* Educ. Comm'n of the States, *Examples of State Leadership in Education Improvement*, ECS CLEARINGHOUSE NOTES, 1990, at 1.

100. *See id.*

101. *See* KY. REV. STAT. ANN. § 160.345 (Baldwin Supp. 1990).

102. *See id.*

of expanding its membership proportionately) to make decisions on various school policies.[103] The law also sets forth procedures for local schools to seek approval of alternative representation on their school councils.[104]

Two crucial issues arise whenever school site-based management is used: (1) how teacher and parent members of the council are to be selected; and (2) how the extent of decisionmaking authority of the council is to be determined. The method of selecting parent members of the council is particularly important. Can two parents be broadly representative of the community? As we move from a *Gemeinschaft* to a *Gesellschaft* society, this question becomes more significant. If parent members are elected by parents of the pupils in the school, how can one assure that minority viewpoints will be represented?[105] If parent members are to be appointed, who will make the appointments? How can one assure that appointed members will not be rubber stamps for the appointing body? To raise these questions is not to impugn the value of parent membership on a school council. It is, rather, to point out that merely providing for such membership does not guarantee achievement of the objective to obtain equitable, meaningful, and appropriate parental involvement in the management of the local school. Involvement should be equitable in that *all* parents (regardless of social class, race, political persuasion, or previous involvement in civic affairs) are involved; meaningful in that the parent members actually influence important decisions that make real differences in the education of children; and appropriate in that the decisions made by parents fall within the proper scope of parental influence.

The question of who should be involved in decisionmaking has been discussed extensively. Moon has reviewed and synthesized the literature on teacher participation in decisionmaking and proposed a conceptual model for appropriate decisionmaking at the public school site.[106] As Moon pointed out, an individual school and its staff necessarily only have jurisdiction

103. *See id.*

104. *See id.*

105. Parents elected by majority vote would tend to be from the more popular, influential, or articulate segment of the community.

106. *See* Nak Jin Moon, The Construction of a Conceptual Framework for Teacher Participation in School Decision-Making 153-56 (1983) (unpublished dissertation, University of Kentucky). Although Moon's study focused on teacher participation, his model applies to parental participation as well.

only over those decisionmaking areas that have been assigned to them.[107] Therefore, one of the first criteria of appropriateness is that the school has legal authority to make the decision. The school council must be given clear and accurate information about the reach of its jurisdiction; otherwise, participation will lead to frustration. If a matter lies within its jurisdiction, a school council should apply the test of relevance, that is, whether the decisionmaker has a personal stake in the decision, and the test of expertise, namely, whether the decisionmaker has the necessary knowledge to contribute to a wise decision in determining whether and how to participate.

If an issue fails both tests, that is, if members of the council have no personal stake in the outcome or no expertise to lend to the decisionmaking process, then the council should leave the decision to those who have the interest and expertise to make it. On the other hand, if council members have both a personal stake and expertise in making the decision, they should be involved. In these latter cases, it is important to ensure that the minority view has a fair hearing.

Between the extremes of either meeting or failing both tests are those decisions in which council members meet one, but not both, criteria. For example, council members may have a high personal stake in a decision, but possess only a low potential for contributing significantly to the quality of the decision. In such a case, the involvement of the council should be limited. Perhaps the principal should attempt to guide the council by presenting alternatives to consider, along with the advantages and disadvantages of each alternative. In other cases, council members may have no personal stake in the decision, but have a high potential for contributing to the decisionmaking process. In such cases, the principal should capitalize on this capability without requiring the members to spend inordinate amounts of time on matters they deem irrelevant.

Of course, applying the tests of relevance and expertise could yield different results for the teachers and parents on the same council. This problem could be solved by creating two different councils. One would be a management team consisting of the principal and other professional personnel, while the

107. *See id.* at 141.

other would be an advisory committee consisting of parents and other lay citizens.

A similar approach, which has been implemented by the Monroe County, Florida school system, has been cited as a successful example of school-based management.[108] In the Monroe County system, schools are operated by teams that usually consist of the principal, assistant principal, guidance counselor, department heads, and other in-house personnel. Each school also has an advisory committee composed of parents, teachers, students (at the secondary level), and other citizens. These latter committees consist of fifteen to twenty-five members, thus allowing for diversity of representation. After hearing the advice of the school team and the committee, a principal approves consensus decisions or makes decisions of his own. The school-based management procedures were phased in over a period of five years, during which the school system's principals received extensive and intensive training in team management and decisionmaking skills.

After reviewing numerous examples of school-based management systems, Lindelow and Heynderickx reached four conclusions: (1) Successful implementation requires extensive retraining of central office and school-site personnel; (2) strong support is required from the school board and superintendent; (3) the authority given to the school site and its team and council should be decided in advance; and (4) successful implementation requires a great deal of trust and commitment.[109] To achieve successful implementation, site-based management clearly requires much advance planning. Consequently, school-site management can not be mandated by a state legislature one year and successfully implemented statewide the next.

IV. A Rationale for Federal-State-Local Relationships in School Governance

The most effective roles of the federal, state, and local governments in educational governance have not yet been determined; rather, the desirable federal-state-local relationship remains a political issue. Policy analysts can guide the achieve-

108. *See* Lindelow & Heynderickx, *School Based Management*, in School Leadership: Handbook for Excellence 109, 114 (S. Smith & P. Piele eds. 1989).

109. *See id.*

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ment of a political solution through research and by developing conceptual analyses.

Professors McDonnell and McLaughlin have developed a conceptual framework to study the implementation of federal programs in states and local school districts.[110] Their model assumes that federal policy is transformed as it moves from Congress to the federal Department of Education, to the states, and finally, to local school districts.[111] Furthermore, each level of government has its own views about federal program objectives and imposes its own set of organizational and political constraints on program implementation.[112] As a result of these differences, procedural changes, as well as substantive modifications, will occur as federal policy percolates through the three levels of government.[113] McDonnell and McLaughlin specifically addressed two dimensions of federal policy implementation: compliance (the extent to which states adhere to federal program regulations) and programmatic development (the ways in which federal policy goals have been implemented).[114] Logically, the same model could apply to implementation of state policy by local school districts.

Another conceptual framework, this one developed by Professors McDonnell and Elmore, categorizes alternative policy instruments.[115] From existing theories about governmental action and observed patterns in the choices of policymakers, they constructed four policy instruments: mandates, inducements, capacity-building, and system-changing. For each instrument, they specified its primary elements, expected effects, costs, and benefits.[116] Although McDonnell and Elmore did not explicitly address which level of government can best use each

110. *See* L. McDonnell & M. McLaughlin, Education Policy and the Role of the States 9 (1982).

111. *See id.*

112. *See id.*

113. *See id.*

114. *See id.* at 11.

115. *See* L. McDonnell & R. Elmore, Alternative Policy Instruments 7 (1987).

116. *See id.* at 7-8. Mandates rely upon rules and regulations to secure compliance and are based on the assumption that the required action is something that all individuals and agencies should do, but will not in the absence of explicit regulations. Because mandates assume an adversarial relationship between enforcers and objects of enforcement, the major responsibility for assuring compliance rests at the policymaking level. Most mandates set minimum standards for compliance, a practice that McDonnell and Elmore believe discourages performance beyond those standards.

Inducements consist of the use of transfers of money to secure the performance desired by the policymakers. The use of inducements assumes that without additional

of the four instruments, federal and state policymakers can use all four instruments, unlike policymakers at the local level.

The McDonnell-Elmore formulation, in its singular focus on instruments of exercise of authority, omits any mention of leadership as a possible instrument of change. This is a serious omission; administrative theory and research both support the view that the power to elicit human behavior in the service of some goal requires both authority and influence.[117] McDonnell and Elmore ignored influence, which comes through the exercise of leadership. Leaders can persuade others to adopt their policies by articulation of a vision, by persuasion based on logical reasoning that demonstrates the benefits of adopting the particular policies, through personal prestige earned by demonstration of expertise or commitment, and through many other techniques unavailable to those who rely only on authority. Indeed, to rely on authority alone is to be half-powerless.[118] Leadership can provide a stand regarding a preferred future, one that is "strategic and lofty"[119] yet compatible with customers and colleagues.

The use of authority through mandates carries some negative consequences. Coercion is required, and adversarial relations are created. Natural resistance to change is intensified in the resulting "us versus them" atmosphere. Finally, the coercers are viewed as lacking understanding of the local situation or interest in what is best for "our kids."

If national and state policymakers rely entirely on formal authority to institute educational reforms, local school leaders will find methods to circumvent rules and procedures they view as inappropriate for their schools. They do this not because

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incentives, certain actions will not be taken. Consequently, the transfer of money is used to elicit performance.

Capacity-building refers to the investment of money to enhance the recipients' ability, skill, or competence in areas designated by the policymakers. It is based on the assumption that, without such investment, certain long-term benefits regarded as important by policymakers will not be realized by society.

Finally, system-changing shifts the authority for policy implementation from one institution to another. System-changing instruments are based on the assumption that existing institutions cannot produce the results policymakers want and that altering the distribution of authority among institutions will enable the policymakers' desires to be met. *See id.* at 14-18.

117. *See* C. FABER & G. SHEARRON, ELEMENTARY SCHOOL ADMINISTRATION: THEORY AND PRACTICE 308 (1970).

118. *See id.* at 108.

119. P. BLOCK, THE EMPOWERED MANAGER: POSITIVE POLITICAL SKILLS AT WORK 102 (1987).

they are opposed to education reform, but because they view the welfare of the school as more important than any rule, policy, or enforcer.[120] Local leaders recognize that the goals of schooling can be achieved only through pupils interacting in local schools with their teachers, instructional materials, and fellow students. Consequently, the vision of national and state leaders needs to be compatible with that of local leaders.

Policymakers need to confront questions regarding which level of government should make what decisions, and which policy instrument best implements each policy, to achieve a suitable balance of federal, state, and local control. Providing a comprehensive answer to these questions is beyond the scope of the present paper. For purposes of illustration, however, a few key policies are examined in Table 1 using the framework outlined above.

Leadership is the preferred method of seeking and implementing changes. In some situations, however, leadership must be supplemented by capacity-building. By contrast, mandates should be used only whenever coercion is required, because the will to comply cannot be elicited through other means. Inducements in the form of financial incentives are not as coercive as mandates, but they have some of the same negative consequences, including an abundance of rules, regulations, directives, and paperwork. System-changing, the final policy instrument proposed by McDonnell and Elmore, is an unacceptable alternative, because necessary changes in the public school system can be made within the existing institutions. New institutions need not be created.

Even though the proper balance of federal-state-local control is a political question, it need not be settled on the basis of political ideology alone. In education, the scenes of action are the classroom and the school site. Because the best decisions are made closest to the scene of the action, as much control as possible should remain at that level; other levels of governance should intervene only when local schools lack the capacity or the will to make or implement acceptable policy.

The need for equitable school financing exemplifies a lack of capacity. Many local communities simply do not have the tax base to fund their schools at the level easily attainable by

120. *See* H. BARSKY, THE POLITICAL STYLE OF AN URBAN PRINCIPAL: A CASE STUDY (1975).

TABLE 1. FRAMEWORK FOR POLICYMAKING AND IMPLEMENTATION

Policy Issue	Policymaking Level	Instrument	Expected Effects
Nondiscrimination	Federal	Mandates	Compliance
Equitable Funding Within State	State	Mandates	Compliance
Bilingual Education	State	Inducements	Implementation Of Program by Some Districts
Experimental Programs	State	Leadership	Development of New Programs by Some Districts
Teaching Methodologies	Local	Leadership	Adoption of Teaching Methodologies Most Appropriate to Local Conditions
Need to Improve Mathematics Skills of High School Students	Federal	Capacity-building	Research on Effectiveness of Mathematics Curricula and Teaching Techniques; Recruitment of Promising Candidates into Profession

wealthier districts. Assuming that children living in poor districts are entitled to educational opportunities equal to those living in the wealthier districts of the same state, policies regarding school finance must be made at the state level. Poor local districts simply do not have the capacity to formulate these policies. Similarly, if equal educational opportunities are to be available throughout the nation, the federal government must be involved in school finance.

While capacity is one of the two variables required for attaining equity among schools, will is the other. For example, after

Brown v. Board of Education of Topeka,[121] which held that racial segregation in the schools was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, many states and local communities made it abundantly clear that they lacked the will to desegregate their schools. Therefore, the federal government mandated school desegregation. Additionally, because most states lack the will to provide appropriate services for special needs students,[122] such federal mandates as the Education for All Handicapped Children Act[123] were enacted. Coercion was required; adversarial relationships developed between the federal government on one hand and some states and local communities on the other. Significant levels of school desegregation and handicapped integration were accomplished, however, that otherwise would not have been achieved.

In summary, although the question of the desirability of a particular policy remains a political issue, policy analysts can offer guidance on the appropriate locus of policymaking. Analysts have found that policies work best when implemented at the level closest to the classroom, whenever that level has the capacity and will to achieve the desired result.

V. Implications for Policymakers

A review of the research and an understanding of the place of schooling in our nation's culture suggests the following implications for policymakers at the federal, state, and local levels as they forge appropriate federal-state-local relationships for the 1990s and beyond. The role of the federal government should continue to be limited to ensuring that the constitutional rights of all participants in education are honored; ensuring equal opportunity for participation in public education, regardless of race, sex, religion, national origin, socioeconomic status, physical or mental handicap, or age; articulating national goals for education, providing leadership, and creating a favorable climate for the achievement of these goals; providing the financial support necessary for fulfillment of its role; and

121. 347 U.S. 483 (1954).

122. *See* L. McDonnell & M. McLaughlin, *supra* note 110, at 34.

123. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400-1485 (1988).

using mandates only when states and local communities fail to demonstrate the will or capacity to act.

State governments should continue to provide efficient and effective systems of common schools throughout their states. To carry out this role, a state should delegate operation of its schools to local districts, while retaining responsibility for the effectiveness, efficiency, and equity of local schools.

In fulfilling this responsibility, the state department of education must engage in leadership, regulatory, and service functions. Leadership should involve, among other things, setting appropriate goals for the state's schools; setting high standards; developing a statewide climate supportive of education; and engaging in research, planning, and evaluation. Regulation at the state level should involve ensuring that schools comply with minimum standards as well as encouraging them to achieve excellence. Holding schools accountable for compliance with state laws and ethical practices is part of the regulatory function. The provision of services at the state level should include providing direct services, such as data processing or test scoring for local districts as well as providing in-service training to improve the competence of school personnel; conducting workshops to acquaint school personnel with state requirements; and providing a setting for state and local educators to work out mutually optimal methods to implement new programs. The service category also includes anything that the state-level agency can do to facilitate the work of local schools.

In exercising its leadership, regulatory, and service functions, a state agency should be guided by past research on effective methods of change. Top-down reform imposed on persons not ready to accept it will be ineffective. Certain philosophies toward reform and particular techniques have been proven to be more successful than others in overcoming resistance to change. Research has shown, for example, that those who implement changes should have an opportunity to participate in their formation. Consequently, state-level personnel should understand the philosophies and utilize the techniques proven effective.

If pressure must be applied to local school districts to secure adoption of a reform, the pressure must be applied interactively. That is, the pressure is best applied in a workshop or

problem-solving setting in which the reform is presented as something that "we" (the state and local district) must work together to implement. Thereby, the issue becomes one of how *we* can best implement the policy, rather than what *you* must do. Even so, state officials will still need to work to overcome the feeling of local school officials that they are being forced to act by an outside party that is further from the classroom than they are. For this reason, it is extremely important that, whenever possible, teachers be given input in setting goals, instead of being limited merely to deciding how to achieve goals set by the state.

In setting mandates for local school districts, state agencies must allow for situational factors and contingencies, and consider the historical, social, political, and cultural context of the community in which the mandate is to be implemented. State agencies cannot apply rigid rules to every community and expect to achieve the desired results. Attention must be given to the organizational culture of the schools. If a reform impacts negatively on the school climate, it is likely to be ineffective.

In addition, if the state mandates programs and leaves the details of implementation to local districts, the state should aid the local districts through training and financial support. The state should give the districts adequate time to implement the programs, both in terms of lead time and in the actual time needed to implement the program. Lead time is crucial because a reform mandate cannot be announced today and implemented effectively tomorrow. Depending upon the nature of the reform, one or more years of lead time may be necessary for successful implementation. State officials should also be mindful that implementing a new program takes a certain number of hours per day and per week by local school personnel. When new programs are mandated, existing programs normally must be continued, but the existing demands on time are seldom modified. If the amount of paperwork (or any other kind of work) imposed by the new program is perceived as overwhelming, and if the additional work must be fit into an already full schedule, something is going to suffer—the new program, existing programs, the morale of local school personnel, or all of the above. Adequate time must be provided for effective implementation.

Furthermore, unduly hasty implementation may convert a

good idea into bad practice. School-based management, for example, may be a good idea, but successful implementation cannot occur statewide immediately. Implementation must occur in stages. Questions about selection of school council members and their areas of jurisdiction must be addressed. Workshops must be conducted in which these matters are debated, and training must be provided in implementation of the concept. Otherwise, a potentially helpful innovation will prove to be a failure.

State-level personnel should regard local school teachers, administrators, and board members as colleagues and allies engaged in a mutual effort to improve education. Any reform based upon the premise that teachers are foes or incompetent is bound to fail, because only teachers can implement reforms in the classroom. State agencies, local school boards, and school-site councils can make a positive contribution only by taking a cooperative, helpful stance.

To achieve reform, state and federal policymakers should use leadership and capacity-building as their preferred policy instruments. Inducements should be used only when leadership and capacity-building do not effect the desired results. Mandates should be used only as a last resort whenever local districts do not have the will or capacity to act.

At the local level, school boards and administrators must pursue highly ethical courses of action, rather than following paths of political expediency or building their own power bases. Local control of the schools cannot survive a widespread perception that power brokers are using control to benefit themselves at the expense of pupil achievement. (Fortunately, the vast majority of local boards and administrators are public servants of unimpeachable integrity.) Not only do individual board members and administrators have a responsibility to be guided in their own actions by ethical principles, but associations of board members and school superintendents should develop and enforce codes of ethics upon their respective memberships.

Local school boards and administrators should strive to make schools responsive to the needs of all residents of the community, to get previously passive parents involved, to conduct school affairs openly, and to live up to the rhetoric of local control. It is said that the schools belong to the people; if this is

the case, the people must gain a sense of ownership of their schools. The techniques are well-known: school councils, open meetings, public forums, volunteers in the schools, reaching out to all members of the public. If local control survives, it will not be the result of federal or state mandates. Rather, it will survive only because local school officials continue to earn the trust that has been placed in them.

Increased state promotion of education reform must involve local districts in the change *process* to secure commitment to the *substance* of the change. If local school districts are to remain viable, the state must engage in capacity-building activities to help them acquire the necessary skills to identify and solve problems at the district and school-site levels.

Finally, policymakers at the federal, state, and local levels must always recognize that the goals of schooling can be achieved only through the interaction of pupils in local schools with their teachers, instructional materials, and fellow students. Therefore, teachers, parents, and students must work together if reform efforts are to be successful.

JUDICIAL REVIEW OF THE SPECIAL EDUCATIONAL PROGRAM REQUIREMENTS UNDER THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT: WHERE HAVE WE BEEN AND WHERE SHOULD WE BE GOING?

DIXIE SNOW HUEFNER*

In the nearly sixteen years since the enactment of the Education for All Handicapped Children Act (EAHCA),[1] hundreds of parents have brought suit in state and federal courts to test the limits of the Act as it affects their school-age children with disabilities.[2] School districts also frequently have filed suit under the Act.[3] The litigation has had an important impact on the identification, evaluation, educational programming, and placement of the more than four million students with disabilities who are receiving services under the Act.[4] Unfortunately,

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1. The Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975), extensively amended what is now known as the Individuals with Disabilities Education Act (IDEA; formerly The Education of the Handicapped Act or EHA), 20 U.S.C. §§ 1400-1485 (1988).

When the EHA was renamed the IDEA, the modifying phrase "with disabilities" was substituted for previous references to "handicapped" students, children, youth, infants, et cetera. *See* Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1103, 1141-50 (1990). This Article adopts the new terminology except where unavoidable, as when referencing the title of Public Law Number 94-142, "The Education for All *Handicapped* Children Act."

2. A LEXIS search reveals that several hundred cases were decided in federal courts under the EAHCA between 1977 and 1990. Several hundred cases were also filed in state courts. *See* T. MARVELL, STUDENT LITIGATION: A COMPILATION AND ANALYSIS OF CIVIL CASES INVOLVING STUDENTS 1977-1981, at 7, 17 (1982). A 1989 study found a "mini-explosion" of special education litigation in the federal courts during the 1980s. By extrapolating data, the study projected a total of 342 reported federal cases and 99 reported state cases during the decade. *See* Zirkel & Richardson, *The "Explosion" in Education Litigation*, 53 Educ. L. Rep. (West) 767, 778-81 (1989).

3. *See, e.g.*, Burlington School Comm. v. Massachusetts Dep't of Educ., 471 U.S. 359 (1985); Board of Educ. of N.Y. v. Ambach, 612 F. Supp. 230 (E.D.N.Y. 1985); Norris v. Massachusetts Dep't of Educ., 529 F. Supp. 759 (D. Mass. 1981).

4. According to the latest figures from the Department of Education, 4.3 million students are receiving services under the Education for All Handicapped Children Act. *See* U.S. DEP'T OF EDUC., TWELFTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE EDUCATION OF THE HANDICAPPED ACT A-4 (1990).

the courts have interpreted ambiguous statutory and regulatory provisions in ways that are not consistent, especially with respect to the meaning of the requirement that students with disabilities receive a "free appropriate public education"[5] (FAPE) with their nondisabled peers "to the maximum extent appropriate."[6] The purposes of this Article are to: (1) examine and critique the case law generated by the FAPE provision of the Act; and (2) recommend certain refinements in the judicial interpretation of this provision in the light of the "Individualized Education Program" (IEP) requirements for students with disabilities.[7] In particular, I argue that the courts have not utilized all the required contents of the IEP as a substantive means to advance the quality of educational programming for students with disabilities, and should do so in the future.

I. Background

Prior to passage of the Education for All Handicapped Children Act (hereinafter the IDEA-B or the Act)[8] in 1975, the States had adopted different educational standards and procedural safeguards for students with disabilities. In response to growing sensitivity to the plight of such students, several states enacted statutes in the late 1960s and early 1970s establishing that all children with disabilities had the right to a public school education.[9] In a few areas in the Northeast, federal courts had begun to apply the Due Process and Equal Protection Clauses of the Fourteenth Amendment[10] to protect students with disabilities from exclusion and expulsion from public schools and from placements made without parental notice and input.[11]

5. 20 U.S.C. § 1412(2)(B) (1988).

6. 20 U.S.C. § 1412(5) (1988).

7. *See* 20 U.S.C. § 1401(a)(19) (1988). *See also* 34 C.F.R. §§ 300.340-.349 (1990).

8. As the largest of the various programs authorized by what was the Education of the Handicapped Act (EHA), the EAHCA was frequently referred to in court cases as the EHA-B. Because the EHA has been renamed the Individuals with Disabilities Education Act (IDEA), *see* Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 901(a)(1), 104 Stat. 1103, 1142 (1990), the EAHCA will now be referred to as the IDEA-B.

9. *See* F. Weintraub, A. Abeson & D. Braddock, State Law and Education of Handicapped Children: Issues and Recommendations 16 (1971).

10. U.S. Const. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

11. *See, e.g.*, Mills v. Board of Educ. of the District of Columbia, 348 F. Supp. 866 (D.D.C. 1972); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972).

Elsewhere, however, many school districts identified, labelled, and served special education students without providing for parental involvement. In some states, schools continued to provide funds for the education of certain groups of children with disabilities but not for others, doing so as a matter of public largesse, not individual right.[12] School district decisions to serve some children with disabilities and exclude others often were motivated as much by historic stereotyping and bureaucratic inertia as by assessment of individual students' abilities.[13]

The IDEA-B amounts to a commitment by the federal government to the States to underwrite a portion of the cost of educating children with disabilities, while mandating that the States guarantee certain substantive and procedural rights of these students. In return for its financial support, the federal government requires assurances from the states that each disabled student under the Act will have available a free, appropriate public education (FAPE) in the least restrictive environment (LRE) appropriate to the student's needs.[14] Each student's needs are to be determined by a multifaceted, nondiscriminatory assessment,[15] which in turn is to provide the basis for the design of an individualized education program (IEP) for each eligible student. The IEP is to report the child's current level of educational performance, set annual goals and short-term instructional objectives, and establish objective criteria by which to measure student progress toward those objectives. The IEP is also to specify the extent of both special education and regular education programs.[16] In special education jargon, the Act requires schools to provide FAPE in the LRE with an IEP, all based on a nondiscriminatory assessment process.

To lessen the risk of arbitrary or self-serving unilateral action by school districts, the IDEA-B includes a number of procedural safeguards designed to ensure that parents of handicapped children are not excluded from the process of special education identification, evaluation, programming, and place-

12. Maine and New York had statutes excluding certain children as ineducable as late as 1975 and 1974, respectively. *See* Dussault, *Is Exclusion Legally Defensible*, in PERSONS WITH PROFOUND DISABILITIES 43, 45 (F. Brown & D. Lehr eds. 1989).

13. *See* Burgdorf & Bersoff, *Equal Educational Opportunity*, in THE LEGAL RIGHTS OF HANDICAPPED PERSONS 53, 57 (R. Burgdorf ed. 1980).

14. *See* 20 U.S.C. § 1412(2)(B), (5) (1988). *See also* 34 C.F.R. §§ 300.1(a), 300.550-.556 (1990).

15. *See* 20 U.S.C. § 1412(5)(C) (1988). *See also* 34 C.F.R. §§ 300.530-.534 (1990).

16. *See* 20 U.S.C. § 1401(a)(19) (1988).

ment. Parental participation was thought by the drafters of the Act to be the surest mechanism against ill-considered decision-making.[17] Among the safeguards is a requirement that parents be given notice of all proposals or refusals to initiate the identification, evaluation, placement, or provision of FAPE to a student with disabilities.[18] In addition, the IDEA-B regulations require the school to seek permission from parents prior to evaluating the child for special education eligibility and prior to initial placement into a special education program.[19] The Act requires the school to provide parents access to their child's personally identifiable educational records and to permit the parents to obtain, at public expense, an independent educational evaluation if dissatisfied with the school district's evaluation.[20] Significantly, parents are to be invited to participate in the development of their child's IEP, including the formulation of educational goals and objectives and the criteria for evaluations of progress.[21] Finally, upon written request, parents are entitled to an administrative hearing conducted by an impartial "due process hearing officer" if they and the school cannot agree on the child's identification as a special education student or on the evaluation, placement, or provision of FAPE to their child.[22] The impartial hearing officer is empowered to resolve the dispute, subject to appeal.[23]

Although thousands of parents have used the administrative hearing remedy, far fewer have sought review in state or federal court of administrative hearing decisions. Most cases challenging decisions of administrative hearing officers respecting substantive rights have focused on programming and placement decisions.[24] A significant number also have challenged school district interpretation of the related services provisions

17. The Fifth Circuit described the formality of the Act's procedures as "itself a safeguard against arbitrary or erroneous decision-making." Jackson v. Franklin County School Bd., 806 F.2d 623, 630 (5th Cir. 1986).

18. *See* 20 U.S.C. § 1415(b)(1)(C) (1988). The statute also provides for the designation of a surrogate parent in situations where the parents or guardian is not known or is unavailable, or the child is a ward of the state. *See* 20 U.S.C. § 1415(b)(1)(B) (1988).

19. *See* 34 C.F.R. § 300.504(b) (1990).

20. *See* 20 U.S.C. § 1415(b)(1)(A) (1988).

21. *See* 20 U.S.C. § 1401(a)(19) (1988).

22. *See* 20 U.S.C. § 1415(b)(2) (1988).

23. *See* 20 U.S.C. § 1415(e)(1) (1988). Each state is given the authority to establish either a one-stage or a two-stage administrative hearing procedure. *See* 20 U.S.C. § 1415(b)(2), (c) (1988). After exhausting the administrative review process, an aggrieved party is given the right to bring a civil action. *See* 20 U.S.C. § 1415(e)(2) (1988).

24. *See, e.g.*, T. MARVELL, *supra* note 2, at 6-7.

of the Act.[25] A smaller number have concerned identification and evaluation issues, and these have lent themselves to class action suits.[26] Recently, a number of attorney's fees cases have been brought under the Handicapped Children's Protection Act.[27]

In many of the cases in which parents claim a violation of a substantive educational right, they also claim that the school district has failed to honor the procedural requirements of the Act. The Supreme Court made clear in *Hendrick Hudson District Board of Education v. Rowley*[28] that the procedural safeguards are at the heart of the Act and are a primary focus of judicial review.[29] Nevertheless, procedural safeguards alone do not assure a student with disabilities the substantive right to an appropriate education in the least restrictive environment appropriate to the student's needs.

When a parent or the school files suit because of a disagreement over what constitutes an appropriate special education program, courts not only should examine compliance with the procedures, but they also should determine whether schools have met the programming requirements of the Act. The programming requirements of the IDEA-B are also an integral part of the Act and must be enforced to comply with the purpose of the Act. To a large extent, these programming requirements determine the meaningfulness of the student's education; accordingly, they are the main focus of this Article.

Part II of this Article begins with an analysis of *Rowley*, in which the Supreme Court established a "some educational

25. Among the more interesting cases involving related services are Irving Indep. School Dist. v. Tatro, 468 U.S. 883 (1984); Bevin H. by Michael H. v. Wright, 666 F. Supp. 71 (W.D. Pa. 1987); Detsel by Detsel v. Board of Educ., 637 F. Supp. 1022 (N.D.N.Y. 1986), *aff'd*, 820 F.2d 587 (2d Cir.), *cert. denied*, 484 U.S. 981 (1987); and Max M. v. Illinois State Bd. of Educ., 629 F. Supp. 1504 (N.D. Ill. 1986).

26. Among the important cases involving evaluation and identification are Parents in Action on Special Educ. v. Hannon, 506 F. Supp. 831 (N.D. Ill. 1980); and Larry P. v. Riles, 495 F. Supp. 926 (N.D. Cal. 1979), *aff'd in part*, 793 F.2d 969 (9th Cir. 1984).

27. Pub. L. No. 99-372, 100 Stat. 796 (1986) (codified in scattered sections of 20 U.S.C.). Major cases include Moore v. District of Columbia, 907 F.2d 165 (D.C. Cir.), *cert. denied*, 111 S. Ct. 556 (1990); McSomebodies v. Burlingame Elementary School, 886 F.2d 1559 (9th Cir. 1989); Mitten v. Muscogee County School Dist., 877 F.2d 932 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1117 (1990); Duane M. v. Orleans Parish School Bd., 861 F.2d 115 (5th Cir. 1988); and Eggers v. Bullit County School Dist., 854 F.2d 892 (6th Cir. 1988).

28. 458 U.S. 176 (1982).

29. *See Rowley*, 458 U.S. at 205-06 ("Congress placed every bit as much emphasis upon compliance with procedures . . . as it did upon the measurement of the resulting IEP against a substantive standard.").

benefit" standard for determining whether students with disabilities are receiving an appropriate education under the IDEA-B. I assert that the Court in *Rowley* was interested not only in the IEP document but also in its implementation. Therefore, only those courts that interpret the *Rowley* standard to require educational process under the IEP understand the true intent of that standard.

In Part III, I argue that the elements of the IEP provide an overlooked means of gauging whether students with disabilities are progressing sufficiently to be receiving a FAPE. In particular, I urge the courts to go beyond a focus on the nature of special education services, and especially to examine and apply the criteria by which progress toward achievement of IEP objectives is to be measured. I also argue that the burden of proof in FAPE disputes properly rests with the school district at the administrative hearing level. Finally, I conclude that many courts misconstrue the Supreme Court's admonition that questions of methodology are for the schools, and, as a result, invoke that admonition as an excuse for failing to determine whether the IEP produces an appropriate education for students with disabilities.

II. Programming Issues

A. *The* Rowley *Case*

In *Hendrick Hudson District Board of Education v. Rowley*,[30] the first and most important case to reach the Supreme Court regarding the IDEA-B, the Court addressed two issues: (1) what standard of educational services is required by the IDEA-B's requirement of a "free appropriate public education," and (2) what the role of state and federal courts is in reviewing administrative hearing decisions under the Act.

Addressing the first issue, the *Rowley* Court stated:

> Noticeably absent from the language of the [IDEA-B] is any substantive standard prescribing the level of education to be accorded handicapped children. . . .
>
> . . . .
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> . . . [I]n seeking to provide . . . access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to

30. 458 U.S. 176 (1982).

> make such access meaningful. . . . [T]he intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.[31]

The Supreme Court rejected several standards that lower courts had adopted regarding the FAPE provision. Among them was a standard requiring maximization of special education students' chances of self-sufficiency.[32] Another was a standard providing opportunities to reach "potential commensurate with the opportunity provided to other children."[33] A third was an absolute standard that required maximizing the potential of children with disabilities.[34]

Before rejecting these standards, the Court analyzed the language and legislative history of the IDEA-B. It noted that the Act defined a free appropriate public education (FAPE) as follows:

> The term "free appropriate public education" means *special education* and *related services* which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the state educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.[35]

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31. *Rowley*, 458 U.S. at 189, 192.

32. Such a standard was adopted in Armstrong v. Kline, 476 F. Supp. 583, 604 (E.D. Pa. 1979), *aff'd on other grounds sub nom.* Battle v. Pennsylvania, 629 F.2d 269 (3d Cir. 1980), *cert. denied*, 449 U.S. 1109 (1981).

33. Rowley v. Board of Educ., 483 F. Supp. 528, 534 (S.D.N.Y.), *aff'd*, 632 F.2d 945 (2d Cir. 1980), *rev'd*, 458 U.S. 176 (1982). *See also* Springdale School Dist. No. 50 v. Grace, 693 F.2d 41 (8th Cir. 1981). After the Supreme Court's decision in *Rowley*, this relative maximization standard was also found to be North Carolina's and California's standard. *See* Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 983 (4th Cir. 1990) (citing Harrell v. Wilson County Schools, 58 N.C. App. 260, 264, 293 S.E.2d 687, 690 (1987), *cert. denied*, 460 U.S. 1012 (1988)); Pink v. Mount Diablo Unified School Dist., 738 F. Supp. 345, 347 (N.D. Cal. 1990).

34. *See Rowley*, 458 U.S. at 197 n.21, 200. *Cf.* David D. v. Dartmouth School Comm., 775 F.2d 411, 423 (1st Cir. 1985) (Massachusetts higher standard of "maximum possible development" incorporated into federal standard), *cert. denied sub nom.* Massachusetts Dep't of Educ. v. David D., 475 U.S. 1140 (1986); Geis v. Board of Educ. of Parsippany-Troy Hills, Morris County, 774 F.2d 575, 583 (3d Cir. 1985) (New Jersey standard is "best available placement"). The New Jersey standard applied in *Geis* has since been lowered to conform to the federal standard. *See* Lascari v. Board of Educ., 116 N.J. 30, 35, 560 A.2d 1180, 1189 (1989) (requiring the school's individualized education program to provide an education "according to how the pupil can best achieve success in learning").

35. *Rowley*, 458 U.S. at 188 (emphasis added by the Court) (quoting 20 U.S.C. § 1401(a)(18)).

After examining the Act's definitions of special education and related services, the Court concluded that a FAPE, as defined by the Act, consists of educational instruction specially designed to meet the unique needs of the child with disabilities, supported by such services as are necessary to permit the child to benefit from the instruction.[36] In addition, the Court noted that a FAPE is to be delivered in accordance with requirements (A) through (D), as listed by the Court.[37]

After reviewing the legislative history to determine whether Congress intended to require schools to provide more instruction than the statutory language indicated, the Court concluded that

> [i]mplicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be *sufficient to confer some educational benefit* upon the handicapped child. *It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education.*[38]

The Court's language clearly indicates that the purpose of providing access to an appropriate education is to confer actual benefit upon the child. The phrase "sufficient to confer some educational benefit" has been cited by lower courts as a substantive standard by which to review Individualized Education Programs (IEPs).[39] The Court continued:

> The statutory definition of "free appropriate public education," in addition to requiring that States provide each child with "specially designed instruction," expressly requires the provision of "such . . . supportive services . . . as may be required to assist a handicapped child *to benefit* from special education." . . . We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the hand-

36. *See id.* This standard was taken directly from the statutory definitions of special education and related services. *See* 20 U.S.C. § 1401(a)(16), (17) (1988).

37. *See Rowley*, 458 U.S. at 188.

38. *Id.* at 200-01 (emphasis added).

39. *See, e.g.*, Knight v. district of Columbia, 877 F.2d 1025, 1029 (D.C. Cir. 1989); Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1047 (5th Cir. 1989); Abrahamson v. Hershman, 701 F.2d 223, 228 (1st Cir. 1983); Matta v. Board of Educ.-Indian Hill Ex Vil Schools, 731 F. Supp. 253, 254 (S.D. Ohio 1990); Lascari v. Board of Educ., 116 N.J. 30, 35, 560 A.2d 1180, 1189 (1989).

icapped child.[40]

In other words, the Court maintained that because related services are meant to enable the "handicapped child" to *benefit* from special education, special education instruction too must be intended to benefit the student. It then concluded that the special instruction and related services delivered to a student with disabilities are to be "individually designed to provide educational benefit,"[41] a phrase to which this Article will return.

In establishing the "some educational benefit" standard, the Supreme Court acknowledged both that self-sufficiency was too low a goal for some high-functioning students with disabilities and that a strict "equal"-opportunity standard could well disregard the extensive needs of some students with disabilities.[42] Therefore, it interpreted the Act as establishing a modest but nonetheless genuine right to beneficial, personalized instruction.

The *Rowley* Court did "not attempt . . . to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act."[43] Instead, it confined its analysis to the situation before it, that of Amy Rowley, a young hearing impaired student who had attained an above-average level of achievement in a regular elementary school classroom with the help of a tutor for the deaf, a speech therapist, and an FM wireless hearing aid. Amy's parents were seeking the related service of a sign-language interpreter to enhance Amy's academic progress. The Court determined, however, that because her achievement was "above average in

40. *Rowley*, 458 U.S. at 201 (footnote omitted) (emphasis added by the Court) (quoting 20 U.S.C. § 1401(a)(17)).

41. *Id.* at 201.

42. The Court chose to equate the concept of equal opportunity with the concept of same opportunity. The standard proposed by the trial court, namely, an equal opportunity to learn commensurate with the opportunity offered to nonhandicapped students, did not mean delivery of the same services but delivery of an equivalent opportunity to learn through delivery of different, individualized services appropriate to the student's needs. *See* Rowley v. Board of Educ., 483 F. Supp. 528, 534 (S.D.N.Y.), *aff'd*, 632 F.2d 945 (2d Cir. 1980), *rev'd*, 458 U.S. 176 (1982). The Supreme Court found that the statute provided no basis for the standard utilized by the district court: "Certainly the language of the statute contains no requirement like the one imposed by the lower courts—that states maximize the potential of handicapped children 'commensurate with the opportunity provided to other children.' " *Rowley*, 458 U.S. at 189-90 (quoting Rowley v. Board of Educ., 483 F. Supp. at 534). The Court commented that requiring states to provide strict equality of opportunity seemed to present an "entirely unworkable standard requiring impossible measurements and comparisons." *Id.* at 198.

43. *Rowley*, 458 U.S. at 202.

the regular classrooms of a public school system,"[44] the substantial specialized instruction and related services that Amy received were enough to provide her with a FAPE.[45]

Concluding its analysis of the FAPE provision, the Court declared: "[A] state . . . satisfies [the FAPE] requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. . . . In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act . . . ."[46]

In a subsequent section of the *Rowley* opinion addressing the scope of judicial review, the modest substantive standard established in the earlier portion of the opinion was restated as follows:

> [A] court's inquiry in suits brought [after exhaustion of administrative remedies] is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.[47]

This language, taken out of the previous substantive context, raises the question whether a standard requiring some demonstrable educational benefit has been reduced to a standard requiring only a paper IEP that is likely to produce some benefit if implemented. The phrase "reasonably calculated to enable the child to receive educational benefit" seems to limit courts to an assessment of a school district's *proposed* IEP instead of an implemented IEP—to a review of the IEP document rather than the actual individualized education program.[48] An exclu-

44. *Id.*

45. *See id.* at 203 n.25.

46. *Id.* at 203-04.

47. *Id.* at 206-07 (footnotes omitted).

48. It is important to remember that IEP stands for an "individualized education *program*," not an individualized education plan, as many courts and commentators mistakenly refer to it. Congressional choice of the word "program" conveys the intent that the IEP is more than just a planning document; it is a "written statement" both "developed and implemented." 34 C.F.R. § 300.340 (1990). The IEP is to be formulated at a meeting in which the school and parents together establish the goals and objectives for the student, the special education and related services, the duration and length of the special education services, the extent of time to be spent in regular education, and the criteria for measuring progress toward achievement of IEP objectives. Parents are to be

sively document-oriented review would appear to preclude courts from assessing whether any benefit has actually resulted and instead would confine judicial review to a consideration of the design of the IEP and what the design was expected to produce.

A review limited to a proposed IEP does not fit the facts of *Rowley*, in which Amy's parents were challenging the appropriateness of an ongoing IEP. In fact, the *Rowley* Court did not base its analysis on its "reasonably calculated" or "individually designed" phraseology. Instead, it examined Amy's actual progress under the IEP that had been implemented. It then ruled that Amy had received sufficient benefit from her special education services because her achievement in the regular classroom was good enough to allow her to pass easily from grade to grade. Curiously, it never mentioned what goals and objectives had been established in Amy's IEP and did not use them as a standard against which to measure whether her program was benefitting her.

The Court's review of Amy's progress in her regular classroom suggests that it was creating two standards of benefit applicable in slightly different situations. When a parent-requested or district-proposed program has not been implemented, courts are to review the district's proposed IEP to see if it is "individually designed"[49] or "reasonably calculated"[50] to provide educational benefit. When an IEP has been implemented, courts are to review the student's progress to see whether the IEP was "sufficient to confer some educational benefit."[51] The first standard is future-oriented; the second is anchored in the past and present. In some cases, a court must base its decision on the first standard because parents will have removed their child from public school without giving the school district an opportunity to demonstrate that its proposed IEP was appropriate. In others, a court will be able to use the second standard because the student with disabilities will have remained in the allegedly unsatisfactory program pending resolution of the dispute, thereby providing evidence of whether

co-participants in designing the IEP. *See* 34 C.F.R. pt. 300 app. C (Question 26) (1990). The program agreed upon is then to be implemented and evaluated by the school. *See* 34 C.F.R. § 300.341(a) (1990).

49. *Rowley*, 458 U.S. at 201.

50. *Id.* at 207.

51. *Id.* at 200.

the proposed program actually provided some educational benefit.

Once one regards the *Rowley* decision as establishing slightly different substantive standards for implemented and unimplemented IEPs, one is still left with the important questions: How is benefit to be measured, and how much benefit is enough to provide a student with a FAPE? The Court did not decide these questions in *Rowley*, stating that it was making no attempt to define benefit across a range of student needs and abilities.[52] It noted that where a student is being educated in regular classrooms, grading and promotion standards constitute "an important factor"[53] in assessing the sufficiency of benefit. Obviously, if a student with disabilities is not being educated in regular classes, this factor does not apply. Even where a student is able to participate in regular classroom activity, however, grading and promotion standards may be entirely inapplicable if the student's progress is not being measured by ordinary minimum standards for promotion.

B. *Post*-Rowley *Interpretation*

Courts have viewed the *Rowley* "some educational benefit" standard as establishing that a school is not required to provide the best education that money can buy.[54] The standard is viewed as workable because an obligation to provide the "best" or an "ideal" education would have financial implications far

52. *See id.* at 202.

53. *Id.* at 203. The *Rowley* Court assumed that for those being educated in the regular classroom, "the system itself monitors the educational progress of the child." *Id.* Yet some students with disabilities are mainstreamed for a substantial portion of their day in the regular classroom with a different set of goals and objectives than those that are implicitly established for all nondisabled students. For these students with disabilities, the regular education system does not monitor their educational progress. That is, some students with disabilities are not held to the minimum standards for promotion, but are placed in the regular classroom so that they can see and model appropriate social behaviors; their academic programming is conducted separately from that of their nondisabled peers. Furthermore, the regular education system does not have exclusive responsibility for monitoring the progress of children with disabilities. If this were the case, there would be no need for the establishment of individualized education goals and objectives to meet unique needs of students with disabilities.

54. *See, e.g.*, Lunceford v. District of Columbia Bd. of Educ., 745 F.2d 1577, 1583 (D.C. Cir. 1984) (emphasis in original) ("[R]esources are not infinite, and many other demands compete for limited public funds. The [IDEA-B] does not secure the *best education* money can buy; it calls upon government, more modestly, to provide an appropriate education for the child."); Wilson v. Marana Unified School Dist. No. 6, 735 F.2d 1178, 1182 (9th Cir. 1984) (education need not be the best education); Hessler v. State Bd. of Educ., 700 F.2d 134, 139 (4th Cir. 1983) (same).

outdistancing current state and federal funding capabilities and commitments. Moreover, schools are not obliged to guarantee the realization of the goals and objectives set forth in the IEP.[55] If the IEP were a contract obligating the school to achieve the specified goals and objectives, districts would set the most minimal of goals and objectives to protect themselves from liability. By the same token, however, many courts have concluded that the IEP is nevertheless an obligation to provide students with disabilities with more than just physical access to minimal special education services. Most recent cases construing the *Rowley* educational benefit standard have concluded that special education should produce satisfactory or meaningful progress toward achievement of a special education student's unique educational needs.[56]

The Third Circuit provided one of the best statements of the progress standard in rejecting a "toothless standard" requiring only *de minimis* benefit to the child in *Polk v. Central Susquehanna Intermediate Unit 16*.[57] In reversing the district court's summary judgment for the school district, the court noted the strenuous disagreement between the parties over whether the school district had a blanket policy excluding Christopher Polk and others from receiving the services of a licensed physical therapist and whether he needed those services in order to receive meaningful benefit from his special education program. The circuit court ruled that the lower court had mistaken the *Rowley* standard for a *de minimis* standard.[58] The anticipated benefit

55. The regulations implementing the IDEA-B make clear that the creation of an obligation to meet the goals and objectives was not the intent of the Act. *See* 34 C.F.R. § 300.349 (1990). *See also* 34 C.F.R. pt. 300 app. C (Question 60) (1990).

56. *See, e.g.*, Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 980 (4th Cir. 1990) (affirming district court finding that day program constituted FAPE because student made good "educational progress" in that setting); Evans v. District No. 17, 841 F.2d 824, 831 (8th Cir. 1988) (*Rowley* directive to allow school district to choose method of instruction means that "if a child is progressing satisfactorily" with the current method, court is not to question whether another method might work better); Abrahamson v. Hershman, 701 F.2d 223, 228 (1st Cir. 1983) ("educational progress" necessary for FAPE); Brown v. Wilson County School Bd., 747 F. Supp. 436, 442 (M.D. Tenn. 1990) (educational benefits under *Rowley* need not maximize child's potential but must offer a " 'basic floor of opportunity' which will allow the child to progress with his education"); Chris D. v. Montgomery County Bd. of Educ., 743 F. Supp. 1524, 1531 (M.D. Ala. 1990) (IDEA-B "requires a plan likely to produce progress" (quoting Board of Educ. v. Diamond, 808 F.2d 987, 991 (3d Cir. 1986))); B.G. v. Cranford Bd. of Educ., 702 F. Supp. 1140, 1149 (D.N.J. 1988) (least restrictive environment requires setting in which "education progress, rather than educational regression, can take place").

57. 853 F.2d 171 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989).

58. *See Polk*, 853 F.2d at 180-83.

must be meaningful, which in turn means that more than trivial progress must occur and certainly more than mere prevention of regression.[59]

In general, courts correctly understand the implications of the IDEA-B definition of special education as "specially designed instruction . . . to meet the student's unique needs."[60] Courts have repeatedly adopted a broad view of education in ruling on such matters as the placement of children with disabilities in residential settings, thus rejecting a definition of educational needs that is limited to the regular education curriculum.[61] That this is appropriate is obvious when one considers the problems visually- and hearing-impaired students face. They certainly need special instruction designed to heighten their sensory awareness and to compensate for their sensory disabilities. For instance, mobility training is important for the blind, and development of speech or signing capacity is important for the deaf. Yet we do not consider such instruction to be noneducational just because it falls outside the regular education curriculum. Similarly, many physically impaired students, such as those with cerebral palsy, need instruction in such motor development skills as walking and speaking, along with instruction in academic subjects. Others with learning dis-

59. In so ruling, the court expanded its earlier decision in Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986) (affirming residential placement of child with severe disabilities because child was regressing under school district's day program). The court in *Polk* rejected the argument that an IEP confers benefit if it prevents regression, and emphasized that although regression was one measure of whether benefit was lacking, trivial progress was another. *See Polk*, 853 F.2d at 183-84.

The court remanded the *Polk* case for further fact-finding under the higher standard. Other circuits are following the *Polk* standard. *See, e.g.*, Doe v. Smith, 879 F.2d 1340, 1341 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 730 (1990).

60. 20 U.S.C. § 1401(a)(16) (1988). The term "unique" is interpreted as a reference to the individualized needs of a given student with disabilities rather than to the exclusive needs of one student. "Unique" cannot mean unique only to one such student because many students with disabilities have similar needs, and no one child's needs are entirely exclusive to that child. *See* Battle v. Pennsylvania, 629 F.2d 269, 280 (3d Cir. 1980) ("there can be little doubt that by requiring attention to 'unique needs,' the Act demands that special education be tailored to the individual").

61. *See, e.g.*, Evans v. District No. 17, 841 F.2d 824, 831 n.7 (8th Cir. 1988); Abrahamson v. Hershman, 701 F.2d 223, 228 (1st Cir. 1983); Kruelle v. New Castle School Dist., 642 F.2d 687, 693-94 (3d Cir. 1981); Christopher T. v. San Francisco Unified School Dist., 553 F. Supp. 1107, 1120 (N.D. Cal. 1982); Papacoda v. Connecticut, 528 F. Supp. 68, 71-72 (D. Conn. 1981); North v. District of Columbia Bd. of Educ., 471 F. Supp. 136, 141 (D.D.C. 1979). All of these cases, and the other "residential placement" cases, recognize that children with severe and multiple disabilities have educational needs that go well beyond regular academic requirements, and that, for them, education consists of systematic instruction to produce growth toward such societally approved objectives as the development of functional life skills.

abilities and behavior problems suffer from academic or social gaps that are unique to those disabling conditions. In addition to specially designed academic instruction, such students may need instruction in how to read the social environment and behave in socially appropriate ways. While we expect regular education students to pick up these skills indirectly or to acquire them outside of school, for many students with disabilities the skills must be systematically and directly taught. Instruction in such social and behavioral skills is appropriately considered "educational."

If a school district chooses to provide only individualized academic instruction to an emotionally disturbed child and neglects to address the student's primary emotional problems, the district fails to address the most significant of the student's needs for special education. In such a case, the program—although perhaps beneficial in some limited sense—does not respond to the child's underlying need for special education. For many students with disabilities, their unique academic needs interrelate with their unique behavioral, physical, and sensory needs. If such a child's IEP addressed only some of the special education needs and ignored others, it would not be providing services individually designed or reasonably calculated to provide meaningful progress.

A recent decision by the United States Court of Appeals for the First Circuit challenges, in an unusual and perhaps unintended way, the *Polk* court's explicit requirement of meaningful progress. In *Timothy W. v. Rochester, New Hampshire School District*,[62] the First Circuit held that the IDEA-B imposes no requirement that an initial determination of a child's ability to benefit is a prerequisite to eligibility under the Act.[63] The court declared that, for purposes of IDEA-B eligibility, it is irrelevant whether a profoundly disabled student can benefit from special education so long as the student is in need of it, as it found

62. 875 F.2d 954 (lst Cir. 1989), *cert. denied*, 110 S. Ct. 519 (1990). At the time that *Timothy W.* was decided, the Act was still entitled, and the First Circuit referred to, the EHA-B. To be consistent with the remainder of this Article, in this discussion of the case I refer to the Act as the IDEA-B.

63. The IDEA-B requires that those who receive services under the Act must not only fit within one of the specified categories of disability but must also "require special education." 20 U.S.C. § 1401(a)(1) (1988). The reason that the IDEA-B requires a student evaluated as disabled to need special education is that some students with disabilities can be educated successfully in the regular classroom without special education and related services.

Timothy to be.[64] Timothy's disabling conditions were multiple and severe, including "complex developmental disabilities, spastic quadriplegia, cerebral palsy, seizure disorder, and cortical blindness."[65] The court observed that the IDEA-B, in unmistakable terms, requires the provision of special education to *all* disabled children in need thereof, including, without exception, the most severely disabled, without regard for level of achievement.[66] This observation is consistent with *Rowley* and, in and of itself, is not a source of concern. The following paradox emerges, however, from the *Timothy W.* holding: If ability to benefit from special education is irrelevant for eligibility purposes, why is it not irrelevant for programming purposes as well? That is, if a school must accept a student who is unable to benefit, then why should one measure FAPE by whether the IEP will enable the child to benefit?

In *Timothy W.*, the First Circuit seemed to alter the Supreme Court's understanding of the IEP. What seemed to be a Supreme Court requirement that an IEP produce or be designed to produce some educational benefit was reduced to a requirement that a school district propose and provide an IEP that addresses the student's "needs," regardless of whether any benefit can realistically be expected to result from its implementation.

What lurks behind these questions is a resurrection of the debate over whether some children with disabilities are so profoundly impaired as to lack the ability to benefit from educational services. The court in *Timothy W.* assumed a peculiar stance in acknowledging on the one hand that the IDEA-B anticipates service to all children with disabilities who need special education, and inferring on the other hand that Congress does not care whether federal monies are spent on children who can benefit from the education. The *Rowley* Court did not make the same assumption; recall its statement that "[i]t would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education."[67]

The reasoning of the First Circuit in *Timothy W.* is curious in

64. *See Timothy W.*, 875 F.2d at 960.
65. *Id.* at 956.
66. *See id.* at 959-61.
67. Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 200-01 (1982).

light of dicta in the opinion acknowledging the validity of a broad definition of education.[68] The court emphasized that Congress, in enacting the Education for All Handicapped Children Act, was adopting the "zero-reject" model urged by the expert witnesses in *Pennsylvania Association for Retarded Children v. Pennsylvania*,[69] and cited other cases that embrace the principle that even profoundly disabled children are capable of responding to systematic instruction and can learn certain skills that make them less dependent on others.[70]

Despite its sympathy with the proposition that all students with disabilities are educable, the court in *Timothy W.* concluded that the IDEA-B requires schools to provide all disabled students with a chance to progress, regardless of whether they are capable of progressing. In other words, it again raised the spectre that some children are, in fact, ineducable. In the First Circuit, under the logic of *Timothy W.*, school districts must produce an IEP regardless of whether the child can benefit from it. Under that logic, a school district presumably would be expected to provide sensory stimulation services to a special education student who becomes comatose.[71]

The reasoning of *Timothy W.* is inherently contradictory. The court should not have held that the ability to benefit is irrelevant to eligibility while simultaneously concluding that Timothy met the eligibility criterion of being a child "in need of special education."[72] It is difficult to understand how Timothy could *need* special education and at the same time not

68. *See Timothy W.*, 875 F.2d at 970, 973.

69. 343 F. Supp. 279 (E.D. Pa. 1972) (*PARC*). Expert testimony in *PARC* was overwhelmingly to the effect that many severely mentally retarded students need instruction in self-help skills, such as toileting, feeding, and dressing skills. When such instruction is offered, these students become far more self-sufficient and may enable their families to care for them at home rather than placing them in an institution. Similarly, self-help skills, such as riding the bus, may equip them for partial independence as adults. Educators, not medical doctors or social service workers, are the ones trained to provide such instruction. On the basis of the testimony in the *PARC* case, the State of Pennsylvania chose not to present its defense but instead to negotiate for a consent agreement accepting responsibility for the education of the mentally retarded. For an account of this landmark consent agreement, see L. LIPPMAN & I. GOLDBERG, RIGHT TO EDUCATION: ANATOMY OF THE PENNSYLVANIA CASE AND ITS IMPLICATIONS FOR EXCEPTIONAL CHILDREN (1973).

70. *See Timothy W.*, 875 F.2d at 969.

71. The more sensible view would be that students with disabilities who become comatose are no longer in "need" of special education because until they are able to respond volitionally to stimuli, they are not in a position to benefit from systematic instruction.

72. *Timothy W.*, 875 F.2d at 962. *See supra* note 63. The First Circuit court did not review the lower court's factual finding that Timothy could not benefit from special

be able to benefit from it, unless someone can need a service that he cannot use.

The court might have reached a similar outcome and have ordered special education services for Timothy on alternative grounds. The evidence was sufficient for the First Circuit to have found that the district court's factual findings were clearly erroneous and that Timothy was able to benefit from special education. While the practical effect would have been the same, such a holding would have created fewer philosophical and policy dilemmas. A finding that Timothy could benefit educationally would not have produced an interpretation of the IDEA-B that imputes congressional indifference as to whether federal money is being well spent. Furthermore, such a finding would not have appeared to limit the application of the concept of educational benefit to those who are capable of more normal achievement than Timothy. The First Circuit had invoked a broad definition of education in the earlier case of *Abrahamson v. Hershman*,[73] and it could have drawn on that precedent in finding that Timothy's ability to respond to stimuli and to progress in responding to sound, bright light, and physical handling made him clearly able to benefit from special education services. Had it so ruled, the court would not have been in the position of indirectly reinterpreting the principles behind *Rowley* to be indifferent as to whether actual benefit would result from an implemented IEP. As it stands, *Polk* and *Timothy W.* appear to be on a collision course. Although the Supreme Court denied certiorari in both of these cases, sooner or later the Court is likely to need to elaborate on its educational benefit standard to address differing interpretations by the lower courts.[74]

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education. It limited its review to the lower court's legal determination that ability to benefit is a prerequisite for eligibility under the Act. *See Timothy W.*, 875 F.2d at 959.

73. 701 F.2d 223 (1st Cir. 1983) (unique needs of student with severe retardation required residential placement with round-the-clock training and reinforcement in order to produce any educational progress).

74. Since the *Timothy W.* decision was handed down, a federal district court in Texas concluded that the IDEA-B does not hold school districts responsible when a student does not succeed under her IEP. *See* McDowell v. Fort Bend Indep. School Dist., 737 F. Supp. 386, 390 (S.D. Tex. 1990). Although the court found *sua sponte* that the IDEA-B issues raised were moot, it addressed the merits nonetheless. The court stated that a *res ipsa loquitur* theory was inapplicable and could not establish liability on the part of the school for a student's failure to learn. Although the court stated that the failure might be in the implementation of the IEP, and that a failure to properly teach, properly assess, or properly modify the curriculum might be negligence, it concluded that such failures did not result in failure to comply with the IDEA-B. In doing so, it summarily

III. Proposed Standards for Measuring Benefit

A. *Better Use of IEP Goals, Objectives, and Evaluation Criteria as Reference Points for Measuring Benefit*

Polk, Timothy W., and *Rowley* are potentially reconcilable. The IDEA-B does not obligate schools to enable a special education student to achieve any certain level of education, and IEP goals do not require a school district to guarantee their achievement. Schools should, however, be held to the requirements of the IEP and ordinarily should be required to modify a student's IEP if no progress is occurring.

The *Rowley* Court, while discussing the paramount importance of the IEP as a procedural safeguard for parents, overlooked an opportunity to illustrate the importance of the IEP requirements to which it paid lip service. The Court seemingly placed no weight on the IEP goals and objectives, or on IEP evaluation criteria, in deciding that Amy had received adequate educational benefit. Instead, it simply noted that she was performing above average in her regular classroom and was re-

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rejected the hearing officer's finding that the student "had made no significant educational progress and that her behavioral problems had not been adequately addressed." *Id.* at 389. The court also concluded that inability to foresee whether a proposed IEP would succeed was not discrimination on the basis of handicap, a conclusion directed toward Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1988) (prohibiting discrimination on the basis of handicap in programs or activities receiving federal money). In other words, the court focused exclusively on the IEP as proposed, and treated the effect of its actual *implementation* as irrelevant under the IDEA-B.

Another recent case exemplifies what appears to be a different misapplication of the *Rowley* standard—in this case, a failure to examine a *proposed* but unimplemented IEP. In Angevine v. Jenkins, 752 F. Supp. 24 (D.D.C. 1990), the court focused on progress in a private school and did not assess whether a revised but unimplemented IEP could also have produced progress. The case has a long history, and an unpublished memorandum opinion preceded this one. In its motion to amend or alter the memorandum judgment, the District of Columbia Public Schools argued that Ann Marie Angevine's progress in a private school should not be the measure of educational benefit under *Rowley* and that a progress standard is suggestive of a potential-maximizing standard. *See id.* at 27. The court disagreed and denied the motion, concluding that a progress standard does not equate with potential-maximizing. *See id.* My disagreement is not with this part of the opinion. The court then determined that Ann Marie had made little or no progress under her old IEP and was progressing in her private setting. What is puzzling is why the court did not assess Ann Marie's revised but unimplemented IEP. The IEP had been revised in compliance with an order by a hearing officer who, at the second hearing, judged the revised IEP sufficient to provide Ann Marie with a FAPE. Ann Marie's parents appealed this second decision to federal court. Because Ann Marie's parents had placed her unilaterally in a private school during the interval between the first and the second hearing, the revised IEP could not be implemented. The court gave no explanation for why it did not determine whether progress was likely under the school district's revised IEP. The decision has been appealed. Interviews with Jeffrey M. Ford, Attorney for Defendants, and Michael Eig, Attorney for Plaintiffs (Feb. 21-22, 1991).

ceiving substantial special education services, which from their nature were obviously related to lessening the negative impact of her hearing impairment.

A process anchored more tightly to the IEP might have produced the same result in *Rowley* while offering guidance as to how benefit is to be measured for other students. The goals and objectives of Amy's IEP presumably reflected a multidisciplinary evaluation of her strengths and weaknesses. Unfortunately, we do not know what goals were proposed, because the Supreme Court omitted discussion of them. Their omission by the Supreme Court is probably a result of the failure of the two lower courts to analyze the goals,[75] though it is difficult to imagine that the contested IEP was not in the record on appeal. Given what we know about Amy from various treatments of the case by the three courts, the IEP goals are likely to have proposed (1) the enhancement of her receptive-language skills[76] through maximization of her residual hearing and continuing development of her lip reading skills, and (2) the development of expressive language[77] through development of her ability to produce accurate consonant and vowel sounds. The IEP goals then should have been broken down into short-term, measurable objectives on which the actual special instruction would be based.[78] Based on the multidisciplinary assessment that determined Amy's initial eligibility for IDEA-B services, the Court might have determined that the goals and objectives were relevant to Amy's unique needs, that the services of a speech therapist and a tutor for the deaf were reasonably calculated to provide sufficient benefit to enable her to make meaningful progress on those objectives, and that the argument regarding

75. *See* Rowley v. Board of Educ., 483 F. Supp. 528 (S.D.N.Y.), *aff'd*, 632 F.2d 945 (2d Cir. 1980).

76. Receptive language refers to language, whether spoken, written, or nonverbal, that is received and understood by another. Basic receptive-language skills are listening and reading.

77. Expressive language refers to the capacity to communicate with others, either by speaking, by writing, or by some other means such as signing.

78. Short-term instructional objectives are described in Appendix C to the regulations implementing the IDEA-B as

> measurable, intermediate steps between a handicapped child's present levels of educational performance and the annual goals that are established for the child. The objectives are developed based on a logical breakdown of the major components of the annual goals, and can serve as milestones for measuring progress toward meeting the goals.

34 C.F.R. pt. 300 app. C (Question 39) (1990).

the sign-language interpreter was an argument regarding an additional method of accessing classroom information.

Because Amy had been receiving the services prescribed in her IEP, the Court properly attempted to assess her benefit from those services. The fact that she was achieving above grade level in her academic subjects was relevant in the Court's view, apparently because the Court inferred a relationship between Amy's regular education progress and her special education services. It would have been helpful, however, to learn whether the IEP itself proposed measuring the effectiveness of the special education services by whether or not Amy maintained her grades in her regular education setting. Indeed, by adopting grading and promotion standards as the measure of educational benefit for Amy, the Court may have been substituting its own criteria for those of the IEP team. It is possible, for instance, that the criteria for evaluation established in the IEP were related to whether or not Amy's lip-reading and expressive-language skills were increasing. We do not know, however, because the Court did not discuss the IEP criteria for measuring progress toward the achievement of IEP goals and objectives. It may be that the objectives were consonant with the result reached by the Court and were simply not mentioned, but it is also possible that their potential as a tool in assessing benefit was not realized at the time.

In sum, the *Rowley* Court failed to address the goals and objectives of Amy's IEP and the criteria by which progress toward them was to be evaluated. This failure obfuscated the use of the IEP as a judicial tool by which to determine how much educational benefit is enough to provide a child with a FAPE. Although many district court opinions contain detailed information about the disability of the child in question, the opinions tend to focus on the nature of the special education services and seldom discuss the child's educational needs in terms of specific and current performance data, IEP goals and objectives, and criteria for measuring the effect of special education on achievement of those objectives.[79] Yet, by reference to such matters, a court would be in a better position to decide

79. Some cases refer to due-process hearings in which the hearing officer rejected an incomplete IEP. *See e.g.*, Kerkam v. District of Columbia Bd. of Educ., 672 F. Supp. 519, 522 (D.D.C. 1987) (school district failed to specify objectives related to annual goal of reinforcing acquired self-help and socialization skills), *rev'd and remanded on other grounds*, 862 F.2d 884 (D.C. Cir. 1988).

if proposed or implemented services are designed to produce (or are actually producing) meaningful benefits.

The wasted opportunity resulting from avoidance of consideration of IEP goals and objectives is illustrated by two recent cases. In *Hudson v. Wilson*,[80] the Fourth Circuit Court of Appeals upheld the findings of the district court that Cody Hudson's contested dual placement in a "behavioral adjustment" classroom for four hours a day and in a learning disability resource room[81] for forty-five minutes a day[82] was appropriate. The Fourth Circuit concluded that dual placement for the time allotted represented a "reasonable judgment by local school officials"[83] that Cody suffered from both an emotional disturbance and a learning disability. The court appeared to base its deference to school officials on evidence supporting the dual labels rather than on any discussion of the particular IEP objectives for the student. One really cannot determine, however, whether four hours a day in a classroom for students with emotional disturbances is appropriate without any reference to the particular behavioral goals and objectives being sought for Cody. The Fourth Circuit noted that the district court was "undoubtedly somewhat deferring, as *Rowley* commands, to the school authorities' expertise."[84] What *Rowley* "commands," however, is deference to the school authorities on questions of methodology and policy,[85] not on questions of whether an IEP constitutes a FAPE.

One might conclude that the *Hudson* court affirmed a placement and concomitant, but undescribed, instructional program based on evidence supporting a certain label rather than on consideration of an individualized set of IEP goals and objectives. In fact, the IEP is to be developed prior to placement to

80. 828 F.2d 1059 (4th Cir. 1987).

81. A resource room is one in which the student receives special education instruction for a portion of the day under the supervision of a resource teacher. The resource teacher and resource program are intended to be what their name implies: a resource to the regular classroom, where the bulk of the student's education occurs. *See* M. REYNOLDS & J. BIRCH, ADAPTIVE MAINSTREAMING: A PRIMER FOR TEACHERS AND PRINCIPALS 126-27 (3d ed. 1988).

82. The remainder of the day was to be spent in the regular classroom. *See Hudson*, 828 F.2d at 1062.

83. *Id.* at 1063.

84. *Id.*

85. *See* Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 207-09 (1982).

avoid such blanket assumptions about placement.[86] *Hudson*, however, omits any discussion whatsoever of the contents of the IEP. Courts should be more careful than covertly to support labels as the basis for placement and program decisions.

A somewhat different problem arose in *Doe v. Defendant I*,[87] in which the Sixth Circuit Court of Appeals affirmed the denial of a parental request for reimbursement of private tutoring and private school tuition. The Sixth Circuit concluded that the IEP had not been given a chance to succeed before the parents pulled their child out of the public school. The court discussed the fact that the dysgraphic student[88] was not succeeding in regular junior high school classes. Furthermore, the court noted that because of his absences and his parents' lack of cooperation, the contemplated "consultative" services by the resource teacher and volunteer tutoring had not been implemented as prescribed by the IEP.

As in *Hudson*, the *Doe* court did not discuss the IEP goals and objectives to determine whether they related to Doe's primary educational needs.[89] Moreover, a statement regarding the child's current educational performance was missing from the IEP, as were the criteria to evaluate his progress. The court ruled that omission of Doe's current educational performance was insignificant because the parties knew he was failing his academic subjects in junior high. The court also ruled that omission of the evaluation criteria was insignificant because Doe "was to be given instruction in the regular classroom, [and] he would be graded according to the normal criteria used in the class. Only his method of instruction would be different."[90] This conclusion may well be accurate, but it is belied by a statement from his multidisciplinary team, quoted in the opinion,

86. *See* 34 C.F.R. § 300.342(b)(1) (1990) (IEP must be in effect before special education and related services are provided).

87. 898 F.2d 1186 (6th Cir. 1990).

88. Dysgraphia is a deficit in ability to produce handwritten work, which may include a memory deficit affecting ability to remember the motor movements required to form letters, memory deficit regarding spelling patterns, or a deficit affecting ability to construct grammatically correct sentences when language is expressed in written form.

89. One can speculate that, based on such factors as the child's evaluation data, prior school performance, and his parents' preferences, the objectives might have been (1) to strengthen his motor memory and writing fluency, or (2) to compensate for his motor deficits by teaching him how to use a word processor with a speller attached. In any event, the special education team should not have seen its role as simply tutoring him in academic content areas if the primary goal of Doe's IEP was to help him communicate effectively in some written form.

90. *Doe*, 898 F.2d at 1190.

that his "total program needs modification because of his difficulty in motor skills. Written tasks are very difficult for [him]; therefore, cutbacks in assignments may be needed."[91] If a student is given fewer assignments, not only is the method of instruction likely to be different, but the grading criteria are also likely to differ. Although the IEP data missing from the court's opinion might have reported only *regular* education classroom grades as performance levels and specified only regular education grades as evaluation criteria, the assumptions made by the *Doe* court show little understanding of the special education data that is to be provided on an IEP. A well-drafted IEP document would have reported current, specific, rather detailed performance on a variety of educational skills. It might well have specified criterion-referenced evaluation standards,[92] such as the accuracy of Doe's handwritten work or, alternatively, word-processed work, first in his tutored setting and later in his regular education classrooms. Failure to understand the possible range of IEP content may have led the court to assume that the IEP would relate to regular education alone because the student was being instructed primarily in the regular classroom. *Rowley* does nothing to discourage this misunderstanding.

Not only did the *Doe* court miss the potential importance of the IEP's criteria as a measure of the sufficiency of the benefit, it construed *Rowley* as "giving utmost deference to specific educational decisions once it is determined that they stem from the procedures outlined in the Act."[93] This interpretation conflicts with the court's own pronouncement that it must review *de novo* whether an IEP provides a student with a FAPE.[94] A related

91. *Id.* at 1187-88.

92. A criterion-referenced evaluation standard is one in which the student's performance is compared to a specific criterion of acceptable performance on a given task. The criterion is tailored to the abilities of and objectives for the individual student.

93. *Doe*, 898 F.2d at 1189.

94. *See id.* at 1190. As the Supreme Court in *Rowley* acknowledged, under the IDEA-B, a court reviewing an administrative hearing is to accept additional evidence when warranted and make an independent ruling based on the preponderance of the evidence. *See* Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 205 (1982). Some courts have interpreted this provision and the *Rowley* construction of it as requiring *de novo* review. *See, e.g.*, Wilson v. Marana Unified School Dist., 735 F.2d 1178, 1181 (9th Cir. 1984); Roncker v. Walter, 700 F.2d 1058, 1062 (6th Cir.), *cert. denied*, 464 U.S. 864 (1983); Bonadonna v. Cooperman, 619 F. Supp. 401, 407 (D.C.N.J. 1985). Others have interpreted the "due weight" to be accorded to administrative proceedings under *Rowley* as calling for something less than *de novo* review. *See, e.g.*, Roland M. v. Concord School Comm., 910 F.2d 983, 988 (1st Cir. 1990) ("bounded independent review");

remark by the Court in *Rowley* contributes to the confusion: "[C]ongressional emphasis upon full participation of concerned parties throughout the development of the IEP . . . demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP."[95] This observation is true in situations in which the home and school agree on the content of an IEP. Nevertheless, the statement should not be read to establish a presumption that a district-proposed IEP that is challenged by parents provides a FAPE. If such a reading were given to the statement, the substantive rights provided by the IDEA-B would be reduced to little more than rights whose parameters and implementation were at the mercy of the subjective inclinations of the schools. The statutorily required contents of the IEP undermine such a view.

To return to the case of Amy Rowley, let us assume, hypothetically, that Amy's IEP addressed only her receptive-language needs, when the development of expressive language was clearly a primary need. Under such a circumstance, the Supreme Court would be justified in concluding that the IEP was inappropriate and ordering the addition of expressive-language objectives. On the other hand, if Amy was regressing in her ability to keep up with her class, despite the appropriateness of her IEP goals and objectives, then the Court should determine whether some other component of her IEP was deficient. For example, the extent of services provided by the speech therapist or tutor for the deaf might have been inadequate to enable progress toward otherwise appropriate goals and objectives, or the methods and materials chosen to achieve those objectives might have been inappropriate. If the evidence suggested the former, the Court should order extended services and would not need to examine the methods selected by the school. If, on the other hand, the evidence suggested that

Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 981 (4th Cir. 1990) ("bounded independent decision"). In any event, the "due weight" requirement applies to the proceedings, not to the administrative decision. In fact, sometimes the court must choose between two conflicting administrative rulings in states where two-stage hearings are conducted. *See, e.g.*, Board of Educ. of N.Y. v. Ambach, 628 F. Supp. 972 (E.D.N.Y. 1986) (court affirmed state-level hearing officer (the Commissioner of the New York Education Department), who had reversed local due-process hearing officer's decision in part).

95. *Rowley*, 458 U.S. at 206.

the chosen method was simply not producing progress, the Court would need to find another avenue to follow its admonition that "questions of methodology are for resolution by the States."[96] One such approach would be for the Court to order the school district to introduce a new method of its choosing, one better calculated to achieve progress. In other words, if no demonstrable progress is being made despite significant expenditures of time, another method should be implemented. Although the district is not accountable for a failure to achieve IEP objectives, and the IEP is no guarantee of success, if its implementation does not result in progress, some aspect of the IEP must be inappropriate. In short, in the face of failure, courts should not allow a school to be intransigent and refuse to alter an IEP.

Use of IEP objectives and criteria as reference points in determining the sufficiency of educational benefit serves students from one end of the handicapped spectrum to the other—from Amy Rowley to Timothy W. No progress, vastly diminished progress, trivial progress toward IEP objectives, or actual regression would be indications either that the goals and objectives, the special education services, or the methods and materials were inappropriate. Courts should examine the student's assessment data and current levels of performance to determine whether the goals and objectives match the student's unique educational needs. If they do, and progress is minimal or nonexistent, then courts should require the school district to extend services, try a different method, or both, depending on the evidence. This is not an unfair burden on the school. If no meaningful or measurable progress can be shown after a reasonable trial period, a school district should be required to try another approach.

Alternatively, if no progress is occurring, a school district should have the burden of explaining (1) why the present IEP has a better chance of success than an expanded one, (2) why prevention of regression, that is, maintenance of the status quo, is sufficient under the circumstances, or (3) why some regression is unavoidable.[97] For instance, school district evidence

96. *Id.* at 208.

97. The only situation of which I am aware in which maintenance has been seen as sufficient to establish benefit is summer programming for students with severe disabilities. Some school districts provide just enough service to keep the student from regressing during the summer months, on the theory that the student will then be in a

of limited technological advances in serving some students with profound autism might justify its continuance of a program that was not producing any change for the better. Comparably, evidence of a student's degenerative disease, such as muscular dystrophy, might justify continuance of given levels of physical therapy even though the student's performance was declining under them.

Where progress is expected to be limited and slow, as in a case like Timothy W.'s, what constitutes sufficient benefit will be different from a situation like Amy Rowley's, and the time allowed for a school to show measurable benefit may well be longer. The goals and objectives themselves may be quite limited, but courts should presume that progress toward them will be discernable and meaningful for the given child, when measured against the individual student's goals and objectives.

In cases in which norm-referenced regular classroom standards,[98] such as grading and promotion standards, are inapplicable to a student with disabilities or provide only part of the measure of benefit, the sufficiency of the benefit could be measured against a criterion-referenced standard of the student's own progress toward individualized objectives. Such a standard is common in special education classrooms and is quantifiable in settings in which teachers gather continuous data on student performance and learning rate. It is also used where a child has demonstrated good ability to learn in a private program but has made only marginal progress in a public school program. Some courts have used a similar standard, without realizing it, by comparing progress in a private school program with progress (or lack thereof) in a public school program.[99] In short, courts should identify the criteria for measuring progress that are specified in the IEP in question and include them as important

position to continue progressing when school is resumed in the fall and will not have lost the benefit of the previous year's services. For example, the Utah Special Education Rules provide that extended school-year services are designed to "*maintain* . . . the current level of a student's skills and behaviors in areas identified as crucial in reaching self-sufficiency." Utah State Office of Educ., State Board of Education Special Education Rules, Appendix H, at H-3 to H-4 (Apr. 1988) (emphasis added). Prevention of regression in this situation appears to be sufficient "progress." *See, e.g.*, Bales v. Clark, 523 F. Supp. 1366 (E.D. Va. 1981) (pre-*Rowley* case in which irreparable loss of progress during summer months was required before child was entitled to year-round schooling).

98. Norm-referenced standards are those in which the student's performance is compared to that of an appropriate reference group.

99. *See, e.g.*, Adams v. Hansen, 632 F. Supp. 858 (N.D. Cal. 1985).

factors in determining whether the student is benefitting sufficiently from the IEP. In doing so, they would honor criteria proposed by the IEP team itself, rather than substituting their own notions of appropriate criteria. They would also thereby create an incentive for the education system to increase its accountability, while leaving it to the schools to determine what technologies to implement.

B. *The Burden of Proof In Administrative Hearings and In Court*

An examination of an IEP by a court must necessarily begin with the due-process hearing. An aggrieved party must utilize the administrative hearing procedure before filing in court, except where "exhaustion would be futile or inadequate."[100] Unfortunately, the IDEA-B is silent as to which party bears the burden of proving the appropriateness of a special education program both in the hearing and in court. One trial court held that, at least in court, parents bore the burden of proving that both an implemented and a subsequently proposed IEP were inappropriate.[101] Two other courts have come to the opposite conclusion.[102] Other courts give the burden to the party (frequently the school district) proposing to change a previously agreed-upon IEP or placement.[103] Still other courts place the burden on the party appealing the administrative decision.[104] This occurred in *Doe v. Defendant I*,[105] and may have had a direct

100. Honig v. Doe, 484 U.S. 305, 327 (1988); *see* Smith v. Robinson, 468 U.S. 992, 1014 n.17 (1984).

101. *See* Bales v. Clark, 523 F. Supp. 1366, 1370 (E.D. Va. 1981).

102. *See* Davis v. District of Columbia Bd. of Educ., 530 F. Supp. 1209 (D.D.C. 1982); Lascari v. Board of Educ., 116 N.J. 30, 560 A.2d 1180 (1989). *Davis* appears to have been overturned silently by subsequent decisions by the Court of Appeals for the District of Columbia Circuit. *See* cases cited *infra* notes 103-04.

103. *See, e.g.*, McKenzie v. Smith, 771 F.2d 1527, 1531 (D.C. Cir. 1985); Grymes v. Madden, 672 F.2d 321, 322 (3d Cir. 1982). *Cf.* Tatro v. Texas, 703 F.2d 823, 824 (5th Cir. 1983), *aff'd in part, rev'd in part on other grounds sub nom.* Irvington Indep. School Dist. v. Tatro, 468 U.S. 883 (1984); Burger v. Murray County School Dist., 612 F. Supp. 434, 437 (D.C. Ga. 1984); Lang v. Braintree School Comm., 545 F. Supp. 1221, 1228 (D. Mass. 1982).

104. *See, e.g.*, Roland M. v. Concord School Comm., 910 F.2d 983, 991 (1st Cir. 1990); Tice v. Botetourt County School Bd., 908 F.2d 1200, 1206 (4th Cir. 1990) (citing Spielberg v. Henrico County Public Schools, 853 F.2d 256, 258 n.2 (4th Cir. 1988)); Doe v. Smith, 879 F.2d 1340, 1341 (6th Cir. 1989); Leonard v. McKenzie, 869 F.2d 1558, 1561 (D.C. Cir. 1989) (citing Kerkam v. McKenzie, 862 F.2d 884, 887 (D.C. Cir. 1988)); Hiller v. Board of Educ., 743 F. Supp. 958, 967-68 (N.D.N.Y. 1990); Hall v. Freeman, 700 F. Supp. 1106, 1111 (N.D. Ga. 1987); Tracey T. v. McDaniel, 610 F. Supp. 947, 948 (N.D. Ga. 1985).

105. 898 F.2d 1186, 1191 (6th Cir. 1990). The court in *Doe* suggested that it was following Tatro v. Texas, 703 F.2d 823, 830 (5th Cir. 1983), *aff'd in part and rev'd in part*

impact on the outcome. As it is often dispositive, resolution of the burden question is becoming increasingly urgent.

Placing the initial burden on parents misconstrues the provisions of the IDEA-B and undermines the procedural protections provided to parents. Such a burden properly belongs on the school district for a number of reasons. First, the parents lack access to the same information concerning the program and service alternatives considered by the school district.[106] The parents also lack expertise in special education programming and placement decisions and may not understand the full import of the IEP's provisions concerning goals, objectives, and evaluation criteria. The school district can plead no such ignorance. Furthermore, parents do not necessarily have an attorney at the administrative hearings to represent their child's interests and may not understand their legal rights.[107] If the parents appeal the hearing decision in court, and if they bear the burden in the administrative hearing, they are doubly burdened by the "due weight" given to the administrative record under *Rowley*.[108] Finally, the extensiveness of the IDEA-B's procedural safeguards suggests congressional intent to make school districts accountable for their decisions. The school district is far less accountable if the burden is placed on a parent to prove that an IEP is not appropriate.[109]

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sub nom. Irving Indep. School Dist. v. Tatro, 468 U.S. 883 (1984), in placing the burden on the party challenging the IEP. *See Doe*, 898 F.2d at 1191. In *Tatro*, however, the school district proposed to change a previously *agreed-upon* IEP, while in *Doe*, the parents challenged the school district's *proposed* IEP, to which they had not consented. *See Tatro*, 703 F.2d at 829; *Doe*, 898 F.2d at 1188. The IEP in *Doe* was upheld by the hearing officer, and the parents appealed the hearing decision. I therefore conclude that the court in *Doe* actually placed the burden on the party appealing the administrative decision.

106. The regulations implementing the IDEA-B require that written notice to parents include a "description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected." 34 C.F.R. § 300.505(a)(2) (1990). Notwithstanding this provision, I have seldom seen evidence in school records or court cases that schools provide parents with written explanations of district-rejected options. Even if they did, it is highly doubtful that the written notice would equalize the parents' and school district's knowledge of the school's reasoning.

107. While parents are given the right to counsel at the administrative hearing stage, *see* 20 U.S.C. § 1415(d)(1) (1988), some parents do not or cannot avail themselves of that right.

108. *See* Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982).

109. The best judicial discussion of this view can be found in the New Jersey Supreme Court decision, Lascari v. Board of Educ., 116 N.J. 30, 560 A.2d 1180 (1989) (allowing parents of dyslexic child to recover expenses of private education from school district because the goals of the school's program could not be evaluated objec-

If the school district is given the burden of proof in the administrative hearing, it may make sense to give the burden in court to the party appealing the administrative decision. Courts giving the burden of proof to the party challenging the administrative decision, however, make no reference to the burden below.[110]

Moreover, courts may confuse the *Rowley* Court's deference to school officials on methodological matters with matters of burden of proof. Although the *Rowley* Court admonished that "once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States,"[111] this does not imply broad deference to the judgment of the administrative hearing officer, nor does it imply deference to all school decisionmaking. Rather, it is deference to a state's choice of methods to attempt to achieve IEP goals and objectives. It is important to realize that methods and materials need not be specified in the IEP[112] and, therefore, deference to methods is justifiably a separate matter from deference to the proposed contents of the IEP.

Rowley mandates that the school district formulate the IEP in accordance with the requirements of the IDEA-B.[113] Compliance in form rather than substance should not be seen as meeting this mandate. In other words, the contents of the IEP matter. *Rowley* does not require the schools to provide the best education possible but only to provide meaningful access to some educational benefit. Therefore, it does not seem burdensome to ask the school district to demonstrate that: (1) its proposed goals and objectives address the student's unique needs for special education and related services; (2) the IEP delivers services addressed to those needs in a way that should or does provide some meaningful, measurable progress toward those goals and objectives; and (3) its criteria to evaluate progress are in place and can actually measure the extent to which the objectives are attained. All three matters are crucial to the appropriateness of the IEP. Without integrated attention to all three

tively, the child's progress could not be measured, and hence, the program was incapable of review).

110. *See* cases cited *supra* note 104. In the cases cited *supra* notes 101-03, the courts also failed to discuss the burden of proof at the administrative hearing level.

111. *Rowley*, 458 U.S. at 208.

112. *See* 20 U.S.C. § 1401(a)(19) (1988); 34 C.F.R. pt. 300 app. C (Question 39) (1990).

113. *See Rowley*, 458 U.S. at 203-04, 206 n.27.

requirements, schools could provide minimal special education services that appear beneficial, while shielding themselves from court review of whether the content of the services is, in fact, relevant and making any positive difference in the life of the child. Ironically, contrary to the expressed intent of *Rowley*, to attend to only some of the requirements and contents of the IEP and ignore others may be to substitute judges' ignorance about special education matters for the combined expertise of special and regular educators.

C. *The Temptation of Courts to Compare the Efficacy of Various Methods*

As noted above, the *Rowley* Court envisioned that "questions of methodology are for resolution by the states."[114] Such guidance creates no special difficulty in a situation such as Amy Rowley's, in which a dispute over competing methods of instructing the hearing impaired arose and progress was demonstrated under the method chosen by the school. In at least one situation, however, it does not function so well.

The court's decision in *Adams v. Hansen*[115] provides an example. Andy Adams, a learning-disabled student, was placed by his mother in a private school as a result of her dissatisfaction with her son's progress in a regular third-grade classroom with additional resource services of up to ninety minutes each day. The district court had access to assessment measures indicating that Andy progressed only four months in "total reading" achievement and eight months in math achievement after some twenty months (two years) of instruction in the third grade.[116] The court found this lack of progress dispositive. The court also cited *Rowley* and noted Andy's inability to achieve passing marks and advance from grade to grade under his old IEP.[117] The court could have ended its analysis at that point. It did not do so, however, because it was influenced by evaluation data indicating that Andy's specific learning disability involved defi-

114. *Id.* at 208.

115. 632 F. Supp. 858 (N.D. Cal. 1985).

116. These assessment data were based on scores on the Woodcock-Johnson test battery given to Andy Adams after two years in the third grade. After only one year in a private school, Andy's scores on the same test battery showed a two-year growth in reading ability. The judge concluded that Andy's "prior lack of growth was due to the ineffectiveness of the Resource Specialist Program." *Adams*, 632 F. Supp. at 862.

117. *See id.* at 866.

cits in auditory, visual, and sensory-motor learning modalities and that, as a result, he required an "intensive simultaneous multi-sensory approach"[118] to learning. The court accepted as valid the recommendation that this particular method of instruction was required for Andy and had not been provided in his public school setting. It placed considerable emphasis on the fact that, at a mediation conference, the school district agreed with the parents that Andy required such an approach for reading and language instruction, along with "minimal distractions; auditory sequencing; visual-motor integration; [and] small-group instruction."[119] The court determined that these objectives and methods could not be implemented in either of the placements proposed by the school district, and were being implemented successfully in the private placement.

Adams exemplifies the temptation for courts to consider, implicitly or explicitly, methodology wherever progress in a private school setting is compared to progress in a public school setting. Had the school district unequivocally challenged the need for a simultaneous multi-sensory approach, the court would still have been faced with the evidence of unsuccessful programming in the public school under one method and successful programming at the private school under another. One can hardly ignore the effectiveness of a given method in such circumstances. If Andy had been making meaningful progress under the school's chosen method, however, as apparently Amy Rowley was, then the court could have upheld it, even if it were less effective than an alternative method. On the other hand, when progress using the school's method is marginal or nonexistent, and evidence demonstrates that another method has produced significant progress, it is difficult to ignore that evidence.[120]

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118. *Id.* at 863.

119. *Id.* at 865.

120. For another case in which meaningful progress in a private-school setting is compared to no progress in a public-school setting, see Beasley v. School Bd., 6 Va. App. 206, 367 S.E.2d 738 (1987) (proposed IEP did not provide FAPE because it continued a program that had failed to teach plaintiff to read—in face of evidence that plaintiff was learning to read under different, private school program), *rev'd*, 238 Va. 44, 380 S.E.2d 884 (1989) (appeals court erred in redetermining facts established by trial court). A case in which significant progress is compared to no progress is to be differentiated from a case in which different amounts of progress are made under two different instructional methods. *See* Roland M. v. Concord School Comm., 910 F.2d 983, 992, 993 (1st Cir. 1990) ("courts should be loathe to . . . become embroiled in captious disputes as to the precise efficacy of different instructional programs"; "com-

IV. Conclusion

Courts need to hold school districts accountable for meeting the requirements of IEPs and for producing some meaningful progress toward IEP goals and objectives. "Some educational benefit" ordinarily does not result from the delivery of special education and related services unless meaningful progress can be produced by implementing the child's individualized education program. The appropriateness of IEP goals and objectives can be judged by reference to a student's multidisciplinary evaluation of eligibility and by current levels of educational performance. The result of this inquiry can then become the focus for a determination of whether the IEP is really designed to provide educational benefit across the range of the child's unique educational needs. The inquiry should also examine whether a direct relationship exists between the student's current level of educational performance and the specific services. This will make possible a determination regarding whether services are reasonably calculated to provide, or are providing, meaningful progress toward achievement of the goals and objectives.

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parative academic progress, in and of itself, is not necessarily a valid proxy for, or determinative of, the degree to which an IEP was reasonably calculated to achieve the mandated level of educational benefit"). *But cf.* Visco v. School Dist. of Pittsburgh, 684 F. Supp. 1310 (W.D. Pa. 1988) (IDEA-B does not require two hearing-impaired students to shift from successful oral instruction at private school to total communication method in public school). In determining whether two hearing-impaired students could receive a FAPE in a public-school setting, the court in *Visco* considered the effect of a change of placement and change of methodology on the quality of services needed by the children. In doing so, it referred to a little-known regulation under the IDEA-B, which states that "[i]n selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services he or she needs." *Id.* at 1315 (quoting 34 C.F.R. § 300.552(d) (1987)). The court concluded that

> [o]nce a student is making good progress in a particular program, a change must be viewed with a great degree of caution. In balancing the potential benefits against the potential harms, even if the benefits and the harms were to weigh equally, the child in question should not be moved from one program to another.

Id. In reaching this conclusion, the court in *Visco* relied on a pre-*Rowley* case, Grkman v. Scanlon, 528 F. Supp. 1032, 1036, 1037 (W.D. Pa. 1981) (court "can not escape the task of comparing [private and public] programs and determining . . . which placement is 'appropriate' "; risks of change in placement outweigh benefits when student is making satisfactory progress in private setting and when it is important to maintain momentum). The *Visco* court was concerned about loss of fundamental language skills as a result of the district-recommended method of instruction. The regulation cited above that allows for consideration of the quality of services in determining the least restrictive placement appears to conflict with the *Rowley* view that quality is not to be determinative so long as the poorer program is providing a FAPE. *See Rowley*, 458 U.S. at 207 & n.29.

In addition to paying closer attention to current levels of performance and IEP goals and objectives, courts should use the criteria specified in the IEP as measures of the student's progress toward IEP objectives, unless the criteria are being challenged by the parents. In cases in which criteria are being challenged, courts will need to base decisions on the preponderance of the evidence as to the suitability of those criteria. Although methods and materials may be examined as evidence that the school's efforts are conscientious and in good faith, courts usually will not need to determine whether one set of methods or materials might produce better benefits than another, especially because methods and materials are not required to be included in the IEP document. If a comparison of methods is unavoidable, the court can simply determine whether the school's chosen methods and materials are designed to produce (or are producing) meaningful educational progress.

Whenever a court is given evidence comparing actual progress of the student under two different methods, however, the court inevitably must make some judgment regarding whether the less effective method is effective enough to meet the *Rowley* standard of sufficient educational benefit. This judgment is not difficult if the public school's method is producing no progress. If both methods are producing some meaningful progress, *Rowley* indicates that courts are to resist the temptation to decide that the superior method is required for the student to receive a FAPE. Provision of a program conferring some educational benefit, or design of a program calculated to confer some educational benefit, remains the test of whether a FAPE is being provided.

The IEP is the statutorily designated vehicle for deciding how much benefit is enough under the *Rowley* definition of an appropriate education. While the last decade has seen intense judicial attention to the procedural provisions of the IDEA-B, it is time to focus more closely on the IEP. Together, the IEP document, its implementation, and its undergirding—the evaluation of the student's unique needs—provide a basis for evaluation of school district programming that relies both on school district expertise and parents' knowledge of the unique needs of their children. By focusing on the IEP, courts will help special educators realize the intent of the law.

SCHOOL FINANCE LITIGATION: A NEW WAVE OF REFORM

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I. INTRODUCTION

The principle of fiscal equity is founded on the belief that the education a child receives should not depend on the wealth of the district in which the child resides. Indeed, "[t]he quality of public education may not be a function of wealth other than the wealth of the state as a whole."[1] The concept of fiscal equity, however, is not one of strict equalization of resources. In many situations, the public policy objective should be to encourage differentials in spending in order to achieve greater equity in results. Fiscal equity dictates that each child, regardless of circumstances—residence, socio-economic status, national origin, or handicapping condition—be provided adequate educational opportunities.[2]

The criteria used to measure fiscal equity have changed over time. Traditionally, the major, if not sole, criterion used to evaluate fiscal equity was the per-pupil expenditure for each district. In view of the differences among districts, including the students they serve, this approach has proven to be an inadequate measure of equity. The education that some children require to meet their needs is more expensive than the educa-

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1. J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 2 (1970). *See generally* R. BERNE & L. STIEFE, THE MEASUREMENT OF EQUITY IN SCHOOL FINANCE (1984) (comprehensive philosophical discussion of the concept of equity and its application to public school finance).

2. As stated by Professor Kern Alexander:

> Herein lies the essential difference between the educational finance definition of mere equality and a more pervasive standard of equity. A system of educational finance which merely fiscally equalizes, or naturalizes, or provides equal distribution to low school districts with low fiscal capacity is admittedly inferior, on this scale of social justice, to a system which attempts to fully fiscally equalize and, in addition, to provide resources to the "least favored" children in the Rawlsian tradition.

Alexander, *Concepts of Equity*, in FINANCING EDUCATION 193, 201 (W. McMahon & T. Geske eds. 1982).

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tion required by others. For example, an education for an economically deprived, non-English speaking, or disabled child is more expensive than for an average child. Thus, the criteria used have become more result-oriented.

The issue of fiscal equity is complicated by a number of fundamental value conflicts in this area.[3] For example, there is the question of whether to adopt the "best" principle,[4] which holds that each student should have the best education possible, or the "equal" principle, which holds that each student should have an education as good as that provided for others. Another conflict arises with respect to which governmental level or branch has the authority to control the public schools. Tensions in this regard exist among the federal, state, and local governments,[5] as well as among the branches of government.[6]

3. The issues that public school finance involves, like all political issues, are value-laden. In a democratic form of government, we turn to our political institutions as forums for resolving competing interests and values. Although the courts are often viewed as an objective forum, they are in fact a passionately subjective forum for the resolution of competing interests. Litigation is based on individual advocacy. The issues are narrowed and disputed from an advocacy position. In fact, if issues were not litigated with fervor, the system would probably not work. In order to have standing to sue, a plaintiff must have a real and substantial interest in the outcome of the litigation. *See* Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 202 (Ky. 1989) (discussing the standing of local school boards). Although judges making final decisions apply the law to the facts in front of them, their decisions are not devoid of value judgments or subjective determinations. Likewise, legislatures make value-laden decisions in an attempt to resolve value conflicts. Because elected officials represent diverse and often competing values and interests in our society, their solutions reflect these conflicts.

4. The "best" principle is reflected in the following assertion by the American philosopher, John Dewey:

> What the best and wisest parent wants for his own child, that must the community want for all its children. Any other ideal for our schools is narrow and unlovely; acted upon it destroys our democracy. . . . Only by being true to the full growth of all the individuals who make it up, can society by any chance be true to itself.

J. DEWEY, THE SCHOOL AND SOCIETY 19-20 (1900), *reprinted in* 1 JOHN DEWEY: THE MIDDLE WORKS, 1899-1924, at 5 (A. Boydston ed. 1976).

5. Education is not mentioned in the United States Constitution. It is generally accepted as a truism that because of the Reserved Powers Clause, education is a state function. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); Rossmiller, *Federal Funds: A Shifting Balance?*, in THE IMPACTS OF LITIGATION AND LEGISLATION ON PUBLIC SCHOOL FINANCE: ADEQUACY, EQUITY, AND EXCELLENCE 3, 3 (J. Underwood & D. Verstegen eds. 1990); *see also* Alexander, *Equitable Financing, Local Control, and Self-Interest*, in THE IMPACTS OF LITIGATION AND LEGISLATION ON PUBLIC SCHOOL FINANCE: ADEQUACY, EQUITY, AND EXCELLENCE, *supra*, at 293, 297 (discussing the concept of local control).

6. Courts currently defer issues involving competing social values to the legislative branch of government. For example, in the school finance context, in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), although the Texas system of finance was "chaotic and unjust," one justice observed that "the ultimate solution must

Fiscal equity advocates generally have concentrated their efforts on state legislatures and in federal and state courts. Historically, these arguments were made at the state level, reflecting the belief that education is exclusively within the realm of state authority.[7] During the height of the civil rights

come from the lawmakers and from the democratic pressure of those who elect them." *Id.* at 59 (Stewart, J., concurring). The majority stated:

> In addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. Education, perhaps even more than welfare assistance, presents a myriad of "intractable economic, social and even philosophical problems". . . . [W]ithin the limits of rationality, "the legislature's efforts to tackle the problems" should be entitled to respect.

Id. at 42 (citations omitted).

The Texas Court of Appeals similarly deferred to the legislative branch in Edgewood Indep. School Dist. v. Kirby, 761 S.W.2d 859 (Tex. Ct. App. 1988), referring to the interpretation of that state's education clause as a "political question." *Id.* at 867. The court stated:

> [Article VII, Section One of the Texas Constitution] does, of course, require that the school system be "efficient" . . . . Given the enormous complexity of a school system educating three million children, this Court concludes that which is, or is not, "efficient" is essentially a political question not suitable for judicial review.

Id. This language was noted with disapproval by the Texas Supreme Court in its decision reversing the court of appeals, Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391, 394 (Tex. 1989).

The New Jersey Supreme Court has also spoken to the risk of interbranch conflict:

> That potential confrontation [among the branches of government] concerns one of the most important functions of government—education—and involves substantial public funds, implicates the taxing power, and is potentially of a continuing nature. The Legislature's role in education is fundamental and primary; this Court's function is limited strictly to constitutional review. The definition of the constitutional provision by this Court, therefore, must allow the fullest scope to the exercise of the Legislature's legitimate power.

Abbott by Abbott v. Burke, 110 N.J. 287, 304, 575 A.2d 359, 367 (1990). *See also* Kukor v. Grover, 148 Wis. 2d 469, 502, 436 N.W.2d 568, 581-82 (1989).

7. As noted above, it is generally accepted that education is exclusively a state function. *See supra* note 5. Courts have adopted this view in discussions of whether access to public education or receipt of a minimal education is a federal constitutional right. *See infra* text accompanying notes 30-40. As stated by the Supreme Court: "Today, education is perhaps the most important function of state and local governments." Brown v. Board of Educ. of Topeka, 347 U.S. 483, 493 (1954).

Nevertheless, over time the federal government has become increasingly involved in public school education. This involvement has come primarily through the provision of federal funds. *See, e.g.*, 20 U.S.C. § 236 (1988) (block grant of federal funds for education); Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400-1485 (1988)) (federal funding and regulation of the education of handicapped children). The federal government also regulates schools that receive federal funds. *See, e.g.*, Education Amendments of 1972, Pub. L. No. 92-318, §§ 901-908, 88 Stat. 235, 373-75 (codified as amended at 20 U.S.C. §§ 1681-1687 (1988)) (prohibiting discrimination on the basis of sex); Family Education Rights and Privacy Act of 1974, Pub. L. No. 93-380, § 513, 88 Stat. 484, 571-74 (codified as amended at 20 U.S.C. § 1232g (1988)); Equal Access Act, Pub. L. No.

movement and federal judicial activism, the legal theories for litigating fiscal equity cases in the federal courts were developed. Because of the length of the litigation process,[8] however, many cases were ultimately decided by less activist federal courts. Advocates, therefore, have returned to state courts and legislatures to effect change.

II. Litigation Theories

Generally, three litigation approaches are used in school fi-

98-377, §§ 801-805, 98 Stat. 1267, 1302-04 (1984) (codified at 20 U.S.C. §§ 4071-4072 (1988)).

In addition, schools have been affected by Congress's increasing exercise of authority over states through the Commerce Clause. *See* U.S. Const. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States."); Lipner, *Imposing Federal Business on Officers of the States: What the Tenth Amendment Might Mean*, 57 Geo. Wash. L. Rev. 907 (1989); Murchison, *The Burger Court and the Commerce Clause: An Evaluation of the Role of State Sovereignty*, 60 Notre Dame L. Rev. 1056 (1985).

Public education is not beyond the scope of congressional control. Congress, however, has been more willing to regulate than to fund. Education, and specifically the financing of education, has been held to be the province of state authorities. As stated recently by the Supreme Court: "[N]o matter has been more consistently placed upon the shoulders of local government than that of financing public schools." Missouri v. Jenkins, 110 S. Ct. 1651, 1663 (1990).

8. Significant problems arise in fiscal equity litigation because of the lengthy process. For example, the legislature of a state involved in school finance litigation might enact a new school finance law or amend its present law during the pendency of the case. Such legislation might render a subsequent judgment moot. *See, e.g.*, Knowles v. State Bd. of Educ., 219 Kan. 271, 278-80, 547 P.2d 699, 705-06 (1976) (vacating order dismissing case as moot because of intervening legislation). If the parties so stipulate, the new legislation might become the subject of the lawsuit. *See, e.g.*, Serrano v. Priest, 18 Cal. 3d 728, 736-37, 557 P.2d 929, 931-32, 135 Cal. Rptr. 345, 347-48 (1976) (*Serrano II*). In cases in which a court has retained jurisdiction after declaring a school finance law unconstitutional, it may decide to rule on motions challenging newly enacted legislation in order to expedite the judicial process, even though the law has not gone into effect. In such cases, the court is in the position of ruling on the facial validity of the law rather than the program's actual operation. *See, e.g.*, Robinson v. Cahill, 69 N.J. 449, 355 A.2d 129 (1976) (*Robinson II*).

School finance cases frequently are remanded numerous times before being resolved. The most notable example of this tendency occurred in New Jersey. *See infra* notes 81-87 and accompanying text. Changes in the courts' personnel during such a case's pendency can alter the outcome of litigation. For example, in 1974, the Washington Supreme Court upheld the constitutionality of the state school finance system. *See* Northshore School Dist. No. 417 v. Kinnear, 84 Wash. 2d 685, 530 P.2d 178 (1974). Four years later, though, the same court ruled that the special excess levy was an unconstitutional method of discharging the state's duty to educate children. *See* Seattle School Dist. No. 1 v. Washington, 90 Wash. 2d 476, 585 P.2d 71 (1978) (en banc). Justice Stafford, who wrote a dissenting opinion in 1974, wrote the majority opinion in 1978.

As factors change within the school districts, such as local wealth, educational needs, and taxation methods, or as economic changes brought about by inflation or recession affect a state's fiscal outlook, school finance reform legislation may be ineffective in reducing fiscal disparities. Furthermore, changes to the school finance formula itself may fail to rectify inequities.

nance equity cases. Two center on the constitutional theory of equal protection. In the first of these approaches, plaintiffs argue that the state unjustifiably treats students who reside in poorer districts differently from those who reside in more affluent districts by allowing a disparity to exist in the funding of educational programs. The other argument based on equal protection is that the lower funding level in poorer districts results in a deprivation of education to students who reside in these districts. The third approach is to rely on the education article of the individual state's constitution as a basis for relief.

A. *Differential Treatment*

Most school finance equity cases have focused on the argument that the differential treatment of students from poor districts and students from wealthy districts, in terms of money expended per student, is a violation of the Equal Protection Clause.[9] Equal protection guarantees require that similarly situated persons be treated similarly, or that differential treatment of persons be justified by classifications based on actual differences among people.[10] The standard of review generally applied in school finance equity litigation has been traditional rationality, upholding school finance formulae if they are rationally related to a legitimate state interest.

In fact, the United States Supreme Court, in the two cases it has considered involving school finance equity litigation, has stated that the appropriate level of scrutiny in analyzing a disparity in funding argument is the lowest level, that is, the ra-

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

10. To determine the reasonableness of a governmental classification scheme under the Equal Protection Clause, a three-tier approach has evolved. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 644 (3d ed. 1986). For most classifications, a rational-basis test is applied. The classification scheme is upheld if it is rationally related to a legitimate state interest. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-2 (2d ed. 1988). When the state uses a "suspect" classification in treating groups differently, a stricter level of scrutiny is employed. A classification is deemed "suspect" if it affects a group of persons who are isolated, have immutable characteristics, and are politically powerless. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); L. TRIBE, *supra*, § 16-6. *See also* Ambach v. Norwich, 441 U.S. 68 (1979) (alienage); Graham v. Richardson, 403 U.S. 365 (1971) (national origin); Loving v. Virginia, 388 U.S. 1 (1967) (race). To be upheld, such a classification must be narrowly tailored to further a compelling state interest. Finally, intermediate scrutiny has been applied in cases where the court was reluctant to deem a particular classification "suspect," yet wanted to afford some protection. To pass intermediate scrutiny, a classification must be substantially related to an important governmental interest. *See, e.g.*, Lalli v. Lalli, 439 U.S. 259 (1978) (illegitimacy); Craig v. Boren, 429 U.S. 190 (1976) (gender).

tional-basis test. In *San Antonio Independent School District v. Rodriguez*,[11] the Court stated that wealth itself does not constitute a suspect classification.[12] Even if wealth were suspect, the Court found that differential treatment in school finance litigation is based not on individual wealth, but on school district wealth. The classification of children living within a poor school district, however, does not fit the established criteria for suspect classification: isolation, immutable characteristics, and political powerlessness.[13] The traditional level of scrutiny was therefore applied, and the disparity in funding was upheld as a result of the state's legitimate interest in preserving local control of education.[14] Thirteen years later, in *Papasan v. Allain*,[15] the Supreme Court reiterated its view that the rational-basis test is the correct standard;[16] however, it vacated the court of appeals decision and remanded the case for further factual findings to determine whether the disparities were actually ra-

11. 411 U.S. 1 (1973). The plaintiffs in this litigation alleged that the funding disparity between more and less affluent school districts in the state of Texas was a violation of the federal Equal Protection Clause. Two districts within the San Antonio area were used for comparison: Edgewood was an inner-city district, Alamo Heights was an affluent residential district. In Edgewood, a district with low property values, the annual local contribution to the education program was $26 per pupil, and the state minimum foundation program contributed $222. Federal funds added $108 for a total expenditure of $356 per pupil per year. In Alamo Heights, a district with high property values, the local share was $333 (even with a lower local tax rate than Edgewood), and the foundation program contributed $225. Federal funds contributed $36 for a total expenditure of $594 per student annually. The plaintiffs argued that this system of financing public schools discriminated against the poor citizens of Texas by providing them with an inferior education. *See Rodriguez*, 411 U.S. at 13.

12. *See id.* at 28.

13. *See id.*

14. *See id.* at 43.

15. 478 U.S. 265 (1986). The plaintiffs in *Papasan* argued that their districts received far less money per pupil than did other districts in Mississippi. The case, however, involved a rather complicated set of facts. Since 1802, in almost every state admitted to the Union, certain parcels of land have been set aside in each school district to generate revenue for public schools. In the plaintiffs' districts, the lands originally set aside to generate revenue for public schools had been sold, and the proceeds invested in the state railroad, in 1856. That investment was later lost when the railroads were destroyed in the Civil War. To compensate for this loss, the state appropriated a sum in the approximate amount of the original interest paid on the land investment. In 1981, this sum amounted to $0.63 per pupil, compared to the average income of $75.34 per pupil from school lands in other districts. *See Papasan*, 478 U.S. at 273. In 1981, the plaintiff school districts and the children residing in them challenged the funding disparity. Among their allegations was that the disparities in the level of financial support between the districts deprived the children in the poorer districts of equal protection. *See id.* at 274.

16. The Court stated: "Concentrating . . . on the disparities in terms of Sixteen Section Lands benefits . . . we were persuaded . . . that *Rodriguez* indicated the applicable standard of review." *Id.* at 286.

tionally related to a legitimate state interest.[17]

The *Rodriguez* standard of rationality is typically applied without question by courts[18] when they are faced with an equal protection challenge based on differential treatment due to funding disparities.[19] In fact, in only four cases have courts ap-

17. The district court originally dismissed the complaints, holding that they were barred "by the applicable statute of limitations and by the Eleventh Amendment." *Id.* at 275. The Fifth Circuit Court of Appeals affirmed the decision, although it reversed the specific holding regarding the applicability of Eleventh-Amendment immunity. *See* Papasan v. United States, 756 F.2d 1087 (5th Cir. 1985). The Supreme Court affirmed the court of appeals decision regarding Eleventh-Amendment immunity, but vacated and remanded the case for further factual findings on the equal protection issue. Interestingly, Justice White, who dissented in *Rodriguez*, wrote the opinion for the Court in *Papasan*.

18. A number of school finance equity challenges based on equal protection provisions of state constitutions have been brought in state courts. The application of the federal standard of equal protection to the equal protection provisions of state constitutions presents an interesting issue. Beginning in the late 1970s and continuing into the early 1980s, legal scholars began to focus on the role of state courts in constitutional analysis. Many argued that state courts should make an independent evaluation of standards rather than automatically adopt federal standards. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 504 (1977); Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1050 (1985); Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1224 (1985) [hereinafter Williams, *Equality Guarantees*]. Federal standards may be inappropriate because of differences between the state and federal judicial systems and constitutions. *See* Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C.L. REV. 353, 404 (1984).

Only 18 states have specific equal protection clauses in their constitutions: ALASKA CONST. art. I, § 1; CAL. CONST. art. I, § 7; CONN. CONST. art. I, § 20; GA. CONST. art. I, § 1; HAW. CONST. art. I, § 5; IDAHO CONST. art. I, § 2; ILL. CONST. art. I, § 2; KAN. BILL OF RIGHTS; LA. CONST. art. I, § 3; ME. CONST. art. I, § 6-A; MICH. CONST. art. I, § 2; MONT. CONST. art. II, § 4; N.M. CONST. art. II, § 18; N.Y. CONST. art. I, § 11; N.C. CONST. art. I, § 19; OHIO CONST. art. I, § 2; S.C. CONST. art. I, § 3; and UTAH CONST. art. I, § 2. If a state constitution contains no specific equal protection guarantee, courts have determined that other provisions embody this principle. *See, e.g.*, Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1014 (Colo. 1982) (due process clause encompasses equal protection principle); McDaniel v. Thomas, 248 Ga. 632, 646, 285 S.E.2d 156, 166 (1981) (equal protection contained in the clause, "[p]rotection to person and property is the paramount duty of government, and shall be impartial and complete"). *See also* Williams, *Equality Guarantees, supra*, at 1197.

Some state courts have adopted the federal standards of review at face value and have not made independent inquiries into suspect classifications and fundamental rights. *See, e.g.*, Northshore School Dist. No. 417 v. Kinnear, 84 Wash. 2d 685, 530 P.2d 178 (1974). On the other hand, some courts have followed federal equal protection standards, but have conducted their own independent analyses of the claims based on their respective state constitutions. *See, e.g.*, Horton v. Meskill, 172 Conn. 615, 641-42, 376 A.2d 359, 371 (1977). Finally, some courts have rejected the federal doctrine, and applied their own analytical framework. *See, e.g.*, Robinson v. Cahill, 62 N.J. 473, 491-92, 303 A.2d 273, 282 (1973) (*Robinson I*); Olsen v. Oregon, 276 Or. 9, 20-21, 554 P.2d 139, 145 (1976).

19. *See, e.g.*, Livingston School Bd. v. Louisiana State Bd. of Educ., 830 F.2d 563, 568 (5th Cir. 1987). In litigation in state courts, the rational-basis standard is also typically adopted. In Northshore School Dist. No. 417 v. Kinnear, 84 Wash. 2d 685, 530 P.2d 178 (1974), the court found no suspect class, used a rational-basis test, and upheld the

plied a higher level of scrutiny based on an argument of differential treatment.[20] In those cases, the courts found a suspect classification, applied strict scrutiny, and struck down the state schemes as unconstitutional.

As the Supreme Court's ruling in *Papasan* indicates, the application of the rational-basis test does not guarantee that the challenged school financing formula will be upheld. Moreover, the Court's language in *Papasan* can be interpreted as a narrowing of the ruling in *Rodriguez*. The Court stated that *Rodriguez* did not "purport to validate all funding variations that might result from a State's public school funding decision."[21] Funding disparities may constitute an equal protection violation, the Court stated, when it can be shown that they are not rationally related to a legitimate state interest. The Court was unable to pursue the issue further in *Papasan* because the district court had dismissed the claims without making the necessary factual determination. The factual differences between *Rodriguez*, in which the state funding scheme passed the rational-basis test, and *Papasan* might therefore require a different result. *Papasan*, which involved only disparities between districts that received substantial school land funds and those that did not, did not involve a challenge to the overall system of state school finance, as did *Rodriguez*. In *Rodriguez*, the funding disparities arose from local decisions regarding funds derived from local property taxes; in *Papasan*, the disparities arose directly from the state's decision regarding the level of compensation for the school land funds lost by the plaintiff districts. Granting credence to these differences, the Court in *Papasan* concluded that the facts provided a sufficient basis on which the plaintiffs could allege a federal equal protection violation.[22]

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state financing scheme as constitutional. *Accord* Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982); Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635 (1975); Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 458 A.2d 758 (1983); Board of Educ., Levittown v. Nyquist, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982); Fair School Finance Council of Oklahoma, Inc. v. Oklahoma, 746 P.2d 1135 (Okla. 1987).

20. *See Serrano II*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976) (district wealth found to be suspect); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (*Serrano I*) (district wealth and wealth of residents found to be suspect); Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859 (1979) (various classifications found to be suspect); Washakie County School Dist. v. Herschler, 606 P.2d 310 (Wyo. 1980) (district wealth found to be suspect).

21. *Papasan*, 478 U.S. at 287.

22. *See id.* at 287-89.

In sum, the courts will apply a rational-basis test to evaluate an equal protection claim based on unequal funding between poor and wealthy districts. If a rational relationship to a legitimate state interest exists, the financing program will survive. *Papasan* contains specific language indicating that plaintiffs may be successful at this minimum level of scrutiny in challenging disparate funding levels. The question then is whether the courts are willing to accept the theoretical rationales for disparate funding levels as legitimate. Most courts have been willing to accept local control of public education as a legitimate state purpose. Thus, financing structures that allow for disparities in funding while ensuring a minimum foundation program are generally seen by courts as rationally related to the objective of local control.[23] A court, however, could just as easily see the purpose of a school funding formula to be the equitable provision of education to all children of the state. If this posture were taken, it would be easy for the court to conclude that funding disparities do nothing to further this state interest.[24] As such, the funding formula would be found unconstitutional under minimum equal protection scrutiny.

B. *Educational Deprivation*

The theory of "substantive equal protection" is often employed to challenge state action that impinges on an individual's rights.[25] Crucial to the outcome of a school finance equity

23. *See, e.g., Livingston School Board*, 830 F.2d at 572.

24. *See, e.g.*, DuPree v. Alma School Dist. No. 30, 279 Ark. 340, 651 S.W.2d 90 (1983); *see also Rodriguez*, 411 U.S. at 63-75 (White, J., dissenting).

25. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 10, at 367-72. Substantive equal protection is really a reincarnation of substantive due process; the only difference between the two is the constitutional provision upon which the challenge is based. The analysis remains the same under both theories. The Supreme Court rejected the substantive due process approach as a control over economic and social welfare legislation in 1937; as a result, litigants and courts in recent years have shifted many claims involving the substance of state action from due process challenges to equal protection challenges. This has been styled the "new" equal protection. *See* Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). The "new" equal protection doctrine has not been without its critics. *See, e.g.*, Williams v. Illinois, 399 U.S. 235, 259 (1970) (Harlan, J., concurring) (emphasis in original):

> The "equal protection" analysis of the Court is, I submit, a "wolf in sheep's clothing," for that rationale is no more a masquerade of a supposedly objective standard for *subjective* judicial judgment as to what state legislation offends notions of "fundamental fairness." Under the rubric of "equal protection" this Court has in recent times effectively substituted its own "enlightened" social philosophy for that of the legislature no less than did in the older days

challenge under the theory of substantive equal protection is the importance of a public school education within the framework of fundamental liberties. A determination that public school education is a fundamental right, for example, implies that the school financing plan in question must survive strict scrutiny. Under strict scrutiny, the state must justify its actions by showing that they are narrowly tailored to achieve a compelling state interest.[26] A determination that a public school education, although not a fundamental right, falls within the middle tier of individual interests that are afforded some protection would trigger intermediate scrutiny; the state would be required to show that denial of an education is substantially related to some important state interest.[27]

At this point, it is unclear whether state actions impinging on the right to a public school education trigger heightened scrutiny under federal substantive equal protection analysis. Although education is not explicitly a federal constitutional right, each individual deserves access to the opportunity to develop the skills necessary to be a productive member of society and to be able to participate in the democratic process.[28] In *Papasan*, the Supreme Court deliberately left the issue unresolved, stating: "As *Rodriguez* and *Plyler* indicate, this Court has not yet definitively settled the question whether a minimally adequate education is a fundamental right and whether a

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the judicial adherents of the now discredited doctrine of "substantive" due process.

In both substantive equal protection and substantive due process suits, individuals challenge the substance of a state action that has restricted their liberties or rights. The state must justify the restriction with an overriding governmental concern. Courts have grown increasingly dissatisfied with rigid classifications of what constitute overriding governmental concerns and are thus moving toward a three-tier or basic reasonableness approach. To justify an imposition on an individual's general (not constitutional) liberties or interests, the state must show only that its action was rationally related to a legitimate state interest. *See* L. TRIBE, *supra* note 10, § 16-2. The middle level of scrutiny is reserved for those individual interests that are important but not raised to the level of constitutional rights. To justify a restriction on this tier, the state must show that its action was substantially related to some important state interest. *See* Plyler v. Doe, 457 U.S. 202 (1982). Strict scrutiny is applied only in those situations in which the governmental action deprives a person of a constitutionally protected right. To justify this deprivation, the state must show the action was necessary to achieve a compelling state interest. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (right to privacy and personal autonomy); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to interstate travel); Loving v. Virginia, 388 U.S. 1 (1967) (right to marry); Harper v. Virginia State Bd. of Election, 383 U.S. 663 (1966) (right to vote). This approach parallels the three levels of scrutiny used in substantive due process analysis.

26. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

27. *See* Plyler v. Doe, 457 U.S. 202 (1982).

28. *See, e.g., id.* at 221-23.

statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review."[29]

1. *Education as a Federal Constitutional Right*

In *Brown v. Board of Education of Topeka*,[30] the Supreme Court stated that education is one of the most important state functions and is vital to the development of an informed citizenry.[31] The Court retreated from this language in *Rodriguez* when it found no explicit constitutional right to public school education in the school finance equity context.[32] In the 1982 case of *Plyler v. Doe*,[33] however, the Court applied intermediate scrutiny in ruling on the constitutionality of a statute that excluded undocumented alien children from public school attendance.[34]

29. *Papasan*, 478 U.S. at 285-86. The Court's holding focused on the disparities in the funding system and not on whether a minimally adequate education is a fundamental right.

30. 347 U.S. 483 (1954).

31. As Justice Warren stated:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Brown, 347 U.S. at 493.

32. *See Rodriguez*, 411 U.S. at 35. In *Rodriguez*, the Court declined to apply heightened scrutiny because it did not find public school education to be a fundamental right. Some identifiable quantum of education, however, may be a constitutionally protected prerequisite to the meaningful exercise of other constitutional rights. As the Court noted:

> Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

Id. at 37.

33. 457 U.S. 202 (1982).

34. The Texas statute withheld "from local school districts any state funds for the education of children who were not 'legally admitted' into the United States." *Plyler*, 457 U.S. at 205 (citing TEX. EDUC. CODE ANN. § 21.031 (Vernon Supp. 1981)). The statute also "authorized local districts to deny enrollment . . . to children not 'legally admitted' to the country." *Id.* (citing TEX. EDUC. CODE ANN. § 21.031 (Vernon Supp. 1981)). The Court determined that Texas violated the Fourteenth Amendment's Equal

Although still not recognizing education as a constitutionally protected right, the Court determined that the case involved an "area of special constitutional sensitivity,"[35] one requiring that the state distinction be substantially related to the furtherance of "some substantial goal of the state."[36] Thus, the Supreme Court softened slightly the impact of *Rodriguez* less than ten years after that decision.[37]

The Court again avoided resolving the issue whether there is a constitutional right to education in *Kadrmas v. Dickinson Public Schools*.[38] *Kadrmas* involved the constitutionality of a state law permitting certain school districts to charge a school bus fee. The case was distinguished from *Plyler* because the user fee did not "promot[e] the creation and perpetuation of a sub-class of illiterates within our boundaries."[39] As pointed out by Justice Marshall in his dissent:

> The Court therefore does not address the question whether a state constitutionally could deny a child access to a mini-

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Protection Clause by refusing to provide undocumented alien children with the same educational services that were provided to other children residing in the state. *See id.* at 210-16.

35. *Id.* at 226.

36. *Id.* at 224. The Court emphasized that the opportunity to acquire an education is very important in our society. In language reminiscent of *Brown*, written nearly 30 years earlier, the Court stated:

> [E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.

Id. at 221.

37. The Court distinguished *Plyler* from *Rodriguez* by noting that in *Plyler*, the children were totally excluded from the educational system, whereas in *Rodriguez* children residing in poor districts merely received unequal funding. In addition, the classification of undocumented alien children itself might warrant strict scrutiny under a differential-treatment theory. *See id.* at 224-26.

38. 487 U.S. 450 (1988). In an effort to encourage school consolidation, North Dakota allowed non-reorganized districts to assess fees for bus transportation, but did not allow reorganized districts to do so. *See* N.D. CENT. CODE § 15-43-11.2 (1981). Sarita Kadrmas, an indigent student in a nonreorganized district, did not pay the transportation fee assessed; therefore, she was not allowed to use the school bus. She did, however, attend school using private transportation. The Kadrmas family alleged that the charging of a bus fee was a violation of equal protection. The Court, finding no equal protection violation, noted that Sarita was not denied an education and that the fee could, in fact, be waived by the school board if the parents were unable to pay. *See Kadrmas*, 487 U.S. at 458.

39. *Kadrmas*, 487 U.S. at 459 (quoting *Plyler*, 457 U.S. at 230). This distinction recasts the issue in *Plyler* more as one of classification of students rather than one of exclusion from public school education. The Court also noted that Sarita Kadrmas actually was not denied admission to the school; she was only denied free transportation to it. *See id.* at 459-60.

mally adequate education. In prior cases, this Court explicitly has left open the question whether such a deprivation of access would violate a fundamental constitutional right. That question remains open today.[40]

2. *Education as a State Constitutional Right*

A state constitutional claim of educational deprivation takes the form of an argument that the state's education article[41] establishes education as a fundamental right and that any infringement of that right triggers strict scrutiny of the state action in question. A court hearing such a claim must determine whether education is in fact a fundamental right under the respective state constitution, and, if so, whether that right has been violated by the educational deprivations resulting from the fiscal disparities. This inquiry requires courts to determine the nature of the constitutional right and the level of scrutiny to be used in determining whether the legislature has acted consistently with that right.

State courts disagree on whether education is a fundamental right under their respective state constitutions. The language in different state constitutions vary, and state courts differ in interpreting similar provisions and in construing what is fundamental under their states' constitutions. Most state courts, however, reject the Supreme Court's view that a fundamental right is one that is "explicitly or implicitly guaranteed by the Constitution."[42]

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40. *Id.* at 466 n.1 (Marshall, J., dissenting) (citations omitted).

41. *See infra* text accompanying notes 54-62. The education article of a state constitution is that provision containing some statement about the state's role or the legislature's obligation in public school education. The state education articles are typically invoked in school finance equity litigation either by alleging that they create a state constitutional right to an education or, more directly, by alleging that the finance program in the state does not fulfill the obligation set forth in the constitution.

42. *Rodriguez*, 411 U.S. at 33-34. Only two states have accepted the *Rodriguez* formulation. In 1974, the Washington Supreme Court followed *Rodriguez* explicitly and refused to give education standing as a fundamental right, but that decision was reversed four years later, Northshore School Dist. No. 417 v. Kinnear, 84 Wash. 2d 685, 530 P.2d 178 (1974), *rev'd on other grounds*, Seattle School District No. 1 v. Washington, 90 Wash. 2d 476, 585 P.2d 71 (1978) (en banc). The Arizona Supreme Court followed the *Rodriguez* formulation but determined that education is a fundamental right. *See* Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973).

State courts have more commonly rejected the *Rodriguez* approach altogether. The New Jersey Supreme Court, in rejecting an equal protection claim, stated:

> [W]e have not found helpful the concept of a "fundamental" right. No one has successfully defined the term for this purpose. Even the proposition discussed in *Rodriguez* . . . is immediately vulnerable, for the right to acquire and hold

The highest courts of seven states have determined that education is not a fundamental right provided by the state constitution.[43] For example, New York's highest court observed that public education is not automatically entitled to designation as a fundamental right even though it is an important priority of government, involves the expenditure of enormous sums of money, and is an explicit provision of the New York Constitution.[44]

The highest courts of six states have determined that education is a fundamental right provided by the state constitution.[45]

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property is guaranteed in the Federal and State Constitutions, and surely that right is not a likely candidate for such preferred treatment.

Robinson v. Cahill, 62 N.J. 473, 491, 303 A.2d 273, 282 (1973) (*Robinson I*). The supreme courts of Georgia and Idaho have noted with approval the New Jersey Supreme Court's discussion of fundamental rights. *See* McDaniel v. Thomas, 248 Ga. 632, 646, 285 S.E.2d 156, 166-67 (1981); Thompson v. Engelking, 96 Idaho 793, 804, 537 P.2d 635, 646 (1975).

Courts in Colorado, Georgia, Idaho, Maryland, New York, and Oklahoma have rejected the *Rodriguez* formulation, but nevertheless have refused to find education to be a state fundamental right. *See* Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1017-18 (Colo. 1982) (en banc); McDaniel v. Thomas, 248 Ga. 632, 645-47, 285 S.E.2d 156, 166-67 (1981); Thompson v. Engelking, 96 Idaho 793, 802-05, 537 P.2d 635, 644-47 (1975); Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 650, 458 A.2d 758, 786 (1983); Board of Educ., Levittown v. Nyquist, 57 N.Y.2d 27, 43-44, 439 N.E.2d 359, 365-66, 453 N.Y.S.2d 643, 650 (1982); Fair School Finance Council of Oklahoma, Inc. v. Oklahoma, 746 P.2d 1135, 1149-50 (Okla. 1987). Courts in California, Connecticut, West Virginia, Wisconsin, and Wyoming concluded that the *Rodriguez* decision was applicable only to federal equal protection claims, but that there were adequate and independent state grounds to determine that education was a state fundamental right. *See Serrano II*, 18 Cal. 3d 728, 763-66, 557 P.2d 929, 949-51, 135 Cal. Rptr. 345, 365-67 (1976); Horton v. Meskill, 172 Conn. 615, 641-45, 376 A.2d 359, 371-73 (1977); Pauley v. Kelly, 162 W. Va. 672, 707, 255 S.E.2d 859, 878 (1979); Buse v. Smith, 74 Wis. 2d 550, 567, 247 N.W.2d 141, 149 (1976); Washakie County School Dist. No. 1 v. Herschler, 606 P.2d 310, 332-33 (Wyo. 1980). It thus appears that whether a court bases its analysis on the *Rodriguez* formulation has little effect on whether the court finds education to be a fundamental right.

43. *See* Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982) (en banc); McDaniel v. Thomas, 248 Ga. 632, 285 S.E.2d 156 (1981); Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635 (1975); Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 458 A.2d 758 (1983); Board of Educ., Levittown v. Nyquist, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982); Fair School Finance Council of Oklahoma, Inc. v. Oklahoma, 746 P.2d 1135 (Okla. 1987); Northshore School Dist. No. 417 v. Kinnear, 84 Wash. 2d 685, 530 P.2d 178 (1974).

The Arkansas Supreme Court ruled that it was unnecessary to determine whether education was fundamental because the school finance system failed the rational-basis test. *See* Dupree v. Alma School Dist. No. 30, 279 Ark. 340, 651 S.W.2d 90 (1983). On two occasions, the New Jersey Supreme Court has addressed whether education is a fundamental right in a school finance context, finding that the concept was not "helpful," *Robinson I*, 62 N.J. at 491, 303 A.2d at 282, and, later, that it had "no talismanic significance." Abbott by Abbott v. Burke, 100 N.J. 287, 295, 495 A.2d 359, 390 (1990). The court rejected the equal protection claims altogether and based its decision on the state's education article. *See infra* notes 81-87 and accompanying text.

44. *See Levittown*, 57 N.Y.2d at 43, 439 N.E.2d at 366, 453 N.Y.S.2d at 650.

45. *See* Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973); *Serrano I*, 5 Cal. 3d

The California Supreme Court felt compelled to treat education as a fundamental interest because of the "distinctive and priceless function of education in our society."[46] The court observed that education is essential to a free enterprise democracy, is universally relevant, continues over a lengthy period of life, molds the personality of young people, and is so important that the state has made it compulsory.[47] The Wyoming Supreme Court concluded that education is a fundamental right because of the emphasis placed on it in the state's constitution.[48] Legislative involvement in education since the framing of the state's constitution convinced the Wisconsin Supreme Court that education is a fundamental right.[49]

As is the case for differential treatment claims, state courts do not necessarily apply the federal formulation of scrutiny to determine whether the state is justified in impinging on an individual's right to an education. In each case in which a court has held that education is not a fundamental right, the court has sustained the constitutionality of the school finance law by finding a rational relationship between the school finance laws and a legitimate state interest, usually local control of education.[50] In cases in which state courts have found education to be a fundamental state interest, however, the analyses have varied. Four of the six state courts invoked strict scrutiny to test the equal protection claims.[51] In each of the cases in which strict scrutiny has been invoked, the school finance system was declared unconstitutional. Nevertheless, a finding that education is a state constitutional right does not necessarily ensure that the school financing scheme will be invalidated. The supreme

584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977) (*Horton I*); Pauley v. Kelley, 162 W. Va. 672, 255 S.E.2d 859 (1979); Kukor v. Grover, 148 Wis. 2d 469, 436 N.W.2d 568 (1989); Washakie County School Dist. v. Herschler, 606 P.2d 310 (Wyo. 1980).

46. *Serrano I*, 5 Cal. 3d at 608-09, 487 P.2d at 1258, 96 Cal. Rptr. at 618.

47. *See id.*

48. *See Herschler*, 606 P.2d at 333.

49. *See Kukor*, 148 Wis. 2d at 496, 436 N.W.2d at 579.

50. *See* cases cited *supra* note 42.

51. *See Serrano II*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976); *Horton I*, 172 Conn. 615, 376 A.2d 359 (1977); Pauley v. Kelley, 162 W. Va. 672, 255 S.E.2d 859 (1979); Washakie County School Dist. v. Herschler, 606 P.2d 310 (Wyo. 1980). *But see* Horton v. Meskill, 195 Conn. 24, 486 A.2d 1099 (1985) (*Horton II*) (remanding to determine whether the statutes furthered a rational state policy).

The Wisconsin Supreme Court found education to be a constitutional right, but concluded that the plaintiffs had not been deprived of that right because each of the districts provided an education that met minimum state standards. *See Kukor*, 148 Wis. 2d at 496-97, 436 N.W.2d at 579 (citing WIS. STAT. § 121.02).

courts of Arizona and Connecticut, after finding education to be a state constitutional right, upheld school financing systems as justifiable deprivations of that right.[52]

According to the courts, in order to prevail under a deprivation theory, it must be argued successfully that the plaintiffs were not receiving a minimum level of education, and that deprivation of minimal education triggers heightened scrutiny under the federal or state equal protection clause. It must also be proven that the plaintiffs have not been provided with a minimal level of education, thereby producing a constitutional violation. The history of school finance litigation shows that this latter element is more easily established by focusing on an individual's needs and the opportunities offered by the system to meet those needs, rather than the number of dollars expended per student within a district.[53]

C. *Education Articles*

The education article of a state constitution articulates the state's role in public education. Education articles vary widely by state. Some states merely pronounce the importance of education, while others mandate a "system" of free public education. Still others qualify the term "system" with such phrases as "thorough and efficient," "uniform," or "general and

52. *See* Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973) (using a rational-basis test even though it found that education is a state constitutional right); *Horton II*, 195 Conn. 24, 486 A.2d 1099 (1985) (employing a three-part test and upholding the facial validity of the finance system).

53. *See* Abbott by Abbott v. Burke, 119 N.J. 287, 575 A.2d 359 (1990). The New Jersey Supreme Court stated that "[t]his record shows that the educational needs of students in poorer urban districts vastly exceed those of others, especially those from richer districts. The difference is monumental, no matter how it is measured." *Id.* at 338, 575 A.2d at 400. *But see* McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969). In *McInnis*, the court found that educational needs was a "nebulous concept." *McInnis*, 293 F. Supp. at 329 n.4. It ruled that the plaintiffs' claim that the state school finance system was irrational because funds were allocated on allegedly arbitrary factors could not be supported. According to the court, even if equal protection required school expenditures to be made solely on the basis of pupils' needs, there were "no discoverable and manageable standards" to determine constitutional compliance. *Id.* at 335. .

A federal court in Virginia also touched on the educational needs issue in disclaiming any ability to fashion a remedy. It stated that

> the courts have neither the knowledge, nor the means nor the power to tailor the public moneys to fit the varying needs of these students throughout the State. We can only see to it that the outlays on one group are not invidiously greater or less than that of another.

Burruss v. Wilkerson, 310 F. Supp. 572, 574 (W.D. Va. 1969), *aff'd*, 397 U.S. 44 (1970).

uniform."[54]

In school finance litigation, education articles can be used in two different ways, either by direct application of the provision to void a finance scheme, or by a more circuitous route—using the provision to define education as a fundamental right requir-

54. *See* ALA. CONST. art. XIV, § 256 ("a liberal system of public schools"); ALASKA CONST. art. VII, § 1 ("a system of public schools"); ARIZ. CONST. art. XI, § 1 ("a general and uniform public school system"); ARK. CONST. art. XIV, § 1 ("a general, veritable and efficient system of free public schools"); CAL. CONST. art. IX, § 1 ("a system of common schools"); COLO. CONST. art. IX, § 2 ("a thorough and uniform system of free public schools"); CONN. CONST. art. VIII, § 1 ("free public elementary and secondary schools"); DEL. CONST. art. X, § 1 ("a general and efficient system of free public schools"); FLA. CONST. art. IX, § 1 ("a uniform system of free public education"); GA. CONST. art. VIII, § 1 ("an adequate public education"); HAW. CONST. art. X, § 1 ("a statewide system of public schools"); IDAHO CONST. art. IX, § 1 ("a general, uniform and thorough system of public, free common schools"); ILL. CONST. art. X, § 1 ("an efficient system of high quality public educational institutions and services"); IND. CONST. art. 8, § 1 ("a general and uniform system of common schools"); IOWA CONST. art. IX, § 3 ("encourage by suitable means, the promotion of intellectual, scientific, moral and agricultural improvement"); KAN. CONST. art. 6, § 1 ("establishing and maintaining public schools"); KY. CONST. § 183 ("an efficient system of common schools"); LA. CONST. art. XIII, § 1 ("a public educational system"); ME. CONST. art. VIII, § 1 ("the Legislature is authorized, and it shall be its duty to require, the several towns to make suitable provision at their own expense, for the support and maintenance of public schools"); MD. CONST. art. VIII, § 1 ("a thorough and efficient System of Free Public Schools"); MASS. CONST. ch. V, § II ("to cherish the interests of literature and the sciences and all seminaries of them, especially at the University at Cambridge, public schools and grammar schools in the towns"); MICH. CONST. art. VIII, § 2 ("a system of free public elementary and secondary schools"); MINN. CONST. art. XIII, § 1 ("a general and uniform system of public schools"); MISS. CONST. art. 8, § 201 ("maintenance and establishment of free public schools"); MO. CONST. art. IX, § 1(a) ("establish and maintain free public schools for the gratuitous instruction"); MONT. CONST. art. X, § 1(3) ("a basic system of free quality public elementary and secondary schools"); NEB. CONST. art. VII, § 1 ("free instruction in the common schools"); NEV. CONST. art. XI, § 2 ("a uniform system of common schools"); N.H. CONST. art. LXXXIII ("cherish the interest of literature and the sciences, and all seminaries and public schools"); N.J. CONST. art. VIII, § 4 ("a thorough and efficient system of free public schools"); N.M. CONST. art. XII, § 1 ("a uniform system of free public schools"); N.Y. CONST. art. XI, § 1 ("a system of free common schools"); N.C. CONST. art. IX, § 2 ("a general and uniform system of free public schools"); N.D. CONST. art. VIII, §§ 1-2 ("a uniform system of free public schools"); OHIO CONST. art. VI, § 2 ("a thorough and efficient system of common schools"); OKLA. CONST. art. XIII, § 1 ("a system of free public schools"); OR. CONST. art. VIII, § 3 ("a uniform and general system of common schools"); PA. CONST. art. III, § 14 ("a thorough and efficient system of public education"); R.I. CONST. art. XII, § 1 ("promote public schools"); S.C. CONST. art. XI, § 3 ("a system of free public schools"); S.D. CONST. art. VIII, § 1 ("a general and uniform system of public schools"); TENN. CONST. art. XI, § 12 ("a system of free public schools"); TEX. CONST. art. VII, § 1 ("an efficient system of public free schools"); UTAH CONST. art. XI, § 1 ("a uniform system of public schools"); VT. CONST. ch. II, § 68 ("a competent number of schools ought to be maintained in each town"); VA. CONST. art. VIII, § 1 ("a system of free public elementary and secondary schools"); WASH. CONST. art. IX, § 2 ("a general and uniform of public schools"); W. VA. CONST. art. XII, § 1 ("a thorough and efficient system of free schools"); WIS. CONST. art. X, § 3 ("the establishment of district schools, which shall be as nearly uniform as practicable"); WYO. CONST. art. 7, § 1 ("a complete and uniform system of public instruction").

ing a high level of scrutiny under equal-protection analysis.[55] In some cases, both claims have been made, though they often overlap.

In the past, state supreme courts were reluctant to adopt either an education article theory to void school financing schemes[56] or to require specific legislative action.[57] Instead,

55. *See supra* text accompanying notes 9-29. The primary method by which the education article is brought within the purview of equal protection is to allege a claim of educational deprivation. *See* Kaster, *A "Uniform" Education: Reform of Local Property Tax School Finance Systems Through State Constitutions*, 62 MARQ. L. REV. 565, 570 (1979). While determining whether education is a fundamental right justifying strict scrutiny, a court must interpret the education clause of its state's constitution. Usually, this requires the court to determine whether the education article mandates equality in the distribution of or access to educational resources.

State courts have reached varying conclusions when confronted with claims involving education articles. For example, even though it found education to be a fundamental right under the state constitution, the Arizona Supreme Court held that the contested school finance program was constitutional because it provided for a system that was statewide and uniform, as required by the education article. *See* Shofstall v. Hollins, 110 Ariz. at 90, 515 P.2d at 592-93. The Oklahoma Supreme Court concluded that the education article of the Oklahoma Constitution merely mandates action by the legislature to establish and maintain a system of free public schools. *See* Fair School Finance Council of Oklahoma, Inc. v. Oklahoma, 746 P.2d 1135, 1149 (Okla. 1987). The Oklahoma court did not find a state right to an education.

Maryland's highest court ruled that the words "thorough and efficient" are not equivalent to "uniform" and, therefore, do not dictate exact equality in pupil funding and expenditures. *See* Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 631-32, 458 A.2d 758, 776 (1983). The Arkansas Supreme Court, on the other hand, concluded that equal protection requires equal educational opportunities; as such, bare and minimal sufficiency of programs does not suffice. *See* Dupree v. Alma School Dist. No. 30, 279 Ark. 340, 345, 651 S.W.2d 90, 93 (1983). The court found no legitimate state purpose to support the school finance system, which had no rational relationship to the educational needs of the individual school district. *See id.*

The West Virginia Supreme Court of Appeals stated that "[e]qual protection, applied to education, must mean an equality in substantive educational offerings and results, no matter what the expenditure may be." Pauley v. Kelly, 162 W. Va. at 680 n.7, 255 S.E.2d at 865 n.7.

56. Notable exceptions include *Robinson I*, 62 N.J. 473, 303 A.2d 273 (1973); and Seattle School Dist. No. 1 v. Washington, 90 Wash. 2d 476, 585 P.2d 71 (1978). Recently, courts have increasingly adopted such a theory. *See* Rose v. The Council for Better Educ., Inc. 790 S.W.2d 186 (Ky. 1989); Helena Elementary School Dist. No. 1 v. Montana, 236 Mont. 44, 769 P.2d 684 (1989); Abbott by Abbott v. Burke, 119 N.J. 287, 575 A.2d 359 (1990); Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989); *infra* notes 66-87 and accompanying text.

In 1978, the Washington Supreme Court was confronted with a challenge to the state's "special excess levy" elections, which were authorized by state statute to allow local school districts to supplement state funds. *See* Seattle School Dist. No. 1 v. Washington, 90 Wash. 2d 476, 585 P.2d 71 (1978). The basis for the lawsuit was the Washington Constitution's education article, which provides in part that "[i]t is the paramount duty of the state to make ample provision for the education of all children residing within its borders." WASH. CONST. art. 9, § 1. Just four years earlier, in Northshore School Dist. No. 417 v. Kinnear, 84 Wash. 2d 685, 530 P.2d 178 (1974), the same court had upheld the constitutionality of the school finance law, finding that the legislature's duty in education was no greater than its responsibility for other functions of state government. In the later case, the court reversed its earlier ruling and held that the constitutional terms "paramount duty" and "ample provision" were mandatory,

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they were largely content to determine that the articles established a general obligation to provide public education,[58] and then to defer to the legislature on the exact content of the education system.[59] Courts have justified this deference with a few common arguments. First, some have pointed to the large amount of money spent on education, arguing that such expenditures represent adequate legislative attention to the constitutional obligation.[60] Second, some have emphasized that no one has been absolutely deprived of an education, or received an education that did not meet some very basic or minimum standard.[61] Finally, finding that there existed statewide qualitative standards promulgated by the legislature and state department of education, some courts have simply upheld lenient interpretations of education articles, thus limiting the legislature's responsibility to provide educational equality.[62]

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and imposed a judicially enforceable duty on the legislative and executive branches of state government. As such, the legislature was required to define and give substantive content to the requirement of a basic education, as well as provide sufficient funds to support the system. *See Seattle School District*, 90 Wash. 2d at 510-23, 585 P.2d at 90-97.

57. The South Carolina Supreme Court concluded that the education article's command that the legislature "shall provide for the maintenance and support of a system of free public schools" did not require the state to pay for the cost of education, but left the legislature free to select the means of financing the schools. *See* Richland County v. Campbell, 294 S.C. 346, 349, 364 S.E.2d 470, 471-72 (1988).

58. The Illinois Supreme Court declared that the purpose of the education article "was to state a commitment, a purpose, a goal" rather than to impose upon the legislature any specific obligation regarding education. Blase v. Illinois, 55 Ill. 2d 94, 100, 302 N.E.2d 46, 49 (1973).

59. The Idaho Supreme Court held that the constitution's directive of "a general, uniform and thorough system" of schools mandated action by the legislature, but did not require a "central state system of equal expenditures per student." Thompson v. Engelking, 96 Idaho 793, 806, 537 P.2d 635, 648 (1975). In sustaining the validity of the school finance system, the court held that the constitution was satisfied when every child had free access to "certain minimum and reasonably standardized educational and instructional facilities and opportunities." *Id.* at 810, 537 P.2d at 652.

60. *See, e.g.*, McDaniel v. Thomas, 248 Ga. 632, 285 S.E.2d 156 (1981). In *Thomas*, the Georgia Supreme Court held that the legislature had not disregarded the education article's command to provide an "adequate education." *Id.* at 644, 285 S.E.2d at 165. The court noted the "massive" financial commitment to public education and was satisfied that no students were deprived of basic educational opportunities as a result of the school finance system. The education article did not require the state to equalize educational opportunities, nor did it prohibit the local school districts from doing whatever necessary to improve education locally. In attempting to define "adequate education," the court observed that it was something more than a minimum education, but there were no "judicially manageable standards for determining whether or not pupils are being provided an adequate education." *Id.* (quoting Deriso v. Cooper, 246 Ga. 540, 543, 272 S.E.2d 274, 277 (1980)). The court refused to become embroiled in the process of specifying the exact content of the term for fear of usurping legislative prerogatives. *See id.*

61. *See, e.g.*, Kukor v. Grover, 148 Wis. 2d 469, 436 N.W.2d 568 (1989).

62. The Wisconsin Supreme Court, for example, ruled that the uniformity requirement in the Wisconsin Constitution does not mandate equal educational opportunities

III. Recent Cases

Following the example set nearly two decades ago by the New Jersey Supreme Court in *Robinson v. Cahill*,[63] several state courts have recently shown receptiveness to challenges to school financing systems based on education articles of state constitutions. In light of this recent development, state courts that formerly applied a minimal level of scrutiny under equal protection and found state funding schemes justified may now be required to confront the issue anew. Plaintiffs challenging school finance programs under education articles have met with success in Kentucky, Texas, Montana, and New Jersey.[64] The same approach was employed in litigation in Wisconsin, though the plaintiffs were unsuccessful.[65]

In June 1989, the Supreme Court of Kentucky found that its public school system violated both the state constitutional requirement of an "efficient" school system and the Kentucky Constitution's equal protection clause.[66] More important than the court's analysis of unequal resources under equal-protection doctrine was the finding that the entire system was inadequate under the education article.[67]

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in the state, but was only intended to assure that state resources "were applied in such a manner as to assure that the 'character' of instruction was as uniform as practicable." *Id.* at 492, 436 N.W.2d at 577.

63. 62 N.J. 473, 303 A.2d 273 (1973) (*Robinson I*).

64. *See* Rose v. The Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); Helena Elementary School Dist. No. 1 v. Montana, 236 Mont. 44, 769 P.2d 684 (1989); Abbott by Abbott v. Burke, 119 N.J. 287, 575 A.2d 359 (1990); Edgewood v. Kirby Indep. School Dist., 777 S.W.2d 391 (Tex. 1989).

65. *See* Kukor v. Grover, 148 Wis. 2d 469, 436 N.W.2d 568 (1989).

66. *See Rose*, 790 S.W.2d 186. The Kentucky Constitution requires the Kentucky General Assembly to "provide an efficient system of common schools throughout the state." Ky. Const. § 183.

67. A similar result was reached in the earlier West Virginia case, Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859 (1979). West Virginia's education article requires legislative provision of "a thorough and efficient system of free schools." W. Va. Const. art. XII, § 1. Unlike the Kentucky Supreme Court, the West Virginia Supreme Court was unable to discern any state standards to implement the provision. The court thus defined the provision more generally and remanded the case to the circuit court, so that more specific standards could be developed. The instructions to the lower court were clear and unequivocal: Given a set of guidelines, develop high-quality education standards and evaluate the existing education system accordingly. The circuit court was also directed to develop an evidentiary record on practically every major dimension of the state's education system, including, for example, the state finance program, the role of the state tax commissioner, and local property tax appraisals.

Following the instructions from the high court, the circuit court developed specific standards and requirements for curriculum, personnel, facilities, and materials and equipment for all programs and support services. The court also identified the resources necessary to implement the specific standards. Comparing the existing education system with the judicially-developed standards, Judge Recht concluded that the

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The Kentucky high court found that wide variations in funding resulted in unequal opportunity, that achievement scores and wealth were positively related, that residence determined educational opportunity, that resources were not only unequal but inadequate, and that the constitutional mandate of an efficient education system created a fundamental right. In sum, the court viewed the constitutional mandate as placing "an absolute duty on the General Assembly to re-create, [and] re-establish a new system of common schools in the commonwealth."[68]

The court went further to make an independent determination of what would be necessary before the public school system could comply with the state's obligation under the state education clause.[69] The court focused on the product involved—the education actually delivered to the students—rather than on the resources allocated to districts, as had been done in past equal-protection cases.

In November 1989, the Texas Supreme Court in *Edgewood Independent School District v. Kirby*[70] declared that the state's edu-

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current system was "woefully inadequate" and failed to meet constitutional standards. Pauley v. Bailey, No. 75-1268, slip op. at 100 (Cir. Ct. Kanawha Co. May 11, 1982). The court invalidated the school finance system and that portion of the state tax system relating to the assessment of local property. The judge ordered that a special master be appointed to develop a master plan that would encompass all the elements of a thorough and efficient education system, as developed by the court. In September 1982, Judge Recht agreed to a plan permitting the state department of education to supervise the restructuring of the state's education system. *See* Ward, *W. Va. Agency to Comply with Judge's Standards*, Educ. Week, Sept. 22, 1982, at 8, col. 1. *See also* Pauley v. Bailey, 324 S.E.2d 128 (W. Va. 1984) (state board of education and the state superintendent of schools had a duty to implement the "thorough and efficient system" embodied in the master plan). It should be noted that West Virginia continues to struggle with the fallout from this landmark school finance case. *See* Pauley v. Gainer, 353 S.E.2d 318 (W. Va. 1986).

68. *Rose*, 790 S.W.2d at 215.

69. The court found that, in order to pass state constitutional muster, a child's education must include seven essential aspects:

> (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

Id. at 212.

70. 777 S.W.2d 391 (Tex. 1989).

cational funding system violated the Texas Constitution.[71] Although the *Edgewood* decision was not as sweeping as the Kentucky decision, it was equally significant. Rather than finding the Texas system unconstitutionally inadequate based on educational services provided,[72] the court found the system unconstitutionally inefficient because it failed to cover even the costs of mandated programs,[73] and because the correlations among wealth, educational revenues, and the education provided by districts were found to impede rather than implement the "general diffusion of knowledge," as required by the Texas Constitution.[74]

Montana was the third state in which a statewide school financing system was struck down on fiscal equity grounds in 1989.[75] In the Montana case, plaintiffs again challenged the state funding system as a violation of the state's education article, this time as a violation of Montana's guarantee of an "equal educational opportunity" for all students.[76] Because of the language of the state constitution, the Montana Supreme Court focused on the equality of educational opportunities. In doing so, it relied on evidence of actual program availability in poor and wealthy districts. The evidence presented showed that the

71. The Texas Constitution includes the following provision regarding education: "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools." TEX. CONST. art. VII, § 1.

72. The Texas Supreme Court did note the disparity in course offerings between poor and wealthy districts. "The differences in the quality of educational programs offered are dramatic. For example, San Elizario I.S.D. offers no foreign language, no pre-kindergarten program, no chemistry, no physics, no calculus, and no college preparatory or honors program. It also offers virtually no extracurricular activities such as band, debate, or football." *Edgewood*, 777 S.W.2d at 393.

73. *See id.* at 392.

74. "The present system . . . provides not for a diffusion that is general but for one that is limited and unbalanced. The resultant inequalities are thus directly contrary to the constitutional vision of efficiency." *Id.* at 396.

75. *See* Helena Elementary School Dist. No. 1 v. Montana, 236 Mont. 44, 769 P.2d 684 (1989).

76. Article X, Section One of the Montana Constitution provides in part:

> (1) It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state. . . .
>
> . . . .
>
> (3) The legislature shall provide a basic system of free quality public elementary and secondary schools. . . . It shall fund and distribute in an equitable manner to the school districts the state's share of the cost of the basic elementary and secondary school system.

MONT. CONST. art. X, § 1.

spending differences in the state among similarly sized school districts resulted in unequal educational opportunities for students.[77] The court was not persuaded that because the districts provided educational programs sufficient to meet the state accreditation standards, all students' educational opportunities were met.[78] Instead, the court found that these standards are a minimum; it did not define in constitutional terms what an adequate program would be, however.[79] The court struck down the system and ordered the legislature to revise the program.[80]

The New Jersey Supreme Court also recently found the New Jersey school financing system invalid under the education article of that state's constitution.[81] The court found that the New Jersey Constitution does not require equal expenditures per pupil[82] but that it does require "a certain level of education, that which equates with thorough and efficient; it is that level that *all* must attain; that is the *only* equality required by the Constitution."[83] The required levels of thoroughness and effi-

77. The court relied on the findings of an expert to this effect. The court stated:

> Dr. Gray concluded that there are substantial differences in educational opportunities among Montana school districts, which are manifested significantly between the high versus low expenditure categories which he studied. More specifically, he found that wealthier districts offered more science classes, in labs which were typically larger, better stocked with more equipment and consumable supplies, with more storage, and generally more functional than those in poorer districts.

Helena, 236 Mont. at 50, 769 P.2d at 687-88.

78. The court did note that state funding under the state's foundation program was insufficient to cover the costs of complying with the minimum state accreditation standards. *See id.* at 54, 769 P.2d at 690.

79. The court amended the findings to read: "The Montana School Accreditation Standards do not fully define either the constitutional rights of students or the constitutional responsibilities of the State of Montana for funding its public elementary and secondary schools." *Id.* at 57, 769 P.2d at 692.

80. The court's opinion was revised to afford the legislature more time to devise and implement a new financing structure for the state. *See* Helena Elementary School Dist. No. 1 v. Montana, 236 Mont. 44, 784 P.2d 412 (1990).

81. *See* Abbott by Abbott v. Burke, 119 N.J. 287, 575 A.2d 359 (1990). The New Jersey Constitution provides in part that "[t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools . . . ." N.J. CONST. art. VIII, § 4.

82. *See Abbott*, 119 N.J. at 306-07, 575 A.2d at 369.

83. *Id.* at 305, 575 A.2d at 368 (emphasis in original). The court noted that the purpose of education is to develop productive citizens. It took this concept one step further by stating:

> Thorough and efficient means more than teaching the skills needed to compete in the labor market, as critically important as that may be. It means being able to fulfill one's role as a citizen, a role that encompasses far more than merely registering to vote. It means the ability to participate fully in society, in the life of one's community, the ability to appreciate music, art, and literature, and the ability to share all of that with friends.

ciency, the court concluded, are spelled out in the state statute.[84] Though the financing structure was not deficient for all districts, the court found that it was deficient for poor urban districts. The court focused on the needs of the students in poor urban districts, their schools' lack of curricular offerings, and their facilities in comparison to wealthy school districts.[85] The court found that, although students in poor districts have greater educational needs, the system provided them fewer educational resources:

> Obviously, we are no more able to identify what these disadvantaged students need in concrete educational terms than are the experts. What they don't need is more disadvantage, in the form of a school district that does not even approach the funding level that supports advantaged students. They need more, and the law entitles them to more.[86]

The court stated that its focus was not on per-pupil expenditure alone, but on the needs of the students in the poor districts and the state's response to those needs.[87]

The Wisconsin Supreme Court adopted a different view in *Kukor v. Grover*.[88] The plaintiffs in *Kukor* challenged the Wiscon-

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Id. at 363-64, 575 A.2d at 397.

84. The court reiterated the definition of thorough and efficient as:

> (a) establishment of educational goals at both the state and local levels; (b) encouragement of public involvement in goal-setting; (c) instruction intended to produce the attainment of reasonable levels of proficiency in the basic communications and computational skills; (d) a breadth of program offerings designed to develop the individual talents and abilities of pupils; (e) programs and supportive services for all pupils especially those who are educationally disadvantaged or who have special educational needs; (f) adequately equipped, sanitary, and secure physical facilities and adequate materials and supplies; (g) qualified instructional and other personnel; (h) efficient administrative procedures; (i) an adequate State program of research and development; and (j) evaluation and monitoring programs at both the state and local levels.

Id. at 348-49, 575 A.2d at 390 (quoting N.J. STAT. ANN. § 18A:7A-5 (West 1989)).

85. *See id.* at 357-58, 575 A.2d at 394.

86. *Id.* at 372, 575 A.2d at 401-02.

87. The court stated:

> We therefore adhere to the conventional wisdom that money is one of the many factors that counts. Staff ratios, breadth of course offerings, teacher experience and qualifications, and availability of equipment make a real difference in educational opportunity. We do not mean that money guarantees a thorough and efficient education, nor that, given the approach recommended by the Commissioner, a lower spending district with an effective schools program will not do better than a higher spending district without it. All we mean is that if "effective schools" is a desirable approach, it should be superimposed on a structure that starts out equal.

Id. at 381, 575 A.2d at 406.

88. 148 Wis. 2d 469, 436 N.W.2d 568 (1989).

sin school finance system under the education article[89] and the equal protection clause of the Wisconsin Constitution. They argued, as had the successful plaintiffs in New Jersey, that the greater needs of economically disadvantaged students and the municipal overburden of poor urban areas required a constitutional finding that these people and areas deserve more funding than others.[90] The Wisconsin court, however, found that this reapportionment of state funds is not required by the Wisconsin Constitution; instead, it held that only uniformity of educational standards is required.[91]

The court found that the substance of the constitutional uniformity provision is embodied in a state statute that establishes certain minimum standards for school districts.[92] The court stated that

> the uniformity provision . . . could only have been intended to assure that those resources distributed equally on a per pupil basis were applied in such a manner as to assure that

89. The Wisconsin Constitution provides that "[t]he legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable . . . ." WIS. CONST. art. X, § 3.

90. The court summarized this argument as follows:

> The appellants maintain that the unconstitutional deficiency in the system is that the school finance program fails to take into account the fact that children have differing educational needs, some of which may, as a result of socioeconomic factors, require greater financial resources to achieve the same level of educational opportunity. It is further argued that those districts with the greatest educational burden are the least capable of raising sufficient financing from property taxation as a result of lower property valuations or "municipal overburden" placing greater tax demands upon the property.

Kukor, 148 Wis. 2d at 481, 436 N.W.2d at 573.

91. *See id.* at 485-92, 436 N.W.2d at 575-77.

92. The statute lists the following minimum requirements:

(a) employment of certified personnel;
(b) annual staff development plans;
(c) remedial reading services;
(d) five-year-old kindergarten;
(e) guidance and counseling services;
(f) 180 days of scheduled instruction;
(g) emergency nursing services;
(h) adequate instructional materials, texts, and library facilities;
(i) safe and healthful facilities;
(j) instruction in health, physical education, art and music;
(k) development of sequential curriculum plans;
(l) instruction in reading, language arts, social studies, math, science, health, physical education, art, and music for elementary; additional instruction in career exploration for grades 5-8; and access to instruction in vocational education and foreign language for grades 9-12;
(m) access to education for employment; and
(n) a plan for children at risk.

See WIS. STAT. § 121.02 (Supp. 1991).

> the "character" of instruction which is constitutionally compelled to be uniform is legislatively regulated by [the statute]. . . . The appellants have not asserted that due to the distribution of school aid under the equalization formula, their districts were unable to meet these standards.[93]

Unlike the Montana, Texas, and Kentucky courts, the Wisconsin court concluded that the present funding scheme was adequate to meet constitutional and statutory requirements. Unlike the New Jersey court, the Wisconsin court was unwilling to impose a requirement that greater educational services be provided to students with greater needs.[94]

Nor was the Wisconsin court willing to find a violation of the state equal protection clause. The court stated that, because all districts were able to offer a program in compliance with the statutorily mandated minimum standards, and because there was no allegation that the funding scheme totally deprived any students of an education altogether, there was no equal-protection violation.[95] Disparities in the system, the court stated, are justified[96] by the governmental interest in local control.[97] Accordingly, the system was upheld.

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93. *Kukor*, 148 Wis. 2d at 492-94, 436 N.W.2d at 577-78.

94. The Wisconsin court recognized the educational needs of economically disadvantaged youth. It was not willing, however, to find a constitutional violation on the basis that schools were not serving these needs:

> What has been challenged in the case at bar is not that less affluent schools have insufficient funds to provide for basic education, but that they have inadequate funds to provide specialized programs and to meet the particularized needs of students related to the effects of poverty. We recognize that more and improved programs are needed in the less affluent or overburdened districts but find that these legitimate demands may not be correctly described as claims for uniformity under [the education article]. . . . Such demands cannot be remedied by claims of constitutional discrepancies, but rather must be made to the legislature and, perhaps, also to the community.

Id. at 509-10, 436 N.W.2d at 585.

95. The court stated:

> [S]ince the deficiency allegedly exists not in the denial of a right to attend a public school free of charge, nor in the less affluent districts' failure to meet the educational standards delineated under [the statute], nor in the state's failure to distribute state resources to the less affluent districts on at least an equal per-pupil basis as distribution is made to wealthier districts, no fundamental right is implicated in the challenged spending disparity.

Id. at 496-97, 436 N.W.2d at 579.

96. The court employed a rational-basis test because the fundamental right of education was not being deprived. "[W]e apply . . . a rational basis standard because the rights at issue . . . are premised upon spending disparities and not upon a complete denial of educational opportunity with the scope of [the education article]." *Id.* at 498, 436 N.W.2d at 580. The court noted that it would reach the same result if strict scrutiny were applied. *See id.* at 504 n.13, 436 N.W.2d at 582 n.13.

97. *See id.* at 499-501, 436 N.W.2d at 580-81.

IV. Lessons to Be Learned

Many fiscal equity litigants in recent cases have been able to effect reform through the use of education clauses in state constitutions. They have thereby been successful without needing to achieve the elusive heightened scrutiny under state or federal equal protection.

To succeed in a fiscal equity action today, one should explore several issues. First, one should examine whether the relevant state constitution carries with it some substantive requirement for the legislature to implement a state system of public schools. Second, one should determine whether the state has, by legislation or regulation, adopted academic performance standards or minimum programs for districts. Third, one should ascertain whether districts in fact meet these minimum obligations. As an alternative to this third component, one can explore whether the education system provides a minimally adequate education, as defined by some normative standard.

This new wave of litigation has had two primary effects. First, it has changed the focus of finance equity litigation from per-pupil expenditure to the broader concept of meeting students' educational needs. This in turn has shifted attention in such cases from mechanical funding formulae to the product of education. The profundity of this change is best seen in the New Jersey case. There, the New Jersey Supreme Court concluded that the legislature had shirked its constitutional obligation by failing to meet the needs of students who live in poor urban districts, even though New Jersey ranked second in per capita educational expenditures in the nation.[98] Focusing on the educational product and student needs changes the question from how much is spent to *how* it is spent and with what effects.

Second, the new wave of litigation changes the likely forum from federal to state courts. The focus on state constitutional provisions removes many of these cases from the overloaded federal docket and permits state citizens to interpret the requirements of their own state constitutions. This enhances state power in our federal system and reduces federal-state comity concerns.[99]

98. *See* Abbott by Abbott v. Burke, 119 N.J. 287, 302 n.4, 575 A.2d 359, 366 n.4 (1990).

99. It is interesting to note that, as this trend toward state self-determination regarding school finance occurred, the United States Supreme Court permitted federal judi-

It is unlikely that the debate over the services to be provided by the public schools—including the type, cost, and method of delivery—will wane. In fact, during these times of fierce attention to governmental spending, increased demands on public schools, and growing activism of state judiciaries, it is likely that this debate will only grow. It does appear likely, however, that the forums for this debate over competing social values will, for the most part, be state courts and legislatures.

cial control over a state's taxing authority to remedy the effects of school segregation. *See* Missouri v. Jenkins, 110 S. Ct. 1651 (1990).

ACADEMIC TENURE: AN ECONOMIC CRITIQUE

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I. INTRODUCTION

A number of arguments have been put forth in favor of academic tenure, the guarantee of lifetime employment in substantially the same position after some initial probationary period. These arguments have centered around cost effectiveness, academic freedom, and pedagogical quality. They invariably conclude that tenure is good and that horrendous things would happen if tenure were abolished or modified. In fact, it is very difficult to find an academic, especially one with tenure, who is not in favor of tenure.[1] "Tenure is to the academic what the closed shop is to a craft union."[2]

In this Article, we take the position of the devil's advocate. We show that many of the arguments usually offered in favor of

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1. One journalist scoured North America and could find only one academic who would argue against tenure. *See* Walker, *Tenure Debate Falls Short*, THE PROVINCE, Sept. 4, 1983, at 269, 269. He should have polled primary and secondary school administrators. A 1972 poll of school administrators found that 86 percent wanted tenure either reformed or abolished. *See* E. BRIDGES, MANAGING THE INCOMPETENT TEACHER 3 (1984) (citing Cramer, *How Would Your Faucets Work If Plumbers Were Shielded by Tenure Laws?*, AM. SCH. BD. J., Oct. 1976, at 22, 22-24). In four Gallup polls of parents' attitudes toward public education, more than 50 percent said they opposed tenure. *See* A DECADE OF GALLUP POLLS OF ATTITUDES TOWARD EDUCATION, 1969-1978 (S. Elam ed. 1978).

For a strong defense of tenure, see Machlup, *In Defense of Academic Tenure*, 50 AM. A.U. PROF. BULL. 112 (1964), *reprinted in* ACADEMIC FREEDOM AND TENURE: A HANDBOOK OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS 306-38 (L. Joughin ed. 1969). Professor Machlup's argument is based on the rather curious premise that although tenure harms academics more than it helps them, the benefits to "society" accruing from tenure more than compensate for the loss by academics because tenure encourages the free flow of debate. There is no evidence, however, that tenure improves the flow of debate beyond what already exists as a result of freedom of the press. Professor Machlup does not recognize that other groups are also harmed by tenure: Consumers of education, for example, must be content to endure a number of mediocre and incompetent professors who would be fired in the absence of the protection that tenure affords. Machlup apparently believes that "society" consists of something more than the sum of all individuals, but society as a whole cannot benefit from tenure—only individuals can benefit.

2. Walker, *supra* note 1, at 269.

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tenure do not hold up under close analysis.[3] While tenure can save out-of-pocket expenses, promote independence from outside forces, and increase quality, it also increases overall costs, decreases flexibility, disenfranchises the paying consumer of education, increases dependence on unaccountable insiders, and makes it nearly impossible to remove incompetent and unnecessary professors. While we do not advocate the total abolition of tenure, we would like to see the present tenure practice abolished. We conclude that decisions on the value of tenure should be left to the market. In the absence of the current tenure policy, consumers of education would benefit from lower prices, more choices, and better quality products.

II. A Critical Analysis of Arguments for Tenure

A. *Is Tenure Cost-Effective?*

The argument that tenure is cost-effective is a plausible one on the surface. Just ask this question: If two teaching positions paid the same salary, had identical duties, and were identical in every other way—student body, prestige, geographic location, fringe benefits—but one position carried a guarantee of lifetime employment and one did not, which position would one choose? The answer appears obvious. Because most people are risk-averse, they would choose the position that included a guaranteed job for life, other things being equal. Therefore, the possession of tenure has some value.[4] That being the case, professors who have tenure, or who are hired with the possibility of receiving tenure, will work for less money than professors who cannot hope to receive a guarantee of lifetime employ-

3. For detailed discussions of tenure and the issues relating to it, see generally The Tenure Debate (B. Smith ed. 1973); and Faculty Tenure (W. Keast & J. Macy eds. 1973).

4. The United States Supreme Court has held that tenure may create a property right that cannot be taken away without due process. *See, e.g.*, Perry v. Sindermann, 408 U.S. 593 (1972) (a written contract with an explicit tenure provision may be evidence supporting a claim of a property right to continued employment); Connell v. Higginbotham, 403 U.S. 207 (1971) (due-process requirements apply when teacher is hired with clearly implied promise of continued employment); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956) (tenured public college professor has interest in continued employment that is safeguarded by due process); Wieman v. Updegraff, 344 U.S. 183 (1952) (college professors have interest in continued employment that is safeguarded by due process). *Cf.* Board of Regents v. Roth, 408 U.S. 564 (1972) (non-tenured faculty member's property interest in employment was created by the terms of his employment and was insufficient to constitute property interest requiring due-process protections before nonrenewal of contract).

ment.[5] Consequently, universities can save money by granting tenure.[6] Once tenure exists at an institution, abolishing it would be equivalent to reducing professors' salaries.[7]

Although this argument is true as far as it goes, it is incomplete. There are other factors to consider in evaluating the tenure system besides initial out-of-pocket costs. If guaranteeing workers lifetime employment were cost-effective, wouldn't it make sense for all employers everywhere to grant lifetime employment to all workers? When viewed from this perspective, the cost-effectiveness argument in favor of tenure seems unpersuasive. If it were valid, all employers could reduce labor costs by guaranteeing lifetime employment. Yet the education industry is practically the only American industry that grants lifetime employment security.[8] One might ask why the practice is not more widespread, especially in the private sector where costs are closely scrutinized.

One reason why the idea has not spread throughout the pri-

5. *See* Machlup, *supra* note 1, at 323-26. This salary effect is a double-edged sword. On the one hand, it attracts individuals to academia, which increases the supply of professors and lowers salaries generally (as supply increases, price decreases). On the other hand, consumers of education benefit because they can purchase more professors for their money because of the lower unit cost. This raises an interesting point. All professors' salaries tend to be reduced because of tenure. Yet only a minority of professors realistically benefit from the academic freedom that tenure affords. For example, political science professors tend to be shielded more by academic-freedom protections than do mathematicians and French grammarians. Would it not be more equitable, then, to allow those professors who do not see the need for protecting their academic freedom to bargain it away for higher salaries? Allowing this possibility would increase freedom of choice without jeopardizing the positions of those professors who would be content with lower salaries plus tenure.

6. This argument is a pervasive one, one that is always advanced whenever the institution of tenure is attacked or questioned. Twenty-nine economics department faculty members from the University of British Columbia used this argument when the tenure policy was being challenged in Canada. *See* Block, *Put an End to Academic Tenure*, ECON. AFF., July-Sept. 1984, at 37, 37-38.

7. *See* Milne, *Arthritic Academia: The Problems of Government Universities*, in OCCUPATIONAL REGULATION AND THE PUBLIC INTEREST 193, 198 (R. Albon & G. Lindsay eds. 1984). Of course, if tenure were abolished, professors would tend to demand higher monetary salaries because, as pointed out above, tenure is a form of compensation.

8. The civil service also guarantees lifetime employment, but people rarely argue that providing guaranteed lifetime employment to civil servants reduces labor costs. In fact, there is a widespread perception that the civil service is laden with inefficient or incompetent workers who are underworked and overpaid. Judges often have lifetime tenure, ostensibly so that they will be insulated from political pressure. A problem with lifetime judicial tenure is that it is nearly impossible for the citizenry to remove from the bench an unwanted judge who does not want to resign. The United States Constitution even prevents Congress from reducing judges' pay, although it does not provide that judges must get cost-of-living raises. *See* U.S. CONST. art. III, § 1. Therefore, in the absence of a pay raise, inflation will result in a de facto pay reduction. Such a pay cut, however, would apply to all judges, not just those Congress wished to single out for retribution.

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vate sector is that lifetime employment guarantees reduce flexibility. If General Motors, Ford, and Chrysler guaranteed their workers lifetime employment, the companies would have gone out of business long ago. To stay solvent, a company must have the flexibility to discard unneeded resources: low-quality or excess machinery, and low-quality or excess employees. The private sector must flexibly comply with the demands of the market in order to survive and prosper.

The education industry need not be so flexible, because it is virtually insulated from competition. Although colleges and universities compete for students, various accreditation agencies and governments dictate much of what they can and cannot do. Colleges and universities cannot compete freely by offering a product that is radically different from what other similar institutions are offering because they must meet the requirements of the accreditation agencies and government regulators, or risk having their accreditation revoked.[9] The insulation from competition in the education industry, and the resulting ability of many educational institutions to survive without being flexible, allows the tenure system to survive. As one academic economist has observed:

> [T]enure is neither necessary nor efficient. Its survival depends upon the absence of private ownership and is also en-

9. Elaboration of this point is beyond the scope of this Article. Accreditation agencies are monopolies. The United States Department of Education places its stamp of approval on only one accreditation agency for each geographic location. For example, all schools in Ohio are accredited by the North Central Association. Any agency other than the North Central Association that accredits schools in Ohio is an unrecognized agency. *See* J. BEAR, HOW TO GET THE DEGREE YOU WANT 32-35 (8th ed. 1982).

The Department of Education also approves accreditation agencies for specific disciplines. For example, business schools are accredited by the American Assembly of Collegiate Schools of Business (AACSB). Much of what the AACSB requires before it will grant accreditation, though, actually decreases the quality of the educational institution. Accreditation pressures force schools to offer courses that are irrelevant and unwanted by educational consumers, and taught by faculty who may not be the best qualified. *See* R. MCGEE, A MODEL PROGRAM FOR SCHOOLS OF PROFESSIONAL ACCOUNTANCY 103-26 (1987) (providing further elaboration).

At least two of the six regional accreditation agencies in the United States are placing pressure on universities to increase ethnic and racial diversity in their faculties and student bodies. This means that schools are being pressured to hire faculty and accept students on the basis of race, ethnic background, and gender, rather than ability. For example, the Middle States Association delayed reaccrediting Baruch College of the City University of New York for three months because of alleged deficiencies in these areas. Critics of this policy say that the accreditation agencies are going too far, but not much can be done because of their monopoly status. *See 2 of 6 Regional Accreditation Agencies Take Steps to Prod Colleges on Racial, Ethnic Diversity*, Chron. Higher Educ., Aug. 15, 1990, at A1, col. 3. *See also Accrediting Quotas*, Wall St. J., Dec. 14, 1990, at A18, col. 1.

> couraged by subsidization of education by non-customer income sources [(taxpayers and philanthropists)]. Without a private profit-seeking system and without full-cost tuition, the demand for tenure increases and the cost of granting it appears to be cheaper because the full costs are not imposed on those granting it. Competition among schools, teachers, and students provides protection to the search for the truth without tenure.[10]

The inflexibility that results from a policy of guaranteeing lifetime employment means that colleges and universities are not able to fire professors who are either incompetent or no longer needed.[11] If educational consumers—students—want more business or engineering courses, a university might try to meet this demand by hiring additional professors to teach these subjects. But it cannot fire tenured professors in fields not favored by consumers. As a result, classes in unpopular disciplines have fewer students, while classes in popular disciplines grow unwieldy. The quality of the classroom experience could be enhanced if class size in the popular disciplines were reduced, but university budgets are tight. Without extra funds, additional professors in the popular disciplines cannot be hired unless unneeded professors who teach other subjects can be dismissed. If tenure exists, students who study popular subjects must often do so in large classes because universities do not have the flexibility, at least in the short term, to allocate their resources according to consumer demand. Tenure thus prevents efficient resource allocation, to the detriment of consumers.[12] Universities must wait for the faculty in overstaffed departments to retire or die before resources can be reallocated.[13]

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10. A. ALCHIAN, *Private Property and the Relative Cost of Tenure*, in ECONOMIC FORCES AT WORK 177, 201 (1977).

11. It is sometimes possible (but expensive) to encourage professors who are no longer needed to leave through early retirement and attractive severance packages. Universities, in effect, buy out the professors' property rights in their tenure agreement. Britain recently used this approach to rid its universities of unwanted faculty. *See* H. FERNS, HOW MUCH FREEDOM FOR UNIVERSITIES? 43 (1982).

12. For a discussion of flexibility and tenure, see Morris, *Flexibility and the Tenured Academic*, HIGHER EDUC. REV., Spring 1974, at 3.

13. *See id.* at 3. Universities have a number of other options in addition to waiting for unneeded faculty to retire or die. They can be given increased courseloads or unwanted administrative duties, which might induce some faculty members to leave. They could deny salary increases, which would decrease their purchasing power as inflation reduces the value of the dollar. Implementing such policies, however, increases animosity and could lead to a strike, which most university officials would rather avoid. Furthermore, such policies often take years to address the problem.

Although tenure may allow universities to hire faculty at lower salaries, total salary costs may be higher under a tenure system because universities will be forced to hire more faculty to teach popular disciplines and will not be able to fire unneeded faculty who teach unpopular subjects. If professors in disciplines with small consumer demand were given classes of thirty students instead of ten, two-thirds of them could be fired, and the funds saved could be used to hire professors in disciplines that students want to study, such as business.[14] When this inflexibility factor is considered, one can conclude that tenure actually increases salary costs.[15]

B. *Does Tenure Promote Academic Freedom?*

Another popular argument in favor of tenure is that without it, professors would hesitate to speak out on controversial subjects for fear of being fired.[16] This argument seems plausible on the surface. Certainly, if one need not worry about being

14. Some might argue that the students do not know what is best for them and that college administrators and accreditation agencies are better able to determine what students should study than the students themselves. This assumes that administrators and accreditors have the right to force their views and values on students, who may have far different values and views. Some schools thus require students to take Western civilization courses that consist of works written exclusively by white males. Other schools force students to take "watered down" Western civilization courses that include authors of questionable value just because they happen to be black, hispanic, or female. Some colleges force students to take sensitivity courses or courses that assert a particular political agenda. Many colleges force students to take mathematics, literature, foreign languages, or other courses that many students consider nonessential or a waste of time and money. For example, schools that are accredited by the American Assembly of Collegiate Schools of Business require students to take background "common body of knowledge" courses for the M.B.A. degree that often have little or nothing to do with what the student wants to learn. These courses often comprise up to 50 percent or more of the total coursework required for the M.B.A., thus doubling the cost and the time needed to complete the degree. The requirements for the M.S. degree in taxation are especially outrageous in this regard. In order to take the 10 or so courses needed for the degree, tax students are forced to take many courses totally outside the field of taxation. *See* R. McGee, *supra* note 9, at 18-24. Why would an education bureaucrat or committee necessarily know the needs of students better than the students themselves? In what other industry would the providers of a product be able to tell the buyers what they must buy? If the education monopoly were crushed, students could study the subjects that they value and save years of study and thousands of dollars.

15. This does not take into account the possible detrimental effects of the tenure system on the quality of the professoriate. *See infra* pp. 554-57.

16. Some would describe tenure as "the best guarantee of academic freedom." Lovain, *Grounds for Dismissing Tenured Postsecondary Faculty for Cause*, 10 J.C. & U.L. 419, 419 (quoting Comm'n on Academic Tenure in Higher Educ., Faculty Tenure 21 (1973)). The United States Supreme Court has recognized that academic freedom is a special concern of the First Amendment. *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589 (1967) (teachers cannot be dismissed for refusing to sign a certificate that indicates whether or not they had ever been Communists).

fired for speaking out on controversial issues, one will be more likely to speak out than if one fears for his livelihood. We know that many theories that we now recognize as truth were once considered heretical: The world is round, not flat; the earth revolves around the sun, not the other way around; slavery is evil, even though it was thought of as normal and even necessary in the past. Members of the academic profession have been the proponents of these new ideas that have changed our ideas about truth. The argument runs that, in the absence of tenure, professors who speak out on controversial subjects or espouse unpopular views may jeopardize their careers. The free flow of information will be slowed or stopped.

But academics are not the only ones who challenge authority or existing orthodoxy. Novelists, playwrights, editors, news commentators, journalists, song writers, clergy, film producers, actors, cartoonists, and whistleblowers from various walks of life also espouse unpopular views and challenge orthodoxy. Should each of these groups also be given guaranteed jobs for life so that they can feel free to challenge the establishment? In the case of news journalists, tenure is not needed because journalists are motivated by the market. They seek out the truth and try to present it better and faster than the competition, so that their employer can capture a larger audience. Might not the same argument be made for academics? If universities were entrepreneurial, academics who sought the truth would be valued commodities; they would not need to worry about tenure, because their careers would be secure so long as they sought the discovery and dissemination of truth.[17] On the other hand, if teaching the truth offends or harms some individuals or groups, should not these individuals or groups have the right to combat the dissemination of truth by refusing to pay someone to disseminate it? To argue otherwise would be to conclude that professors deserve some special claim to the pocketbooks of the students or taxpayers who pay their salaries.[18]

The academic-freedom argument also suffers from its weak premise—that academics must be completely "free" and "independent." From whom should academics be independent? Academics are always worried about threats from outsiders.

17. *See* H. FERNS, *supra* note 11, at 44.
18. *See* A. ALCHIAN, *supra* note 10, at 199.

But what about the individuals who pay their salaries—education consumers and taxpayers? If a journalist writes something that is unpopular, consumers can exercise their view of the piece by not buying the newspaper that prints the article. Television viewers can turn to another channel if they dislike a commentator's views. Yet taxpayers and consumers of education must often support the careers of academics of whom they disapprove. In effect, those who advocate tenure on the grounds of academic freedom claim that academics have a right to the hard-earned dollars of others even if those who earn the dollars do not support the academics' views. In the view of tenure advocates, academic freedom justifies forcing others to support an academic's views with their cash.

Ironically, a major threat to outspoken professors can be found within the academy itself. Tenured academics decide whether an untenured professor is awarded tenure. Untenured faculty can easily be weeded out if they offend the members of the faculty tenure committee.[19] Unless he can show that racial, ethnic, or gender bias influenced the tenure decision, a professor who is denied tenure has little recourse.[20] Many scholars have had their careers short-circuited by their fellow professors because of their political leanings.[21] If a group of liberals, conservatives, or Marxists wants to exclude those who disagree with their views, all they have to do is deny them tenure. Yale

19. The tenure process works in different ways at different schools. At Seton Hall University, for example, there are three tenure committees, one each at the departmental, school, and university level. At other schools, there is only one committee.

20. Finding proof of discrimination is often difficult. *See generally* Note, *Title VII and the Tenure Decision: The Need for a Qualified Academic Freedom Privilege Protecting Confidential Peer Review Materials in University Employment Discrimination Cases*, 21 SUFFOLK U.L. REV. 691 (1987); Palombi, *The Ineffectiveness of Title VII in Tenure Denial Decisions*, 36 DEPAUL L. REV. 259 (1987); Mahoney, *Title VII and Academic Freedom: The Authority of the EEOC to Investigate College Faculty Tenure Decisions*, 28 B.C.L. REV. 559 (1987).

21. *See, e.g., A Teacher Disillusioned With Utopia*, Boston Globe, Dec. 20, 1990, at 97, col. 3 (professor of comparative literature dismissed from Hampshire College for "his refusal, despite his leftish sympathies, to reduce the European literature he teaches to a one dimensional story of imperialism, colonialism and Third World oppression"); Dershowitz, *Quota System Wrong for Harvard Law*, Boston Herald, May 8, 1990, at 29, col. 1 (female assistant professor denied tenure at Harvard Law School because the "women [faculty members] argued that she, though a woman, was not a feminist"). *See generally* ACADEMIC LICENSE: THE WAR ON ACADEMIC FREEDOM (L. Csorba ed. 1988) [hereinafter ACADEMIC LICENSE]; R. KIMBALL, TENURED RADICALS: HOW POLITICS HAS CORRUPTED OUR HIGHER EDUCATION (1990).

A professor's political opinions often enter into the hiring, firing, and tenure decisions. *See, e.g.*, P. LAZARSFELD & W. THIELENS, THE ACADEMIC MIND 392 (1958); W. BUCKLEY, GOD AND MAN AT YALE 136-90 (1951); E. ROOT, COLLECTIVISM ON THE CAMPUS 289-335 (1955); Menn, *The Tenure Process and Its Invisible Kingmaker*, in HOW HARVARD RULES 271, 271-78 (J. Trumpdour ed. 1989).

University's president acknowledged this problem in 1972: "In strong universities, assuring freedom from intellectual conformity coerced within the institution is even more of a concern than is the protection of freedom from external interference."[22] As another academic observed:

> [It is a] tattered secret that faculty members may devise a pattern of departmental appointments that shuts out significant schools of thought, may enter into a Faustian bargain with the grant-givers that trades off mental independence for a larger bank roll, and may make political judgments when reviewing the professional merits of their peers.[23]

Some academics go even further and prevent individuals from speaking at the university if they espouse views with which they disagree.[24] Officials of the South African government, officials from the Reagan administration, Nicaraguan contras, and other non-liberal types often are the victims of such anti-free speech activists these days.[25] During the 1950s, academics who espoused Communist, Marxist, or collectivist views experienced similar difficulties.[26] Even when an unpopular or "politically incorrect" individual is permitted to speak, he will often pay a price in the form of harassment, heckling, and picketing. Academics who promote cultural diversity often use these disruptions as an excuse to exclude certain individuals from the university and foreclose debate on issues of the day.[27] Academic freedom can be threatened from within the university as

22. Brewster, *On Tenure*, 58 AM. A.U. PROF. BULL. 381, 382 (1972).

23. Metzger, *Academic Freedom: A Symposium*, 13 N.Y.U. EDUC. Q. 4, 5 (1982).

24. The American Association of University Professors (AAUP) takes the position that college and university students have the right to listen to anyone whom they wish to hear, "and affirms its own belief that it is educationally desirable that students be confronted with diverse opinions of all kinds . . . [A]ny person who is presented by a recognized student or faculty organization should be allowed to speak on a college or university campus." *Summary of Forty-Third Annual Meeting*, 43 AM. A.U. PROF. BULL. 359, 363 (1957), *reprinted in* ACADEMIC FREEDOM AND TENURE: A HANDBOOK OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS 112-13 (L. Joughin ed. 1969). This position has sometimes been ignored when the person invited to speak has espoused a conservative position. *See, e.g.*, Silber, *Free Speech and the Academy*, INTERCOLLEGIATE REV., Fall 1990, at 33, 34 (Marxist English professor attacked former contra leader Adolfo Calero at Northwestern University).

25. For a listing of campus free speech abuses, see ACADEMIC LICENSE, *supra* note 21, at 305-12.

26. *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589 (1967) (refusal to sign a certificate indicating membership in the Communist Party); Sweezy v. New Hampshire, 354 U.S. 234 (1957) (refusal to answer questions about political beliefs and associations).

27. *See* Chavez, *The Real Aim of the Promoters of Cultural Diversity Is to Exclude Certain People and to Foreclose Debate*, Chron. Higher Educ., July 18, 1990, at B1, col. 2. *See also* Timmons, *Fraudulent Diversity*, NEWSWEEK, Nov. 9, 1990, at 8.

well as from without, and the tenure process does not guarantee that untenured professors will be protected from internal assaults on the right to say or write what is on their minds.

C. *Does Tenure Insure a High-Quality Professoriate?*

According to the tenure theory, only those professors who prove themselves through excellent teaching, research, and service are awarded tenure;[28] their weaker brethren fall by the wayside. At some of the "better" universities, however, receiving an award for good teaching is considered the kiss of death for an untenured professor.[29] Anyone who spends so much time preparing for class must somehow be deficient in research, or so the rationale goes.[30] In one recent period, three out of four recipients of Harvard's teaching award were denied tenure.[31] Stephen Ferruolo, a widely known medieval history scholar, won the Dinkelspiel award for outstanding teaching at Stanford in 1982, and was denied tenure shortly thereafter.[32] Bruce Tiffney won Yale's teaching award two weeks after being denied tenure.[33] Faye Crosby won the Yale teaching award in 1982 and was denied tenure three years later.[34] " 'It's extremely unlikely,' says Douglas Kankel, a tenured associate professor in Yale's Biology Department, 'that if you are a professor with an exceptional teaching background, you will survive the

28. A fourth criterion—collegiality—is sometimes added to this list. One court defined collegiality as "the capacity to relate well and constructively to the comparatively small bank of scholars on whom the ultimate fate of the university rests." Mayberry v. Dees, 663 F.2d 502, 514 (4th Cir. 1981), *cert. denied*, 459 U.S. 830 (1982). While personality is not usually an official criterion for tenure, it often plays an indirect role in determining whether a faculty member is awarded tenure. For a discussion of this point, see Zirkel, *Personality as a Criterion for Faculty Tenure: The Enemy It Is Us*, 33 CLEV. ST. L. REV. 223 (1984-85).

A sore spot among those who regard teaching as paramount and everything else as secondary is the rather low esteem in which teaching is held by those in control of promotion and tenure. These persons argue that students are paying tuition to be taught by professors, not graduate assistants, and they are not paying tuition to subsidize faculty research. Yet research is rewarded, and teaching is not. In some universities, it is possible to go through an entire undergraduate program without being taught by a single member of the faculty. The student may be exposed only to a series of graduate assistants. *See* C. SYKES, PROFSCAM: PROFESSORS AND THE DEMISE OF HIGHER EDUCATION 35 (1988) (citing R. DUGGER, OUR INVADED UNIVERSITIES 170 (1974)).

29. *See* C. SYKES, *supra* note 28, at 58 (citing Barol, *The Threat to College Teaching*, NEWSWEEK ON CAMPUS, Oct. 1983).

30. *See id.* at 53.

31. *See id.*

32. *See id.* at 53-54.

33. *See id.* at 54.

34. *See id.*

tenure process.' "[35] One critic has characterized the trend as systemic: "The pattern extends throughout higher education. Virtually every university in the country has a similar story. These cases are dramatic, irrefutable evidence that the academic culture is not merely indifferent to teaching, it is actively hostile to it. In the modern university, no act of good teaching goes unpunished."[36]

Even if the tenure process serves as a gauntlet that only the excellent survive,[37] that does not mean that the excellent untenured professor will continue to be excellent after receiving tenure. A professor may become out-of-date, lazy, incompetent, or senile after receiving tenure, yet need not fear being fired. Furthermore, the tenure process is marred by favoritism, politicking, and the "good old boy" network. Professors who receive strong tenure recommendations from the department chair and dean have a better chance of receiving tenure than do other, perhaps better-qualified nominees who receive lukewarm recommendations.[38] A majority of the professors who sit on university tenure committees are from fields other than that of the tenure nominee, know little about what the nominee has accomplished in his area of research, and depend heavily on the recommendations of others. When examining a nominee's list of publications, some committee members have even been known to ask which journals are refereed and which are not, because they are totally unfamiliar with the literature in the nominee's field.

Another argument against the present tenure rule of "up-or-out"[39] is that the probationary period is too short to evaluate properly a faculty member's potential.[40] This is especially true

35. *Id.* (quoting Professor Douglas Kankel).

36. *Id.*

37. Professor Machlup suggests that at least part of the "deadwood" problem is caused not by tenure, but by the inability of university administrations and tenure committees to weed out inefficient and incompetent professors, who also happen to be their friends, before they receive tenure. *See* Machlup, *supra* note 1, at 313-14, 317.

38. One prominent educator has pointed out that this politicking takes valuable time and energy away from teaching. Such politicking, however, is encouraged by the tenure process. *See* G. ROCHE, EDUCATION IN AMERICA 106-07 (1977).

39. In most institutions, professors who do not receive tenure within approximately six years are dismissed.

40. The probationary period varies with the institution. It is generally about six years but may be longer or shorter. Professors who have taught at another institution may have a reduced probationary period at their new institution. The AAUP has recommended a seven-year probationary period. The arbitrariness of this rule has been criticized by a number of commentators, including John R. Silber, now President of

whenever the probationary period is short and the faculty member is engaged in a type of research that takes years to complete. The probationary period might end before the professor has published anything, and thus, a professor with excellent potential may be dismissed.[41] The university and the professor lose in such cases. If the professor can find another academic position, one university's loss is another's gain. But professors who lose their positions must endure the hassle and trauma of finding another position and relocating to another city, often disrupting their family life in the process.

The "up-or-out" policy of tenure also increases turnover rates among untenured faculty. As a result, costs rise as universities engage in constant searches for replacement candidates. The quality of the faculty also generally drops whenever universities fire untenured professors who have a few years experience and replace them with untenured professors who have little or none.[42]

Junior professors who teach such "drill" courses as elementary accounting, beginning French, and freshman English do not need the protection of academic freedom provided by the tenure system as much as professors who teach more theoretical courses.[43] At the same time, many of these young professors face such heavy teaching loads that the burden of a tenure-level research program is at best impracticable. If tenure cannot be completely abolished, at least it should be ended for these junior professors, who stand to lose more from tenure than they can gain. In this way, they can have the opportunity to be employed at the same institution for more than six years and will not have to look for a new job every few years.[44]

As Charles Sykes has noted:

> Tenure corrupts, enervates, and dulls higher education. It is, moreover, the academic culture's ultimate control mechanism to weed out the idiosyncratic, the creative, the nonconformist. The replacement of lifetime tenure with fixed-term

Boston University. *See* Silber, *Tenure in Context*, in THE TENURE DEBATE 34, 48-50 (B. Smith ed. 1973).

41. *See* Machlup, *supra* note 1, at 315.

42. *See id.* at 318-19.

43. We do not concede that anyone needs tenure to protect the right to speak and write. We merely assume it here for the sake of argument.

44. Some academic fields are extremely overcrowded. Professors in these fields who are fortunate enough to find one job may not be so lucky if they must find another job after a few years. Some individuals who are good classroom teachers may be forced to leave teaching altogether.

> renewable contracts would, at one stroke, restore accountability, while potentially freeing the vast untapped energies of the academy that have been locked in the petrified grip of a tenured professoriate.[45]

The argument that tenure insures a high-quality professoriate cannot withstand scrutiny. If tenure cannot provide special benefits in the form of enhanced academic freedom or lower costs—and it appears likely that this is the case—the arguments for its continuation are correspondingly weakened.

III. Additional Reasons for Abolishing Tenure

The tenure system came under increased attack after World War II,[46] and two national commissions cited it as a possible cause of student unrest during the 1960s.[47] The Linowitz Commission called tenure "a shield for indifference and neglect of scholarly duties."[48] The Scranton Commission said that tenure protects "practices that detract from the institution's primary functions, that are unjust to students, and that grant faculty members a freedom from accountability that would be unacceptable for any other profession."[49] The American Association of University Professors (AAUP) and Association of American Colleges (AAC) were understandably upset at these criticisms, but their own commission concluded that the fault was not with the tenure system itself but with its application and administration.[50] The AAUP's commission recommended that

> "adequate cause" in faculty dismissal proceedings should be restricted to (a) demonstrated incompetence or dishonesty in teaching or research, (b) substantial and manifest neglect of duty, and (c) personal conduct which substantially impairs the individual's fulfillment of his institutional responsibilities. The burden of proof in establishing cause for dismissal rests upon the administration.[51]

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45. C. Sykes, *supra* note 28, at 258.

46. *See* Lovain, *supra* note 16, at 420 (citing Comm'n on Academic Tenure in Higher Educ., Faculty Tenure 8-10 (1973)).

47. *See id.*

48. *Id.* (quoting Special Comm. on Campus Tensions, Am. Council on Educ., Campus Tensions: Analysis and Recommendations 42 (1970)).

49. *Id.* (quoting President's Comm'n on Campus Unrest, Report of the President's Commission on Campus Unrest 201 (1970)).

50. *See id.* at 421 (citing Comm'n on Academic Tenure in Higher Educ., Faculty Tenure 20 (1973)).

51. *Id.* (quoting Comm'n on Academic Tenure in Higher Educ., Faculty Tenure 75 (1973)).

Other commentators have attacked the tenure system for other reasons. Attorney John Gierak cites Michigan's Teacher Tenure Act[52] as the "single biggest obstacle to correcting the problem of poor teachers in [Michigan] public schools."[53] He gives three compelling reasons for this conclusion:

> [1] The teacher tenure system is wholly unnecessary to protect teachers from arbitrary and capricious actions of school boards, because teachers have more than adequate protection under collective bargaining agreements administered by powerful teachers unions.
>
> [2] Teacher tenure procedures are exorbitantly expensive in terms of both time and money, due in part to the fact that board of education members are required under the system to spend endless hours sitting as a "jury" on charges of teacher incompetency and misconduct.
>
> [3] The enormous amounts of time and money that must be invested in a teacher tenure case are powerful forces built into the tenure system that strongly discourage action against poor teachers. The impact of these cost considerations upon how districts deal with incompetent teachers cannot be overestimated, especially in small districts and those districts experiencing financial difficulties, which include the vast majority of all public school districts in the state.[54]

Times have changed drastically since Michigan passed its teacher tenure law in 1937. Labor law in Michigan and the rest of the nation has evolved to the point where tenure is no longer needed.[55] Teachers are now well-protected against arbitrary dismissal by various teachers' unions, to which the vast majority of teachers belong.[56] Union grievance procedures are much like those afforded by the Teacher Tenure Act. Special legisla-

52. MICH. COMP. LAWS § 38.91 (1990) (MICH. STAT. ANN. § 15.1971 (Callaghan 1990)).

53. Gierak, *Abolish the Teacher Tenure Act to Improve the Quality of Public Education*, 68 MICH. B.J. 1098, 1098 (1989). Although Gierak focuses primarily upon primary and secondary schools, his arguments and our subsequent discussion are also applicable to higher education.

Professor Steven Amberg takes a contrary view of the need to abolish the Teacher Tenure Act. *See* Amberg, *Abolish the Teacher Tenure Act? Not While the Need Still Exists*, 68 MICH. B.J. 1104 (1989). However, Amberg ignores Gierak's arguments, does not make any valid arguments of his own, and blames incompetent teachers on administrators who fail to supervise or train them properly.

54. Gierak, *supra* note 53, at 1098.

55. *See id.* at 1099.

56. For a discussion of unions and tenure, see Olswang, *Union Security Provisions, Academic Freedom and Tenure: The Implications of* Chicago Teachers Union v. Hudson, 14 J.C. & U.L. 539 (1988).

tion is thus no longer needed to protect teachers' rights.[57]

Part of the problem with tenure acts like Michigan's is that they make dismissal of an incompetent teacher exorbitantly expensive. In Michigan, for example, legal fees for an action to discharge an incompetent teacher are typically between $50,000 and $70,000 and in some cases exceed $100,000.[58] Dismissing a teacher is time-consuming—a board of education may have to sit through ten or more hearings before it can take action.[59] In Michigan, if a board of education determines that a teacher should be dismissed, the teacher can request another hearing before the state's Teacher Tenure Commission. If the tenure commission upholds the board's dismissal, the teacher may appeal to the circuit court, then to the appellate court, and finally to the Michigan Supreme Court. In order to pay the legal costs of defending its action, the school board may need to lay off an additional teacher for three or four years.[60] In view of the time required to serve as a board member throughout this process, some school districts may find it difficult to obtain volunteers to sit on their boards of education, especially in large school districts, where several teachers may be attempting to have their dismissals overturned.[61]

With such expensive and drawn-out procedures required to dismiss an incompetent teacher, it is always possible that the school administration will decide that retaining an incompetent teacher is the lesser of two evils.[62] If that happens, the incompetent teacher is left free to damage hundreds or even thousands of students over the course of his career.[63] Allowing incompetent teachers to continue teaching also harms the morale of good teachers and administrators. This problem can be solved by abolishing the Teacher Tenure Act and instead rely-

57. Almost every state legislature has passed some type of statewide tenure legislation. *See* L. STELZER & J. BANTHIN, TEACHERS HAVE RIGHTS TOO 1 (1980).

58. *See* Gierak, *supra* note 53, at 1100.

59. *See id.* Gierak points out that some hearings take much longer. In Cooper v. Oak Park Public Schools, 624 F. Supp. 515 (E.D. Mich. 1986), board hearings took almost 10 months. *See id.* at 516.

60. *See* Gierak, *supra* note 53, at 1100.

61. *See id.* at 1101.

62. Gierak cites this fact as a major contributing cause to the mediocrity of the public schools. *See id.*

63. Several studies by the American Association of School Administrators found teacher incompetence to be a major problem in public schools. In a 1977 study, school administrators estimated that between 5 and 15 percent of their teachers were unsatisfactory performers. *See* E. BRIDGES, MANAGING THE INCOMPETENT TEACHER 1 (1984) (citing S. NEILL & J. CUSTIS, STAFF DISMISSAL: PROBLEMS AND SOLUTIONS 5 (1978)).

ing upon binding arbitration,[64] which, according to Gierak, offers a number of advantages over the present system:

> 1. Arbitration is much quicker, which results in less disruption to educational programs, less potential back-pay liability, and increased fairness. . . .
>
> 2. Arbitration is much less expensive, for it reduces attorneys fees and costs. . . .
>
> 3. Arbitration does not necessarily involve board members. . . .
>
> 4. Because arbitrators are mutually selected by the parties, their decisions are generally better received and perceived to be more fair. . . .
>
> 5. Arbitration decisions are seldom appealed, which lends greater finality to the process. . . .[65]

Gierak goes on to observe that eliminating the Teacher Tenure Commission and its accompanying overhead would save taxpayers millions of dollars.[66]

While Gierak's arguments do not necessarily apply directly to situations in other states, many states have processes similar to that of Michigan.[67] And, although Gierak aims his attacks at the public primary and secondary school systems, his analysis largely applies to the collegiate level. Unionism is not as rampant at the college level as it is in the primary and secondary public schools, and university trustees do not necessarily become as involved in tenure disputes as do board of education members, but abolishing tenure at the college level can improve the quality of education by ridding the school of incompetent teachers.

IV. Conclusions and Recommendations

Academic tenure has advantages and drawbacks. It may save out-of-pocket expenses, but it also decreases flexibility, and the

64. *See* Gierak, *supra* note 53, at 1101-03.

65. *Id.* at 1102. Gierak uses as a case-in-point Beebee v. Haslett Public Schools, 406 Mich. 224, 278 N.W.2d 37 (1979), in which "the tenure charges filed with and upheld by the board against a teacher in 1968 were not finally resolved until 1979, a period of litigation spanning 11 years." Gierak, *supra* note 53, at 1103 n.13. Gierak does not mention how much money was wasted in the course of this litigation or how many students were permanently damaged during the 11 years that this incompetent teacher was in the classroom.

66. *See* Gierak, *supra* note 53, at 1103.

67. As noted above, most other states also have teacher tenure acts. For discussions of Louisiana's Teacher Tenure Act, see Comment, *Louisiana's Teacher Tenure Act*, 34 Loy. L. Rev. 517 (1988); and Resetar, *The Louisiana Teachers' Tenure Act—Protection from Dismissal for Striking Teachers?*, 47 La. L. Rev. 1333 (1987).

resulting inflexibility may cost more than the out-of-pocket expenses saved. Tenure enhances independence from outside forces but reduces the influence of those who pay and consume—taxpayers and students—while increasing the influence that tenured professors have on their untenured colleagues. The tenure process might increase the quality of the professoriate if it can truly separate high-quality teachers from those of low quality, but once a professor is tenured, it is difficult for the university to fire him unless he becomes incompetent or unneeded. Indeed, courts have ruled that universities may not fire a tenured professor even for ethical lapses.[68] Moreover, dismissing a tenured professor or teacher who does not want to go can be time-consuming and expensive.

So what is the solution? Is tenure good or bad? Nothing in the discipline of economics allows an unambiguous answer. The question is similar to "What is the optimal allocation of labor and capital in a given plant or industry?" Economics, however, can provide a methodology for answering this question. Let the market determine the worth of tenure. Give buyers and sellers of educational services freedom of choice. Allow colleges and universities the freedom to determine whether they want to offer tenure and how they want their tenure policy to be structured, without fear of losing accreditation.[69] Then, educational consumers would have the option of going to a school that has a tenure policy or one that does not. If tenure is a good management policy, it will tend to show in the consumer's perception of the university's reputation,[70] and that will have an effect on the university's enrollment and the amount of tuition it can charge.

Education consumers' dollar votes will be most effective, however, in rewarding good universities and punishing poor universities only if government is completely removed from the picture.[71] Government tends to reward universities with fund-

68. *See* Burton v. Cascade School Dist. Union High School No. 5, 353 F. Supp. 254, 255 (1973), *aff'd*, 512 F.2d 850 (9th Cir.), *cert. denied*, 423 U.S. 839 (1975); Texton v. Hancock, 359 So. 2d 895 (Fla. Dist. Ct. App. 1978). *See also* Magner, *Can't Fire Professor for Ethical Lapses, Rutgers Told*, Chron. Higher Educ., Aug. 15, 1990, at A2, col. 2.

69. For a discussion of how tenure policies may be changed or abolished, and how schools that do not have tenure policies have fared, see R. CHAIT & A. FORD, BEYOND TRADITIONAL TENURE: A GUIDE TO SOUND POLICIES AND PRACTICES (1982).

70. We do not mean to limit our recommendations to universities. The economics of tenure also apply to primary and secondary schools, although the problems and opportunities are somewhat different.

71. Readers may be shocked by the suggestion that education be completely priva-

ing regardless of quality, whereas consumers reward universities (by paying tuition) based on their perceptions of quality. Consumers will have little influence if a university's budget is provided entirely or mostly by government and accredited by a government-approved accreditation agency. Universities can best serve consumers only if they are free to offer the best product they can without artificially-imposed government obstacles and prohibitions. If universities were allowed to become entrepreneurial, they would be forced to serve consumers or suffer a loss of enrollment.[72] Under the present system, universities can thrive while ignoring consumers so long as they continue to receive generous government funding and, at the same time, can prevent other universities from competing effectively

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tized. We have been taught to believe that free public education is desirable and even a right. Discussing this issue in depth is beyond this Article's scope. Fortunately, several books and articles have been written on the benefits of totally private education, which can be much cheaper and qualitatively better than tax-supported education. For discussions of this point, see S. BLUMENFELD, IS PUBLIC EDUCATION NECESSARY? (1985); J. COLEMAN & T. HOFFER, PUBLIC AND PRIVATE HIGH SCHOOLS (1987); J. COONS & S. SUGARMAN, EDUCATION BY CHOICE (1978); S. DENNISON, CHOICE IN EDUCATION (1984); R. FITZGERALD, WHEN GOVERNMENT GOES PRIVATE: SUCCESSFUL ALTERNATIVES TO PUBLIC SERVICES 139-48 (1988); F. FORTKAMP, THE CASE AGAINST GOVERNMENT SCHOOLS (1979); M. PIRIE, PRIVATIZATION: THEORY, PRACTICE AND CHOICE 194-97, 231-35, 283-87 (1988); R. POOLE, CUTTING BACK CITY HALL 172-88 (1980); THE PUBLIC SCHOOL MONOPOLY: A CRITICAL ANALYSIS OF EDUCATION AND THE STATE IN AMERICAN SOCIETY (R. Everhart ed. 1982); E. SAVAS, PRIVATIZING THE PUBLIC SECTOR: HOW TO SHRINK THE GOVERNMENT 102-03 (1982); Spring, *The Public School Movement vs. the Libertarian Tradition*, J. LIBERTARIAN STUD., Spring 1983, at 61; E. WEST, EDUCATION AND THE STATE: A STUDY IN POLITICAL ECONOMY (2d ed. 1970).

72. Professor Armen Alchian suggests that the incidence of tenure is directly correlated to the percentage of university income that comes from endowments and taxpayers. That is, the higher percentage of funding that comes from sources other than consumers (students), the more likely there is to be a high incidence of tenure, because the system is insulated from consumer demand. Such universities can continue to grant tenure, despite its inefficient features, because consumers do not have much clout if the vast majority of university funding comes from other sources. If consumers paid 100 percent of the cost of their education, tenure would be far less likely to exist as a management policy, as evidenced by the fact that at proprietary schools (which are run like businesses), tenure is practically nonexistent. Thus, tenure can best be eliminated by getting government out of education. *See* A. ALCHIAN, *supra* note 10, at 194.

Alchian also points out that teaching will grow in importance as the percentage of total university funding that comes from tuition increases. *See* A. ALCHIAN, *The Economic and Social Impact of Free Tuition*, in ECONOMIC FORCES AT WORK 203, 220 (1977). Students pay tuition to be taught rather than to subsidize faculty research and service, and if they are paying the full cost, they will be able to exercise tremendous influence by threatening to withhold their tuition or take their money to a competing institution. As it stands, tuition covers a small part of total funding, especially at tax-supported institutions. The inescapable conclusion is that teaching will improve if government is removed from the business of funding education. Even if this does not occur, emphasis on teaching could improve if government provided support in the form of vouchers instead of direct funding. A voucher policy still raises a moral question, because under such a policy, the government is still using the force of taxation to make some persons (taxpayers) pay for a benefit that goes to others (students).

by blocking such competitors' innovative courses and delivery systems.[73]

If a consumer-oriented educational system were available, a number of tenure options would likely result. Some universities would probably retain the traditional tenure system. Others would abolish it entirely, thus becoming like every other industry that refuses to guarantee its workers lifetime employment. A number of combinations and permutations would also likely develop. Perhaps five-year renewable contracts would replace tenure in some cases. Through hybrid instruments of this type, professors could be somewhat insulated from external and internal influences but could still be dismissed if their services became unneeded or unwanted. Other universities might decide to grant tenure to some professors and give term contracts to everyone else.[74] The market would discover other options as well, if allowed to operate. Tenure is a management policy. As is the case with all management policies, companies with good policies tend to thrive and companies with poor ones tend to lag behind the competition. The market determines what a good management policy is, and what is not, far better than theoreticians gathered around the fireplace in the faculty lounge.

73. The accreditation system prevents competition. A university cannot just offer an innovative course whenever and wherever it wants. It must first look over its shoulder to see whether the relevant accreditation agency will permit the new course. The American Assembly of Collegiate Schools of Business (AACSB), for example, routinely prohibits business schools from starting or expanding a new program without its approval—and approval is often denied in advance by telling the business school at the time of its accreditation visit that it may not expand a certain program or start any new programs unless it first complies with specified conditions and receives AACSB approval. Thus, a business school may be prevented from offering M.B.A. courses at a company's facilities and may be forced by the accreditation agency to phase out such programs already in existence in order to maintain accreditation—even if consumers want the programs to be expanded.

74. Present university policy is either to grant tenure after some period of time, generally about six years, or to give a one-year notice of termination. Thus, professors who do not receive tenure are fired with one year's advance warning. If a termination letter is not received after a certain cut-off date, the professor is often considered tenured. The tenure or term contract option, by contrast, would allow untenured professors to continue teaching without forcing the university to terminate after some arbitrary period of time. Until a few years ago, academics in British schools were generally granted tenure automatically after a one- to five-year probationary period. *See* H. FERNS, *supra* note 11, at 42 n.2.

LEAVING THEM SPEECHLESS: A CRITIQUE OF SPEECH RESTRICTIONS ON CAMPUS

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ARTHUR J. BURKE**

> When a multitude of young persons, keen, open-hearted, sympathetic, and observant, as young persons are, come together and freely mix with each other, they are sure to learn from one another . . . . [T]he conversation of all is a series of lectures to each, and they gain for themselves new ideas and views, fresh matter of thought and distinct principles for judging and acting, day by day.
>
> — John Henry, Cardinal Newman[1]

Although philosophers view the ideal university as a place of free expression, open debate, and critical reflection, many academic institutions have recently begun to adopt restrictive speech codes regulating the content of campus discussion. Designed to combat racist, sexist, and other offensive speech, these policies, while pursuing admirable goals, ultimately undermine the character and purpose of the academy.

The courts first confronted the constitutional validity of a university speech code in 1989 in *Doe v. University of Michigan*.[2] In that case, Judge Avern Cohn of the United States District Court for the Eastern District of Michigan struck down on First Amendment grounds the University of Michigan's speech code, noting that free expression is essential to the mission of the university. Still, many similar speech codes remain in force in public and private universities throughout the nation.[3]

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1. Newman, *The Idea of a University; Discourse VI*, *reprinted in* 2 FROM BEOWULF TO THOMAS HARDY 403, 412 (R. Shafer ed. 1931).

2. 721 F. Supp. 852 (E.D. Mich. 1989). *See generally* Case Comment, *First Amendment—Racist and Sexist Expression on Campus—Court Strikes Down University Limits on Hate Speech:* Doe v. University of Michigan, 103 HARV. L. REV. 1397 (1990); Comment, *Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech at Colleges and Universities*, 39 EMORY L.J. 1351 (1990).

3. Various permutations of speech codes have been adopted at some of our nation's most prominent universities, including the University of California, the University of Connecticut, Emory University, the University of North Carolina-Chapel Hill, the Uni-

University administrators and academics advocate the use of speech codes to combat what they see as a rising tide of racial intolerance and sexual harassment on campus. They defend speech codes against First Amendment objections on two grounds. First, they contend that such codes fall within traditional exceptions to First Amendment protection. Second, they argue that the speech prohibited by such codes would be particularly harmful to historically oppressed groups, and thus, they advocate a new interpretive methodology that would allow content restrictions to be placed on speech offensive to such groups.

This Article posits that free debate and discourse are the best remedies for racism, sexism, and other forms of intolerance. Open discussion not only overcomes prejudice, but also works to empower historically oppressed groups.[4] In contrast, speech codes simultaneously patronize and stigmatize minority groups[5] and offend the underlying principles of the Constitution. Part I of this Article argues that most existing university speech codes are invalid under traditional constitutional analysis. Part II examines the controversial views of revisionist scholars, concluding that the goal of reducing ignorance and intolerance is best attained through the free market of ideas.

I. Traditional First Amendment Analysis

Under the First Amendment, Congress may not abridge the right to free speech.[6] This primary provision of the Bill of Rights, which has been held to apply to the states,[7] means, at the least, that content-based governmental restrictions on speech are impermissible.[8] In *Texas v. Johnson*,[9] the 1989 deci-

versity of Pennsylvania, Stanford University, the University of Texas, Tufts University, and the University of Wisconsin. *See* Grey, *Discriminatory Harassment and Free Speech*, 14 Harv. J.L. & Pub. Pol'y 157 (1991); Wilson, *Colleges' Anti-Harassment Policies Bring Controversy Over Free-Speech Issues*, Chron. Higher Educ., Oct. 4, 1989, at A1, col. 2.

4. *See infra* notes 66-68 and accompanying text.

5. *See infra* note 69 and accompanying text.

6. U.S. Const. amend. I.

7. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); Fiske v. Kansas, 274 U.S. 380 (1927); *cf.* Near v. Minnesota, 283 U.S. 697, 707 (1931) (freedom of the press). State universities are thus subject to the First Amendment. "University administrators at public institutions are bound by the first amendment under state action doctrine. At private institutions, the principle of free speech is often evoked as a matter of ethics, regardless of whether the Constitution applies directly." Matsuda, *Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2370 (1989).

8. *See, e.g.*, Central Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S. 557, 561

sion finding unconstitutional a state flag-burning statute, Justice Brennan stated: "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[10]

University speech codes designed to prohibit racist, sexist, and other offensive speech are inherently content-based. Administrators and academics openly admit that they object to this speech because they disagree with the very message it conveys.[11] Such content-based restrictions are contitutionally unacceptable. When striking down the University of Michigan's speech code, Judge Cohn emphasized the principle of content neutrality: "What the University could not do . . . was establish an anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas or messages sought to be conveyed."[12]

(1980) (commercial speech protected); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1978); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972) ("[The] government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

9. 109 S. Ct. 2533 (1989).

10. *Johnson*, 109 S. Ct. at 2544 (citations omitted).

11. Professor Charles Lawrence, a fervent advocate of speech codes that restrict racist speech, acknowledges that such codes are content-based. He argues that speech codes should go even further: "[C]ontent regulation of racist speech is not just permissible but, in certain circumstances, may be required by the Constitution." France, *Hate Goes to College*, A.B.A. J., July 1990, at 44, 48 (quoting Lawrence). Professor Mari Matsuda argues that "[w]e can attack racist speech—not because it isn't really speech, not because it falls within a hoped-for exception, but because it is wrong." Matsuda, *supra* note 7, at 2380.

12. Doe v. University of Mich., 721 F. Supp. 852, 863 (E.D. Mich. 1989).

An educational institution's content-based restriction of speech was the focus in the case in Tinker v. Des Moines School Dist., 393 U.S. 503 (1969). The petitioners in *Tinker* were high school and junior high school students who had been suspended for wearing armbands that violated the school dress code. Specifically at issue in *Tinker* was an armband restriction that had been adopted two days before the students attempted to attend class wearing armbands. *See id.* at 504. The school officials adopted this restriction because they anticipated disturbances by students wearing armbands as a sign of protest against the Vietnam War. *See id.* at 508. The Supreme Court, however, found that such a regulation violated the students' right to free speech and characterized the case as involving "direct, primary First Amendment rights." *Id.* The Court held that the school officials could not adopt such a code simply because they disagreed with the content of the students' message:

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. *But our Constitution says we must take this risk* . . . .

Id. (citation omitted) (emphasis added). *See also* Shelton v. Tucker, 364 U.S. 479, 487

Content-based speech regulation is unconstitutional on its face unless it falls within one of the narrow categories of exceptions to First Amendment protection.[13] These exceptions take the form of categorical rules that differentiate between protected expression and expression that the government may regulate so long as minimal due-process requirements have been met.[14]

One of the categorical exceptions from First Amendment protection, often cited by speech code advocates, is for "fighting words."[15] The rationale behind the restrictions on fighting words can be best described as a limitation on actions rather than on words: Fighting words contain no actual content per se; rather, they are offensive because they provoke. That is, the speaker of fighting words seeks to convey a message intended and likely to incite an immediate and violent reaction. Thus, the fighting-words exception is justified on the ground of the government's interest in maintaining order and preventing

(1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

13. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-8, at 832 (2d ed. 1988).

14. *See id.* These categories include fighting words, libelous statements, and obscene expression. *See id.* § 12-18, at 928-29.

15. Other possible categorical exceptions that might be used to shelter speech code regulations have been suggested. For example, Professor Richard Delgado has argued for such speech restrictions through a libel-law exception. *See* Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982). Libel laws have been held to constitute a categorical exception from First Amendment protection. Most prominently, in Beauharnais v. Illinois, 343 U.S. 250 (1952), the Supreme Court found constitutional a statute prohibiting exhibition in a public place of any publication portraying "depravity, criminality, unchastity, or lack of virtue of any class of citizens, of any race, color, creed or religion . . . ." ILL. REV. STAT. ch. 38, para. 471 (1959) (repealed 1961). The statute also required that the publication expose the victim "[t]o contempt, derision, or obloquy, or [be] productive of breach of the peace or riots." *Id.* In *Beauharnais*, the defendant had circulated leaflets deriding blacks and calling for an uprising of one million white persons. The Court rested its decision on Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). Serious doubt, however, exists as to whether *Beauharnais* is still good law. *See* Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978); C.E. BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 21 (1989) ("[T]he currently dominant legal view in the United States is that *Beauharnais* . . . is no longer good law.").

Professor Catharine MacKinnon advocates anti-obscenity legislation on the basis of an obscenity exception to First Amendment protection. *See* MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985). In American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986), however, the Seventh Circuit Court of Appeals held unconstitutional a statute, authored by MacKinnon and Professor Andrea Dworkin, that imposed civil liability on producers and purveyors of pornography and allowed victims to maintain a private action. Thus, to date, this categorical exception has failed to provide a legal shelter for speech codes that restrict free expression.

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physical violence.[16]

The United States Supreme Court has articulated standards governing the fighting words exception. In *Chaplinsky v. New Hampshire*,[17] the Court unanimously upheld a statute banning "face-to-face words plainly likely to cause a breach of the peace by the addressee."[18] The test outlined in *Chaplinsky* is whether or not a person of ordinary intelligence would understand the words as likely to cause the average addressee to react violently.[19] Such words include "the lewd and obscene, the profane, the libelous, and the insulting . . . those which by their very utterance inflict or tend to incite an immediate breach of the peace."[20] In preemptory fashion, the Court noted that "[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."[21] Similarly, the court in *Doe v. University of Michigan* recognized that "[u]nder certain circumstances racial and ethnic epithets, slurs, and insults might fall within [the fighting-words] description and could constitutionally be prohibited by the University."[22]

The fighting-words doctrine does not, however, constitute an ironclad justification for limiting free speech. Specifically, the fighting-words doctrine can work as an undesirable restriction on speech when someone who objects to certain speech silences that speech by threatening violence. This doctrine is therefore particularly dangerous to minority groups who express unpopular views.[23] This is one reason that the courts have narrowly construed the fighting words doctrine, limiting its application.[24]

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16. *See* Gard, *Fighting Words as Free Speech*, 58 WASH. U.L.Q. 531, 534 (1980).

17. 315 U.S. 568 (1942).

18. *Chaplinsky*, 315 U.S. at 573.

19. *See id.* at 572.

20. *Id.*

21. *Id.* (quoting Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1937)).

22. Doe v. University of Mich., 721 F. Supp. 852, 862 (E.D. Mich. 1989). The court, however, ruled that the University of Michigan's speech code did not confine itself to regulating such circumstances. *See id.* at 863 ("If the Policy had the effect of only regulating in these areas, it is unlikely that any constitutional problem would have arisen.").

23. *See* Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 512.

24. Professor Tribe notes that, in effect, the Court has incorporated the clear-and-present-danger test into the fighting-words doctrine. According to Professor Tribe, the courts are interpreting *Chaplinsky* as it was intended to be interpreted—as an opinion based on the ground that the government was not to be foreclosed by the First Amend-

Under current case law, universities seeking to restrict fighting words would need to include four elements in their speech codes before the fighting-words exception from First Amendment protection would be applicable. First, offending utterances must constitute extremely provocative personal insults.[25] Second, the words must have a direct tendency to incite an immediate, violent response by the average recipient.[26] Third, the words must be uttered face-to-face to the addressee.[27] Fourth, each offending utterance must be directed at an individual, not a group.[28] Following these guidelines, public universities could constitutionally enact codes that restrict fighting words. Yet such codes would likely encompass more than the remarks that they currently proscribe. For example, in *Chaplinsky* the fighting words held to be unprotected were "damned Fascist" and "damned racketeer."[29] Any attempt to regulate exclusively speech aimed at particular groups would render a code unconstitutional because the focus would be on content rather than on public order.

Even assuming that universities may constitutionally regulate

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ment from prohibiting words likely to cause a public brawl. *See* L. TRIBE, *supra* note 13, § 12-18, at 929 n.9.

25. *See, e.g.*, Norwell v. City of Cincinnati, 414 U.S. 14 (1973) (refusing to uphold the conviction of one "verbally and negatively" protesting his arrest, finding no fighting words); Cohen v. California, 403 U.S. 15 (1971) (refusing to uphold conviction of person wearing a jacket bearing the message "F— the draft"); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

26. *See, e.g.*, Lewis v. City of New Orleans, 415 U.S. 130 (1974) (refusing to uphold conviction of defendant who said "you g—d— motherf—ing police"); Goodig v. Wilson, 405 U.S. 518 (1972) (refusing to uphold defendant's conviction for addressing a policeman by saying "you son of a b— I'll choke you to death"); Cohen v. California, 403 U.S. 15, 20 (1971) (stating that fighting words are "those personally abusive epithets which, when addressed to the ordinary citizen, are as a matter of common knowledge, inherently likely to provoke reaction"); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

27. *See, e.g.*, Hess v. Indiana, 414 U.S. 105 (1973) (statement made during antiwar protest that "We'll take the f—ing street later" was constitutionally protected because the words were not aimed at anyone in particular); Lewis v. City of New Orleans, 408 U.S. 913, 913 (1972) (Powell, J., concurring) (If the words in question "had been addressed by one citizen to another, face to face and in a hostile manner . . . they would be 'fighting words.' "); Gooding v. Wilson, 405 U.S. 518, 524 (1972) (stating that speech restrictions must be limited to words that have a direct tendency to cause acts of violence by the person to whom the remark is addressed); Cohen v. California, 403 U.S. 15, 20 (1971) ("No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult."); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

28. *See, e.g.*, Gooding v. Wilson, 405 U.S. 518, 524 (1972); Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942). *See also supra* note 15 (questioning continued validity of *Beauharnais*).

29. *Chaplinsky*, 315 U.S. at 569.

a narrow category of speech, university speech codes face two additional hurdles. First is the doctrine of overbreadth. An overbroad statute is one that, although designed to restrict only unprotected speech, includes within its ambit speech protected by the First Amendment.[30] Most university codes are likely to fail this test. The quintessential example of an overbroad university speech code was presented in *Doe v. University of Michigan*. The University of Michigan code subjected students to discipline for "any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status."[31]

The overbroad speech code of the University of Michigan resulted in multiple infringements on free speech. For instance, a student in the School of Social Work openly stated in an academic discussion that he believed homosexuality to be a disease and that he hoped to develop a program for persuading gay clients to become heterosexual.[32] After other students filed a complaint, the Interim Policy Administrator at the University of Michigan concluded that the evidence warranted an official hearing on charges of "sex and sexual orientation harassment."[33] The panel that heard the student's case found him "guilty" of sexual harassment, but refused to convict him, citing First Amendment protections. The scruples of the administrators apparently prevented the suppression of unpopular views. But as the court noted in its review:

> [T]he fact remains that the Policy Administrator—the authoritative voice of the University on these matters—saw no First Amendment problem in forcing the student to a hearing to answer for allegedly harassing statements made in the

30. *See* Broadrick v. Oklahoma, 413 U.S. 601, 612-13 (1973):

> In [some] cases, it has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes.

See also Houston v. Hill, 482 U.S. 451, 458-60 (1987) (municipal ordinance prohibiting the interruption of police executing their duties is overbroad); NAACP v. Button, 371 U.S. 415, 433 (1963) (Virginia statute defining and punishing malpractice by attorneys unduly inhibits free expression).

31. Doe v. University of Mich., 721 F. Supp. 852, 856 (E.D. Mich. 1989) (quoting University of Michigan code).

32. *See id.* at 865.

33. *Id.*

> course of academic discussion and research. Moreover, there is no indication that had the hearing panel convicted rather than acquitted the student, the University would have interceded to protect the interests of academic freedom and freedom of speech.[34]

Another incident at the University of Michigan involved a statement made in an orientation session of a dentistry class. The class was widely regarded as one of the most difficult in the dentistry curriculum. During a small group discussion, a student noted that "he had heard that minorities had a difficult time in the course and that he had heard that they were not treated fairly."[35] The student attributed this information to his roommate, a black former dentistry student. A minority professor teaching the class filed a complaint, contending that the statement was unfair and hurt her chances for tenure. As a result of this complaint, the student was "counseled" on the University's racial harassment policy and agreed to write a letter apologizing for the comment.[36]

These two incidents indicate that the University of Michigan's code was overbroad because, contrary to the basic principles of the First Amendment, the code constrained speech on the basis of its content. Furthermore, both incidents occurred in the context of academic discussion and produced no imminent threat of physical violence, as required by the fighting-words doctrine.[37] Thus, even if universities may restrain speech within the narrow fighting-words exception, the University of Michigan's code went far beyond the scope of this exception.

A second obstacle that university speech codes face is vagueness. Statutes that seek to regulate speech are "void for vagueness" if they fail to give public notice as to what constitutes criminal or sanctionable conduct.[38] The vagueness doctrine is particularly important in the context of free speech, because a vague statute may well "chill" constitutionally protected speech. To avert the concerns posed by the vagueness doctrine, a restriction on speech must give adequate warning of the conduct that is prohibited; it must precisely define the unpro-

34. *Id.*
35. *Id.* at 866.
36. *See id.*
37. *See supra* notes 25-29 and accompanying text.
38. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 16.9, at 846 (3d ed. 1986).

tected speech.[39] Yet this is no easy task. For example, vagueness will continue to plague all speech codes that fail to adequately define such terms as "racist."[40]

Existing university speech codes have not been drafted with sufficient care to avoid the vagueness problem. In *Doe*, Judge Cohn found that the words "stigmatize" and "victimize" "elude precise definition."[41] The language in the University of Michigan code, he said, put students in a position to have to guess what it meant in order to avoid sanctions by the University.[42]

The University of Michigan code is by no means the only campus speech regulation with vagueness problems. For example, the Stanford University speech code, while purporting to limit itself to "fighting words," restricts statements intended to "stigmatize" or "convey . . . contempt for human beings on [the] basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin."[43] As with the provisions of the University of Michigan's code, the terms "stigmatize" and "convey . . . contempt for" lack a precise definition and are exceptionally ambiguous. The University of Connecticut's speech code punishes students for "derogatory names, inappropriately directed laughter, inconsiderate jokes and conspicuous exclusion [of other students] from conversation."[44] It is difficult to imagine a more vague and ambiguous regulation of speech. The State University of New York at Buffalo Law

39. *See* Broadrick v. Oklahoma, 413 U.S. 601, 607 (1973).

40. *See* Wright, *Racist Speech and the First Amendment*, 9 MISS. C.L. REV. 1, 23 (1988) ("[A] reasonably workable definition of racist speech that commands the agreement of even the targets of such speech may be practically unattainable, given that not only the behavioral patterns associated with racism, but also the nature or definition of racism may change historically.").

41. *Doe*, 721 F. Supp. at 867. *Cf.* American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 324-31 (7th Cir. 1985) (Indianapolis ordinance "defining 'pornography' as a practice that discriminates against women" struck down as violative of First Amendment because the ordinance "left out of its definition any reference to literary, artistic, political, or scientific value"), *aff'd mem.*, 475 U.S. 1001 (1986).

42. *See Doe*, 721 F. Supp. at 867.

43. Stanford Univ., Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment 1 (June 1990) (available in office of *Harvard Journal of Law & Public Policy*). For a discussion of the Stanford code, see Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 451. *See also* Grey, *supra* note 3, at 160.

44. Wiener, *Words that Wound: Free Speech for Campus Bigots?*, NATION, Feb. 26, 1990, at 272, 273 (citing the University of Connecticut speech code). A student disciplined under the University of Connecticut code attacked the regulation as unconstitutional. A court-approved settlement of the suit substantially restricted the scope of the code. *See* Emerson, *Only Correct*, THE NEW REPUBLIC, Feb. 18, 1991, at 18.

School's code states that by "joining this legal community each student's absolute right to liberty of speech must also become tempered."[45] The law school's policy warns students that "racist, sexist, homophobic, anti-lesbian, ageist and ethnically derogatory statements" will evoke "swift, open condemnation by faculty."[46] Two law students complained that the language of this policy was so vague that they were afraid that speech not intended to be racist but interpreted as such could result in sanctions.[47]

In summary, the university speech codes presently in place fail the test of constitutionality because they do not confine themselves to regulating fighting words and because they are overbroad and vague.[48] Unless universities write narrower codes or abandon the project altogether, they will continue to be unable to withstand attack under existing constitutional law standards.[49]

II. Responses to the Revisionists

Traditional First Amendment analysis yields strong arguments against campus speech codes at state universities. The proponents of these codes, however, rely on more than just the existing precedents and principles. In support of restrictions on racist speech, some revisionist scholars reject conventional First Amendment analysis as "absolutist" and instead call for a

45. *Colleges' Harassment Codes Stir Free-Speech Debate Suits*, Wash. Times, Nov. 28, 1990, at A5, col. 1 (quoting State University of New York at Buffalo Law School policy).

46. *Id.* (quoting State University of New York at Buffalo Law School policy).

47. *See id.*

48. Gerald Gunther, Stanford law professor and author of a leading casebook on constitutional law, believes that "no matter how narrow or broad [speech codes] may be, anti-harassment policies are 'wrong as a matter of policy as well as doubtful as a matter of law.' " *Id.* (quoting Professor Gunther). He stated that he is worried about "the intimidating effect of these rules on a student who might feel vehemently opposed to affirmative action, but doesn't speak up because he feels he will be charged with racism . . . . This is thought control and interference in free debate of the worst variety." *Id.* (quoting Professor Gunther).

49. Subsequent to the court's holding in *Doe*, the University of Michigan redrafted its speech code in an attempt to bring it into conformity with constitutional constraints. The "interim policy on discriminatory conduct" presently states:

> Physical acts or threats or verbal slurs, invectives or epithets referring to an individual's race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age or handicap made with the purpose of injuring the person to whom the words or actions are directed and that are not made as part of a discussion or exchange of an idea, ideology or philosophy are prohibited.

Office of the President, Univ. of Mich., Interim Policy on Discriminatory Conduct (Sept. 1990) (available in office of *Harvard Journal of Law & Public Policy*).

new approach that takes into account the "victim's story."[50]

Arguing that racist speech alienates minority students and encourages racial violence, these scholars propose explicitly content-based restrictions on racist speech.[51] They seek to quash offending utterances with speech codes, criminal penalties, and tort actions for group libel.[52]

The revisionists contend that racist speech silences and marginalizes minorities, effectively depriving these groups of free speech as well as the right to an education and personal development. Taking an anecdotal approach, they recount recent racial incidents on campus and elsewhere and discuss the emotional costs these incidents impose on the victims.[53] These revisionist scholars argue that allowing racist speech on campus constitutes a "psychic tax imposed on those least able to pay."[54]

Revisionist scholars accuse First Amendment "romantics" of extreme insensitivity at best and actual discriminatory intent at worst. Thus, Professor Richard Delgado, responding to an attack by an American Civil Liberties Union (ACLU) attorney on his proposal for a tort action for racial insults, notes that the ACLU "is composed mostly of white, male, middle-class lawyers who care a great deal about free speech,"[55] but less about exploited women and holocaust survivors. Professor Delgado

50. Matsuda, *supra* note 7, at 2321-22. *See also* Lawrence, *supra* note 43, at 456; Delgado, *supra* note 15, at 181.

51. *See supra* note 11.

52. *See* Matsuda, *supra* note 7, at 2357-58 (urging criminal penalties for statements that carry a "message of racial inferiority" that is "persecutorial, hateful and degrading" to a historically oppressed group); Lawrence, *supra* note 43, at 457 (arguing for campus speech regulations that would "prohibit face-to-face vilification"); Delgado, *supra* note 15, at 133 (arguing for a tort action for group libel).

53. *See* Lawrence, *supra* note 43, at 482-83 (discussing a personal experience of racism); Matsuda, *supra* note 7, at 2326-31 (recounting a litany of racist incidents). *See also* Scheppele, *Foreword: Telling Stories,* 87 MICH. L. REV. 2073 (1989) (discussing the trend toward anecdotal "storytelling" in legal scholarship). While this trend toward legal storytelling is innovative and refreshing, it shares the limitations of all anecdotal evidence. From the articles listing racist incidents on campus, it is difficult to determine the exact magnitude of the problem, because statistics or other objective measures are not presented.

54. Matsuda, *supra* note 7, at 2371 (noting that "[m]inority students often come to the university at risk academically, socially, and psychologically"). She adds:

> The application of absolutist free speech principles to hate speech, then is a choice to burden one group with a disproportionate share of the cost of speech promotion. The principle of equality is violated by such allocation. The more progressive principle of rectification or reparation—the obligation to repair effects of historical wrongs—is even more grossly violated.

Id. at 2376.

55. Delgado, *Professor Delgado Replies,* 18 HARV. C.R.-C.L. L. REV. 593, 596 (1983).

has taken this analysis a step further, arguing that white administrators secretly approve of racial insults and attacks. At "powerful white-dominated institutions," the administrators "benefit, and on a subconscious level they know they benefit, from a certain amount of low-grade racism in the environment."[56]

While revisionist proposals are likely to provide obvious advantages, they are not the most efficient means of combatting offensive speech. Public discussion and discourse serve better in opposing racism, sexism, and other forms of intolerance than rigid restrictions on speech. The traditional "marketplace of ideas" should discourage the purveyors of ignorance and faslehood. As Justice Holmes wrote:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by *free trade in ideas*—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[57]

According to Dean Lee Bollinger, this statement by Justice Holmes "stands as one of the central organizing pronouncements for our contemporary vision of free speech."[58]

Open exchange and discussion play a particularly vital role in the truth-seeking mission of colleges and universities. By forc-

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56. Lawrence, *supra* note 43, at 475 (quoting address by Richard Delgado to State Historical Society, Madison, Wisconsin, April 24, 1989). "If an occasional bigot or redneck calls one of us a nigger or a spick one night late as we're on our way home from the library, that is all to the good." *Id.* (quoting same).

57. Abrams v. United States, 250 U.S. 616, 630 (Holmes, J., dissenting) (emphasis added). *Abrams* involved the prosecution of five Russian aliens for the distribution, in August 1918, of leaflets denouncing President Wilson for the United States intervention in Russia following the Russian Revolution. The leaflets urged munitions and other workers to protest the intervention with a general strike. The defendants were prosecuted under the Espionage Act, "a World War I piece of legislative handiwork that proscribed a variety of activities the Congress had deemed potentially harmful to the war effort." L. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 16 (1986).

58. L. BOLLINGER, *supra* note 57, at 18. An earlier statement of the "marketplace" thesis was made by John Milton in 1644 in an argument for the repeal of the British licensing system. Milton wrote:

> And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?

Id. at 58-59 (quoting J. MILTON, AREOPAGITICA 58 (R. Jebb ed. 1918)).

ing students to confront and address differing views, free campus debate ultimately advances the goals of toleration and understanding. As the Supreme Court stated in *Keyishian v. Board of Regents of the University of New York*:[59] "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' "[60]

The revisionist scholars reject claims by civil libertarians that free debate and discussion will ultimately provide a remedy for intolerant speech. According to Professor Lawrence, racism renders the marketplace of ideas "dysfunctional" by limiting access and discouraging participation by minorities. "The American marketplace of ideas was founded with the idea of the racial inferiority of non-whites as one of its chief commodities, and ever since the market opened, racism had remained its most active item in trade."[61]

Ironically, the very success that the revisionists have achieved helps to establish the validity of the much-maligned marketplace of ideas. Today, scholars representing the perspectives of various minority groups wield substantial power on college campuses. Most obviously, their efforts have led to the adoption of the many current speech codes.[62] The numerous sensitivity workshops and diversity requirements adopted by prestigious universities also underscore the influence of these scholars.[63]

It seems hypocritical for revisionist scholars to persist in referring to themselves as members of "outgroups" when their views carry such weight in the academic community.[64] As Rob-

59. 385 U.S. 589 (1967).

60. *Keyishian*, 385 U.S. at 603 (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

61. Lawrence, *supra* note 43, at 468.

62. *See supra* note 3.

63. For example, Duke University requires freshmen to attend a diversity seminar that introduces students to "Duke's vision" of "multiculturalism." *See* Siegel, *The Cult of Multiculturalism*, THE NEW REPUBLIC, Feb. 18, 1991, at 34. Yale Law School instituted "race-sensitivity training workshops" in response to the distribution of a racist letter. *See* Rosen, *Hate Mail*, THE NEW REPUBLIC, Feb. 18, 1991, at 19. Columbia University has adopted mandatory "multicultural sensitivity-training" workshops for all freshmen. *See* Gibbs, *Bigots in the Ivory Tower*, TIME, May 7, 1990, at 104, 105.

64. Professor Delgado defines an "outgroup" as "any group whose consciousness is other than that of the dominant one." Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412 n.8 (1989).

ert Sedler, a professor at Wayne State University who argued the case against the University of Michigan speech code, stated, "[t]he 60's New Left radicals have taken over lots of university establishments. They can be just as fascistic as anyone."[65]

Furthermore, racist incidents on campus have not forced minority students into isolation and inaction; instead, they have produced a powerful student reaction.[66] And although Professor Matsuda insists that "the mainstream press often ignores [stories of racial harassment],"[67] in fact, activists and academics have proven adept in drawing the popular media's attention to the problem of campus racism.[68] This sort of private agitation and activism is precisely what is prescribed by the traditional "marketplace of ideas" approach.

In contrast, university speech codes tend to patronize and marginalize minority groups. Alan Keyes, a black who served as an official in the Reagan administration, denounces such codes as "paternalistic forms of well-intentioned racism that cripple[] blacks," and indicates that "he would feel cheated by an education that insulated him from contact with white racist views."[69] Codes prohibiting racist and sexist speech are demeaning because they isolate certain groups at the expense of others. This arouses resentment and hinders communication. Ultimately, the communication effected through privately-organized pressure and protest advances the goals of improved opportunity

65. France, *supra* note 11, at 49 (quoting Professor Sedler). *See also* Adler, *Taking Offense*, NEWSWEEK, Dec. 24, 1990, at 48 ("politically correct" movement on campus is "the program of a generation of campus radicals who grew up in the '60s and are now achieving positions of academic influence").

66. The United Coalition Against Racism (UCAR), a student organization at the University of Michigan, is probably one of the most well-organized and visible student groups on the campus. Following several racist incidents on the Michigan campus in 1987, UCAR threatened to file a class action suit against the university "for not maintaining or creating a non-racist, non-violent atmosphere" on campus. Following this threat, the university adopted its "anti-racial harassment policy." Doe v. University of Mich., 721 F. Supp. 852, 854 (E.D. Mich. 1989).

67. Matsuda, *supra* note 7, at 2331.

68. The following are a sample of some recent popular articles describing racist incidents on campus: France, *supra* note 11; Gibbs, *supra* note 63, at 104 (noting that "many campuses seem to distill the free-floating bigotries of American society into a lethal brew"); Wiener, *supra* note 44 (discussing the competing view on campus speech codes); White, *The New Racist*, Ms. MAG., Oct. 1987, at 68 (discussing racist incidents at the University of Michigan, the University of Massachusetts-Amherst, the University of Wisconsin, and others); and Lord, *Frats and Sororities: The Greek Rites of Exclusion*, NATION, July 4, 1987, at 1012 (describing a variety of racist incidents on campus, including the "jungle party" of the Sigma Alpha Mu fraternity at the University of Michigan).

69. France, *supra* note 11, at 49 (quoting Keyes). *See also* Keyes, *Freedom Through Moral Education*, 14 HARV. J.L. & PUB. POL'Y 165 (1991).

for and sensitivity toward minorities more successfully than do codes restricting speech.

The marketplace approach also avoids some of the potential pitfalls of official regulation of speech content. Official speech code restrictions, unlike private action, may stifle a broad range of politically unpopular speech on campus.[70] The danger lies in the balancing analysis advocated by speech code proponents. These advocates urge universities and courts to weigh the injury to victims of racist speech against the value of the First Amendment rights involved.[71] Many commentators have expressed the concern, however, that such a "balancing approach" may ultimately justify restrictions on a broad array of speech rights.[72]

The advocates of speech restriction respond that their proposals are modest and narrow in scope, focusing only on the most extreme racist statements. Professor Lawrence writes that "narrowly drafted regulations of racist speech . . . can be defended within the confines of existing First Amendment doctrine."[73] Likewise, Professor Matsuda proposes a "narrow definition of actionable racist speech."[74] While these reassurances are undoubtedly sincere, they should be examined critically. The same scholars who advocate speech restrictions are also often involved in expanding contemporary definitions of racism. Professor Lawrence writes that in America "[r]acism is ubiquitous. We are all racists."[75] Professor Matsuda implies that opposition to affirmative action and other diversity policies is really just a form of covert racism.[76] This suggests that the

70. *See infra* notes 78-86 and accompanying text.

71. *See, e.g.*, Matsuda, *supra* note 7, at 2376 (stating that "[t]he failure to hear the victim's story results in an inability to give weight to competing values of constitutional dimension"); Lawrence, *supra* note 43, at 457 (urging "reconsideration of the balance that must be struck between our concerns for racial equality and freedom of expression").

72. *See, e.g.*, L. TRIBE, *supra* note 13, § 12-2, at 794 (arguing that balancing is a "slippery slope," providing no clear standard for distinguishing various types of restrictions); M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 2.02, at 2-11 to 2-12 (1984) (discussing the dangers of "ad hoc balancing").

73. Lawrence, *supra* note 43, at 457.

74. Matsuda, *supra* note 7, at 2357.

75. Lawrence, *supra* note 43, at 468. *See also* Lawrence, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (applying Freudian and Cognitive psychology in developing a theory of unconscious racism).

76. *See* Matsuda, *supra* note 7, at 2332-34. She writes:

> Lower- and middle-class white men might use violence against people of color, while upper-class whites might resort to private clubs or righteous indignation against "diversity" and "reverse discrimination." Institutions—gov-

validity of affirmative action programs and plans to "diversify" the college curriculum are not issues about which reasonable people can disagree. Given this eagerness to find hidden agendas and unconscious racism, one might reasonably be suspicious of assurances that speech codes will remain narrow in scope.

To the extent these scholars succeed in expanding the definition and scope of "racist" behavior, more academic activities may be at risk. The balancing analysis of First Amendment revisionists makes it difficult to establish a point at which vague First Amendment rights begin to outweigh the more concrete pain and injury of the victims of racist, sexist, and other insulting comments. The result of such analysis would likely support more inclusive codes of regulation.

Recent incidents on college campuses reveal the dangers inherent in using broad definitions of racism or other offenses to regulate speech. The following examples, though anecdotal, provide an appropriate counter-point to the "victims' stories" of Professors Matsuda and Lawrence.[77]

One story from Dartmouth College is particularly illustrative.[78] A lecturer in French and Italian required her class to write an essay on the infamous *Dartmouth Review*. One student, apparently failing to condemn the publication, received a "D" on his essay on the ground that it was racist. The student appealed the grade, and an ad hoc committee composed of French department professors concluded that there was no racism in the piece. The professor responded that "[she couldn't] in good conscience reward with an 'A' someone who is writing racist remarks, no matter how well it is said."[79] She was unable or unwilling, however, to specify in what respect the essay was racist. The department refused to reverse its conclusion and the professor resigned. In this incident, the procedural safeguards fortunately prevented a student from being subject to political grading. Still, the harassing and biased behavior of the

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ernment bodies, schools, corporations—also perpetuate racism through a variety of overt and covert means.

Id. at 2334 (footnotes omitted). *See also* Kinder, *The Continuing American Dilemma: White Resistance to Racial Change 40 Years After Myrdal*, J. Soc. Issues, 1986, No. 2, at 151, 152 (arguing that opposition to affirmative action and busing is often part of a new "symbolic racism").

77. *See supra* note 50 and accompanying text.

78. *See Good News at Dartmouth; Sarah Sully Resigns*, Nat'l Rev., Sept. 15, 1989, at 18.

79. *Id.* at 18.

French professor in question will undoubtedly make students think twice before voicing unpopular views on campus.

A recent incident at Duke University also reveals the increasing intolerance on college campuses.[80] In September 1990, several faculty members joined the National Association of Scholars, an organization committed to preserving the classical Western curriculum. In response, Stanley Fish, Chairman of the English Department and professor of law at Duke,[81] charged the organization with racism, sexism, and homophobia.[82] He also urged that the university administration exclude association members from major campus committees on curriculum and tenure. Thus, instead of relying on debate and discussion, Fish attempted to enforce his views through coercive sanctions. Fortunately, the Duke administration rebuffed his demands.[83]

A litany of other incidents have appeared in the press. At Brown University, an art professor cancelled a showing of *The Birth of a Nation*, D.W. Griffith's classic film on the Ku Klux Klan, because of objections by the local NAACP.[84] Student publications at the University of Virginia and Vassar College have fought recognition and funding battles with student governments over politically charged issues.[85] During a recent Yale-Dartmouth football game in Hanover, New Hampshire, several students raised a banner advocating the restoration of the traditional Dartmouth Indian symbol. A college proctor, deeming the banner offensive, ordered the police to seize it.[86]

These incidents hardly prove that there is an epidemic of speech oppression on college campuses. Combined with the rise of speech codes, however, the incidents evince a possible trend toward content-based speech restrictions at America's universities. The incidents give substance and life to the threat posed to free expression by such a trend.

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80. *See Scholars' Group Accused of Bias, Divides Faculty*, N.Y. Times, Oct. 21, 1990, at 45, col. 3.

81. One collection of essays by Professor Fish that has been especially influential in the "politically correct" movement is S. FISH, IS THERE A TEXT IN THIS CLASS? (1980). For a discussion of Fish's role in the "politically correct" movement, see Prescott, *Learning to Love the PC Canon*, NEWSWEEK, Dec. 24, 1990, at 50.

82. *See Scholars' Group Accused of Bias, Divides Faculty*, *supra* note 80.

83. *See id.*

84. *See* Gibbs, *supra* note 63, at 106.

85. *See Papers Proliferate; The Right Presses Case on Campus*, L.A. Times, May 1, 1989, at 1, col. 1.

86. *See Good News at Dartmouth; Sarah Sully Resigns*, *supra* note 78, at 19.

III. Conclusion

For thousands of years, poets and scholars have directed the young to "seek for truth in the groves of Academe."[87] Today, however, this search for truth is imperiled as well-respected scholars and prestigious universities commit themselves to restrictions on free debate and discussion. While these restrictions are doubtless well-intentioned, they constitute a dangerous example of state-sanctioned controls on free expression.

This new regime of speech restrictions rejects the traditional goal of truth-seeking at the university and substitutes a questionable policy of social engineering. History presents many sobering examples of the dangers of accepting restrictions on liberty in the name of utopian visions. As Edmund Burke wrote in his analysis of the French Revolution, "[i]n the groves of *their* academy, at the end of every vista, you see nothing but the gallows."[88]

87. Horace, *Epistolarum libri II*, ii, 45, *reprinted in* The Complete Works of Horace 260 (J. Yonge ed. 1867) ("Atque inter silvas Academi quaerere verum," translated, "And seek for truth in the groves of Academe").

88. E. Burke, Reflections on the Revolution in France 88 (T. Mahoney ed. 1955) (1790) (emphasis in original).

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ANNUAL I.H.S.-EBERHARD STUDENT WRITING COMPETITION WINNER

THE IMBALANCE OF POWER AND THE PRESIDENTIAL VETO: A CASE FOR THE ITEM VETO

DIANE-MICHELE KRASNOW*

> [A]ll human Constitutions are subject to Corruption and must perish, unless they are timely renewed by reducing them to their first Principles.
>
> - Machiavelli[1]

> A legislative, an executive, and a judicial power comprehend the whole of what is meant and understood by government. It is by balancing each of these powers against the other two, that the efforts in human nature towards tyranny can alone be checked and restrained, and any degree of freedom preserved in the constitution.
>
> - John Adams[2]

INTRODUCTION

The veto power of the President of the United States resides in the Constitution's Presentment Clauses.[3] These clauses give

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1. G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 34 (1969) (quoting Machiavelli).

2. Letter from John Adams to Richard Henry Lee (Nov. 15, 1775), *reprinted in* 4 THE WORKS OF JOHN ADAMS 185, 186 (C.F. Adams ed. 1851).

3. The Presentment Clauses are found in Article I, Section 7 of the United States Constitution. Article I, Section 7, Clause 2 provides in part:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law. . . .

Article I, Section 7, Clause 3 provides:

> Every order, resolution, or vote to which a concurrence of the Senate and the House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the

the President the authority to approve by signing, or to reject by vetoing, all legislative enactments presented to him. The Framers intended the veto as a "check and balance" against congressional encroachment on the President's power, as well as a safeguard against the enactment of ill-conceived legislation.[4] The veto power authorizes the President to return to Congress, with comments, those bills that he finds objectionable.[5] Congress may then consider the President's comments and revise the legislation accordingly, or it may override the President's veto by a two-thirds majority.

The advent of omnibus appropriations bills[6] and Congress's propensity for attaching non-germane riders to legislation,[7] however, have made a mockery of the President's ability to exercise the veto power. In the current budget process, the President is frequently coerced into signing bills that contain objectionable provisions, at the peril of risking the very operation of government.[8]

One possible response to the growing ineffectiveness of the veto power would be to exercise an item veto, that is, a veto of individual items within pieces of legislation passed by Congress. The Framers were silent on the subject of a item veto.[9] The item veto has been on the national agenda for over 100 years.[10] Proponents of the item veto generally insist that the

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Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and the House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

4. *See infra* notes 64-65 and accompanying text.

5. What is now understood to be the executive veto power was referred to by the Framers as the "negative voice," "qualified negative," or "revisionary power." The term "veto," which is rooted in the Latin "I forbid," was seen as pejorative and did not come into use until later. The use of the word veto has obviated the need for the somewhat cumbersome term "negative voice"; for purposes of this Note, they are considered synonymous.

6. Omnibus appropriations bills are an amalgamation of assorted legislation grouped together and presented in a single bill or resolution.

7. *See infra* notes 98-102 and accompanying text.

8. The 1987 budget, for example, was completed and presented to President Reagan on the eve of Congress's adjournment, thereby forcing the President's signature lest he take responsibility for grinding the government to a halt. Congress therefore succeeded in securing Presidential approval to this unwieldy 2,100-page budget, which neither the President nor his advisers had time to read in its entirety before the President signed the bill. *See* Bartley, *Next President Must Start Now to Mend Office*, Wall St. J., Jan. 20, 1988, at 28, col. 3.

9. The item veto is often referred to as the "line-item veto," a misnomer, because Congress does not itemize bills by line. *See* R. SPITZER, THE PRESIDENTIAL VETO: TOUCHSTONE OF THE AMERICAN PRESIDENCY 122 (1988).

10. *See infra* notes 103-13 and accompanying text.

President needs this tool to ensure fiscal responsibility.[11] Although some commentators urge application of an item veto to both appropriations and general legislation,[12] most of the debate addresses only appropriations measures. Those favoring the implementation of the item veto to improve the federal budget process are divided on whether the Framers intended the Constitution to encompass the item veto.[13] Moreover, some commentators who acknowledge the breakdown of the budget process are unconvinced that the item veto would cure the problem.[14]

Two commentators have suggested that authorization of an item veto power could be achieved by (1) an act of Congress, (2) a change in the House and Senate rules, or (3) a constitutional amendment.[15] The prospects for congressional action, however, are remote at best; Congress is unlikely to relinquish to the President any power over the nation's purse strings.[16] The passage of a constitutional amendment has also been the topic of considerable discussion,[17] but this too seems unlikely.

This Note takes the position that none of the above approaches is necessary, because the item veto power currently resides within the President's constitutional authority. Part I of the Note explores the historical context in which the Framers drafted the Constitution to provide insight regarding their intentions respecting the veto power. The analysis examines the plain meaning of the terminology used and, in the case of ambiguities, what the Framers understood and intended for the

11. *See* Ross & Schwengel, *An Item Veto for the President?*, 12 PRESIDENTIAL STUD. Q. 66, 76-77 (1982) (item veto would reduce extravagance in public expenditures by discouraging "pork-barrel" appropriations). *See also* Miller, *An Expanded Veto Power and the Budget*, in PORK BARRELS AND PRINCIPLES: THE POLITICS OF THE PRESIDENTIAL VETO 47, 50 (1988) [hereinafter PORK BARRELS AND PRINCIPLES]. *But see* Wolfson, *Is a Presidential Item Veto Constitutional?*, 96 YALE L.J. 838, 851-52 (1987) (spending power is a "core" legislative power).

12. *See, e.g.*, Robinson, *Public Choice Speculations on the Item Veto*, 74 VA. L. REV. 403 (1988); Glazier, *The Line-Item Veto: Provided in the Constitution and Traditionally Applied*, in PORK BARRELS AND PRINCIPLES, *supra* note 11, at 9.

13. *Compare* Best, *The Item Veto: Would the Founders Approve?*, 14 PRESIDENTIAL STUD. Q. 183 (1984) (answering in the affirmative) *with* Cooper, *The Line-Item Veto: The Framers' Intentions*, in PORK BARRELS AND PRINCIPLES, *supra* note 11, at 29 (Framers did not intend President to have item-veto power).

14. *See, e.g.*, Miller, *supra* note 11, at 48.

15. *See* Ross & Schwengel, *supra* note 11, at 67.

16. Although the notion of a quick legislative solution is appealing to those favoring the item veto, it is unclear whether such a legislative enactment would itself be unconstitutional. *See Line Item Veto: Hearings to Consider S. 43 Before the Senate Rules and Administration Comm.*, 99th Cong., 1st Sess. 13-20 (1985).

17. *See infra* notes 103-13 and accompanying text.

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words of the Presentment Clauses to mean. Part II addresses the evolution of the veto power since 1789 by reviewing subsequent interpretations by the Executive and Judicial Branches of the Presentment Clauses. Part III discusses alternative approaches that presidents have used to skirt the item veto question. The discussion specifically addresses the impact of the Congressional Budget and Impoundment Control Act of 1974[18] on one such alternative, presidential impoundment. Part IV assesses the balance of power between the President and Congress today. In the past few decades, changes in the budget process have shifted a significant amount of control from the President to the Congress. The effect of this shift, viewed in light of the ambiguous nature of the veto provisions and the ideological foundations of the Constitution, leads to the conclusion that the Presentment Clauses should be read as authorizing the item veto.

I. The Item Veto and the Constitutional Convention

A. *Introduction*

When the Framers gathered to draft the Constitution in May 1787, they brought the sum of their educational and practical experience to bear. Schooled in Locke and Montesquieu, they had seen the principles of the English Constitution, once thought to be "[t]he noblest improvement to human reason,"[19] corrupted by the tyranny of man. Likewise, they had seen the mistakes made by state governments. This Part reviews the events leading up to the Constitutional Convention and analyzes the Framers' action with respect to the item veto.

B. *The Pre-Revolutionary Period*

The American colonists' early experience with the executive veto, although varied, included substantial experience with the item veto.[20] In the proprietary or self-governing American colonies, the governor possessed absolute veto power. In the pro-

18. Pub. L. No. 93-344, 88 Stat. 297 (codified as amended in scattered sections of 2 U.S.C.).

19. G. Wood, *supra* note 1, at 32 (quoting an early American columnist).

20. The English Constitution contained an absolute negative possessed by the Crown, the House of Lords, and the House of Commons. A single no vote was sufficient to defeat pending legislation. *See* E. Mason, The Veto Power 17 (1891). After the Glorious Revolution of 1688, the negative voice, as directed against acts of Parliament, fell into disuse. *See* G. Wood, *supra* note 1, at 24.

prietary colony of Pennsylvania, the governor's proposed legislation originally was sent to tribunals. If the tribunals approved the legislation, it became law; if they withheld their consent, it failed.[21] That system was eventually changed, and the colonial governor, either a member of the Penn family or, later, its designee, repeatedly exercised the item veto.[22]

In the royal colonies, the Crown used the veto.[23] Between 1696 and 1776, the Board of Trade, acting on behalf of the Crown, reviewed 8,563 pieces of legislation submitted by the American colonial legislatures.[24] The board subsequently vetoed 469 of these in part or in entirety. In 1702, the board declared its policy to be that bills "might be altered in any part thereof."[25]

The royal governors possessed an analog of the item veto over nominations by the lower house of the legislature (the general assembly) of persons for membership in the upper house.[26] The governor could selectively accept or reject any of the lower house's appointees.[27] For the royal governor, who was not infrequently at loggerheads with his general assembly, this selective or item veto enabled him to reject those nominees with dubious loyalty.[28] The colonists complained that King George III and his governors were withholding his assent from laws that were essential to the public welfare.[29] The American Whigs believed that while the government had become "sunk in corruption," the principles underlying the constitution had to be preserved.[30] This tension between the desire for continuity and the desire to end tyrannous abuses provided the backdrop for the American Revolution.

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21. *See* 6 W. SHEPHERD, HISTORY OF PROPRIETARY GOVERNMENT IN PENNSYLVANIA 41-42 (1967).

22. *See id.* The veto applied to both appropriations and other types of legislation.

23. *See* R. SPITZER, *supra* note 9, at 5.

24. *See* McDonald, *Line-Item Veto: Older Than Constitution*, Wall St. J., Mar. 7, 1988, at 16, col. 4. These 8,563 pieces of legislation were all the laws enacted by the legislatures of the nine royal colonies in this 80-year period. *See id.*

25. *Id.*

26. *See* McDonald, *The Framers' Conception of the Veto Power*, in PORK BARRELS AND PRINCIPLES, *supra* note 11, at 1, 2. The upper house acted as the governor's executive council analogous to a combination of today's Cabinet and Senate. *See* O. DICKERSON, AMERICAN COLONIAL GOVERNMENT: 1696-1765, at 158-59 (1962).

27. *See* McDonald, *supra* note 26, at 2.

28. *See, e.g.*, J. BURNS, CONTROVERSIES BETWEEN ROYAL GOVERNORS AND THEIR ASSEMBLIES IN THE NORTH AMERICAN COLONIES 117, 173-74 (1923).

29. *See* R. SPITZER, *supra* note 9, at 5. The colonists focused their complaints not against the King's negative, but rather against his abuse of this authority.

30. *See* G. WOOD, *supra* note 1, at 32, 43-45.

To many of the colonial legislatures, a veto meant a selective veto. As this selective veto and other tools were used by the British monarchy in an increasingly abusive fashion, the colonists sought to diminish the throne's power to ensure that the will of the people could not be overridden by an overly powerful executive.

C. *Post-Revolutionary Period: 1776-1787*

Following the Declaration of Independence, most of the state governments removed the executive's veto power. At the same time, the revolutionary governments preserved much of the ideology of the English Constitution. The new governments of the states closely resembled the colonial charters;[31] however, the revolutionaries saw fit to abandon certain anachronistic provisions.

The most significant departure from the colonial charters was the metamorphosis of the magistery. Motivated by the desire to rid the government of tyranny and bruised by their experiences under English rule, the drafters of the new constitutions obliterated the "kingly" nature of the executive and "absolutely divested [it] of all [its] rights, powers, and prerogatives."[32] Most states also sought to subordinate the executive to the legislature.

Not all states, however, abolished the governor's position in their new charters.[33] Pennsylvania took the most radical step by replacing the governor with a council of twelve representatives of the people,[34] clearly reflecting the post-revolutionary desire to keep the bulk of the power with the people. The 1776 draft of the Virginia Constitution, proposed by Thomas Jefferson, delineated numerous checks on the governor's power.[35] These checks were so abundant that the ultimate effect was to strip the governor of virtually all authority.[36] Most states recognized the need for an executive with some power. Some states established councils that participated in gubernatorial duties,

31. *See id.* at 134.
32. *Id.* at 136.
33. *See* R. SPITZER, *supra* note 9, at 8.
34. *See* G. WOOD, *supra* note 1, at 137.
35. *See id.* at 136-37. "The Constitution explicitly removed the governor's role in legislation, his control over the meeting of the assembly, his powers to declare war, make peace, raise armies, coin money, erect courts or other offices, and pardon crime." *Id.*
36. *See id.*

thereby diluting the authority of the executive.[37] The absolute negative enjoyed earlier by the colonial governors was generally viewed during this period as repugnant to the revolutionary spirit of most of the fledgling states.[38]

While lingering revolutionary fervor precluded governors' participation in writing legislation in most of the new states, the Massachusetts Bay Constitution gave the governor the opportunity to negative bills.[39] The governor was given the power of "revisal."[40] Although the constitution is ambiguous on the issue of the item veto, the choice of words may suggest the permissibility of selective application. No governor, however, exercised the veto authority before 1787.[41]

The Massachusetts Constitution came to represent the ideal of a perfect constitution.[42] It embodied the separation of powers among the three branches of the legislature: the House of Representatives, the Senate, and the governor, in descending authority. The governor was elected by the people and empowered with a veto that was subject to override by two-thirds of the House of Representatives and Senate. The veto was seen as a means of maintaining separation of powers by instituting a check on the legislature. It ensured the autonomy of the executive by preventing the legislature from chipping away at his rights.[43] Meanwhile, the possibility of a two-thirds override in-

37. *See id.* at 138.

38. *See id.* at 141. Even proponents of a stronger magistrate found the concept of one person exercising his will over that of society inconsistent with the newly formed concept of "authority." *Id.* With few exceptions, the revolutionary constitutions prohibited their governors from participating in the formulation of legislation. *See id.*

South Carolina experimented with an absolute veto in its 1776 constitution, but when Governor Rutlage actually attempted to use this power, the public protest forced Rutlage's resignation and reconsideration of the provision. *See* Watson, *Origins and Early Development of the Veto Power*, 17 PRESIDENTIAL STUD. Q. 401, 405 (1987). South Carolina's revised 1778 constitution denied the governor the veto power. *See id.*

39. *See* R. SPITZER, *supra* note 9, at 9-10.

40. *See* E. MASON, *supra* note 20, at 19 n.2. The Massachusetts Constitution of 1780 provides in pertinent part:

> No bill or resolve of the senate or house of representatives shall become law, and have force as such, until it shall have been laid before the governor for his revisal: and if he, upon such revision, approve thereof, he shall signify his approbation by signing the same. But if he have any objection to the passing of such bill or resolve, he shall return the same, together with his objections thereto . . . .

MASS. CONST. art. II, ch. I, § I.

41. *See* McDonald, *supra* note 24.

42. *See* G. WOOD, *supra* note 1, at 434.

43. This new approach to providing the governor a voice in formulating legislation, coupled with bicameralism (division into two houses of legislative power), reflected a

dicated a new "suspensive" role for the veto; this qualified veto amounted not so much to a requirement that the governor assent to legislation as a mechanism for him to place a check on it.[44]

The New York Constitution of 1777 is instructive in that it provided for a strong executive with an implicit item veto. The constitution provided for a council of revision with the authority to assess all bills passed by the state legislature.[45] The council was comprised of the governor, the chancellor, and the judges of the state supreme court.[46] If a majority of the council had reservations, the bill was returned to the chamber from which it originated with comments.[47] The legislature would then enact the bill into law, incorporating the proposed revisions.[48] After the enactment, the law was again reviewed by the council of revision.[49] Although the New York Constitution of 1777 was ambiguous on the power to veto items selectively, on February 3, 1778, the council of revision set precedent in its first exercise of veto authority by taking exception to several clauses in a legislative enactment.[50] The legislation was later passed in its entirety, the offending clauses having been revised.[51] It thus appears that the council had selective or item veto authority.

The post-revolutionary period is also helpful in providing a background understanding of the veto power with respect to appropriations. Although appropriations were made by the legislatures, spending was almost totally discretionary in the hands of the governor.[52] For example, the 1776 Constitution of North Carolina, the Massachusetts Constitution of 1780, and

growing view that power is no less dangerous in the hands of the representatives of the people than in the governor's hands.

44. *See* G. WOOD, *supra* note 1, at 452-53. As noted at the Massachusetts Convention of 1780, the governor was granted some legislative authority "not because, as in England, the magistracy was a social entity which must consent and thus bind itself to all laws," *id.*, but rather, because this veto ensured a balance among the three capital powers of government.

45. N.Y. CONST. of 1777, § III, *reprinted in* 7 SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS 168, 172 (W. Swindler ed. 1978). *See also* McDonald, *supra* note 26, at 3. The use of the term "revision" indicates that the framers of the New York Constitution thought of the veto as revisionary, not merely nay-saying, power.

46. *See* N.Y. CONST. of 1777, § III.

47. *See id.*

48. *See id.*

49. *See id.*

50. *See* McDonald, *supra* note 24.

51. *See id.*

52. *See* McDonald, *supra* note 26, at 3.

the New Hampshire Constitution of 1784 all explicitly stated that no money could be removed from the public treasury without the consent of the governor.[53] The legislatures made lump-sum appropriations, and the governor allocated—or chose not to allocate—those funds as he saw fit within proscribed legislative boundaries.[54] This power of impoundment, which functioned in much the same way as an item veto, gave the governor discretionary authority over appropriations.[55]

D. *Changing Ideology—A Prelude to the Constitutional Convention*

The 1780s again witnessed a gradual shift of sentiment toward the appropriate structure of government. The people's fear of centralized authority, which at this point rested in the state legislatures, increased. This was accompanied by a growing cleavage between large property owners and other classes of society. After the adoption of the Articles of Confederation, characterized by the states' refusal to relinquish control and emphasis on a strong legislature,[56] growing recognition of legislative licentiousness created pressure for a stronger executive. The changing ideology reflected the observation, based in experience, that a concentration of power *anywhere* is potentially bad (even in an elected, representative body).[57]

By the time of the Constitutional Convention, prevailing wisdom argued that a stronger central government was essential.[58] At the same time, the Framers recognized the shortcomings of a headless government.[59] They sought to remedy this problem

53. *See id.*

54. *See id.*

55. *See infra* notes 114-17, 121-38 and accompanying text (discussing further executive's impoundment and its impact on the balance of power).

56. *See* ARTICLES OF CONFEDERATION art. II. The Articles contained no veto provision.

57. Madison, for example, expressed the fear that, in a system dominated by a majoritarian legislature, the few would be unnecessarily sacrificed to the many. *See* Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* THE PAPERS OF THOMAS JEFFERSON, 1788-1789, at 20 (J. Boyd ed. 1964).

58. Edmund Jennings Randolph opened the Constitutional Convention by enumerating the defects of the Confederate government. *See* 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 127 (J. Elliot ed. 1901) [hereinafter DEBATES]. He noted, in particular, the lack of security against foreign invasion and the lack of federal authority to check infighting among the states. *See id.*

59. *See* R. SPITZER, *supra* note 9, at 10. The Articles of Confederation had required concurrence of all 13 states to execute measures of importance to the union. *See id.* This restriction had virtually halted the operation of the national government. *See* THE FEDERALIST No. 15, at 106 (A. Hamilton) (C. Rossiter ed. 1961).

by strengthening the executive and dividing the powers of the federal government among three discrete branches.[60]

The doctrine of separation of powers thus became an underlying theme for the Framers. Although historians have suggested that separation of powers meant nothing more than a bar to duplicitous office-holding,[61] a closer examination of its application indicates that the doctrine was intended to keep the judiciary and the legislature from becoming like the power-amassing executive.[62]

E. *The Constitutional Convention—Adoption of the Veto Provision*

The Framers effected the dissemination of power within a strong central government by dividing the governing powers among the legislature, the executive, and the judiciary. The enumeration of the legislature's power in Article I of the Constitution is evidence of its primacy in the federal scheme.[63]

To ensure the autonomy of the three branches, the Framers sought institutionalized checks on the divided powers.[64] The dominance of the legislature, for example, necessitated a defense mechanism for the executive—the veto power. Because presentment and the veto power are inextricably intertwined, they were considered together at the convention. The discussion focused on whether this "check" was necessary and, if so, whether it should be held solely by the executive or shared with a council of revision. The Presentment Clauses were written to give the executive alone some means of defending against the usurpation of power by the legislature as well as to protect against the enactment of ill-conceived legislation.[65] Although the debates of the convention attest to the battles waged to secure approval of the Presentment Clauses, they offer scant insight into whether the item veto was included within those clauses' scope.

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60. *See* 5 DEBATES, *supra* note 58, at 127.

61. *See* G. WOOD, *supra* note 1, at 156.

62. *See id.* at 157.

63. *See* THE FEDERALIST No. 51, at 322 (J. Madison) (C. Rossiter ed. 1961). There was not absolute unanimity on the supremacy of the legislature, however. John Adams predicted the ultimate collapse of the government because the executive was rendered virtually powerless against its natural adversary, Congress. *See* L. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 51 (1948).

64. Madison commented that "[a]mbition must be made to counteract ambition." THE FEDERALIST No. 51, *supra* note 63, at 322.

65. *See* THE FEDERALIST No. 73 (A. Hamilton).

1. *Adoption of the Bills Presentment Clause*

On May 25, 1787, the Constitutional Convention convened. Edmund Jennings Randolph of Virginia opened business on May 29.[66] He proposed several resolutions, one of which provided for a council of revision—comprised of members of the judiciary—to examine acts of the national legislature and veto such acts that it deemed unsuitable.[67] A proposal for an executive negative also appears in a draft of a federal constitution presented to the convention on the same day by Charles Pinkney of South Carolina.[68]

On June 4, Randolph's proposal for a council of revision was taken up for debate.[69] Elbridge Gerry moved to postpone consideration of the issue because he believed that the judiciary ought not to be included in the legislative process.[70] Wilson and Hamilton wished to provide the executive with an absolute negative.[71] After some discussion, this proposal was defeated.

The council of revision proposal was reconsidered on June 6.[72] Madison supported the participation of judges, arguing that they could bolster the executive's resolve and prevent him from being wooed by the legislature.[73] He also noted that this check would prevent encroachment on the judiciary by the legislature. After Gerry argued that the executive could be more impartial when standing alone, the council of revision proposal was rejected.[74]

Having not received approval by the convention, the executive negative was once again the topic of debate on June 18. Alexander Hamilton presented to the convention his plan for the government, the fourth clause of which provided for a supreme executive authority to be vested in a governor with

66. *See* 5 DEBATES, *supra* note 58, at 127.

67. *See id.* at 128. Randolph's resolution, it appears, is derived from Madison's prior suggestion that appeared in a letter dated April 8, 1787. *See id.* at 107-08. Madison proposed that the national government "have a negative, in all cases whatsoever, on the legislative acts of the states, as the King of Great Britain heretofore had." *Id.*

68. *See id.* at 128.

69. *See* 4 DEBATES, *supra* note 58, at 623.

70. *See* 5 DEBATES, *supra* note 58, at 151.

71. *See id.* Gerry responded that, because the legislature would be comprised of the country's best, an absolute negative would be an unnecessary check. *See id.*

72. *See id.* at 164.

73. *See id.*

74. *See id.* at 154, 165-66. It was also noted that, standing alone, the executive would be the party with ultimate responsibility. *See id.*

veto power.[75] This proposal was ultimately reported in a draft of the Constitution on August 6.[76] On August 15, Madison moved once again to include the judiciary in the revisionary process. The proposal was rejected,[77] and the Bills Presentment Clause was adopted in its present form.[78]

2. *Adoption of the Orders Presentment Clause*

Another of Madison's suggestions did, however, provide the genesis for the Orders Presentment Clause.[79] On August 15, Madison observed that Congress could circumvent the executive veto by identifying a bill as an act or resolution.[80] Accordingly, he proposed that the language of the Bills Presentment Clause be amended to include more expansive terms.[81] After a rather confused discussion, the proposal was rejected.[82] The following day, Edward Jennings Randolph, at Madison's urging, proposed that all orders, resolutions, and votes requiring the approval of both Houses be presented to the President.[83] The language of Randolph's proposal was essentially lifted from a similar provision in the Massachusetts Constitution of 1780.[84]

The origin of the orders presentment clause of the Massachusetts Constitution, although rooted in the pre-revolutionary era, is particularly illuminating, because it served as a model for the Orders Presentment Clause of the United States Constitution.[85] In 1721, the Massachusetts legislature sought to circumvent a possible veto by the Board of Trade by calling its appropriations measure for the year a resolution rather than a

75. *See id.* at 205.

76. *See* 4 DEBATES, *supra* note 58, at 624.

77. *See* 5 DEBATES, *supra* note 58, at 428. Two reasons have been suggested for the rejection of Madison's proposal: (1) Judges might render biased opinions on legislation, having previously reviewed laws in a revisionary capacity; and (2) the Framers desired to keep the judiciary at a distance from the political process. *See* J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 886 (1833).

78. *See* 4 DEBATES, *supra* note 58, at 624.

79. *See* NOTES ON THE DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 461-66 (A. Koch ed. 1966) [hereinafter NOTES ON THE DEBATES].

80. *See* 5 DEBATES, *supra* note 58, at 431.

81. *See id.* Madison suggested that the term "or resolve" be included after "bill." *See id.*

82. *See id.*

83. *See* NOTES ON THE DEBATES, *supra* note 79, at 466.

84. *See, e.g.*, THE FEDERALIST No. 69, at 416 (A. Hamilton) (C. Rossiter ed. 1961).

85. *See* E. MASON, *supra* note 20, at 19 n.2.

bill.[86] This legislative "game of words" was successful until 1729.[87] The legislature then passed appropriations measures as votes.[88] Both methods of renaming appropriations bills allowed the legislature to bypass the royal governor and the Board of Trade.[89] By 1733, the Massachusetts colony had outspent itself, and the House of Representatives itself gave the governor an institutional check on the legislature by providing for the presentment of all orders, resolutions, and votes.[90] This provision was subsequently incorporated into the Massachusetts Constitution of 1780.

In light of the Massachusetts experience, the Framers recognized the need for comprehensive language to check congressional spending. After Roger Sherman of Connecticut observed that the Orders Presentment Clause was unnecessary except for appropriations bills, it was approved.[91]

3. *Conclusions*

In absolute terms, little can be drawn from the records of the Constitutional Convention with respect to the item veto. Certainly, the Framers intended to protect the President from legislative usurpation by empowering him with an institutional weapon to wield in the legislative process. Yet the reach of this weapon remains unclear. The Framers' non-inclusion of an explicit item veto provision, it could be argued, is indicative of their disapproval. Equally compelling, however, is the view that the language was deliberately left opaque to allow for possible contingencies in the application of the veto power. It is clear that the Framers, in light of the Massachusetts experience, considered the prospect of congressional avoidance of the veto and sought to prevent it by drafting the Orders Presentment Clause.

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86. *See* 3 H. OSGOOD, THE AMERICAN COLONIES IN THE EIGHTEENTH CENTURY 185 (1924). The Board of Trade was only empowered to review bills.

87. *See id.*

88. *See* J.R. POLE, POLITICAL REPRESENTATION IN ENGLAND AND THE ORIGINS OF THE AMERICAN REPUBLIC 57 (1966).

89. *See id.*

90. *See id.* For the remainder of the colonial period, the legislature was restrained, and spending became under control.

91. *See* 5 DEBATES, *supra* note 58, at 431. There was no other discussion of the differential application of the veto to appropriations bills and other types of legislation.

F. *Framers' View of the Constitutional Language*

Although some opponents of the item-veto authority draw a negative inference from the Constitution's silence and look to history to argue that the fear of a powerful executive precluded the possibility that the Framers would have authorized an item veto,[92] their arguments fail to provide a dispositive answer on the question. Alexander Hamilton, in delineating the scope of the executive's powers, analogized the President's role in developing legislation to that of the governors of New York and Massachusetts.[93] Recognizing the United States Constitution's departure from the absolute negative employed by the British sovereign, Hamilton likened the executive veto to the "revisionary authority" granted by the New York Constitution.[94] Hamilton then equated the presidential veto with that found in the Massachusetts Constitution and observed that it served as the model from which the presentment clause was derived. He wrote that the presidential veto power "would be exactly the same with that of the governor of Massachusetts, whose contribution, as to this article, seems to have been the original from which the convention have [sic] copied."[95] Hamilton thus left open the possibility of item-veto authority.

II. An Evolutionary Process: The Veto Since 1789

A. *Introduction*

Opponents of the constitutionality of the item veto contend that a power that has not been claimed by any president for 200 years needs more than an assertion.[96] Some have argued that

92. *See* Wolfson, *supra* note 11, at 844 (abuse of veto power by colonial executives demonstrated to Framers the desirability of giving spending power to lower houses); Edwards, *The New Congress's No. 1 Priority*, N.Y. Times, Jan. 26, 1987, at A35, col. 2 (acquiescence to an "imperial Presidency" threatens the foundation of our government). *But see* Best, *supra* note 13, at 188 (concluding the Framers would authorize an item veto to restore proper balance to executive).

93. *See* The Federalist No. 69, at 416-17 (A. Hamilton) (C. Rossiter ed. 1961).

94. *See id.* (President's qualified negative "tallies exactly" with revisionary authority granted by New York's Constitution). Hamilton noted, however, that the President's veto authority actually exceeded the New York governor's, because the President exercises the authority alone, while the governor was but one member of a revisionary council consisting also of a chancellor and judges. *See id.*

95. *Id. See also* E. Mason, *supra* note 20, at 19 n.2 (federal constitutional provision of veto power is improved version of Massachusetts provision).

96. *See* Bork, *Epilogue: The Decline of Presidential Power*, in Pork Barrels and Principles, *supra* note 11, at 57 (solution to balance-of-power shift that no one has thought of for 200 years bears burden of persuasion).

because the power has never been invoked, it cannot possibly be in the Constitution. Although it is true that the Supreme Court has never adjudicated the constitutionality of an implicit item veto, a variation of the item-veto power, presidential impoundment, has been employed by presidents throughout most of the history of the Constitution.[97]

B. *Executive Interpretation of the Veto Provision*

The practice of attaching riders to appropriations bills and other significant measures commenced in the United States Congress in 1820 when a bill for the admission of Maine was "amended" by adding a bill for the admission of Missouri.[98] Congress soon began using these riders as a means of coercing the President into assenting to measures he would certainly veto if presented individually.[99] This practice grew to excess by 1861, when the item veto was incorporated into the Constitution of the Confederacy.[100] After the Civil War, several states sought to incorporate explicit item veto provisions into their constitutions to promote efficient fiscal policy.[101] Although some governors have interpreted their state constitutions to sanction an implicit item veto, most state courts have not accepted such an interpretation.[102] These state court decisions,

97. *See infra* notes 114-17, 121-38 and accompanying text.

98. *See* E. MASON, *supra* note 20, at 48 n.1 (detailing history of legislative riders). *See also* Glazier, *Reagan Already Has an Item Veto*, Wall St. J., Dec. 4, 1987, at 14, col. 4. The term rider developed in the pre-Civil War era as Congress, with growing frequency, attached irrelevant amendments to appropriations bills in an effort to subvert the President. *See id.* Correspondingly, the term line-item veto was coined to characterize the executive response to this gradual limitation of his authority. *See id.*

99. *See* E. MASON, *supra* note 20, at 48. Initially, coercive riders were used by one house of Congress to coerce the other. *See id.* at 48 n.1.

100. *See* R. SPITZER, *supra* note 9, at 126. The item veto was introduced by Robert H. Smith as a means of empowering the President to arrest corruption and illegitimate expenditures. *See* Ross & Schwengel, *supra* note 11, at 69.

101. *See* R. SPITZER, *supra* note 9, at 134-35. Today, 43 states have an item veto specifically authorized by their constitutions. With the exception of only one state, every state admitted to the union since the Civil War, and many older states, have granted the item-veto authority to their governors. *See id.* at 134. Eleven states have a partial veto that allows the governor to reduce or delete items in appropriations bills. Early this century, several governors sought to expand their ordinary vetoes into partial vetoes, thereby increasing their participation in the legislative process. *See* Abascal & Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 GEO. L.J. 1549, 1564 (1974).

102. In only one case, Commonwealth v. Barnett, 199 Pa. 161, 48 A. 976 (1901), has a state court sustained the governor's expansive interpretation of his veto authority. The *Barnett* Court noted that the advent of "omnibus bills," "riders," and "logrolling" subverted the executive's control over the legislative process. This balance of power, the court stated, could be restored by allowing the governor's interpretation to stand.

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however, offer little insight as to how the issue should be resolved at the federal level. Each state constitution has its own unique structure and provisions and was approved under unique circumstances; in no other area of constitutional law do we expect the United States Supreme Court, in deciding cases under the United States Constitution, to follow state courts' interpretations of *state* constitutions.

In the absence of an explicit grant of authority, numerous presidents have appealed to Congress to pass a constitutional amendment granting them explicit item-veto power. The first such recorded appeal came in 1873, when President Grant recommended in his message to Congress a constitutional amendment to give the executive a discretionary veto.[103] In response to this request, Representative Faulkner of West Virginia proposed a constitutional amendment giving the President an item veto for appropriations bills.[104] This proposed amendment, of course, was never approved.

President Grant's request was renewed by Presidents Hayes and Arthur in 1879 and 1882, respectively. President Hayes was particularly frustrated by legislative riders, vetoing five appropriations bills in 1879 alone.[105] President Hayes systematically vetoed these measures on constitutional grounds, arguing that the attachment of riders "strikes from the Constitution the qualified negative of the President."[106] Hayes suggested a restoration of executive powers through the item veto.[107]

President Arthur was equally frustrated by the "serious pub-

Other state courts, however, have declined to follow the reasoning of *Barnett*. *See* Fairfield v. Foster, 25 Ariz. 146, 214 P. 319 (1923); Wood v. Riley, 192 Cal. 293, 219 P. 966 (1923); Stong v. People *ex rel.* Curran, 74 Colo. 283, 220 P. 999 (1923); Fergus v. Russel, 270 Ill. 626, 110 N.E. 887 (1915); Nowell v. Harrington, 122 Md. 487, 89 A. 1098 (1914); Mills v. Porter, 69 Mont. 325, 222 P. 428 (1924); Peebly v. Childers, 95 Okla. 40, 217 P. 1049 (1923); Regents v. Trapp, 28 Okla. 83, 113 P. 910 (1911); Fulmore v. Lane, 104 Tex. 499, 140 S.W. 405 (1911); State *ex rel.* Jamison v. Forsyth, 21 Wyo. 359, 133 P. 521 (1913).

103. *See* Ross & Schwengel, *supra* note 11, at 69. Under President Grant's proposal, any rejected provisions would be subject to a two-thirds override, as is the case for entire bills under the Presentment Clauses. *See id.* Grant also recommended a cessation of legislation 24 hours prior to adjournment to give the President an opportunity to veto eleventh-hour bills. *See* 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 242 (J. Richardson ed. 1899) [hereinafter COMPILATION] (President Grant's Fifth Annual Message to Congress, December 1, 1873).

104. *See* H.R.J. Res. 45, 44th Cong., 1st Sess., 4 CONG. REC. 477 (1876).

105. *See* Ross & Schwengel, *supra* note 11, at 70.

106. R. SPITZER, *supra* note 9, at 60 (quoting 4 MESSAGES AND PAPERS OF THE PRESIDENT 4483 (1913)). *See also* E. MASON, *supra* note 20, at 48.

107. *See* E. MASON, *supra* note 20, at 137.

lic mischief" he saw in the congressional practice of combining a wide array of appropriations, diverse in both their nature and subject. Arthur's 1882 message to Congress eloquently stated that appropriations tended to snowball, as citizens from one state demanded the benefits being extended to citizens from another state, thus simultaneously making a bill more objectionable and securing it more support.[108] He implored Congress to restrict appropriations to specific internal improvements or, alternatively, to give the executive the explicit constitutional power to veto individual items.[109] He reiterated his proposal in 1883 and again in 1884.

Subsequent presidents, with one exception, have been equally vocal about the need for an item veto. Franklin Roosevelt, Harry Truman, and Dwight Eisenhower all urged Congress to give the President an item veto either through legislation or through a constitutional amendment.[110] President Reagan repeatedly urged both Congress and the public that an item veto would restore order to the budget process.[111]

President Taft was the only president who did not support the item veto. Although he found the prevalence of congressional riders to contravene the efficiency of the legislative process, he thought that the item veto would give the President undue power.[112] He suggested that the remedy for excessive expenditures already existed: Through the electoral process, the people could voice their displeasure with runaway spending and oust the party responsible.

Opponents of the item veto have attempted to infer from the numerous presidential requests for a constitutional amendment or legislation explicitly authorizing the item veto, and from the fact that presidents have not ever employed an item veto,[113] that there is no implicit item veto power in the Constitution. Such an inference is not warranted, however. Presidents could have faced serious political repercussions from using an express item-veto power. Moreover, presidents have accom-

108. *See* R. SPITZER, *supra* note 9, at 61.

109. *See* 8 COMPILATION, *supra* note 103, at 138.

110. *See* Ross & Schwengel, *supra* note 11, at 72.

111. *See President Ronald Reagan on the Line-Item Veto*, in PORK BARRELS AND PRINCIPLES, *supra* note 11, at xiii (excerpts from the President's Radio Address to the Nation, November 8, 1986).

112. *See* Ross & Schwengel, *supra* note 11, at 72.

113. *But see* Crovitz, *President Bush Exercises the So-Sue-Me Line-Item Veto*, Wall St. J., Nov. 21, 1990, at A15, col. 3.

plished the same objective by employing other means already at their disposal. The rest of this Section examines two such means: the impoundment of funds and the use of "signing statements."

President Grant provides an early example of a president's using impoundment effectively to strike out provisions of an appropriations bill. President Grant was presented with a river and harbor bill that he signed into law, while at the same time objecting to Congress that certain harbor improvements sought in the bill did not serve the national interest.[114] He vowed that, during his administration, no public money would be expended on the improvements of which he disapproved.[115] No objection was made to the President's interpretation.[116] Since then, such approaches have repeatedly been used.

President Bush has made extensive use of "signing statements" as a "second-best" substitute for the item veto. He has already used this mechanism with respect to at least forty-one provisions of more than twenty bills passed by Congress.[117] In these instances, President Bush signed the legislation, but declared in his signing statements that certain provisions will not be enforced. Thus far, President Bush has restricted this technique to provisions he considers unconstitutional. He has not used signing statements to excise "pork" from spending bills, but his practice to this point establishes precedent for the practice of choosing which provisions of a "bill" will be enforced and which will be unenforced.

C. *Judicial Interpretation of Presentment Clauses*

The federal judiciary has not conclusively passed on whether the Constitution implicitly grants item-veto authority to the President. Because no president has yet tested the reaches of the Presentment Clauses by attempting to veto specific items in a bill, the Supreme Court has not had the opportunity to rule on the constitutionality of the item veto.

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114. *See* E. MASON, *supra* note 20, at 104.

115. *See id. See also* Ross & Schwengel, *supra* note 11, at 70 (text of Grant's message to Congress).

116. *See* E. MASON, *supra* note 20, at 104.

117. *See* Crovitz, *supra* note 113. *But see* Lear Siegler, Inc., Energy Products Div. v. Lehman, 842 F.2d 1102 (9th Cir. 1988) (Executive Branch cannot refuse to abide by certain provisions of statute signed by the President, even if President considers those provisions unconstitutional).

In *Lear Siegler, Inc., Energy Products Division v. Lehman*,[118] however, the United States Court of Appeals for the Ninth Circuit did state that the item veto does not exist in the Constitution. In that case, the Ninth Circuit held that the Navy acted in bad faith in disregarding part of the Competition in Contracting Act of 1984.[119] When signing that legislation into law, President Reagan stated that he considered certain provisions of the law to be unconstitutional based on separation of powers, and that the Executive Branch would therefore not enforce those provisions. The Ninth Circuit, however, ruled that the contested provisions were constitutional, and awarded legal fees to the plaintiff on the ground that the government acted in bad faith by refusing to enforce the law as passed by the Congress and signed by the President.

Though the Ninth Circuit in *Lear Siegler* indicated its belief that the item-veto power is not granted by the Constitution, the case did not turn on the existence of an item-veto power, because the President did not expressly exercise such power. Moreover, the legislation in question was not an appropriations bill. Finally, one cannot ignore the fact that the court's opinion was undoubtedly in large part a response to the President's effort to define the constitutionality of the provisions in question, thereby threatening the province of the judiciary.[120]

III. The Crisis in the Balance of Powers

During the past seventy years, a fundamental shift has occurred in the balance of power between Congress and the Executive Branch. Two main factors have contributed to this crisis and are considered here. The first is the erosion of the President's impoundment authority. The second is the advent of the omnibus budget reconciliation bill and omnibus appropriations measures. These two factors have handcuffed the President's ability to influence legislation and have rendered his veto authority nearly meaningless.

118. 842 F.2d 1102, 1124 (9th Cir. 1988).

119. *See Lear Siegler*, 842 F.2d at 1121.

120. *See id.* at 1125 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)):

> We also note that in declaring the [Competition in Contracting Act] stay provisions unconstitutional and suspending their operation, the executive branch has assumed a role reserved for the judicial branch. It hardly need be repeated that "it is emphatically the province and duty of the judicial department to say what the law is."

A. *Erosion of Presidential Impoundment Authority*

Presidents have historically regarded appropriations as subject to executive discretion.[121] President Washington received relatively general appropriations bills and used impoundment as a means of controlling spending.[122] In 1803, Thomas Jefferson refused to expend $50,000 that had previously been appropriated for gunboats to protect the Mississippi River—a function no longer required after the Louisiana Purchase.[123] Subsequent presidents continued to withhold appropriated funds, although this practice was generally confined to "pork-barrel" appropriations.[124]

In 1838, the constitutionality of impoundment[125] was challenged in *Kendall v. United States ex rel. Stokes*.[126] In *Kendall*, the Supreme Court was called upon to assess the propriety of the decision of President Jackson's Postmaster General to withhold what he believed to be excessive remuneration for a delivery contract.[127] To resolve the contract dispute, Congress ordered the Postmaster General to pay whatever amount was agreed upon by an outside arbitrator. The Postmaster General ignored the congressional mandate and chose to pay only the amount he thought warranted and impounded the remainder. The Court did not accept the administration's interpretation of the President's obligation to faithfully execute the laws as conferring upon his office the power to forbid their execution.[128]

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121. *See* L. FISHER, PRESIDENTIAL SPENDING POWER 148 (1975) (Executive Branch regards appropriations as permissive).

122. *See id.*

123. *See id.* at 150.

124. *See* Note, *Addressing the Resurgence of the Presidential Budgetmaking Initiative: A Proposal to Reform the Impoundment Control Act of 1974*, 63 TEX. L. REV. 693, 696 (impoundment targeted at pork-barrel bills). "Pork-barreling" refers to the congressional method of securing votes for legislation by which one congressman conditions his support for a colleague's bill on the colleague's support for his own. The resulting multi-faceted appropriations bill is then presented to the President. *See* Ross & Schwengel, *supra* note 11, at 75 (pork-barreling presents the president with an impossible choice).

125. Impoundment is defined as any action or inaction by the executive that effectively prevents the expenditure of monies previously allocated for a particular program or project. *See* Note, *supra* note 124, at 693 n.2. This Note delineates two types of impoundment, "routine impoundment," which is used to achieve savings, and "policy impoundment," which is used by the executive to obstruct funding of programs that the executive finds repugnant. *See id.* at 694. Generally, if the executive and the legislature concur, the impoundment is classified as routine; if they disagree, the impoundment is classified as a policy impoundment. *See id.* at 695.

126. 37 U.S. (12 Pet.) 524 (1838).

127. *See Kendall*, 37 U.S. (12 Pet.) at 527. The complaint was lodged by Mr. Stokes, who had secured the delivery contract. *See id.*

128. *See id.* at 613 (holding that writ of mandamus could issue directing Postmaster

Although the *Kendall* Court held that impoundment was not an inherent power, subsequent presidents continued to justify the practice on the basis of statutory authority,[129] or as a function of their role as commander-in-chief.[130] Throughout World War II, the president used impoundment as a fiscal policy tool.[131] This practice increased dramatically during the administration of Lyndon Johnson.[132] Congress, recognizing that President Johnson's impoundments were fiscally motivated, was generally supportive.[133]

President Nixon's subsequent use of impoundment met with no such congressional acquiescence.[134] During his first term, President Nixon encountered a congressional mandate to impound in the form of a mandatory, across-the-board reduction in spending.[135] As the President zealously imposed spending cuts in excess of those mandated by Congress, however, it became clear that several Democratic programs were imperiled.[136] Nixon focused his impoundments on public works, environmental appropriations, and public welfare programs, prompting critics to characterize his impoundments as a means of effecting his agenda rather than ensuring fiscal responsibility.[137] Nixon's unilateral spending decisions for the budget for fiscal year 1973 especially raised Congress's ire.[138] Congress responded by passing the Congressional Budget and Impound-

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General to comply with congressional directive). This case is exceptional, however, in that it involved an appropriation for payment for services already rendered. In the more common case, impoundment typically precludes payment for services that have not yet been rendered. *See* L. FISHER, *supra* note 121, at 159 (impoundment does not usually involve claim for services performed).

129. *See* L. FISHER, THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE 85 (1981) (impoundment justified by statutory authority or claim of executive right). Initial statutory authority was implicit in the Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20 (repealed 1982). In 1950, an amendment to the Antideficiency Act of 1906, ch. 510, § 3, 34 Stat. 27, 48, gave the President explicit impoundment authority. *See* General Appropriations Act of 1951, ch. 896, § 1211(c)(2), 64 Stat. 595, 765.

130. *See* Note, *supra* note 124, at 696 (president's broad application of impoundment to defense appropriations justified by role as commander-in-chief).

131. *See id.* (wartime impoundment used to curb rampant congressional spending).

132. *See id.* (immense domestic impoundments began with Johnson administration).

133. *See id.* at 696-97 (Johnson's Great Society programs affected).

134. *See id.* at 697. *See also* J. SUNDQUIST, THE DECLINE AND RESURGENCE OF CONGRESS 203 (1981) (Nixon deliberately flouted the will of Congress by deliberately provoking congressional opponents).

135. *See* J. SUNDQUIST, *supra* note 134, at 204 (1968 tax legislation required $6 million reduction in spending).

136. *See id.* at 205.

137. *See* Note, *supra* note 124, at 697.

138. *See id.* at 702 (Nixon vowed to impound expenditures in excess of $250 billion).

ment Control Act of 1974 (the 1974 Act), which was designed to proscribe sharply any future impoundments.

The 1974 Act requires the President to submit a report to Congress detailing his decision to withhold appropriated funds. If the withholding is temporary, it is considered a deferral, which is permitted only in certain circumstances.[139] If the President intends the withholding to be permanent, he must secure the support of both houses of Congress within forty-five days.[140] In the absence of congressional approval, the President must make the appropriated funds available.[141] The effect of the Act is to render executive exercise of the impoundment power almost nugatory, thus impairing the President's ability to influence legislation.[142]

Presidential impoundment was dealt another blow in 1975 by *State of Louisiana v. Brinegar*.[143] The case was brought by several states seeking injunctive relief to prevent the Secretary of Transportation from withholding highway funds authorized under the Federal-Aid Highway Act of 1956.[144] In granting the plaintiffs' motion for summary judgment, the court noted that the Executive Branch is precluded from impounding appropriated funds when the appropriations bill specifically prohibits impoundment.[145] In light of this ruling, Congress could further limit the President's role in spending decisions by prohibiting impoundment on precisely those bills where impoundment would be most effective.

This statutory limitation on presidential impoundment has necessitated a reexamination of the scope of the veto authority. For 200 years, presidents have used impoundment as an institutional budget-control device. This authority has provided a check on congressional appropriations by allowing the President some discretion over federal spending. In practice, impoundment functions in much the same way as an item veto would operate, by allowing the President to withhold his approval from specific spending measures as he deems prudent.

139. *See* 2 U.S.C. § 684(b) (1988).
140. *See id.* § 683(b).
141. *See id.*
142. *See infra* notes 146, 150-57 and accompanying text (discussing the effect of the 1974 Act on executive-legislative balance of power).
143. 388 F. Supp. 1319 (D.D.C. 1975).
144. *See id.* at 1321.
145. *See id.* at 1324 (such restriction is Congress's interpretation of the law and must be accorded due weight).

In the absence of both impoundment authority and item-veto power, the appropriations power of the President is drastically weakened, vis-à-vis Congress.

B. *Changes in Budget Process*

Other changes during the past two decades have also effected a gradual shift of power in the budget process from the Executive Branch to the Congress. Most notably, the Congressional Budget and Impoundment Control Act of 1974, enacted to streamline the federal budget procedure and impede presidential impoundment of appropriated funds,[146] resulted in a pronounced reduction in the President's role in the budget and appropriations process.

In 1921, the President was granted a more significant role in the development of the national budget.[147] In that year, Congress enacted the Budget and Accounting Act,[148] which directed the President to submit to Congress an annual national budget formulated with the assistance of the newly created Bureau of the Budget. Congress was then to make adjustments, subject to a majority vote.

Over the next fifty years, Congress increasingly found this process unworkable.[149] Congress enacted the 1974 Act based on this perceived loss of control and concerns raised by Watergate. In general terms, under the 1974 Act, the President offers broad budget goals in his annual budget; the Congress takes the budget under advisement and adopts its own budget goals. Individual spending bills are then reconciled with the goals set by Congress.

At the outset of the budget process, the President submits his budget recommendations to Congress.[150] By April 15, Congress is to complete action on a concurrent resolution on the

146. *See* Note, *The Intersession Pocket Veto and the Executive-Legislative Balance of Powers*, 73 GEO. L.J. 1185, 1210 (1985) (legislation curtails use of presidential impoundment); *id.* at 1212 (new budget procedure streamlines, coordinates, and brings responsibility to haphazard budget process).

147. *See* L. FISHER, *supra* note 121, at 9 (1921 point of origin for presidential spending power). Dr. Fisher cautions against interpreting this to mean that prior presidents played no role in the budget process. *See id.* at 10. For purposes of this discussion, I do not examine developments before 1921.

148. Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20 (repealed 1982).

149. *See* AM. ENTER. INST., PROPOSALS FOR LINE-ITEM VETO AUTHORITY 6 (1984) (beginning in 1950s, Congress paralyzed by budget process).

150. *See* 2 U.S.C. § 631 (1988).

budget for the following fiscal year.[151] This resolution is based on both the recommendations of each standing committee of the House of Representatives and Senate and on the President's recommendation.[152] In approving appropriations bills, the relevant appropriations committee must file a report comparing the outlays in those bills with the concurrent budget resolution.[153] Each house must consider and approve all appropriations bills prior to the July congressional recess.[154] Congress must then complete action on a second concurrent budget resolution by September 15.[155] This second budget resolution directs House and Senate committees to recommend legislative changes to reconcile expected program expenditures with the broad budget goals prescribed by the first concurrent budget resolution.[156] These recommendations are then incorporated into an omnibus budget reconciliation bill, to be approved by Congress by October 1, the beginning of the fiscal year.

The problem with this lengthy process lies in the interim phase, that is, the setting of budget goals with which the subsequent legislation must be reconciled. These goals are set with no presidential participation; the concurrent budget resolution requires no presidential signature. Following the initial submission of his budget proposal, the President does not formally participate in the process until his final approval of the omnibus budget reconciliation bill and appropriations bills. In light of the breadth of these huge pieces of legislation, a presidential veto at this stage would literally close down the government.[157]

IV. Legal Theories for the Item Veto

As discussed in Part I, the Framers intended the presidential

151. *See id.* § 632(a). Note that this resolution, like all concurrent resolutions, requires no presidential approval.

152. *See id.* § 632(d). The Congress, however, is under no compulsion to give *any* weight to the President's recommendations.

153. *See id.* §§ 638-639.

154. *See id.* § 640.

155. *See id.* § 641.

156. *See id.* § 641(a).

157. In 1987, for example, President Reagan was presented a continuing resolution of over 2,000 pages, providing appropriations for most of the federal government for fiscal year 1988. The measure was completed by Congress and presented to the President on December 22, 1987, at 10:45 p.m., only hours before the Congress adjourned. In light of the time constraints, the President was forced to sign the measure without fully reading the resolution. *See* Bartley, *supra* note 8.

veto to serve as a check and balance against congressional encroachment on the authority of the Executive Branch. Due to the erosion of the presidential impoundment power and changes in the way Congress now legislates, the veto power no longer adequately serves to maintain that balance. Item-veto authority would enable the President to reassert his authority and counteract the recent encroachment by Congress. This Part presents several legal theories for finding implicit item-veto authority in the Constitution.

One route to imputing an implicit item veto in the Constitution is to explore the Framers' understanding of the term "bill." The first of the Presentment Clauses provides that any bill requiring a vote of both houses shall be presented to the President for his approval.[158] A narrow interpretation of what constitutes a bill would obviate the need for an explicitly granted item veto. Some proponents of the item veto have argued that the Framers were unaware of the possibility of legislative "riders" and non-germane amendments. The argument follows that, at that time, "bill" referred to legislation free of such non-germane provisions. If this was the case, the President should be empowered with an item veto to restore the Framers' vision of legislative and executive balance.[159] This reading of history, however, appears incorrect.

The process of attaching riders, then known as "tacking," originated in 1667.[160] Tacking fell into disuse in the Eighteenth Century, as it became perceived as a means of evading constitutional principles.[161] It is likely that the Framers were aware of the procedure of attaching riders to legislation.[162] On the other hand, there is no evidence that the Framers foresaw the extent to which this practice would evolve.[163]

A related theory has been offered by Stephen Glazier to clar-

158. *See* U.S. CONST. art. I, § 7, cl. 2.

159. *See* Ross & Schwengel, *supra* note 11, at 77 (item veto would restore power to executive); Best, *supra* note 13, at 188 (veto power created by Framers "displaced and discredited"; item veto necessary to restore balance).

160. *See* R. SPITZER, *supra* note 9, at 7.

161. *See id.* (citing T. TASWELL-LONGMEAD, ENGLISH CONSTITUTIONAL HISTORY 613-14 (1946)).

162. *See* Edwards, *Of Conservatives and Kings*, 48 HERITAGE FOUND. POL'Y REV. 24, 26 (1989) (debunking argument that Framers' grant of congressional preeminence in appropriations occurred prior to the development of riders).

163. *See* L. FISHER, *supra* note 129, at 24 (the President is no longer given the opportunity to consider discrete measures).

ify the Framers' intent in drafting the Presentment Clauses.[164] He relies essentially on the Framers' reasoning in revising the executive veto by adding the Orders Presentment Clause to Article I, Section Seven. Glazier points out that the Framers drafted the clause requiring presentment and presidential approval of "resolutions" and "orders" as an additional means of protecting the President from congressional avoidance of the executive veto.[165] The Orders Presentment Clause was proposed to prevent Congress from bypassing the executive veto by labeling legislative acts as something other than "bills."[166] Glazier contends that this institutional check on congressional usurpation was an unequivocal act by the Framers to give the President veto authority over individual legislative enactments requiring bicameral approval. The Framers granted broad veto powers to preempt Congress's game of "form and name," intended to evade the requirement of presentment. Glazier concludes by extension that the President implicitly has the constitutional authority to "unbunch" today's omnibus spending bills by vetoing individual items or riders. Today's omnibus bills, he argues, are merely another device intended to evade and make meaningless the presentment process. He concludes that the item veto is an essential and constitutionally permissible means to beat Congress at its current round of the game of "form and name."

Glazier's point can be illustrated by a not-so-extreme example, by present standards. Under the present system, including the view of an "all-or-none" veto power, all legislative acts passed by a Congress in its two sessions could be labeled a "bill" and presented to the President for approval. The President would be forced to sign the "bill" or risk grinding the government to a halt if Congress could not override his veto. This plainly defies the Framers' intent. Unfortunately, a reading of the Presentment Clauses that does not include an implicit item veto presents no short-term barriers, other than political repercussions, to this abusive behavior. The juxtaposition of recent rates of reelection of members of Congress and the extraordinary propensity of Congress to bunch legislation

164. *See* Glazier, *supra* note 98.

165. *See id.*

166. *See* Glazier, *supra* note 12, at 10. *See also* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 301-02, 304-05 (M. Farrand rev. ed. 1937).

into separate "bills" calls into serious question the effectiveness of electoral feedback in controlling Congress's present-day game of "form and name."

Another, more compelling argument for an implicit item veto in the Constitution relies on the doctrine of separation of powers. In this regard, it is important to note that the Supreme Court has not settled on a single approach to resolving separation-of-power issues of this type in the past.[167] In *Youngstown Sheet & Tube v. Sawyer*,[168] the justices offered no less than three distinct modes of assessing the limitations on President Truman's authority. In *Buckley v. Valeo*[169] and *Immigration and Naturalization Service v. Chadha*,[170] the Court adopted a "formal" approach. When conducting a formal analysis, the Court examines the text of the provision being challenged, the context of the language being used, and the Framers' intent.[171] The Court then looks to any precedent for enlightenment.[172] Finally, the Court considers past practice and congressional acquiescence.[173]

In conducting a formal analysis of the constitutionality of the item veto, the Court would first review, as we have done above, the text of Article I, Section Seven of the Constitution. Because the Presentment Clauses are silent on the subject of the item veto, the Court would then look at the context within which they were drafted. This would entail an analysis of both the meaning of the words of the clauses to the Framers, and the motivation for their inclusion in the Constitution. Although the evidence is by no means conclusive, an examination of the Constitutional Convention debates suggests that the Framers may have intended the president to enjoy item-veto power.

Continuing with the formal-analysis approach, there has been no prior executive assertion of item-veto power to provide a test case, and accordingly, no congressional acquiescence. Although several presidents have sought explicit item veto power through constitutional amendment, none has with-

167. *See* Note, *supra* note 146, at 1187.

168. 343 U.S. 579 (1952) (President Truman's seizure of steel mills exceeded scope of presidential power).

169. 424 U.S. 1 (1976) (per curiam).

170. 462 U.S. 919 (1983).

171. *See* Note, *supra* note 146, at 1188. *See also id.* at 1188 nn.16-19 (discussing the Court's use of the formal approach in *Buckley* and *Chadha*).

172. *See id.* at 1188.

173. *See id.* (past practice relevant but not determinative).

held his signature from select items in an appropriations bill. Certainly, 200 years of abstinence with respect to the item veto is probative, but the message to be drawn from this is unclear. Prior to the congressional roadblock erected by the 1974 Congressional Budget and Impoundment Control Act, presidents could effect their budgetary goals by impounding appropriated funds. Impoundment accomplished virtually the same end as an item veto. This practice of withholding appropriated funds, coupled with the insistence of nearly every post-Civil War era president on the propriety of an item veto, offers a legitimate explanation for 200 years of presidential practice. Ultimately, however, under a "formal" analysis such as that employed by the Supreme Court in cases involving the balance of power between the Executive and Legislative Branches, the constitutionality of the implicit item veto is not clear.

Separation-of-powers questions, however, are often resolved through a more functional approach, an approach that is more inclined to countenance an argument that the Constitution authorizes the item veto. Justice Jackson, for example, eschewed any approach that would precisely delineate the scope of each governmental branch's power. In his view, the Constitution disperses powers among the branches, entrusting politics to fashion them into a functioning whole.[174] Justice Powell similarly rejected the formal approach in his concurring opinion in *Chadha*.[175] He noted that the Constitution does not define the boundaries between the branches precisely,[176] but rather fixes them "according to common sense and the inherent necessities of governmental confrontation."[177]

This pragmatic analysis of separation-of-powers questions has been recognized by the majority of the Court in two recent decisions written by Justice O'Connor. In the 1984 case of *Thomas v. Union Carbide Agricultural Products Co.*,[178] the Court explicitly rejected "strict doctrinaire reliance on formal catego-

174. *See Chadha*, 462 U.S. at 978 (White, J., dissenting) (citing Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (Constitution diffuses power to ensure liberty, allowing practice to integrate powers into a workable government)).

175. *See id.* at 962-63 (Powell, J., concurring) (analysis should focus on functional impact of separation-of-powers doctrine).

176. *See id.* at 962 (citing Buckley v. Valeo, 424 U.S. 1, 121 (1976) (per curiam)).

177. *Id.* (citing J.W. Hampton & Co. v. United Sates, 276 U.S. 394, 406 (1928)).

178. 473 U.S. 568 (1984) (Article III does not preclude Congress from vesting decisionmaking authority in tribunals that lack attributes of Article III courts).

ries."[179] Justice O'Connor cited Chief Justice Hughes's adoption of the substance-over-form approach to Article III inquiries.[180] The following year, in *Commodity Futures Trading Commission v. Schor*,[181] the Court rejected an unbending formalistic approach.[182] Instead, it balanced a number of competing factors, none of which was determinative, in order to assess the practical effect of Congress's decision to allow the Commodity Futures Trading Commission to adjudicate claims upon the constitutionally assigned role of the federal judiciary.[183]

Although these cases are limited to possible congressional intrusion into the province of the judiciary, the separation-of-powers analysis that the Court adopted is no less applicable to similar intrusions into that of the executive. Indeed, the Supreme Court has recently applied the functional approach in the executive-legislative context. In *Morrison v. Olson*,[184] the Court applied a functional approach in assessing the practical impact of congressional appointment of a special prosecutor on the balance of power between the Executive and Legislative Branches.[185]

Recent applications of the functional approach to separation-of-powers cases suggest that the item-veto power might be found in the Constitution. An overarching theme of these cases has been the preservation of checks and balances among the branches, in accordance with Madison's pronouncement that "the constant aim [of the Constitution] is to divide and arrange the several offices in such a manner that each may be a check on the other."[186] Justice Powell, arguing against a strict doctrinaire approach in *Chadha*, suggested that this aim may be subverted when one branch interferes impermissibly with the

179. *Thomas*, 473 U.S. at 587.

180. *See id.* at 586 (citing Crowell v. Benson, 285 U.S. 22, 53 (1932) (Congress could replace seamen's traditional negligence action in admiralty with statutory scheme of strict liability)).

181. 478 U.S. 833 (1986) (Commodity Futures Trading Commission's assumption of jurisdiction over common-law counterclaims not violative of Article III).

182. *See id.* at 851 (citing *Thomas*, 473 U.S. at 590).

183. *See id.* The Court focused on the concerns that drove Congress to divest the judiciary of some of its powers, thus departing from the requirements of Article III. *See id.* The Court also considered the extent to which the "essential attributes of judicial power," *id.*, were reserved to the judiciary.

184. 487 U.S. 654 (1988).

185. *See Morrison*, 487 U.S. at 685-97 (congressional appointment of "independent counsel" does not impermissibly interfere with the constitutional principle of separation of powers).

186. THE FEDERALIST No. 51, at 322 (J. Madison) (C. Rossiter ed. 1961).

constitutionally assigned function of another or, alternatively, when one branch "assumes a function more properly entrusted to another."[187]

As discussed above, finding an implicit item-veto power would enhance the balance of powers, a balance that has been lost since the adoption of the Congressional Budget and Impoundment Control Act of 1974. The debacle of the 1988 federal budget process is illustrative. Congress's eleventh-hour submission of a 2,100-page continuing resolution clearly obviated the possibility of meaningful presidential participation in the legislative process.[188] Congress forced President Reagan to make the Hobson's choice of putting his imprimatur on a pork-rich budget or closing down the federal government.

Using a pragmatic analysis to assess the constitutionality of the item veto, the Supreme Court would review recent developments that have disrupted the delicate legislative-executive power balance. The statutory limitations on presidential impoundment imposed by the 1974 Act have circumscribed an area of executive power historically viewed as proprietary. Moreover, the lengthy budget process has effectively hamstrung presidential veto power. In view of the effect of the 1974 Act on this constitutionally assigned check on the legislature, the Court would be justified in finding that the item veto would simply restore the balance of power that existed before Congress's denial of the President's impoundment power.

Conclusion

It is time to recognize that an item veto for appropriations is consistent with the Framers' intentions. Today, Congress typically sends an amalgamation of unrelated legislation to the president for his approval. Meanwhile, Congress persists with the coercive pre-Civil War practice of attaching non-germane riders to appropriations bills. The current budget reconciliation process provides uncontroverted evidence of congressional supremacy that has developed over the past two decades. Most significantly, presidential impoundment, the President's major tool in the appropriations process, was severely restricted by the 1974 Congressional Budget and Impoundment

187. Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 963 (Powell, J., concurring).

188. *See* Bartley, *supra* note 8.

Control Act.[189] Although the Framers were aware of legislative riders and other mechanisms used by legislatures to dominate the appropriations process, they certainly could not have anticipated the collection of factors that characterize the imbalanced budget process that we have today.

A presidential item veto would no doubt be difficult for Congress to swallow. It should be kept in mind, however, that Congress could override any item veto with a two-thirds vote. Therefore, if Congress felt strongly about a particular item, it could muster the votes necessary for its passage. In effect, the item veto would restore the Presentment Clauses to their intended function: a means for presidential self-defense and a protection against the enactment of ill-conceived legislation.

A formal analysis of the executive veto, while suggesting the possible existence of an implicit item veto, fails to provide unequivocal proof that the Framers intended for the President to have this authority. The Framers' silence on the subject of the item veto is not so damning, however, as its opponents would suggest. Rather, it provides a launching pad from which to pursue a functional analysis of the item veto in light of historical developments. Institutional changes of the past twenty-five years, including the Congressional Budget and Impoundment Control Act of 1974 and runaway congressional spending, have corrupted the delicate structure of shared powers effected by the Framers and made a mockery of the veto power. Equilibrium can only be restored by express recognition of item-veto authority in the Constitution. The time has come for the presidential veto to come of age.

189. The analysis of this Note may suggest an alternative route to redressing the balance-of-power crisis in the appropriations process: declaring unconstitutional the Budget and Impoundment Control Act on grounds of violation of separation of powers.

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SYMPOSIUM

FOREWORD: UNENUMERATED CONSTITUTIONAL RIGHTS AND THE RULE OF LAW

RANDY E. BARNETT*

> The great and *chief end* . . . of Mens uniting into Commonwealths, and putting themselves under Government, *is the Preservation of their Property*. To which in the state of Nature there are many things wanting.
>
> *First*, There wants an *establish'd*, settled, known *Law*, received and allowed by common consent to be the standard of Right and Wrong, and the common measure to decide all Controversies between them. For though the Law of Nature be plain and intelligible to all rational Creatures, yet Men, being biassed by their Interest, as well as ignorant for want of study of it, are apt not to allow of it as a Law binding to them in the application of it to their particular Cases.[1]

INTRODUCTION: THE RULE OF LAW REVIVAL

The rule of law has long been one of the mainstays of liberal thought. John Locke cited its absence—not the absence of rights, which Locke thought existed in the state of nature—as the first reason for forming a government.[2] Essentially, the rule of law says that the requirements of justice must take a form such that persons can know what justice requires of them before they act and can detect abuses by those charged with law enforcement. If the formal and procedural requirements of the rule of law are adhered to, those "good" persons who seek to

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1. J. LOCKE, TWO TREATISES OF GOVERNMENT 368-69 (P. Laslett 2d ed. 1967) (3d ed. 1698) (emphasis in original).

2. According to Locke, the other two shortcomings of the state of nature are the absence of impartial judges and the dangers faced by victims seeking to enforce their own rights when confronted by the violent resistance of the offender. *See id.* at 369-70.

act properly can know what proper actions are. With this knowledge they can order their actions with those of others, thereby achieving a peaceful society with a minimum of conflict. The order of actions provided by adherence to the rule of law not only avoids conflict, it permits individuals and associations to plan for the future and to take action in reliance on a predictable legal regime.

Moreover, the formal and procedural standards provided by the rule of law address two problems inherent to the administration of justice: the problems of enforcement error and enforcement abuse. Some of these standards—such as rules allocating burdens of proof—help avoid enforcement errors. Others—such as the requirement of generality or equal treatment—help observers of a system of justice to detect "bad" actions by persons vested with the responsibility for correcting injustice. The ability to detect enforcement abuse is a prerequisite for taking action against such persons.[3]

All this was challenged by the legal realists in the 1920s and 1930s, a period when the stable "order of actions" governed by the rule of law posed obstacles to the sort of radical progressivist reforms that were thought to be needed to combat the abuses of "unfettered" capitalism and eventually the Great Depression. The legal realists charged that adhering to the rule of law resulted in a "mechanical jurisprudence"—now widely called "formalism." According to this criticism, formal rules that are thought to be necessary for establishing a rule of law cannot be relied upon to reach just results. From the perspective of justice, rules are either redundant or pernicious. They are redundant when they reach the same result as substantive justice requires; they are pernicious when they yield a different result. The very generality of rules means that they often do injustice. As Jerome Frank contended:

> Once trapped by the belief that the announced rules are the paramount thing in the law, and that uniformity and certainty are of major importance, and are to be procured by uniformity and certainty in the phrasing of rules, a judge is likely to be affected, in determining what is fair to the parties in the unique situation before him, by consideration of the possible, yet scarcely imaginable, bad effect of a just opinion in the instant case on possible unlike cases which may later

3. *See* Barnett, *Foreword: Can Justice and the Rule of Law Be Reconciled?*, 11 HARV. J.L. & PUB. POL'Y 597, 602-09, 619-21 (1988).

> be brought into court. He then refuses to do justice in the case on trial because he fears that "hard cases make bad laws." And thus arises what may aptly be called "injustice according to law."
>
> Such injustice is particularly tragic because it is based on a hope doomed to futility, a hope of controlling the future. . . . For it is the nature of the future that it never arrives. . . .[4]

Moreover, some realists argued that rules of law are really indeterminate—that is, they are subject to unchecked manipulation and therefore fail to constrain judges and other legal decisionmakers. Furthermore, because people are widely ignorant of legal rules, they do not really rely on such rules to order their future. For all these reasons, realists believed that the objectives of the rule of law cannot be achieved by devising and adhering to formal rules; other means of predicting legal sanctions are required.

In place of the rule of law, some of the realists, like Jerome Frank, urged a more "particularist" mode of justice in which decisions are reached without much effort at identifying rules. According to this method, after all the relevant facts are developed, all these facts are reported together with the outcomes of cases so that future decisionmakers can predict how their factual circumstances might be decided. Equity, not the common law, was to be the model:

> *The judge, at his best, is an arbitrator*, a "sound man" who strives to do justice to the parties by exercising a wise discretion with reference to the peculiar circumstances of the case. He does not merely "find" or invent some generalized rule which he "applies" to the facts presented to him. He does "equity" in the sense in which Aristotle—when thinking most clearly—described it.[5]

Other realists, such as Karl Llewellyn, urged that decisions be reached by taking into account other bodies of knowledge, such as sociology or economics.[6]

Although the realists succeeded in undermining confidence in the efficacy of rules, they never succeeded in finding an adequate substitute for the formal requirements of the rule of law.

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4. J. FRANK, LAW AND THE MODERN MIND 165-66 (1963).

5. *Id.* at 168 (emphasis in original).

6. *See, e.g.*, Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931). In this respect, while the critical legal studies movement has inherited the realist's particularism and antiformalism, the law and economics movement can be viewed as an outgrowth of this other more empirical strain of legal realism.

Although Jerome Frank assured us that "it is the nature of the future that it never arises,"[7] we are now living in the post-realist world in which the absence of rules often makes the outcome of lawsuits in many areas of law very difficult to predict.[8]

In the 1960s, three influential objections to this realist revolution appeared. In *The Concept of Law*, H.L.A. Hart challenged the radical indeterminacy thesis of the realists. According to Hart, a common-law system of judge-made rules was as good a source of comparatively determinate legal rules as any system of legislation:

> Any honest description of the use of precedent in English law must allow a place for the following pairs of contrasting facts. *First*, there is no single method of determining the rule for which a given authoritative precedent is an authority. Notwithstanding this, in the vast majority of decided cases there is very little doubt. The head-note is usually correct enough. *Secondly*, there is no authoritative or uniquely correct formulation of any rule to be extracted from cases. On the other hand, there is often very general agreement, when the bearing of a precedent on a later case is in issue, that a given formulation is adequate. *Thirdly*, whatever authoritative status a rule extracted from precedent may have, it is compatible with the exercise by courts which are bound by it of . . . creative or legislative activity. . . . Notwithstanding [this,] . . . the result of the English system of precedent has been to produce, by its use, a body of rules of which a vast number, of both major and minor importance, are as determinate as any statutory rule.[9]

In *The Judicial Decision*, Richard Wasserstrom challenged the wisdom of the realists' particularist view of justice. He argued that if judges did not base their decisions on general rules, such decisions would be based only on intuitions. An exclusive reliance on intuitions, however, provides an inadequate check on the exercise of judicial partiality. Intuitions of particular just decisions

> are essentially private affairs. They are difficult to obtain; they are even harder to repeat and thereby verify. The evidence for the correctness of the conclusion reached and advanced must consist in the testimony of the "intuitor" that he has had the proper intuition. Unless one has had a comparable intuition, the word of the "intuitor" must be taken

7. J. FRANK, *supra* note 4, at 166.
8. *See* P. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988).
9. H.L.A. HART, THE CONCEPT OF LAW 131-32 (1961) (emphasis in original).

> both for the fact that he has had the vision and for the fact that he has interpreted its commands faithfully. The course of human history has revealed the desirability of imposing far more stringent requirements than this in other areas of consequence; it seems strange, therefore, to argue that an institution so vital as the legal system ought to settle for so little.[10]

Finally, a crucial development occurred when Ronald Dworkin, in "The Model of Rules,"[11] criticized the realists' (and Hart's) exclusive identification of law with rules in favor of a more realistic view of law as a mixture of both rules and general principles. Dworkin accepted Hart's view that rules could effectively guide (and thereby order) human conduct, but challenged Hart's thesis that when the guidance provided by legal rules is exhausted, we are left with nothing but discretion unguided by general and predictable standards. "[W]hen lawyers reason or dispute about legal rights and obligations, particularly in those hard cases when our problems with these concepts seem most acute," Dworkin argued, "they make use of standards that do not function as rules, but operate differently as principles, policies, and other sorts of standards."[12] When operating in the "open texture" of rules, Dworkin insisted that lawyers could still reach determinate "right answers" by taking into account background principles:

> Once we identify legal principles as separate sorts of standards, different from legal rules, we are suddenly aware of them all around us. Law teachers teach them, lawbooks cite them, legal historians celebrate them. But they seem most energetically at work, carrying most weight, in difficult lawsuits. . . . [In such cases] principles play an essential part in arguments supporting judgments about particular legal rights and obligations. After the case is decided, we may say that the case stands for a particular rule. . . . But the rule does not exist before the case is decided; the court cites principles as its justification for adopting and applying a new rule. . . .
>
> An analysis of the concept of legal obligation must therefore account for the important role of principles in reaching

10. R. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION 95-96 (1961).

11. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967).

12. *Id.* at 22. In his later writings, Dworkin distinguishes between principles and policies and eschews the judicial pursuit of the latter. *See* R. DWORKIN, LAW'S EMPIRE 244 (1986) ("Judges must make their common-law decisions on grounds of principle, not policy.").

particular decisions of law.[13]

This Symposium on "Rules and the Rule of Law" can be seen as the culmination of the emerging post-realist consensus concerning the rule of law. According to this consensus, the conception of the rule of law that, together with the conception of justice, is so important to liberalism should not be identified exclusively with legal rules. Though legal rules are surely important, other legal precepts, such as general principles, are also needed to achieve a rule of law and to avoid a "rule of men." The writings of Frederick Schauer that are the focus of this Symposium have done much to develop this insight, at a time when the critical legal studies movement was reacting to the revival of the rule of law with a renewed adherence to the radical indeterminacy thesis of the realists.[14]

In the balance of this Foreword, I wish to use this refined vision of the rule of law to address a controversy in constitutional theory: the protection of unenumerated constitutional rights. As I explain, constitutional theorists who resist recognizing and protecting unenumerated rights on the ground that the judicial protection of these rights violates the rule of law fail to grasp the new, refined conception of the rule of law based on both rules and principles. In particular, they fail to recognize the importance of presumptions—a type of legal precept also stressed by Fred Schauer[15]—in reconciling the rule of law with the pursuit of justice.

The Rule of Law and the Problem of Unenumerated Rights

The Ninth Amendment to the United States Constitution reads: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."[16] In a like vein, the Privileges or Immunities Clause of the Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or

13. Dworkin, *supra* note 11, at 29.

14. *Compare* Schauer, *Easy Cases*, 58 S. Cal. L. Rev. 399 (1985) *with* Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 Harv. L. Rev. 781 (1983).

15. *See* Schauer, *Rules and the Rule of Law*, 14 Harv. J.L. & Pub. Pol'y 645, 674-77 (1991).

16. U.S. Const. amend. IX.

immunities of citizens of the United States . . . ."[17] The meanings of both of these provisions are highly controverted. Everyone agrees that each provision refers to rights that are not enumerated in the text of the Constitution. The controversy instead surrounds (a) the source and content of these rights, and (b) their judicial enforceability.[18] I will not rehearse these controversies in this Foreword. Instead, I will consider whether a commitment to the formal values represented by the rule of law is somehow incompatable with judges protecting the unenumerated rights encompassed by these provisions.

The very concept of *unenumerated* rights presents obvious rule of law problems. The rule of law dictates that the requirements of justice take an articulate and understandable form. Quite obviously, the unenumerated rights referred to by the Ninth and Fourteenth Amendments have no form at all—they are unwritten. Without some authoritative way to give them a sufficiently determinate content, judicial enforcement of these rights would seem to violate the rule of law. This becomes especially important when the separation of powers is considered. According to the theory of separation of powers, courts are only authorized to enforce the Constitution and the rights it protects, not to legislate. When faced with textual provisions as completely open-ended as these, any judicial interpretation of unenumerated rights hardly seems an *interpretation* at all, for there is simply nothing to interpret. Enforcing unenumerated rights in the absence of a text would seem instead to be a purely legislative act. To put the problem in H.L.A. Hart's terms, every case or controversy arising under the Ninth Amendment and the Privileges or Immunities Clause lies in the "open texture"[19] of these provisions; therefore, neither provision facilitates rule-bound decisions. When confronted with a case lying within the open texture of language, the only option

17. U.S. CONST. amend. XIV, § 1.

18. For the debate on the Ninth Amendment, see THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (R. Barnett ed. 1989) [hereinafter R. BARNETT]; and *Symposium on Interpreting the Ninth Amendment*, 64 CHI.-KENT L. REV. 37 (1988). For a concise summary of the Ninth Amendment debate, see Alexander, Book Review, 7 CONST. COMMENTARY 396 (1990). For the debate on the Privileges or Immunities Clause, compare R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) with M. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986).

19. *See* H.L.A. HART, *supra* note 9, at 120-32.

is to exercise judicial discretion, and this sort of discretion conflicts with the rule of law.

The apparent conflict between these clauses and the rule of law has most likely been one reason for their judicial neglect ever since their enactment. Recently, however, this rule of law difficulty with unenumerated rights has received special attention in the writings of Robert Bork. As Bork has explained:

> In a constitutional democracy the moral content of law must be given by the morality of the framer or the legislator, never by the morality of the judge. The sole task of the latter—and it is a task quite large enough for anyone's wisdom, skill, and virtue—is to translate the framer's or the legislator's morality into a rule to govern unforseen circumstances. That abstinence from giving his own desires free play, that continuing and self-conscious renunciation of power, that is the morality of the jurist.[20]

Adhering to this philosophy, says Bork, is "essential if courts are to govern according to the rule of law rather than whims of politics and personal preference."[21] To illustrate this, Bork offers an analogy:

> [S]uppose that the United States, like the United Kingdom, had no written constitution, and, therefore, no law to apply to strike down acts of the legislature. The U.S. judge, like the U.K. judge, could never properly invalidate a statute or an official action as unconstitutional. The very concept of unconstitutionality would be meaningless. The absence of a constitutional provision means the absence of a power of judicial review. But when a U.S. judge is given a set of constitutional provisions, then, as to anything not covered by those provisions, he is in the same position as the U.K. judge. *He has no law to apply* and is, quite properly, powerless. *In the absence of law*, a judge is a functionary without a function.[22]

As Bork repeatedly argues, "[d]emocratic choice must be accepted by the judge where the Constitution is silent."[23]

For one who takes this view of the judiciary and the rule of law, the Ninth Amendment and the Privileges or Immunities Clause pose a dilemma. On the one hand, the Constitution is not exactly silent; it certainly includes these passages. On the

20. R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 318 (1990).
21. *Id.*
22. *Id.* at 147 (emphasis added).
23. *Id.* at 150.

other hand, because these passages are so open-textured, their framers failed to provide judges with "their" morality; thus, these provisions appear to provide "no law" to the judge. In the absence of such authoritative guidance, judges would be free to allow their own desires free rein. The Ninth Amendment (and the Privileges or Immunities Clause) would thus provide "a bottomless well in which the judiciary can dip for the formation of undreamed of 'rights' in their limitless discretion, a possibility that the Founders would have rejected out of hand."[24] Consequently, unless we can somehow discover the framers' original intent—that is, what specific rights they had in mind when drafting these provisions—the rule of law seems to require that judges ignore these enacted passages of the Constitution.

This is precisely Bork's conclusion. In his Senate confirmation hearings, Bork was asked about the Ninth Amendment and gave the following, now famous, reply:

> I do not think that you can use the ninth amendment unless you know something of what it means. For example, if you had an amendment that says "Congress shall make no" and then there is an ink blot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the ink blot.[25]

In his book, *The Tempting of America*, Bork shifts this analogy to the Privileges or Immunities Clause:

> The judge who cannot make out the meaning of a provision is in exactly the same circumstance as judge who has *no Constitution to work with*. There being nothing to work with, the judge should refrain from working. A provision whose meaning cannot be ascertained is precisely like a provision that is written in Sanskrit or is obliterated past deciphering by an ink blot. No judge is entitled to interpret an ink blot on the grounds that there must be something under it. So it has been with the clause of the fourteenth amendment prohibiting any state from denying citizens the privileges and immunities of citizens of the United States. The clause has been a mystery since its adoption and in consequence has, quite properly, remained a dead letter.[26]

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24. Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1, 2 (1980).

25. *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 249 (1987) [hereinafter *Nomination Hearings*] (testimony of Robert Bork).

26. R. BORK, *supra* note 20, at 166 (emphasis added).

In this manner, Bork uses the rule of law to justify ignoring the unenumerated rights that are the subject of these two textual provisions.

Notice that Bork equates a judge intepreting a passage with no clear meaning with a judge having no constitution (like the U.K. judge described above). Where the text of the Constitution is insufficiently rule-like, Bork concludes that there is simply no *law* to apply, and consequently the Constitution is deemed to be "silent," notwithstanding what it says. As Bork concludes: "If the meaning of the Constitution is unknowable, if, so far as we can tell, it is written in undecipherable hieroglyphics . . . judges must stand aside and let democratic majorities rule, because there is no law superior to theirs."[27]

The Presumption of Liberty and the Rule of Law

The post-realist rule of law provides a way to escape the conundrum of ignoring those parts of the Constitution that fail to meet the criterion of ruleness. The rule of law is not a commitment to rules *simpliciter*; it is not the law of rules, though some talk as though it is.[28] It is a commitment to a particular set of values—in particular, the value of enabling persons to discern the requirements of justice *in advance of action* (and in advance of subsequent litigation). Individuals and associations must know what justice requires before acting, if they are to coordinate their actions with those of others. Moreover, only by somehow discerning the requirements of justice apart from the outcome of a lawsuit can we detect the existence of partiality in judicial decisionmaking that contributes to the problem of enforcement abuse.

Given this function of the rule of law, we can see that its informational requirements can be satisfied by means other than general rules—for instance, by general principles. Fred Schauer's emphasis on the use of "justificatory presumptions" in legal reasoning is particularly valuable in this regard:

> [A] justificatory presumption . . . in constitutional law, operates in a decisionmaking framework in which reasons vary in

27. *Id.* at 167.

28. *See, e.g.*, Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989). While Justice Scalia's choice of titles reflects this view of the rule of law, throughout his article he repeatedly refers not only to rules, but also to "general" principles, "governing" principles, "firm, clear" principles, or "precise, principled content," as opposed to rules.

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> strength. Even absent epistemic uncertainty, there may be reasons for taking some action that are simply stronger or more pressing than others. This loose observation, strong enough for present purposes, explains the difference between a reason that is compelling and one that is simply rational, between a justification that is reasonable and one that is important. The constitutional import of all these distinctions is that, time and again, reasons that are sufficient for some purposes are insufficient for others. For instance, the existence of a quite good reason for restricting speech or taking race into account may still turn out to be insufficient because of the overwhelming justificatory burden that such a reason must meet.[29]

Let us now return to the basic problem posed by unenumerated rights to see how the device of justificatory presumptions can be of assistance.

The problem posed by unenumerated rights for the rule of law is that they are unenumerated. For this reason, the text does not provide judges with specific guidance to inform their decisions so that they are both predictable and impartial. One alternative to ignoring such clauses is to determine the framers' original intentions with respect to specific unenumerated rights.[30] When pressed on the matter of judicial protection of unenumerated rights during his confirmation hearings, Bork replied, "Senator, if anybody shows me historical evidence about what . . . [the framers] meant, I would be delighted to do it. I simply do not know."[31] Assuming that the original intent of the framers with respect to specific rights can be determined, then, the rule of law problem created by the Ninth Amendment and the Privileges or Immunities Clause can be solved. These provisions should be taken to refer to the specific rights that the framers or ratifiers intended them to include.[32]

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29. Schauer, *supra* note 15, at 675.

30. *See* Barnett, *Reconceiving the Ninth Amendment*, 71 CORNELL L. REV. 1, 30-32 (1988) (describing the "originalist method" for determining unenumerated rights). This interpretive approach is distinct from one that seeks the original intention as to whether unenumerated rights—whose content is ascertained, perhaps, by some other interpretive method—should be protected. For a recent effort to enumerate the rights that the framers believed to be natural, see Rosen, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073, 1074-81 (1991).

31. *Nomination Hearings*, *supra* note 25, at 249.

32. *Cf.* Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 81 NW. U.L. REV. 226, 264 (1988) (citations omitted):

> The existence of broad terms in the Constitution does seem to be good evidence of an abstract original intention or one which directs us to values outside the Constitution. But it is mere evidence. It must be reconciled with

The strength of using the originalist method to determine unenumerated rights is that it would extend enforcement to specific rights that the framers had in mind but did not enumerate. The weakness is that it would *only* enforce such specific rights and, thus, would fail to address the serious difficulty that motivated the framers to enact the passages in question in the first place. The problem is that a complete enumeration of such rights is simply impossible. As James Wilson noted:

> [T]here are very few who understand the whole of these rights. All the political writers, from *Grotius* and *Puffendorf* down to *Vattel*, have treated on this subject; but in no one of those books, nor in the aggregate of them all, can you find a complete enumeration of rights appertaining to the people as men and as citizens. . . .
>
> . . . Enumerate all the rights of men! I am sure, sir, that no gentleman in the late Convention would have attempted such a thing.[33]

Because Wilson was an ardent natural-rights theorist,[34] we know that his remarks do not reflect a modern rights-skepticism based on the inherently contestable character of natural rights claims. But given his commitment to natural rights, what possible conception of "the rights appertaining to the people as men and as citizens" could account for the fact that they are unenumerable?

The puzzle is resolved by viewing rights not as *welfare rights* entitling persons to claim a specified portion of the resources of others, but as *liberty rights* entitling persons to the freedom to use what is theirs as they choose.[35] Liberty rights define a boundary within which individuals and associations are free to do as they wish. Because the ways by which this liberty can be exercised are unlimited, it is impossible to enumerate all the specific rights that people possess. A complete list would in-

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contrary evidence, including the commitment to a government limited by preexisting law. The constitution-makers may have used broad language to express narrow, concrete intentions. What appears to us to be general terms may, in fact, have been used as specific terms of art, or they may just have been inapt words chosen carelessly.

33. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 454 (J. Elliot reprint ed. 1987) (2d ed. 1836) (remarks of James Wilson).

34. Wilson lectured extensively on the content of natural rights while a law professor. *See* Wilson, *Of the Natural Rights of Individuals*, in 2 THE WORKS OF JAMES WILSON 296 (J.D. Andrews ed. 1896).

35. *See* L. LOMASKY, PERSONS, RIGHTS, AND THE MORAL COMMUNITY 84 (1987) (distinguishing between welfare rights and liberty rights).

clude the right to type on a computer, to sip a Diet Coke, to scratch one's nose, and so forth.

To see this conception of rights in operation, consider the following exchange that occurred in the first United States House of Representatives during the debate over the language proposed by the House Select Committee charged with drafting the Bill of Rights for what eventually would become the First Amendment. Representative Theodore Sedgwick criticized the committee's inclusion of the right of assembly on the grounds that "it is a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called into question; it is derogatory to the dignity of the House to descend to such minutiae. . . ."[36] Representative Egbert Benson replied: "The committee who framed this report proceeded on the principle that these rights belonged to the people; they conceived them to be inherent; and all that they meant to provide against was their being infringed by the Government."[37] Sedgwick then responded that

> if the committee were governed by that general principle, they might have gone into a very lengthy enumeration of rights; they might have declared that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper. . . .[38]

Sedgwick's point was not that these rights are unimportant. Indeed, he equated the inherent right to wear a hat with the "self-evident, unalienable right" of assembly.[39] Rather,

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36. 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 731 (Gales ed. 1834) [hereinafter ANNALS OF CONG.] (statement of Rep. Sedgwick).

37. *Id.* at 731-32 (statement of Rep. Benson). "Inherent rights" was commonly used synonymously with natural rights.

38. *Id.* at 732 (statement of Rep. Sedgwick).

39. Even if Sedgwick believed both the right of assembly and the right to wear one's hat to be unimportant, others in Congress did not share his view. Representative John Page's reply to Sedgwick's example also reveals that the importance of what appear to be trifling rights depends crucially upon the context, and cannot always be anticipated:

> [L]et me observe to him that such rights have been opposed, and a man has been obliged to pull off his hat when he appeared before the face of authority; people have also been prevented from assembling together on their lawful occasions, therefore it is well to guard against such stretches of authority, by inserting the privilege in the declaration of rights.

Id. at 732 (statement of Rep. Page). Of course, the right to wear a hat did not make it into the Bill of Rights. Should the government require head-baring in the presence of authority, the justificatory "presumption of liberty" discussed below would require that this infringement on the liberty of the people be justified as a legitimate exercise of governmental power, notwithstanding that the Constitution is "silent" with respect to hats. *See infra* notes 49-84 and accompanying text.

Sedgwick's point was that the Constitution should not be cluttered with a potentially endless list of rights that "would never be called in[to] question"[40] and were not "intended to be infringed."[41] Sedgwick's argument implicitly assumes that the "self-evident, unalienable," and inherent liberty rights retained by the people are unenumerable because the human imagination is limitless. In light of this difficulty, James Wilson and others argued that it would be dangerous to list just some rights, because others would necessarily be excluded and thereby put in jeopardy of being ceded to government:

> In all societies, there are many powers and rights, which cannot be particularly enumerated. A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, everything that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of government; and the rights of the people would be rendered incomplete.[42]

James Madison's solution to this serious problem was the Ninth Amendment. As he explained when introducing his proposed constitutional amendments to the House:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentleman may see by turning to . . . [the precursor of the Ninth Amendment].[43]

Ironically, it is Robert Bork's interpretation of the Constitution *sans* Ninth Amendment that fulfills Madison's greatest fears concerning the Bill of Rights. For Bork contends that "[t]he elected legislator or executive may act *where not forbidden*; his

40. *Id.* at 731 (statement of Rep. Sedgwick).

41. *Id.* at 732 (statement of Rep. Sedgwick).

42. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 388 (M. Jensen ed. 1976) (statement of James Wilson to the Pennsylvania Ratifying Convention, Nov. 28, 1787). For a different interpretation of Wilson's statement, see McAffee, 90 COLUM. L. REV. 1215, 1249-59 (1990). For a brief discussion of McAffee's interpretation of the Ninth Amendment, see *infra* notes 85-92 and accompanying text.

43. 1 ANNALS OF CONG., *supra* note 36, at 439 (statement of Rep. Madison).

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delegation of power from the people through an election is his authority."[44]

There still remains the problem of protecting these unenumerated and unenumerable liberty rights in a manner that is consistent with the rule of law. Other than the originalist method, how can this be done? Bork presumes the power of legislatures to act unless rightfully restrained by the Constitution, but by ignoring the Ninth Amendment and the Privileges or Immunities Clause, he picks up in the middle of a story that begins with the rights of the people. This is not surprising in light of his view that "the ratifiers' creation of one set of rights is simultaneously a failure or refusal to create more. There is no basis for extrapolating from the rights they did create to produce rights they did not."[45]

Of course, although the framers undoubtedly thought bills of rights consisted of an amalgam of different sorts of rights, they certainly did not believe that they were "creating" the rights "*retained* by the people." The Constitution presupposes natural rights that preexisted its enactment.[46] As Madison stated: "Trial by jury cannot be considered as a natural right, but a right resulting from a social compact which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the *pre-existent* rights of nature."[47] Representative Roger Sherman, who served with Madison on the House Select Committee to draft the Bill of Rights, reaffirmed this basic assumption in the second article of his proposed version:

> The people have certain *natural rights* which are *retained by them* when they enter into Society, Such are the rights of Conscience in matters of religion; of acquiring property and of pursuing happiness & Safety; of Speaking, writing and

44. R. BORK, *supra* note 20, at 150 (emphasis added). The perversity of this claim for legislative and executive power is manifest when one considers the Tenth Amendment's dictate that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. According to the Tenth Amendment, the delegation of legislative and executive powers is not "through an election," as Bork asserts, but "by the Constitution."

45. R. BORK, *supra* note 20, at 198.

46. *See* Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 152-53 (1928); Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978); Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1166, 1177 (1987).

47. 1 ANNALS OF CONG., *supra* note 36, at 437 (emphasis added).

> publishing their Sentiments with decency and freedom; of peaceably assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of grievances. Of these rights therefore they Shall not be deprived by the Government of the united States.[48]

These natural or inherent rights protect the people's liberty to act as they see fit unless justly restrained by the government. Protecting these rights does not require specifying every instance of protected liberty in advance. Instead, we may adopt a justificatory *presumption of liberty* that puts the burden on government to show that any interference with the exercise of the rights retained by the people is justified. In contrast, courts today employ a "presumption of constitutionality" that can be rebutted by the citizen identifying a "fundamental" right that has been infringed.[49] With the exception of the right to privacy, in recent years only enumerated rights have been deemed to be fundamental. Certainly, no general right to liberty has been so characterized.

Of course, liberty does not mean license to do whatever one wishes.[50] Justice, which is to say rights, defines the boundaries within which one may do as one wishes. One cannot permissi-

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48. Sherman, *Roger Sherman's Draft of the Bill of Rights, reprinted in* R. BARNETT, *supra* note 18, at 351 (emphasis added). This recently discovered draft, and Madison's use of the Ninth Amendment in his argument against the constitutionality of a national bank, *see infra* notes 71-84 and accompanying text, do much to undercut Russell Caplan's thesis that the rights "retained by the people" mentioned in the Ninth Amendment refer *exclusively* to state constitutional rights (that can be altered by a state's amendment process) or to statutory and common-law rights (that can be altered by simple state legislation), and not also to natural or inherent rights. *See* Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 227-28 (1983). Having shifted his inkblot analogy to the Privileges or Immunities Clause, Bork now tepidly endorses Caplan's theory of the Ninth Amendment. *See* R. BORK, *supra* note 20, at 184-85. For a provocative discussion of how state constitutional rights can serve as one source of rights protected by the Ninth Amendment, see Massey, *The Anti-Federalist Ninth Amendment and Its Implications for State Constitutional Law*, 1990 WIS. L. REV. 1229.

49. *See, e.g.*, United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) ("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. . . ."). The Court also suggested that the presumption may be rebutted by showing that discrete and insular minorities are adversely affected or that the political process is being impeded. *See id.*

50. As Locke put the matter:

> But though this be a *State of Liberty*, yet it is *not a State of License*. . . . The *State of Nature* has a Law of Nature to govern it, which obliges everyone: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions.

J. LOCKE, *supra* note 1, at 288-89.

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bly infringe upon the rightful domains of others.[51] The common law of property, contracts, and torts defines the extent and nature of these boundaries.[52] Tortious conduct is not a "rightful" exercise of one's liberty; likewise, one has no constitutional right to commit trespass upon the land of another. Provided that one is acting rightfully in this sense, however, government must justify any interference with such conduct.

Bork himself once flirted with the idea that the Constitution supports a "general principle of individual autonomy underlying the particular guarantees of the Bill of Rights."[53] Ultimately, he came to reject the idea of an "independent right of freedom, which is to say a general constitutional right to be free of legal coercion,"[54] on the grounds that such a right is "a manifest impossibility in any imaginable society."[55] If, however, this general right to liberty is considered not as absolute but rather as a justificatory presumption that shifts the burden to the government to show that interference with liberty is "necessary" and its motives "proper," then there is nothing remotely impossible about protecting such a right. Indeed, the allocation of such burdens of proof is a traditional function of the rule of law.

In *The Tempting of America*, Bork considers and rejects a similar proposal advanced by Bernard Siegan.[56] His first objection

51. According to Locke, in the state of nature, "all Men may be restrained from invading others' Rights, and from doing hurt to one another." *Id.* at 288.

52. The common-law process was not seen as the source of these rights—which are natural—but as the means of giving these otherwise abstract rights a conventionally established, specific content. *See, e.g., id.* at 368-69. While it is true that state legislation could systematize and even alter judge-made common-law rights, this was considered in large part to be an extraordinary corrective to the very strict common-law doctrine of precedent. Even so, most state and federal legislation does not even purport to be performing this corrective function. Moreover, the rules established by both common-law decisions and legislation can be critically scrutinized to determine whether they are inconsistent with abstract natural rights.

53. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971) [hereinafter Bork, *Neutral Principles*]. *See also* Bork, *The Supreme Court Needs a New Philosophy*, FORTUNE, Dec. 1968, at 138, 174 ("[I recommend] great lateral expansion of the area of individual rights. The new concept of rights becomes, indeed, something roughly describable as a presumption in favor of human autonomy.").

54. Bork, *Neutral Principles*, *supra* note 53, at 9.

55. *Id.*

56. *See* B. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980). Siegan proposes the following standard of review:

> [T]he government would have the burden of persuading a court utilizing an intermediate standard of scrutiny, first, that the legislation serves important governmental objectives; second, that the restraint imposed by government is substantially related to achievement of these objectives, that is, . . . the fit

is the familiar one that the many liberties protected by such a presumption are "not mentioned in constitutional materials."[57] As he puts it: "There being nothing in the Constitution about maximum hours laws, minimum wage laws, contraception, or abortion, the Court should have said simply that and left the legislative decision where it was."[58] We have already seen, however, that Bork's argument for ignoring unenumerated rights depends upon the claim that the framers' failure to enumerate specific rights makes the judicial enforcement of rights not enumerated violative of the rule of law. If, however, there is a way of giving these provisions content that is consistent with the rule of law, then this objection must fail.

Second, and more interestingly, Bork considers the presumptive nature of the right to liberty. Although he again rejects the concept on the grounds of feasibility, he no longer argues, as he once did, that such a right is an "impossibility in any imaginable society."[59] Siegan cites Aaron Director's claim that "[l]aissez faire has never been more than a slogan in defense of the proposition that every extension of state activity should be examined under a presumption of error."[60] Bork replies that the "next question, however, is who is to apply the presumption of error, players in the political process or judges. My answer is the former; Siegan's is the latter."[61]

Bork defends his preference on the ground that the task facing a judiciary seeking to evaluate the necessity and propriety of governmental conduct would be "stupendous":[62]

> The court could not carry out the task assigned unless it had worked out a complete and coherent philosophy of the proper and improper ends of government with respect to all human activities and relationships. This philosophy must give answers to all questions social, economic, sexual, familial, political, moral, etc. It must be so detailed and well articulated, with all major and minor premises constructed and put in place, that it enables judges to decide infinite numbers

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between means and ends must be close; and third, that a similar result cannot be obtained by less drastic means.

Id. at 324.

57. R. BORK, *supra* note 20, at 225.

58. *Id.*

59. Bork, *Neutral Principles*, *supra* note 53, at 9.

60. B. SIEGAN, *supra* note 56, at 154 (citing Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1, 2 (1964)).

61. R. BORK, *supra* note 20, at 225.

62. *Id.* at 226.

> of concrete disputes. . . . No theory of the legitimate and important objectives of government that possesses all of these characteristics is even conceivable. No single philosopher has accomplished it, and nine Justices could not work it out and agree on it. Yet, upon the premise that a judge may not override democratic choice without an authority other than his own will, each of these qualities is essential.[63]

The problem with Bork's reply is revealed in his last sentence, in which he assumes what a presumption of liberty calls into question—namely, that the legitimacy of democratic choice places the burden on the court to justify any interference with legislative will when protecting unenumerated rights. He repeatedly asks how the court is "to demonstrate"[64] or "to prove"[65] that it is right and the legislature is wrong. However, we are speaking now of adjudication with parties on both sides of a case or controversy. In this context, placing the burden on "the court" is no different than placing the burden on the citizen to justify his or her exercise of liberty.

Although this position is entirely consistent with Bork's view that the "elected legislator or executive may act where not forbidden," it does no more than reassert the presumption of constitutionality, rather than defend it. The presumption of liberty places the burden on the government to justify its interference with the liberties of the people. Therefore, the burden falls to the legislature or executive, not the court, to develop the theories to justify its actions. One need not be too cynical to suspect that, when the justificatory shoe is placed on the other foot, this burden will no longer remain so insurmountable.

In his response to Siegan, Bork not only misses the basic thrust of the presumption of liberty, he also misses the point of the theory of delegated powers that underlies the entire Constitution and that is explicitly acknowledged in the Tenth Amendment. If the government cannot articulate a coherent and legitimate justification for its actions, if it cannot show how its actions are substantially related to these objectives and that it cannot achieve its objectives by means that do not infringe upon liberty,[66] then it deserves to lose, and the citizen deserves

63. *Id.*

64. *Id.* at 227.

65. *Id.*

66. The text paraphrases the type of scrutiny recommended by Bernard Siegan. *See supra* note 56.

to win. According to the presumption of liberty, it is the legislature's burden to justify its conduct, not the citizen's or the court's.[67]

Moreover, what Bork claims is an impossible function for judges is precisely how the First Amendment protection of speech is interpreted. Indeed, it is how Bork himself protected the freedom of speech as a federal appeals court judge.[68] Courts have not interpreted the First Amendment to mean that government actions may never in any manner affect speech, but that when they do, the government is under a heavy burden to justify its conduct. This is a burden that the Executive and Legislative Branches have sometimes met and sometimes failed to meet. The presumption of liberty simply extends the protection afforded to the enumerated right of free speech, and other enumerated rights, to the unenumerated freedoms retained by the people.

One source of Bork's difficulty here is his acceptance of Herbert Wechsler's view of legislation: "No legislature or executive is obligated by the nature of its function to support its choice of values by the type of reasoned explanation that . . . is intrinsic to judicial action. . . ."[69] In Bork's words, "no legislation rests on a principle that is capable of being applied generally."[70] But a presumption of liberty contests this interpretive assumption—an assumption that is, by the way, both extra-textual and questionable on originalist grounds. While the legislature may be under no general obligation to state a principled basis for its legislative acts, *when these acts infringe upon the rightful liberties of the people and are challenged,* they must be defended in a princi-

67. Although the delegated powers provisions of the Constitution do not define the limits of state governmental powers, neither do state governments have plenary powers to do anything they will. Rather, when their actions infringe upon the unenumerated rights protected by the Fourteenth Amendment, state government officials must show that they are properly exercising their so-called police powers. Any such justification requires a theory of this extra-textual doctrine of state powers that is not inconsistent with the textual protections afforded by the Ninth and Fourteenth Amendments. For one such theory, see R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

68. *See* Lebron v. Washington Metro. Area Transit Auth., 749 F.2d 893 (D.C. Cir. 1984). As Bork himself has argued: "We are . . . forced to construct our own theory of the constitutional protection of speech. We cannot solve our problems simply by reference to the text or to its history. But we are not without materials for building." Bork, *Neutral Principles, supra* note 53, at 22-23.

69. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15-16 (1959).

70. R. BORK, *supra* note 20, at 80.

pled manner or be nullified as un*law*ful. It is not enough for a legislature to say, "We just wanted to do this." The legislature, no less than a court, must act lawfully.

To see how a presumption of liberty might operate, consider Congress's power under Article I, Section Eight to "establish post offices." Having exercised this power of establishment, Congress is free under the Necessary and Proper Clause to regulate the operation of its post offices in any manner it sees fit. But when Congress, allegedly pursuant to its postal powers, goes beyond its power to administer its own offices and claims the further power to establish a postal monopoly, as it has, then it must be prepared to articulate a compelling reason why such action is both necessary and proper, for presumptively it is not. In establishing the Constitution, the people retained the right to establish their own private post offices.

Madison used the Ninth Amendment in a strikingly similar fashion during his speech to the House opposing the national bank bill. In challenging the constitutionality of the act, Madison examined the Constitution at length to see if the power to create such a bank could be found among any of those delegated to the government, and he concluded that "it was not possible to discover in [the Constitution] the power to incorporate a Bank."[71] He then considered whether the proposed bank might be justified under the Necessary and Proper Clause[72] as a means of executing the Borrowing Power.[73] "Whatever meaning this clause may have," he began, "none can be admitted, that would give unlimited discretion to Congress. Its meaning must, according to the natural and obvious force of the terms and the context, be limited to means necessary to the end, and incident to the nature of the specified powers."[74]

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71. 2 ANNALS OF CONG., *supra* note 36, at 1896 (statement of Rep. Madison).

72. *See* U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers . . . .").

73. *See id.* ("The Congress shall have Power . . . To borrow Money on the credit of the United States . . . .").

74. 2 ANNALS OF CONG., *supra* note 36, at 1898. Madison's argument here reflects one of the reasons he offered for adopting a bill of rights:

> It is true, the powers of the General Government are circumscribed, they are directed to particular objects; but even if Government keeps within those limits, it has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent, . . . because in the Constitution of the United States, there is a clause granting to Congress the power to make all

In evaluating the legitimacy of the lawmaking power, Madison contrasted the requirement of necessity with that of mere convenience or expediency. In so doing, he employed a type of scrutiny that is quite like the third step of the analysis urged by Bernard Siegan:[75]

> But the proposed bank could not even be called necessary to the Government; at most it could be but convenient. Its uses to the Government could be supplied by keeping the taxes a little in advance; by loans from individuals; by the other Banks, over which the Government would have equal command; nay greater, as it might grant or refuse to these the privilege (a free and irrevocable gift to the proposed Bank) of using their notes in the Federal revenues.[76]

Notice that Madison was not simply making what would now be called a "policy" choice.[77] Rather, he was advancing the constitutional argument that these other means of accomplishing an enumerated objective or end are to be preferred in principle precisely because they do not entail the violation of the rights retained by the people. In particular, these measures do not involve the grant of a monopoly, which, according to Madison, "affects the equal rights of every citizen."[78] There is a difference in principle between these alternative means, just as there is a difference in principle, not merely in policy, between drafting citizens and paying volunteers as the means of exercising the congressional power to "raise and support Armies . . . ."[79]

Madison offered another reason against the theory that the

> laws which shall be necessary and proper for carrying into execution the powers vested in the Government of the United States, or in any department thereof.

1 ANNALS OF CONG., *supra* note 36, at 438 (statement of Rep. Madison). Madison contended that a bill of rights was one way to police abuses of this discretion.

75. *See supra* note 56.

76. 2 ANNALS OF CONG., *supra* note 36, at 1901 (statement of Rep. Madison).

77. In his address to the House, Madison did address the policy issues raised by the proposal when he "began with a general review of the advantages and disadvantages of Banks." *Id.* at 1894. However, "[i]n making these remarks on the merits of the bill, he had reserved to himself the right to deny the authority of Congress to pass it." *Id.* at 1896.

78. *Id.* at 1900. In this claim, Madison was in no way idiosyncratic. The eighth article of Roger Sherman's draft of the Bill of Rights stated: "Congress Shall not have power to grant any monopoly or exclusive advantages of commerce to any person or Company; nor to restrain the liberty of the Press." Sherman, *supra* note 48, at 352. Of the eight states that accompanied their ratification of the Constitution with proposed amendments, five (Massachusetts, New Hampshire, New York, North Carolina, and Rhode Island) offered similar language. *See* R. BARNETT, *supra* note 18, at 353-85.

79. U.S. CONST. art. I, § 8.

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Necessary and Proper Clause justified the bank—the fact that the power claimed was highly remote from any enumerated power:

> Mark the reasoning on which the validity of the bill depends! To borrow money is made the end, and the accumulation of capitals implied as the means. The accumulation of capitals is then the end, and a Bank implied as the means. The Bank is then the end, and a charter of incorporation, a monopoly, capital punishments, & c. implied as the means.
>
> If implications, thus remote and thus multiplied, can be linked together, a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy.
>
> The *latitude of interpretation* required by the bill is condemned by the *rule* furnished by the Constitution itself.[80]

As authority for this "rule" of interpretation, Madison offered the Ninth Amendment. His reference to the Ninth Amendment is reported in the *Annals of Congress* as follows:

> The explanatory amendments proposed by Congress themselves, at least, would be good authority with them; all these renunciations of power proceeded on a rule of construction, excluding the latitude now contended for. . . . He read several of the articles proposed, remarking particularly on the 11th [the Ninth Amendment] and 12th [the Tenth Amendment], *the former, as guarding against a latitude of interpretation*; the latter, as excluding every source of power not within the Constitution itself.[81]

Thus, while Madison saw the Tenth Amendment as authority for the rule that the Congress could only exercise a delegated power, he saw the Ninth Amendment as authority for a rule against the loose construction of such powers—especially the Necessary and Proper Clause—when legislation affects the rights retained by the people.[82] In Madison's view, for legisla-

80. 2 ANNALS OF CONG., *supra* note 36, at 1899 (statement of Rep. Madison) (emphasis added).

81. *Id.* at 1901. The numbering of the amendments changed because the first two amendments proposed by Congress were not ratified by the states. At the time Madison spoke, this outcome was not yet known.

82. This is not the only time that Madison expressed his view that, though they may both share the objective of constraining the powers of government, the Ninth and Tenth Amendments do not operate identically. In his speech to the House explaining his proposed amendments, Madison referred to the precursor of the Tenth Amendment in the following way: "Perhaps other words may define this more precisely than the whole of the instrument now does. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration. . . ." 1 ANNALS OF CONG., *supra* note 36, at 441 (statement of Rep. Madison). Contrast this tone with the seriousness with

tion to fall under a delegated power it must be a genuinely necessary and proper exercise of such a power. As he concluded: "In fine, if the power were in the Constitution, the immediate exercise of it cannot be essential; if not there, the exercise of it involves the guilt of usurpation. . . ."[83] Put another way, as I have argued elsewhere, constitutional rights—including unenumerated rights—operate both as "means-constraints" and "ends-constraints."[84]

Recently, Thomas McAffee has offered an insightful, detailed, and closely-reasoned analysis of the original meaning of the Ninth Amendment.[85] An adequate treatment of his theory would require a more extensive consideration than is possible or appropriate in this discussion of the rule of law. Nonetheless, it is worth noting how Madison's application of the Ninth Amendment in his argument against the national bank undercuts McAffee's interpretation.

McAffee denies that the rights retained by the people "are to be defined independently of, and may serve to limit the scope of, powers granted to the national government by the Constitution."[86] Instead, "the other rights retained by the people are *defined* residually from the powers granted to the national government."[87] He contends that the Ninth Amendment was originally intended *solely* to prevent later intepreters of the Constitution from exploiting the incompleteness of the enumeration of rights to expand federal powers beyond those delegated by the Constitution.[88] He denies that it was intended to *better* protect individual rights by justifying a more strict con-

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which he treated the precursor to Ninth Amendment. *See* text accompanying *supra* note 43.

83. 2 ANNALS OF CONG., *supra* note 36, at 1902 (statement of Rep. Madison).

84. *See* Barnett, *supra* note 30, at 11-16.

85. McAffee, *supra* note 42.

86. *Id.* at 1222.

87. *Id.* at 1221 (emphasis added).

88. As McAffee explains: "On the residual rights reading, the ninth amendment serves the unique function of safeguarding the system of enumerated powers against a particular threat arguably presented by the enumeration of limitations on national power." *Id.* at 1306-07. So, for example:

> If the government contended in a particular case that it held a general power to regulate the press *as an appropriate inference from the first amendment restriction on that power*, or argued that it possessed a general police power *by virtue of the existence of the bill of rights*, the ninth amendment would provide a direct refutation.

Id. at 1307 (emphasis added). In sum, according to McAffee, the only function of the Ninth Amendment is to protect the scheme of delegated powers by arguing against this specific sort of inference.

struction of the enumerated powers than might be warranted under the delegated-powers provisions standing alone:

> The Ninth Amendment reads *entirely* as a "hold harmless" provision: it thus says nothing about how to construe the powers of Congress or how broadly to read the doctrine of implied powers; it indicates *only* that no inference about those powers should be drawn from the mere fact that rights are enumerated in the Bill of Rights.[89]

Yet when Madison used the Ninth Amendment in his speech concerning the national bank, he was in no manner responding to an argument for expanded federal powers based on the incomplete enumeration of rights, but rather was arguing entirely outside the only context in which, according to McAffee, the Ninth Amendment was meant to be relevant. Moreover, in contrast to McAffee's thesis, Madison used the Ninth Amendment precisely and explicitly as authority for more strictly construing enumerated powers—in particular, the Necessary and Proper Clause. That is, Madison used the Ninth Amendment to restrict the means by which delegated powers can be exercised—the "means-constraints" construction of the Ninth Amendment that I have defended elsewhere.[90] Finally, contrary to what McAffee's theory would predict, Madison rested his argument against the claimed power to grant a monopoly charter in part on the fact that such a power violates the "equal rights of every citizen."

In sum, rather than looking exclusively to the delegation of powers to define as well as to protect the rights of the people, as McAffee would have it, Madison looked to the rights retained by the people in his effort to interpret and define the delegated-powers provisions.[91] In Madison's words, the bill

89. *Id.* at 1300 n.325 (emphasis added).

90. *See* Barnett, *supra* note 30, at 11-16. There I defend the "power-constraint" conception of constitutional rights in which rights constrain the exercise of constitutionally delegated powers. The alternative "rights-powers" conception views rights solely as what is left over after the powers have been delegated and thus "residual rights" (to employ McAffee's terminology) can and must be defined exclusively by reference to the enumerated powers.

91. Although he does not discuss this use by Madison of the Ninth Amendment, McAffee is nothing if not resourceful in interpreting unfriendly evidence—as exemplified by the lengths to which he goes to explain why Roger Sherman's reference to the "natural rights . . . retained by [the people]" in his draft bill of rights has no bearing on the proper construction of the Ninth Amendment. *See* McAffee, *supra* note 42, at 1303 n.333. I can imagine two responses that McAffee might make to my interpretation of Madison's speech concerning a national bank:

First, because Madison did not specify the rights of the people that would be vio-

"was condemned by the explanatory amendments proposed by the Congress themselves to the Constitution."[92]

CONCLUSION

We may summarize the analysis presented here as follows. If the unenumerated rights retained by the people deserve judicial protection, we require some means for protecting them that is consistent with the rule of law. The presumption of liberty is one such means: It protects rights by providing a "rule" or, more accurately, a justificatory presumption that places the burden of justification upon the government whenever its actions infringe the rightful exercise of liberty by a person or association. This presumption is at least as compatible with the

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lated, perhaps he was defining the infringement of these rights solely by the fact that the power claimed is beyond those delegated by the Constitution. According to this account, Madison was simply referring to the rights "reserved by" the delegation of powers and not to any "affirmative" rights retained by the people. But this response would have Madison engaged in a meaningless rhetorical flourish when making this part of his argument. Moreover, it does not explain Madison's consideration of the alternative means of exercising the borrowing powers. This construction would have Madison at this juncture making a policy argument in the guise of a constitutional claim, rather than, as I contend, to be making a principled distinction between means that violate the equal rights of the people, and those that do not. Nor does it explain Madison's use of the Ninth Amendment as authority for his conclusion that "if the power were in the Constitution, the immediate exercise of it cannot be essential." 2 ANNALS OF CONG., *supra* note 36, at 1902 (statement of Rep. Madison). According to my reading of the Ninth Amendment, one need not specify the rights retained by the people for these rights to do independent work in constraining the exercise of government powers. One need only shift the burden of justification to those advocating the legitimacy of the power.

Second, McAffee may respond that Madison was not protecting "affirmative rights" at all but was simply using the Ninth Amendment to bolster the enumerated-powers scheme. Without question, the protection of the enumerated-powers structure of the Constitution was the main thrust of Madison's constitutional objection and was repeatedly mentioned by him. However, this answer would not save McAffee's thesis that a rights analysis is irrelevant to the construction of enumerated powers. According to McAffee, enumerated powers alone define rights; rights do not define powers. For this thesis to survive, it is not enough to argue that when the retained rights are being used to limit delegated powers, this is merely an expression of the limited-powers scheme. While preserving the form of McAffee's "reserved rights" thesis, this would reverse the interpretive methodology he favors. Instead of using the concept of delegated powers to define the concept of reserved rights, as he would have it, reserved rights would be used to help define the delegated powers. Thus, this response would support my view of the Ninth Amendment—one McAffee explicitly rejects, *see* McAffee, *supra* note 42, at 1291-92—that the concept of constitutional rights, including unenumerated ones, provides a *conceptual* means *in addition* to the concept of delegated powers by which the legitimacy of claimed government powers can be critically assessed. In his speech concerning a national bank, Madison appears to have used the Ninth Amendment in just this way.

92. 2 ANNALS OF CONG., *supra* note 36, at 1902 (statement of Rep. Madison).

rule of law as the prevailing presumption of constitutionality, and perhaps more so.

The presumption of constitutionality surrenders to the government the power to restrict any of the people's retained rights (unless prevented from doing so by the existence of an enumerated right). By providing no principled and effective procedural means to detect abuses in the exercise of government power, this presumption fails to perform one of the principal functions of the rule of law: the detection of enforcement abuse. After all, legislatures are but men and women, and if the "rule of men" is to be avoided, then legislative enactments must be scrutinized to determine whether they truly are "laws." In words that echo and apply to representative government the question John Locke asked of absolute monarchy,[93] Madison observed:

> No man is allowed to be the judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay, with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine? . . . Justice ought to hold the balance between them.[94]

The only agency available to put "justice" or rights between the claims of the executive or legislature and that of the citizen is a court.[95] By putting on those who infringe upon the liberties

93. Here are Locke's words:

> I easily grant, that *Civil Government* is the proper Remedy for the Inconveniences of the State of Nature, which must certainly be Great, where Men may be Judges in their own Case, since 'tis easily to be imagined, that he who was so unjust as to do his Brother an Injury, will scarce be so just as to condemn himself for it: But I shall desire those who make this Objection, to remember that *Absolute Monarchs* are but Men, and if Government is to be the Remedy of those Evils, which necessarily follow from Mens being Judges in their own Cases, and the State of Nature is therefore not to be endured, I desire to know what kind of Government that is, and how much better it is than the State of Nature, where one Man commanding a multitude, has the Liberty to be Judge in his own Case, and may do to all his subjects whatever he pleases, without the least liberty to any one to question or controle those who Execute his Pleasure?

J. LOCKE, *supra* note 1, at 294 (emphasis in original).

94. THE FEDERALIST No. 10, at 79-80 (J. Madison) (C. Rossiter ed. 1961).

95. True, at the time he wrote this passage, Madison did not appear to contemplate that judicial review could help deal with this problem. After the passage quoted in the

of the people the onus of explaining why their enactments are lawful—in the sense that they are justified on general principles—the presumption of liberty serves the rule of law far better than the presumption of constitutionality. For we must never forget that the rule of law is meant to protect the people from the government, not to protect the government from the people.

Beneath this debate about unenumerated rights and the rule of law lies another that concerns the source of constitutional legitimacy. Is the Constitution binding solely because it is the product of the exercise of will—in this case, the will of the people who ratified it—as Robert Bork insists, or is it legitimate in whole or in part because it establishes a system of government that is substantively justified? The question of legitimacy is hardly a new one. As observed by Edward Corwin:

> The attribution of supremacy to the Constitution on the ground solely of its rootage in popular will represents . . . a comparatively late outgrowth of American constitutional theory. Earlier the supremacy accorded to constitutions was ascribed less to their putative source than to their supposed content, to their embodiment of essential and unchanging justice . . . . The Ninth Amendment of the Constitution of the United States . . . illustrates this theory perfectly, except that the principles of transcendental justice have been here translated into terms of personal and private rights. . . . [These rights] owe nothing to their recognition in the Constitution—such recognition was necessary if the Constitution was to be regarded as complete.
>
> Thus the *legality* of the Constitution, its *supremacy*, and its claim to be worshipped, alike find common standing ground on the belief in a law superior to the will of human governors.[96]

Actually, it is the legitimacy of governmental action, rather than of the Constitution itself, that is directly at issue. The Constitution is binding, if at all, on the government and its offi-

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text accompanying *supra* note 94, he continued: "Yet the parties are, *and must be*, themselves the judges. . . ." *Id.* at 57 (emphasis added). After the ratification of the Constitution and under the influence of Jefferson, however, he came to change his view. *See* B. SCHWARTZ, THE GREAT RIGHTS OF MANKIND 118 (1977). In his speech introducing his proposed amendments to the House, he referred to "independent tribunals of justice [who] will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive. . . ." 1 ANNALS OF CONG., *supra* note 36, at 439 (statement of Rep. Madison).

96. Corwin, *supra* note 46, at 152-53 (emphasis in original).

cials. The question is whether actions of the government established by the Constitution are binding "in conscience" on individuals and associations.[97] Unless we have reason to think that legislative or executive actions are consistent with the rights retained by the people, there is no prima facie moral duty to obey their dictates.

When legislation is produced by constitutional processes that lack any impartial review to determine whether the legislation has this rights-respecting quality, then the people have no assurance of legitimacy. In the absence of such assurances, nothing but force or power exists to enlist obedience. As Bork acknowledges: "Power alone is not sufficient to produce legitimate authority."[98] What he fails to see is that, without the scrutiny provided by a presumption of liberty, the fact that legislation is enacted suggests little, if anything, about its substantive legitimacy. Citizens have no reason to think it represents anything other than an exercise of naked legislative power—whether in service of a majority or a minority faction.[99]

With the protection of the background rights retained by the people—both enumerated and unenumerated—providing the basis of constitutional legitimacy, the Borkian picture of the Constitution as "islands [of rights] surrounded by a sea of government powers"[100] is reversed. In its place is the original picture of the Constitution, "wherein government powers are limited and specified and rendered as islands surrounded by a sea of individual rights."[101] Ultimately, it is for us to decide which picture is correct.

97. *See* Barnett, *The Ninth Amendment and Constitutional Legitimacy*, 64 CHI.-KENT L. REV. 37 (1988).

98. R. BORK, *supra* note 20, at 176.

99. *See* THE FEDERALIST No. 10, *supra* note 94, at 78 (emphasis added):

> By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, *adverse to the rights of other citizens*, or to the permanent and aggregate interests of the community.

100. S. MACEDO, THE NEW RIGHT V. THE CONSTITUTION 32 (rev. ed. 1987).

101. *Id.*

SUPP 12a-000657

RULES AND THE RULE OF LAW

FREDERICK SCHAUER*

What is the connection between rules and law? My goal here is to address this question, and in doing so I will take up four particular questions that the general one subsumes. First, *must* law be an affair of rules? Does something about the nature of law necessitate that legal decisionmaking involve the application of preexisting rules? My second question is the mirror image of the first. *Can* law be an affair of rules? Is rule-based decisionmaking possible, and, if so, is *it* consistent with the idea of law? Third, if law need not but *can* be based primarily on the application of rules, then, descriptively, is it so? That is, are the legal systems with which we are most familiar usefully explained by focusing on rules? Finally, if law need not but can be based largely on rules, then, normatively, *should* it be? Ought legal decisionmakers to be constrained by rules, and, if so, when, and why?

Many contemporary debates in legal theory address one or more of these interrelated questions. The disputes about legal positivism as an account of law concern the place of a limited set of rules in legal decisionmaking. Traditional and modern versions of legal realism attack the view that legal decisionmaking involves the simple application of preexisting rules. Other theorists make the call to *context*, urging legal decisionmakers to consider more features of any event than is possible through the application of necessarily acontextual rules. Similarly, some see law as essentially *rhetorical*, focusing on the different arguments that prevail in cases rather than on the possibility that fixed rules predetermine the resolution of those cases. Most recently, American pragmatism[1] and Aristotelian practical reason[2] have inspired theorists to urge a decisionmaking mode

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1. *See, e.g.*, R. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990); *Symposium on the Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990).

2. *See, e.g.*, Burton, *Law as Practical Reason*, 62 S. CAL. L. REV. 747 (1989); Farber & Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615 (1987); Solum, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 S. CAL. L. REV. 1735 (1988).

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more sensitive to all relevant facts than is possible under supposedly "formalistic" styles of decisionmaking.

This list is hardly exhaustive, and even the aforementioned perspectives come in several variations.[3] Yet all of them share a preoccupation with the size of the categories within which legal decisions should be made, and a related concern with the rigidity of those categories in the face of moral, social, or political considerations indicating a contrary result. These are concerns about the place of rules within law, and my purpose is to address this family of issues.

I commence with a brief summary of the account of rules I have set forth at length elsewhere.[4] This account, focusing on rules as entrenched generalizations likely to be under- and over-inclusive in particular cases, enables us to contrast two forms of decisionmaking: rule-based decisionmaking, in which a generalization provides a reason for decision even in the area of its under- or over-inclusion; and particularistic decisionmaking, which aims to optimize for each case and treats normative generalizations as only temporary and transparent approximations of the better results a decisionmaker should try to reach.

After describing this account of rules, I take up the question whether every institution that is properly called law must necessarily make its decisions in rule-based fashion. I conclude that this is not the case, and that many existing and justifiable forms of legal decisionmaking are more particularistic than rule-based. I then address the opposite question, whether law *must* avoid the formal constraints of rules, instead seeking justice in the individual case. Again, I conclude that this is a poor account of the idea of law, and that rule-based decisionmaking, just like particularistic decisionmaking, has a place in any plausible account of what law is.

Having determined that both rule-based and particularistic decisionmaking are compatible with the idea of law, I pause for a brief polemic against those who would deny these alternatives, seeking to disguise their normative arguments for one by

3. There are, for example, close affinities between the focus on context in much of feminist jurisprudence and the focus on the particular case in the constitutional jurisprudence of Justice Stevens. *See, e.g.*, Pacific Gas & Elec. Co. v. Public Utilities Comm'n of Cal., 475 U.S. 1, 35 (1986) (Stevens, J., dissenting); New York v. Ferber, 458 U.S. 747, 777 (1982) (Stevens, J., concurring).

4. F. SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISIONMAKING IN LAW AND IN LIFE (forthcoming 1991).

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claiming the impossibility of the other. With the alternatives then set out, I consider descriptively and normatively the place of rules within the legal system. The descriptive account elaborates the idea of *presumptive positivism*, combining features of rule-based and particularistic decisionmaking such that a limited set of pedigreeable rules possesses presumptive but nonconclusive force in the legal systems we know best.

That we have such a system, however, does not mean that it is the system we ought to have, and I go on to explore the arguments for and against constraint by rules. I avoid the frequently overstated arguments for certainty and predictability, and instead concentrate largely on rules as devices for the allocation of power. I conclude by addressing the dilemma of authority, exploring the way in which the question of authority looks quite different from the perspective of the imposer of authority than it does to those who are subject to it.

I.

Understanding rules requires grasping the distinction between the general and the particular. Although many of the items and events we see as particulars are themselves collections of even finer particulars, there is still a logical difference between trees and *this* tree, between words and *this* word, and between the activity of writing and my writing of this page. This distinction is a commonplace, undergirding our understanding of *de*scriptive rules purporting not to describe one event or observation, but to explain and generalize about a series of them.

It is equally a commonplace that descriptive and *pre*scriptive rules are logically distinct—the laws of gravity are different from the laws of New Jersey. Still, for all the differences, there are often-overlooked similarities, because prescriptive rules, just like descriptive ones, are necessarily general rather than particular. What distinguishes a rule from a command is the rule's generality, speaking to classes of events and not just *this* event. There are no rules for particulars.

Descriptive generalizations are commonly probabilistic rather than universal, as when we say that Swiss cheese has holes or German wine is sweet. And even when a descriptive generalization appears universal (all zebras have stripes), the phenomenon of open texture remains, ordinarily holding open the possibility that even the most seemingly precise and univer-

sal of descriptive generalizations may be false in some instances.[5] Rules, as prescriptive generalizations, have these same features. Frequently, their factual predicates are probabilistic rather than universal when measured against their background justifications. When we set the minimum age for driving at sixteen, we know that a generalization about age and responsible driving is both under- and over-inclusive. And even when some rule seems neither under- nor over-inclusive with respect to its background justification, the phenomenon of open texture persists. Even the rule that seems to fit its background justification perfectly may yet produce a bad fit in a particular circumstance neither imagined nor imaginable when the rule was originally crafted.

We are now able to distinguish two different forms of decisionmaking. Under *particularistic* decisionmaking, the prescriptive generalizations that purport to guide us are transparent heuristic guides. The rules are but rules of thumb, offering no independent reasons for decision when they indicate results other than those indicated by the direct application of the justifications lying behind those prescriptions, or indicated by the full range of justifications otherwise accepted by the decisionmaker.[6] When prescriptive generalizations are either under- or over-inclusive in individual cases, the particularistic

5. I say "ordinarily" because the phenomenon of open texture appears inapplicable to closed sets, as when we say that all Supreme Court justices prior to 1981 were men. It also appears inapplicable to properties that are definitional, as when we say that all chess sets have pawns. These qualifications point to deep philosophical controversies, but I will only note the issue here.

6. The sentence in the text draws a distinction worthy of further elaboration. A prescriptive generalization (only 16-year-olds may drive) instantiates some background justification (only responsible drivers should drive). The one background justification lying behind one instantiation, however, does not represent the full array of background justifications available to some decisionmaker. When that full array is consulted in every case, we can call the process "all-things-considered" decisionmaking. By contrast, considering the justification behind one prescription is considering *one* justification and not "*all* things." Thus, to adopt a purpose- or justification-oriented approach to decisionmaking is not necessarily to adopt an all-things-considered decisionmaking mode. Still, the justification behind a prescription itself instantiates an even deeper justification, and thus a decisionmaking environment might but need not have its decisionmakers treating all instantiations, at whatever level, as transparent to the justifications lying behind them. When this is the case, starting with one prescription still turns into all-things-considered decisionmaking. If a decisionmaker treats a prescription as transparent to its background justification, however, without *that* background justification itself being treated as transparent to *its* background justifications, a purpose- or justification-oriented approach to rules need not be equivalent to all-things-considered decisionmaking. On all of this, see Schauer, *Formalism*, 97 YALE L.J. 509 (1988) [hereinafter *Formalism*]; and Schauer, *The Jurisprudence of Reasons* (Book Review), 85 MICH. L. REV. 847 (1987) [hereinafter *The Jurisprudence of Reasons*].

decisionmaker may cure that under- or over-inclusion by reaching what would, without the constraint of the prescription, be the correct result.

Alternatively, however, these prescriptive generalizations may be entrenched—opaque rather than transparent. Rule-based decisionmaking, consequently, exists just when and insofar as decisionmakers treat prescriptive generalizations as providing reasons for decision in accordance with the terms of the generalization *qua* generalization. The fact of entrenchment thus provides a reason for following the indications of a generalization in the area of under- and over-inclusion, even when following those indications produces the "wrong" result either from the perspective of the justification undergirding the single rule or from the perspective of the full array of justifications that would have produced the best "all-things-considered" result.[7] A rule, according to this account, is therefore not some entity, but rather a relationship or status. A rule exists when some generalization is entrenched vis-à-vis its background justifications, resisting efforts to pierce it in the service of those justifications.

This stark distinction between particularistic and rule-based decisionmaking, although a useful first cut, is defective in two ways. First, it omits a third possibility, one I refer to as *rule-sensitive particularism*. This type of decisionmaking, of which sophisticated act-consequentialism is an example, is particularistic because it expects decisionmakers to make the best all-

7. To treat under- and over-inclusion as equivalent is a potentially distorting oversimplification. When an over-inclusive generalization is "cured" in the area of its over-inclusion, such as when we admit a well-behaved seeing-eye dog to a restaurant despite a "No dogs allowed" rule, the narrowing of the generalization seems to involve less assertion of authority than when a rule is broadened to cure its under-inclusion, such as when the same rule is broadened to include bears and pigs. In law, there are likely to be important questions of jurisdictional legitimacy involved in determining when it is appropriate for some decisionmaker, such as a police officer or judge, to broaden a rule to cure its under-inclusion. The questions seem smaller when those same officials refuse to apply the same rule in the area of its over-inclusion. Things are not always what they seem, however, and this example is itself premised on a particular view about the comparative undesirability of potentially erroneous assertions or non-assertions of official power. Moreover, we might generate a different conclusion with a different view about the seriousness with which we take the maxim *expressio unius est alterio exclusius*. Indeed, much of the idea of under-inclusion is premised on issues raised by that maxim. How strongly should we presume that legislatures as speakers of law have excluded situations when they have not included them? When such implications are justified, curing what appears to be under-inclusion is less warranted. On the legitimacy of treating *expressio unius* as a maxim of conversational interpretation, see Grice, *Presupposition and Conversational Implicature*, in RADICAL PRAGMATICS 183 (P. Cole ed. 1981).

things-considered decision on each occasion, but also expects them to take into account as one of the all-things-to-be-considered the value of having a rule.[8] This form of decisionmaking thus differs from a pure particularism in which the value of having a rule is not part of the calculation. It also differs from a purer form of rule-based decisionmaking in which the existence of a rule precludes a decisionmaker from evaluating whether the reasons for having the rule are sufficient to justify following the rule on this occasion. At this point, I am not preferring one of these to the other, but only noting that rule-sensitive particularism is different from decisionmaking that does not allow the decisionmaker to determine whether the rule should be followed in a particular case.

In addition, I do not intend my distinction among three decisionmaking modes to suggest that these are three discrete forms representing the only alternatives. Rather, these three modes are distinguished artificially and heuristically. In truth, they represent points along a continuum rather than a trichotomy. What is therefore at stake is the size of the categories of decision, with larger categories being more likely under- and over-inclusive than smaller ones. Where the categories of decision are both large and opaque, the dimension of *ruleness* is

8. Gerald Postema attributes this form of decisionmaking to Bentham in BENTHAM AND THE COMMON LAW TRADITION (1986). For a similar perspective, see Gans, *Mandatory Rules and Exclusionary Reasons*, 15 PHILOSOPHIA 373 (1986). *See also* M.J. DETMOLD, THE UNITY OF LAW AND MORALITY: A REFUTATION OF LEGAL POSITIVISM (1984). I say that this is a type of decisionmaking of which sophisticated act-consequentialism is only a token because there are advocates of such an approach who start from non-consequentialist premises. *See* Moore, *Authority, Law, and Razian Reasons*, 62 S. CAL. L. REV. 827 (1989). The traditional debates between act- and rule-utilitarians suggest that the act-rule issue is the exclusive province of the consequentialists, but this turns out not to be the case, for even in a non-consequentialist world there are important questions about the size of the categories within which decisions should be made. Although the decision to embody any rule is consequentialist in terms of that rule being adopted in order to serve some other end, the ends that rules serve might themselves be non-consequentially selected. Believing that all torture except the torture of torturers is irreducibly and non-consequentially wrong, for example, we might adopt as a rule a prohibition on all torture, period, in order to maximize compliance with the primary prohibition of torture of non-torturers. Although the selection of a rule-based rather than an act-based approach is consequentialist vis-à-vis the administration of the prohibition against torture of non-torturers, that prohibition is not itself a consequentialist one. None of this is to maintain, however, that my account of rules is an account of "ultimate" moral rules, and I thus have no quarrel with Moore's observation in this Symposium that those rules are quite different from the instrumental rules that are my exclusive concern. *See* Moore, *Three Concepts of Rules*, 14 HARV. J.L. & PUB. POL'Y 771 (1991). My concern is exclusively with rules that have a justification lying behind them, and with the relationship between rule and justification. When justification runs out, the particular relationship that concerns me is not at issue.

greatest, and where the categories are narrow and more transparent to background justifications, the constraints of ruleness are minimized. In all that follows, my reference to what seems to be an either-or choice between decisionmaking modes is only a useful way of simplifying the infinite alternatives lying along this continuum.

II.

Our first question, then, is whether it is necessarily the case that only rule-based decisionmaking is within the realm of law, properly so-called. Must law be an affair of rules, in the conceptual or definitional sense of "must"? Can we imagine something appropriately called a legal system that is not significantly rule-based in the sense just sketched.

The answer I want to offer is, quite simply, "yes." I will argue that a system of decisionmaking could rely very little on rules and still comport with a number of different views about the necessary and sufficient conditions for qualification as a legal system.

In order to sustain the argument, I must distinguish regulatory rules from rules establishing decisionmaking institutions. Although some aspects of the contrast between rule-based and particularistic decisionmaking are applicable to jurisdictional rules, and although the distinction between jurisdictional and substantive rules is less than commonly supposed, we can still usefully distinguish rules establishing decisionmaking environments from rules purporting to control or guide the decisions within them.

Rules establishing decisionmaking environments are likely a species of *powers*, but I will remain equivocal about the label because it is not necessary here to subscribe to one or another of the somewhat different accounts of powers offered by Bentham, Hohfeld, Kelsen, Hart, Raz, and others.[9] Whether we call them powers, power-conferring rules, or something else, I am referring to a cluster of rules serving interrelated purposes. Within this category are rules creating decisionmaking environments, such as the rules establishing courts or administrative agencies; rules delineating the jurisdiction for the created envi-

9. *See generally* Tapper, *Powers and Secondary Rules of Change*, in OXFORD ESSAYS IN JURISPRUDENCE (SECOND SERIES) 242 (A.W.B. Simpson ed. 1973).

ronments, such as rules specifying whose and what type of disputes may be decided; rules staffing an environment, delineating the qualifications and selection procedures for decisionmakers; and rules designating the procedures to be used, including, for example, rules requiring decisions to be in writing and permitting parties to be represented by counsel.

I make no claim that such empowering rules have neither substantive aim nor substantive effect. Despite the frequent substantive effects of procedural or jurisdictional rules, however, there remains an important contrast between rules establishing decisionmaking environments and rules determining the results within those environments. The very concept of jurisdiction is the useful distinction between the authority to decide and the substance of the decision made. Consequently, we can distinguish two types of decisionmaking environments: those having both empowering jurisdictional rules and substantive outcome-determining rules; and those having only the former, thus leaving the determination of the outcome to the non-rule-based judgment of the decisionmaker.[10]

When decisionmaking environments employ substantive outcome-determining rules, decisionmakers are charged with applying those rules to the cases at hand, exercising discretion only when the rules do not determine the result. In such an environment, decisionmakers will be most occupied with making those factual determinations necessary to apply the rules to specific cases. A rule empowering a police officer to give a citation to those and only those driving in excess of fifty-five miles per hour would be an example of an empowering jurisdictional rule combined with a substantive outcome-determining rule. Although the police officer is empowered both to issue citations and to determine the speeds of cars, she is empowered neither to determine what speed is unlawful nor the circumstances under which someone exceeding that speed should be absolved.

In decisionmaking environments employing only empowering jurisdictional rules, however, the substantive outcome-determining constraint is absent. The decisionmaker is empowered to do more than simply apply a concrete rule to specific cases. She must decide what ought to be done in those

10. On the distinction drawn in the text, see Paulson, *Material and Formal Authorisation in Kelsen's Pure Theory*, 39 CAMBRIDGE L.J. 172 (1980).

specific cases, based on a virtually unlimited array of social and moral principles and policies. Were the same police officer to be instructed simply to "keep the peace" or "ensure safe driving," her decisionmaking would be substantially less rule-based.[11] This form of decisionmaking is commonly referred to as "discretion" or the application of "standards." We could go one step further and consider the *cadi*, restricted by no standard at all, but empowered by jurisdictional rule to make the best all-things-considered decision for the controversy at hand.

Distinguishing these two types of decisionmaking environment is only the first step in the argument. It remains necessary to establish that forms of decisionmaking resembling the latter more than the former, forms in which only empowering but not outcome-determining rules are at work, are still conceptually and definitionally entitled to the label "law." That inquiry can be pursued in a variety of ways. First, the inquiry can be a definitional-empirical one, where by "empirical" I mean only the actual extensions of the terms "law" and "legal system" as those terms are used within and without the legal system. And when we engage in that inquiry, we observe that decisionmaking environments in which decisionmakers are under little outcome-determining constraint are still ordinarily referred to as existing within the "legal" system. One example is the traditional court of equity, historically—and to a lesser extent, currently—empowered to do justice in the particular case, the indications of some specific legal rule notwithstanding. Other

11. Much of this is a matter of degree, because even a mandate to "ensure safe driving" is more constraining than a mandate to "keep the peace," which is in turn more constraining than a simple mandate to make the best all-things-considered decisions. In this sense, any specification of mandate narrower than a mandate to make the best all-things-considered decision is a form of rule, because it precludes the decisionmaker from considering those factors that would be included in an all-things-considered mandate but are not included in the narrower mandate.

I resist the traditional rules-standards distinction because that distinction couches the degree of constraint on the decisionmaker solely in terms of the linguistic specificity of the applicable prescription. This is a potentially misleading oversimplification. If we define constraint as the proportion of rule-indicated results that differ from the results that a decisionmaker would have reached absent the rule, then a quite specific rule, such as "Do not eat bats," is not very constraining, while a much more general "maximize individual liberty" might appear quite constraining to a strong communitarian.

In addition, certain seemingly linguistically indeterminate prescriptions, such as "be honorable," may be quite determinate in practice if there is within some community or sub-community a shared understanding of what conduct counts as "honorable." When this is the case, one would again be mistaken in taking the linguistic vagueness or precision of the prescriptive term as an adequate marker for the degree of constraint imposed by the prescription on the decisionmaker who accepts it.

examples are the power of a judge in a custody determination to reach the result that is "in the best interests of the child," and the prevalence within administrative *law* of administrators or agencies empowered merely to exercise their discretion. Thus, insofar as we are asking only whether it is linguistically permissible in the 1990s to apply the word "law" to such substantially rule-free decisionmaking environments, the answer seems clearly to be "yes."

We can also ask the empirical question in a more sociological manner. In any differentiated society, institutions and individuals will group themselves into functional clusters like health care, construction, mass media, fine arts, higher education, heavy industry, financial services, and so on, with one of these functional clusters being the "legal system." Consequently, one method of determining whether an existing institution is "legal" is by asking whether its participants are members of the legal cluster of institutions, measured in terms of such indicia as type and place of education, self-identification, nature and locus of employment, and membership in professional organizations. And it does appear that the substantially rule-free decisionmaking environments I have described are part of the legal cluster of institutions. For example, lawyers who move in and out of more rule-based decisionmaking environments staff administrative agencies, family courts, and arbitration mechanisms. Moreover, such decisionmaking environments are studied in law schools and written about in law reviews. Commonly, these rule-free decisionmaking environments are also located in the same buildings and use the same staffs and rules of procedure as more rule-based decisionmaking environments. In this respect, many substantially rule-free decisionmaking environments still comprise part of the legal system. Thus, whether we look at the question definitionally as one of actual use and actual extensions of the word "law," or sociologically as one of locating a family of linked institutions, it appears that law need not impose a substantial array of outcome-determining rules sharply limiting the decisionmakers' judgment or discretion.[12]

12. I explicitly do not make the claim that the exercise of even all-things-considered judgment is or should be made free from constraint by moral or other non-legal rules. Contemporary American legal theory frequently refers to "ad hoc" decisionmaking in pejorative terms, and even those who willingly embrace fully contextualized judgment still distance themselves from what they call "ad hoc" decisionmaking. *See, e.g.*, Farber,

This definitional and empirical account, allowing largely rule-free forms of decisionmaking to "count" as law, also fits well with many modern versions of legal positivism. Starting with Kelsen and continuing to more contemporary versions espoused by Jules Coleman, David Lyons, and Philip Soper, some positivists have considered it consistent with the core of positivism to allow a society to recognize as law the societal empowerment of some officials (such as judges) to make decisions that are not based on specifically pedigreed legal norms.[13] To these

Legal Pragmatism and the Constitution, 72 MINN. L. REV. 1331 (1988). This is possibly evidence of simple confusion or an unwillingness to acknowledge the implications of a particularistic perspective, but a more charitable interpretation would suggest that "ad hoc" is often used to refer to an unreasoned and intuitive "shoot-from-the-hip" form of decisionmaking. The process I describe as particularistic, however, need not be "ad hoc" in this pejorative sense. It could involve only the application of legally unmediated background principles of reason and morality to particular cases.

13. *See* Coleman, *Rules and Social Facts*, 14 HARV. J.L. & PUB. POL'Y 703 (1991) [hereinafter *Rules and Social Facts*]; Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982); Lyons, *Principles, Positivism, and Legal Theory*, 87 YALE L.J. 424 (1977); Soper, *Legal Theory and the Obligation of the Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 511 (1977). Although not couched quite as explicitly in terms of a definition of "law," Kenneth Kress's account is compatible with this perspective. *See* Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283 (1989). Joseph Raz, however, takes issue with all of these accounts, arguing that a mandate to incorporate by reference non-legal considerations does not convert those considerations into legal ones. *See* J. RAZ, *Legal Positivism and the Sources of Law*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 37 (1979). At first, this looks like a definitional dispute, but it is more than that. When Raz challenges those holding the Kelsen-Coleman-Lyons-Soper position to provide "an adequate criterion" for distinguishing "legal references to morality" from "discretion," *id.* at 47 n.8, he makes clear that he considers it central to the positivist idea that the domain of non-law be recognized as different from the domain of law:

> Hence the law has limits; it does not contain all the justifiable standards (moral or other) nor does it necessarily comprise all social rules and conventions. It comprises only a subset of these, only those standards having the proper institutional connection. This is incompatible with the view that law does not form a separate system of standards and especially with the claim that there is no difference between law and morality or between it and social morality.

Id. at 45.

Raz appears to have the worse of the debate *if* positivism is considered only as a conceptual or metaphysical opponent of natural law. Yet Raz is correct in maintaining that views such as those held by Coleman, Kress, Lyons, and Soper fail to provide an adequate descriptive account of a society in which *law* appears to be different both to the citizen and to the judge, and in which such institutions as lawyers, law schools, and law professors occupy the foreground of legal and judicial phenomenology. Coleman may be correct that this question is not about positivism, and that positivism is compatible with a social decision not to have law exist as a limited domain. *See Rules and Social Facts*, *supra*, at 723-24. The limited domain question, however, remains for Raz, for Dworkin, and for me an important question simply (and perhaps appropriately) not addressed by Coleman's version of the questions that the debate about positivism does address. For present purposes, however, all I need is the claim, one about which Coleman and I do not differ one jot, that societies could choose to empower their legal officials to base their decisions on non-legal norms without calling into question the entitlement of those officials to a place in the legal system, positivistically conceived.

positivists, the existence of a social source of the appropriate kind for the empowerment of the decisionmaker is sufficient to justify the designation "law," and therefore a process emanating from social sources counts as law even if the decisions made within that process are not themselves substantially constrained by legal rules.

Finally, even some varieties of a Fullerian approach to the nature of law would accept as law various particularistic forms of decisionmaking. It is true that many of Fuller's procedural desiderata for the existence of a legal system might not exist in the more extreme versions of the particularistic decisionmaking environments I have just described. Fuller seems unwilling to recognize as law a decisionmaking system without "a published code declaring the rules to be applied in future disputes,"[14] and most of Fuller's requirements for the existence of something "properly called a legal system" presuppose the existence of rule-based decisionmaking.[15] At least some of Fuller's requirements, however, and arguably all of them, could be satisfied by the promulgation of largely transparent rules of thumb still providing predictive guidance for the normal case. Moreover, the Fullerian idea of morally necessary procedural conditions for the existence of law, if not Fuller's own list, might be satisfied by requirements designed to distinguish some forms of particularistic decisionmaking from others. For example, Margaret Radin implicitly, and Frank Michelman explicitly, believe that the necessary conditions for legality are satisfied by the procedural and deliberative features of judicial decisionmaking, such as (and the examples are mine) a public adversary process, notice to affected parties, decisionmakers unrelated to the litigants, a right of appeal, and written opinions justifying the result.[16]

This perspective provides an account of what is unique about law without maintaining that decisionmaking according to

14. L. FULLER, THE MORALITY OF LAW 35 (1964). Fuller also declares that the most basic way to fail to make law would lie in "a failure to achieve rules at all, so that every issue would be decided on an ad hoc basis." *Id.* at 39.

15. For a richer elaboration of this interpretation of Fuller, see Radin, *Reconsidering the Rule of Law*, 69 B.U.L. REV. 781 (1989). *See also* J. FINNIS, NATURAL LAW AND NATURAL RIGHTS 8-9 (1980).

16. *See* Michelman, *Justification (and Justifiability) in a Contradictory World*, in JUSTIFICATION: NOMOS XXVIII 71 (J. Pennock & J. Chapman eds. 1986). *See also* Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 28-36 (1986) [hereinafter Michelman, *Foreword*].

opaque legal rules is a necessary component of that uniqueness. If this account is successful, then law is distinguished from other forms of public or authoritative decisionmaking not by its heavy use of outcome-determining rules laid down in advance, but by the use of procedures designed to ensure that legal decisionmaking is not merely the ad hoc imposition of personal will or the practice of politics. Now the differences between these desiderata of law and those actually on Fuller's list may be sufficiently crucial that the particularistic forms of decisionmaking I have described ought not to be considered law from a Fullerian perspective. The view that decisionmaking according to entrenched rule is one of the factors necessary for a decisionmaking environment to count as law—a view most powerfully espoused these days by Justice Scalia[17]—now looks less definitional and more normative, however, and I will address the normative claims presently. But for now it is sufficient to note only that a system employing empowering rules but leaving substantive decisionmaking authority largely unconstrained by external legal rules seems both pragmatically plausible and accepted as "law" within the world in which we now exist.

III.

I now take up the converse claim. Although a largely particularistic decisionmaking environment is both empirically plausible and still "counts" as law, I must address the opposite: Is rule-based decisionmaking possible, and, if so, should *it* count as "law"?

Traditionally, the question has been thought to answer itself. That's what law *is*, so it has been said, most recently and forcefully by Justice Scalia,[18] and traditionally by countless others.[19]

17. "A government of laws means a government of rules. Today's decision on the basic issue of fragmentation of executive power is ungoverned by rule, and hence ungoverned by law." Morrison v. Olson, 487 U.S. 654, 733 (1988) (Scalia, J., dissenting). *See also* Burnham v. Superior Court of Cal., 110 S. Ct. 2105, 2117-19 (1990) (plurality opinion of Scalia, J.); Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

18. *See* sources cited *supra* note 17; Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595 (1990); Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 895 (1988) (Scalia, J., concurring in judgment).

19. "The rule of law, sometimes called 'the supremacy of law,' provides that decisions should be made by the application of known principles or laws without the intervention of discretion in their application." BLACK'S LAW DICTIONARY 1196 (5th ed. 1979). For subtler but largely consistent accounts, see J. FINNIS, *supra* note 15, at 270-

But even if we reject the view that law *must* be about rules, then surely, at least law *can* be largely about rules, and can employ rule-based decisionmaking as its primary method.

Despite the lineage of this seemingly mild claim, it is not without its detractors. The first criticism is a version of legal realism commonly associated with Jerome Frank and Judge Joseph Hutcheson, but first appearing in the writings of Joseph Bingham.[20] This maintains that external rule-based constraint verges on being a psychological impossibility. To Bingham, Frank, Hutcheson, and others, the immediate parties, their problems, and the equities of their dispute are so much in the foreground of the judicial phenomenology that rules cannot prevent a decisionmaker from reaching the result consistent with those immediate equities.[21]

Even this caricatured version of the least guarded claims of the realists still depends, however, on a contingent fact about American law. Neither Bingham, Frank, nor Hutcheson supposed that judges could make their rule-independent decisions and then justify those decisions without reference to recognized legal materials (although one could plausibly imagine just such a legal realist claim about, say, law enforcement of-

81; J. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS (1986); E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT (1975); and Raz, *The Rule of Law and Its Virtue*, 93 L.Q. REV. 195 (1977).

20. *See* J. FRANK, LAW AND THE MODERN MIND (1930); Bingham, *What is the Law?*, 11 MICH. L. REV. 1, 109 (1912); Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L. REV. 274 (1929).

21. All these theorists, perhaps most explicitly Bingham and Frank, made a less psychological and more normative claim as well, urging the desirability of case-specific optimization. From this normative perspective, the intrusion by general rules, even if psychologically possible, is an evil to be avoided. Professor Coleman says that I

> argue[] that rules dictate or indicate results. This is precisely what realists deny. I do not deny that rules dictate results, but it is incumbent upon anyone who wants to emphasize a distinction between rule-based and other theories to show how rules generate results in ways that do not collapse rule-based theories into all-things-considered theories.

Rules and Social Facts, *supra* note 13, at 713. This is a larger assertion than I make. I claim that rules *indicate* results, which is a claim about language, and not that rules *dictate* results. This latter claim would be made by those who conflate the linguistic meaning of a rule with its authority. Rules that plainly indicate results may appear to dictate results to those decisionmakers who take the indications of a rule to be dispositive. But even if we accept the possibility that there could be decisionmakers who felt "dictated to" in this way, we would know nothing about the size or location of such a set of decisionmakers. The claim that there exist decisionmakers who follow the indications of a rule is an empirical claim, one that many of the realists are at pains to deny, or at least to deflate, and one that I believe (but do not purport to defend empirically here) is sometimes well-grounded for some decisionmakers in some decisionmaking environments. That is all I need in order to sustain the claim that rule-based and particularistic decisionmaking modes are both intensionally and extensionally divergent.

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ficers at some times and in some places[22]). Rather, many legal realists claimed that the array of American legal materials, including conflicting canons of statutory construction, conflicting precedents, and conflicting legal rules themselves, always provided a judge with some non-laughable legal source to justify almost any result that the judge desired for reasons other than the existence of a rule to reach.[23]

If we limit our thinking to judges and courts, and if we recognize the effects of the selection hypothesis on the array of cases that wind up in court, the contingent empirical claim of realism is quite compelling.[24] Here, however, I am less concerned with the contingent empirical claim that most litigated cases have two or more mutually exclusive but legally justifiable answers than I am with the fact of that claim's very contingency. Although I make no claim that internal conflict could be totally eliminated, still the *extent* of conflict is contingent rather than necessary. In a system with fewer conflicting authoritative materials, the realist claim would be much less maintainable. Thus, we would be hard pressed at the outset to say that constraint by rule is impossible just because the existing array of rules in American law makes constraint by rule less constraining than it might be.

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22. That is, nothing about the formal validity of a rule prevents some official from saying, in effect, "I don't care what the rule says. You're going to do what I tell you to and keep your mouth shut about it." Exploring the circumstances under which such explicit flouting of a rule would be socially or politically possible is far beyond my agenda here. I now make only the claim that this form of *judicial* behavior, although hardly impossible and hardly non-existent, is rare.

23. *See, e.g.*, Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950). *See also* Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986); Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

24. *See* Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717 (1988). *See also* Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 832 (1988). The selection hypothesis, maintaining that litigation is largely restricted to the unrepresentative sample of legal events in which plausible legal arguments can be made on both sides, is suggested by Llewellyn in THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 58 (1960), and in JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 58 (1962), but owes its modern articulation and development to Priest & Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). *See also* R. POSNER, ECONOMIC ANALYSIS OF LAW § 21.5 (3d ed. 1986); Priest, *Selective Characteristics of Litigation*, 9 J. LEGAL STUD. 399 (1980); Wittman, *Is the Selection of Cases for Trial Biased?*, 14 J. LEGAL STUD. 185 (1985). If the selection hypothesis is correct, two conclusions follow. First, litigated cases will support the legal realist claim because if there were not plausible legal arguments on both sides, the case would not be in court in the first place. Second, it is a mistake to generalize about the nature of constraint by rule from this nonrepresentative sample, selected precisely on the basis of the characteristic that would reject the claim that legal events are or can be constrained by rule.

Moreover, the psychological component of the strongest version of the realist position has been repeatedly falsified by experience. If realism is committed to the position that it is not *possible* for legal decisionmakers to subjugate their own all-things-considered judgments to the external constraints of rules, then every case in which a legal decisionmaker does just that, and such cases are legion,[25] falsifies the realist position. But if the realist position is taken only to maintain that there are more ways of effectuating that decisionmaker's own best all-things-considered judgment than is often realized, then legal realism seems to me substantially correct. This contingent and probabilistic empirical claim, however, does not undercut the view that some decisionmakers and some decisionmaking environments will be significantly rule-constrained, and that is no more nor less than the claim I wish to make.

One variant on the realist position, most attributable to Duncan Kennedy,[26] holds that the decision whether to apply the rule remains open to the legal decisionmaker in every case. This decision is based not *on* the rule but on the full set of social, political, moral, cultural, psychological, and institutional norms that the decisionmaker would, absent the rule, use in making a decision. This claim, therefore, sees legal indeterminacy (which is not the same as indeterminacy *simpliciter*) as residing not in legal rules, or even necessarily in the nature of the array of legal rules, but in the status that one rule or the array of rules has for the decisionmaker. This claim, however, with

25. For example, there are instances in which the First Amendment, itself a rule to the core, generates the kind of protection of harmful speakers saying harmful things (Nazis, Klansmen, glorifiers of sexual violence against women, et cetera) that would be far less likely to exist under a more particularistic outlook. *See* Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1 (1989). Note as well the judicial willingness on occasion to follow literal language even when it produces an unjust result in furtherance of a legislative mistake, as in United States v. Locke, 471 U.S. 84 (1985), or creates a silly distinction, *see* Pavelic & LeFlore v. Marvel Entertainment Group, 110 S. Ct. 456 (1989), or rewards the unworthy, as did the cases that, unlike Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889), allowed heirs who had caused the death of the testator to inherit according to the terms of the will. *See* T. ATKINSON, HANDBOOK OF THE LAW OF WILLS 111-21 (1937).

Still, contrary to Kress, *supra* note 13, at 324-26, I do not see the existence of predictability of outcome as much evidence of the existence of constraint *by legal rule*; predictability would be compatible with the use of widely shared non-legal-rule factors to prefer one result to another.

26. *See* Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973). Similar claims are offered in Hutchinson, *Democracy and Determinacy: An Essay on Legal Interpretation*, 43 U. MIAMI L. REV. 541 (1988); and Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683 (1985).

which I am in substantial agreement,[27] is agnostic about whether the decision to apply a rule is to be made wholesale or retail. If retail, if a decisionmaker is deciding *in every case* whether it is best, all things (including the existence of the rule) considered, to do what the rule requires, then the existence of the rule is only one member of a large array of reasons of equivalent status.[28] There is no reason, though, to suppose that this decision cannot be made wholesale. A decisionmaker might choose at the outset to follow the rule blindly in the next 10, 100, or 10,000 cases and then choose *not* to reexamine that choice.[29] Whether a decisionmaker should do so is another issue. The claim now is only that one of the choices open to a decisionmaker is one in which decisions are made according to rules of considerable generality, even when following those rules results in decisions that are suboptimal in individual cases.

It thus appears that a strong form of rule-based decisionmaking is conceptually and psychologically possible. But although decisionmaking according to rule is possible, one could still argue that this form of decisionmaking ought not to be considered *legal* decisionmaking. Law might arguably be something else, and its essence may lie in seeking to resolve particular cases according to all their unique features.[30] Many have asserted that law's chief concerns should be to reach the best re-

27. It is important to distinguish the logical version of this claim from the psychological. I agree that the application of even the clearest rule logically presupposes a decision, not made by the rule itself, to apply the rule according to its linguistic indications. That logical presupposition, however, need not be perceived as a choice by the rule-applier. Thus, the logical existence of an alternative is compatible with some (or indeed all) decisionmakers seeing only one choice, and *feeling* compelled, whether they are or not. This explains, in part, the important critical legal studies focus on exposing the logically presupposed choices, for once the existence of choice is exposed, the denial of it becomes less psychologically possible.

28. *See supra* note 8 (discussing rule-sensitive particularism).

29. This sentence suggests the relevance of a rich literature in psychological decision theory. *See, e.g.*, J. ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY (rev. ed. 1984); PERSPECTIVES ON SELF-DECEPTION (B. McLaughlin & A. Rorty eds. 1988); Schelling, *Enforcing Rules on Oneself*, 1 J.L. ECON. & ORGANIZATION 357 (1985).

30. *See, e.g.*, Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348 (1990). Seeing law as essentially particularistic, as necessarily placing great weight on reaching the right decision in the particular case, is a central theme in much of feminist jurisprudence. *See* Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); Minow, *Beyond Universality*, 1989 U. CHI. LEGAL F. 115. It is also central to those perspectives that see law as largely an exercise in case-specific rhetorical practice. *See* Burton, *Law as Practical Reason*, 62 S. CAL. L. REV. 747 (1989); Frug, *Argument as Character*, 40 STAN. L. REV. 869 (1988).

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sult in the individual case, to do justice between the parties, and to make the best decision in each case on the basis of "all relevant factors." I have no quarrel with claims that such a form of decisionmaking is frequently morally desirable or instrumentally useful. The surprising claim, however, is that this is the *only* form of decisionmaking that anything rightfully called *law* can tolerate. I have sympathy with the argument that rule-based decisionmaking is a form of decisionmaking that ought to be rejected more often than it is. The argument that rule-based decisionmaking is not at all compatible with the idea of law, however, is much less plausible, for reasons I will now explain.

As a definitional and empirical question, the claim that law cannot tolerate rule-based decisionmaking, just like the claim that law can tolerate only rule-based decisionmaking, is false. Insofar as judges frequently see themselves as rule-appliers,[31] and insofar as that is what on occasion they are indeed doing, then it is plain that the word "law," as used in the United States and other English-speaking countries in 1991, is broad enough to encompass the activities of decisionmakers who do not claim to attempt to do justice in a case-by-case equitable manner, and whose actual practice of decisionmaking is consistent with that self-definition.[32] If this is so with respect to judges, then, *a fortiori*, it seems even more true with respect to various other people properly called "legal" officials, such as clerks of courts, functionaries in administrative agencies, and law enforcement officials.

Moreover, and again tracking (in reverse) the claim that law is necessarily rule-based, positivist theory points to the same conclusion. Whatever positivism may be at its fringes, at its core it acknowledges the ability of a polity to recognize as law some set of rules distinguished from the totality of social norms

31. *See, e.g.*, Rubin, *Does Law Matter? A Judge's Response to the Critical Legal Studies Movement*, 37 J. LEGAL EDUC. 307 (1987).

32. *See* Newman, *Between Legal Realism and Neutral Principles*, 72 CALIF. L. REV. 200 (1984). As I hint in the text, I take self-reports, by judges or others, of their own behavior and their own motivations to be relevant, but hardly dispositive. People are often among the worst perceivers, explainers, or even reporters of their own behavior. As a result, decisionmaker reports of decisionmaker motivation must be subject to at least some skepticism, in part because those reports may be influenced, consciously or not, by some sense of which motivations are currently acceptable and which are not, and in part because they may represent insufficient self-awareness about actual choices and actual motivations.

by a source-based standard, to designate some group of officials as appliers of that limited set of rules, and to sanction officials who make decisions in any other way.[33] This is *not* to claim that positivism in this sense is a satisfactory account of American law. Claiming that law *can* be a system of rules does not mean that law *must* be a system of rules. The claim that law *must* involve the attempt to reach the best result in individual cases, however, cannot start from positivist conceptions of law.

Thus, one again returns to the Fullerian version of the normative-natural law-essentialist argument: Is it so wrong for legal decisionmakers to abjure justice between the immediate parties in the service of rigid application of rules that we should say that such a mode of decisionmaking simply cannot count as law at all? When put this way, the claim seems highly implausible. There are, of course, serious normative arguments about whether all or some legal officials ought to see themselves as rule-appliers. It seems counterintuitive to view this as a definitional question, though, or to see it as a question with so obvious a negative answer that those societies having rule-based adjudicatory systems ought to be thought of as having "no law" in the way that Fuller wanted to make that claim about Nazi Germany. As Robert Summers and Patrick Atiyah have pointed out, for example, legal decisionmaking in the United Kingdom is guided by a substantially more rule-based consciousness than exists in the United States.[34] The British adjudicatory mechanism may (or may not) be accordingly less morally desirable, or less pragmatically useful, but to argue that it is *eo ipso* less *law* seems to beg the question.

IV.

We have now established that both rule-based and particularistic forms of decisionmaking are conceptually and psychologically possible, and that both forms of decisionmaking meet the minimum requirements to qualify as *law*. Although I intend to go further and explore descriptively which of these options we have chosen and normatively which we ought to choose, we

33. *See* Gavison, *Comment*, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART 21, 30-31 (R. Gavison ed. 1987).

34. *See* P. ATIYAH & R. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS (1987). *See also* Summers, *Form and Substance in Legal Reasoning*, in LEGAL REASONING AND STATUTORY INTERPRETATION 11 (J. van Dunne ed. 1989).

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should not underestimate the extent to which even this claim might be controversial.

In presenting the issue as a choice between two possible and law-compatible decisionmaking modes, I mean to reject an unfortunate and increasingly prevalent form of formalism. I have argued elsewhere that the term "formalism" admits of numerous contemporary uses, the least happy but most common of which is as an all-purpose term of condemnation in legal theory.[35] Beneath the purely epithetical use of the term, however, there exist two distinct forms of legal thought often designated as "formalistic." In the first, a decisionmaker reaches the result indicated by some legal rule, independent of that decisionmaker's own best judgment and independent of the result that might be reached by direct application of the justifications lying behind the rule. The second refers to a style of decisionmaking in which the decisionmaker denies having made a choice when in fact the decisionmaker did so. Formalism in this sense, treating as inexorable a decision that was in fact open, is ordinarily more deserving of opprobrium.[36]

I want to focus on this second sense of formalism as the denial of choice, because my main purpose thus far has been to demonstrate the availability of a choice between decisionmaking modes. My point is not that every decisionmaker in every decision has a choice whether to be rule-based or particularistic (although in a sense this is so), but rather that the process of creating a decisionmaking environment involves a choice about how rule-based that environment is going to be.[37] In making this point, I mean to reject as formalistic in this second sense those perspectives that would dismiss out-of-hand a rule-based or a particularistic decisionmaking style, or that would too easily label a form of decisionmaking as acontextually immoral,

35. *See Formalism*, *supra* note 6.

36. I append the qualification "ordinarily" because I do not take decisionmaker candor to have a lexical priority over all other values. Indeed, I am willing to be persuaded that decisionmaker candor is less important than we commonly take it to be, but have not yet been so persuaded. *See generally* Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990); Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987).

37. I refer to choice in an abstract way to keep off the present agenda an exploration of how a decisionmaking environment develops, especially with respect to the degree to which rules prevail. I touch on these issues briefly in the final sections of this Article, but a fuller examination would have to deal with, *inter alia*, patterns of decisionmaker selection, forms of post-selection decisionmaker education, techniques of rewarding and punishing decisionmakers for deciding in one or another way, and forms of social and professional stimuli likely to affect decisionmakers.

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impossible, undesirable, or incompatible with the idea of law. Such perspectives deny the extent to which different forms of decisionmaking are possible, compatible with the idea of law, and even desirable. Insofar as part of my goal is to demonstrate the moral, conceptual, and psychological plausibility of two different forms of decisionmaking, my target is precisely those perspectives that would condemn one or the other *tout court*, and that deny the extent of the choice involved in establishing a decisionmaking environment.[38]

V.

Having recognized the conceptual possibility and actual occurrence of multiple forms of decisionmaking, what can we say about the forms of legal decisionmaking that actually character-

38. My claim about a choice between degrees of ruleness, either for a decisionmaking environment or for particular rules within that environment (that is, whether the rules will be precise and constraining or looser and less constraining) would be undercut to the extent that the *convergence hypothesis* turns out to be true. If there is within a given legal system a single prevailing view of the appropriate degree of ruleness (and the existence of such a prevailing view is logically independent of the content of that outlook), we might expect to see the style of legal decisionmaking converging on that view, regardless of the starting point. For example, Section 16 of the Securities Exchange Act of 1934, 15 U.S.C. § 78p (1988), and Rule 10b-5 promulgated pursuant to that Act, 17 C.F.R. § 240.10b-5 (1990), both deal, broadly speaking, with the problem of insider trading. The two provisions, however, seek to achieve the same goal in quite different ways. Section 16, with its use of such rigid and precise statutory boundaries as "six months" and "10 per centum," appears to be a rule-based approach to the problem, with all of the attendant advantages and disadvantages of rule-based decisionmaking. Rule 10b-5, by contrast, uses such terms as "device or artifice to defraud," and is a "standards" or "discretionary" approach, abjuring the virtues of ruleness in order to maximize the amount of individualized justice, with all the advantages and disadvantages of that approach. If the convergence hypothesis is correct, we would expect to see decisions pursuant to Rule 10b-5 creating a number of reasonably rigid rules (as we see with the development of per se rules under the equally indeterminate Sherman Antitrust Act), and decisions pursuant to Section 16 refusing to apply the rigid rules when doing so would be inconsistent with the underlying purposes of the statute. If this occurs, if decisions under Section 16 tend toward amelioration of its ruleness, and decisions under Rule 10b-5 tend toward the creation of rules, then the result might be a rough equivalence of ruleness in practice under the two provisions, even though the starting points were quite divergent.

As I indicated at the outset of this note, I hope that the convergence hypothesis turns out to be false. If true, the hypothesis would cast doubt on the projects of those of us who want to understand rules as contextually contingent tools in the short or intermediate term, available in a wide range of contexts but actually used only when there is a reason to believe that the particular decisions of a particular class of decisionmakers ought to be constrained. *See* Schauer, *Rules, the Rule of Law, and the Constitution*, 6 CONST. COMMENTARY 69 (1989); F. Schauer, Three Comments on Context (1988) (unpublished manuscript; available from author). If the convergence hypothesis is correct, however, the tendencies toward convergence will substantially undercut the ability of a rulemaker to use varying degrees of ruleness as variable constraint. It would not undercut, however, the ability of a society in the long term to change its prevailing view of the appropriate degree of ruleness applied in all its decisionmaking environments.

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ize the legal systems with which we are most familiar? It is tempting to say nothing, for my argument about the plausibility of different decisionmaking modes suggests very strongly that it would be impossible to generalize about what kind of decisionmaking environment now "exists" in law. Given the wide range of possibilities,[39] it would be astonishing to discover that all legal systems had chosen the same one. Almost as astonishing would be the discovery that a single legal system had chosen similar styles with respect to the degree of ruleness for all its decisionmaking environments.[40] Still, some descriptive generalization is possible, at least with respect to the widely scrutinized domain of American appellate adjudication. I believe that much that I say applies outside that domain, but the existence of reported appellate cases makes it easier (usually too easy) to focus on that domain.

As I indicated above, many versions of legal positivism are conceptually compatible with the existence of legal systems employing substantially particularistic decisionmaking modes. Positivism, however, is not only a conceptual claim about the nature of law. It is also (to me, if not to Coleman) a descriptive claim, purporting to give an account of those legal systems in which a limited and pedigreeable set of norms is extensionally divergent from the non-pedigreed set of norms then accepted within a society and available to all of its decisionmakers. From this perspective, the distinction between law and non-law is a central feature of the positivist picture.[41]

39. As I indicated in Part I, my sharp distinctions between decisionmaking modes are heuristic simplifications, and are not designed to deny the existence of innumerable gradations between the distinguished poles.

40. *But see supra* note 38 (discussing the convergence hypothesis).

41. In saying this, I find myself in substantial agreement with the account of positivism set forth by Joseph Raz in THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM (2d ed. 1980), and in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979). Moreover, this sense of positivism is the one Ronald Dworkin targets in both TAKING RIGHTS SERIOUSLY (1977) and LAW'S EMPIRE (1986). *See also* Gavison, *supra* note 33, at 30-31 (using the phrase "first stage law" to designate something quite close to what I mean by "law" in this sense of the distinction between law and non-law). This conception of positivism, however, seeing as central the question whether there is a limited domain of pedigreeable legal norms that is not extensionally equivalent to the totality of then-available social norms, is controversial. Other conceptions of positivism, conceptions more responsive to the traditional concern to distinguish positive law from natural law, are not nearly so concerned with the "limited domain" issue. Here I am referring in part to the arguments of Coleman, Lyons, and Soper, *see supra* note 13, each of whom in a different way maintains that a system contingently empowering judges to consider the totality of social norms still satisfies the central positivist aim of rejecting a non-socially-contingent standard for the existence of a legal system. I am referring as well to Kelsen, because his account of a dynamic or non-

Under the "limited domain" account, there is plainly a close affinity between legal positivism and rule-based decisionmaking. This affinity stems from the fact that both the idea of a rule and the idea of positivism as a limited set of norms entail some extensional divergence between the set of results indicated by a rule or set of rules, or the set of results indicated by a set of pedigreeable rules, and the set of results indicated by the full array of norms otherwise accepted by some decisionmaker. Just as a decisionmaker who follows a rule will on occasion make decisions other than those that she would have made absent the rule, so too will a decisionmaker constrained to take account of only a limited set of rules on occasion reach results other than those that she would have made were she not so restricted. Under both a single rule and law as a system of such rules, the rule-restricted decisionmaker may reach results different than those reached by an unrestricted decisionmaker.

Thus, both my account of decision according to a single rule and positivist accounts of decision according to a limited set of rules draw a distinction between the rule-indicated decision and the all-things-considered decision. It is just that distinction that most of the attacks on positivism, and most of the attacks on legal decisionmaking as rule-based decisionmaking, target. Many of the descriptive attacks sound a similar theme. Duncan Kennedy, for example, acknowledges that it would be possible to have a system of rigid rule-based decisionmaking, one in which decisionmakers simply apply the rules mechanically to the cases that come before them.[42] But this theoretically possible system, he argues, is not the American legal system, where the fact that a case falls within the plain indication of an unquestionably applicable and valid rule is not dispositive of the result. Under some circumstances, the result may be set aside in the service of other, larger values. No matter how applicable

momentary legal system pays close attention to the fact that legal change can and does take place through the application of an unlimited set of social norms. *See* H. KELSEN, PURE THEORY OF LAW 193-278 (M. Knight trans. 1967). Such accounts of positivism serve important purposes, but one purpose they do not serve is that of explaining how a limited set of pedigreeable materials appears to dominate the legal consciousness. Dworkin's response, that things are not what they seem, may or may not be correct. That is not, however, to dispute the goal of one version of positivism as attempting to explain the phenomenon of limited domain. If this is a false version of what is "really" central to positivism, then so much the worse for positivism, for it still leaves us without an account of what does appear at first sight to be a phenomenon of a limited domain of legal materials.

42. *See* Kennedy, *supra* note 26, at 383-91.

and valid the rule appears to be, the judge may still legitimately[43] refuse to follow a rule where following it would conflict with moral or other socially accepted norms.

Kennedy acknowledges that the instances of such apparent non-following are statistically rare. But so long as there is at least one, he says, or at least the possibility of one, then *every* case offers the possibility that this is that case. How, then, is the judge to determine if this is the one? Kennedy argues that the judge must do so by consulting the same full array of considerations that would justify setting aside the rule *if* this were the one. The result, therefore, is that the full array of considerations is at work in every case, not just in those cases in which the array actually overrides the rule-indicated result. If this is so, then it is error to conclude that legal decisionmakers are restricted to a domain of legal norms smaller than the totality of norms available to any public decisionmaker.

The best reading of Dworkin turns out to be quite similar to this best reading of Kennedy. Start with the premise that, to the positivist, cases like *Riggs v. Palmer*[44] and *Henningsen v. Bloomfield Motors, Inc.*[45] are cases in which there was "a rule of law" (not to be confused with "the rule of law") that existed before the particular decision. That rule of law could have been identified by resorting to the very kind of rule of recognition that is posited by the positivists. Had the judges applied that so-recognized rule of law to the facts of the cases at issue, exactly the opposite results would have been reached: Elmer Palmer would have inherited the proceeds of his evil deed, and Bloomfield Motors would have reaped the benefits of the disclaimer written into the contract.[46]

43. By legitimately, I mean that the judge can so act without being thought to violate the metanorms of the society or her role within it. Compare this (contingent) sociological acceptability with the unacceptability of a judicial decision refusing to apply an applicable rule because its rigid application would produce the astrologically unacceptable consequence of allowing a Sagittarian plaintiff to recover on a Tuesday during April of a leap year.

44. 115 N.Y. 506, 22 N.E. 188 (1889).

45. 32 N.J. 358, 161 A.2d 69 (1960).

46. Dworkin's most misleading and confusing phrase is plainly his claim about "one right answer," but close behind as a sower of the seeds of confusion is his use of the phrase "hard cases." It has led many people to believe, quite erroneously, that the Dworkinian perspective arises only in the context of those cases that are in some way doctrinally indeterminate. *See, e.g.*, Mirfield, *In Defense of Modern Legal Positivism*, 16 FLA. ST. U.L. REV. 985 (1989). To the contrary, appreciating the bite of Dworkin's critique requires understanding that cases like *Riggs* and *Henningsen* were doctrinally *easy*, in the opposite direction, prior to their decision. *See The Jurisprudence of Reasons*, *supra* note 6.

So why not? It is Dworkin's point, or should be, that when the recognized rule generated a result at odds with what a non-recognized and non-recognizable set of political, social, and moral principles would have generated, then the recognized-rule-generated result gave way to the unlimited-norm-set-generated result. Therefore, it turns out that *every* case requires consultation of that unlimited norm set, and it is simply illusion that there is a distinction between the cases in which this unlimited norm set is applied and those in which it is not.[47]

A common response to Dworkin is that it is possible to construct a rule of recognition such that the legal principles used to set aside legal rules in cases like *Riggs*, principles like the one mandating that no man shall profit from his own wrong, were in fact legally recognizable and recognized rules at the time. Arguably, so too was the meta-principle allowing a legal principle to trump a legal rule. That being the case, the critics say, the idea of a rule of recognition and the idea of positivism as limited domain remain intact.[48]

Dworkin rejoins (or should) with *Henningsen*, which arguably involved the trumping of a recognized rule by a principle (unconscionable agreements will not be enforced) not hitherto recognized by the legal system. Thus, it appears once again that the full array of a society's moral, social, and political principles are available to set aside those undesirable results that might be indicated by the set of legal principles. That being the case, then, as in Kennedy's account, the decisionmaker must consult in *every* case the full set of society's principles and not only the legal set, because prior to that consultation the result generated by the recognized rule is not final.

The positivist now has two responses. She could challenge this account of *Henningsen*, or, more precisely, she could challenge the account of the state of the law of New Jersey immediately prior to the decision in *Henningsen*. What if the unconscionability principle, like the no-man-shall-profit-from-his-own-wrong principle in *Riggs*, did exist (in the rule-of-rec-

47. This is made explicit in *Law's Empire*. *See* R. DWORKIN, LAW'S EMPIRE 352-53 (1986). Consequently, although Dworkin's claim is that positivism cannot explain legal change, *see* Kress, *The Interpretive Turn*, 97 ETHICS 834, 850-51 (1987), what gives that claim real force is the fact that the legal change to which Dworkin refers takes place not only when "first stage" law runs out, but also when it is clear.

48. *See, e.g.*, N. MACCORMICK, LEGAL REASONING AND LEGAL THEORY (1978); Waluchow, *Herculean Positivism*, 5 OXFORD J. LEGAL STUD. 187 (1985).

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ognition sense) in New Jersey prior to *Henningsen*? If so, the example would fail. True enough, but this is a failure only of the example and not the argument. If *every* potential rule-trumping principle were previously recognized by a rule of recognition, then either by some miraculous fortuity the common law from the beginning incorporated all the principles we would ever want in a legal system, *or* the set of legal principles can at no time be considered closed. If the set is not closed, however (and that is why Dworkin uses *Henningsen*), then positivism has no account of how a previously non-recognized principle is available to trump a rule-of-recognition-recognized legal rule or legal principle.[49]

Dworkin purports to cabin the implications of his account by distinguishing principle from policy. Judges should not consult the full totality of social factors, Dworkin claims, but only principles. As normative argument, Dworkin's account of the policy-principle distinction has some appeal, but as description of judicial behavior, it turns out to be empirically false. As Melvin Eisenberg demonstrates, common law judges consult the domain of policy as much as that of principle, and thus in every case the judge is explicitly or implicitly examining the full range of what Eisenberg calls "social propositions" in order to determine whether what looked like the legal rule should be applied.[50] Because the judge applies the legal rule only when it is consistent with the social propositions, and because that determination must be made in every case, the result is that this non-recognized set of social propositions is at work in *every*

49. A response might be that positivism is compatible with a system in which judges are permitted without rule-based constraint to employ a non-pedigreeable set of moral and social norms to set aside, when necessary, morally or socially undesirable results indicated by legal rules. Here, everything depends on the debate in which the positivist is taken to be a combatant. Professor Coleman has me claiming that the limited-domain thesis holds that "in *any* community the law *must* be only a part of that community's stock of norms." *Rules and Social Facts*, *supra* note 13, at 723 (emphasis added). Coleman erroneously attributes that view to me because he, unlike me, wants the question about positivism to be solely a question about concepts and not a question about contingently non-congruent domains. I maintain only that in this and most other communities of which I am aware, the law is indeed only a part of the community's stock of norms. Clearly, a society could choose otherwise and still be conceptually explainable from a positivistic perspective. However, the limited-domain thesis is what Raz, Gavison, and I, among others, claim is a description of this and most other modern communities. That is what Dworkin denies, and that is a real debate, whether it is Coleman's or not. Unlike me, Raz also maintains that the limited-domain thesis is a necessary feature of the concept of law. Thus, Raz and Coleman do have something to argue about, but Coleman is at least correct in not involving me in *that* debate.

50. *See* M. EISENBERG, THE NATURE OF THE COMMON LAW 14-42 (1988).

legal decision. Thus, the idea of legal decision being based on a limited set of rules, and therefore the idea of legal decision itself being rule-based, appears to dissolve.

As logical arguments, the anti-positivist and anti-rule accounts of Kennedy, Dworkin, and Eisenberg appear compelling. They all demonstrate that no interesting positivist position or rule-based account of legal decisionmaking can explain the common law, or uses of common law method in statutory context,[51] if that method allows legal decisionmakers legitimately to consult the totality of a society's norms to set aside a previously-recognized rule. To put it more broadly, it appears difficult to reconcile actual constraint by rule, and a perspective based on constraint by rule, with the observation about the common law that "the rules change as the rules are applied."[52]

Although the attacks I have described seem argumentatively impeccable, they also seem phenomenologically false. Judges, lawyers, and citizens see a world in which law appears to loom larger at times than other sources of norms. Under one view, perhaps Dworkin's and perhaps Kennedy's,[53] this is partly illusion, a function of the way in which some applications of the totality of social norms are so routine that the decisionmaker scarcely perceives what she is doing. It also turns out, however, that the world of legal decisionmaking does not look like the world we would expect to have if legal results were entirely at the mercy of the non-limited set of social norms.

If decisionmakers applied a legal rule only when consistent (or coherent?)[54] with a larger and unpedigreeable set of social norms, then we should be surprised to see many legal results inconsistent with that larger set of social norms. From that perspective, every such result would be a mistake, representing an

51. *See generally* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation*, 85 MICH. L. REV. 672 (1987); Note, *Intent, Clear Statements, and the Common Law: Statutory Construction and the Supreme Court*, 95 HARV. L. REV. 892 (1982).

52. E. LEVI, AN INTRODUCTION TO LEGAL REASONING 3 (1948).

53. There are many Duncan Kennedys. Some of what follows is more compatible with the Duncan Kennedy of *Freedom and Constraint in Adjudication*, *supra* note 23, than with the Duncan Kennedy of *Legal Formality*, *supra* note 26.

54. The parenthetical is designed only to contrast Dworkin's interpretive approach and that of others.

instance of a decisionmaker failing to test the legal-rule-generated result against the larger norm set.

But we know, of course, that such results are omnipresent, and we do not consider them mistakes. This is most obvious with respect to statutes and other canonically-inscribed rules. For instance, there are few arguments of principle or policy suggesting that the ethical obligations of a two-lawyer partnership are different from those of a single lawyer. A recent Supreme Court ruling, though, disallowed Rule 11 sanctions against a partnership solely because the language of the rule plainly applies only to lawyers in their individual capacity.[55] Even more extreme is *United States v. Locke*,[56] in which the Court, in interpreting an obviously misdrafted statutory filing deadline ("before December 31"—the plaintiffs filed on December 31), treated the literal deadline as dispositive.

With respect to the common law, judges often give the most directly applicable doctrinal answer even when that answer conflicts with the kinds of arguments from more distant policy and principle that were determinative in *Riggs* and *Henningsen*.[57] One example is the abrogation of common-law tort immuni-

55. Pavelic & Leflore v. Marvel Entertainment Group, 110 S. Ct. 456 (1989). The language of the rule refers only to "the person who signed." FED. R. CIV. P. 11.

56. 471 U.S. 84 (1985). For a criticism of *Locke* on just these grounds, see Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. U.L. REV. 179 (1986).

57. There is a great deal embedded in the phrase "most directly applicable." Initially, it is important to acknowledge the realist-sounding argument that a case, or a legal event of any kind, is unlikely to present only a small number of salient facts easily matched with the factual predicate of a single rule. Rather, facts appear as components of highly complex events, with the salience of particular facts determined not prior to their subsumption under one rule, but rather after some lawyer or judge identifies the rule that makes certain facts but not others important. In other words, many events are likely to present themselves as candidates for inclusion under any of several potentially mutually exclusive rules. At that point, it is the selection of the rules that drives the selection of the salient facts, and the picture of an event as naturally fitting within only one prior rule turns out to be false.

Even when only one specific rule applies to an event, there are likely to be some number of more general but still applicable rules. This is how we can view cases like *Riggs*, for the events of that case fell within the "no man should profit from his own wrong" rule just as much as they fell within the "named beneficiaries inherit according to the terms of the will" rule. (The rejection of Dworkin's rule-principle distinction in the preceding sentence is intentional.) Yet the latter rule, because it encompasses this event and a far smaller number of others, is the more directly applicable, or the more locally applicable, or the more narrowly applicable. Much of the bite of a rule-based adjudicatory structure is a function of the priority that the more narrowly applicable rule has over an also-applicable, but less narrowly so, rule. Put differently, much that is in the text about the presumptive priority of recognized over unrecognized rules is applicable, *mutatis mutandis*, to the potential presumptive priority of the most narrowly applicable rule.

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ties. Although most courts themselves abrogated these immunities once they determined that they could no longer be justified, others insisted that abrogation was solely the province of the legislature.[58] A better example is the fact that *Riggs* for a long time remained the minority view. A significant number of courts determined, even with knowledge of the "no man may profit from his own wrong" principle, that a wide range of unworthy beneficiaries, including ones causing the death of the testator or intestate, could, in the absence of statute, still inherit.[59]

Thus, there appears a set of cases in which the recognized rule dictates the result, even in the face of judicial awareness and acceptance of policies or principles that would indicate the undesirability of applying that rule. Yet there are also cases like *Riggs* and *Henningsen*, in which the recognized rule gives way to some policy or principle lying outside the set of recognized rules. Similarly, cases like *Locke* and *Pavelic & Leflore v. Marvel Entertainment Group* generate both dissents and criticism,[60] indicating that even in the statutory context, the primacy of the most directly applicable recognized rule is contested and controversial. How are we to explain this?

One explanation, sounding again in realism and inspired by Llewellyn's thrust-but-parry,[61] holds that both the rule-based and the non-rule-based approaches are available in any case, with the selection of one rather than the other being largely a function of the decisionmaker's view of the appropriate resolution of the particular case. Indeed, perhaps as soon as the decisionmaker realizes that the non-rule-based approach is available, the rule-based approach disappears, because the selection of a rule-based approach for necessarily non-rule-based reasons is itself a non-rule-based decision. If the choice of following a rule is based on non-rule-of-recognition-recognized principles of equity, then the presence of the rule-based alternative is illusory.

This rule-rejecting explanation of even those cases that at first appear to involve the application of rules is problematic. What is significant about the immunity abrogation cases, the

58. *See, e.g.*, Riss v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968); Jivelekas v. City of Worland, 546 P.2d 419 (Wyo. 1976).

59. *See generally* T. ATKINSON, *supra* note 25, at 111-21.

60. *See, e.g.*, Posner, *supra* note 56, at 204-05.

61. *See* Llewellyn, *supra* note 23, at 401-06.

unworthy beneficiary cases, and many of the statutory formality cases is that the very judges refusing to set aside the rule-based result plainly indicated their dissatisfaction with that result.[62] Were a legally legitimate alternative available to those judges, and seen by them to be available, then we would expect to see the opposite result in these and many other cases. Because we do not, there is a strong indication that the simple realist explanation is simply too simple.

Alternatively, we might explain the differences as a clash of competing legal theories. Dworkin sees *Riggs* and similar cases as evidence that different legal decisionmakers have different (that is, positivist and non-positivist) legal theories. Because these differences have yet to be resolved, a legal decisionmaker can, without fear of charges of betrayal of her role, adopt either of these theories in a way that she could not adopt a legal theory based on astrology, numerology, or the view that the right legal decision is always the one that would best pave the road to socialism.

This explanation, however, fails to explain why some legal decisionmakers appear to do both. Although I have not researched this assertion, I would be surprised to discover that none of the judges in *Riggs* or *Henningsen* had ever followed a common-law or statutory rule that they believed in error. I would be equally surprised to discover that the dissenters in those cases had never voted to set aside a rule in the service of other larger and non-recognized values. If this is so, and if the simple realist explanation does not hold, then we must search for some non-realist method of reconciling the presence of both approaches and both outcomes within the same legal theory and within the same judicial self-understanding.

At this point in the inquiry, the idea of a *presumption* seems quite useful, and I will argue that positivistically-recognized rules exercise presumptive but not conclusive force in many decisionmaking environments. In order to support the argu-

62. Moreover, most of these cases cannot be explained simply as examples of rule-sensitive particularism. Some cases in which a judge reaches a result she finds mistaken or suboptimal might be explained by the judge's own determination that this was a case in which the reasons for following the rule *qua* rule outweighed the reasons for reaching the individually optimal result that happened to contravene the rule. What characterizes many of the cases I am thinking of, though, is that the judges, by assuming that rule-revision is not part of their job, are engaging in the process I referred to above as "wholesale" rather than "retail" exclusion of rule-based values from case-by-case assessment.

ment, however, it is important that I distinguish two types of presumptions, the *epistemic* and the *justificatory*.[63]

An epistemic presumption, quite familiar in procedural law, deals with the implications of factual uncertainty. When there is no or incomplete information, decisionmaking systems often presume one fact rather than another for a host of substantive and procedural reasons. The form of such a presumption, as set forth in an interesting philosophical articulation of the common evidentiary uses of presumptions in the legal system, is: "Given that p is the case, you (the rule subject) shall proceed as if q were true, unless or until you have (sufficient) reason to believe that q is not the case."[64] The epistemic presumption thus exists within a framework in which the question is the existence or non-existence of q.

By contrast, a justificatory presumption, more familiar (although not by this infelicitous term) in constitutional law, operates in a decisionmaking framework in which reasons vary in strength. Even absent epistemic uncertainty, there may be reasons for taking some action that are simply stronger or more pressing than others. This loose observation, strong enough for present purposes, explains the difference between a reason that is compelling and one that is simply rational, between a justification that is reasonable and one that is important. The constitutional import of all of these distinctions is that, time and again, reasons that are sufficient for some purposes are insufficient for others. For instance, the existence of a quite good reason for restricting speech or taking race or gender into account may still turn out to be insufficient because of the overwhelming justificatory burden that such a reason must meet.[65]

As should be plain, this latter type of presumption is most applicable to the relationship between the results indicated by a recognized rule and those indicated by the full set of extant

63. I am extraordinarily dissatisfied with the latter term, but have yet to come up with anything better.

64. Ullman-Margalit, *On Presumption*, 80 J. PHIL. 143, 154 (1983). Although not germane here, Ullman-Margalit does recognize that presumptions may be of varying strengths, including the conclusive. *See also* Ullman-Margalit & Margalit, *Analyticity By Way of Presumption*, 12 CAN. J. PHIL. 435 (1982).

65. There should be little doubt, for example, that the governmental justifications offered in cases as diverse as Palmore v. Sidoti, 466 U.S. 429 (1984); Craig v. Boren, 429 U.S. 190 (1976); and American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd without opinion*, 475 U.S. 1001 (1986), would have been sufficient to satisfy a rational basis level of scrutiny.

moral, political, and social norms. Following the above formalization of the epistemic presumption, we might formalize the justificatory presumption as: "Given that result *a* is indicated by rule *R*, you (the rule subject) shall reach result *a*, unless or until you have a reason of great strength for not reaching result *a*."[66] I use "great strength," but the idea is only that the reason must be sufficiently weighty to overcome some weight in the opposite direction. This means that the weight must be stronger than *ceteris paribus*, but just how much stronger need not be specified. Although there are confusions engendered by the use of any term, the idea I am trying to capture is often articulated in terms of the rule having *prima facie* force.[67]

Although examining the extent and subtleties of the presumption as it exists in this or any other legal system would require more investigation than I have performed, it appears likely that the conflicting descriptive insights of the positivists and their critics can be reconciled by thinking of the recognized rules as justificatory presumptions. Were that the case, we would expect to see many cases in which the recognized rule generated a result consistent with that generated by the full norm set; some cases in which the recognized rule indicated a result that was set aside in the service of some conflicting social norm; *and some cases in which the recognized rule indicated a result that conflicted with a larger social norm, but not by so much or so egregiously that it was worth setting aside the result indicated by the social norm.* It is this last set, the set of slightly but not extremely wrong answers (from the perspective of the set of social norms), that indicates the existence of exactly the kind of presumption in favor of the recognized rules that I am positing. More importantly, it explains how the insights of Dworkin and others can be seen as consistent with the apparent phenomenological dominance of the very kind of limited domain of recognized

66. Contrast the following: "Given that result *a* is indicated by rule *R*, you (the rule subject) shall reach result *a* unless there are reasons for not following rule *R* in this case that outweigh the sum of the reasons underlying *R* and the reasons for setting forth those underlying reasons in the form of a rule." The difference between this formulation and the one in the text is both enormous and of enormous significance. It is another way of stating the difference between the form of decisionmaking I call "rule-based" and the one I refer to as "rule-sensitive particularism." For further development of this distinction, see F. SCHAUER, *supra* note 4, at 159-71; *supra* note 8 and accompanying text.

67. I am, however, reluctant to endorse use of that term in this context, largely for reasons set out in Searle, *Prima Facie Obligations*, in PRACTICAL REASONING 81 (J. Raz. ed. 1978).

rules that lies at the heart of the positivist perspective.[68]

Implicit in *presumptive positivism*,[69] in this picture of the presumptive force of a first-stage legal rule vis-à-vis a wide range of other, non-pedigreeable considerations,[70] is the assumption that a decisionmaker can examine the set of other, non-pedigreeable considerations casually. That is, the picture of presumptive positivism is open to the charge that there is no way of knowing that the presumption has *not* been overcome without examining the very factors that might overcome it. If that is the case, so the argument goes, then the idea of the presumptive force of a limited norm set disappears.

Against this possibility, I tentatively offer the idea of a casual look, a glimpse, a peek, a preliminary check, pursuant to which a decisionmaker follows the recognized rule unless some other factor overtly intrudes on her decisionmaking process. Implicit in presumptive positivism is a phenomenology such that the decisionmaker is open to the possibility of the presumption being overcome, but does not actively pursue it, or can do a quick check short of a thorough inquiry. If I am correct, if presumptions do serve as psychological simplifiers as well as analytic decisionmaking devices, then presumptive positivism does not fail, even though it requires the decisionmaker to examine in some way the larger range of potentially overriding factors.[71]

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68. My thesis that the existence of presumptive positivism explains a significant amount of the dominance of a limited domain of legal rules in America might fit with my description of the *convergence hypothesis*. *See supra* note 38.

69. Professor Gavison suggests that I steer clear of the debates about what kind of claims positivism makes by referring to this descriptive-explanatory thesis as "presumptive ruleness." *See* Gavison, *Comment: Legal Theory and the Role of Rules*, 14 HARV. J.L. & PUB. POL'Y 727, 750-52 (1991). I have no strong objection to that term, except insofar as it cedes the term "positivism" too easily to only one debate, a debate of less contemporary importance than the debate about limited domains.

70. Professor Postema properly chastises me (and too gently at that) for some ambiguity about the sources of the potentially overriding norms. *See* Postema, *Positivism, I Presume?... Comments on Schauer's "Rules and the Rule of Law"*, 14 HARV. J.L. & PUB. POL'Y 797, 813 n.23 (1991). Here, the debate seems to be one between Dworkin, for whom only principles accepted in a certain way will be usable in legal decisionmaking, and Eisenberg, whose domain of "social propositions" is congruent with the full set of normative propositions or sources accepted by the society at large. Descriptively, Eisenberg seems to be correct, but as a celebrant of existing common law practice he needs to offer some justification for treating judges and lawyers as appropriate translators and appliers of the totality of society's norms. Dworkin's account is sensitive to this problem, but his attempt to argue that this is the best explanation of existing practice seems somewhat of a reach.

71. Postema argues that although he accepts the distinction among (non-presumptive) rule-based decisionmaking, rule-sensitive particularism, and pure particularism, he thinks that presumptive rule-based decisionmaking and rule-sensitive particularism are intensionally and extensionally identical. *See id.* at 813-17. *Pace* Postema, however, I

As a descriptive account, therefore, American law appears to treat an existing legal rule, whether it be a crystallized common-law rule or a rule canonically inscribed in a statute, as entitled to presumptive but not conclusive force.[72] Because the presumption necessarily produces some suboptimal results, American law, as described by presumptive positivism, appears

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am not persuaded that there is no difference between the two, and I still maintain that the difference relates to the decisionmaker's ability to vary the weight of the presumption. As I conceive of presumptive rule-based decisionmaking, all of a certain domain of rules come to the decisionmaker with a certain presumptive force, and although that force can be outweighed by other reasons, it cannot be eliminated, even if the reason for the presumption does not obtain. In other words, although the ruleness values are not so strong as to make the rules necessarily conclusive, those values are still not open to evaluation for applicability in the individual case. By contrast, rule-sensitive particularism allows the decisionmaker to evaluate the strength and applicability of the ruleness values in each case, consequently giving those values as little as no weight where they are entirely inapplicable to the case at hand.

Thus, beneath all of the abstraction and excessive pigeonholing in the previous paragraph, there is a real debate here, not so much conceptual as normative. The normative debate is about whether it is always desirable for decisionmakers to be able to reevaluate their own roles in particular cases. In part because that reevaluation will usually be in favor of greater rather than lesser power for the decisionmaker, it is plausible to think that some decisionmaking environments will try to coerce or train their decisionmakers into a decisionmaking mode in which rules *always* have a certain amount of force, albeit a non-conclusive amount. That mode, which I refer to as presumptive rule-based decisionmaking, remains logically distinct from a mode in which the amount of force possessed by the rule is itself determined by the decisionmaker in each case.

72. In referring to a "crystallized" common-law rule, I bracket the question of precedent, except to note my agreement with what Larry Alexander calls the "rule model" of precedent. *See* Alexander, *Constrained By Precedent*, 63 S. CAL. L. REV. 1 (1989). Although I have some minor disagreements with Alexander about where the rule in the rule model comes from, *cf.* Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987), we agree that precedent is illusory where the precedents do not indicate some rule to be applied in future cases even when under- and over-inclusive. We also agree that such a rule exists most plainly when there are so many precedents that there is a common understanding, set forth in treatises and the like, as to what that rule is. The very fact that we refer to "the mailbox rule" or "the Rule in Shelley's Case" is some evidence for the existence of these common understandings operating in rule-like fashion even within the common law. *See* Schauer, *Is the Common Law Law?* (Book Review), 77 CALIF. L. REV. 455 (1989).

When compared to the presumptive force of such a crystallized common-law rule, the force of a statutory rule in the modern United States is typically greater. As the perspectives of Dworkin, Calabresi, and many others indicate, however, and as the existence of dissents in cases like *Locke* indicate, even the rule-based force of statutes is no more than presumptive for many judges. The best and most recent description and defense of a fairly aggressive and thus less rule-based understanding of the process of statutory interpretation is Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989). *See also* Eskridge & Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989). As should be clear from the text, I believe that many of these perspectives understate the degree of presumptive ruleness that now exists, overstate the extent to which aggressive attempts at "ideal" interpretation are compatible with the idea of rule-based constraint, and treat as inevitable and beyond normative question a form of decisionmaking that is at best contingently desirable in some decisionmaking environments.

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to have some of the manifestations of rule-based decisionmaking in a strong form. Insofar as the presumptions can be overcome, insofar as determining when they should be overcome requires at least a "peek" behind or beyond the rule in every case, and insofar as that peek entails a look at the full array of relevant all-things-considered factors that would be employed absent the rule, American law also appears to have some of the manifestations both of pure particularism and of rule-sensitive particularism. This mix in American law is contingent and not necessary, however, and it is to the normative evaluation of this and other possible mixes that I now turn.

VI.

Even if my account of presumptive positivism captures more accurately than its descriptive opponents the place of rules within much of contemporary legal decisionmaking, it may still be normatively undesirable. By allowing some number of morally suboptimal results to remain in place, it may be thought undesirable by those with greater aspirations for moral optimization.[73] Yet by recognizing a substantial relaxation in the constraint of rules, it may be thought too loose by others.[74] It is now time, therefore, to address these normative questions, not just about presumptive positivism, but about the place of rules within legal decisionmaking generally.[75]

In order to address the normative questions, we must dis-

73. I am inclined to think that Professor Radin is correct in identifying as trivial in one sense those cases in which ruleness values will predominate. *See* Radin, *Presumptive Positivism and Trivial Cases*, 14 HARV. J.L. & PUB. POL'Y 823 (1991). These are the cases, not necessarily trivial in amount or quantitative import, and not necessarily unimportant to the disputants, in which, from the perspective of the decisionmaker, either the stakes are small, or the stakes are large but the non-legal factors are roughly in equipoise (*see, e.g.*, Hustler Magazine v. Falwell, 485 U.S. 46 (1988)), or the decisionmaker herself sees the ruleness values as predominant.

74. In this respect, Professor Gavison provides a useful corrective to American theoretical provincialism. She reminds us that the debates in which we engage, debates in part that take seriously extreme forms of normative and descriptive rule-skepticism but do not take seriously equivalently extreme forms of formalism, are a peculiar product of American legal consciousness. *See* Gavison, *supra* note 69, at 731-32.

75. In what follows, the tone of the argument is much more a response to those theorists who have a weaker view of the desirability, on occasion, of rule-based decisionmaking than do I. This is not to say that I agree with the arguments of those, such as Bentham and Justice Scalia, who maintain that for reasons of majoritarian political theory, the idea of judge-made law, especially as it is made by the common-law process, is somewhere between highly undesirable and totally illegitimate. I believe that not to be the case, and believe as well that judicial lawmaking is neither illegitimate nor acontextually undesirable. But because so much of the present American theoretical climate takes just the opposite approach—maintaining that strongly rule-based decisionmak-

tance ourselves from the unfortunate tendency in much of American legal theory to conflate the questions of what the law should be and how judges should decide cases. By defining the former in terms of the latter, a great deal of judge-centered legal theory generalizes about the nature of law from an account of what judges, especially appellate judges, ought to be doing.[76] These, however, are distinct questions, and I want to address them distinctly. First, we must consider what place, if any, rule-based decisionmaking occupies in a conception of law far richer than an exclusive preoccupation with judges deciding hard cases. Then, and only then, can we turn to the question of what role judges are to play within that system.

By removing the judge from center stage, we can start with a more robust conception of the domain of "legal officials." This conception includes all those officials who have the authority to wield official power, who are under some role-related legal constraint, and who have the authority to apply law to specific instances, including the authority to exercise discretion when the law does not control that discretion. This definition is broad and inspired by a somewhat positivist conception of what

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ing, especially by judges, is what is illegitimate—I devote my attention here to examining that claim. *But see* Gavison, *supra* note 69.

76. In fact, the pathology is even more serious. A common normative account of appellate judging sees the appellate judge as a "proxy for me." What I would do were I an appellate judge, and were all appellate judges like me, is a quite different question from the question of what rules or what understandings I would urge on the current array of appellate judges, or the expected future array of appellate judges. I do not deny the utility of ideal theory, but it is important to recognize that those who are prescribing for ideal judges are engaged in a very different enterprise than are those of us who are engaged in the necessarily non-ideal enterprise of describing or prescribing the institutions of and for a non-ideal array of non-ideal decisionmakers. Without this distinction, very little about rules makes sense. As a result, thinking about the role of rules for ideal decisionmakers verges on the self-contradictory.

Moreover, I want to avoid the constraint of thinking that legal theory must make the role and the life of the judge intellectually stimulating and morally enriching, a point of view aptly captured in Posner, *What Am I, A Potted Plant?*, THE NEW REPUBLIC, Sept. 28, 1987, at 23. It is undeniable that, under a much more rule-constrained conception of judging than we now have, the judicial task (subject to the complications of the selection hypothesis) would be more mechanical and less dependent on judgment, more routine and less creative, more narrow and less intellectually stimulating. It is equally undeniable that, were that the case, some of the people now attracted to the job of judging would be less willing to become judges. I find it odd, though, that enriching the job description of judge should be the starting point for an argument, or even much of an argument at all for judicial empowerment. We do not, after all, take too seriously identical arguments with respect to the powers of police officers, court functionaries, or Central Intelligence Agency agents. As a result, the distinction between a judge exercising considerable judgment and a clerk of the courts exercising very little judgment seems more appropriately the conclusion of an argument about judicial power, rather than a premise of it.

law is and how it operates, but nothing turns on that positivist conception here. I merely want to make it clear that I am now talking about a domain of legal institutions and legal officials that includes, *inter alia*, appellate judges, trial judges, municipal judges, non-legally trained justices of the peace, executive officials of national and state and local government, tribunals like zoning and public housing boards, administrative officials, bureaucrats in administrative agencies and in the courts, and law enforcement officials from the Attorney General of the United States to the cop on the beat (including in this latter category the military police), the Federal Bureau of Investigation, and the Central Intelligence Agency. By saying that such individuals and institutions are part of the legal system, I do not deny that they may be part of other systems as well. For example, the official of the military police is part of the military, and the executive official is also part of the system of partisan politics. Still, all of these individuals and institutions have some role to play both in making and applying law, and thus seem in important ways part of the legal system.

From the perspective of this expansive conception of the individuals and institutions comprising the legal system, it is apparent that some of them are not institutions we normally expect to make all of their decisions in a rule-based manner. Let us take Congress as an example. In part, we *do* expect Congress to act within constitutional and legal constraints, and we expect Congress to treat those constraints in rule-like fashion. That is, we do not expect Congress to treat the constraints of the Constitution as only rules of thumb, to be revised *by* Congress when *it* finds that direct application of the justifications underlying constitutional rules would be better served by ignoring what the Constitution actually says. Were Congress to determine that, in the 1990s, a minimum age of thirty-five for senators better approximated the 1787 justification of sufficient maturity than the constitutionally-specified age of thirty, we would react that Congress had simply done something *wrong*. In other cases, the lines blur, such as when we debate the current effect of a Second Amendment adopted in an age of flintlock rifles and no cocaine, or the obsolescence in an age of nuclear weapons and space satellites of the textual commitment of exclusive power to Congress to declare war. Still, were Congress to say that some constitutional provision was not to be

followed because its literal application would not serve the Constitution's background purposes, many of us would respond that not only had Congress misinterpreted those background purposes, but that their very interpretation was unauthorized where the text was clear. The Constitution is not merely a summary of past experience from which Congress is expected to learn, but a rule that Congress is expected to obey.

Despite the fact that many of us thus expect Congress to act within constitutional constraints and to treat those constraints as comparatively opaque rules, the practice of lawmaking does not strike us as significantly rule-based. In deciding what laws to enact and what taxes to impose, most of what legislatures do is taken to be an exercise of judgment, discretion, politics, morality, and policy, involving not the application of legal rules but the making of them.

If we thus see the legislature as the *maker* of rules within the powers granted by some empowering norm, we can recognize the same activity in other participants in the legal system. When a rule empowers an agent or institution, it cannot specify every instance of that power, and therefore some applications of that power will not be rule-based. Thus, a common-law court empowered to make law is not acting in a rule-based manner when it decides to make one law rather than another. For instance, when it decides, on a clean slate, to adopt or not to adopt the principle of charitable immunity in tort, or to allow or not to allow third-party beneficiaries to recover contract damages, it is not acting in a rule-based manner. Similarly, the actions of an administrative agency within its domain of discretion are not rule-based, nor are the determinations of a police officer in deciding, within the geographic boundaries of her "beat," which streets to patrol, and the order in which to patrol them.

These examples are merely an application of the standard positivist position that any set of norms leaves to the applier of those norms some room for action, and that the action exercised in that room is not rule-based, at least not based on or constrained by *legal* rules. Consequently, it is a mistake to assume that *any* legal official is solely in the business of rule-application, for most such officials will be operating at least in part within an area in which the rules allow that official to choose among mutually exclusive but equally legally permissi-

ble options.[77] In this sense, law is necessarily at least in part something other than the process of rule-application.

The more substantial question is whether law should *only* be something other than rule-application. This question concerns the attitude that legal officials should take toward the rules that *do* appear to constrain. Why is it so obvious, for example, that Congress should be precluded from recognizing that the age limitations in the Constitution are but crude and now-obsolete approximations of some ideal that has changed with time? Why is it so obvious that Congress should be disabled from abridging the freedom of speech if doing so would foster rather than impede the process of democratic decisionmaking that, arguably, represents the justification lying behind the First Amendment? Why is it so obvious that the right to jury trial in federal civil suits should be allowed in cases in which the amount in controversy is less than the amount in 1990 dollars that would be the equivalent of twenty 1791 dollars? Why is it so obvious that the pocket veto is permissible in an era of modern communication, modern transportation, and a full-time Congress?

We commonly answer these questions by drawing a distinction between the power of revision and the process of application. If an institution has the authority to set aside the indications of a rule in the service of that rule's background justifications, then the rule is not a rule at all for that institution, although the set of background justifications may be.[78] Thus, when we deny to Congress the power to revise the constitutional constraints upon it, we base that denial on a determination of the allocation of power between Congress and

77. I say "most" because of the possibility of closure rules. Although such rules are rare, it is possible to create a mandate under which officials are, for example, instructed to impose a sanction when plainly authorized by the mandate, but in no other case. There will still, of course, be some room for judgment when it is not clear whether the rule plainly applies. When a rule dictates a default rule when the rule does not otherwise indicate a result, though, the space in which discretion operates is significantly reduced.

78. As I have argued elsewhere, we can ask the same questions for background justifications as for rules, because cases may arise in which a background justification is under-inclusive, over-inclusive, or obsolete with respect to *its* background justifications. *See* F. SCHAUER, *supra* note 4, at 125; *Formalism*, *supra* note 6, at 534. What is the relationship, for example, of a "public deliberation" justification for the First Amendment to the "democracy" justification that might lie behind *it*? Thus, how we think about some restriction on the functioning of the deliberative process in the service of democracy is similar to how we think of some restriction on speech in the service of more effective functioning of the deliberative process. Similarly, if the language of a statute can be set aside in the service of its purpose, can that purpose be set aside in the service of even deeper purposes?

those who "made" the Constitution. Even if congressional revision were for the better, granting Congress the authority to revise does not comport with our understanding of who possesses the revising power.

Now, let us look at the issue from the perspective of a police officer. Consider the rules constraining a police officer, such as the rule prohibiting electronic surveillance without a prior court order, except in cases involving an emergency of a national security or organized crime variety.[79] We can imagine some instances in which an all-things-considered judgment, including consideration of the value of having a rule *qua* rule, would lead a police officer to conclude that not conducting electronic surveillance in a non-national security, non-organized crime case would produce an undesirable result: The officer might conclude that the law enforcement system would be unable to arrest, convict, and incarcerate an individual highly likely in the future to commit dangerous crimes, and that none of the potential abuses of the power to conduct electronic surveillance was present in this case or would be more likely in the future because of the use of electronic surveillance without court order in this case.

There is no clear answer to what the police officer should do in such a case, but we can conclude that the police officer's proposed unauthorized electronic surveillance contravenes the existing rule. We can also assume from the assumptions in the preceding paragraph that it could reasonably be concluded that the morally best thing to do in this case is to conduct the surveillance. Even under these conditions, however, many people, including myself, would be reluctant to accept the police officer's claimed authority to revise the rule. Because the proposed exception is not on the closed list of existing exceptions to the rule, the question is unavoidably one of revision. It is thus much the same as the question with respect to Congress and the Constitution: Who should have the power to revise, rather than just to apply, the rules when some circumstance indicates that the rule has generated an erroneous result in the case at hand?

I have used these tendentiously selected examples[80] to sug-

79. *See* 18 U.S.C. § 2518(7) (1988). *See generally* J. CARR, THE LAW OF ELECTRONIC SURVEILLANCE § 3.7 (1986).

80. Actually, they are only tendentious depending on one's point of view. They are

gest that the virtues of rules within legal decisionmaking are, if taken to be contextual and not universal, virtually self-evident. The two cases are designed, however, to provide more than just two examples of the same point, for they involve two quite different rule-based values, neither of which has much to do with the occasionally valid but often overstated virtues of reliance, predictability, and certainty.

The first of these virtues, presented most plainly by the example of the police officer conducting electronic surveillance,[81] is the virtue of preventing some number of incorrect decisions through the use of a procedure that admittedly produces some other incorrect decisions.[82] It is true that faithful obedience to rules will produce some number of suboptimal, unjust, or downright silly results in the area of under- or over-inclusion of those rules. It is often likely that actual decisionmakers, however, if empowered to make a decision contrary to the rule when such a decision appears to them to be more just or less silly, will produce some number of unjust or downright silly results as a consequence of misjudging what is just, or making a silly calculation of silliness. In a world of non-ideal decisionmakers, therefore, one should calculate the virtues of ruleness based not only on an assessment of the costs of errors of under- or over-inclusion, but also on an assessment of the incidence and consequences of those errors that are more likely when decisionmakers are not constrained by rules. This is not to say that the calculation will always go the same way. Indeed, I have some sympathy for the view that we may traditionally overestimate the likelihood of governmental or official error (at

most tendentious with respect to the class of people likely to be concerned simultaneously with excessive ruleness in the abstract and abuses of police or legislative power in the particular.

81. Consider as well the circumstances, if any, under which a police officer should have the power to determine that a *Miranda* warning need not be given. *See* New York v. Quarles, 467 U.S. 649 (1984) (establishing public safety exception to *Miranda* warning requirement).

82. Those of us who occasionally see some virtues in rules are commonly chastised for supposing that under a system of rules all disputes can be decided in advance. *See* Bartlett, *supra* note 30, at 853. Nothing could be further from the truth. *No one* I know of makes that claim, and no one has since Bentham. Moreover, even those of us who do think that some number of disputes can be decided in advance do *not* maintain that they can be decided *correctly* in advance. Rather, we think that on occasion the expected negative consequences (the product of frequency and harm) of those incorrect results may be less than the expected negative consequences of trying to eliminate them by empowering a particular array of decisionmakers to determine what that array of decisionmakers believes is an incorrect result.

the expense of the errors of governmental under-involvement) and thus overvalue the importance of government-disabling rules.[83] It still seems odd, though, to suggest that the risk of official error is never present, or that the risk of official error when officials are freed from rules is necessarily less than the risk of error from the faithful application of rules. Consequently, it appears counter-intuitive to conclude that, for all sets of official decisionmakers at all times, the mistakes likely to be made in pursuit of the power to revise rules when necessary will be less in number and degree than the mistakes made in faithful application of those rules.

My example of Congress and the Constitution looks slightly different. When we consider that example, we do not think about the likelihood that Congress will make more mistakes if given the power to revise the Constitution than it would make by faithfully applying it (although that is likely true). Rather, we concentrate on authority, thinking that this task is just not one for Congress to perform. The determination is a bedrock question of political theory, not strictly a function of who is better at doing what. Even if we were convinced that the present Congress could improve the Constitution by rewriting it, it would not follow that Congress, as a matter of political and constitutional theory, should be allowed to do so.

This suggests that rules are necessarily part of any differentiated decisionmaking environment that acknowledges the idea of separation of powers in the broadest sense. Where one decisionmaker performs all decisionmaking—as in the classic act- versus rule-utilitarian debates, which treat the decisionmaker as the one who both makes the rules and then applies them—rules have little or no role to play.[84] Only when there is role differentiation, *and always when there is role differentiation*, will rules be an essential component of the process of differentiation, of the process of allocating decisionmaking power.

When viewed from a separation-of-powers perspective, it

83. See C. MacKinnon, Toward a Feminist Theory of the State (1989); C. MacKinnon, Feminism Unmodified (1987). *See also* Horwitz, *The Rule of Law: An Unqualified Human Good?* (Book Review), 86 Yale L.J. 561 (1977); Fiss, *Why the State?*, 100 Harv. L. Rev. 781 (1987).

84. Thus, David Lyons is both correct and beside the point when he argues that act- and rule-utilitarianism are extensionally equivalent when the rule-follower is permitted to make a rule of unlimited specificity at the time that the putative action is contemplated. *See* D. Lyons, The Forms and Limits of Utilitarianism (1965). *See also* Alexander, *Pursuing the Good—Indirectly*, 95 Ethics 315 (1985).

seems neither self-evidently true nor self-evidently false that judges should be in the business of rule-revision. To say that judges cannot be involved in rule-revision seems mistaken, for it is not necessary that majoritarian bodies like legislatures be the only legitimate rulemakers in a well-ordered society. We can and should ask about separation of powers in the well-ordered society, and we can and should ask about the incidence of errors by various bodies in the well-ordered society. It does not, however, inexorably flow from these questions that the well-ordered society is one that does not see judges as important components in a process recognizing the importance of rule-revision. Partly because of the difficulty of constitutional or legislative rule-revision, a society might entrust some less immediately accountable officials with rule-revision. Moreover, rule-revision by judges might be a necessary pressure-release valve from rules the under- or over-inclusion of which would otherwise produce results of such unjustness or silliness as to exceed the capacity of a society to tolerate them.[85]

Conversely, however, it seems equally mistaken to assert that judges *must* be in the business of rule-revision. To require that judges perform this function for reasons of morality seems mistaken, for as I argued above, there is no reason to suppose ex ante that judges will make fewer moral mistakes than will those whose rules they are to apply. In the eyes of some, such as Michael Moore, the question is whether it is moral for a judge to permit or be an instrument of an immoral result.[86] To couch

85. All of the foregoing, and more, explains why I disagree with the position espoused by Justice Scalia. *See supra* notes 17 and 18 and accompanying text. At some level, though, I am glad that Justice Scalia, given *his* substantive moral and political views, has the view of rules that he has. Those who urge a much more particularistic and context-sensitive account of judicial decisionmaking must consider the circumstances under which they would urge it on Justice Scalia. Although I am not particularly sympathetic to the idea of picking a *descriptive* legal theory on moral or political grounds, a prescriptive legal theory cannot avoid those concerns. *See generally* Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); MacCormick, *A Moralistic Case for A-Moralistic Law*, 20 VAL. U.L. REV. 1 (1985); Soper, *Choosing a Legal Theory on Moral Grounds*, in PHILOSOPHY AND LAW 31 (J. Coleman & E. Paul eds. 1987). That does not mean that such a theory should be responsive to short-term political winds. It does mean, however, that a prescriptive theory of the advantages or disadvantages of constraint by rule must, given the role of rules as potential constrainers of decisionmaker mistake, take into account the likely array of mistakes to be made by the likely array of decisionmakers, where "mistake" is necessarily measured from the perspective of the offeror of the prescriptive theory.

86. *See* Moore, *Authority, Law, and Razian Reasons*, 62 S. CAL. L. REV. 827 (1989). *See also* Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985); Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151 (1981). In fairness to Moore, his view

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the question in this way, however, is to focus on the single ideal judge making a single decision. Even putting aside the distinction between ideal and non-ideal, we must remember that judges make more than one decision, and, as I have argued, the best decision procedure is not always the one that tries to make the best decision in each individual case. Thus, when we look at judicial decisionmaking in the aggregate, the question is whether it is immoral to prefer a procedure expected to make, say, six mistakes in a thousand to one expected to make ten mistakes in a thousand. If it is morally best to minimize the number of moral mistakes, assuming they cannot be eliminated, then the identification of a certain case of immorality as a sufficient condition for revision is to commit the same statistical fallacy as assuming from the appearance of double sixes on the first throw of the dice that twelve is a much more likely outcome than seven. Of course, the possibility that this decisionmaker might be in error is a factor that she should consider, and Moore and other proponents of rule-sensitive particularism appear to take this view. It hardly seems unreasonable, though, for some decisionmaker to disable herself in advance from making those calculations precisely for fear that she might underestimate the likelihood of her own error. Nor is it unreasonable for a designer of a decisionmaking environment to design that environment in a way that takes account of a decisionmaker's own likelihood of underestimating the frequency and consequences of her own errors.

Thus, we are led to one of two conclusions. The first is that failure to recognize the role of rules in allocating decisionmaking authority, and thus in serving the functions of separation of powers, leads to the impossibility of allocating functions at all. This generates the odd conclusion that ultimate authority resides in the last and most immediate decisionmaker, whether that be the cop on the beat or the juror. Or, alternatively, a

about judicial power might merely be part of a larger view that it is the responsibility of *any* independent moral agent, including but not limited to judges, to avoid being the instrument of unjust results. Such a view, though, produces results with respect to police officers, agents of the Central Intelligence Agency, and justices of the peace with which I and many others are morally and politically uncomfortable. These results also do not seem compelled by an account of morality that recognizes the moral underpinnings of separation of powers, an account of which my current preoccupation with rules is a part. Alternatively, we need from Moore and others an account of the acontextual moral specialness of judges, an account that I find conceivable, but that has yet to be offered to my satisfaction.

special account of judging, or appellate judging, or Supreme Court judging, makes the judge, but not necessarily other legal decisionmakers, appropriate for the task of rule-revision when and as necessary.

I have doubts whether this last task can be performed. That is, I doubt whether the role of the judge is so special that we can assume, acontextually, that judicial mistakes of excessive or erroneous rule-revision will be less in number and consequences than the mistakes of insufficient rule-revision or erroneous non-revision that would occur if judges were prohibited from engaging in that task. What I have few doubts about, however, is the frequency with which this claim is taken to be self-evident. Perhaps judges are the ones to perform this task, or perhaps only certain judges, but if that is so, then the claim must be supported by a plausible account of judicial behavior.

If, as I suspect, no such account can be maintained, then what emerges is the first position I described above: the view that rule-revision is a task entrusted to any of a number of possible officials. The designation of the officials best suited to the task is an essentially context-dependent judgment. When I refer to context here, however, I refer not to the particular context of a particular decision, but rather to the context of this decisionmaking environment rather than that environment, this country rather than that one, and this era rather than another. I mean only to suggest, therefore, that it is a mistake to assume that official empowerment to pierce a rule in the service of its justifications, or the full array of justifications, is a good thing for all officials, all decisionmaking environments, all times, and all places.

Thus, I am emphatically *not* claiming that rules are always good things to have. I *am*, however, claiming that rule-based decisionmaking, in the service of allocation of power values, is frequently a good thing, and that it is virtually impossible to imagine a legal system without it. That is not to endorse the claim that all legal decisionmaking should be rule-based. But it is intentionally to reject the view that none of it should be.

Part of what I am urging here, and have urged elsewhere, is that rules, by allocating decisional roles, might serve the cause of decisional or personal modesty. In other words, rules can cause the individual decisionmaker to submerge her own judgment of what the best result ought to be, and of who ought to

make that determination. Joseph Raz asks whether it can ever be rational for an agent to do something other than what she thinks ought to be done.[87] Part of my answer, and Raz's as well, is that it can be rational for an agent to recognize that someone other than herself might be better at determining what, on the balance of reasons, ought to be done. Moreover, the rational agent may want to take account of the fact that even she is likely to overestimate her own decisionmaking abilities.[88] Another part of my answer, and a smaller part of Raz's also, is that it can be rational to think that for certain categories of decisions, determining what ought to be done is not within my scope of authority.

Some have couched these concerns in the language of coordination (in a non-technical sense) or cooperation, and I do not want to resist those arguments.[89] I would, however, take the arguments for law as coordination as but a special case of rules as coordinating, and in turn I would take this as a special case of decisional modesty. The modern feminist concern with lessening the reliance on rules,[90] although correct in noting that individualized decisionmaking can include voices excluded by existing rules, may be only one story. A different story might also be told from a feminist standpoint. An important strand of feminist thought focuses on cooperation rather than combativeness, interaction rather than distance, compromise rather than conflict, supportive rather than competitive institutions, and "collective engagement rather than the individual exercise of judgment and power."[91] This perspective suggests that we might want to encourage use of those decisionmaking devices,

87. *See* J. RAZ, THE MORALITY OF FREEDOM 38-69 (1986); J. RAZ, PRACTICAL REASON AND NORMS 36-48 (1975).

88. *See* Regan, *Authority and Value: Reflections on Raz's "Morality of Freedom"*, 62 S. CAL. L. REV. 995, 1095 n.215 (1989).

89. *See* Finnis, *The Authority of Law in the Predicament of Contemporary Social Theory*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 115, 129-33 (1984); Green, *Law, Coordination, and the Common Good*, 3 OXFORD J. LEGAL STUD. 299 (1983); Green, *Law, Legitimacy, and Consent*, 62 S. CAL. L. REV. 795, 804-08 (1989); Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165 (1982); Raz, *The Obligation to Obey: Revision and Tradition*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 139 (1984); Regan, *supra* note 88.

90. *See, e.g.*, Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988); Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

91. Bartlett, *supra* note 30, at 865. *See generally* Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988); Menkel-Meadow, *supra* note 90.

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including rules, that discourage rather than encourage a view of the world in which the immediate decisionmaker is the only one whose judgment matters. Rules make it harder rather than easier to assert the specialness of the asserter, and make it harder for a decisionmaker to cast aside the decisions of others in order to take full control of the situation. Insofar as taking control without due respect for decisions made by others looks more prototypically male than does a form of decisionmaking that dampens difference and dampens individual control, the feminist concern with cooperation, interaction, and collective engagement might be more compatible with rule-based decisionmaking than is commonly supposed.

VII.

What of the actual decisionmaker? I have for the most part looked at the question from the perspective of the hypothetical designer of a decisionmaking environment. What is the relationship between this perspective and that of the decisionmaker making a decision? Implicit in what I have been saying is that the questions and the answers are quite different depending on where we are standing, and I want to explore this now.[92]

In order to make the point crispest, let us assume that it *is* irrational for the agent not to do what she thinks ought to be done, factoring all of the virtues of ruleness into the balance of reasons.[93] Thus, let us assume that the rational judge will and should do what that judge thinks on the balance of reasons ought to be done, including within the balance every reason—even judicial disempowerment—for not reaching the optimal reason in this case. Also assume the same for the police officer, the clerk of the courts, the citizen, and the member of Congress. Assume, in other words, a world of independent moral

92. My view that the virtues of rules vary by standpoint is compatible with Gerald Postema's view that authority looks different from the perspective of the self-identified participant than it does from the perspective of the observer. *See* Postema, *The Normativity of Law*, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART 81 (R. Gavison ed. 1987). But I not only want to reverse the focus, looking less at self-identified participants, but also to suggest that the standpoint of the designer of a decisionmaking environment is quite different from the standpoint of a decisionmaker within that environment.

93. For varieties of this perspective, see Regan, *supra* note 88; Regan, *Law's Halo*, in PHILOSOPHY AND LAW, *supra* note 85, at 15; Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 YALE L.J. 950 (1973); and A.J. SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS (1979).

agents who must both make and also take responsibility for their own actions.[94] In such a world, it is both irrational and immoral for each agent to avoid making the best all-things-considered determination, including, as I have said, the full array of ruleness values within the notion of all things considered.

Under this view, a judge or a police officer who does not reach the most rational decision is not only acting irrationally, but may be acting immorally. It does not follow, however, that it is rational for the creator of a decisionmaking environment to encourage that freedom of decisionmaking. Thus, I want to focus on the phenomenon of the *asymmetry of authority*, the way in which the irrationality or immorality of imposing authority does not necessarily result from the (stipulated) irrationality or immorality of succumbing to that authority.

The argument for the asymmetry of authority is quite simple. Consistent with my assumptions, suppose that deference to authority in any strong sense is irrational and potentially immoral. Suppose, however, that it is also the case (as discussed above) that there is reason to suspect that a given decisionmaker or array of decisionmakers will make more errors, and consequently more immoral decisions, if allowed to make a decision on the basis of what she thinks is the balance of reasons than if compelled to make decisions only within a certain, much narrower range. In those circumstances, it seems plain that the moral designer of a decisionmaking environment has a moral responsibility to design that environment in such a way as to minimize the number of moral mistakes. If this is so, then just as it is rational and moral for a decisionmaker to reach the result she thinks best, then so too is it just as rational and moral for the designer of a decisionmaking environment to prevent her from doing so.

To put the matter somewhat differently, the question of authority arises when and only when there is disagreement between the authority and the subject of the authority. If in cases of such disagreement the subject should make the decision she thinks best, all things considered, then in those cases the authority make should also the decision *she* thinks best, all things considered. If we are talking about rules, then the question for the authority arises *prior* to any particular instance. It arises

94. On the relationship between rules and responsibility in this sense, see Michelman, *Foreword*, *supra* note 16.

from the expectation by the authority that in the future there will be cases in which the subject will *mistakenly* attempt to substitute her judgment for that of the authority. Predicting that this will be the case, the authority, in advance, makes the best all-things-considered decision not by creating a procedure in which the subject will be free to make mistakes, but instead by creating a procedure in which the subject will be dissuaded from exercising that subject's best (but expected to be mistaken) judgment.

If authority is asymmetric in this sense, then the task facing the rule imposer is to get the rule-applier or rule-follower to relinquish her best judgment. This might be done either with punishment or with rewards. Focusing on punishment rather than reward (although much that follows also applies to rewards), we can create a method by which the rule-applier is subject to sanctions in any case in which the rule was violated, even if it turned out to be best, all things considered, for that rule to have been violated. A good example of such a sanction is the exclusionary rule under the Fourth Amendment, which excludes all illegally obtained evidence, even if it turns out to have been best, all things considered, to seize the evidence. Under this approach, the imposers of authority attempt to discourage the subjects of authority from substituting their judgment by punishing the substitution, even in those cases in which the substitution turns out ex post to have been for the best.

The foregoing approach is likely to be both effective and unworkable. Its unworkability stems not from anything about the effectiveness of such sanctions *if imposed*, but from the psychological difficulty of imposing sanctions on those whose rule-avoiding decisions have turned out for the best. There is no reason to suppose that this cannot be done, but in most societies, the pressures will likely make punishment of those whose judgment turned out for the best to be quite difficult.[95]

There does seem to be an alternative, the increased palatability of which would likely increase its workability. This alternative posits a sanction system in which ex post sanctions are imposed for violating a rule only when it turns out best, all

95. Some support for this proposition is provided by society's willingness to punish those whose wrongful acts were within the scope of a seemingly reasonable rule. *See* Allen, *Foreword: The Nature of Discretion*, LAW & CONTEMP. PROBS., Autumn 1984, at 1.

things considered, *not* to have violated the rule, but in which such sanctions are extremely large. If contravening the rule turns out to have been for the best, then no sanctions are imposed. If contravening the rule turns out to have been in error, then sanctions of great severity are imposed.

This approach would force the rational punishment-avoiding agent to achieve a high degree of certainty before she proceeds against the indications of the rule. The deterrent effect of the severe punishment will prevent most agents from violating the rule, even when they do think it probably best to do so. Rule-constrained agents will be justifiably risk-averse not only because of their uncertainty about whether contravening the rule is indeed best, but also because of the uncertainty as to whether the sanction-imposer will agree with them about the inadvisability of following the rule. Unlike the first approach, this one avoids the unlikelihood-of-sanctions-actually-being-imposed problem. Because it does not sanction justified rule-contravention, it minimizes the number of public impositions of punishment on those whose rule-contravention turned out to be for the best.

Punishment, of course, is not the only way for a rational imposer of authority to induce those whose well-intended contraventions of rules are expected to be more likely mistaken than wise. As an alternative, there could be process, call it education in the broad sense, by which rule-following values are inculcated. This is part sanction and part reward, partly a function of whom we glorify and whom we condemn, whom we promote and who languishes in the same job for years, and what virtues we praise and what we scorn. Much of this explains why rule-following *qua* rule-following seems less dominant in this legal system than in many others. Perhaps this is appropriate, but *if* rules are to have their purposes, then we would expect to see encouragement of those who follow rules and thus serve those purposes. If rules have their purposes, then we would also expect to see discouragement of those who frustrate those purposes by arrogating to themselves decisions that are best made by others. Whether our current system of rewards and punishments for rule-following and rule-revising comports with our understanding of the optimal level of ruleness, however, is a question that must wait for another day.

THE GAP

LARRY ALEXANDER*

I.

In the last pages of his article, Professor Fred Schauer gets to the heart of the problem of rules and thus to what I consider the heart of the problem of law.[1] I believe that under any conception of law, rules in Schauer's "entrenched generalizations" sense[2] are essential, if only to identify the authorities whose non-rule-based decisions shall be authoritative.[3] The heart of the problem of rules and law is this: There is an always-possible gap between what we have reason to do, all things considered (including the value of rules and the effects of our conduct on preserving valued rules), and what we have reason to have our rules (and the officials who promulgate and enforce them) require us to do. A rule may not allow for an exception where, all things considered, we should violate it, and yet be an ideal rule for all that. We may not trust others—really, ourselves in the role of rule-followers rather than rule-authors—to apply the exception correctly. In other words, an exception may lead to an unfavorable balance of incorrect versus correct applications

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1. *See* Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645, 691-94 (1991).

2. *See id.* at 647-51.

3. Professor Jules Coleman's brand of legal positivism might appear to make rules of the type with which Schauer and I are concerned dispensable. *See* Coleman, *Rules and Social Facts*, 14 HARV. J.L. & PUB. POL'Y 703 (1991).

Coleman's weak positivism includes a negative thesis, the separability of law and morality, and a positive thesis, that law is a matter of social fact. Coleman's position does not entail a limited domain for law, as does the positivism of Joseph Raz and Schauer. *See id.* at 723-24. Nor is Coleman's rule of recognition, unlike Raz's, epistemic as opposed to semantic (ontological). For Raz, though not for Coleman, law has a function in practical reasoning: It is authoritative. And it cannot be authoritative unless it can be identified apart from the moral issues it is designed to settle authoritatively (Raz's sources thesis). Therefore, for Raz, the rule of recognition must be epistemic as well as semantic.

One might argue that even Coleman's weak positivism requires an epistemic rule in the sense of a proposition that identifies the rule of recognition or that identifies the authorities on whose acceptance the rule of recognition depends. In any event, I believe that Razian authority, and therefore rules of the type with which Schauer and I are concerned, will be *morally* required for any complex society. Therefore, even if the rule of recognition is "Law is correct moral principles," rules and "the gap" will emerge at the next level down.

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of the exception. But without the exception, we end up with "the gap."

The upshot of this is that in one role we occupy, that of authority, we should impose sanctions on ourselves for actions that are correct in another role we occupy, that of subjects of rules. It may be morally good that we punish ourselves for breaking morally good rules for morally good reasons.

II.

There are two reasons for "the gap." First, we as rulemakers are fallible in crafting rules; nevertheless, to avoid even worse consequences than our imperfect rules produce, we need to have some finality attached to our decisions. Second, we as the subjects of rules are fallible, and we are more likely to produce those consequences demanded by our moral principles if we are governed not directly by those principles but by blunt (over- and under-inclusive) rules that are relatively easy to follow and to monitor. The first reason is really only an instance of the second: A rule of finality is one of the morally optimal blunt rules.[4]

How can we as rulemakers know enough to prescribe the indirect strategy of decisionmaking under rules rather than the direct, all-things-considered strategy? That question is especially difficult because the reasons for preferring the indirect strategy are based on our fallibility. If we are fallible in deciding how to act in particular cases, and thus need the guidance of blunt rules, will we not be equally fallible in formulating such rules? I think not. The reason why the indirect strategy seems plausible despite its potentially self-undermining reliance on fallibility probably lies in either differential expertise or relative favorableness of decisionmaking environments (promulgating a general rule versus making a particular decision). As rule prescribers we may be in a better position to estimate consequences than we are as subjects of the rules.

III.

The problem of rules is a problem of consequentialism.

4. *See* Alexander, *The Constitution as Law*, 6 CONST. COMMENTARY 103, 107-09 (1989) (discussing how fallibility-based arguments for ideal rules, though over- and under-inclusive, relate to the argument for giving finality to non-ideal rules).

Promulgating, obeying or disobeying, and responding to disobedience are all acts that we will judge, at least in part, by their consequences. And it is quite possible that the best consequences are obtained as follows:

(1) As authority, *promulgate* an absolute rule, "do x," or a presumptive rule, "do x unless doing x is outweighed by reasons of weight w."
(2) As a rational subject of the promulgated rule, engage in Schauer's "rule-sensitive particularism" (RSP)[5]—take the course of action that is morally best, all things considered, including effects on valued rules—and *disobey* the rule promulgated in (1).
(3) As authority, *respond* to this rule violation by a separate, non-publicized, decisional rule that
    (a) says "do not criticize and/or punish those who justifiably disobey"; or
    (b) says "criticize and/or punish only class c of those who justifiably disobey"; or
    (c) (in a published decisional rule) says "criticize and/or punish all of those who justifiably disobey."

Furthermore, it is possible that the responders in (3), who also, as rational agents, employ RSP, could justifiably conclude that they should disobey the decisional rule in some or all cases. It also might be optimal for others to criticize and/or punish *them* in some or all cases in which they justifiably disobey the decisional rule. And so on.

IV.

The situation just described, the rejection of what Sartorius has labelled the Reflection Principle,[6] is highly unstable. Schauer's "solution" is to punish those whose rule violations, though motivated by good faith beliefs that they were morally warranted, do not appear so to us as officials, but not to punish those whose violations appear to us to be justified.[7] Schauer's solution, however, does not solve the problem of "the gap." (Note: Schauer's solution is similar to the Model Penal Code's general "lesser evils" defense,[8] except that Schauer's solution

5. *See* Schauer, *supra* note 1, at 649-50.
6. *See* R. SARTORIUS, INDIVIDUAL CONDUCT AND SOCIAL NORMS 55-57 (1975).
7. *See* Schauer, *supra* note 1, at 691-94.
8. *See* MODEL PENAL CODE § 3.02(1) (Proposed Official Draft 1962). The provision reads as follows:

applies even in the face of a clear legislative intent to exclude the defense.) Schauer's solution may lead to too many unjustified violations by those who in bad faith or in good faith mistakenly believe they are justified in violating the rules (and will get no punishment) when they are in fact *not* justified in violating the rules. And punishing those who in good faith mistakenly violate the rules smacks sufficiently of strict liability to cause the psychological instability associated with "the gap": It is difficult to bring ourselves to punish those who have done what we acknowledge was the correct thing to do, even when we understand the consequentialist warrant for punishing them.[9]

V.

Schauer's presumptive positivism cannot eliminate "the gap." Presumptive positivism consists of adding a weight (w) to the rule-following side of the moral balance. Under presumptive positivism, one may violate the rule if, and only if, the balance of moral reasons, including the effects of undermining valued rules, tips in favor of rule violation by more than weight w.[10]

But what if the balance of reasons tips in favor of rule violation, even if we include in support of rule obedience the effects of disobedience on undermining valued rules, but it tips in favor of rule violation by an amount less than w? Presumptive positivism would dictate obedience, but reason dictates disobedience. If amending the rule is not indicated, then reason suggests that we as authority should keep the rule and as subject should violate it, even though presumptive positivism would dictate obedience. Therefore, presumptive positivism fails to eliminate "the gap."

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(1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
   (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
   (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
   (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

9. *See* Alexander, *Pursuing the Good—Indirectly*, 95 ETHICS 315, 324-25 (1985).

10. *See* Schauer, *supra* note 1, at 674-77.

VI.

Although presumptive positivism cannot eliminate "the gap," it can be an implicit part of every rule, unlike Schauer's "rule-sensitive particularism" (RSP).[11] Schauer's treatment of presumptive positivism and RSP masks this important asymmetry.

Compare (1) "follow the rule" with (2) "follow the rule unless the reasons in favor of following the rule, including the reasons for adopting a rule and the effects of violation on undermining rules, are outweighed by the reasons against following the rule." Formulation (2) is Schauer's RSP. Rules cannot be formulated in terms of RSP. A rule so formulated would say, in effect, "Follow me unless the reasons for following me, including the reasons for adopting a rule of my type and the destabilizing effects of violation on rules of my type, are outweighed." The value of that rule *as a rule* is de minimis. Such a rule would be self-undermining and collapse into pure particularism. RSP is and can only be the proper decisional framework for those subject to rules that are *not* formulated in terms of RSP.

Schauer's favored position, presumptive positivism, translates into "follow the rule unless there are reasons of weight w against doing so." The subject would decide whether to follow the rule by engaging in RSP, as is only rational, but the value of the rule *qua* rule in the RSP equation is reduced to the value *qua* rule of a rule with only presumptive weight w. Because that value will be lower than the value of an absolute rule *qua* rule, RSP will lead to violating Schauer's presumptive rules more often than absolute rules, though it will *not* produce the same results as pure particularism.

VII.

Professor Michael Moore argues that laws can be first-order reasons for action based on normative powers.[12] I reject this position.[13] The arguments for laws being first-order reasons are weak, especially in non-democratic legal systems. Even in democratic systems, at best it is not the law, but the majority

11. *See id.* at 649-50. *See also* Alexander, *supra* note 4, at 108.
12. *See* Moore, *Three Concepts of Rules*, 14 HARV. J.L. & PUB.POL'Y 771 (1991).
13. *See* Alexander, *Law and Exclusionary Reasons*, 18 PHIL. TOPICS 5, 15-16 (1990).

will, that most plausibly counts as a first-order reason. Even this is doubtful. As Heidi Hurd points out, an objectionable law enacted democratically may not carry any more weight in terms of first-order reasons for obedience than the same law imposed by a dictator.[14]

Nor can consenting or promising to obey transform law into a first-order reason for action. It is controversial whether promising is itself a first-order reason for action. On one view, promising is analogous to law, a valuable practice that to achieve its value must claim to give first-order reasons for action in accordance with the promise, but that in fact does not do so.[15] On another view, promising does create a first-order moral reason to act as promised, even when there has been no detrimental reliance, but only when the promise concerns matters not subject to any preexisting moral reasons. In other words, leaving aside its reliance effects,[16] promising creates moral reasons to do what is promised only when what is promised is, in the absence of the promise, a matter of moral indifference.[17] (Support for this view of promising comes from noting that promising to commit a murder cannot alter in the slightest the balance of moral reasons against murdering; for, if it could do so, then by making promises to commit murder to a sufficient number of people, one could become morally obligated to commit the murder. And what is true of murder is also true of acts that are only slightly wrong, such as stealing a dime: No matter how many people one promises, one cannot become obligated to steal a dime.)

But even if consenting and promising were first-order moral reasons, there are well known difficulties in generating the moral authority of law out of the moral authority of consenting or promising.[18] And just as with promising and consent, no other theories of legal authority succeed in showing law to be a first-order moral reason.[19]

Moreover, even if law *were* a first-order moral reason, this

14. *See* Hurd, *Challenging Authority*, 100 YALE L.J. 1611, 1646-66 (1991).

15. *See generally id.* at 1657-63. *See also* Buckley, *Paradox Lost*, 72 MINN. L. REV. 775, 775-80 (1988).

16. For a discussion of reliance as a moral basis for keeping promises, see Scanlon, *Promises and Practices*, 19 PHIL. & PUB. AFF. 199 (1990).

17. *See* Alexander, *supra* note 13, at 15.

18. *See* Hurd, *supra* note 14, at 1657-63.

19. *See generally id.* at 1649-57, 1663-66.

would narrow *but not eliminate* "the gap." For unless law were not only a first-order moral reason, but a *conclusive* moral reason as well, "the gap" would remain between what law will justifiably claim one must do and what one must do, all things considered.

VIII.

Alternative solutions to "the gap" either consist in some form of acoustic separation,[20] self-deception, or myth-making about law's authority[21] that would incline us in favor of what legal rules require beyond what we truly have reason to do, or they consist in trying to make punishments for rule-violations more automatic and less subject to the human instinct to withhold punishment from those whose violations are either morally justified or subjectively nonculpable.[22] If legal rules were not over- and under-inclusive with respect to their background reasons—and not justified consequentially by their production over time of a better state of affairs in terms of those reasons than case-by-case direct application of those reasons would produce—then "the gap" would not necessarily be a feature of legal rules. For example, if legal rules were perfect mirrors of moral rules—if they were identical to their justifying reasons, which happened to be rulelike in their formulation—then the rules would not produce "the gap." Although some legal rules may be rules of this type, most are probably of the type Schauer describes. It is highly implausible to imagine a legal system of which all rules, including rules designating procedures, were perfect mirrors of moral rules rather than blunt instruments for achieving the maximum moral benefits over a range of cases. Thus, any plausible legal system will contain "the gap."

20. *See* Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

21. *See* Alexander, *supra* note 9, at 324-25.

22. *See id.*

RULES AND SOCIAL FACTS

JULES L. COLEMAN*

Ronald Dworkin has identified H.L.A. Hart with the view that law consists in rules.[1] That attribution is partially understandable, if ultimately unwarranted. Hart does claim that law consists in rules, but he also explicitly acknowledges that customary norms can constitute part of a community's law though they are not rules. Even if Dworkin overstates the point, it is true that rules are essential both to Hart's jurisprudence and to his theory of adjudication. Why is it that law, for Hart, is primarily a matter of rules?

I. HART AND AUSTIN

In *The Concept of Law*,[2] Hart develops his own position by contrasting it with Austin's. My view is that Hart is constrained by his methodology, which is to develop his view in the light of the particular shortcomings he identifies in Austin's jurisprudence. Nowhere is this clearer than in his development and articulation of the view that law consists in social rules. Before turning to the way in which Hart is drawn to identify law with social rules, it is useful to look at another example of the way in which Hart develops his view as a response to, and ultimately as an extension of, Austin's.

Hart correctly argues that Austin's view of law as the order of a sovereign, backed by a threat of sanction, can explain neither (1) the fact that the commands of dead and departed sovereigns continue to be law, nor (2) the fact that the first command of a nascent sovereign is law in spite of the fact that it has not yet secured the requisite habit of obedience from those it orders.[3]

The flaw in Austin's logic lies in his narrow conception of the nature of law as consisting in liberty-limiting or constraining

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1. *See* R. DWORKIN, LAW'S EMPIRE 34-35 (1986).
2. H.L.A. HART, THE CONCEPT OF LAW (1961).
3. *See id.* at 60-76.

principles or norms.[4] By introducing into the concept of law the idea that some legal norms enhance the scope of liberty by empowering individuals, the problem Hart poses for Austin's account is solved. The sovereign at any given time is someone who occupies a legal office. Occupants of that office have authority of a certain sort; their commands are law. Thus, they are empowered with legal authority by the rules that define their office.

Were all positive law liberty-limiting, then the concept of an office of this sort would be impossible. Such offices are defined by legal rules, but these rules do not constrain. Rather, these rules empower. Were there no such rules, there could be no offices. Were there no office of the sovereign, there would be only particular sovereigns whose identities as such would depend on having secured and maintained the habit of obedience. Thus, the problems of persistence and continuity to which Hart draws our attention would remain. They can be resolved only by notions of sovereignty and the office from which the sovereign governs. Such offices, in turn, are constituted by rules that empower, not by norms that constrain.

Because offices require power-conferring or enabling norms, it comes as no surprise that in identifying the core of his position, Hart claims that law consists in norms of two sorts: those that *constrain*, consistent with Austin's analysis, and those that *enable*.[5]

Hart's introduction of rules into the concept of law has a similar genesis. He begins by noting a problem in Austin's account and demonstrates that the source of the problem is Austin's identification of law with particular commands rather than with norms of sufficient generality and normativity (that is, rules).[6] Jurisprudential theories have traditionally attempted to answer two distinct but related questions. First, what is law, and second, why is it binding? The first of these questions is analytic, hence the concept of analytic jurisprudence. The second question is normative. Many scholars have taken the first question to be an invitation to provide an account of the meaning or the proper or ordinary use of the term "law." These are the theo-

4. *See* J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (H.L.A. Hart ed. 1954).

5. *See* H.L.A. HART, *supra* note 2, at 77-79.

6. *See id.* at 78-96.

ries—semantic theories—that Dworkin believes are particularly subject to what he calls the "semantic sting."[7]

The more interesting question concerns the law's normativity or authority. If law is the command of a sovereign, how is it that law can be binding or thought to create obligations in those to whom it is directed? Austin's answer to this question relies on the fact that as a result of the sovereign's ability to offer credible threats, individuals develop a habit of obedience directed toward the sovereign and his commands. Hart objects that the picture Austin paints is one more suitable to the relationship between gunman and hostage, where we are more likely to speak of those to whom commands are directed as being *obliged* to behave in certain ways, rather than as their being obligated so to act. As such, Austin does not account for the law's ability to impose *obligations* upon its citizens. The shorthand way of characterizing this objection is to say that "habits of obedience express what people do *as a rule*," and, as a consequence, are mere descriptions lacking the normative dimension necessary to explain the normative force of law.

Having identified the problem, it remains for Hart to provide the solution. In this case, the solution is provided by the concept of rules. Law is not formed through the marriage of commands with habits of obedience. Instead, Hart argues that law consists in rules, and, in particular, law consists in *social rules*. What are social rules? Social rules have two dimensions. In one respect, they are descriptions and characterizations of what people do *as a rule*. As such, they correspond closely to Austin's "habits of obedience." Habits of obedience, however, lack a normative dimension. By conceiving of these habits as motivated by the credible threats of the sovereign, Austin fails to address this second, normative dimension.

Social rules can have normative force in that they have a prescriptive or reason-giving dimension. Whether they provide reasons for action depends on citizens accepting them from an internal point of view. Social rules that are constituted by convergent social behavior accepted from an internal point of view

7. *See* R. DWORKIN, *supra* note 1, at 45-46. My own view is that there is no such thing as a semantic sting. Whatever objection Dworkin intends to put forward under this label, it is considerably less troublesome than Dworkin thinks it is. Nor do I believe that any of the people Dworkin seeks to criticize, particularly positivists like Raz or myself, see jurisprudence as an effort to provide definitions in the form of necessary and sufficient conditions.

provide reasons for compliance with their demands and grounds for criticizing the noncompliance of others. As such, social rules possess normative force. Only if laws are social rules in this sense can law's normativity be understood in a manner consistent with positivism's identification of law with social fact. In part, this is because acceptance from the internal point of view is itself characterized in terms of the behavior of members of the community. Rules are accepted from an internal point of view when the actors treat the rules as providing them with reasons for acting and with grounds for criticizing the behavior of those who fail to comply with the rules' requirements.

Rules are introduced into the concept of law by Hart as a way of solving the problem of accounting for law's obligatory or reason-giving nature. It is important that the notion of a rule Hart introduces is that of a social rule, a rule that is constituted by convergent social practices, and whose authority as law is also a matter of social fact. The notion of law as social rule is important for two reasons. The first, and most important, is that the concept of authority implicit in law is rooted in behavior, and ultimately in concrete social fact. The second, and most relevant for my current purpose, is that Hart's notion of a social rule is built up from and incorporates Austin's "habits of obedience." A social rule is constructed from convergent social practices; its content, in other words, is given by what people do as a rule. To make all well with Austin's account, we can keep the identification of law with convergent social practices. We simply jettison the view that such practices are normative because they have a causal history of a certain sort—that is, they arise from the sovereign's capacity to render credible threats—and replace it with the idea that such practices are aspects of social rules. Once again, we see how Hart's position is built up from his objections to Austin's.

II. Social Rules and Legal Rules

Introducing this conception of rules into Hart's jurisprudence is not without its share of problems. Law is binding because it consists in social rules. Social rules require convergent social practices. In fact, law can have authority, even in the absence of convergent behavior with respect to them. In some cases, legal rules create a convergent practice where none had

previously existed. In other cases, legal rules adjudicate among conflicting and competing practices. Rules can be law, and binding if law is binding, even if they are not social rules and lack the convergent social practice associated with them. It cannot be the case that the authority of a law depends on the existence of a convergent social practice.

In fact, Hart gives up this account of law's authority. He does not ultimately require that, in order that law be binding, law consist in social rules. In the end, Hart's view is something like this: The authority of a norm as law depends on its relationship to a master rule—a rule of recognition. Law is authoritative if it is *valid* under a rule of recognition. The rule of recognition sets forth the conditions of legal validity. For each norm subordinate to the rule of recognition, its authority does not depend on it being a social rule. Social rules depend on convergent social practices, and in the case of many particular legal rules, there is no social practice of the relevant sort. Therefore, we find in Hart an inconsistency that is largely a function of the development of his theory entirely as a response to the shortcomings he identifies in Austin.

If Hart cannot consistently advance the view that law's authority depends on law consisting in social rules, what view of law's authority does he ultimately come to? Hart has a two-part answer. For rules subordinate to the rule of recognition, legal authority is a matter of legal validity. Particular norms are binding provided they are valid under a rule of recognition, but what makes the rule of recognition authoritative?

There are only three possibilities. First, the authority of the rule of recognition may itself be a matter of its validity under some other rule. This is hardly a satisfactory solution because it renders this latter rule the true rule of recognition. Instead of answering the question, it merely postpones it. Alternatively, the authority of the rule of recognition may depend on its morality; that is, the rule of recognition is itself ultimately a normative rule whose authority is a matter of its truth as a principle in some defensible critical morality. This solution will not work for the positivist for the simple reason that it reduces positivism to a form of natural law theory. Finally, the authority of the rule of recognition may itself consist in its being a social rule, constituted by a social practice among the relevant officials, a rule that they accept from the internal point of view.

This last solution is in fact Hart's position.[8] The claim that all laws are binding because they are social rules disappears. Instead, laws are authoritative, provided they are valid under some other rule, the rule of recognition. Thus, the authority of particular norms as law is a function of their having a formal relationship of validity with the rule of recognition. But that rule's (the rule of recognition's) authority cannot be a matter either of its formal validity or its substantive defensibility. Its authority must be a matter of *social fact*. Thus, Hart saves the social rule account of legal obligation by abandoning the claim that all legal rules are social rules. He replaces that account with the view that a norm has legal authority only if it is valid under a rule of recognition that is itself authoritative because it is a social rule.[9]

The rule of recognition is a social rule, but a very special one.

8. *See* H.L.A. HART, *supra* note 2, at 144-50.

9. Two brief points should be made here. First, in the same way that Hart's view is constrained by the fact that he develops it largely as a response to the shortcomings he finds in Austin's account, Dworkin's early work, *Taking Rights Seriously*, is constrained by the fact that his view is developed largely as a response to the features of Hart's view that he finds objectionable, especially Hart's theory of adjudication. Thus, it comes as no surprise that Dworkin develops his theory of law by beginning with a theory of adjudication. *See* R. DWORKIN, *supra* note 1, at 1-44, *passim*; R. DWORKIN, TAKING RIGHTS SERIOUSLY 14-45, *passim* (1977). Like Hart, whose work is defined by the parameters Austin's account provides, Dworkin is imprisoned by his connection to Hart's account.

The second point concerns the rule of recognition and is more interesting and controversial. Two possible conceptions of the claim that the rule of recognition is a social rule should be distinguished. The first is that the rule of recognition is itself a social rule in the sense that its content is determined by a convergent social practice accepted from the internal point of view. The substance or content of the rule is given by the practice.

The second interpretation of the claim that the rule of recognition is a social rule recognizes that the rule itself may not be constituted by convergent social practices. Instead, its authority as a rule of recognition depends on there being a social practice of accepting it as authoritative.

The difference is important and complex. First, to claim that the rule of recognition is a social rule is to say that its content cannot be specified other than as a description of a prevailing practice. In the second interpretation, the one that I favor, the rule of recognition, in principle at least, can be specified independently of the existence of a social practice. Rather, the social practice is a complex of behaviors of officials oriented toward the rule of recognition. There can be a rule of recognition in the second sense independent of the practice, though there may be epistemic barriers to determining its content. The first, traditional interpretation, which views the rule of recognition itself as a social rule, maintains that the content of the rule is given by the practice, whereas the authority of the rule is given by its acceptance from an internal point of view. In the second interpretation, it is not a necessary feature of the rule of recognition that its content be given by a convergent practice. It is this distinction that threatens to reduce positivism to a form of realism. What makes the second interpretation of the rule of recognition consistent with positivism is the claim that the authority of the rule depends on the existence of a social practice among officials oriented toward it, a practice of accepting a rule accepted from the internal point of view. In both interpretations, there can be no rule of recognition without a convergent practice. The difference is

It serves two functions in Hart's jurisprudence: One of these is epistemic, the other ontological or semantic.[10] The rule of recognition serves an epistemic function to the extent it specifies conditions of identification, validity, and authority. The rule of recognition serves an ontological or semantic function to the extent that it specifies existence and truth conditions.[11]

Once there is a rule of recognition, the authority of a particular rule need not depend upon its being a social rule. If norms can have legal authority without being social rules, must they be rules at all? What constraints does positivism impose on the sorts of norms that can be law or sources of law? To the extent that law is a matter of rules, what sort of rules must law be? The account that Hart gives in the first few chapters of *The Concept of Law* suggests that law must consist in rules and that otherwise law's authority cannot be explained.[12] Once Hart recognizes the plain fact that law can be authoritative even if it does not consist in rules, however, he can no longer require that law consist in social rules. Does this mean he has to give up the claim that law consists in rules? Or does it mean that if he remains committed to the view that law consists in rules, he needs another argument in support of it? If he does not require that law consist in rules alone or primarily, what else might law consist in? Does legal positivism have a stake in the extent to which law is necessarily or primarily a matter of rules?

III. SCHAUER AND THE POSITIVIST TRADITION

Hart does not specifically address any of these questions. They are, however, among the questions that Professor Frederick Schauer takes up both in this Symposium[13] and in the book-length manuscript, *Playing By The Rules*.[14] Schauer sets for him-

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that in the first interpretation, but not the second, the rule is constituted by the practice.

10. *See* J. COLEMAN, *Negative and Positive Positivism*, in MARKETS, MORALS AND THE LAW 1, 5 (1988).

11. One of the problems in Raz's version of positivism is the fact that he invariably runs these two functions together. *See* J. RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 212 (1979). So, for example, he claims that the sources thesis applies to both law's identification and existence conditions. The conditions that must be satisfied to identify law, however, need not coincide with those that are necessary either to establish law's existence or its justifiability.

12. *See* H.L.A. HART, *supra* note 2, at 1-76.

13. *See* Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645 (1991).

14. F. SCHAUER, PLAYING BY THE RULES (forthcoming 1991). In the essay in this volume, Schauer restricts himself primarily to the question: What is the relationship be-

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self the task of analyzing the nature of rules, and then exploring their relationship to law. In his contribution to this volume, he is most interested in the under- and over-inclusiveness of rules.

We can distinguish between rules and the sets of factors that support them. These factors include considerations of justice, social policy, morality, and efficiency. In some cases, a decision based on rules will not further the goals or aspirations that support the rule as well as might a decision based directly upon more particularistic and contextual considerations. Rules are incapable of being perfectly fine-tuned. Sometimes rules will include within their domain cases that fall outside their set of background reasons, and they will exclude others that fall within that set. These characteristics are a function of rule generality. Thus, rules are necessarily under- and over-inclusive *with respect to the sets of reasons that support or ground them.*

Because rules are designed to promote certain background aims and ambitions, and because rules are both under- and over-inclusive with respect to those goals and principles, it is a fair question to ask why law should emphasize rules. Why not appeal directly to the reasons and leave rules out altogether? This question presupposes that a particular jurisprudence is a matter of choice, that a community can choose whether its law should consist in rules or in the principles that inform rules. Finally, this raises the question in analytic jurisprudence whether law is necessarily a matter of rules, for if law is necessarily a matter of rules, then communities are not free to formulate law in terms of background reasons alone—or even primarily in those terms.

We can distinguish between an analytic question of general jurisprudence and a question about a particular jurisprudence, namely, positivism. The question of general jurisprudence is whether law necessarily is a matter of rules. Is there something about the nature or essence of law that requires that legal norms consist in rules? The question about positivism is whether *it* is committed to the view that law necessarily consists in rules. Certainly, Dworkin believes that positivism is commit-

tween law and rules? In the book-length manuscript, he provides an analysis of the nature of rules more generally, and of the way rules figure into our social and normative lives.

ted to the view that law consists in rules.[15] That assumption is one of the reasons that in his early articles he concludes that he has defeated positivism by showing that principles and policies can be legal norms though they are not rules.

Hart is committed to the view that law consists in rules as a consequence of his belief that the reason-giving capacity of law depends on law consisting in social rules. Once the social rule argument evaporates, so too does the only argument for law-as-rules in *The Concept of Law*. So if positivism is committed to the model of rules, there is no argument for that position in Hart. My view is that positivism is not in fact committed to the view that law consists in rules.

For his part, Schauer simply assumes that positivism is committed to the view that law consists in rules.[16] Like Dworkin, he identifies positivism with the jurisprudence of rules and attempts to provide an explication of what rules are. Assuming that positivism is the jurisprudence of rules, he begins his inquiry with the problem of general jurisprudence: Is law necessarily a matter of rules or not? Schauer's answer to the problem of general jurisprudence is that law is neither necessarily a matter of rules exclusively, nor is it necessarily a matter of reasons exclusively. This is the easy answer, but it is an answer to an easy question as well. The more difficult question is whether law must be in some part, large or small, a matter of rules, even if it is not necessary to the concept of law that all law consist in rules.

Following Schauer, I accept that law need not be exclusively a matter either of rules or of reasons. It can be a mixture of both, or it can, in a particular community, be one or the other. Which mix of rules and reasons is expressed by American jurisprudence? That is a question of particular jurisprudence, and at first blush, appears to be a question in sociology, not one in analytic or normative jurisprudence. To the extent that answering it requires a constructive interpretation of our existing practice, however, it is as much a problem in jurisprudence, analytic and normative, as it is a problem in sociology.

Like Hart, who constructs his account in response to the failings he identifies in Austin, and like Dworkin, who develops his theory of law as a response to the shortcomings he notes in

15. *See* R. DWORKIN, *supra* note 1, at 33-35.
16. *See* Schauer, *supra* note 13, at 662-63.

what he takes to be Hart's theory of adjudication, Schauer stakes out the ground between Hart and Dworkin, who represent the jurisprudence of rules and of reasons, respectively. He accepts Dworkin's characterization of positivism as the model of rules.[17] At the same time, he characterizes Dworkin as arguing for the centrality of reasons and sources of law, not for rules of law as such.[18] Rules merely give expression to a set of principles that provide the best explanation of them. Jurisprudence begins with the rights of litigants. These rights derive from the best theory of the law. Rules are the data from which the theory is to be constructed, but the judge's task is to enforce the relevant rights, not to apply the rules. Thus, Schauer identifies Hart's positivism with the model of rules and Dworkin's position with the model of reasons.[19] In advancing the view that law is neither a matter necessarily of rules nor of reasons alone, Schauer intends to offer an alternative to both Hart's positivism as well as to Dworkinian rights theory. He calls his thesis "presumptive positivism," emphasizing the centrality of rules to jurisprudence and the importance of departures from rules to the reasons that support them.

A. *Jurisprudence and Reasons*

In fact, as Schauer correctly notes, Dworkin's theory is only one of a family of possible alternatives to rule-based jurisprudence. Let us call all members of this family "all-things-considered" theories, by which we mean that in a particular case, a judge should reach the result that is best, all things considered. The contrasting view is that in particular cases, judges should reach those decisions that are dictated by the rules, whenever rules dictate decisions, whether or not the decision is the best, all things considered.[20] In this regard, three points need to be emphasized.

17. *See id.* at 668-71.

18. *See id.*

19. *See id.* at 665-74.

20. It is unclear exactly the sense in which rules dictate particular results, in Schauer's view. In one sense, we can say that the rule has particular *linguistic* indications. For example, suppose the relevant rule of law prohibits motor cars in the park on weekends. A Ford or Chevrolet automobile is a motor car, and if such a car is found in the park on the weekend, it stands in violation of the law. On the other hand, we might say that a rule has decisive *normative* indications if it turns out that a particular case is an instance of the policies, principles, and goals that support the relevant rule. Linguistic indications of a rule need not coincide with its normative indications.

1. *Rules, Reasons, and Open Texture*

The first point concerns the open texture of rules. A theory of law that emphasizes rules in the way Schauer believes that legal positivism does recognizes cases in which rules neither dictate nor indicate a particular result. A positivist may claim that judges should decide such cases in ways that produce the best result, all things considered. In spite of this feature of rule-based theories, an important difference between them and all-things-considered theories remains. This difference surfaces in those cases in which the rule departs from what would be best, all things considered. In such cases, all-things-considered theories claim that judges should impose the outcome that is the best, all things considered, even if the rules dictate a different result. And this is precisely what someone who believes in the centrality of rules means to deny. Thus, the open texture of rules provides an area of overlap between rule- and non-rule-based theories, but it does not imply that rule-based theories collapse into all-things-considered theories.

2. *Rules, Reasons, and Adjudication*

The second point concerns the theory of adjudication. In all-things-considered theories, adjudication is nothing more than determining what, in a particular context, is the best result. It is central to Schauer's analysis that rule-based theories can give different results than all-things-considered theories. This claim requires that Schauer produce a theory of adjudication—an account, in other words—of the ways in which judges apply and follow rules. In particular, he argues that rules dictate or indicate results.[21] This is precisely what realists deny. I do not deny that rules dictate results, but it is incumbent upon anyone who wants to emphasize a distinction between rule-based and other theories to show how rules generate results in ways that do not collapse rule-based theories into all-things-considered theories.

3. *Reasons and Constraints*

The third point to note is that there is an enormous variety of all-things-considered theories that differ in a number of dimensions. First, there can be forward- and backward-looking theo-

21. *See* Schauer, *supra* note 13, at 671-74.

ries. Economic instrumentalism is a version of the former; Dworkin's rights thesis is a version of the latter. According to economic instrumentalism, judges decide cases so as to minimize costs and maximize welfare *in the future*. Legal disputes enable us to more finely hone the incentives that legal rules put in place; those incentives are, or should be, wealth-maximizing. According to a version of Dworkin's thesis, judges enforce the preexisting rights of litigants. In both cases, the role of preexisting rules is of contingent and derivative significance. In the instrumentalist account, rules are (at best) approximations of efficient solutions to resource allocation problems. Moreover, in determining what would be efficient, judges should consider the extent to which departures from the rule threaten to upset the coordination effects of well-entrenched rules.

In Dworkin's view, the rules are presumed to be an articulation or expression of underlying principles of a political morality. In every case, even those that fit the core of a rule, the judge must take recourse to those principles to determine the litigant's *preexisting* rights under the law, not under the rules. Thus, economic instrumentalism is forward-looking; Dworkin's rights-based thesis is backward-looking. In both cases, explicit legal rules are understood in the context of approximations of the background policies and principles. In the former case, legal rules are efficient solutions to resource allocation problems. In the latter case, legal rules operate as expressions of the underlying principles of justice and fairness characteristic of constitutional democracies.

IV. Positivism and Presumptive Positivism

Schauer articulates a theory located between rule-based positivism and Dworkin's all-things-considered theories: a theory that lies between rules and reasons. Schauer identifies his position as presumptive positivism, indicating the centrality of rules in the first instance and the flexibility to consider the background reasons. He attempts to develop his theory in such a way so as to be conceptually unassailable, descriptively accurate, and normatively attractive.

There are many ways one might seek to criticize Schauer's position. One might ask whether he correctly describes or characterizes the positions with which he seeks to contrast his own. On the other hand, he might have these accounts right, but his

account of Anglo-American jurisprudence may be *descriptively inaccurate*. Finally, his account of law in constitutional democracies may be descriptively accurate, but it may be *normatively unattractive*. That is, he may over- or under-emphasize the value of rules in law.

There are some problems with all of these aspects of Schauer's thesis, but in an essay of this sort I am in no position to explore them all. Therefore, I will focus on problems of the first sort. Frankly, as one of the positivists Schauer discusses, I don't think he has positivism right. I want to lay out my version of positivism and contrast it both with Schauer's and Raz's, with which he periodically aligns himself. I then want to explain why the version of positivism I advance is descriptively accurate in ways that Schauer suggests it cannot be. Ultimately, my account is descriptively and conceptually more accurate than Schauer's.

A. *Negative and Positive Positivism*

It is important to distinguish between two forms of positivism. I label these negative and positive positivism.[22] Both theories attempt to identify the core claims of positivism: just what positivism as a legal theory seeks to assert or to deny; what its essential elements are; what every positivist must assert is true of law necessarily. In "Positivism and the Separation of Law and Morals,"[23] Hart argues for a version of positivism that merely denies a necessary connection between law and morals. There is no necessary connection between what the law is and what it ought to be. In other words, the fact that a legal norm is valid in a particular community does not imply that it is a morally desirable norm of behavior. On the other hand, as Raz notes in passing, it does not follow that the validity of a norm as law somehow precludes a norm's moral desirability, even to the extent that it is compatible with this claim of positivism that every valid norm of a legal system turns out to be morally desirable.[24] The core claim of positivism is simply that the morality of a legal norm is analytically distinct from its legality.

Positivists and their critics refer to this core claim of positiv-

22. *See* J. COLEMAN, *supra* note 10.

23. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

24. *See* J. RAZ, *supra* note 11, at 212. Raz makes the same argument in a more recent article. *See* Raz, *Legal Rights*, 4 OXFORD J. LEGAL STUD. 1, 10 (1984).

ism as the separability thesis. Though no proponent or critic of legal positivism denies that positivism is committed to the separability thesis, there is far less agreement about what it means and its implications for positivism. Hart characterizes the separability thesis as the claim that there is no necessary connection between the law as it is and as it ought to be. I understand this to mean that positivism is committed to the view that the morality of a norm is not necessarily a condition of its legality. Ultimately, however, positivism does not rule out the possibility that, in some legal regimes, the legality of a norm can depend on its morality. An important difference, in my view, is that positivism denies that the morality of a norm is a necessary condition of its legality. The separability thesis can be characterized in other equally defensible ways. For example, it can be understood as the claim that even in those communities in which law and morality are coextensive, they are not cointensional. Alternatively, it might be understood as claiming that what makes a norm a matter of the community's law is distinguishable from what makes it a part of that community's morality.

All versions of positivism that are characterized entirely in terms of the constraints imposed by the separability thesis alone I call negative positivism to draw attention to the sort of claim that they make, namely, a negative one. Instead of articulating some truth about all law everywhere, negative positivism simply denies that morality is necessarily a condition of legality for all possible legal systems.

Given a proper interpretation of the separability thesis, I think negative positivism is conceptually unassailable and descriptively accurate. There is no logical or conceptual contradiction in asserting that there exists a possible world in which there is law and in which what makes something law is not a matter of its morality. So long as such assertions are not contradictory, negative positivism will be unassailable. It is descriptively accurate largely because it makes no descriptive claim. It does not say that such-and-such is true of law in the United States, England, or the like. It simply says what is not necessarily true of law, period. So what is true of law in the United States, or anywhere else, for that matter, will be perfectly compatible with positivism, so understood. Therefore, while I am convinced that negative positivism is both concep-

tually unassailable and descriptively accurate, it is also true that I do not think it a very interesting thesis—and neither should you.

One might impose an adequacy condition on theories of general jurisprudence that they make a claim about what, if anything, is true about all possible legal systems. That is a reasonable constraint on anything that purports to be a general jurisprudence, as opposed, say, to an American jurisprudence—a subject about which I for one have considerably less interest. Now it is perfectly compatible with all that I have said so far that there is nothing that is true of law as such: that all features of legal systems other than that captured by negative positivism are contingent features of them. This is a perfectly plausible thesis, and perhaps it is the "positive" claim advocates of negative positivism are prepared to put forward.

B. *Understanding Law's Sociology*

Still, I think a positivist can say more, and what that something else is is captured by a form of what I call positive positivism. Theories are instances of positive positivism if they make a claim about what is true of all legal systems necessarily—as part of the very concept of law or legality—claims that are consistent with and motivated by the underlying commitments of a positivist jurisprudence. What are those commitments? So far, following Hart, we have identified positivism with the separability thesis. Is there anything other than the separability thesis to which positivism is committed? Raz, for one, identifies positivism with the claim that law is essentially or fundamentally *institutional* in nature.[25] I agree, but the claim needs to be clarified further. Both Raz and I want to express the institutional nature of law in terms of the claim that law is ultimately a matter of social fact. In my view, law is ultimately a matter of social fact in the sense that the authority of the rule of recognition is itself a matter of social convention. I want to explain what I mean by this claim. In doing so, I shall contrast my position with Raz's, identify where Schauer thinks I run into trouble, and respond to his objections.

Let me begin by noting that the view I advance, that law is ultimately a matter of sociology or social fact, is not original

25. *See* J. RAZ, *supra* note 11, at 191.

with me. In the introduction to *The Concept of Law*, Hart claims that the book can be viewed as an inquiry into analytic jurisprudence or descriptive sociology.[26] This is a deep point. For I believe the point of positivist jurisprudence is to demonstrate exactly how thin the concept of law is; how few are the substantive inferences that can be drawn from it; how minimal its moral content is. If one wants to know anything particularly substantive about a legal system or culture, one has to go beyond analytic philosophy to sociology, to an account of the ongoing practices that constitute a community's legal culture, an account that is, in a variety of ways, internal to the culture and to its practices.[27]

It is also worth noting how deep the commitment to jurisprudence-as-sociology runs in *The Concept of Law*. First, when discussing how law can be binding, Hart notes that the answer lies in the fact that law consists in rules. What kind of rules? *Social rules*![28] And what exactly are social rules? They are constructed from existing social practices. Moreover, what makes them binding or authoritative? The fact that they are accepted from an internal point of view. But how does Hart analyze acceptance from an internal point of view? In terms of social behavior, that's how. Rules are accepted from an internal point of view if individuals use them in a certain way, if they characteristically appeal to the rules to provide grounds for criticism and reasons for action.[29]

Next, when Hart abandons the view that a law is binding only if it is a social rule, what does he put in its place? Two related notions. First, that the legality of a norm depends on some fact about it. What fact? That it satisfies the conditions of legality set forth in the rule of recognition. That is either true of a norm or it is not, and whether it is depends on the criterion of legality set forth in the rule of recognition. Whether or not it is true of a norm is a *social* fact about it. Second, the authority of the rule of recognition itself is a matter of social fact. Hart puts

26. *See* H.L.A. HART, *supra* note 2, at v-vi.

27. One cannot doubt that the central positive claim of positivism is that law is ultimately a matter of social fact. Returning to Austin, one again notes that the law is the order of a sovereign, but what makes someone the sovereign? Two social facts provide the answer: First, she has the habit of obedience from subordinates, and second, she is not herself in the habit of obeying anyone. Raz and the sources thesis also shed light on this inquiry. *See* J. RAZ, *supra* note 11, at 210-16.

28. *See* H.L.A. HART, *supra* note 2, at 86-96.

29. *See id.* at 55-56.

this somewhat differently. He says the rule of recognition is itself a social rule. It is not valid or in some other sense correct; it just is. In either case, legality is a matter of social fact.

There are a lot of ways of understanding these claims, but Dworkin does not seem fully to appreciate them. The claim that law is a matter of social fact is sometimes treated by Dworkin as the claim that law is a matter of plain fact or historical fact or uncontroversial fact or else it is a matter of pedigree.[30] It is evident that none of these claims is equivalent to or otherwise entailed by the claim that law is a matter of social fact. Social facts may or may not be plain, simple, historical, or uncontroversial.

Schauer follows Dworkin in ascribing to positivism the view that the legality of norms is a matter of their pedigree.[31] I fail to see how either the separability thesis or the claim that law is a matter of social fact entails this requirement. Let's return to the distinction I have mentioned between the epistemic and semantic senses of the rule of recognition. Now if the rule of recognition is a semantic rule—as I have argued it is—there is no reason why the conditions of legality set forth in it should rely entirely on pedigree.[32] On the other hand, suppose the rule of recognition is an epistemic rule, that is, it specifies criteria by which individuals can come to know what the law of their community is. In that case, the claim that the rule of recognition must set out a pedigree test of legality is understandable, but it is still incorrect.

The basic idea is this. Let's contrast a pedigree standard with a moral standard. A pedigree standard will look something like this: (x) (x is a proposition of law iff x has been passed by a legislature and signed by the relevant executive, or x is an established judicial precedent). A moral standard may look like this: (x) (x is a proposition of law iff x represents a dimension of justice or morality within the best moral theory). In order to determine whether something is part of the community's law under the typical pedigree standard, one need only look it up. It can be found by nearly everyone, at least in principle, and so everyone can determine by the use of the relevant rule of recognition what their rights and duties under the law are. On the

30. *See* R. DWORKIN, *supra* note 1, at 33-35.
31. *See* Schauer, *supra* note 13, at 666; R. DWORKIN, *supra* note 9, at 17.
32. *See supra* p. 709.

other hand, determining what the law is under the moral criterion is no easy matter. It requires substantive moral argument. Controversy about one's rights and duties will be inevitable, and individuals guided by such a rule of recognition will be unlikely to ascertain adequately, let alone fully, the scope of their legal rights and obligations. Only if one identifies positivism with Hart's version of it does it make sense to characterize positivism as committed to a pedigree standard of legality.

But there is no reason to identify every claim Hart advances with an essential commitment of positivism more generally. Moreover, epistemic adequacy does not require pedigree. Pedigree standards are among those standards that in principle can be epistemically adequate. In principle, any non-contentful criterion of legality can be epistemically adequate. The real problem surrounds the question whether contentful standards of legality can be epistemically adequate. To answer this question completely, we will need a good analysis of what it means for a standard to be contentful as well as a conception of epistemic adequacy. In the context of this paper, we shall settle for something less. Let's say that a standard is contentful if determining whether something is law under it requires an evaluation of the norm's value. On the other hand, let's say that something is epistemically adequate if average citizens can reliably call upon it to determine with an acceptable degree of confidence what their legal rights and responsibilities are.

It follows that some contentful standards of legality can be epistemically adequate. Substantive consideration of a norm's value need not stir controversy nor need a criterion that requires such assessments as a condition of legality prove epistemically unmanageable. Certainly in communities that share some fundamental set of values, not only in the abstract, but in concrete particulars as well, reference to a norm's value as a condition of its legality need not render the rule epistemically inadequate or essentially controversial.

Of course, some possible rules of recognition will be less than epistemically adequate in this sense. The rule that a norm is a legal norm iff it is part of the correct morality may well be such a rule. But even here notice how much is being assumed about the background conditions of the community. When critics like Dworkin deny that any such rule can be a rule of recognition in the positivist's sense, they are presupposing that any

such rule will be a source of substantial controversy. If it is a source of substantial controversy, it cannot be a social rule nor can it be epistemically adequate. It cannot be a social rule because social rules are constructed in part from convergent practices and such rules lead to divergence, not convergence.[33] It cannot be an epistemic rule because individuals cannot appeal to it in a reliable way to determine their legal rights and duties.

But neither of these claims really follow, do they? In my view, as I noted earlier, the rule of recognition is not itself a social rule. It is authoritative only if there is a social practice in regard to it among relevant officials. Therefore, it need not be constructed out of convergent practices. And, in particular communities, there may be so much agreement about the demands of a correct morality that the rule of recognition is in fact epistemically adequate in that community. In other words, the claim that such a rule cannot be epistemically adequate has as its background condition a view of societies like our own—extremely heterogenous and pluralistic. That is a contingent feature of social organizations, not a necessary one.

Moreover, I deny that the rule of recognition must be epistemically adequate in this sense. My claim is that an analysis of the concept of law is fundamentally a *metaphysical* inquiry; and, as such, the rule of recognition must specify ontological or semantic conditions only. Is the analysis fundamentally a metaphysical one?

To see where the issue lies, consider the difference between Raz and me. Recall that we are discussing my claim that positivists are committed to the view that law is in some sense a matter of sociology or social fact. Raz and I differ on what the proper interpretation of this claim is or should be. For Raz, it entails the view that what makes any norm a matter of law must be a social fact about it: This is his famous Sources Thesis.[34] Thus, even if the norms themselves need not be social rules or facts, the conditions of legality must be social facts, as opposed, say, to moral criteria. That, for Raz, is what it means for the law to consist in social facts. And it is a position he believes is true of both law's epistemic and existence conditions. Thus, in Raz's view, "(*x*) (*x* is a legal norm iff it is a dimension of justice or morality in the best critical moral theory)" could never be a

33. *See* J. COLEMAN, *supra* note 10, at 12-20.
34. *See* J. RAZ, *supra* note 11, at 212.

rule of recognition, for such a rule would identify the grounds or sources of law with moral arguments, not social facts.

In my view, there is no reason why such a rule cannot be a rule of recognition, at least in principle. Therefore, I must have something else in mind when I claim that the law is ultimately a matter of sociology or social fact. I do. My claim is not that the conditions of legality must specify only social facts about norms; rather, the claim is that a particular rule of recognition that is the rule of recognition in a particular community is a social fact about that community. For Raz, the social fact thesis is a constraint on the content of the rule of recognition itself. In my view, neither the separability thesis nor the view of the rule of recognition as a semantic rule imposes any constraints on the substantive content of a rule of recognition. Virtually anything can in principle be a rule of recognition. That a particular norm is the rule of recognition in a community is in my view a social fact about that community; it is not, for example, a claim in critical morality, and therefore, its truth does not depend on substantive moral argument. That in my view is the cash value of the claim that law is a matter of social fact. In short, determining which norms are part of a community's law may well involve substantive moral argument given a particular rule of recognition; that that rule is the rule of recognition, however, is a social fact about the community that does not require moral argument for its truth.

V. The Limited-Domain Thesis

Properly understood, the separability thesis does not restrict the *content* of a rule of recognition. Thus, in some community, the rule of recognition may be: x is law in the community iff x is a principle of a correct or defensible morality. In that case, a community's law will be a proper subset of morality. This is a logical consequence of my view. Is there anything wrong with it? Both Schauer and Raz think so. Schauer asserts that positivism insists on a distinction between "law" and "non-law," and he cites a variety of people to that effect.[35] And since my view entails the possibility that in a *particular* community, there may be no difference between the two, either my view is incorrect or it is not positivism. This objection is groundless, however.

35. *See* Schauer, *supra* note 13, at 666 & n.41.

Suppose that, in every possible legal system, the community's law completely *coincided* with what was morally correct. This would show only that law and morality are everywhere coextensive, not that they are cointensional. As I understand positivism, it is the intensional (conceptual) relationship between law and morality that counts. Even if law and morality coincide, what *makes* something a moral principle is the fact that it is so in the correct theory of morality; and what *makes* something law is the fact that it satisfies the conditions of legality in the rule of recognition. The ontological and semantic criteria of law and morality continue to differ. Generally, if law and morality coincide in a particular community because the criterion of legality is *x* is law only if it satisfies the criterion of morality, the distinction between law and morality would remain. There is a criterion of morality, and there is the separately identifiable criterion of legality.

It would be a very different thing if it were not merely a contingent social fact about all legal systems that their rules of recognition made morality a condition of legality, if, for example, it could not be otherwise, that the concept of law required that law be a matter of morality. Then, the relationship between legality and morality would be intensional. Only then would there be no separation between law and morality of the sort envisioned by the separability thesis.

There is an important sense in which anyone who accepts the separability thesis believes that there is a difference between the categories of "law" and "non-law." The difference is one of criteria of meaning, not extension.

Schauer appears to treat the claim that there is a difference between law and non-law as equivalent to what he calls the *limited-domain thesis*, by which he means that in any community the law must be only a part of that community's stock of norms.[36] The limited-domain thesis is *not* entailed by the law/non-law distinction. The former is a claim about concepts; the latter is a claim about norms in particular communities. As I demonstrated above, in some community, the law may coincide completely with its morality, and yet there will be the analytical or conceptual difference between law and non-law.

Because the limited-domain thesis is not entailed by the sep-

36. *See id.* at 667.

arability thesis, it must stand on its own. The limited-domain thesis's truth is supposed to present a problem for my view. Because my view allows anything to be a rule of recognition, it allows law to be unlimited, whereas in fact law everywhere is limited. Therefore, my form of positivism, even if it is conceptually unassailable, is *descriptively* inaccurate. Nothing could be further from the truth. My view is not that law will invariably be unlimited, only that in principle it can be; it all depends on the particular rule of recognition in effect. Very likely, the law of most communities will be limited by the rule of recognition in just the way Schauer thinks our law is limited and for just the sorts of reasons Schauer has in mind. My thesis, remember, is that legal theory is ultimately a matter of descriptive sociology, not conceptual analysis. So how can its conceptual claim, which after all is just, law is sociology, render it descriptively inaccurate?

It is my view that the law can in a particular community be unlimited. Perhaps Schauer's point is that because of the limited-domain thesis, law can *never* be unlimited. I hold that law *can* in principle be unlimited. But the limited-domain thesis denies that it can be. Then my theory fails, not because it is descriptively inaccurate, but because it is conceptually inadequate. Positivism is committed to both the separability and social fact theses. Neither of these entail the limited-domain thesis. Therefore, there are no grounds for rejecting my version of positivism because it violates the limited-domain thesis, which is itself unmotivated by the concerns that animate positivism in the first place.

In short, positivism as I understand it does not claim that law is necessarily a matter of rules. Nor does it claim that law necessarily has a limited domain. It does claim that law and morality are distinct and that law is a social fact. I have cashed these out in the following way. The difference between law and morality is conceptual; it has to do with the criteria of meaning of the terms. Terms with different meanings can have the same extensions, and so the law of a community can completely overlap with its morality. The criterion of meaning of law is the rule of recognition; and what that rule is in a particular community is a matter of social fact; and that is the social fact aspect of law.

VI. Conclusion

I have argued that the limited-domain thesis is itself unmotivated, but this claim is contentious. I want to close by sketching a version of positivism that grounds the limited-domain thesis in an account of the relationship between law and practical reason. I attribute this view to Joseph Raz. The theory of practical reasoning is at the heart of Raz's work.[37] What is interesting about law for Raz is that it can provide reasons for acting, reasons of a special kind, peremptory or exclusionary reasons. Such reasons are imposed by authorities. Law must claim for itself the possibility of being such an authority. This is a *necessary* feature of law. In other words, the concept of law entails the possibility of authority. If law can be the sort of thing that has authority, then it must be the sort of thing that provides reasons of the sort authorities do. These are exclusionary reasons. Now it is part of Raz's view that norms that provide such reasons cannot be fundamentally controversial, because if they are, they cannot guide action in the appropriate way. Thus, legal norms cannot be substantive in the way in which my theory says they can be. For such norms cannot be authoritative in the way in which they must be if they are to provide reasons for action.

Raz's view then requires the version of the social fact thesis he advocates, and it precludes mine. It also entails a dichotomy between law and non-law in every community in which there is law. But notice that in Raz's case, the limited-domain thesis is motivated in a way in which it is not in Schauer's case. To evaluate whether Raz or I get the better of this, we would need to determine first whether the concept of law is connected to the concept of authority in the way in which Raz says it is; whether the concept of authority is to be understood in the way Raz says it must be; and finally, whether analytic jurisprudence is itself part of the theory of practical reasoning. In fact, I want to deny each of the claims Raz either explicitly or implicitly makes on behalf of his thesis, but that is an argument for another occasion.

37. *See, e.g.*, Perry, *Second-Order Reasons, Uncertainty, and Legal Theory*, 62 S. Cal. L. Rev. 918 (1989).

COMMENT: LEGAL THEORY AND THE ROLE OF RULES

RUTH GAVISON*

I. INTRODUCTION

Before I consider Frederick Schauer's *Rules and the Rule of Law*[1] in detail, let me emphasize the ways in which I agree with him. I have sympathy with Schauer's theoretical agenda and agree with most of his theses. I believe that it is both important and true to say that rules can bind and that they often do, in law and in life; that not all decisionmaking, and not even all legal decisionmaking, is rule-based, but much of it is; and that this rule-basedness cannot be dismissed, simply and in a sweeping way, as unjustified. I further agree with Schauer that an important function of rules is to limit powers and to enforce conceptions of a desirable division of responsibility and acceptable answers to *who* should decide an issue, not only *how* an issue should be decided. Finally, I think that it is important to stress that we are discussing not only the moral responsibilities of judges making individual decisions, but also those of the people deciding about desirable decisionmaking environments. At times, these responsibilities may pull in different directions, justifying a requirement of obedience to rules even when the requirement seems unjustified.

Schauer's enterprise is a complex one: He wishes to discuss the role, actual and desirable, of rules in the law, and the relationship between this question and the nature of law, as it is reflected in general theories about the law.[2] His argument, in a nutshell, is that the essence of law neither requires nor pre-

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1. Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645 (1991).

2. The particular structure of the argument may be unique to Schauer's Symposium contribution, although it is hinted at in other parts of Schauer's lengthy and detailed examination of the role of rules in law and life. *See* F. SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISIONMAKING IN LAW AND IN LIFE (forthcoming 1991). *See also* Schauer, *Rules, the Rule of Law, and the Constitution*, 6 CONST. COMMENTARY 69 (1989); Schauer, *Is The Common Law Law?* (Book Review), 77 CALIF. L. REV. 455 (1989); Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987); Schauer, *Formalism*, 97 YALE L.J. 509 (1988) [hereinafter *Formalism*].

cludes that rules will be central to law.[3] Consequently, Schauer concludes that general theories about law leave open the descriptive and normative questions about the role of rules in law.[4] After reaching that conclusion, Schauer describes and evaluates the role that rules play and should play in the American legal system.[5] Schauer argues that, in fact, legal decisionmakers in the American system take rules into consideration, but deviate from them if there are strong reasons for doing so.[6] In other words, rules constrain, but their power is not always conclusive. Despite Schauer's belief that this is a contingent empirical statement about the American legal system, one not dictated by any theory about the nature of law, he labels his descriptive thesis "presumptive positivism."[7] Furthermore, he apparently also advocates the desirability of the same presumptive approach to rules. Positivism, we should recall, is one type of a general theory of law, much criticized by contemporary jurisprudence. Thus, there is a tension between the first part of Schauer's argument—that legal theory in general, and positivism in particular, does not decide the issue of rules in the law—and the second part—that the role of rules in the American legal system is best captured by presumptive positivism, and presumptive positivism is also the desirable attitude to rules.

This Article explores this tension. First, I examine what general theories of law (as distinct both from general theories of action or morals and from other types of investigations concerning law and specific legal systems), positivism included, tell us about the actual and the desirable role of rules in the law.[8] I conclude that the contribution of such general theories to

3. *See* Schauer, *supra* note 1, at 651-63.

4. *See id.* at 663.

5. *See id.* at 665-79.

6. *See id.* at 674-77.

7. *See id.* at 677. In *Formalism*, *supra* note 2, at 546-48, Schauer labels the position *presumptive formalism*; later, he changes the label to *presumptive positivism*, in order to avoid the more pejorative term. *See id.* at 548. In *Rules and the Rule of Law*, Schauer's justification for the label is more substantial; ruleness and positivism share important features, including being the targets of similar criticisms.

8. The sense in which I use the phrase "a general theory of law" is somewhat different from Schauer's, but I believe it is sufficiently similar to avoid any difficulty. A general theory of law seeks to identify features that are central to law in all societies, and that distinguish law from such similar phenomena as religion and morality. The identifying features need not be necessary and sufficient conditions of law. Rather, we seek an ideal type of law, which can then be used in comparative analyses of different cultures and societies.

Schauer's questions is indirect and limited: The classical descriptive theories of law all hold that law is largely a matter of general rules.[9] Furthermore, they usually do not offer any detailed account of how judges actually carry out adjudication, or how judges relate to the legal rules of their particular system. In addition, these theories do not propose any normative theory of adjudication (that is, a theory of how judges should decide cases), because their conception of legal theory is not normative.[10] In this sense, general theories of law indeed leave open Schauer's questions.[11] There is no special message, however, that positivism, as opposed to other theories of law, provides on this point.

In Part III, I make a few comments about the descriptive and the normative role of rules in law. Basically, I agree with Schauer that "presumptive ruleness" (a term I prefer to presumptive positivism) is an illuminating way to describe what happens with rules and implies a good general recommendation for dealing with rules. Unfortunately, I believe that presumptive ruleness does not have much practical "bite," either as description or as a recommendation. This is a failure shared by presumptive ruleness and accounts of adjudication in general theories of law: Most of the descriptive and normative

9. By classical descriptive theories of law I mean natural law theories, positivism, and realism. Natural law theories portray law as a system of general prescriptive rules that may be at least partly man-made, but must conform to some non-human "natural law" norms. Positivism describes law as a system of general prescriptive norms identified by some human institution (the sovereign or the judges). Realism sees law as a set of descriptive generalizations or predictions of how judges will decide cases; the statutory rules are the bases for predictions, but not law itself. If these three theories are on a continuum, Dworkin falls somewhere between natural law (human rules made by state organs must be interpreted by political morality or integrity) and positivism (law is man-made, but must be identified by an appeal to a wider social and political community). *See* Mackie, *The Third Theory of Law*, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 161 (M. Cohen ed. 1984).

10. Dworkin's theory is a notable exception on both grounds: It is built around a culture-dependent theory of adjudication, which claims to be both descriptive and normative. *See* R. DWORKIN, LAW'S EMPIRE 45-113 (1986) [hereinafter LAW'S EMPIRE]; R. DWORKIN, TAKING RIGHTS SERIOUSLY 81-149 (1977) [hereinafter TAKING RIGHTS SERIOUSLY]. Not surprisingly, I believe that Dworkin's enterprise, for the most part, is not a theory of law. For a similar position, see Burton, *Ronald Dworkin and Legal Positivism*, 73 IOWA L. REV. 109 (1987). On the distinction between theories of law and theories of adjudication, see *infra* note 25 and accompanying text.

11. General theories of law leave open the question of the role of rules in legal decisionmaking—one formulation of Schauer's first question, the one central to his concerns. They do not, I believe, leave open the question whether law must be a matter of rules, as opposed to particularistic decisionmaking. For Schauer's argument to follow, this question need not be left open.

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work remains to be done, even if we agree on presumptive ruleness.

In Part IV, I consider Schauer's choice of "presumptive positivism" as the label for his descriptive and normative theses. I address the question whether there is a strong connection between positivism and "ruleness" that makes them both targets for similar criticisms of their contribution to undesirable decisionmaking in law.

My conclusion is that we should discuss the role of rules in law on its own merits, without trying to implicate general legal theory in the discussion. Nevertheless, similarities exist in the ways that scholars use theories of law (for example, natural law theories, positivism, and realism) and formal attributes of decisionmaking (for example, rules versus principles, following rules versus creative judge-made legislation, and the usage of a rhetoric of "rights") in contemporary legal thought. Often, criticisms of both these theories and attributes are misplaced, distorting discussions of the theories and attributes and disguising the political or ideological concerns presumably motivating the critics.

Let me be clear that I do not imply that developing general legal theory is more important or more profound than developing and articulating detailed descriptive and normative theories about adjudication and the role of rules. If a choice must be made, I think that the opposite is the case. What is important is to understand the nature of the two enterprises, and not to expect that general theories about the nature of law will solve all of our legal and social problems.[12]

II. Legal Theory I

To understand the role that rules may play in a field or area, we need a theory of rules and their possible roles, and a theory of the field in question. Real understanding is likely to lie in the intersection between these two theories. This is because rules

12. The persistent tendency to deny this weak claim is itself an interesting phenomenon deserving more study. So, too, is the tendency to tie criticisms and descriptions of legal phenomena to general theories of law, thereby often distorting the theories by creating artificial joinders between them and the phenomena. Naturally, I shall not undertake such an analysis here. Within this general climate, however, Schauer's connection between the two is more understandable. It is this climate, rather than Schauer's thesis, that led me to make the point here. For Schauer's position, this argument is clearly of secondary importance.

are not unique to any particular field, but their role and importance may vary with the context in which the rules are used.[13]

Schematically, a general theory of the role of rules will have a conceptual-analytical part (What are rules?), a descriptive part (How do rules affect behavior?), and an evaluative part (Are the ways that rules affect behavior, in principle, good or bad? Can we identify circumstances in which they will tend to be good or bad? What follows for the identification of circumstances in which we ought to have (or not to have) rules? What should be our attitude toward rules?). These parts of the theory are interdependent, in the sense that both the descriptive and the normative part use the answers provided in the conceptual-analytical part, and the normative part evaluates the effects of rules identified by the descriptive part.[14] A general theory of law will have the same three parts.[15]

A general theory of law is relevant to a theory about the role of rules in law to the extent that its statements are relevant, as premises, in arguments about the role of rules in law. Schauer is right to suggest that general legal theory may be relevant in at least two senses: It will be relevant if it *defines* (or describes) law, wholly or partly, in terms of rules (at least in the sense that it will identify law as a system that uses rules), or if it *denies* that law can be, or ever is, a matter of rules. Common sense tells us that the second position is false. There is less superficial agreement on the first one: Legal theorists do give rules different importance in their characterizations of law. I shall suggest, however, that no legal theorist has ever argued that the legal

13. It might be that we shall need more than one "theory" of rules and of law, because there may be sufficient differences between types of rules so that more than one type is relevant to law, but other types are completely foreign to it. I do not mean to suggest that there is only one important sense of "rule."

14. The interrelationship among these parts of the theory is even more complex. The descriptive part, for example, will also require conceptual-analytical work belonging to a theory of action and to psychology, not only concerning the "meaning" of rules. Conceptual-analytical choices involve decisions concerning both description and evaluation (in the theoretical sense). The process is thus not a linear one of conceptual choices followed by description and evaluation, but a complex interrelated process. Nevertheless, we can divide the process into these categories fruitfully, although the process must be unpacked when the choices made in each stage are justified.

15. "Legal theory" and "a general theory of law" may mean many things. I need not enter the debate and explain my choices of terms (or senses) because my discussion is triggered by Schauer's references to positivism—a paradigmatic instance of a theory within general jurisprudence. Similarly, I need not take a stand on whether descriptive legal theory must be evaluative, because the object it describes (law) is immanently evaluative. Even those who make this argument must accept the difference between seeking the nature of law and determining what the law should be.

system is nothing but rules, and that no one has argued that we can have a legal system without legal rules.

Those who appear to challenge the idea that law *can* involve rules, or that it ever does (as distinguished from those who argue that there is more rhetoric of rule-following than is possible, reflective of reality, or desirable), typically do not invoke any of the special characteristics of law. They deny that legal rules make any difference because of either the psychological inability or the general incoherence of the idea of humans following rules.[16] If they are right, a description of humans and human societies that includes rules and rule-following is part of a huge exercise in false consciousness. The radicalness of the challenge is clarified when we recall that "rules" include not only legal rules, but all rules, including rules of games, mathematics, logic, language, and prudence. Such radical skepticism is not unknown in human thought, but it has never affected our life or our day-to-day descriptions of our life.[17] In any event, this has nothing to do with legal theory. All legal theories, like all legal systems and all language and many other human activities, presuppose that humans can identify what rules require, and that they can follow them.[18] As Schauer notes, it is harder to decide whether law must be exclusively a matter of rules.[19] If legal theory defines law as consisting only of rules, then the definition of law preempts the question whether and where we should have legal rules (as opposed to other ways of having "law").

16. *See infra* note 18.

17. If we truly adopt a profound radicalism of this sort, and do not use it merely to demonstrate the ultimate presuppositions of our thought and conduct, we must stop teaching doctrine, because it does not affect behavior. We must cease to advocate changes in the law, because the content of legal rules does not make any difference. If we are truly serious, we will also not write articles explaining law, because we do not have any linguistic tools to make the writing and the reading a coherent exercise. . . . Obviously, the radical critics whom we read and discuss do not take their theoretical skepticism to this extreme.

18. One could assert that one version of the realist claim—that legal materials are so indeterminate that it is impossible to identify what they require—is a general statement about law, rather than a statement about the incoherence of rule-following in general. Schauer answers this assertion by saying that the indeterminacy is contingent on the nature of the legal materials in the American legal system, and therefore not a part of a general theory of law. *See* Schauer, *supra* note 1, at 659-60. This is true, but two additional caveats should be added. First, the realists have never claimed that, even in the American legal materials, it was always impossible to identify what rules required. Second, the argument may be made in a general, non-system-dependent way, by invoking characterizations of language and constraints on attempts to govern conduct by rules. These two, though, are not unique to law.

19. *See* Schauer, *supra* note 1, at 651-57.

Some theorists do define law in terms of rules.[20] Even theories that do not offer definitions of law feature prominently legal rules or norms. In fact, all descriptive theories of law presuppose, as a central feature of law, the existence of legal norms that preexist actual litigation.[21] So, in one formulation of Schauer's first question, legal theory does dictate an answer, and the answer is not the one that he gives. This is not fatal, because Schauer's question is not whether we can conceive of law without legal norms,[22] but whether there may be contexts of decisionmaking that will be particularistic and that will be called "legal." No legal theorist, no matter how important the idea of rules is to his conception of law, will deny this.[23]

The equivocation in Schauer's first question—must law be a matter of rules?—stems from two sources. First is the oftenmade move between a theory of *law* (that is, the appropriate characterization of the social institution of law) and a theory of *adjudication* (that is, legal decisionmaking by officials in that realm). We may collapse the two descriptive theories together only if we define law as everything that courts or other legal decisionmakers invoke to *justify* their decisions (or, in a less popular move, everything that in fact *explains* judicial decisions). Some theorists, notably Dworkin, make just this move.[24] Others find it more fruitful to say that law is independent of adjudication, and often preexists decisions by legal officials,

20. Hart insisted that law is a unity of primary and secondary rules, rather than a system of primary commands alone. *See* H.L.A. HART, THE CONCEPT OF LAW 77-96 (1961). Fuller characterized law as the enterprise of governing human conduct by rules. *See* L. FULLER, THE MORALITY OF LAW 35 (1964). Finnis defined law as "rules made, in accordance with regulative legal rules . . . ." J. FINNIS, NATURAL LAW AND NATURAL RIGHTS 276 (1980). At least two of these definitions come from critics of positivism. As Schauer himself notes, Fuller's theory posits rules as the defining feature of law more insistently than many positivists. *See* Schauer, *supra* note 1, at 656.

21. The critics may claim that rules are invoked as rationalizations, and that the restraining effects of rules on conduct are illusory to a large extent. They do not, however, challenge the statement that we have the equipment, linguistically and psychologically, to identify what rules of conduct require, and to follow them. Furthermore, many critics do think it useful to teach doctrine, because doctrine constrains, even if the constraint is merely instrumental. *See, e.g.*, Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986).

22. Schauer himself answers this question in the negative. *See* Schauer, *supra* note 1, at 689.

23. Thus, Schauer need not work so hard to make Fuller consistent with his position. For Fuller, the essence of law is that it is general and known in advance. Fuller, however, fully recognizes that there are limits to adjudication, and that courts will often decide cases in ways that are not "adjudication" in a strong sense. He therefore clearly joins Schauer in saying that legal decisionmakers often make non-rule-based decisions. *See* Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

24. *See* LAW'S EMPIRE, *supra* note 10, at 90-113, 176-224.

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and that it is illuminating and interesting to observe when courts use the law and when they invoke other types of authority.[25] For these theorists, a characterization of law in terms of general norms does not commit them to a particular stand on the nature of decisionmaking in law. It may well be that many decisions within the law and in its shadow are not made on the basis of rules (laws) alone.

Even Dworkinians, however, may still, by Schauer's account, allow for particularistic decisionmaking. The second source of the equivocation is that rules, according to Schauer, vary in terms of generality and vagueness. This allows decisionmaking that will be both rule-based, because it will be done in the context of a rule, and particularistic, because the rule requires that many detailed circumstances be taken into account.[26] Good examples might be judging "in the best interest of the child" or "in the public interest." According to Fuller, these standards meet the requirements of the "inner morality of law," and therefore are good examples of "submitting human behavior to rules."[27] They do, however, allow a particularistic mode of decisionmaking, thus supporting Schauer's claim that legal decisionmaking is not exhausted by rule-based decisions. In other words, indeterminacy and its implications are much less central to Fuller's concerns than they are to Schauer's.[28] Their conceptions of rules and rule-based decisions similarly differ.

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25. For the distinction, and for an argument against collapsing the theory of law into a theory of adjudication, see Raz, *The Problem About the Nature of Law*, 21 U.W. ONTARIO L. REV. 203 (1983). The desire to distinguish between a theory of law and a theory of adjudication is common to those, like Raz, who identify law by the "sources thesis," and those who are willing to include in law the moral judgments incorporated into legal norms (for example, norms referring to morality). Both groups identify legal norms themselves by reference to some pedigree. Raz adds to the pedigree a further constraint: The identification of the law must not be a matter of moral argument. *See id.* at 213-14. Natural law theories, as we saw, define law in terms of rules. The real challenge may have come from realists, who, at certain moments, have suggested that law consists of decisions rather than general rules. To the extent that they claim this, Hart's critique is fatal. *See* H.L.A. HART, *supra* note 20, at 136. I doubt, however, that any of the realists would consistently defend such a position. It should be noted that one can define law in terms of its institutional structure, including that of having courts and other specialized institutions, without collapsing it into the decisions of such institutions. *See, e.g.*, M. WEBER, LAW IN ECONOMY AND SOCIETY (E. Shils & M. Rheinstein trans. 1954) (2d ed. 1925).

26. *See* Schauer, *supra* note 1, at 650-51 (noting that rules may have categories of different "sizes").

27. *See* L. FULLER, *supra* note 20, at 63-65, 200-24.

28. *See* Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283 (1989) (arguing that indeterminacy does not affect the general grounds for the legitimacy of law's claims of obedience).

All general legal theories characterize law in part as a set of general norms. It is not surprising that they do. First, our common-sense experience with legal systems includes a body of rules identified as legal. This is, in fact, a primary subject of legal education. This prevalence of legal rules, though, is not accidental. Dispute resolution and authoritative decisionmaking in particular cases is but one (albeit indispensable) function of law. Even if we allow a *cadi* to decide disputes as he sees fit, this does not imply that his decisions are not governed by rules.[29] Usually, his decisions are made against a background of social rules governing the conduct of members of society. Disputes arise only when this regulatory activity of rules breaks down. The *cadi*, in turn, will often base his decisions on an interpretation of the background rules. Furthermore, by the time we observe the *cadi*'s adjudication as a practice, he has probably adopted the great maxim of justice that "equal cases should be treated alike." Chances are that the *cadi*'s decisions create new social rules, which help people predict his future decisions so that they may avoid going to him for resolution of the next similar dispute. An important task of the law is to identify in advance what people should do. This allows all to maximize their welfare. The law could not achieve this function without general rules of conduct.

The social institution of law has never existed without rules of conduct in the background. It is a defining feature of law that some, but not all, of these rules of conduct are made into "law." In this sense, law must be a matter of rules. This does not preclude the possibility that legal institutions (for example, courts) will not always be required to decide only according to rules. As Schauer notes, there are many contexts in which legal power-holders are given broad discretion.[30] But this discretion is "parasitic" on the fact that the officials are a part of an institutional system in which some, in fact many, contexts are governed by a combination of rules of jurisdiction and substantive rules of conduct, with stronger senses of "ruleness."

29. *See* Schauer, *supra* note 1, at 653.

30. For the purpose of argument, it does not matter if discretion is granted with, for example, an accompanying directive to promote the public interest, or if discretion is granted without any substantive guidance except a jurisdictional test. In both cases, we do not have much "ruleness" in Schauer's terms. In both cases, though, we have some "ruleness" in the sense that the sources of jurisdiction are rules, and that decisions must be justified by some general principle.

Therefore, in some sense, law must be a matter of rules. But if rules may require particularistic decisionmaking, if the nature of the decisionmaking process in a particular culture depends on the approach to rules that that particular culture practices, and if both the type of rules used and the approach to rules are contingent, can a *general* theory of law tell us more about how law is a matter of rules? It is here, I believe, that general theories of law, including positivism, cease to be relevant to Schauer's concerns. The particular account of adjudication, the decision who should decide what and the decision how general rules should be, is not a matter of general jurisprudence. Consequently, general theories just leave all these questions open.

The point might become clearer if we recall what general theories of law seek to do. Theories of law seek to give an adequate account of the phenomenon of law. Debates about the adequacy of the account are internal to the enterprise of seeking to provide such an account. The enterprise presupposes that the concept of law is a useful cross-cultural and cross-temporal concept, so that there is a distinction between the attributes of law and the attributes of particular legal systems at certain times and places. General theories of law seek to elucidate those features of law that are universal. This universality does *not* stem from stipulative definitions. Rather, it reflects basic similarities in human nature and in forms of social organizations. The presupposition is twofold: first, that human societies have similar problems, and are likely to generate similar ways of solving them; and second, that it is useful to designate a part of the way that human societies deal with their problems "law," thus distinguishing this part from other ways of solving problems. Therefore, a general theory of law is both a general social theory and a theory about individuating social phenomena and labelling them.

If this enterprise is coherent, statements about features that can be shown to be contingent or non-universal should not be included in general theories of law. Because answers to such questions as how broad rules should be, or how extensive the reasons for which a decisionmaker is permitted to deviate from a rule should be, depend necessarily on non-universal factors, they cannot form a part of a general theory of law.[31]

31. None of this suggests that a conception of law cannot be specific to a culture, or that this particular conception cannot be derived from processes of "social interpreta-

When we look at theories of law, we find that, in fact, most agree on what the universal features of law are. All theorists agree that some social institutions reflect law, that law is designed to guide behavior (it is normative, not descriptive),[32] and that law *claims* legitimate authority (it is normative in a stronger sense of claiming moral authority). Many agree that legal systems reflect the values of "legality." These values include the existence of general norms, which are promulgated and made available, and the resolution of disputes, according to these same norms, by an independent judiciary.[33]

There is some debate concerning constraints on the content of law, however. Sometimes, this debate is general and theoretical, as when natural law theorists claim that an atrocious human directive, even if issued by a person with legal authority, should not be regarded as law. Sometimes, the debate is system-dependent, as when the United States Constitution incorporates values that permit moral considerations to be directly relevant to determinations of constitutional validity.

One of the great contributions of modern positivists has been the insistence that legal systems include not only primary duty-imposing rules of conduct (for example, "do not kill, steal, rape"), but also power-conferring rules.[34] These rules enable individuals to make enforceable contracts or create legal personalities; the rules also allow individuals to make and change laws, and to create and define the institutions that enforce and apply them, and that perform the other tasks required for a smooth working of the legal system and the social system that it seeks to facilitate. In view of the importance of

tion," such as those described by Dworkin. It only says that this particular conception is an instantiation of the social institution of law that exists, in one form or another, in many societies.

32. In this sense, even the realists acknowledge that law is normative. It may be just the prediction of what the courts will do, but the "bad man" will use this prediction to guide his conduct.

33. Occasionally, there may be instances of "acoustic separation," in which, at least for a period, issues are decided according to rules that are different from those presumably guiding the conduct before adjudication. Occasionally, such acoustic separation may be justified. *See* Dan-Cohen, *Decisional Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984). These are exceptions, however, that strengthen the rule that, to be both effective and just, rules of decision (the rules for the conduct of dispute decisionmakers) should be the rules by which the litigants could have planned their behavior.

34. *See, e.g.*, H.L.A. HART, *supra* note 20; J. RAZ, THE CONCEPT OF A LEGAL SYSTEM (2d ed. 1980); J. RAZ, PRACTICAL REASON AND NORMS (1979) [hereinafter PRACTICAL REASON AND NORMS]; J. RAZ, THE AUTHORITY OF LAW (1979) [hereinafter THE AUTHORITY OF LAW]; H. KELSEN, GENERAL THEORY OF LAW AND STATE (A. Wedberg trans. 1949).

power-conferring norms to understanding legal orders, general theories of law should include them in their accounts.

Legal theory acknowledges the fact that legal systems provide the framework for the use of political force within a society. Legal theory specifies the types of norms that should be used, and the tasks that should be performed. It is not committed to particular political choices about structures or about the content of particular rules. It is not committed to any position on who should have what powers. General theories of law presuppose that differences in the content of particular rules, even differences in legal cultures and structures (for example, a constitutional democracy, as in the United States, versus a principle of parliamentary sovereignty, as in the United Kingdom) do not, and should not, affect the characterization of these cultures as having law.

There are a few further generalizations that can be made about legal systems. Hart suggested that all legal systems must have a "minimal content of natural law," because a society that does not seek to regulate private use of violence and some right to possession does not give human beings their basic needs.[35] Therefore, we should expect that all legal systems will have norms against intentional killing. If we identify basic and universal human problems and persistent causes for disputes, we should expect societies to regulate these in their laws. It is essential to the idea of law that there will be some regulation of private use of violence, and that the state will tend to monopolize the legitimate use of violence. In addition, we can expect all legal systems to seek a balance between giving discretion to accomplish some task, and limiting that discretion to minimize abuse. This expectation presupposes, again, that we can effectively control, at least to some extent, both the broadness of the discretion conferred and the effectiveness of structuring it and supervising it.

A general theory of law becomes enriched when these generalizations are articulated and detailed. These statements about what actually happens in society, however, are directly relevant to such a theory only if they refute, or cast doubt on, the truth or the utility of the account given by it. Beyond this, should we incorporate a more detailed account of adjudication, of the

35. *See* H.L.A. HART, *supra* note 20, at 189-95.

ways that legal decisionmakers deal with rules, into legal theory, and into the defining characteristics of law? Some of the more detailed accounts are culture- and system-dependent. Many of them, however, can easily be presented as illustrations of universal features. The question is, therefore, double: First, how general and how skeletal should general jurisprudence be? Second, when does a skeletal description become so incomplete as to be misleading?

No one can deny that an account of legal systems will not be complete without reference to legal institutions, and that courts are a paradigmatic legal institution, performing a vital legal function. Furthermore, no one can deny that a legal system cannot work without intricate decisionmaking by various officials. The real question is whether a theory of law must include a detailed descriptive theory of adjudication, or whether it can choose, instead, to provide a sketch of courts and their functions as a part of its framework. Often, general legal theorists have done just that. They have discussed the nature of law and its defining characteristics, while making only a few scattered observations about adjudication. By implication, they have asserted that a theory of law could be adequate with a skeletal account of adjudication.

This is the initial challenge posed by Dworkin, who said, in effect, that the skeletal description of adjudication given by Hart's version of legal positivism was wrong, and that this affected positivism's theory of law itself. According to the skeletal description, judges begin the decisionmaking process by consulting preexisting, pedigreed legal materials. Often, these materials do not determine an answer; in these cases, judges have discretion and must decide on the basis of extra-legal material. Positivists, said Dworkin, characterize law as consisting exclusively of those pedigreed legal materials. Dworkin argued that, to the contrary, judges invoke other materials, notably principles. These materials, Dworkin concluded, should also be seen as law, and consequently, the characterization of law in legal theory should be modified, on the basis of a more accurate account of adjudication.[36]

36. *See* Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967), *reprinted in* TAKING RIGHTS SERIOUSLY, *supra* note 10, at 14. Dworkin still argues that the positivists' conception of law distorts our picture of adjudication in *Law's Empire*, but there is some controversy about the way his present challenge fits in with his initial stand. *See* Raz, *Legal Principles and the Limits of Law*, in RONALD DWORKIN AND CONTEMPORARY JURISPRU-

Dworkin's attack has been extremely influential. Legal theorists endorsing the skeletal description usually ignored the nature of the extra-legal materials judges invoke to justify their decisions. Positivists, as a whole, did not provide detailed accounts of what actually happened in adjudication. Obviously, they did not deal with the question of what judges should do in such cases as a part of articulating their theory of law. Only the need to respond to such criticisms made many positivists clarify their descriptive and normative theories of adjudication. Most of them would still argue today, however, that the skeletal description of adjudication is accurate, and that it suffices for the purposes of a general theory of the nature of law.[37]

To some extent, the skeletal account of adjudication is legal theory-dependent. It justifies a decision by invoking law and, only when law is not sufficient, invoking extra-legal materials. The skeletal account presupposes that legal justificatory materials can be identified, and that they are different and differentiated from non-legal materials. This presupposition, at least in the sense required for an account of adjudication, is an extremely weak one. To see this, we have to distinguish between the phenomena of law and legal systems, and labelling. There is no dispute that legal phenomena include easily identified materials such as statutes, decisions of the Supreme Court, and the United States Constitution. These are the materials identified by pedigree. Some will call them, misleadingly, "positivistic law." Dworkin would call them "pre-interpretive law."[38] Furthermore, there is no dispute that the process of justifying judicial decisions starts, and often ends, with these materials.[39] Pedigreed law is therefore important. It is entitled to a name.

DENCE, *supra* note 9, at 73, 81-86; Dworkin, *A Reply by Ronald Dworkin*, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE, *supra* note 9, at 247, 260-63.

37. In other words, Dworkin persuaded many that much could be gained from examining adjudication and legal reasoning more closely. He did not convince many, however, that his "imperialistic" conception of law, under which judges merely "discover" preexisting legal directives, is more illuminating than the acknowledgement of the limits of law and judicial discretion emphasized by the skeletal description. Furthermore, Dworkin created a misleading target by "forcing" positivism, as a general theory of law, into a debate about normative theories of adjudication that it never aspired to address. *See, e.g.*, Soper, *Legal Theory and the Obligation of the Judge: The Hart-Dworkin Dispute*, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE, *supra* note 9, at 1, 8-9; *see also* J. FINNIS, *supra* note 20, at 21.

38. *See* LAW'S EMPIRE, *supra* note 10, at 65-66, 90-91.

39. I do not mean to suggest that there must be distinguishable stages of the decision, so that one moves to consult other sources only when the first stage proves inadequate. There will often be such a sequence, however.

Let us call it, so as not to preempt the issue by using the term "law" itself, "first-stage law."

The skeletal description of adjudication need only say that a defining feature of law and legal systems is that judges and decisionmakers "start" to justify their decisions by reference to first-stage law. If this is proven false, all legal theorists should reconsider their positions. If it is true, albeit concededly incomplete, the debate changes to whether the richer account of what really happens should change the account given by legal theory. And, I shall repeat, the problem will not be a problem only for the positivist. It will be a problem for any person offering a general account of the nature of law, without including in this account a detailed account of adjudication.

Again, I know of no theorist or critic who argues that the weak skeletal description is *false*.[40] The serious challenge here is to say that it is *incomplete*, in such important and central ways that the description is misleading. For us to have a better sense of what law is, we must incorporate a richer account of adjudication into the account of the phenomenon of law. To do this requires two steps. First, we must identify general, universal features of adjudication that are not reflected in the skeletal description. This should not be too difficult. Second, we must show that it is important to incorporate these features into our analysis of the concept of law itself.

I am willing to assume that the examples that scholars use from particular legal systems to show that rules may be over- and under-inclusive, and that this problem may create a tension between the requirement of the rule and the requirements of "justice" or the "balance of reasons," reflect universal features of decisionmaking in law. I will further assume that decisionmakers the world over use the same techniques to mitigate those tensions. They invoke principles that "override" the rules; they find another rule that is applicable; or they create fictions to avoid an undesirable resolution of a particular dispute. On the other hand, in all legal systems we may find exam-

40. Even if it is true that judges always reach their decisions first (determined by their ideologies, diets, background, or an internalized sense of the law itself), and then seek to justify them, and even if all these attempts at justification are mere rationalizations, the skeletal description is still true. Without any commitment on the question whether the processes of discovery and justification are always, or often, separate and distinct, the skeletal description says that first-stage law is the starting point at the stage of justification. Clearly, natural law theorists endorse this same position.

ples in which judges, when faced with such tensions, prefer the rule. Occasionally, they explicitly discuss the tension, expressly noting that they thought the result to be less than optimal, and providing policy reasons for their choice. At other times, they clothe their opinions in the rhetoric of "legal necessity" or "formalism." They deny (or ignore) the tension between the requirement of the rule and of justice, and deny the availability of other bases for decision.

In other words, I agree that any detailed study of adjudication, in any legal system, will reveal these and other phenomena. Thus, I think that Dworkin is right that adjudication, in all systems, is more than a combination of a mechanical application of specific and determinate rules and "strong" discretion. This, however, is not what the skeletal account said adjudication is. Legal positivism, or the skeletal account, has no problem with acknowledging that judges make decisions like the one in *Riggs v. Palmer*.[41]

So the controversy is not about the obvious reality of legal decisionmaking. It addresses several related questions. First, what is the best description of what the judges are doing in such decisions as *Riggs v. Palmer*? If judges inevitably do such things, can we incorporate these truths into our theory of *law*? Should they affect our concept of law itself? If the answers to these questions are yes, how should they be incorporated? And will such incorporation show how law is (or is not) a matter of "rules"? In other words, is a general descriptive theory of adjudication possible? If it is possible, is it an important part of theories about law, so that the two are linked in a way that suggests that "law" is necessarily linked only to some kinds of legal decisionmaking? If so, is this the kind of decisionmaking that concerns Schauer in his article?

For my present purposes, I do not need to debate whether all, or even most, justificatory materials used by judges should

41. 115 N.Y. 506, 22 N.E. 188 (1889). The beneficiary of his grandfather's will murdered him to prevent a change in the will. The victim's daughters challenged the will in court. There was no provision in the relevant statute that could base an invalidation of the will. The majority of the court nonetheless invalidation the will, invoking the principle that no one should be allowed to benefit from his own wrong. Dworkin uses the case to show that judges use principles, at times, to defeat pedigreed rules. He argues that the case "refutes" positivism, which would have required application of the pedigreed rule. But positivists could argue that the principle was pedigreed as well, or that this was an example of a case in which courts had inherent authority to deviate from rules. *See infra* note 49 and pp. 759-60.

be called "law." Even the realists did not claim that looking exclusively at adjudication gives one an adequate account of what the law is. They were the first to realize that legal rules function in many important ways prior to adjudication, so that the (first-stage) legal materials were an important part of their picture of law,[42] even if law was conceived as the *prediction* of what courts would actually do.[43] On the other hand, Dworkin's account of law and adjudication, which underemphasizes the distinctness of first-stage law, portrays the judges, ultimately, as appliers or interpreters of preexisting law. One of the benefits of the skeletal description is that it describes judges as having mixed powers of application, creation, and revision of (first-stage) law. These are the reasons, among many others, for preferring an analysis of law that separates first-stage law from post-adjudication law. One way of stressing this separateness is by calling only first-stage law "law."

The decision we make on this question will affect our characterization of law, and the limits of general theories of law. Whatever this decision is, though, a detailed account of the ways in which particular legal systems and particular judges solve the immanent tensions between rules and justice in particular cases should not belong in a *general* theory of law.[44] A general descriptive theory of adjudication will distinguish between following rules (deciding settled disputes according to first-stage law) and other kinds of judicial activity. It will also say that while the nature of law dictates that there will be a lot of judicial behavior of the first type, judges will also act in other ways. The account may be more or less detailed and rich. Some of the more detailed elements might be universal to most legal systems, but the significant parts will not be in the nature of general, conceptual claims about legal decisionmaking. They will be an important contribution to a comparative analysis of

42. This acknowledgement is an argument for stressing the importance of first-stage law and maintaining its separate identity.

43. This must be the case because prediction in the abstract is very different from prediction of the decision in a particular case, where knowing the identity of the judge and other particular circumstances enhances any prediction. For a person to guide her behavior by a prediction of what judges in general will do, the contribution of legal doctrine to the decision must be substantial.

44. For additional reasons not to incorporate a richer descriptive theory of adjudication into general theories of law, see *infra* note 46 and accompanying text. It may be that the non-system-dependent generalizations we can generate are not that illuminating.

cultures, stressing the differences between legal cultures against the common background provided by general theory.

The conclusion is that legal theory, as an enterprise, need not have more than the skeletal description of adjudication. Positivism is a type of legal theory in this sense. As such, it is not committed to any particular description of adjudication (including a description of what judges think they ought to do, which I think is a main factor in what they will ultimately do), or to any recommendation for what judges should do. Positivism, like any other genuine general theory of law,[45] is consistent with all true descriptions of adjudication. I am not yet prepared to argue that there is *no* general feature of adjudication that should be incorporated into general legal theory, but I have yet to see a persuasive argument for this view.[46]

Positivism, and legal theories defining law in terms of rules of conduct, are similarly agnostic, to a large extent, about the formal attributes of these norms. Despite the general claim that positivists like "rules,"[47] they have no position on the preference for rules (as opposed to standards or contexts of simply conferring discretion).[48] In addition, although all theories of law regard judges as bound by law (leaving open the question

45. This is why I believe that part of Dworkin's work is not an example of general legal theory: Claiming that law should be defined by reference to adjudication, or that law is an interpretive concept, is a general claim about law. If interpretation is an attempt to discover the best available political justification of law, however, and if legal theory is just the most general part of the legal system, then legal theory must be immanently culture-dependent and contingent.

46. This may support those who think that the general theory of law is uninteresting and unimportant, and that people should instead develop detailed descriptions of adjudication and normative theories about how to use judicial powers. I said above that *if* a choice must be made between the two enterprises, this may be true. *See supra* note 25 and accompanying text. I do not think that this is the case, though. A detailed descriptive theory of adjudication will help us understand and predict what judges do. A detailed normative theory of adjudication will give judges and those who evaluate their decisions a frame of reference, but no clear answers for most hard cases. General theories of law do neither. Their possible justifications and functions are beyond the scope of this paper. I will just say that, in addition to a general wish to "know the truth" about an important social institution, it is quite possible that the adequacy of theories about law depends on the context in which they are offered. There might be differences in approach if the purpose is to provide the social scientist with tools to distinguish law from religion, morals, and politics; or the legal reformer with an understanding of the limits of law as a tool for regulation of human conduct; or the citizen with a criterion of identifying the "right" answer to questions of obedience to authority under the name of law.

47. By "rules," I refer to the sense of specific directives, not as norms in the generic sense used by Schauer. *See* Schauer, *supra* note 1, at 647-51. Rules in these accounts are thus often presented in opposition to "principles" or to "policies."

48. In fact, Dworkin accuses positivism of a willingness to live with too much discretion. *See supra* note 36. I argued above that all legal theories that subscribe to the skele-

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whether they are bound by other things, as well), the theories as such say nothing about the legal question of the content of these rules, including the question whether judges should always be required by the law to follow preexisting law. Most modern positivist theorists accept the phenomenon of judges deciding against the law,[49] and many of them stress the problems of vagueness and open-texturedness, which create opportunities for judges to (indeed, make them) supplement preexisting law.[50]

If this is the nature of general jurisprudence, its contribution to the question of how rules in fact function, and the extent of their desirability in the law, must be limited. We shall do better to discuss our normative and descriptive problems directly and on their merits, without hoping to gain "answers" from theories of law. Therefore, I agree with Schauer that the essence of law neither dictates nor precludes "ruleness." This conclusion offers enough initial support to my argument that the label "presumptive positivism" is unfortunate. I shall return to this question later, after discussing the role of rules in law, to see whether adopting a given theory of law (positivism) has the same effects as adopting rules, and whether the similarities are sufficiently important to justify the label, after all.

III. The Role of Rules

Now that we have addressed theories of law and positivism, let us discuss the very genuine problems raised by Schauer. They are, as he says, both descriptive and normative.[51] The two are related at least in the sense that much of the debate about the description is based on an intuition that most participants accept the law, as a whole, as legitimate.[52]

Schauer is obviously right that, before discussing rules and

tal account of adjudication share this weakness. *See supra* note 46 and accompanying text.

49. Kelsen discusses the power of judges to decide against the law in terms of a fiction of gaps in the law introduced and accepted by legislators to avoid unjust results. *See* H. Kelsen, *supra* note 34, at 146-49. *See also* The Authority of Law, *supra* note 34, at 189-92 (discussing overruling of precedents).

50. *See, e.g.*, H.L.A. Hart, *supra* note 20, at 121-50.

51. *See* Schauer, *supra* note 1, at 647, 665-91.

52. Most legal scholars see the practice of adjudication, in its complexity, as legitimate. They may differ on how best to describe it (the positivists may prefer the account under which judges at times have discretion, Dworkin may prefer an account stressing a search for principles or integrity), but they do not *describe* adjudication in order to discredit it. An exception may be some of the critical accounts, which seem to want to

their role, actual or desirable, we must first be clear about what rules are. Unfortunately, his analysis of rules limits his enterprise in ways not required by his assumptions, so I shall start with a few comments on it. I shall then amplify some of the points he makes under the descriptive and normative claims. I believe that there is not much that we can say, in a general way, about the descriptive claim. It is thus not surprising that legal theories have found it difficult to incorporate more detailed accounts of adjudication. It is interesting to see why this is so, by pointing out some of the many difficulties encountered by any attempt at describing adjudication. On the other hand, legal rules do have unique and important features, not shared by all rules of practical reasoning, that may provide some insights into their actual and desirable roles in law. On the morality of rules, I feel that Schauer surrendered to an unfortunate fashion in American legal academia, namely, by quarrelling mostly with those who think that there is more "ruleness" than is justified.[53] He makes very good arguments for the position that rules are at times justified.[54] I am deeply convinced of that, so, for me, whether rules may be good is a non-issue. The more important problem is to see which rules are good, and how it is possible to implement them. I therefore would like to see more work done on the functions that only rules can perform, and on contexts in which rules may be justified, assuming (rather than arguing for) a general justification of rules (or of authority).

A. *The Nature and Function of Rules*

I agree with Schauer's (unstated) decision not to take a stand on such questions as whether we must conceive of rules as special kinds of reasons for action (as suggested by Joseph Raz[55]), or whether we should see them as providing "only" additional first-order reasons for action.[56] The differences are genuine

expose the process as a deceitful manipulation. *See, e.g.*, Kairys, *Introduction*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 1 (D. Kairys ed. 1982).

53. *See* Schauer, *supra* note 1, at 679-91.

54. *See id.*

55. Raz argues that mandatory rules generated by authorities are "protected reasons for action," that is, a combination of first-order reasons for action and exclusionary second-order reasons for not relying on considerations excluded by the rule. *See* PRACTICAL REASONS AND NORMS, *supra* note 34, at 15-48; THE AUTHORITY OF LAW, *supra* note 34, at 19-25. For a critique of Raz's argument, see Moore, *Authority, Law, and Razian Reasons*, 62 S. CAL. L. REV. 827 (1989).

56. Schauer does not address the question in his discussion of rules, *see* Schauer,

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and important, but it is more important for our present purposes to get at the points at issue. I therefore believe that we should try to give rules the least preemptive and theory-dependent analysis that we can, assuming that the problems can be stated within the different conceptions, and that their main features are clear. Accordingly, I shall follow Schauer's analysis in the main, making only those clarifications I deem necessary for the argument.

Rules, Schauer tells us, are generalizations. Prescriptive rules, the subject of his analysis, have two dimensions: the size of the categories, and their opaqueness—the degree to which a rule requires that considerations external to its command be ignored.[57] The main decisional problem with rules is their inevitable under- or over-inclusiveness. This vice will tend to be more pronounced if the size of the categories is large. The decisional problem is that rules, to be effective, must be entrenched to some degree (or will be entrenched, even if they do not have to be, for a variety of reasons), but this entrenchment may lead to suboptimal decisions. The larger the categories and the stronger the entrenchment, the more "ruleness" we have.

Schauer does not tell us much more about rules (at least in this Symposium). He moves directly to distinguishing between modes of decisionmaking according to their relationship to rules.[58] There is a spectrum, which has as its extreme points rule-based decisionmaking and particularistic decisionmaking, with at least one important intermediate position of rule-sensitive particularism.[59]

Schauer's analysis captures important features of rules, but we should recall that there is something contingent in his usage, especially against the background of the literature with which he argues. According to Schauer, we have "more" rule-

supra note 1, at 647-51, or in his discussion of presumptive ruleness, *see id.* at 674-77. His characterization of rules, *see id.* at 649, is explicitly agnostic on this question.

57. By making some opaqueness a defining feature of rules, Schauer moves beyond seeing rules as providing additional and independent first-order reasons for action, because he defines opaqueness as the requirement that other reasons be excluded. Because Schauer's opaqueness is a matter of degree, and not only of scope, however, the analysis does not yield the conception of rules as protected reasons for action.

58. *See* Schauer, *supra* note 1, at 648.

59. The spectrum is known in discussions of utilitarianism. Act-utilitarianism is particularistic, whereas rule-utilitarianism is rule-based. Those who argue that rule-utilitarianism can be justified in act-utilitarian terms, without collapsing into act-utilitarianism, are believers in the intermediate position.

ness when the categories are broader.[60] Broader categories, however, usually resemble "standards" rather than rules. Even if we take broadness only in the sense of range of applicability, it is not clear that size is directly relevant. Large categories will tend to be over-inclusive and less determinative, but small categories may be under-inclusive and more determinative or constraining. Either raises the ruleness problem. So perhaps we should only use the strength of entrenchment as an indication for ruleness.

In any event, the problem arises only where there is discrepancy between the result that the rule requires and the result required by some other estimate of the best thing to do. If we have freedom to determine the answer to the question of what the rule requires in a way that will avoid the conflict, the problem of ruleness does not arise. Large categories may tend to over-include, but they may also provide more opportunities for "internal" interpretations that avoid the conflict altogether. Size on its own, then, does not add much to the likelihood of a problem of ruleness.[61]

Second, there is something curious and misleading about the way in which Schauer moves from the definition of rules to modes of decisionmaking. Schauer directs us not only to the entrenchment of rules, but to seeing them as the opposite of particularistic decisionmaking (that is, decisionmaking based on the background justification(s) of the rules). In some cases, this is all there is to it: We require some age limit for eligibility because we assume that this is the age at which people typically may have the qualification, and we prefer a mechanical, one-dimensional, objective rule to a case-by-case examination of (the possibly complex criteria of) eligibility. The same applies, within morality, when we debate having rules within the framework of the same moral theory, say, utilitarianism. There, too, the rule stands opposed to the act-utilitarianistic evaluation of the case.

60. *See* Schauer, *supra* note 1, at 651.

61. I do not think this is an important point in Schauer's overall argument, so I do not intend to pursue it here in detail. It is obviously true that a rule applicable to all is more likely to be over-inclusive than a rule applicable to some. If the rule imposes a duty, the scope of the duty is broader under such a rule, thus leading to more "ruleness." Similarly, if the rule describes the behavior to be prohibited in sweeping terms, it is more likely to be over-inclusive than a finer description. Again, more conduct is prohibited, and we may have "more ruleness," that is, more behavior is regulated by the rule.

Some of our decisional problems with rules, however, are not that they are over- or under-inclusive within the *same* justificatory framework. We object to the rules because they create a requirement that conflicts with another justificatory framework, one that we deem superior to that of the rule. The rule in this case is not only entrenched vis-à-vis the particularistic, all-things-considered judgment, taking into consideration its own background justifications; it is also entrenched vis-à-vis the normative requirement of all other justificatory frameworks. These requirements, in their turn, may be formulated in the form of rules or of all-things-considered judgments. So the entrenchment of rules is not necessarily a matter of ruleness versus non-ruleness. It is a matter of identifying, at the outset, the kinds of reasons that are dispositive, and their weight or status.[62]

Schauer at times seems to think that, whereas some entrenchment is definitive of rules, its strength may be a matter of degree:[63] "Ruleness" will be more manifest when entrenchment is stronger.[64] Presumably, we can have a spectrum of degrees of entrenchment (keeping to the first-order level of reasons): from the most entrenched (that is, we must follow the rule always, whatever the consequences) to the least entrenched (that is, the rule provides a weak first-order reason for following it). This account, in addition to taking a controversial stand on the nature of rules, creates a problem for Schauer's formulation of his own problem. It is not clear when a decision should be termed "rule-based," because in principle, everything on this spectrum is rule-based. Clearly, this would be a confusing usage. I conclude that it is better to speak not of de-

62. Thus, we can have a rule-utilitarian position that justifies certain limitations of the government's power to limit freedom of speech because the rule is supposed to serve better the act-utilitarian calculus of maximizing welfare. The problem of ruleness, according to Schauer, arises when, in a particular case, it seems that the rule requires a deviation from the act-utilitarian calculus. We may object to the conclusion (and to the rule itself), though, because we think that decisions about free speech cannot be adequately made if only consequentialist considerations are taken into account.

63. I say "at times" because, when discussing Fuller's theory of law and its consistency with his claim that law does not have to be a matter of rules, Schauer argues that "rules of thumb" are also rules. *See* Schauer, *supra* note 1, at 656. Also, when discussing Kennedy's objection that judges always have to see whether this case is not the one justifying deviation as fatal to rules, Schauer responds by the retail-wholesale distinction, as if ruleness were one-dimensional and an all-or-nothing phenomenon. *See id.* at 660-61.

64. *See, e.g., id.* at 650 (identifying the point of strongest "ruleness" as that at which the rule *precludes* all evaluation of possible reasons for not following the rule).

grees of ruleness but of the proper attitude to rules, and then moving on the spectrum suggested by Schauer.

Equipped with these clarifications, we may move to the notion of presumptive ruleness.

B. *Presumptive Ruleness*

Schauer discusses two types of presumptions.[65] First, the existence of the rule creates a presumption in favor of following the rule: The decisionmaker has a duty to follow the rule unless there is a strong reason for not doing so. Second, when there is a rule, one has the liberty, in most cases, not to scrutinize factors irrelevant to the rule's applicability. One is entitled to merely "peek" at, or even ignore, those factors.

Schauer needs the second implication of presumptive ruleness in order to overcome what he presents as a powerful argument: If a rule merely creates a presumption in its favor, decisionmakers always have a duty to decide whether in this case the presumption should be rebutted, and to do that, they must examine all of the other reasons deemed relevant. According to this argument, all cases are hard cases because the rules act not as entrenched guides for action, but as rules of thumb.

A duty to examine all relevant reasons (where "relevant" is determined by the decisionmaker's ultimate justificatory system, not by the rule itself or even its background justifications) in all cases does not make all cases hard. It does make all cases time-consuming, in ways that are extremely wasteful.[66] To see that, we need to distinguish between recipes for identifying the right decisions and recipes for a decisionmaking procedure. The two are distinct, although they may be interrelated.

"Presumptive ruleness" in the first sense is a description of the right answer to a question governed by a rule. Usually, one should follow the rule. If one wishes to deviate, one must provide (or at least there must be) a justification of a certain strength. It is not enough that, on some balance of reasons, the decision is suboptimal in this case. One can only justify devia-

65. *See id.* at 674-75.

66. If the duty to examine all background justifications creates long delays in decisionmaking, this is a serious cost to the adequacy of the decisionmaking. That cost should count against it, especially if it turns out that in most cases, the examination does not yield a deviation from the rule. This is, in fact, one of the justifications for adopting rules in the first place.

tion with a strong reason for not following the rule.[67] If such a strong reason exists, one should not follow the rule. At this stage, I do not want to argue about the morality of this approach to ruleness. I wish only to stress that it is not a definition of what a rule is, but rather a description of a normative approach to rules.[68]

Identification of the right answer does not depend on the depth of the examination the decisionmaker made, on the comprehensiveness of her analysis of various reasons, or on the answer's validity. A decisionmaker may have had a hunch that proved right and that she did justify persuasively (she may have given a formalistic or essentialistic opinion, consciously or unconsciously hiding the true grounds for her decision), or she may have listed the relevant reasons with great care, in a long opinion, only to be wrong.

The second sense of presumptiveness, that of "peeking," concerns what a decisionmaker should do *before* she decides. Here, it is not clear whether, according to Schauer, the rule creates another presumption, that is, that only the factors enumerated in the rule itself are relevant; whether the practice of following rules justifies disregard of such factors (unless something attracts our attention to the possibility that such factors may be relevant); or whether there is a fully-entrenched rule that non-rule factors should not be considered unless something or someone "shouts."

Does the attitude of "substantive" presumptive ruleness, though, necessarily require that all other factors will always be

67. Or, to adopt the language of exclusionary reasons, you can only look to those "background justifications" or other factors that were not excluded by the exclusionary reason, or the examination of which is required by another reason of a similar status and weight.

68. On the spectrum of strength of entrenchment, Schauer chooses to be close to the lower part. The reason to overcome the presumption must be strong, but it should not be stronger than the first-order reasons for following the rule combined with the value of the rule and the reasons that made the rulemaker embody them in a rule. This is probably an important difference between his account and an exclusionary reasons account: Even if the scope of the reasons excluded is not large, it is reasonable to expect that some reasons that may provide the strong reason for not following the rule might be excluded. This, to me, though, is an advantage of not making a commitment to the exclusionary reasons analysis of rules (as distinguished from normative arguments that there are cases in which the reasons provided by rules should be seen as exclusionary). Although this is not dictated by the analysis, it does suggest that the normative question of the desirable attitude to the rule follows inexorably from the general analysis of rules. I prefer, tentatively, to keep the analysis of rules more open, and to pursue the question if and when the adoption of exclusionary reasons of certain scopes is justified as a normative question.

examined? To some extent, it does. If this is the adopted attitude, any decision to follow the rule should be read as including a statement that the decisionmaker thought that the rule should be followed. Decisionmakers should be made aware of this fact. The important question, however, is what kind of investigations or examinations decisionmakers must make to reach this judgment. The *normative* answer may be that life experience suggests that the costs of a comprehensive search and analysis, in the absence of something suggesting that such a search is called for, are greater than their contribution to the right decision.[69]

In many contexts, including in many cases of legal decisionmaking, the need to reach a decision quickly is part of our notion of justice. A long delayed decision puts burdens on the litigants, which burdens are desirable to avoid. So the balance of reasons cannot always be for a comprehensive deliberation seeking to make extra certain that the decision that seems right initially is indeed the right one. Once the risk of error is minimized, it is mandatory to accept the finality of deliberation and to reach a decision, even though a deeper examination would have occasionally revealed a better decision.[70]

This feature is not unique to law, but it is often present in law and adjudication. It is thus a suitable point with which to move to the question of whether the nature of law can shed some light on the desiderata of legal decisionmaking.

C. *The Uniqueness of Law*

As Schauer keeps reminding us, most of the decisionmaking problems that he raises are not unique to law. Moral theorists often debate the relative merits of the application of rules of law and case-by-case particularism.[71] Moral theorists also raise the problem of ultimate versus intermediate principles. There are also debates both within a moral theory and between different moral theories; in the latter, one of the important differ-

69. I believe that Schauer is right that there is a psychological tendency not to examine what seem to be "external" factors in the absence of a sense of conflict. If one's sense of conflict is usually adequate, this tendency may support the normative approach. The tendency may be dangerous if decisionmakers tend to suppress the awareness that some decisions are bad.

70. For a discussion of the rationality of putting some end to deliberations, see H. FRANKFURT, *Identification and Wholeheartedness*, in THE IMPORTANCE OF WHAT WE CARE ABOUT 159 (1988).

71. *See, e.g.*, Moore, *Three Concepts of Rules*, 14 HARV. J.L. & PUB. POL'Y 771 (1991).

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ences may be precisely the relevance of some factors of practical importance.[72] Is there anything that is unique to law that might affect the descriptive and normative claims about the role of rules (or entrenched norms)?

This is where legal theory can help us, after all—in two ways. First, the very enterprise of legal theory is to distinguish between law on the one hand and other facets of human life, especially morality or politics, on the other. So legal theory as an enterprise assumes that law has a certain autonomy. The features that may account for this autonomy may be relevant to the role and the justification of adopting rules in the law. Second, the features that theories of law identify as relevant, and the general things that theories of law tell us about law and its relationships to other parts of social life, may help us see reasons for rules that may not exist to the same degree in other decisionmaking contexts.

All agree that a distinctive feature of law is its institutional character: It confers powers on organs to make law, change laws, enforce them, and apply them; it also confers many powers to act (for example, to issue licenses or supervise activities) that do not amount to lawmaking or to law enforcement. Often, when we want to confer powers, we also want to minimize their abuse. One of the ways to do that is by limiting power; hence, policemen cannot detain people beyond a very short time without judicial approval. As Schauer insists, limiting powers may be done in a combination of two ways: limiting the jurisdiction of an organization, or structuring the types of decisions an organization may make within its powers. At least in some circumstances, we want these structures to be specific, concrete, and clear—and extremely entrenched. We do not want police officers or Central Intelligence Agency (CIA) agents deciding according to their own judgment whose telephones to tap.

This means two things: We do not want them to decide what the background justification of the rule actually adopted requires in each particular case, because we are afraid that they may be overzealous; we are also afraid that their ideologies are such that they do not see the balance between civil rights and

72. One of the criticisms of both act- and rule-utilitarianism, for example, is that they do not take into account distributive considerations. A utilitarian recommendation may thus be criticized for not considering some excluded reasons that are morally relevant, and that utilitarianism as a whole is entrenched against.

law and order in the same way as the rulemakers. We suspect the police officer and the CIA agent of making *bona fide* mistakes within the background justifications, and of wanting to decide the issue by considerations external to those justifications.

This is where the "limited-domain" feature of law comes into the picture. According to Schauer, some versions of positivism emphasize the limited domain of law.[73] No doubt, the wish to distinguish between law and morality and politics motivated all positivist theories of law.[74] As my discussion of legal theory hints above, I wish to argue that some sense of limited domain is the essence of law, and that this essence is reflected in all integrated theories about the law: Natural law theories of law require some connection between law and morality, but they do not collapse the two. They advance theories of human law, and say something substantive about human law, which is different from saying that legal decisionmakers should merely decide legal cases as if they were moral dilemmas. The distinction between law and morality and politics does not suggest separation or absence of many areas of overlap. Most law is made through a political process. Laws are obviously affected by morality both in their making and in their application. Nevertheless, law is distinct from these background justificatory schemes, and this distinctness is an important ingredient of the law's capacity to perform its social functions. In a world in which opinions differ about morality and the status of moral norms, it is of the utmost importance to have normative guidance that cannot be collapsed to those controversial beliefs. Such guidance promotes clarity. It also derives its legitimacy from an agreement about the ways in which these norms were made, rather than from an agreement about their content.

Thus, in addition to the reasons we may have for rules in general (and I believe that there are many, including fear of mistakes in judgment and wishes to gain the rule-of-law virtues of predictability and clarity), and for limited domains in partic-

73. *See* Schauer, *supra* note 1, at 666 n.41.

74. The difference between limited-domain theories (for example, the Razian theory, which identifies laws exclusively by sources and confines laws to legal materials preexisting adjudication) and more "dynamic" theories (those that are willing to label "law," at least in a loose sense, as the product of legal officials) is not the greater willingness of the latter to give up on the distinction between law and morality and politics.

ular, we have a reason for keeping the law from collapsing totally into politics or morality. A prime way of doing this is to limit the types of justificatory materials legal decisionmakers are entitled to invoke.[75] In addition, as Schauer reminds us, if we want to maintain hierarchy in legal systems (as I think we do), we must prevent every decisionmaker from seeing everything as open to her discretion or best judgment.[76] We need a way of entrenching some results from the discretion of some decisionmakers.

I wish to make clear that this position does not commit me to many of the views that people usually associate with it. Nor, as Schauer reminds us, does it commit me to positivism.[77] All I am saying is that judges, as judges, do not reason, and should not reason, as politicians or as moral preachers (or teachers). Judges are unique in at least two ways: They are bound by materials that may be irrelevant to the politician or the moralist (laws); and they are organs in a system that has systemic concerns of a special nature transcending the decision of the instant case. These systemic concerns include both institutional factors of the proper relationships among various authorities, and the general need to have norms of conduct that may be used to plan, to interact, and to avoid and resolve disputes without the invocation of the law-enforcing institutions of the legal system.[78]

There is a third important sense in which judges are unique. The law is a comprehensive system that claims supreme power to regulate all conduct by its subjects. In other words, the law claims general authority. Stated yet another way, the law claims a general legitimate authority to issue rules of conduct that will be binding—rules of conduct that will require the desirable at-

75. I believe that Dworkin's position that judges should (and do) rely only on principles, not on policies, is an attempt to grasp the same truth. *See* LAW'S EMPIRE, *supra* note 10, at 221-24; TAKING RIGHTS SERIOUSLY, *supra* note 10, at 22-28, 90-100. It is an attempt to make judges (and the law) unique by limiting the materials that may be invoked to decide issues within the law (as distinguished from politics, which decides issues outside the law, occasionally creating law in this way).

76. *See* Schauer, *supra* note 1, at 684.

77. *See id.* at 685-91.

78. The mere fact of systemic constraints may not be unique to law and legal decisionmakers. Political decisionmakers obviously also are a part in a system, and even moral decisionmakers may have systemic constraints if they are not one-time decisionmakers. The nature of the systemic constraints of legal decisionmakers, however, is different. For a partial list of such constraints, see Soper, *supra* note 37, at 1-7. *See also* Newman, *Between Legal Realism and Neutral Principles*, 72 CALIF. L. REV. 200 (1984).

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titude toward rules. The morality (or the justification, or the legitimacy) of law is thus very different from that of rules in general. The question whether, and when, it is justified to adopt or follow rules is very different from the question whether, and when, it is justified to adopt an attitude of accepting the authority of law. It is likely that it will be much easier to justify the adoption of some rule, and thus by implication to affirm that some rules may be justified, than it will be to justify the adoption of an attitude of respect for law, simply because there is much less control, in advance, on what this attitude may require. I shall assume below that Schauer is not interested in this particular problem.[79]

D. *The Descriptive Claim*

I agree with Schauer that presumptive ruleness, in both the substantive and the procedural senses, is a good metaphor for the approach of judges to law. It is also a better description of what judges do than either radical "rule-skepticism" or stringent rule-following.[80] Schauer's discussion is illuminating and rich. I would simply like to use the framework that he created to make a few observations about describing such a complex phenomenon as adjudication.

The first problem is that what we seek to describe is not a straightforward empirical phenomenon. We want to know how judges in fact decide cases, and what they examine before they do so. In particular, we want to know how rules affect their decisions. Can we formulate a testable hypothesis to refute (or confirm) either description? Will such a hypothesis rely only on

79. This assumption is based on the fact that Schauer does not connect the standard reasons for having an obligation to obey the law as relevant to his discussion of the desirability or possible justification for rules. I shall return to this question below, when I discuss the criticism that positivism encourages too much obedience to law.

80. I guess that I have a consensus-personality. I cannot think of any serious observer of any legal scene, including the American, who has consistently advanced either of these claims. When we look at "candidates" in context, and we recall what they were fighting when they insisted on their apparent "rule-skepticism," we can see that they did not mean to embrace this. Take Justice Holmes's "bad man theory," that law was what courts did in fact. (Other realist claims, which fought "essentialism," did not offer a "particularistic" conception of law, but wanted to identify "real law," as distinguished from "paper law.") If this is a serious theoretical claim, it does mean that law is not rules but rather is particular decisions (as opposed to the realist view, also expressed by Holmes, that law is the prediction of what courts will do, which may in turn depend on some theory of the extent to which courts follow rules). Holmes, however, clearly did not intend this to be his claim. He just wanted to stress, in a dramatic fashion, that law should not be confused with morals.

"external" facts, such as the text of decisions, or must it rely on other factors as well? Can we know, to a sufficient extent, that other evidence?

It should be clear that the published opinions are an extremely partial body of data to describe what judges in fact do.[81] Moreover, they are systemically misleading,[82] for a variety of reasons. First, judges write opinions in order to *justify* their decisions. Because many judges believe, or at least write opinions as if they believe, that they are bound by what they can identify as the law, we are unlikely to find explicit declarations that a decision is a deviation from what the law requires. Typical judicial decisions, including those that we give as illustrations of preferring "background justifications" to law, still maintain that they are "true" declarations of what the law requires.[83] More seriously, a decision is often a conscious attempt at rhetoric—at explanation, justification, and persuasion. It may have nothing to do with the psychological processes that were involved in the judge's decisionmaking.[84]

Nevertheless, the data that we seek to explain and describe are mainly published opinions of high courts. I would venture that this partial "diet" explains why cases decided on the "merits of the case," as opposed to the "rule," are under-

81. Only a very small number of judicial decisions generate reasoned opinions, and only a small percentage of the opinions are published.

82. At least for those parts of "what judges do" that are distinct from writing their opinions.

83. This feature of adjudication lends some credence to Dworkin's insistence that these judges work "within the law" rather than invoke extra-legal considerations when the "law" has run out. We can, however, accommodate this rhetoric to the skeletal description very easily: First-stage law has indeed run out. The law permits judges to make decisions in such cases, and gives them limited direction as to where to seek answers. In this sense, they are still working "within the law." Some of these other sources may still be "legal" (in some institutionally-linked way), but some are not. There may be some institutional justification in the attempt to show that the "best" decision reached by the court is "law." To the extent that this rhetoric suggests that the answer was pre-determined by legal materials, I believe that both the rhetoric and Dworkin's analysis are misleading rather than illuminating, contributing to the tendency not to see that the judges are making political decisions. *See* Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1087-93 (1975), *reprinted in* TAKING RIGHTS SERIOUSLY, *supra* note 10, at 81, 110-15. *See also* Dworkin, *A Reply by Ronald Dworkin*, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE, *supra* note 9, at 247, 272.

84. I do think, however, that we often make conscious attempts to reconstruct the argument, identifying what convinced the judge that one decision should be preferred to others. I do not think that we should always regard those as mere rationalizations. Professor Stanley Fish is wrong here because he overlooks the fact that the practice of judges (unlike that of athletes) involves the public justification of decisions. *See* Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773 (1987).

represented in the data that we observe.[85] Clearly, our data base is biased in favor of hard cases. Easy cases are unlikely to reach the courts. As mentioned above, judges always say that they decide according to law. So how do we identify the decisions that call for a special explanation, that support or refute a descriptive hypothesis?

I tend to think that we cannot make more than weak generalizations about how judges decide cases using only our common sense. We shall also have a different generalization in different times, for different subjects, for different judges. It is not at all clear that we can generalize for adjudication as a whole. All we may do is *to exclude some sweeping generalizations*, such as "judges never follow rules" versus "judges always follow rules," or "judges always ignore what the rules do not specify" versus "judges always peek at (or fully examine) the circumstances of the case." This is what Schauer's presumptive ruleness does.

The idea of presumption captures the reality of much of adjudication. Judges have an initial tendency to look only to the rule and to what the rule deems relevant. Only if there is something disturbing in the situation or in the result, will judges conduct more elaborate inquiries. When critics accuse a judge of formalism, it may be because the judge has ignored an important aspect of the situation. But more often than not, the judge followed the rule because she did not find the result disturbing, despite efforts by counsel to urge her to see it that way.

If a judge believes that the application of the rule to the case is not straightforward or acceptable, many things may happen. The judge may nevertheless refuse to examine any information or to deviate from the rule. She may justify this by the need to follow the rule. If many judges do that, this might pose some difficulty for Schauer's presumptive ruleness. Judicial behavior would be closer to radical rule-following. More often, I would guess, judges in such situations do more than merely follow the

85. This may sound surprising, because we often assume that it takes a brave judge to deviate from a rule, and brave judges are more often than not on a high court. It takes a good judge, however, to know exactly what the law is, and to be aware of the problems of deviation from rules. I have encountered numerous decisions in Israel's lower courts in which cases were decided in disregard of the law. Sometimes, there was no one involved in the case who argued the law. Sometimes, the judge believed that resolving the dispute was more important, and if the resolution was "just," that was the end of the matter.

rules, especially if the result creates extreme hardship. They seldom deviate from the rule, and when they do, they find some respectable legal justification for that deviation.[86] *Riggs v. Palmer*[87] is a case of this sort. More often, however, the judge decides to follow the rule. This is fine for presumptive positivism. The judge may explicitly discuss the conflict and explain why she preferred to follow the rule, by citing such reasons as considerations of institutional competence, or the need for certainty. She may occasionally invite the legislator or administrator to change the rule, or she may suppress the problem and provide a short, neutral-looking, formal justification.[88]

If we are interested in saying more and knowing more about when to expect the one or the other, and how to bring about a tendency to do one or the other, this goes beyond confirming presumptive ruleness as a descriptive thesis. In this sense, presumptive ruleness, like the skeletal description of adjudication in general legal theory, is just a framework within which these richer discussions must take place.

Presumptive ruleness thus says a bit more than the skeletal description about what actually happens in adjudication. It does rule out radical rule-following. (It also rules out complete rule-skepticism, but the skeletal description presupposed this.) The ability of presumptive ruleness to describe judicial decisionmaking, however, without filling in the details, is not extremely powerful.

The fact that all legal systems give judges, especially judges of last resort, powers of changing the law, strengthens presumptive ruleness as a descriptive thesis. Because of the justificatory rhetoric, it is often hard to identify when judges use these powers, rather than when they use their powers to follow the law or to "apply" it. This rhetoric obscures differences between decisions, which are often easier to state theoretically than to instantiate. Take *Riggs v. Palmer*, for example. Dworkin's assertions notwithstanding, positivists need not be embarrassed by it (or, in fact, by any other judicial decision). The real descriptive question is what happened in that case. Was this a

86. I do not want to speculate which of the two comes first: the decision or the argument supporting it.

87. 115 N.Y. 506, 22 N.E. 188 (1889).

88. Cover argues that antislavery judges who upheld slavery laws took the latter course, thus reducing their own cognitive and moral dissonance. *See* R. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 119 (1975).

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regulated dispute, in which the law said the murderer should inherit, and the judges decided not to follow the rule and to look instead at background justifications? If this is the description, was this a legitimate decision by judges? The description does not answer the question. The legitimacy of judicial decisions, in any system, is not a matter of the analysis of specific decisions on their own. The ultimate court has, in such cases, discretion in the third sense mentioned by Dworkin—that of finality.[89] The system decides whether this is a legitimate use of power by its general response to the decision. Perhaps, however, this is the wrong description of *Riggs*. Was it a case in which the legal materials did include references to background principles that should have governed, so that the law permitted, or maybe required, denying the murderer the right to inherit? Either description is possible. Either description is consistent with presumptive ruleness. It is not clear why it is of any theoretical importance to decide which of these descriptions is a more accurate one.

The difficulty of assessing the descriptive theses, once we make them more specific, is that it is difficult to think of what could support or refute such theses. We do not know enough, and we do know that there are many differences in the ways decisionmakers make decisions and conceive of them. It may just be that making decisions within the legal system is not the type of human behavior that is sufficiently basic and structured to be described in such a general way.

In short, there is a lot that could be done and that should be done to understand how judges make decisions and how they choose to justify them.[90] It might be wise to accept that we should not aspire to general, sweeping descriptions, even within any particular culture or legal system at a certain time.

One interesting thing to consider, suggested by the two

89. *See* TAKING RIGHTS SERIOUSLY, *supra* note 10, at 35.

90. In many cases, opinions do not address some arguments or factors that seem obvious and relevant. Furthermore, in some of the cases, these factors and arguments were made known to the court, either in oral argument or in writing or both. Did the judges ignore these factors because they were excluded by the rule? Did they think that they were irrelevant? Were they simply overworked and not attentive enough, or was this an intricate way to be formalistic in order to disguise political ideologies or moral unease? These questions are all relevant to presumptive ruleness in both its senses. The answers are not likely to be general and sweeping. For an acknowledgement that not much has been done to understand the "real" factors affecting judicial decisionmaking, see Schwartz, *A Proposed Focus For Research on Judicial Behavior*, in FRONTIERS OF JUDICIAL RESEARCH 489 (J. Grossman & J. Tanenhaus eds. 1969).

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senses of presumptiveness Schauer mentions, is the extent to which the existence of the rule strengthens tendencies to ignore, and to legitimate ignoring, those features of social situations that the rule deems irrelevant.[91] Such ignorance may lead to mistaken attitudes toward the rule, because it may lead the decisionmaker to ignore the fact that the circumstances of the case justified or even required deviation from the rule.[92] Thus, this is a good point at which to consider the morality of rules.

E. *The Morality of Rules*

The dilemma that Schauer faces is clear and well-known: What should a decisionmaker do when she is confronted by a rule dictating a result that goes against her best judgment? And what follows from that to the principles that should govern our decisional environment?[93] Presenting the question presupposes two things. First, it presupposes that we can identify, at least at times, what rules require us to do (and that we can identify the conclusion of an all-things-considered judgment, or at least that a decisionmaker can decide what she thinks is the best thing to do, all things considered, and hope that this is close enough to the "reality of things").[94] Second, it presupposes that we can decide whether or not to follow the rule. As I said above, these presuppositions are general in nature. They

91. That the answer to the question may not be simple is illustrated by the fact that we encounter opposing claims. Women often claim that their gender is taken into consideration, usually against them, even in contexts in which rules seek to exclude its relevance. On this account, rules do not effectively affect background sensitivity. They do not succeed in doing so even when we try to use rules precisely for this purpose. On the other hand, women also argue that commitments to equality and to merits effectively prevent decisionmakers from taking into account (as they should) the effects of past discrimination, so that small differences in merits should not disqualify women. In the latter cases, it should be noted, it is not always clear whether what is attacked is the role of the rule or its content.

92. And it does not matter, for this purpose, if we see this deviation as permitted by the system and its practices, or as a deviation from the system as a whole.

93. I shall not comment on the interesting epilogue, in which Schauer discusses the implications of his answer that it is at times justified to follow rules, and at times justified not to do so, to the techniques used by a person or organ wishing to induce obedience to rules.

94. The presupposition about the ability to identify what rules require is not trivial for our purposes. There are many cases in which judicial lawmaking is not revision of law or deviation from it because of injustice, but merely lawmaking in the interstices of law. *Lochner*-type decisions, under this account, do not raise questions of rule-following at all, because there could be a legitimate controversy about the requirement of the Constitution. *See* Lochner v. State of New York, 198 U.S. 45 (1905) (state law limiting hours of workers interfered with freedom of contract, thereby violating Fourteenth Amendment).

belong with all inquiries about rule-following, and are not limited to law, or even to practical reasoning. In answering these two questions, denials of radical skepticism are, therefore, also a matter of general philosophy. If law has a unique contribution to make, it will work to lessen skepticism in this particular context.[95]

Is it ever justified to go against one's better judgment, when making a decision, because of a rule? Is it justified for people in authority to require others—judges as well as citizens—to obey in this way, and to subject their behavior to rules? Finally, is there something unique about the law that makes the answer different from what it might be under general moral theory?

Schauer's presentation of the issue permits us to interpret the question in two ways. First, is it ever justified to give the rule, rather than the reasons that justified the rule's adoption, some independent weight in deciding? So far as I know, all scholars agree that this is appropriate, although they may come from different scholarly traditions.[96] Second, is it ever justified to follow a rule when the result dictated by the rule is unjust? Here, the answer is less clear. How do we determine "justness"? If we agree that we should not follow rules in those cases, does that mean that we must give up all the advantages of rules? Must we reach some threshold of injustice before we abandon the rule? Or are thresholds more appropriate when we talk of "suboptimal" decisions, and out of place when a rule-dictated result is "unjust"? Is the question one of the extent of the deviation between the rule-dictated result and the decisionmaker's best judgment? Or its severity? Or certainty? Or a combination of all three?

Before we reach these questions, we should recall that, although some of these dilemmas may stem from the under-inclusiveness or over-inclusiveness of a rule (as Schauer's ac-

95. Law may lessen skepticism because its texts are designed to be prescriptive communications, because it is relatively easy to identify first-stage law, because there are conventions about how to treat law, because the people who are authorized to interpret and enforce the law are socialized in specific and particular ways, and because there is authoritative finality to some institutional decisions. Most will accept that "the game of" law is more constrained, determinate, and specific than "the game of" moral evaluation or life itself. No one can argue that it is less so.

96. This conclusion can be justified by rule-utilitarians, and by most act-utilitarians—when they are willing to take into account, as indeed they must, some generic consequences of the fact that human behavior is not regulated by anything but rules of thumb. The conclusion may also be justified by most deontological approaches.

count suggests), others may stem from the fact that the rulemakers made a deliberate choice with which the individual decisionmaker does not agree. This helps us to see that the problem here is not ruleness versus particularistic reasoning, nor is it the rule versus its own background justification, but rather the tension (from any source) between the requirement of the rule and the decisionmaker's background assessment of the situation. Schauer thus seems to want to remain within the range of suboptimal results, and it is not clear that all, or even most, suboptimal results are unjust.[97] Schauer also does not raise, explicitly or implicitly, the types of problems that motivated Fuller to accuse positivism of encouraging excessive obedience to authority—for example, the willingness of German judges to participate in enforcing potentially immoral laws.[98] Nothing of much moral consequence seems to depend on the decision by judges to follow rules or ignore them.

Thus, here again we encounter the same frustration we had before. We have ruled out several extremist positions. We have concluded that it is justified at times to follow rules, even if the result departs from one's best judgment absent the rule. On the other hand, it is sometimes justified not to follow a rule. Indeed, common sense requires that one sometimes not follow a rule, even if one is apparently bound by the rules. If this is all that we can say, we do not know much about the correct approach to rules. We can offer little guidance to decisionmakers, those who create decisionmaking environments, and those who evaluate their performance.

Our inability to provide guidance results primarily from the lack of an elaborate, detailed normative theory of adjudication to tell us what the right approach to rules should be, and, more importantly, what the right moral answers are and how to identify them. More discouraging still, even elaborate normative theories of adjudication often provide such general guidance that they leave open hard questions.[99] The sad truth is that all

97. My intuition is that, even in *Riggs v. Palmer*, the issue was not whether it was "just" to give a legatee who had killed his testator the benefit of the legatee's inheritance (assuming that those who would have gained were not those whom the victim wanted to benefit, so that they did not have a claim to the inheritance). The issue was whether the legal system should sanction such a result. *See* Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889).

98. *See* L. FULLER, *supra* note 20, at 40-41 & n.2.

99. *See, e.g.*, Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279 (1985).

general normative theories can help by identifying relevant considerations, but they cannot dictate particular decisions.

How, then, can we help decisionmakers? First, we need to make the *content* of the rules as adequate as possible. The first goal is to make the rules require the right decision most of the time. This may mean, among other things, attention to the different needs for specificity and flexibility in different contexts and at different times. Every lawyer knows that some areas are more suited for regulation by clear rules, others can only be regulated by open-ended norms, and still others have competing considerations. We must also be attentive to those contexts of decisionmaking that appear to be especially vulnerable to wrong "best judgments" by the decisionmaker. Schauer points out one purpose that requires rules: limiting some types of decisions and powers to some types of decisionmakers.[100] This is indeed a distinct function of rules. To achieve this function successfully, we need to know more about the risks of decisionmaking by particular types of decisionmakers, and about the needs of efficient decisionmaking in various fields.[101]

My belief is that the pendulum has swung too far: Schauer believes that he must persuade only those who think we have too much ruleness. These critics see rules as the enemy of justice, flexibility, and rich contextual decisionmaking. I think that, in the hands of responsible legislators, rules (drafted with common sense and wisdom, and enforced appropriately) are great contributors to justice. They may be our defense against discrimination, persecution, bigotry, and corruption. Rules are entrenched exclusions of some considerations. Their contribution depends on the justice and the wisdom of excluding these considerations much more than on their formal, neutral attributes.[102]

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100. *See* Schauer, *supra* note 1, at 686.

101. We may think, for example, that it is wrong to let a police officer decide who should be arrested. In some cases, such as when an arrest warrant is issued before the arrest, this can be done. Most arrests, however, must be made immediately and at the scene. The only way to resolve the dilemma is to give the police broad discretion to arrest, coupled with effective sanctions for clearly illegal arrests, and effective judicial review. The decisionmaker must be the police officer on the beat.

102. There is probably a similar phenomenon in the current debate about "rights-language." The debate is conducted as if language and the concepts we use are the real culprits of incorrect thought and legal practice. I am the last to think that concepts are unimportant, but I am generally suspicious when political agendas seem to concentrate exclusively on them. Language may contribute significantly to biases and stereotypical thinking, which may in turn lead to misconceptions of reality and to discrimination, and

This leads me to my final point: Is there, after all, some general argument against rules, built on an overall assessment of their effects, that should make us change our mind about their morality? Although rules may have some beneficial consequences (and some non-consequentialist benefits), can it be that their costs are so great that we should avoid them? And, returning to positivism, is there a similar argument about legal positivism, and should we therefore discard positivism as an inadequate legal theory?

IV. Legal Theory II: Obedience to Law

Even if we accept, with Schauer, that it is sometimes justified to follow rules, and that it is sometimes justified for judges to decide a case against their "best judgment" (all things considered) absent the rule, we must still face an important second-order argument against rules. I raise this problem because an analogous argument is often made against positivism. In fact Schauer mentions this as a reason for his choice of the label *presumptive positivism*. The argument is an important one. If the similarity between the argument against rules and that against positivism is significant and illuminating, this may indeed justify using the same label to draw attention to the similarity.

For rules, the argument goes something like this: Legal rules create relatively weak justifications for deviating in important ways from moral judgments (and moral rules may create reasons for deviating from all-things-considered moral judgments). The existence of rules, however, creates relatively strong tendencies to follow rules and to disregard factors of the situation that are excluded by the rules. Therefore, on the whole, rules tend to encourage more undesirable following of rules than desirable following of rules. Thus, rules should be, at most, rules of thumb. The decisionmaker should always be required to determine whether what is required by the law is also morally justifiable.

The analogous argument against positivism runs as follows: Positivism, as a theory of law, stresses the social aspect of law.

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it is important to show how it can do that. This relationship, however, is not due to some immanent quality of language, or the concepts generally, but to specific uses and usages. This criticism is less radical and may appear less profound; for this reason, it is less exciting. I believe, though, that it provides a better framework for dealing with the political problems that supposedly trouble these critics of the language.

Positivism is not committed to a particular position on the duty to obey the law,[103] but it nevertheless fosters a certain disregard for the moral implications of legal rules, thus encouraging blind obedience to rules, despite their injustice. On the whole, positivism as a legal theory leads to more unjustified obedience to unjust rules than desirable obedience to good rules (or desirable disobedience to bad rules). We should thus adopt a legal theory that will make it the business of judges to look beyond the law.

At this stage, I am not so interested in the validity of these arguments as I am in their similarity. Even if all the counterfactual empirical hypotheses in the two arguments are true (which I doubt), there is one major structural difference between them. One of the primary reasons for having rules is to improve decisionmaking. If this is their sole purpose,[104] then rules that fail in this respect are bad. Similarly, if rules systematically result in bad decisions, and if we cannot intelligently distinguish contexts in which rules will improve decisionmaking and contexts in which they will not, then rules should indeed go.

Legal theories, on the other hand, offer descriptive accounts of law. They should be evaluated according to the adequacy of their accounts. Let us assume, with Schauer, that positivism's account of what judges actually do is consistent with presumptive ruleness, and that this account provides a more accurate description than either rule-following or rule-skepticism. As-

103. The critics assume that positivism endorses an obligation to follow the law. This is why its emphasis on defining the law as "first-stage law" is supposed to lead to mechanical obedience to such law. Positivists, however, have held a variety of positions on the obligation to obey the law. Joseph Raz, for example, whose version of positivism is one of the most powerful and sophisticated, argues that there is no general obligation to obey the law *qua* law (although he concedes that there may be good moral reasons for obeying many laws, and that individuals subject to just legal systems may adopt an attitude of respect to law that does subject them to such an obligation). *See* THE AUTHORITY OF LAW, *supra* note 34, at 233-61. Raz's position clearly highlights the need to evaluate the law on moral grounds before reaching a conclusion that one should obey it.

104. I am not asserting the validity of this assumption because, for my argument, the hypothetical is sufficient. Rules may have inherent value as reflections of the decisions of the community. Similarly, I do not need to take a position on the view that rules are not human artifacts, of either instrumental or inherent value, but rather the way that moral norms come "packaged" in the natural order of things. My goal here is to elucidate Schauer's perspective, which focuses on the instrumental value of legal rules. The same perspective is shared by Raz, whose discussion of when it may be justified to adopt protected reasons for action concerns the circumstances that might suggest that these reasons will better identify the right thing to do.

sume further the counterfactual that endorsing a positivistic theory of law encourages obedience to atrocious laws.[105] Even with these assumptions, unlike in the first argument, it is not at all clear that the theory should be discarded. I hope that I shall not anger my pragmatist friends by hoping that they, too, see a problem here. I further hope that the superficial similarity between these criticisms of rules and of positivism will not mislead us into thinking of them as identical.

The similarity should help us with a more practical concern: Rules, as well as theories of law, should be advanced with an eye toward their impact.[106] They will not be used only by scholars and theorists. In fact, part of their adequacy is the way in which they reflect the way that ordinary people and practitioners see the law. Consequently, theories of law should be presented as one part of a practitioner's comprehensive equipment, complete with a lot of moral and professional responsi-

105. I think that it does not. First, most judges do not have articulated theories of law at all. They may connect their perception of their role and their perception of a duty to follow the letter of first-stage law, but this connection is not unique to positivistic conceptions of the law. It may be related, more generally, to tendencies to obey authorities. *Cf.* S. MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 1-12, *passim* (1974). A "positivistic" approach may indeed accompany a theory of adjudication under which all that judges should heed is the law. As Dworkin has pointed out, however, this association is built on a misunderstanding of positivism. *See* TAKING RIGHTS SERIOUSLY, *supra* note 10, at 31-39. In fact, positivism requires a theory of adjudication under which judges have discretion. Or, a "positivistic" approach must be interpreted to mean that once the laws are clear, judges have no powers to revise them, even if they are atrocious. This, too, is not dictated by positivism. And the moral dilemma of judges facing an atrocious law upheld by a majority of their society is clearly more complex than fighting with an inarticulate legal theory that is silent on the issue anyway. I have addressed some of these points in *Natural Law, Positivism, and the Limits of Jurisprudence: A Modern Round*, 91 YALE L.J. 1250 (1982); and *The Implications of Jurisprudential Theories for Judicial Election, Selection, and Accountability*, 61 S. CAL. L. REV. 1617 (1988).

106. In this sense, I am even willing to be a pragmatist myself. Rules and theories of law are not identical. Truth and usefulness are not identical. The impact of rules is simpler to gauge than that of theories, simply because rules seek to change behavior (although the behavior patterns that rules seek to change may be very complex—for example, have rules for integration of public schools achieved their goals?). The only relevant question is how much and in what way rules changed things. With theories, we are concerned with their theoretical fruitfulness and with their effects on diverse contexts. We are also interested in their adequacy, accuracy, and success in highlighting the important features of the phenomena they seek to describe. Finally, we are interested in the types of things that they legitimate and enable. The stronger the claim of the theory to "truth," the less significant these consequences will be in a decision to discard it. We shall have to fight these undesirable consequences by methods other than systemic lying. It is quite conceivable, for example, that we would want to promote gender equality in admissions and appointments in law schools even if we discover that women, on the whole, have better theoretical intuitions than men. Nevertheless, such a discovery might legitimize (or rationalize) unknown undercurrents of prejudice against men. Should that danger encourage us to suppress the truth?

bility education. In this regard, I feel great sympathy with the "radicals": It is not enough to understand the world. We should also strive to change it. As legal actors, even as legal academics, we participate in this attempt to change the world as well. Our understanding of the world, our conceptions of law and of rules and of the moral implications of being bound by a rule or by law, necessarily affect our behavior (even if they do not conclusively control it). Disseminating theories about law, and about the moral implications of having rules, is thus an enterprise charged with moral responsibility.

There are two dangers here. The first, often emphasized by critics, is that we refuse to accept the practical implications of theory, and that we divorce our discussion of theory from these implications. For example, if it is true that positivism contributes to undesirable obedience, then this should concern us, even if that theory does not require such an effect.[107] Positivists cannot simply say that the truth or the adequacy of their position is the end of the matter. Similarly, if deciding to add rules into practical reasoning creates more damage than gain, we should rethink the proper role of rules.

The second danger is no less harmful, however. It is the trap of collapsing everything to consequences, and it threatens our enterprise in two ways. On one hand, we have radical critiques that take aim at our picture of the world: They argue that the inadequacy of this picture is directly responsible for the wrongness of our choices. On the other hand, we have critiques that aim at our way of doing things (rules) and argue that they, in themselves, dictate that our choices are politically biased. Both critiques deny the autonomy of theory and understanding (or of formal attributes of means). Similarly, both ignore the fruitfulness of the distinction between understanding and explanation on the one hand and evaluation on the other, and the distinction between ways of doing things and what should be done.

What I have to say may be less integrated, and may sound

107. It is interesting to recall, however, that Fuller's critique of positivism for its alleged contribution to Nazi atrocities was flawed. His own conception of law, with the notion of an "inner morality," would not have changed anything. *See* L. FULLER, *supra* note 20, at 42. The laws that permitted Nazi atrocities, unfortunately, were not deficient in this formal sense. Unlike typical regimes, in which legislatures are constrained by some "barrier of shame," or the outcry of the public, so that the formal requirements of publicity discourage atrocities, these formal constraints failed with the Nazis.

less profound than these critiques. I nevertheless believe it is true. My optimism leads me to think that, ultimately, it is also useful because it is true. Put succinctly, rules are sometimes good and sometimes bad, and can be used to promote all kinds of political goals. Legal systems must have some core of rules, and this core will be pedigreed (first-stage law). Much of this core will also be clear and will not raise serious problems of application in most cases. Positivism, and all other theories of law, are consistent with these minimalistic characterizations of law. Rules in general, and laws in particular, raise the problem of possible conflict between the requirement of the rule and the "right thing to do, all things considered." We should resolve the conflict by giving due weight to the value of having rules, and the value of having an efficacious and on-the-whole just legal system. The resolution is not a matter of the rules themselves, but a matter of the way that the "system" deals with such conflicts. There are many ways of doing this, and a general description of such systems (or of law) should not be committed to any one of them. On the other hand, if the system in question does not provide adequate leeway for resolving such conflicts, this may affect its justness and its viability. Thus, it is reasonable to suppose that most systems, those that are accepted as just by the majority of their subjects, found something that is close to adequate in this respect.

The practical task, therefore, is not to construct a general theory of rules or of law, but an enterprise in which parts of these are presupposed, one that seeks to identify factors relevant to questions such as when (more strongly entrenched) rules are called for, or how we should best attain a balance of tendencies resulting in the most moral behavior by all agents.

My guess is that often we will discover that the problems that make decisionmaking undesirable at times have less to do with the things we talk about and, to some extent, control (that is, rules and theories of law), and more to do with other facets of human action. Again, I am in sympathy with some radical themes: The danger and the hope, in extreme cases, stem from the fact that human beings, including judges, are not exclusively or even primarily motivated by legal reasons for action. They may find ways to "improve" on these reasons, just as they may find ways to frustrate good legal reasons. At times, they will be aware of the fact that this is what they are doing; at

times, they will be doing this unaware. Of course, judges do have independent, strong motivating reasons to be seen as obeying legal reasons most of the time. This is why the effort to make legal reasons good, both substantively and formally, and to strengthen the tendency to obey them when we have succeeded in making them, on the whole, good, is generally desirable.

THREE CONCEPTS OF RULES

MICHAEL S. MOORE*

Professor Frederick Schauer's contribution to this Symposium[1] is an explication of parts of a much richer manuscript soon to be published by the Oxford University Press.[2] In the latter work, Professor Schauer probes the nature of rules, ruleness, and rule-based decisionmaking generically, that is, without particular regard to the law. Professor Schauer presents his jurisprudential theory, which he calls "presumptive positivism," as one spin-off of his more general theses about the role of rules in all decisional environments.

In both works, Schauer has given us a well-organized, comprehensive, well-versed overview of how rules do and should enter into our decisions. He has drawn together the large body of literature that has developed regarding rules since 1950. These literatures have separately focused: on Wittgenstein's preoccupation with rule-following,[3] on H.L.A. Hart's model of law as the union of two kinds of rules,[4] on Joseph Raz's lifetime study of rules as they impact upon our practical rationality both within and without the law,[5] and on the varieties of indirect utilitarianism that have flourished in ethics since John Rawls's seminal article in 1955.[6]

My own contribution in this Article is intended largely to clarify which of the many possible enterprises in the study of rules is the one in which Schauer actually engages. I choose this largely clarificatory task because my reading of Schauer's work leaves me uncertain of the extent to which Schauer has accu-

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1. Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645 (1991).

2. F. SCHAUER, PLAYING BY THE RULES (forthcoming 1991). (Page references to this source in the footnotes of this Article are to the 1990 manuscript version of Schauer's forthcoming book.)

3. *See* L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (3d ed. 1958). The literature in the 1950s on rules inspired by Wittgenstein prominently included: P. WINCH, THE IDEA OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY (1958); R. PETERS, THE CONCEPT OF MOTIVATION (1958); and Melden, *Action*, 65 PHIL. REV. 529 (1956). There recently has been a revival of interest in Wittgenstein's treatment of rules. *See, e.g.*, S. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE (1982); WITTGENSTEIN: TO FOLLOW A RULE (S. Holtzman & C. Leich eds. 1981).

4. *See* H.L.A. HART, THE CONCEPT OF LAW (1961).

5. *See* J. RAZ, PRACTICAL REASON AND NORMS (1975).

6. Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955).

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rately located his enterprise. In any case, I intend such clarifications to help others who read what will surely become a seminal work on rules to grasp what it is that Schauer is, and is not, talking about.

I.

Let me begin with the familiar distinction between *describing* how we and others use rules in our reasoning and acting, and *prescribing* to ourselves and others how we ought to use rules. This is *not* the same as the distinction between descriptive and prescriptive rules with which Schauer begins his book.[7] With his distinction, Schauer intends to differentiate between the two tasks others engage in when they use rules: Sometimes they describe regularities with universally generalized statements ("descriptive rules"), and other times they prescribe to themselves or others what they ought to do in similarly general terms ("prescriptive rules"). In either case, when drawing this distinction, Schauer is not prescribing how we ought to use rules; he is describing two ways in which rules are in fact used.

Schauer's book, *Playing By the Rules*, describes how people use prescriptive rules. It is an essay in what H.L.A. Hart would call "descriptive sociology."[8] This phrase was Hart's characterization of his own classic, *The Concept of Law*, a book with which Schauer's *Playing By the Rules* may be fruitfully compared. In *The Concept of Law*, Hart distinguished an "external attitude" toward rules from what he called an "internal attitude."[9] An external attitude toward a rule is the attitude of one who does not accept the rule as having guiding force for his own or others' behavior, though he might recognize that others believe the rule to have such force. For example, the anthropologist studying primitive religious practices often exhibits such a detached attitude, because he does not accept such practices as desirable standards for his own or others' religious observances; he merely studies such standards as they are in fact employed by the natives being studied. By contrast, the anthropologist who "goes native" by coming to accept the practices as regulative ideals for his own and others' behavior exhibits an internal atti-

7. *See* F. SCHAUER, *supra* note 2, at 2; *see also* Schauer, *supra* note 1, at 647-48.

8. *See* H.L.A. HART, *supra* note 4, at v.

9. *See id.* at 54-56, 86-88. For a discussion of this distinction, see M. MOORE, INTRODUCTION TO H.L.A. HART'S *THE CONCEPT OF LAW* (1991).

tude toward such practices. That is, he sees them as standards of justification (for conforming behavior) and of criticism (for deviating behavior).

When Hart described his own book as "an essay in descriptive sociology," he realized that he had written the book from the external point of view. Occasionally, Hart's descriptions ignore the participant's own internal attitudes toward a rule and describe mere behavioral regularities. Hart called this the extreme external point of view;[10] in Schauer's terminology, this would be called a descriptive rule. More often, Hart's descriptions refer to the actors' internal attitudes toward a rule as essential to understanding what they are doing. Hart called this a moderate external point of view; in Schauer's terminology, this would be called a prescriptive rule. In either case, Hart does not reveal his own attitude toward the rules in question. He does not purport to tell us whether such rules are a good thing, that is, whether they give us reasons to act in conformity with them. He is the detached observer of other people's use of rules. "Descriptive sociology" is an accurate label for such a purely descriptive task.

In his book, Schauer like Hart engages in a purely descriptive sociology of how people in general use prescriptive rules in their reasonings. This is most evident in Schauer's conception of what a rule is, and in what sense it can be said that a rule exists. Because *qua* sociologist Schauer is describing a social phenomenon, rules exist for Schauer only relative to a person or group of persons; as he puts it, "the existence of a rule is in an important way agent-specific."[11] What Schauer means by this is that a generalization is a rule only when some agent treats it as a rule, *viz*, when an agent treats the generalization as itself providing a reason for him to act in conformity with it.[12] The existence of a rule for Schauer is thus a social fact, as it was for Hart. For both Hart and Schauer, the crucial social fact is not the mere coincidence of behavior in conformity with some generalization, but rather the attitude of individuals toward that generalization.

Professor Schauer's analysis of the ontology of rules is as sociological as is his analysis of rules' existence conditions.

10. *See* H.L.A. HART, *supra* note 4, at 87.
11. F. SCHAUER, *supra* note 2, at 177.
12. *See id.* at 192, 210.

"Rules . . . are [not] entities,"[13] according to Schauer. In particular, they are not abstract universals, as are scientific and moral laws. Rather, "a rule is most usefully understood as a *relationship*, or better yet, a *status*."[14] The relationship or status Schauer has in mind is that attained when a generalization is "entrenched" vis-à-vis its "background justification." The social nature of this ontology can be seen clearly when one sees what Schauer means when speaking of the "entrenchment" of a rule and of a rule's "background justification." For Schauer, as for Nelson Goodman, who also spoke of "entrenched predicates,"[15] the "entrenchment of generalizations . . . is in large part a psychological phenomenon."[16] A rule is entrenched whenever it is regarded by its addressee as itself providing a reason for acting in conformity with it. This is a psychological and social criterion of entrenchment because it takes the addressee's attitude toward the rule as it happens to be; it says nothing about the normative force a rule may truly have for that agent. Similarly, the "background justifications" against which Schauer sees rules entrenched are not moral values, for that would require Schauer to abandon his external, sociological stance. Rather, a background justification for Schauer is "the evil sought to be eradicated or the goal sought to be served"[17] by the rulemaker—again, a psychological and social criterion of justification, not a moral one.

The "regulative" or "mandatory" rules that interest Schauer have "normative force," as he describes it. "Normative force" (or the "normativity of rules") only meant for Hart the acceptance of (internal attitude toward) a rule by some group of people;[18] for Schauer, it simply means that such a rule constitutes a *subjective* reason for action. A subjective reason for action is the reason that some determinate person has by virtue of his psychological makeup. If such a person desires to eat cheese, then that person has a reason to act to acquire some cheese. Absent the desire, such a person has no subjective reason to act in this way. Schauer is quite clear that when he writes about the "nor-

13. *Id.* at 192.

14. *Id.* (emphasis in original).

15. N. GOODMAN, FACT, FICTION, AND FORECAST 123 (4th ed. 1983).

16. F. SCHAUER, *supra* note 2, at 73.

17. *Id.* at 47.

18. *See* citations and discussion in M. MOORE, *supra* note 9.

mative force" of a rule as providing a "reason for action" to an agent, he refers only to subjective reasons. As Schauer puts it:

> [R]ules are applicable only insofar as they supply reasons for action for some addressee of a rule, but their ability to supply such reasons for that addressee is not a function of that rule itself . . . . Rather, the applicability of a rule . . . is necessarily dependent on the addressee of the rule *treating* the rule as supplying a reason for action . . . .[19]

Schauer is *not*, in other words, in the business of charting what sorts of rules actually affect the rational and moral reasons for action. He is not, in other words, dealing with objective reasons, reasons we have for performing or not performing certain actions, irrespective of what we happen to desire.[20] Schauer *qua* sociologist has no more desire than Hart to fish these moral waters.

The use of subjective reasons for action to mark prescriptive rules' "normative force" leads Schauer to another aspect of rules that reflects in another way their essentially social nature. Because Schauer believes that rules give only subjective reasons for action, the degree to which they constrain an agent's decisional space (a dimension of rules Schauer aptly calls "ruleness") will also be a *psychological*, not a logical, matter. Thus, Schauer eschews specificity-vagueness as a criterion of ruleness in favor of an agent-specific criterion: How much does the agent, in the absence of the rule, already want to do the act that the rule dictates? "Ruleness," for Schauer,

> will be greatest where rules command the highest proportion of extensionally divergent results for a given agent or class of agents. Conversely, the property of ruleness will diminish insofar as a rule does not indicate, for an agent or a class of agents, actions different from those the agent or agents would have performed in the absence of the rule.[21]

Not surprisingly, this social conception of ruleness yields another aspect to Schauer's descriptive sociology of rules. According to Schauer, not only do rules exist only relative to an

19. F. SCHAUER, *supra* note 2, at 205 (emphasis in original). I am quoting here to the 1989 manuscript version of Schauer's book; he makes largely the same point at page 206 of the 1990 manuscript version.

20. For the distinction between subjective (or descriptive-explanatory) reasons and objective (or normative-justifying) reasons, see Moore, *Authority, Law, and Razian Reasons*, 62 S. CAL. L. REV. 827, 841-45, 878-83 (1989). *See also* T. NAGEL, THE VIEW FROM NOWHERE (1986).

21. F. SCHAUER, *supra* note 2, at 179.

agent or class of agents, but even relative to any given agent, their existence is itself a more-or-less affair, not a matter of yes-or-no. This scalar nature of rules is the logical inference to draw from Schauer's social conception of rules: In order to exist, rules must have ruleness; the social facts that make for ruleness—patterns of some agent's subjective desires without a rule, the patterns of behavior required by the rule, and the difference between the two patterns—are surely a matter of degree that can vary along a smooth continuum, as Schauer recognizes when he concludes that ruleness "is a variable dimension rather than a single condition that either obtains or does not";[22] therefore, the existence of a rule for an agent must also be a scalar phenomenon, not a bright-line distinction.

The individuation of rules is another area within Schauer's treatment of rules where his sociological focus surfaces. For Schauer, rules require a social existence to exist at all. This means that rules must have an historical formulation to exist. Such formulation may be a canonical laying down of a discrete set of symbols, as is done by a legislature in passing a statute. It may be a non-canonical set of statements, each of which is equally authoritative even though syntactically divergent because each means the same thing, as is sometimes the case with common-law rules. It may even consist of unspoken thoughts, the content of which is nonetheless an entrenched rule for the person having the thoughts.[23] Whichever kind of historical formulation there is, Schauer says, "without the formulation there is no rule at all,"[24] because "rules lie much more in rather than behind their formulations."[25] This identification of rules with their formulations creates a social theory of rules' individuation: If one formulation is more specific, more general, or in any other way semantically different than another formulation, then we have formulations of two different rules. As Schauer puts it, " 'No boisterous and annoying dogs allowed' is a different rule from 'No dogs allowed' . . . ."[26]

This formulation-specific individuation for rules leads Schauer to treat exceptions to rules as destroying their ruleness, and thus, their very existence as rules. As we have seen,

22. *Id.* at 18.
23. *See id.* at 122.
24. *Id.* at 120.
25. *Id.* at 114.
26. *Id.* at 113.

Schauer urges that a rule with an exception is a different rule than "the same rule" without it. "Don't kill except in self-defense" is a different rule from "Don't kill." Armed with this view of how to individuate rules, Schauer next notes that if the rule "Don't kill" is subject to a host of unformulated exceptions—like self-defense, defense of others, killing in a just war, et cetera—then it loses its ruleness, because the applier of the rule is actually free to make up new rules (via the exceptions) as he decides. There is thus no rule if it is understood that unformulated exceptions can be added to the general statement.

This tie of a single, individuated rule to its historical formulation, and the accompanying conceptual ban on unformulated exceptions, leads Schauer to his view that rules are always over- and under-inclusive. Because rules are individuated by their historical formulations, and because those formulations cannot be amended by supplying hitherto unformulated exceptions to meet the exigencies of the moment, rules will inevitably cover cases they should not cover, and not cover cases they should cover. These judgments of over- and under-inclusiveness of rules are not to be understood to be moral judgments. They are only instrumental judgments about how perfectly a rule serves the rulemaker's goal in enacting the rule to start with.

Schauer's descriptive sociology thus yields what I shall call the "social rules" concept of rules.[27] In the preceding paragraphs, I have identified ten features of this social rules concept:

1. *Existence Conditions.* Social rules do not exist in the abstract, but exist only relative to an agent and only when that agent entrenches that rule in his thought processes.
2. *Ontological Status.* Social rules are not abstract universals or entities of any kind. They are a state within some agent's psychology, a state constituted by the giving of a subjective reason for action.
3. *Entrenchment.* A psychological process that a rule must have to be a rule. Once the process reaches the state of entrenchment, a rule achieves a "life of its own" within

27. The phrase "social rule" in jurisprudence is most closely associated with H.L.A. Hart, who used it to distinguish rules about which some members of a group have the internal attitude—"social rules"—from mere habits (behavioral regularities engaged in without the internal attitude). *See* H.L.A. HART, *supra* note 4, at 55. *See also* Dworkin, *Social Rules and Legal Theory*, 81 YALE L.J. 855 (1972), *reprinted in* R. DWORKIN, TAKING RIGHTS SERIOUSLY 46 (1978).

some agent's psychology, meaning that the rule is a subjective reason for action for that agent.

4. *Background Justification*. The subjective goal or desire of the rulemaker that he intends the rule to serve; such justification is not the objectively valuable object that a rule might be made to serve.
5. *Normative Force*. The capacity of a rule to give an agent a subjective reason to act in conformity to the rule.
6. *Ruleness*. The constraint imposed on a given agent by a rule, measured by the divergence of what the rule demands from what the agent wants to do in the absence of the rule.
7. *Continuous Nature*. Rules exist for an agent on a continuum; they do not simply either exist or fail to exist.
8. *Individuation Conditions*. Rules are individuated by their historical formulations, such that a semantically different formulation creates a different rule.
9. *Unformulated Exceptions*. To the extent that a rule is subject in its applications to unformulated exceptions that relieve a decisionmaker from having to follow the (unexcepted) rule, a rule is not a rule.
10. *Over- and Under-inclusiveness*. A rule is necessarily over- and under-inclusive with respect to attaining the rulemaker's goal that serves as the rule's background justification.

II.

To say that Schauer is largely engaged in sociological description is not to disparage his work on rules anymore than agreeing with Hart that his own book, *The Concept of Law*, was sociological would disparage that legal classic. Schauer and Hart have both given us valuable and detailed descriptions of that part of our current social practice dealing with social rules. In particular, Schauer's book supplies what Hart's book glosses over,[28] namely, how rule-appliers are to treat the rules that they apply if there can be said to be a system of rules in operation in society. What deserves attention here, however, is what kind of work cannot be done—or even very well understood, when done by others—if one is armed only with the Hart-Schauer conception of social rules. I consider six debates in moral theory, political theory, and jurisprudence for illustration.

28. Hart deals with problems of rule application only in Chapter 7 of *The Concept of Law*. *See* H.L.A. HART, *supra* note 4, at 121-50.

A.

The first is the well-known debate about the general nature of the demands that morality makes upon us: Are these demands in the form of rules addressed to each of us personally, saying things like, "Don't kill an innocent person even if doing so would reduce the numbers of innocents killed by others"? Or are such demands in the form of a maximizing function providing that the right thing to do is determined by minimizing bad states of affairs, regardless of whether we or someone else directly causes such bad states of affairs? If morality takes the latter "agent-neutral" shape, are the states of affairs that we are to maximize by our actions themselves states of conformity to rules like "Don't kill," or are such states of affairs non-rule-conforming items, such as happiness, pleasure, or preference-satisfaction? These are familiar questions with a long history of competing answers.[29] These debates cannot even be understood, let alone solved, if one means by "rules" the social rules referred to by Schauer, because the moral rules at issue in these debates are not "entrenched" vis-à-vis some "background justifications." Rather, such rules, assuming they exist, are themselves right-making in the sense that acting in accordance with them is the morally correct thing to do. Such moral rules, unlike the social artifacts to which Schauer refers, are not *means* to doing the right thing, decisional aids to being moral. Conformity with such rules, if they exist, is intrinsically right.

If we are to understand this long-standing debate in moral theory, we need a different concept of rules than Schauer's social rules concept. I will call the needed concept the "real rules" concept of rules, adopting the phrase "real rules" from Schauer[30] but excising any disparaging connotations that the phrase may have for him. Real rules are not social artifacts of any kind. Their existence does not depend on anyone having a certain attitude toward them, or any group converging in their behavior under such rules. Such rules need not have an historical formulation in order to exist or in order to be individuated. Such rules exist whenever they are *true*, that is, whenever the

29. *See generally* Moore, *Torture and the Balance of Evils*, 23 ISRAEL L. REV. 280 (1989). (In an introduction to the extensive literature on these topics, I defend the view that morality consists in part of a set of "agent-relative" rules directed to each of us individually.) For a collection of essays expressing diverging views on this matter, see CONSEQUENTIALISM AND ITS CRITICS (S. Scheffler ed. 1988).

30. *See* F. SCHAUER, *supra* note 2, at 114 n.18.

entities and properties to which they refer exist. Such real rules are of course what we mean when we speak of moral laws. They are abstract entities—universals, just like scientific laws.

A useful expository device with which to lay out the real rules concept of rules is to analyze it in the same ten dimensions that I used to clarify Schauer's social rules concept. A contrasting exposition of the real rules concept along these ten dimensions is as follows:

1. *Existence Conditions*. A real rule exists whenever it is true, *viz*, whenever the entities, qualities, and relations to which its terms refer exist.
2. *Ontological Status*. Real rules are abstract universals, not acts, conventions, convergent behavior, or shared mental states of historically situated persons.
3. *Entrenchment*. Real rules are entrenched, not in the sense that any individual or group entrenches them within his, her, or their own psychology, but rather in the sense that such rules provide overriding reasons to rational and moral agents to act in conformity with them.
4. *Background Justification*. Conformity with such rules is an intrinsic good, so that, although such rules have a justification, that justification is *not* in terms of some further value served by the existence of such rules.
5. *Normative Force*. The capacity of a rule to give all persons an objective reason to act in conformity with the rule.
6. *Ruleness*. Real rules are true generalizations about what it is right to do and are thus not, as such, guides for decision. Thus, they do not have a dimension of constraint, nor do they have any dimension of "degree of fit" with actions. They either apply or do not apply to any given action.
7. *Non-continuous Nature*. Rules either exist (are true) or they do not exist (are false). They do not "more-or-less exist" any more than they "more-or-less apply" to any given situation.
8. *Individuation Conditions*. Rules, being abstract universals, are individuated in whatever way such universals are individuated. Individuation is not affected by any social practice, such as historical formulation.
9. *Unformulated Exceptions*. A rule may (but need not) be subject to an indefinitely large number of exceptions that have never been formulated by anyone.[31]
10. *Over- and Under-inclusiveness*. Any rule that exists (and

31. One might have a different view regarding whether unformulated exceptions to

> therefore is true) is exactly right; that is, there will be an exception for any situation in which the rule would yield the wrong decision. If there is no exception, action in conformity with the rule is intrinsically right. Therefore, real rules necessarily can be neither under-inclusive nor over-inclusive.

The debates between agent-relative versus agent-neutral, and deontological versus utilitarian, moral theorists are not about the existence of social rules. Such debates are about the existence of real rules. Of course, someone enamored of the social rules concept of rules might deny the existence of real rules and even deny that *their* existence is really at issue in the above debates. In response to moral theorists who often think that they are debating the existence of real rules, such a person might say that what moral theorists are really debating is the place of social rules within the moral conventions of our society, because that is all that it is possible to debate.

Schauer appears more cautious than this. He sees that his enterprise of describing the operation of social rules is valuable, which it is, and does not need the justification that "it is the only game in town" about rules. Thus, Schauer notes at one point that his "account is about a set of problems not directly touching categorical and ultimate rules of a Kantian variety."[32] Those who applaud Schauer's social rules analysis are not always so guarded in the claims that they make for the analysis. Professor Margaret Jane Radin, for example, has recently urged that social rules are the only rules that exist.[33] "Rules depend essentially on social context,"[34] she urges. "Only the fact of our seemingly 'natural' agreement on what are instances of obeying rules permits us to say there are rules."[35]

This is not the place for a frontal assault on the conventionalism about morals that such a view represents. It is sufficient here to note that the social rules concept cannot do the work that Radin would demand of it. One cannot substitute the social rules concept for the real rules concept in the debates mentioned above and still have anything close to the same kind of

real rules exist, depending on how one thinks of moral dilemmas. *See* Moore, *supra* note 20, at 846-48.

32. F. SCHAUER, *supra* note 2, at 149 n.15.

33. *See* Radin, *Reconsidering the Rule of Law*, 69 B.U.L. REV. 781 (1989).

34. *Id.* at 797.

35. *Id.* at 799.

debate. This is because such debates are not third-person exercises in social description in which the participants do not betray their own commitments; rather, such debates are attempts by committed individuals to state the general nature of their own commitments. Such debates cannot be about the place of social rules in the moral conventions of our society and still retain the "internal attitude" of the participants of such debates toward their subject matter.

Radin might believe that she can escape this problem by identifying the objects of one's commitments or attitudes to be social rules; then, third-person description would be first-person commitment. There are limited situations for which such an identification is plausible, namely, for those social rules that solve coordination problems that everyone is obligated to solve. As an across-the-board identification, however, treating all social rules as the content of one's own moral commitments runs counter to everyone's moral experience, Radin's included. We each sense the possibility that a diverging moral judgment that we make about the right rule might be correct even when it disagrees with the social rules of our society. As Radin notes, "law and its institutions may indeed exhibit integrity or coherence . . . and yet be coherently wrong. A main task for nonfoundationalist theory is to find room for this kind of judgment."[36] If we generalize a bit, we should say that any conventionalist theory of moral rules—including Radin's nonfoundationalist theory—has to find room for non-conventional moral judgments.

This is not a proof of moral realism. It is an argument that an important debate about rules that we all have in our daily lives cannot be carried on using the social rules concept. What is needed is a concept adapted to some first-person, non-descriptive, committed, internal point of view. The real rules concept is one such concept. Anti-realists about morality could propose others. Simon Blackburn, for example, sees clearly that no social rules concept can account for "one of the essential possibilities for a moral thinker," namely, "the thought that our own culture and way of life leads us to corrupted judgment."[37] This rejection of the social rules concept does not leave a moral

36. *Id.* at 805 n.85.

37. Blackburn, *Reply: Rule-Following and Moral Realism*, in WITTGENSTEIN: TO FOLLOW A RULE 163, 171 (S. Holtzman & C. Leich eds. 1981).

non-cognitivist like Blackburn with a real rules concept with which to ask questions about the correctness, say, of consequentialist moral theory. It does leave him with what he might call a "quasi-real rules" concept, a concept just like the real rules concept except that it disavows the existence of objective reasons of morality in any sense other than as projections of individual (not social) creation.

Although serious problems exist with non-cognitivist accounts like Blackburn's, on this both the realist and the non-cognitivist can agree: No social rules concept can make sense of the practical debates about the general nature of moral norms.

B.

A second debate about rules in moral reasoning that cannot be understood using a social rules concept of rules is the flourishing debate between rule-utilitarians and act-utilitarians. To be sure, some of that debate concerns the optimal decision-procedures for the rational agent striving to maximize utility with his decisions. Framed in this form, the issue is whether utility is maximized by the agent calculating utility directly in each case, using rules only as epistemic aids ("rules of thumb"), or whether utility is maximized by indirect pursuit through a two-step procedure: (1) calculating the rule that maximizes utility, and (2) applying the rule to individual cases without recalculating utility in any such applications. If the debate is framed in these terms, Schauer's social rules concept of rules is appropriate.

The social rules concept is inappropriate if the debate is framed in another form, however. In this form, the debate is not about optimal decision-strategies (or institutional designs) for utilitarians. Rather, it is about the truth conditions of moral propositions. The debate is not about how we can individually reach the correct decisions, nor even about how we should design institutions to maximize the numbers of right decisions they reach. Rather, the debate is about the rule-based (or not rule-based) character of the right decisions that should be reached if utilitarianism is true. When David Lyons, for example, argues that rule-utilitarianism collapses either into act-utilitarianism or into some non-utilitarian ethics,[38] we should not

38. *See* D. LYONS, FORMS AND LIMITS OF UTILITARIANISM (1965).

understand him to be talking about decision-procedures. Rather, Lyons is talking about the truth of certain moral propositions. Specifically, Lyons argues that the only way a rule-utilitarian could be a utilitarian at all would be if he conceived of his rules as generalizations of potentially unlimited complexity; otherwise, rule-utilitarianism is not equivalent to simple utilitarianism, and it must be shown to be true on some other basis.

Schauer recognizes that Lyons's concept of rules diverges from Schauer's social rules concept in such dimensions as ruleness, individuation conditions, unformulated exceptions, and over- or under-inclusiveness. For Lyons, the rules that make rule-utilitarianism conceptually possible are neither identical to, nor individuated by, their historical formulations; rules may have unformulated exceptions; and rules match perfectly the right decision. Schauer thinks that Lyons's rules may be "rules only in form and not in effect . . . [because] exclusion of these features of continuous malleability and unlimited specificity is necessary to the definition of the concept of a rule . . . ."[39] Schauer fails to perceive, however, the poverty of the social rules concept in making sense of the debate in which Lyons is engaged. Lyons uses what I have called the real rules concept when he argues that the only rule-utilitarianism there can be that is not a contradiction in terms is a *real* rule-utilitarianism. This is a plausible argument if Lyons is using the real rules concept of rule-utilitarianism; it would be a ridiculous conceptual argument if he were using Schauer's social rules concept.

C.

Schauer's social concept rules of rules also cannot be applied to a third debate within moral and political theory. Unlike the previous two debates, however, the real rules concept of rules is also not adequate. I refer to the debate about the impact of the exercise of authority upon our preexisting moral obligations. There is a seemingly heterogeneous set of phenomena that can alter the moral obligations we have. If a friend makes a request of us, if we promise to do something, if we take an oath to fulfill a role, if we consent for another to do something, or if we are commanded by legitimate authority over us, we may

39. F. SCHAUER, *supra* note 2, at 143.

have changed what would be obligatory for us to do or refrain from doing in the absence of such a transaction. Joseph Raz helpfully labels all such phenomena as the exercise of normative powers, because each such phenomenon is an example of the limited ability we possess to change what morality requires of us.[40]

The debate within contemporary moral and political theory is this: In what way do normative powers change our previously existing moral obligations? Raz has centered much of his writing on this question, elegantly detailing one view: that exercises of legitimate authority both provide a new reason for action and protect that new reason from competition with antecedently existing reasons by excluding the latter reasons from counting in determining the rightness of actions.[41] An alternative view, held by myself,[42] concedes that the exercise of legitimate authority does create a new reason for action for the actors subject to such authority, but denies that such a new reason is in any way protected from competition with antecedently existing reasons in determining the rightness of actions. A third view, held by Heidi Hurd, Larry Alexander, and Donald Regan, among others,[43] denies that legitimate authority ever creates new reasons for action. Rather, they assert that promises and commands create only new reasons for belief about what are the true reasons for action that we have (and had before the exercise of authority). Commands of authority then become epistemic guides to our antecedent obligations, but they do not change those obligations.

As before, who has the better of this argument is not our present concern. Instead, we should see the proper terms in which this debate is framed. No party to this debate is asking whether we should treat the commands of authority as a social rule. The debate is not about an optimal decision-procedure at all. Rather, the debate among Raz, myself, and others is about the truth conditions of certain moral propositions. Is it true

40. *See* Raz, *Voluntary Obligations and Normative Powers*, 46 THE ARISTOTELIAN SOCIETY 79 (1972).

41. For a summary of Raz's view, and citations to the relevant work, see Moore, *supra* note 20, at 829 n.1, 849-53.

42. *See* Moore, *supra* note 20.

43. *See* Hurd, *Sovereignty in Silence*, 99 YALE L.J. 945, 1007-22 (1990); Hurd, *Challenging Authority*, 100 YALE L.J. 1611 (1991); Alexander, *Law and Exclusionary Reasons*, 18 PHIL. TOPICS 5 (1990); Regan, *Authority and Value: Reflections on Raz's "Morality of Freedom"*, 62 S. CAL. L. REV. 995, 1001-40 (1989).

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that the utterance of a legitimate authority becomes a new moral rule, giving actors subject to that authority a new reason to act in conformity with that rule, as Raz and I, but not Regan, Alexander, and Hurd, would assert? If so, is it true that such a new moral rule makes right behavior in conformity with it because it excludes antecedently existing reasons from counting any longer, as Raz but not I would hold? The rules, the existence and nature of which are at issue here, are not Schauer's social rules giving actors *subjective* reasons for action, but some other kind of rules giving actors *objective* reasons for action.

On this point, Schauer appears to disagree, because he finds that "Raz's account of rules as exclusionary reasons is largely consistent"[44] with his own conclusions regarding the place of social rules in optimal decision-strategies. Yet Raz's account of rules as exclusionary reasons is neither "largely consistent" nor largely inconsistent with Schauer's account of social rules; the two accounts simply refer to different subject matters. Raz is not talking about optimal decision-strategies. Thus, when he is talking about exclusionary reasons, he is not talking about whether a social rule should be used to exclude other items from consideration. Early in his career, Raz noted that interpreting him to be talking about decision-procedures would transform exclusionary (second-order) reasons into "ordinary (first-order) reasons not to consider the merits of the case (i.e. not to perform a certain mental act)."[45] This interpretation of Raz destroys his distinction between antecedently existing, first-order reasons for action, and exclusionary, second-order reasons (like those created by the exercise of legitimate authority), because second-order reasons get collapsed into first-order reasons "not to perform a certain mental act." Moreover, Raz urged that, taken as a claim about psychological decision-procedures, the claim that rules give exclusionary reasons would be "obviously wrong" because "there is no reason to prevent a person . . . from going through the [excluded] arguments to amuse himself or as an exercise . . . ."[46] Raz has recently repeated these disavowals of any psychological, decision-procedure interpretation of his claim about authority,[47] in re-

44. F. SCHAUER, *supra* note 2, at 155.
45. J. RAZ, *supra* note 5, at 48.
46. *Id.*
47. *See* Raz, *Facing Up: A Reply*, 62 S. CAL. L. REV. 1153, 1157 (1989).

sponse to my charge that he had, on occasion, unwittingly slipped into a decision-procedure discussion.[48]

Raz's opponents are not talking about the role of social rules in decision-procedures, either. Most of my opposition to Raz's exclusionary-reasons analysis of authority is to the idea that the rules that are exercises of legitimate authority ever give us reasons to exclude previously existing, objective reasons that we have for acting contrary to the rule. Even Hurd, Alexander, and Regan, who ultimately analyze authority in terms of optimal decision-procedures, argue against Raz's and my positions by denying that authoritative commands create new reasons for action (new moral rules). At issue for everyone here is thus *not* the place of social rules in desirable decision-procedures, but rather what rules determine that some decisions, but not others, are right.

I mentioned earlier that the real rules concept of rules was also not adequate to explicate this debate about authority. This is because the rules at issue in this debate only partially have the character of real rules. Like real rules, rules that exist because of the exercise of legitimate authority give objective, not subjective, reasons for action. Unlike the real rules of morality, however, rules that come about because of a promise or a command have an historical existence; they exist only because, at some point in time, the actor promised or received a command. Moreover, such rules have an historical formulation in the speech act that constitutes the promise or the command. Therefore, a third concept of rules is needed in order to understand the debate about authority.

I will call this the "authoritative rules" concept of rules. Using the previously articulated ten dimensions of ruleness, an authoritative rule has the following characteristics:

1. *Existence Conditions*. Authoritative rules exist when, but only when, a normative power has been validly exercised by one in possession of it.
2. *Ontological Status*. Authoritative rules are the propositional contents of the speech-act constituting the exercise of a normative power.
3. *Entrenchment* (a feature that Raz but not I would assert that authoritative rules possess). Authoritative rules give exclusionary reasons, that is, reasons that disen-

48. *See* Moore, *supra* note 20, at 854-55.

franchise other reasons (that before the exercise of authority were proper reasons for action) from being proper reasons on which to act.

4. *Background Justification.* Either the (subjectively) intended consequence that an exerciser of legitimate authority intended to achieve with his promise or command (as Raz believes[49]) or the (objective) value that can be served by the rule issued by a legitimate authority (as I believe[50]).
5. *Normative Force.* The capacity of an authoritative rule to change (by exclusion or otherwise) the balance of objective reasons that determine the rightness of any action.
6. *Ruleness.* The constraint exercised on a given action, measured by the divergence of what the rule demands from what the real rules of morality would demand in the absence of any exercise of a normative power.
7. *Non-continuous Nature.* Authoritative rules exist if the real rules of morality create a normative power in a person. Accordingly, if those real rules are non-continuous, authoritative rules are non-continuous in the sense that they either exist or they do not.
8. *Individuation Conditions.* Authoritative rules are individuated by their precise historical formulations, so that a *syntactically* different formulation creates a different rule.
9. *Unformulated Exceptions.* To the extent that a rule is subject in its applications to unformulated exceptions, the rule is not a rule.
10. *Over- and Under-inclusiveness.* An authoritative rule may, but need not, be over- or under-inclusive with respect to its background justification, depending on whether or not that background justification is itself a real rule of morality with a content identical to the content of the authoritative rule.

Whether rules with these characteristics exist—not whether social rules exist, nor whether social rules play the roles that Schauer says they play in decisionmaking—is the subject of the debate about authority.

D.

A fourth debate also requires that we conceive of rules as authoritative rules and not as social rules. This is the debate in

49. *See* Raz, *Authority, Law, and Morality*, 68 THE MONIST 295 (1985).

50. *See* Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 338-58, 383-86 (1985).

political theory regarding whether laws, at least in a democratic and reasonably just society, obligate citizen obedience. The key question is whether laws can possess legitimate authority in at least my minimal sense: Can laws create new reasons for action? The traditional answer was "yes," but more recently, a number of scholars have answered "no."[51] To understand this debate, we cannot equate "laws" with "social rules," because the question is not, "Do laws give actors subjective reasons to act in conformity with them?" In legal systems that attach sanctions to their laws (as all do), framing the question this way makes the answer obvious. As Schauer observes, "a fear of sanctions . . . might still provide for most agents a reason for obeying the law *qua* law even if there is no moral obligation to obey the law."[52] When we come across a long-standing debate between intellectually well-armed opponents and resolve it this easily, it is probably because we have misunderstood what the debate is about. The question whether laws obligate is not a question about whether laws are social rules giving actors subjective reasons to act in conformity with them. The question is the much more difficult—but much more interesting—one of whether laws are authoritative rules. In other words, do laws give objective reasons to act in conformity with them just because they are rules created through a fair and just process, such as democracy?

E.

The fifth debate is one in which Schauer does wish to participate,[53] and one to which his social concept of rules is at least one appropriate approach. This is the debate in jurisprudence

51. This is the position of Hurd, Alexander, and Regan, for example. *See* sources cited *supra* note 43.

52. F. SCHAUER, *supra* note 2, at 209 n.15.

53. In her essay in this Symposium, Professor Ruth Gavison expresses some reservations about whether a general jurisprudence, such as that articulated by Hart, must include a theory of adjudication. *See* Gavison, *Comment: Legal Theory and the Role of Rules*, 14 HARV. J.L. & PUB. POL'Y 727, 744 (1991). If not, Schauer's work is not related to the debate in general jurisprudence that I reference in the text, because Schauer's explicit aims are only within the theory of adjudication. Although there is a distinction between questions of general jurisprudence—when do we have law, in the sense of a legal system—and the questions asked by a theory of adjudication—how do and should judges decide cases—I nevertheless see Schauer's kind of enterprise to be a necessary accompaniment to Hart's general jurisprudence. If we are going to analyze law as consisting of a certain hierarchical ordering of social rules as Hart does, we need to at least show how such rules can attain their claimed benefits (predictability, et cetera) through their power to constrain judicial decisions.

about the nature of law. Does law (that is, a legal system) consist of a set of social rules in existence in some society? H.L.A. Hart famously answered that question affirmatively,[54] and Schauer seeks to align himself with Hart through a legal theory he dubs "presumptive positivism." Yet the debate about the Hart-Schauer position requires more than the social rules concept of rules, because the claims of their opponents are precisely that law is not a set of social rules, but rather, a subset of real moral rules (a pure natural law position), or, alternatively, a set of authoritative rules (which could be either a natural law or a legal positivist position).

Of course, if Hart and Schauer were obviously correct in this debate, the fact that others have opposed them would hardly vindicate alternative concepts of rules for understanding the nature of law. The Hart-Schauer view, though, has a very well-charted difficulty: It seems to leave out the normativity of law. Hart himself reacted to the earlier views of Austin and Bentham by urging that their accounts of law—in terms of sanctions and habits of obedience—did not adequately account for law's essential normativity. Following St. Augustine, Hart thought that law must differ from the orders of a gunman by virtue of something other than mere generality. Law, Hart said, must *obligate*, and not merely *oblige*, obedience. Yet conceiving of law as a set of social rules fails to account for legal obligation, as critics as diverse as Finnis, Dworkin, Lyons, and Raz have argued.[55] If law must obligate in order to be law, then how can law merely be a collection of social rules and still be law? Such social rules, when internalized by a society in the way Hart and Schauer describe, might well be *thought* to be law by those who internalize such rules. Unless the rules obligate, however, as only real rules and authoritative rules can do, then those who believe that they have law in such a system will simply be mistaken.

Thus, it is far from clear that Hart and Schauer are right in conceiving of law as made up of social rules, for both have to answer the nagging question of how such rules can be said to be obligatory. This is not to deny that both might be right in

54. *See* H.L.A. HART, *supra* note 4.

55. *See* J. FINNIS, NATURAL LAW AND NATURAL RIGHTS 12-15 (1980); Dworkin, *supra* note 27; D. LYONS, ETHICS AND THE RULE OF LAW 52 (1984); Raz, *Hart on Moral Rights and Legal Duties*, 4 OXFORD J. LEGAL STUD. 123 (1984).

their sociological enterprise of describing some society's (or even all societies') *concept* of law.[56] Such sociological inquiries, however, do not foreclose a quite different jurisprudential enterprise that requires concepts of both real and authoritative rules.

F.

The sixth and final debate that I wish to discuss is within that part of jurisprudence dealing with the theory of adjudication, often called the theory of legal reasoning. Here, at least, Schauer's social rules concept *seems* fully at home, for it is Schauer's explicit aim to discuss the role of rules in decisionmaking, including, as a special case, *judicial* decisionmaking.

Schauer implicitly distinguishes five models of how social rules might operate in various decisionmaking environments. He calls the first "particularism."[57] In this model, the decisionmaker simply ignores the rule and decides on the basis of the background justification itself. The second model is particularism with an epistemic allowance for rules: The decisionmaker treats the rule as a "rule of thumb" (or an "indicator rule" or a "summary rule"), which is to be used, as all heuristics are used, as an aid in decisionmaking.[58] Such heuristic devices are to be distinguished from rules that are themselves grounds for decision, that is, rules that are entrenched by the decisionmaker in the sense that he treats them as providing a reason for acting.

Schauer calls the third model "rule-sensitive particularism," of which I am supposed to be an exemplar.[59] A rule-sensitive particularist is a particularist because the grounds for his decision are the background justifications themselves, not some intermediate social rule. He is "rule-sensitive," though, because he considers both the value of having a rule, and how much any decision flouting such a rule would disserve this value, in his calculation of how well a decision serves its justification.

Schauer calls his fourth model "presumptive" rule-follow-

56. For a discussion of the difference between seeking to explicate our *concept* of law, and seeking to explicate the nature of law itself, see Moore, *Law as a Functional Kind*, in NATURAL LAW THEORIES (R. George ed. 1991).

57. *See* F. SCHAUER, *supra* note 2, at 134.

58. *See id.* at 180-90.

59. *See id.* at 160-69.

ing.[60] A presumptive rule-follower generally assumes that he is precluded from deciding on the basis of the background justification for some rule; rather, he presumes that he is to decide on the basis of the rule alone. He allows himself, however, a "peek" at the background justification to see if this might not be a case where the presumption should be overcome. The presumption is not an epistemic one, because it is not a mere heuristic but is instead a policy-based presumption that is to be given weight even if the decisionmaker decides that the background justification would clearly be somewhat better served by a decision going against the rule. Therefore, overcoming the presumption in order to decide against the rule should be a rarity for the presumptive rule-follower.

Schauer's fifth model is what he calls "rule-based decisionmaking."[61] In this model, a decisionmaker eschews entirely any resort to the background justification as a ground for his decision. Rather, he simply decides according to the rule, which is fully entrenched for him.

In the context of *judicial* decisionmaking, Schauer plumps for the fourth of these models, and calls this mode of judicial decisionmaking "presumptive positivism." In his book, Schauer defends presumptive positivism purely as a descriptive thesis: This is how judges in fact decide cases. In his contribution to this Symposium, Schauer also defends presumptive positivism as a normative thesis: This is how judges ought to decide cases, because, among other reasons, presumptive positivism allows various allocations of power.[62]

In the course of Schauer's description of his five-part taxonomy, and in the course of his defense of presumptive positivism, Schauer makes many insightful, true, and helpful points. Again, however, I come neither to praise such points, nor even to bury some of their comrades. Rather, I seek to dress them properly. To do so, let me focus on that part of Schauer's debate that I best understand: his arguments against me as an example of that "common mistake" known as rule-sensitive particularism.

In the work of mine to which Schauer refers, I do not defend rule-sensitive particularism as a decision-procedure that our

60. *See id.* at 338-39.
61. *See id.* at 134.
62. *See* Schauer, *supra* note 1, at 679-91.

judges either do or should use in their decisions. If I were to defend a decision-procedure, Schauer is correct to intuit that rule-sensitive particularism is one that I would probably favor. In the work on which Schauer relies, however, I was not defending any decision-procedure for judges, either descriptively or normatively.[63] Rather, I was describing what I took to be the right-making characteristics of judicial decisions, both of the statutory and of the common-law kind. About judicial decisions involving interpretation of a statute or a constitutional text, I urged that the correct decision is one that gives the correct weight to four ingredients: antecedent *ordinary* meaning of the words of the text, antecedent *legal* meaning of the words of the text to the extent prior interpretations of the text by courts gave such distinctive legal meaning, the *purpose* (in the sense of value, not intention) that the text should serve, and general *justice* considerations.[64] With regard to judicial decisions under the common law, I have urged elsewhere that the correct decision gives the correct weight (in terms of equality and other values) to the fact that prior litigants have been treated in a certain way in precedent cases, and correctly balances that moral freight of history with a judgment of what, if there were no such history, would be the best decision, all things considered.[65]

Neither of these theories purported to be about what judges do consider, or should consider, when they make decisions. Rather, these were theories of what the right decisions *are* for judges to reach, however they reach them. For example, some judges may do better—better even as judged by my theory of the right decision to reach under a statute—if they "hunch" their decisions than they would do if they were to follow my four-part interpretive schema for statutes as a decision-procedure. What succeeds as a decision-procedure is an empirical question of psychology that could match any of Schauer's five models and still be compatible with my theories of interpretation and of precedent.

That is why I labelled my theories with the jurisprudential labels "natural law theory of interpretation" and "natural law

63. I stated this explicitly. *See* Moore, *supra* note 50, at 396 n.218.

64. *See id.* at 396-97.

65. *See* Moore, *Precedent, Induction, and Ethical Generalization*, in PRECEDENT IN LAW 183 (L. Goldstein ed. 1987).

theory of precedent." Such theories are metaphysical theories about the truth conditions of those singular propositions of law[66] that decide concrete cases. Schauer's own jurisprudential label, "presumptive positivism," is misleading because he is not really debating my natural law theories of interpretation and of precedent. His is not a competing thesis about the truth conditions of singular propositions of law, nor is it a thesis about the nature of law at all.

This obliqueness of Schauer's "presumptive positivism" to my own natural law theories relates to the three concepts of rules explicated here in the following way. If Schauer wishes to debate about how judges do and ought to reason their way to their decisions—and it is a perfectly worthwhile debate in which to engage—then the concept of rules as social rules is one appropriate concept to figure in such debates. If Schauer wishes, however, to engage me or others on the truth conditions of singular legal propositions, he has to abandon the social rules concept of rules, because my theories speak to different concepts of rules. For my theories say in brief that statutes are authoritative rules, deriving their authority from certain rule-of-law values, which values then dictate the four-part theory of interpretation of those statutes, which interpretive theory then gives the truth conditions of singular propositions of statutory law. Likewise, common-law rules are not authoritative rules but are the real rules of morality as applied to the non-ideal situation of a society whose history diverges from perfect justice; this application of the real rules of morality to the non-ideal world gives the truth conditions of singular propositions of common law.

Someone who disagrees with my theory of statutory interpretation might say that statutes are not authoritative rules. Alternatively, some might argue that statutes are authoritative rules but for different reasons than those I defend. They could yet again believe that the rule-of-law values that do give statutes the status of authoritative rules justify a different set of right-making characteristics than the four I defend. Likewise, someone who disagrees with my theory of precedent might say either that common-law rules are not real moral rules but are

66. A singular proposition of law is a proposition that is not universally generalized. "All valid, non-holographic wills require two witnesses" is a general proposition of law; "this will is valid" is a singular proposition of law. *See generally* Moore, *supra* note 56.

authoritative rules or, alternatively, that common-law rules may be the real rules of morality but that their application is quite different from what I describe. Such disagreements, of course, *use* the concepts of real rules and of authoritative rules, as they must if they are to be about the truth conditions of (and not about the psychological recipe for discovering) legal propositions.

Conclusion

In closing, let me reiterate what I have said throughout this essay. It is not much of a criticism of Schauer's work to say that it does not occupy the field of what is worth talking about with regard to rules. This is particularly so in light of the fact that what Schauer does talk about is a quite worthwhile subject. My remarks have been directed at preempting the thought that such a work is a complete treatise on rules. Indeed, Schauer himself at times seems to succumb to that temptation when he allows himself certain imperialistic construals of others' work on rules. Schauer's book will be a focal point for future discussion of how social rules work in decision-procedures in daily life and in the law. This essay is only a reminder that there is other worthwhile work to be done on rules, work that demands concepts of rules other than Schauer's social rules concept.

POSITIVISM, I PRESUME? . . . COMMENTS ON SCHAUER'S "RULES AND THE RULE OF LAW"

GERALD J. POSTEMA*

Professor Schauer's jurisprudential writings, including his contribution to this Symposium, *Rules and the Rule of Law*,[1] range widely over some of the most important problems of practical philosophy, philosophy of language, and philosophy of law. His always rewarding discussions raise a large number of issues worth debating at great length. I will address only two or three quite general issues, leaving to this Symposium as a whole to demonstrate the breadth of Professor Schauer's jurisprudential work.

I am grateful for Schauer's discussion of the nature of rules and their role in practical deliberation and decisionmaking. I found especially helpful his careful delineation of several models of decisionmaking. I will focus my attention on his use of this theoretical machinery to define and defend "presumptive positivism," his general account of the nature of American legal practice. I believe his argument to be basically correct, yet I have reservations about the terms in which he pursues the project.

My discussion falls into four parts. In the first two parts, I introduce and refine some of the conceptual machinery that Schauer employs to define and defend presumptive positivism. In the third, I criticize Schauer's defense of presumptive positivism. I suggest that his account is incomplete and that, as a result, his argument for presumptive positivism is inconclusive. I also argue that, his protestations to the contrary, his preferred model of decisionmaking, "presumptive rule-based decisionmaking," is indistinguishable from what he calls "rule-sensitive particularism."

In the fourth part, I take up Schauer's discussion of the institutionalization of presumptive positivism. Schauer usefully

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1. Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645 (1991) [hereinafter *Rules and the Rule of Law*]. *See also* Schauer, *Formalism*, 97 YALE L.J. 509 (1988) [hereinafter *Formalism*]; Schauer, *The Jurisprudence of Reasons*, 85 MICH. L. REV. 847 (1989) [hereinafter *The Jurisprudence of Reasons*].

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brings to our attention the importance for theoretical purposes of the institutional environment of legal reasoning and decisionmaking. His proposal for institutionalization of presumptive rule-based decisionmaking is intriguing. The proposal is ambiguous, however, in an important respect, and both ways of construing the proposal face difficulties. I conclude that, while presumptive positivism is on the right track, characterizing it in terms of *presumptive* rule-based decisionmaking may be a mistake.

I. Practical Reasoning, Rules, and Law

A. *Jurisprudence as Practical Philosophy*

Schauer's recent work rests on an important assumption about the province of jurisprudence, although he does not articulate or defend the assumption. Expressed in my terms, the assumption is that jurisprudence is a part of practical philosophy.[2] Because society designs law to operate within the practical reasoning of officials and citizens alike, jurisprudence, the general philosophical study of law, is concerned not only with a descriptive account of the institutions of law, but also with the forms of practical reasoning characteristic of law. With the ultimate aim of clarifying the nature of legal reasoning and decisionmaking, Schauer's article, and his book on which the article builds,[3] raise and address many important general questions of practical philosophy, especially those concerning the nature of rules, and the role of rules in practical deliberation. In this Part, I will discuss some of the results of this important investigation, but first I want to briefly defend Schauer's basic assumption.

Law (or a legal system) *exists* only insofar as a social group of some size *practices* it, that is, insofar as it takes shape in, and guides and directs, the behavior of members of that social group. It does so by addressing directives to these members, directives that the group takes as reasons to act in certain ways. Law, not only typically but essentially, purports to direct action by addressing reasons to those falling within its jurisdiction.

2. Practical philosophy, as I understand it, embraces both conceptual and normative inquiries.

3. F. Schauer, Playing By the Rules (forthcoming 1991). (Page references in this Article to this source are to the 1990 manuscript version of the book.)

Law depends for its efficacy on the understanding and practical reasoning of those whom it addresses.

We can distinguish two ways in which our practical deliberation about what *to do* can be influenced or structured. First, something can influence practical deliberation *externally* by so shaping the *environment within which* action can be taken that only some alternatives appear feasible or reasonable. Second, something can structure deliberation *internally* by providing directives about what *should* or *must* or *ought to* be done. Whereas external devices put obstacles in the way of rational agents choosing certain alternatives, internal devices provide rational agents with *reasons why* they should choose certain actions from the range of available actions.

Law uses both of these devices; sometimes one is more prominent, sometimes the other. But internal guidance is (and, I would maintain, must be) the primary device. That is, it is characteristic of, perhaps essential to, law to provide (or at least purport to provide) us with *reasons why* we should act in certain ways. Thus, a society through its law attempts to structure social interaction by addressing "internally" the practical reasoning of its citizens.

It follows that the activity characteristic of law is essentially deliberative activity. While the long tradition from Aquinas to Kant correctly stresses that law concerns itself with "external" behavior and interactions among members of a society, it must be acknowledged that these interactions are influenced through the practical reasoning of these members. The *activity* characteristic of legal practice (understood to include the activity of lawyers and lay citizens alike) involves practical argument, practical reasoning aimed at determining what one has good reason to do.

Thus, if jurisprudence seeks to provide a general account of the nature of law and legal practice, at its core must be an account of the nature of practical reasoning within the domain of law. To forestall misunderstanding, I should hasten to add that this is *not* to say that we should shape our theory of law to fit our theory of appellate judging. That is likely to yield a far too narrow view of the practice of legal reasoning. In one way or another, the law plays a role in the practical reasoning of *everyone* in society, and in reasonably well-functioning societies, law works as an *internal* guide to (nearly) everyone in society, and

not just to appellate judges. It *is* to say that a general jurisprudential theory would be radically incomplete and seriously misleading, if it failed to give some account of the place of law in the practical reasoning of officials, lawyers, and lay citizens alike. This is what I meant when I say that jurisprudence is a part of practical philosophy.

B. *Rules and Practical Reasoning*

On the strength of this assumption, Schauer grounds his jurisprudential inquiry on an analysis of rules and their role in practical reasoning. I begin with a sketch of his views on this subject and then turn to three models of decisionmaking defined in terms of this analysis.[4]

According to Schauer, rules are general prescriptive propositions that are designed to achieve certain ends if generally followed. These ends provide the purposes or aims in terms of which the rule is justified. Schauer distinguishes two ways in which the general prescriptive proposition may be related to its background justifying aims.

Consider first *rules of thumb*. If we regard a rule as a rule of thumb, we simply regard following the rule as a good way of achieving its background aims. We regard those background aims *alone*, and not the rule itself, as providing reasons for action. Under this view of the rule, the fact that a case falls under the rule would not itself be a reason for following the rule, but only a reason for *believing* that doing so would achieve the background aims. We can say that the rule is *transparent* to its background justification. We might still hold that rules of thumb are binding; they are binding insofar as the ends that they help us achieve are binding, and following the rule (that is, performing the action indicated in the rule) is the best way available for achieving those ends. The purposes behind rules of thumb alone supply reasons for action, so there is no reason to comply with the rule in those cases in which one correctly judges that complying with it will not advance those purposes. It does not follow, however, that one should never look to the rule for guidance, or should ignore the rule and in every case look to the background purposes for guidance. Rules of thumb genuinely

4. I will follow Schauer here for the most part, although I will suggest one or two refinements that I believe he would be willing to accept. My description of rules of thumb follows Regan, *Authority and Value*, 62 S. CAL. L. REV. 995, 1003-13 (1989).

guide action, but only provisionally, and when they conflict with or fail to advance their background aims, an agent has no reason to comply with them.

Contrast rules of thumb with "proper rules."[5] Proper rules are *entrenched* prescriptive generalizations. They apply, or are binding, even when following them would not further the purposes of the rule.[6] Such rules are *opaque* to their background justifications. Schauer explains this defining feature of proper rules in terms of Raz's notion of "exclusionary reasons."[7] Exclusionary reasons are different from first-order reasons (that is, ordinary reasons to act). Exclusionary reasons are not reasons for action, but rather reasons for *not acting* on certain *other* (first-order) reasons. First-order reasons may differ in weight or importance such that, when they conflict, the more important outweigh the less weighty. The relation between first-order and exclusionary reasons, however, is different. Exclusionary reasons do not *outweigh* first-order reasons; rather, they prevail over them by precluding an agent's acting on those reasons. Proper rules, on Schauer's account, provide both first-order reasons for following the rule and second-order, exclusionary reasons not to act on certain, otherwise relevant reasons. To say that proper rules are opaque to their background justifications, then, is to say that they provide reasons for not acting on reasons drawn directly from those background justifications. This explains why proper rules demand that one act as the rule prescribes, even when the purposes of the rule are not thereby served.

Two further features of exclusionary reasons will help us articulate Schauer's notion of proper rules and his alternative decisionmaking models. First, exclusionary reasons themselves stand in need of justification. It is always appropriate to demand justification for treating a prescriptive generalization as a proper rule, rather than a rule of thumb. Second, exclusionary

5. Because the idea of proper rules depends on the idea of "exclusionary reasons," those who reject the idea of exclusionary reasons regard this not, as Schauer does, as an alternative *kind* of rule, but as an alternative (and mistaken) *account* of rules.

6. Of course, following the rule would have to further the purposes of the rule in most cases, or the rule could not be regarded as justified (by reference to those purposes, at least).

7. *See* J. RAZ, PRACTICAL REASON AND NORMS 15-84 (1975); J. RAZ, THE AUTHORITY OF LAW 3-162 (1979) [hereinafter THE AUTHORITY OF LAW]; J. RAZ, THE MORALITY OF FREEDOM 23-69 (1986); Raz, *Facing Up: A Reply*, 62 S. CAL. L. REV. 1153, 1154-79 (1989).

reasons have *scope*: They may exclude some reasons, but not others. The scope of exclusionary reasons is determined by their grounds, that is, by the arguments for treating a rule as a proper rule (with exclusionary or preemptive force), rather than a rule of thumb. I will call the values that, on this view, justify treating rules as proper rules "rule-dictating values."[8]

The background justifications of a proper rule will, presumably, always fall within the scope of its exclusionary reasons. But what shall we say about other values or principles? The values that justify a rule may conflict in some cases with other reasonable values, and it may be important to know whether or not reasons drawn from these competing values fall within the scope of the rule's exclusionary reasons. Suppose they do not. Then, the *rule* can conflict with these competing values in some cases. In these cases, the decisionmaker will have to resolve the conflict between the rule and these competing values like all other conflicts among first-order reasons, *viz*, by determining which has greater weight in the circumstances.

Sometimes, however, the rule's opacity will extend not only to its background justification, but also to potentially conflicting considerations. This would be the case when the rules are thought to be justified because following them is thought best overall, considering both the purposes thereby served and the costs of doing so (measured in terms of defeat to competing values). That is, sometimes proper rules represent a more or less comprehensive balancing of conflicting reasons, and preclude agents from acting on their own assessment of the competing relevant first-order reasons. Putting these two points together, we can see that it is possible for some rules to be opaque both to their background purposes narrowly construed and to *certain* potentially conflicting values, while at the same time *not* being opaque to *other* potentially conflicting considerations. This, of course, is never true of rules of thumb.

Thus far, we have identified two dimensions of a proper rule's opacity: opacity to background considerations and opacity to conflicting considerations. Often, Schauer has just these two dimensions of opacity in mind when he describes the role

8. These include, among many others, considerations of predictability, certainty, reliance, and a certain kind of fairness across cases. *See* F. SCHAUER, *supra* note 3, at 230-77. I prefer "rule-dictating values" to the more common "rule of law values" that Schauer uses, because many of these values are often important outside as well as within the formal, institutional context of law.

of proper rules in rule-based decisionmaking. Schauer also identifies a third possible dimension of opacity, however. As we have seen, it is always appropriate to ask *why* we should treat a prescriptive generalization as a proper rule with a certain range of opacity. In Schauer's view, the opacity of proper rules, and the scope of that opacity, is a function of the nature, strength, and importance of rule-dictating values for the rules in question. Moreover, these rule-dictating values can sometimes justify treating the rule as opaque *to themselves*. Thus, the rule may be "self-opaque"—opaque to the rule-dictating values that justify treating it as a proper rule.

It is Schauer's view, I think, that *proper rules* (or at least, proper "rule-based decisionmaking") are typically opaque in all three dimensions: (1) opaque to their background justifications, (2) opaque to other potentially conflicting values or norms within the scope of their exclusionary reasons,[9] and (3) opaque *to the rule-dictating values* on which their status as rules proper rests. This is important, because if rules are not opaque to these rule-dictating values, then an agent could be tempted to balance rule-dictating values against the excluded reasons, and conclude in some cases that she should not comply with the rule. Such a balancing of reasons would take into account not only the background purposes and other possibly conflicting considerations, but also the relevant and applicable rule-dictating values and decide on the basis of what is now *all* things considered.

C. *Three Models of Decisionmaking*

With these distinctions and concepts in hand, we can briefly sketch Schauer's three primary legal decisionmaking models. *Simple particularism*, or "all-things-considered decisionmaking," regards practical reasoning under law to be a matter of considering and balancing all the practically relevant reasons and values and making a decision based on one's assessment of their

9. Are *proper* rules opaque to *all* values and principles that might conflict with them? That might be more than Schauer wishes to claim. It does seem true of pure rule-based decisionmaking, as Schauer describes it, that the rules that figure in practical reasoning *purport* to represent a comprehensive balancing of *all* competing reasons. It may be consistent with this approach, however, to permit judges, faced with conflicts between clear rules and weighty considerations that the rulemakers simply did not envision, to take these competing values into account and balance them against the value of following the rule. On this view, they could do this only if the rulemakers failed through inadvertence to consider the potential conflict.

relative weight. Simple particularism has no tolerance for proper rules and, according to Schauer's unsympathetic description, seems to fail to recognize the importance of rule-dictating values. Rules of law, like any rules, are treated as rules of thumb.

In contrast, *rule-based decisionmaking* takes rule-dictating values to have great importance. In consequence, it regards legal reasoning to be a matter of reasoning with proper rules opaque *in all three dimensions* just mentioned, including opacity to the very rule-dictating values on which the demand to treat the rules as proper rules rests.

Schauer also identifies a model that stands mid-way between these two ends of a spectrum. He calls it *rule-sensitive particularism.* This third model recognizes the importance in many cases of following rules, even when their background purposes are not best served thereby, but it also holds that, in some cases, competing values can outweigh these rule-dictating values. The difference between rule-based decisionmaking and rule-sensitive particularism, then, is that the latter is willing in some cases to take into account, and weigh against each other, purposes behind standing rules, conflicting considerations, *and* relevant rule-dictating values. By contrast, rule-based decisionmaking treats rules as opaque to all these competing considerations, precluding action on those reasons by anyone bound by the rules in question.

II. Practical Reasoning and Law's Domain: Defining Positivism

The conceptual machinery introduced in the previous section not only enables us to define certain models of decisionmaking, but also allows us to reformulate certain general issues of jurisprudence and thereby to shed new light on them. I will focus in this Part on one such issue, sometimes referred to as the issue of "the limits of law." I will use Schauer's machinery, clarifying and extending it in certain respects. I do this both because the results of the exercise may be of intrinsic interest and because they will help me highlight the distinctive features, and some weaknesses, of Schauer's proposed jurisprudential theory, presumptive positivism.

A. *Practical Reasoning: Domains and Structure*

Within practical philosophy, we can identify two central questions: the *domain* question and the *structure* question. The paradigm *domain* question is: What count as good or relevant reasons for action? The paradigm *structure* question is: How does one properly reason from these considerations to decisions and actions? To illustrate the difference between these two questions, consider the traditional problem of the role of self-interested considerations in moral deliberation. Assume that the thought, *my doing A will increase my prospects of happiness*, is a paradigm self-interested consideration. Suppose now that we believe, as some moral theorists do, that self-interested considerations ought not to play a role in moral deliberation. One way to give theoretical expression to this view is to deny that such self-interested considerations *are reasons* that could justify decision or action. We might say that the domain of relevant practical reasons does not include such reasons.[10] They are not valid or sound reasons. Of course, people might *take* them to be sound reasons, and if so, these invalid reasons might still figure in successful explanations of their actions.

Once a theory of good or right defines the domain of practical reasoning, our preferred theory might set beyond proper consideration some considerations that might otherwise strike us as good reasons, or are counted as good reasons by other theories. Suppose now that our theory of practical reasoning holds that rational deliberation and decisionmaking always involve balancing all relevant considerations within the domain. Such "all-things-considered" practical reasoning would still not regard *all alleged* reasons as appropriate material for practical deliberation, because it would not consider self-interested reasons of the above sort. That is, "all-things-considered" practical reasoning (simple particularism) always operates within a domain of valid or sound reasons. It presupposes that the domain has already been determined by some substantive theory of value or right. The notion of all-things-considered practical reasoning is well-defined only *relative to* some such pre-determined domain.

Return again to my example of the place of self-interested

10. Similarly, a hedonist utilitarian would regard, for example, *because God commanded it* as outside the domain of practical reasons, unless it could be linked instrumentally to promoting someone's pleasure or reducing someone's pain.

considerations in moral deliberation. We might take a quite different view of this relationship. In contrast with the above approach, we might hold that self-interested considerations *are* valid or sound reasons, but hold that in certain circumstances or contexts agents *ought not to act on them*. We could give theoretical shape to this alternative view by altering our view of the structure or *modus operandi* of practical deliberation. We might say that practical deliberation is structured in such a way that, in some cases (for example, where moral values or principles are relevant, or where certain kinds of moral concerns like rights or justice are relevant), certain ordinarily relevant and weighty reasons must not serve as grounds for decision or action. For example, we might think that, once one has promised to meet a student for lunch to discuss her term paper, the fact that discussing her paper over lunch is or is not a pleasant way to spend two hours in mid-day should not be among the reasons one considers in deciding to keep one's promise. The promise should be enough, we might say.

If we take this view, practical reasoning would not always involve "all-things-considered" balancing. Sometimes, one might be required to act against one's assessment of all the relevant reasons. This would be true if some of the reasons against so acting are, on this account of the matter, effectively excluded from the proper grounds of one's action. To the extent practical decisionmaking has this structure, it has something akin to the structure of rule-based decisionmaking.[11]

B. *Law and Practical Reasoning: The Limited-Domain Thesis*

Now consider legal reasoning. It is often thought that introducing law into a framework of practical reasoning (defining a domain and a structure of reasoning) *alters* it in some material way. There are three ways in which it might do so: (1) It might simply *add* considerations that were not available before—creating new situations, introducing new values, adding new kinds of reasons; (2) while adding some considerations, it might also *partition* the domain of practical reasoning, that is, delimit a proper legal sub-domain; and (3) law might create a new domain of *sui generis* legal reasons that, despite a superficial resem-

11. At least the boundaries between moral and practical reasoning seem to be defined by criteria that function like proper rules.

blance, is radically incommensurable with the reasons of the familiar moral or practical domain.

Many legal theorists, while disagreeing fundamentally about other jurisprudential issues, agree that the domain of legal considerations is not co-extensive with the domain of all sound practical reasons (or even with the domain of all moral considerations). Some theorists might have in mind something like (3) above, but I find the idea of such *sui generis* reasons entirely mysterious. It is far more likely that they accept some version of (2), which Schauer calls the limited-domain thesis. Expressed in the terminology introduced above, they hold that the introduction of law into the general domain of practical reasoning results in a partition of that domain, creating a special sub-domain of legally relevant considerations.

Even if the limited-domain thesis captures the practical effect of introducing law into the framework of practical reasoning, we still must explain the *relationship* between the legal sub-domain and the larger domain of practical reasoning of which it is a part. One approach would be to regard legal reasoning *to strictly exclude* acting on practical considerations falling outside the legal domain, just as above we thought that the promise strictly excluded considerations of self-interest. This approach would treat practical considerations within the legal domain as always prevailing over potentially conflicting considerations from outside the legal domain.

A somewhat weaker approach might treat the "exclusion" as entirely *relative to* certain practical questions, but not to final or conclusive practical justification of decisions or actions. On the "relative exclusion" approach, determining what one ought to do "under law" would proceed without reference to considerations outside the legal sub-domain. We might not think, however, that determining what law requires settles *conclusively* what one *morally* ought to do, or (if this is different) what one without qualification ought to do. Law itself might only settle the practical question with respect to *legal* considerations, and then only on the assumption that legal considerations have some rational weight or importance. Thus, on some versions of the limited-domain thesis, settling what one *legally* ought to do would not always settle (though it will typically be relevant to) what one *morally* ought to do.

No matter how we understand the definition of the law's

practical domain, we should note that delimiting the legal domain does not determine what the *structure* of practical reasoning *within* that domain will be. Partitioning the practical domain into legal and non-legal sub-domains does not determine by itself which of Schauer's three decision models properly captures practical reasoning within the law. It is therefore still possible, assuming a limited-domain thesis, that the simple particularist account best models practical reasoning within the legal sub-domain. Of course, in that case, the determination of when "*all* things *are* considered" for legal purposes is made *relative to* the legal domain (it would require only that all *legal* things be considered).

The limited-domain thesis allows us to give shape to the notion of responsible judicial reasoning. It also allows us to distinguish responsible judicial decisionmaking from both (1) legally *correct* judicial reasoning and decisions, and (2) *morally* responsible and morally correct reasoning and decisionmaking. The limited-domain thesis promotes judgments of responsible judicial reasoning because it defines the domain of factors judges may (or must) consider. Because, however, it says nothing about the structure of practical reasoning within that domain, it does not offer an account of correct judicial reasoning. Moreover, because the limited-domain thesis treats the legal domain as only a partition of the larger domain of practical reasoning, it does not settle what responsible (let alone correct) *moral* reasoning is, even for the judge. It does settle what the judge *qua judge* should take into account, but it does not settle what the judge *qua moral agent* should consider or how the judge *qua moral agent* should weigh the relevant considerations.[12]

Our discussion thus far allows us to frame three important jurisprudential questions: (1) Is some version of the limited-domain thesis true? (2) If so, how is the partition defined? Is this a conceptual matter, a matter of sociological fact (that can be described "from the outside"), a matter of interpretation of the practice ("from the inside"), or a matter of political-moral theory? (3) What is the practical status of this limit; how does it operate in practical reasoning?[13] This third question is interest-

12. At least this is true for those versions of the limited-domain thesis that are *relatively* exclusionary in the sense I introduced above.

13. Note that we can ask these questions about law or legal systems in general, or about a particular system or family of legal systems. That is, the scope of the questions can be global or, in varying degrees, local.

ing because it reflects the fact that the question of the place of rules, or rule-based decisionmaking, can be decomposed into two further questions: (a) To what extent do the *boundaries* of the legal domain have a proper rule-like character? and (b) to what extent is decisionmaking *within* the legal domain proper rule-governed?

Different jurisprudential theories give different answers to these questions. I will not pursue these matters any further except to note a contemporary positivist view of the place of limit-defining criteria in practical reasoning, because it provides a foil for discussion of Schauer's presumptive positivism.

Positivist legal theory holds a strong version of the limited-domain thesis. As Schauer has observed,[14] positivism partitions the legal domain from the rest of the domain of practical reasoning in a distinctively rule-like fashion. Positivists believe that, although the criteria that define membership in the domain of valid legal considerations rest on background justifying principles and values, the criteria themselves must be opaque to their background justifications. Positivists treat these criteria like proper rules. Moreover, the properties that define membership in the legal domain by these criteria of validity must be non-evaluative matters of social fact. In particular, these properties must be facts about how the rules were *made*.[15] That is, legal validity is a matter of "pedigree."[16]

This version of the limited-domain thesis is consonant with, though it does not strictly entail, the view that the rule-based model of decisionmaking dominates the practical reasoning within the domain of law. *Strong positivism*, however, represented in recent literature by Hart and Raz, unites these theses into one general jurisprudential theory.[17] Law, on this view, is exclusively a matter of pure rule-based decisionmaking from pedigreed rules.

III. Two Problems of Presumptive Positivism

Now we can introduce Schauer's unique entry into the jurisprudential sweepstakes. Presumptive positivism attempts to

14. *See* F. Schauer, *supra* note 3, at 329-33.

15. This is one way of expressing what Raz calls the "sources thesis"; *see* The Authority of Law, *supra* note 7, at 37-52.

16. *See* R. Dworkin, Taking Rights Seriously 14-45 (1977).

17. *See* The Authority of Law, *supra* note 7, at 163-232; H.L.A. Hart, Essays on Bentham 127-61, 243-68 (1982). "Strong positivism" is my term, not Schauer's.

mark out a position between strong positivism and its most vocal critics, coming from the legal realist or Dworkinian camps. Schauer seems to provide substantial scope to positivist and formalist accounts of practical reasoning within American law, while still allowing room in legal reasoning for the influence of moral and practical considerations to which legal rules are typically thought to be opaque.

Schauer's argument for presumptive positivism is subtle. I will not trace it out in detail. At the heart of it, however, is a distinction between two species of *rule-based* decisionmaking. According to *pure* rule-based decisionmaking, rules should be treated as *absolutely* opaque to considerations within the scope of their exclusionary reasons, including the rule-dictating values on which their status as proper rules rests. According to *presumptive* rule-based decisionmaking, while decisionmaking is opaque to all these considerations, it is only *presumptively* so. The proper rule-like character of the rules is regarded as having significant but not absolute weight within the legal domain. Sometimes, a rule's claim to practical attention—its claim to prevail against competing considerations—can be defeated.

Presumptive positivism is the thesis that legal reason (at least in American practice) is characterized by presumptive rule-based decisionmaking. This model, Schauer argues, *best explains* the practice of legal reasoning in American law, and, for a variety of reasons, is also normatively preferable to positivist, legal realist, or Dworkinian alternatives. In this Part, I raise two general problems with Schauer's preferred theory and his argument for it.

A. *Incompleteness Of Presumptive Positivism as a Theory of American Law*

It is not clear where to locate presumptive positivism in the picture I sketched in Part II. This uncertainty is due to Schauer's presentation of presumptive positivism as a middle way between positivism and its particularist (realist and Dworkinian) critics. The critics of positivism that Schauer considers, however, have had different targets. Some critics (for example, those with roots in legal realism) attack the limited-domain thesis, insisting that no distinction can be drawn between the set of legal norms and the set of *all* (true or valid) norms. Other critics defend a version of the limited-domain

thesis, but attack the positivist view that the limits of law are defined in a rule-like way, precluding recourse to the justifications behind legal practice. Still others attack the strong positivist view that legal reasoning is fundamentally (purely) rule-based.

For example, as I read *Law's Empire*[18] and *Taking Rights Seriously*,[19] Dworkin makes both of the latter criticisms. He insists that non-pedigreed principles play an essential role in legal reasoning, but he denies that just any (true or widely accepted) principle can properly play this role. Non-pedigreed principles properly figure in legal reasoning, on his view, only when they can be shown to have a place in the best interpretive theory of the law as a whole. Thus, Dworkin's theory provides a basis for a partition of the "full norm set" available to judges, and hence for a distinction between legal and purely moral arguments. At the same time, he insists that legal argument is dependent on its moral-political sources in two ways: (1) Judicial decision-making is not strictly rule-based, but rather is sensitive to background non-pedigreed principles "embedded in the legal practice"; and (2) while not all true principles are principles of law, the partition between legal principles and others can be drawn only by interpretive arguments that essentially rely on what look very much like principles of political morality (albeit not necessarily *true* political morality). Thus, on Dworkin's theory, the partition-defining criterion does not operate like a proper rule. Moreover, there is no reason to insist that Dworkin's "particularism" is pure or simple. On the contrary, given his recognition of the importance of "local priority," separation of powers, and other "rule of law values" in our legal system, I believe that his theory can plausibly be interpreted as committed to a version of rule-sensitive particularism.

I mention Dworkin here not to endorse his theory but to clarify Schauer's argument for presumptive positivism. Schauer's basic argument is that neither strong positivism nor its critics adequately account for the phenomena of American legal practice. Strong positivism either (1) denies that non-pedigreed principles have any proper role in legal reasoning and decision-making; or (2) denies that non-pedigreed principles are *law*, but nevertheless allows that they may be used by judges in the

18. R. DWORKIN, LAW'S EMPIRE (1986).
19. R. DWORKIN, *supra* note 16.

proper exercise of their discretion. Schauer argues that the first version flies in the face of all the cases in which non-pedigreed principles played a central role, even while regarding these cases as proper exercises of judicial decisionmaking authority.[20] The second version makes the effort to draw a sharp and rule-like distinction between the legal domain and the domain of practical reasons difficult to defend. "If decisionmakers may disregard the result generated by the legally recognized rule," he argues, "then there seems to be little point in the idea of a rule of recognition at all."[21]

On the other hand, Schauer argues that the *critics* of positivism, while correctly pointing out the role of non-pedigreed norms in proper judicial reasoning, mistakenly draw the particularist conclusion that proper judicial decisionmaking must be decision based on the judge's best assessment of all the relevant moral and practical considerations. He argues that particularism fails to explain the great importance to judges of the most *locally applicable rules*. In the view of judges, he insists, "the world of legal decisionmaking does not look like the world we would expect if legal results were entirely at the mercy of the non-limited set of social norms."[22]

Schauer's criticism of strong positivism is on target, but I think that his criticism of the critics of positivism is incomplete in two respects. First, it fails to distinguish between critics who reject the limited-domain thesis in any form and those, like Dworkin, who reject only the strong positivist version of it. As a result, *if* Schauer wishes to show that a Dworkinian version of the limited-domain thesis is mistaken, he still needs to make that argument.

Second, Schauer's own view of the limited-domain thesis is

20. Schauer discusses, for example, Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889), and Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1968).

21. F. SCHAUER, *supra* note 3, at 333. We can phrase Schauer's argument another way. The criteria that partition the sub-domain of law (the criteria of validity that enable us to distinguish *law* from that which is "*extra-legal*") either function like proper rules—opaque to background considerations and the like—or they do not. If they *do*, then from the point of view of law, officials are precluded from deciding cases on the basis of non-pedigreed considerations. From this, it follows that from the point of view of law, if judges appeal to such non-pedigreed considerations, they go beyond the bounds of responsible judicial decisionmaking. If they *do not* function like proper rules, then strong positivists must abandon their central thesis that law necessarily claims authority in the sense that its rules exclude from *legal* reasoning non-pedigreed ("extra-legal") considerations.

22. *Rules and the Rule of Law*, *supra* note 1, at 671.

not clear. In this respect, not only is his *argument for* presumptive positivism incomplete, but so too is the theory itself. He points out that non-pedigreed, principle-like considerations may at times properly outweigh the presumption in favor of the most locally applicable rules in our legal practice. He is silent, however, about whether these non-pedigreed considerations must meet some other criteria of legal relevance in order to count as appropriate bases for legal decisions. As we have seen in Part II, questions about the *boundaries* of a domain or sub-domain are distinct from questions about the *structure* of practical reasoning within that domain or sub-domain. To be complete, presumptive positivism needs some thesis about whether (and how) the domain of law is partitioned from the rest of practically relevant norms and considerations.[23]

B. *The Essential Identity of Presumptive Rule-based Decisionmaking and Rule-sensitive Particularism*

At most, the above criticisms suggest that Schauer needs to elaborate his theory and argument for it. There is, however, a more serious incompleteness in the argument that may signal a deep difficulty for the theory. Schauer argues that presumptive positivism better accounts for the role that locally applicable rules typically play in our legal practice in general than particularist theories, especially when we consider the operation of law outside of appellate courts. This is plausible, I think, relative to the simple particularism of some realist (and neo-realist) theories. It is less plausible relative to a sophisticated rule-sensitive particularism that takes into account the value of local priority, separation of powers, and other rule of law values, in our system.

Schauer's argument assumes that there is an extensional difference between the presumptive rule-based model and the

23. I am reluctant to guess what Schauer's view might be. Indirect comments in his article and book seem to point in different directions. On the one hand, Schauer is critical of strong positivists like Raz who identify law with locally applicable rules, but allow judges discretion to set aside these rules by appeal to non-legal considerations. *See* F. SCHAUER, *supra* note 3, at 333. On the other hand, he seems to think that *Henningsen*, for example, was decided by appeal to a principle that has its roots *only* in moral theory (or perhaps acceptance in the society at large). This suggests a view much closer to a natural law approach, albeit, of course, one that finds room for presumptive exclusionary force of rules. The latter example is not decisive, however, because for these purposes he does not consider approaches, like Dworkin's, that root such principles in the practice without relying on positivist pedigree.

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rule-sensitive model; that is, he assumes that, in many cases, judges following the presumptive model would make different decisions than if they followed a rule-sensitive particularist model. The arguments that Schauer uses to develop his theory, however, show only that there would be a difference between a *simple* particularist judge and a judge who would give independent weight to locally applicable rules.[24] *Both* presumptive rule-based deliberation and rule-sensitive particularism, though, give the rules independent weight. His arguments do not show that the two would yield different decisions, let alone that the presumptive model better explains the decisions actually made by American courts.

This extensional equivalence of the presumptive rule-based model and rule-sensitive particularism is not merely due to the examples Schauer has chosen. Schauer's argument that presumptive positivism is a distinctive theory of American legal practice depends on his ability to open logical space between pure rule-based decisionmaking, on the one hand, and rule-sensitive particularism, on the other. He has not yet done this. I do not think it can be done.

If we hold the same theory about the moral weight of relevant rule-dictating values when evaluating both models, there just is *no logical* difference between the presumptive rule-based model and the rule-sensitive model. In fact, the presumptive model collapses into rule-sensitive particularism. Presumptions, as Schauer understands them, are simply a function of the weight of reasons. It is "a way of describing a degree of strong but overridable priority within a normative universe in which conflicting norms might produce mutually exclusive results."[25] But the weight of the reasons provided by "presumptive rules" is a direct reflection of the weight of the reasons for treating the generalization as opaque relative to themselves and other reasons. It is just such weight, though, that the rule-sensitive deliberator would be expected to take into account. So there is no essential difference between the models on this score.

Furthermore, the notion of *presumptively* proper rules, or presumptive exclusions, is not coherent. If we attempt to treat the opacity of rules as presumptive, we do not merely weaken their

24. *See Rules and the Rule of Law*, *supra* note 1, at 665-79.
25. F. SCHAUER, *supra* note 3, at 351.

status as rules, we change them into something else. The presumptive model collapses the difference of *kind* between proper rules and rules of thumb into a difference of *degree*. In Raz's model of practical reasoning, the introduction of rules and their associated exclusionary reasons into a given domain creates a profound *structural* change in that area of practical reasoning. It is not the content or weight of reasons, but their structural relationships, that are changed. By contrast, presumptions merely *add* the *weight* of certain reasons to the weight of others. This changes the content or weight of conflicting reasons, but not their structural relationships. Thus, the original mode of reasoning essentially remains. The only way that I can make sense of Schauer's talk of *presumptive rules* is in terms of adding the weight of the rule-dictating values to the reasons in favor of complying with the rule, reasons that compete on the same level with other reasons. That implies, though, that there is no logical difference between presumptive rules and deliberation sensitive to rule-dictating values that nevertheless treats the rules as rules of thumb. Upon pain of incoherence, the presumptive model collapses into rule-sensitive particularism.

To this, Schauer might reply that there is a difference, because the general form of justification for presumptions differs fundamentally from the form of justification characteristic of rule-sensitive deliberation. According to Schauer, the presumptive rule formula (PRF) is:

> Given that result *a* is indicated by rule *R*, [rule subjects] shall reach result *a*, unless or until [they] have a reason of great strength for not reaching result *a*.[26]

He contrasts this with the rule-sensitive formula (RSF):

> Given that result *a* is indicated by rule *R*, [rule subjects] shall reach result *a* unless there are reasons for not following rule *R* in this case that outweigh the sum of the reasons underlying *R* and the reasons for setting forth those underlying reasons in the form of a rule.[27]

We must admit that, as they stand, these formulae are different. Once they are clarified, however, the apparent difference between them vanishes. Note first that the PRF needs to be revised slightly. Surely, it is not enough to defeat a rule that there is a reason of *great* strength against following it, *if* the reasons

26. *Rules and the Rule of Law*, *supra* note 1, at 676.
27. *Id.* at 676 n.66.

for following the rule are even stronger. The reason must be of significant weight, we can grant, but it also must outweigh the (rule-dictating value) reasons supporting the presumptive rule.[28] Clearly, the critical matter is the weight of the reasons for not reaching the rule-dictated result relative to the weight of the reasons for following the rule—not the absolute weight of the former. Once we factor this into the PRF, it seems that the RSF merely spells out more completely what is already implicit in the PRF. Each of these formulas can probably be improved upon, but I doubt that improvements of either will make a clear logical difference, let alone the enormous and enormously significant difference that Schauer finds between them.[29]

Schauer also claims that there is an important *psychological* (or "phenomenological") difference between the presumptive rule-based model and the rule-sensitive model—a difference in the way judges following the two different models would typically look at rules.[30] Again, I fail to see the difference. The difference seems to be that under the presumptive rule model, decisionmakers need to examine the set of excluded considerations only *casually*, whereas under the rule-sensitive model, decisionmakers need to *inspect* and balance out the reasons in every case. In the former model, only "a casual look, a glimpse, a peek, a preliminary check"[31] is necessary, Schauer maintains.

This ignores the role of genuine rules of thumb in rule-sensitive particularist practical reasoning. Rule-sensitive decisionmaking need not be fanatically calculating. It requires only that decisionmakers be sensitive to those cases in which the relevant rule-dictating values are weak relative to conflicting considerations. There is nothing in the rule-sensitive approach, or its treatment of rules as rules of thumb, that requires decisionmakers to ignore the practical advantages of "a casual look, a glimpse, a peek, a preliminary check."

Sometimes, Schauer tries to mark this alleged psychological difference with the metaphor of *wholesale* exclusion, as opposed to *retail*—case-by-case—consideration.[32] Again, although this

28. *See* F. SCHAUER, *supra* note 3, at 351-52; *The Jurisprudence of Reasons*, *supra* note 1, at 862 n.43.

29. *See Rules and the Rule of Law*, *supra* note 1, at 676 n.66.

30. *See* F. SCHAUER, *supra* note 3, at 156-57.

31. *Rules and the Rule of Law*, *supra* note 1, at 677.

32. *See id.* at 660-61, 674 n.62.

contrast may mark a difference if we are comparing the pure rule-based and the simple particularist models, and even (stretching the description some) the pure rule-based with the rule-sensitive model. It does not, however, mark a distinction between presumptive rule-based and rule-sensitive models.

I conclude that, so far as I can see, there is no reliably predictable extensional difference between the presumptive rule-based and the rule-sensitive models of decisionmaking, because there are no deeper psychological or logical differences. Thus, if we accept Schauer's criticisms of strong positivism and the pure rule-based model, as I am inclined to do, we are left with a view of legal reasoning that will turn out to look a great deal like some version of rule-sensitive particularism.

IV. Institutionalizing Presumptive Positivism

A. *Schauer's Proposal*

Toward the end of his article, Schauer shifts his theoretical perspective. Having focused exclusively on the nature of different forms of legal decisionmaking and their relative merits as models of American legal practice—all viewed from the point of view of *the decisionmaker*—Schauer invites us to consider them again, but this time from the point of view of the *designer* of law-applying and law-enforcing institutions. This is primarily a normative and pragmatic point of view, dominated by the question: How should we set up our institutions to insure the best kind of decisionmaking according to law? This presupposes a view about which of the decisionmaking models is preferred, and asks how we might effectively install it in our practice.

Schauer proposes to institutionalize rule-based decisionmaking by making it known that we will punish rule-violations severely, but only if they yield *wrong* decisions or outcomes when judged, all things considered.[33] The aim is, through the use of threats of punishment, to encourage rule-following even when the decisionmaker is inclined to deviate from the rule in the belief that doing so is justified, all things considered. No sanctions would be applied to decisions that in fact turn out to be *right* when judged, all things considered. Only those that turn

33. *See id.* at 691-94. Schauer does not make clear whether he means "all legal things considered" or "*all* things considered." That is, it is not clear whether the outcome is to be judged from within the sub-domain of law or from the perspective of practical (moral) reasoning in general.

out to be *wrong* would be punished. Desire to avoid sanctions, it is supposed, would encourage decisionmakers in *close* cases to follow the rule even if, on their best judgment, doing so cannot be justified, all things considered. In this way, deviations from the rules are likely to be deterred, except where it is clear to the judge that deviation is justified, all things considered.

This proposal aims to construct law-applying institutions that *mimic* rule-based decisionmaking in certain respects. The aim is ambiguous, however, in one respect. Schauer's aim might be to design a decisionmaking environment that approximates the *results* of the presumptive model. Alternatively, his aim might be to encourage decisionmakers to deliberate as the presumptive model dictates. The former is concerned only with decisions or outcomes: The environment is designed to produce results that mimic what ideal officials would decide *were* they to adopt the presumptive model, but it does not expect officials to adopt the model. The latter, by contrast, attempts to have officials *adopt* and successfully *execute* the presumptive model. Schauer's argument, especially his reliance on the "asymmetry of authority,"[34] suggests that his concern is only to mimic results. Yet, in nearly the next breath, he says that "the task facing the rule imposer is to get the rule-applier or rule-follower to relinquish her best judgment."[35] *This* suggests that the aim is to transform the process. I will not try to resolve this ambiguity, because I think both versions face problems. I discuss them one-by-one.

B. *Mimicking Results*

I suspect that Schauer would be happy if we viewed his institutional design proposals as directed at mimicking *results* of presumptive rule-based decisionmaking. Under this version, he would not have to maintain the psychological feasibility of this form of decisionmaking, so long as it is possible to set up incentives to achieve the results that following such a model *would* produce, were it feasible. Sanctions would be intended to work in the normal deterrent way, providing a certain kind of reason for decision—possibly not decisive, but strong enough to put a surcharge on rule-violations that would force officials to think twice before deciding against an established rule. Offi-

34. *See id.* at 692-93.
35. *Id.* at 693.

cial decisionmaking would probably remain "particularist" of some sort.

This institutional design proposal, however, faces two problems. First, it is not clear how we can test whether the design is working. The aim, presumably, is to mimic the results of the presumptive model rather than one of the other models.[36] But if the presumptive model is extensionally equivalent to rule-sensitive particularism, we will not be able to distinguish an institutional device aimed at mimicking the former from a device aimed at mimicking the latter. Of course, we might notice that while sanctions make officials more sensitive to rules, they are not sensitive *in the way* rule-sensitive particularism requires. This, however, cannot help us discriminate between the two devices, because sanctions do not make officials sensitive to the rules *in the way* the presumptive model requires, *either*.

Second, the proposal is open to a moral objection. The objection is not that it encourages individuals not to exercise judgment, but rather that it *corrupts* that judgment. Usually, we are concerned not only about the results of an official decision-procedure, but also about the process by which decisions are made. From this perspective, sanctions introduce extraneous and potentially distorting considerations into the decision process. We would not be happy with a decisionmaking process in which coin tosses or divination played an integral role, *even if* we could be assured on statistical grounds that we were getting at least as many correct decisions with these devices as by asking fallible decisionmakers to assess the merits of the cases that come before them. We should be no more sanguine about Schauer's institutionalization proposal. It introduces as integral components of the deliberation process considerations that are, strictly speaking, irrelevant. If the device produces the right decisions, it does not do so *in the right way*.

The problem is that sanctions are appropriate when we are

36. This is not entirely clear from the text of *Rules and the Rule of Law*. Schauer suggests that the aim of the proposal is to discourage free decisionmaking. *See id.* at 692. But he could have in mind either simple particularism, or rule-sensitive particularism, because both could be described as forms of "free decisionmaking." I suspect that he wishes to discourage both, and to encourage rule-based decisionmaking. That still leaves unclear, however, which of the two forms of rule-based decisionmaking—pure or presumptive—that he wishes to encourage or mimic. From the substance of Schauer's proposal and argument for it, I believe that we can reasonably infer that it is the presumptive model that he has in mind, although sometimes his language suggests otherwise.

concerned only with "external behavior," but they become far more troublesome—from an institutional design point of view—when our concern is with the character of the process of deliberation. It is not surprising, then, that in our current practice, we have only the most vestigial version of the sanction strategy. We talk about overturning a decision at the appellate level as a sanction levelled against the court below. The "sanction," however, is directly tied to the merits of the issues in question. Typically, higher courts overturn decisions on the ground that the arguments of the lower court on the issues in question are faulty. The primary and direct result is that the decision thereby supported is vacated. Reputation is, of course, tied to this, but this is only an indirect consequence. It is a consequence *because* we believe that officials and others first care about the decisions and the process by which they are made.

C. *Mimicking the Process*

Consider now the process-transforming version of Schauer's institutionalization proposal. Threatening sanctions for rule violations again creates problems. Sanctions merely *add* new reasons to the officials' domain of considerations that must be weighed and balanced. Introducing further reasons into their deliberations does not alter the *structure* of that deliberation in the way that the rule-based model prescribes. How, we might ask, could this transform the decisionmaking process?

In Schauer's behalf, we can reply to this objection. Suppose we conceived the function of the sanctions, not as deterrence devices, but as reinforcers carrying an "expressive" message. Sanctions, then, might be part of a package of educational devices, signalling the seriousness with which the rule-imposer takes the rules. Their primary function would be to communicate condemnation and through this to educate the sensibilities of decisionmakers. Secondarily, they could deter backsliding and thereby underwrite integrity in the decisionmaking process.

There is a certain plausibility in this argument, but it does not resolve two remaining worries about Schauer's proposal. First, if the institution designer's task is to get officials to adopt and successfully pursue a presumptive rule-based decision program, then it must be possible to characterize such a program in psychological terms such that officials can understand what

is expected of them, and such that we can test whether the proposed device has achieved this aim. Again, questions about the psychological feasibility of the presumptive model return. If there is no stable middle ground between pure rule-based decisionmaking and rule-sensitive particularism, then Schauer gives his institution designer an infeasible task. The device will either fall short, and encourage rule-sensitive judgments, or overshoot its target, and encourage officials to adopt and follow the pure rule-based program (or, worse yet, encourage them to adopt the latter and then condone their backsliding).

Second, if we grant Schauer the psychological feasibility of presumptive rule-based decisionmaking, we put in jeopardy his "asymmetry-of-authority thesis" and with it a major premise in his defense of the desirability of presumptive positivism. Schauer addresses the objection, made against deliberation governed by proper rules, that for a rational agent to treat rules as proper rules is either irrational or morally objectionable because it requires that the agent abandon her autonomy of judgment. He replies that we can grant that "abandoning one's judgment," as the pure rule-based model requires, is either irrational or immoral (or both), and yet insist on the rationality and even the morality of setting up an institution that brings about a similar result. This is the "asymmetry-of-authority" thesis.[37]

If the aim of "bring[ing] about a similar result," however, is to get officials to adopt and deliberate in the manner described by the rule-based model, then, at the very least, it encourages (on the given assumptions) irrationality and immorality. That alone is enough to throw the "asymmetry assumption" into doubt. For, *if* it is immoral or irrational for one to adopt the model, then it must be at least morally problematic for the institution designer to succeed in getting one to do so. It may even be morally problematic for the designer to encourage it (at least if there is reasonable likelihood of success). It sounds like the intentional corrupting of a moral agent, and, while these are not the same offenses against morality or rationality as the original objection contemplates, they are cognate offenses. Granted, on some moral theories, this might not be conclusive of the immorality of the designer's activities, but at

37. *See id.*

the very least, a significant moral cost has to be put on the designer's bill.

This may not be a deep worry for Schauer, because he does not believe that following the rule-based model (at least its presumptive version) is morally objectionable. Indeed, he argues that some rule of law (that is, rule-dictating) values directly support what we called "self-opacity." They are reasons not only for exclusion of a given rule's aims, but also for exclusion of the very value of pursuing those aims by *means of this rule*.[38] Yet, he should worry a bit at least. We might wonder whether threatening sanctions is the best device to accomplish the essentially educational job that Schauer assigns to them. Even if we accept that sanctions might have the desired psychological effects in some cases, the costs may be too high. As I noted earlier, fear of sanctions is strictly irrelevant to the merits of cases to be decided by officials. Sanctions may not be *intended* to function *as reasons*, but can we be assured that they will not typically do so? If not, does that not risk anew significant *corruption* of the decisionmaking process?

Thus, Schauer's proposal for the institutionalization of presumptive rule-based decisionmaking is open to important worries. These worries, in conjunction with the problems I noted in Part III, lead me to conclude that something like rule-sensitive particularism may provide a better account of legal reasoning. If rule-dictating values are given considerable weight, and greater weight as we move away from appellate courts, then such a model of decisionmaking under law could capture the phenomena Schauer has documented for us in his article and book. I am not yet convinced that presumptive positivism offers a coherent and viable alternative.

38. *See* F. SCHAUER, *supra* note 3, at 168-70.

PRESUMPTIVE POSITIVISM AND TRIVIAL CASES

MARGARET JANE RADIN*

INTRODUCTION

Many aspects of Professor Frederick Schauer's approach to rules and their place in the law seem quite right, or at least quite promising. Like a typical commentator, however, I shall not accentuate the positive; instead, I shall concentrate on a few aspects of Schauer's work that can be questioned or that need further exploration. At least, I can begin by setting out what I see as our points of sympathy, and mention preliminarily my points of questioning in that context.

My first point of sympathy is with the basic orientation to non-ideal theory. This orientation leads Schauer to see rules neither as conceptually essential to law nor as devices to ensure certainty, but rather as devices to allocate power in such a way as to minimize the expected errors from wrong decisions. In other words, according to Schauer, the explanation/justification for rule-based decisionmaking, where it occurs, is that the relevant system-structuring authority evaluates the risk of errors resulting from relatively more rule-like decisions to be less than the risk of errors from relatively less rule-like decisions.[1] I think the risk-of-error approach might be deepened, and might well lead us to think that Schauer's proposed "presumptive positivism" is oversimplified.

Second, I agree with Schauer that ruleness should be understood on a continuum. Thus, absolute ruleness is merely a heuristic device at the far end of the theoretical continuum. It is not found in real-life uses of rules. This means that the traditional conception of rules, in which nothing without this absolute quality deserves the name of rule, must be rejected, or at least qualified to name a theoretical endpoint rather than an actual property. Hence, it is incorrect to postulate "logical" distinctions between rules and standards or between rules and principles, and Schauer rightly rejects these distinctions. I am

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1. *See* Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645, 679-94 (1991).

left wondering, however, whether some of Schauer's reasoning about "presumptive positivism" covertly depends upon the distinctions that he has rejected.

Third, I sympathize with Schauer's general idea that rules must be socially understood. Schauer understands rules as socially based in at least the sense that some shared operative practice must ultimately underlie hierarchies of rules to make rules understood as applicable in particular practical circumstances. The ultimate social basis of rules can readily be understood, as it is by Schauer, in terms of Hart's concept of a rule of recognition.[2] What remains to be asked is to what extent the sociological understanding that underlies the applicability of rules also directly operates to support or undermine the operation of the rules in practice.

Finally, I sympathize with Schauer's blurring of the categories of explanation and justification as well as with his deep concern with what he calls phenomenology—the operation of rules in practice and the self-understandings of decisionmakers (rulemakers and rule-appliers) about their operation in practice. These are earmarks of pragmatism. I believe that Schauer is a pragmatic legal theorist, and I only hope he is not a pragmatist *malgré lui*.

Schauer proposes "presumptive positivism" to explain/justify the practical observation that legal decisionmakers, consistent with their own role conception, sometimes follow rules (and/or believe themselves to be following rules) even though the result is "wrong," and sometimes set aside rules (and/or believe themselves to be setting aside rules) to arrive at the "right" result. The question immediately arises whether "presumptive positivism" is rightly called positivism, because all "presumptive positivism" retains of the traditional positivist commitments is an attenuated version of the distinction between law and non-law.[3] I leave this

2. *See* H.L.A. HART, THE CONCEPT OF LAW 93 (1961). Hart hesitated to refer to the rule of recognition as a rule because, unlike other rules, its existence was a matter of sociological fact, and it would no longer exist if legal actors ceased to follow it and ceased to have a shared public understanding of it. Although I do not pursue the point in this paper, Schauer should be clear that he does not conceive this ultimate basis of rule applicability as being itself a rule. Thus, he may wish to drop Hart's terminology.

3. As I note below, if we accept "presumptive positivism," we will not be entitled to say with certainty that judges are following rules in cases where the judges' own norms agree with the rules, and we will not say that cases that most flout ruleness are the clearest examples of improper judicial behavior. These features of "presumptive posi-

question for positivists to debate among themselves in order to focus on other aspects of "presumptive positivism" as Schauer has presented it: the role of social norms, the relationship between "presumptive positivism's" applicability and the apparent triviality of the case, the idea that judges can "peek" at the non-law domain without fully engaging it, and Schauer's optimism about the stability and operability of rules.

I.

Schauer proposes that "positivistically-recognized rules exercise presumptive but not conclusive force."[4] According to this hypothesis, we would expect to see

> many cases in which the recognized rule generated a result consistent with that generated by the full norm set; some cases in which the recognized rule indicated a result that was set aside in the service of some conflicting social norm; *and some cases in which the recognized rule indicated a result that conflicted with a larger social norm, but not by so much or so egregiously that it was worth setting aside the result indicated by the [recognized] norm.*[5]

Thus, what will tend to verify this hypothesis is the existence of (that is, our identification of) "the set of slightly but not extremely wrong answers (from the perspective of the set of social norms)."[6]

Let me try to unpack this hypothesis. First, there are some difficulties associated with Schauer's use of "social norms." Schauer probably does not mean that when a judge is deciding whether to follow a rule, she understands herself to be consulting a set of "social norms" different from her own set of norms.[7] If Schauer does not mean that judges consult "social norms" directly when deciding whether to follow rules, the hypothesis can be restated to refer to conflicts between rules and the judge's own norms.

Thus restated, the hypothesis supposes that there will be

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tivism" seem at odds with traditional positivism, as (arguably) does Schauer's attenuation of the fact-value distinction by blurring the categories of explanation and justification.

4. Schauer, *supra* note 1, at 674.

5. *Id.* at 676 (emphasis in original).

6. *Id.*

7. If Schauer does mean this, there is certainly a problem in determining how a judge is to identify and apply something that is recognizably a social norm that is not her own norm.

cases in which the judge's own views agree with the result apparently directed by a rule, and these cases will be decided in accordance with the rule. These are Schauer's "many cases in which the recognized rule generate[s] a result consistent with that generated by the full norm set"; I shall call them Type I cases. In Type I cases, there is no way for us to observe in practice whether the rule or the judge's views are the reason for the decision. Consequently, even if the legal world appears to be quite rule-governed, we cannot assume that rules operate in the sense that Schauer defines so long as the judges' views correspond substantially with the norms behind the rules.

Schauer's hypothesis, as restated, also supposes that there will be cases in which the judge disagrees with the result apparently directed by a rule, and that some of these cases will be decided in accordance with the rule anyway, while some will be decided to get the result that the judge thinks is right, apparently in derogation of the rule. Those cases in which the judge decides according to the rule solely because of its constraint, against her understanding of what is right, are Schauer's "set of slightly but not extremely wrong answers"; I shall call them Type II cases. Cases in which the judge decides against the rule and according to what she thinks is right are Schauer's "cases in which the recognized rule indicated a result that was set aside in the service of some conflicting social norm"; I shall call them Type III cases.

How do we observe cases in which the judge apparently went against a rule, that is, Type III cases? Perhaps Schauer would suggest that we have only to consult our own intuitions of ruleness, not our social norms. If so, I am less sure than Schauer that our intuitions of ruleness are disconnected from our general norm system.

At any rate, to observe cases in which the judge disagreed with the result of following a rule and followed it anyway, that is, Type II cases, we need some proxy for understanding when this has happened. Schauer does not limit this subset to cases in which the judge has *stated*, "I don't like the result of this rule, but feel constrained to follow it." Thus, Schauer substitutes "social norms" for the norms of the judge. That is, if the observer thinks social norms would have disagreed with the rule-like outcome, the observer can assume that the judge disagreed with it.

In Schauer's analysis as I have restated it, "social norms" are a proxy for the judge's own views. Using this proxy assumes that judges share the same social norms that prevail in society at large (or perhaps Schauer would say in the legal system as a whole). Note that once this is understood, as I pointed out above, we cannot say that judges are following rules in the great majority of cases, in which their own norms agree with the rules. Parenthetically, it is hard to understand a theory with this implication as "positivist"; rather, it seems to turn positivism on its head.

But maybe we should not assume that judges' norms largely correspond to "social norms." Are there circumstances where this might not be the case? A "liberal" judge (perhaps appointed in the '60s) might decide a case in accordance with "conservative" rules only because she felt constrained by the rules, whereas, on the basis of the prevailing "conservative" social norms, we observers would believe that she had decided according to her own norms as well as the rules. Thus, we would mistake Type II for Type I. We might also mistake Type I for Type III if the "liberal" judge felt herself to be following a "liberal" rule, but "conservative" social norms cause the observers to find that the "liberal" result was not mandated by the rule after all. It is because I imagine that these kinds of observational differences of opinion will occur that I imagine our intuitions of ruleness are not so separate from our accepted norms as Schauer seems to believe.

The crucial question for Schauer, however, is whether Type I and Type III cases are likely to be systematically mistaken for Type II cases. If so, the hypothesis of "presumptive positivism" becomes shaky. If we cannot be sure we are observing Type II cases, then we cannot be sure we are observing any cases of constraint. We may be observing the pure legal realist world in which every decision accords with the judge's own norms.

We are perhaps unlikely to mistake Type III for Type II,[8] but I think Type I can be easily mistaken for Type II. We can mistake Type I for Type II if, for example, the rules and the judges' views are both "liberal," but our "social norms," which

8. To mistake Type III for Type II, we would have to think the judge followed a rule even though she disagreed with the result, while the judge felt herself to be deciding in accordance with her own views and against the rule. To make this mistake, we must be incorrect both about the rule-likeness of the decision and about the judge's views.

were formerly "liberal" (we may suppose that's how the rules got made and the judges got appointed), are now "conservative." In that case we would perceive decisions against our social norms but constrained by rules (Type II), while the judges themselves would perceive decisions in accordance with rules that agree with their own norms (Type I). The phenomenological question here, on which the viability of "presumptive positivism" depends, is whether the norms expressed by the rules and the norms of the judiciary might lag behind the otherwise prevailing "social norms." The legal system might well be conservative in this sense.

If, by referring to "social norms," Schauer only means to invoke the general norms internal to the legal system, including the norms espoused by judges, then his hypothesis would not be threatened by the time-lag problem I have just suggested. If that is what he means by "social norms," however, Schauer can no longer suggest that they inhabit a non-law domain. Preservation of this non-law domain is a central commitment of his theory, and the reason why he believes his theory to be a species of positivism, so I imagine he would want to reject this rather Dworkinesque suggestion.

II.

A second issue raised by "presumptive positivism" relates to the basic understanding that non-ideal evaluation of risk of error underlies ruleness in general, and "presumptive positivism" in particular. What does Schauer mean by his description of Type II cases as "the set of slightly but not extremely wrong answers"?[9] A traditional kind of response suggests itself. Perhaps an answer is slightly but not extremely wrong if it goes against a rule in some sense, but does not directly contradict the rule. If Schauer is consistent in supposing that ruleness is a continuum and that no real-life rules are as absolute as the theoretical endpoint of the continuum, a decision will be more clearly in accordance with or against a rule, the closer the rule is to the theoretical endpoint of the continuum. Thus, some decisions that we can see as in derogation of a rule nevertheless will not appear extremely wrong, if the rule is somewhere in the middle of the continuum. In other words, we could con-

9. Schauer, *supra* note 1, at 676.

clude that, in a case involving a rule in the middle of the continuum, it was wrong, but not extremely wrong, for the judge to have mistaken where this particular rule fell on the ruleness continuum (that is, for her to have perceived the rule as less rule-like than we do).

This reading of Schauer's definition of "not extremely wrong" allies him to some extent with traditional positivism. In this view, "extreme wrongness" corresponds with direct flouting of a clear rule. Nevertheless, I do not think this is the right way to read Schauer. First, I must report that in much of his discussion of "presumptive positivism" I had the sense that his commitment to the notion of a continuum has not been fully applied; the discussion reverts to the notion of "two different forms of decisionmaking"[10] more strongly than mere heuristic simplification. Moreover, this positivist reading does not take directly into account Schauer's qualifier: "not extremely wrong answers (*from the perspective of the set of social norms*)."[11]

A less traditional reading suggests itself. Perhaps Schauer means that an answer will be slightly but not extremely wrong if it is morally wrong, but not morally outrageous. Perhaps an answer will be not extremely wrong if its consequences seem small, that is, if it wrongly (even outrageously) deprives people of only a small amount of liberty or economic security.

If this is what Schauer means, and I think it is, then "presumptive positivism" is radically different from traditional positivism. "Presumptive positivism" applies not in what are traditionally called "easy" cases, that is, cases in which a rule appears plainly applicable and the result appears dictated by the rule. Rather, "presumptive positivism" applies in trivial cases. By a trivial case, I mean one that appears to the judge as if nothing of much importance is at stake. The case could be morally trivial because nothing of much moral importance to the judge is at stake. For example, the judge may not care which form of comparative negligence is adopted. The case could be consequentially trivial if, whichever way it comes out, no one will lose a lot of money, be incarcerated for a long time,

10. *Id.* at 648.

11. *Id.* at 676 (emphasis added). Of course, Schauer could mean that one of our "social norms" is that judges should follow rules. Judges who are not extreme legal realists might have their perceptions of wrongness affected by how strongly they believe that a result is mandated by a rule. This implies that positivism works to the extent judges believe in it. (I owe this point to Professor Scott Altman.)

or have her life strongly affected in some other way.[12]

In other words, Schauer has thoroughly rejected the traditional positivist notion of "easy cases" as being those that fall within the core of a rule, and has substituted a conception of trivial cases in some moral or other consequentialist sense. For Schauer, a rule could appear to dictate a result because the rule lay very near the rule-like end of the continuum. Yet such a case could become a Type III case because for the judge and, as Schauer assumes, likewise from the perspective of social norms, the rule-like result was "extremely wrong."

Schauer admits that "easy cases" in the traditional sense can, at least some of the time, be made the subject of the work of legal argument so as to arrive at a non-rule-like result. Such a result, in retrospect, after the work of legal argument is done, can appear to be the right legal answer. It also appears, although I am not quite sure, that Schauer would agree with Professor Duncan Kennedy that one cannot tell in advance, before doing the work, when an apparently rule-like result will yield to the work of legal argument.[13] (If he does not agree with Kennedy that a non-rule-like result will seem plausible in retrospect only some of the time, then he agrees with the realists that the non-rule-like result can be made to appear plausible all of the time.)

One can see why Schauer rests his theory not on predictability of outcome, as does the traditional ideal of the Rule of Law, but on power allocation. Predictability cannot be a theoretical cornerstone if Schauer is committed either to the realist position on when Type III can be made to look plausible (always), or to Kennedy's position (only sometimes, but we can't tell in advance when). In other words, if I am right that Schauer at least agrees with Kennedy about the unpredictability of when what looks like an "easy case" in the traditional sense will come out differently after working on it, then we cannot know in advance when rules will operate, although in practice it seems as

12. This would be true only so long as the judge did not find the particular result to be morally outrageous enough to make it "extremely wrong," even though only small consequences were at stake.

13. *See* Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 544-45 (1986) (describing how the judge's preliminary view of a case may seem to dictate a clear answer, yet how sometimes legal work can change this preliminary view).

if they are operating. We can only know in retrospect that a rule has been applied.

It remains to be seen whether this picture can correspond normatively or phenomenologically with the notion of the Rule of Law that "we" accept. Schauer explains and defends rules as allocating power away from judges and other decisionmakers when the governing authority that structures the decisionmaking environment weighs the risk of error from rules to be less than the risk of error from non-rule-like decisions. Putting Schauer's position on traditional "easy cases"[14] together with his position on trivial cases in the sense I have described,[15] we arrive at the result that the chosen power allocation can be trusted to work not in all cases that appear to be within the core of a rule, but rather in only those cases that appear trivial to the decisionmakers. I shall call this the hypothesis of "presumptive positivism in trivial cases."

One further refinement is needed. The degree of perceived "wrongness" resulting from rule-following or the degree of perceived triviality of a case will vary on a continuum. "Presumptive positivism" will be strongest when the case is most trivial and weakest when the case is most significant, morally or otherwise. Thus, when rules allocate power away from judges because of the governing authority's evaluation of the risk of error, the power allocation will work best when the case is perceived to be extremely trivial, less well when the case is perceived to be in the middle of the triviality continuum, and least well when the case is viewed as morally or otherwise salient.

If "presumptive positivism in trivial cases" is a good hypothesis, we might observe in practice that it is impossible to make stable rules that can be followed about things that are very important to judges, morally or otherwise, such as the death penalty or the taking of private property. By contrast, we might observe that judges always follow rules, even if they do not agree with them, when the subject is something like the speed limit. It appears phenomenologically plausible that what we can observe in our legal system is indeed "presumptive positivism in trivial cases." This is not trivial for the functioning of the system as a whole, because it is important for the system to

14. "Easy cases" can become Type III cases if the judge dislikes the result.
15. Trivial cases are likely to be Type II cases if the judge dislikes the result.

have rules of the road of various kinds, and these are the kinds of cases that appear trivial when taken individually.

Although "presumptive positivism in trivial cases" thus has a nontrivial result, it poses a problem for Schauer's underlying theory about power allocation, risk of error, and the Rule of Law. Is not the risk of error more important in cases that are *not* trivial? Those who institute systems of rules to implement the social norms *they* accept and have authority to impose presumably care about those norms most in nontrivial cases. If power allocation by rules only works well in trivial cases, then it does not work well to minimize risk of error from the point of view of the authority creating the decisionmaking environment. It may work to some extent in the middle of the triviality continuum, but its force decreases as importance increases. Rules about things that are morally important to decisionmakers, such as the death penalty, will often be remade in particular cases. Perhaps unfortunately for Schauer's thesis about power allocation, the concern about risk of error might also motivate judges and other particular decisionmakers. Judges might work harder in derogation of apparently rule-like results when, according to their own lights, those apparent results threaten nontrivial error.

III.

Schauer is aware, of course, that in order for a judge to determine when it would be "slightly but not extremely wrong,"[16] from the perspective of the full domain of norms, to follow a rule, the judge must have some way of making a judgment in advance, without examining the full domain, about how wrong following the rule would be. Schauer posits the mechanism of "peeking."[17] If "peeking" is not possible, every case will be tested by the full domain of norms, even if it is done tacitly, and the notion of "presumptive positivism" collapses.

What does Schauer mean by "peeking"? He says:

> I tentatively offer the idea of a casual look, a glimpse, a peek, a preliminary check, pursuant to which a decisionmaker follows the recognized rule unless some other factor overtly intrudes on her decisionmaking process. . . . If I am correct, if presumptions do serve as psychological simplifiers . . . , then

16. Schauer, *supra* note 1, at 676.
17. *See id.* at 677.

> presumptive positivism does not fail, even though it requires the decisionmaker to examine in some way the larger range of potentially overriding factors.[18]

Consider the notion of a psychological simplifier. Schauer argues that the judge would try to save herself the work of moral evaluation by using rules, so long as she can satisfy herself that the result will not be too awful. For a judge in this psychological mode of trying to save work, Schauer proposes that the result can only appear too awful if something about the situation sticks out like a sore thumb and cries out for further investigation. A judge is psychologically predisposed to assume a standard set of circumstances—stereotypical circumstances—unless something about the case leaps out to warn her that things are otherwise.

This argument parallels a characteristic pragmatic view of reasoning.[19] In this pragmatic view, reasoners have paradigmatic views or background assumptions about certain situations, and they do not examine these background assumptions unless something forces them to. Schauer suggests that rules are like our unquestioned background assumptions; we follow them unquestioningly until something obtrudes itself upon us that makes us examine them. According to this argument, however, perhaps "peeking" is the wrong metaphor for Schauer. "Peeking" implies that something, however little, is actively being done by the judge, whereas Schauer supposes that the judge is passive, and the sore thumb simply obtrudes itself and forces her to do some moral work.

Now put this picture of "peeking" together with the notion of the triviality continuum. In any case that the judge considers nontrivial, nothing more than juxtaposing the apparent result of the rule with the judge's own norms would be required to trigger further scrutiny. For instance, the very fact that the case involves the death penalty may preclude the psychological shortcut for the judge. On the other hand, judges will not look deeply into cases that are apparently trivial, such as cases involving only a small fine, unless a sore thumb catches the judge's attention and makes her think that something "extremely wrong" may lurk beneath the surface. In this pragmatic reconstruction of the "peeking" theory, judges stick to rules

18. *Id.*

19. *See, e.g.*, G. HARMAN, CHANGE IN VIEW: PRINCIPLES OF REASONING (1986).

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the way reasoners stick to preconceptions or stereotypes—until they are dislodged by circumstances that overcome mental inertia and force the judge or the reasoner to do some work. For the judge, the work will involve rearranging the legal "field."[20] For the reasoner, the work will involve rearranging the background beliefs.

IV.

The various positions of legal theory on whether or not rules operate to constrain decisionmakers can be arrayed on a continuum of discourse-optimism. Discourse-optimism is the faith that words, rules, can constrain someone from acting in the way that she would otherwise prefer and otherwise has power to act. The extreme discourse-optimists are the formalists, who assume that rules can always be efficacious in this sense, and the extreme discourse-pessimists are the legal realists, who assume that rules can never be efficacious in this sense. Schauer tries to stake out a position somewhere in the middle of this continuum. As a pragmatist, I think this approach, in principle, must be correct. Schauer tries to split the difference between the materialist-idealist dichotomy, or the theory-practice dichotomy. We should think that words have some power to affect the way things go in the world, but we should recognize that other things have power, too. Words will not always win and will not always lose. The interesting problems, which we cannot get to from one of the positions at either end of the continuum, are in saying when and how words can win.

Although Schauer is not an extreme discourse-optimist, he is more of a discourse-optimist than most. He writes with apparent faith that rules can work straightforwardly a lot of the time. Because Schauer thinks that both extreme legal realism and Herculean coherence should be rejected because they are false phenomenologically,[21] the only position that Schauer thinks will threaten "presumptive positivism" is the "convergence hypothesis."[22]

According to the "convergence hypothesis," there is a prevailing outlook among decisionmakers about the appropriate

20. *See* Kennedy, *supra* note 13, at 538.

21. By this Schauer means that extreme legal realism and Herculean coherence do not square with our observations of the legal system.

22. *See* Schauer, *supra* note 1, at 665 n.38.

degree of ruleness, a specific preferred point (call it point x) on the continuum of ruleness. When the governing authority tries to structure a decisionmaking environment to be more rule-like than point x, judges will undermine the rules until the degree of ruleness reaches point x; when the governing authority tries to structure a decisionmaking environment to be less rule-like than point x, judges will create subrules within the general directives given them until the degree of ruleness reaches point x. As Schauer concedes, if the "convergence hypothesis" is true, it would undermine his theory, for "the tendencies toward convergence will substantially undercut the ability of a rulemaker to use varying degrees of ruleness as variable constraint."[23] Convergence will prevent authorities from using rules for risk-of-error purposes, that is, from using rules "only when there is a reason to believe that the particular decisions of a particular class of decisionmakers ought to be constrained."[24]

Another threatening possibility that I think Schauer should take into account is what I can call the "divergence hypothesis." The "divergence hypothesis" is favored by those who are less optimistic about discourse than Schauer is—those who find that discourse is always internally conflicted and unstable. According to the "divergence hypothesis," when rules are imposed, decisionmakers will gradually become aware of and dissatisfied with the inadequacies and errors caused by rules. Decisionmakers will find exceptions and will begin to refer directly to the underlying norms that supposedly generate the rules. In other words, when rules are imposed, they will gradually degenerate into what some critical writers call standards. On the other hand, when discretionary standards are imposed, decisionmakers will gradually become aware of and dissatisfied with the seemingly open-ended arbitrariness caused by such standards. Decisionmakers will find areas of decision suitable for carving out subrules and eventually may find that the subrules exclusively define the standard. In other words, when standards are imposed, they will gradually degenerate into rules.[25]

According to this view, there is no place where we can feel at

23. *Id.*

24. *Id.*

25. For a nice exposition of this view, see Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985). I believe that the "rules versus standards" terminology is a less useful way to describe the domain of various kinds of directives than is Schauer's ruleness

home on the continuum of ruleness, no stopping place that will be stable. The various parts of the system will vacillate from relative ruleness to relative non-ruleness, but not in any way that is rational with respect to goals of the system. Nor will this vacillation be rational with respect to underlying grounds concerning the virtues of relative ruleness in context, such as evaluation of the risk of error. There will be no convergence, no point x on the ruleness continuum that decisionmakers find satisfactory.

This skepticism is not equivalent to the outright discourse-pessimism of classical legal realism. In the "divergence hypothesis," we *can* do things with words, sometimes; but our dissatisfaction with the shortcomings of all our ways of dealing with words causes any given decisionmaking environment to be inherently unstable. I think this hypothesis is phenomenologically plausible. I think we can observe many instances in which non-rule-like environments have become rule-like, such as judges creating lists of rules to determine what counts as "due process,"[26] and many instances in which rules have become less rule-like, such as judges measuring antitrust violations under the "rule of reason."[27] Takings doctrine is a suggestive example, because it can be read as evolving from rules involving physical invasion and exclusion, to the non-rule-like *Penn Central* balancing test,[28] and back again to rules involving physical invasion and exclusion.[29] Schauer's own example, in which he sees Section 16(b) of the Securities Exchange Act of 1934 evolving toward non-ruleness, and Rule 10b-5 evolving toward ruleness,[30] can just as easily illustrate this "divergence hypothesis" as the "convergence hypothesis" for which he suggests the example. There is no reason to suppose that the evolution

continuum. *See* Radin & Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019, 1053-54 (1991).

26. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976) (hearing not required before cutoff of Social Security benefits); Goss v. Lopez, 419 U.S. 565 (1975) (hearing required before suspensions from school).

27. *See, e.g.*, Standard Oil Co. v. United States, 221 U.S. 1 (1911) (violations of Section One of Sherman Act will be judged by rule of reason, to be read into the Act).

28. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (Court declared takings decisions to be "essentially ad hoc" and propounded multi-factor balancing test).

29. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (physical invasions of property are takings regardless of how insignificant).

30. *See* Schauer, *supra* note 1, at 665 n.38.

in both directions along the ruleness continuum must stop at point x.

Perhaps the "divergence hypothesis" is not fatal to "presumptive positivism," but it does seem to add another qualification. If we accept the "divergence hypothesis," and add it to the hypothesis of "presumptive positivism in trivial cases," then, in any given decisionmaking environment where the governing authority has chosen rules, Schauer's "presumptive positivism" might still usefully describe the situation, but only for trivial cases and only for awhile. Finally, the "divergence hypothesis" might be strongest in domains that are perceived as very important, morally or otherwise, because our dissatisfaction with all points on the ruleness continuum might be strongest in such domains. So rules both work better in trivial cases and last longer in trivial domains.

THE RULES OF JURISPRUDENCE: A REPLY

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The Editors of the *Journal* have been kind enough to permit me to respond to the comments of Professors Alexander, Coleman, Gavison, Moore, Postema, and Radin. My first reaction was to pass. All of these comments raised such interesting and important issues that to respond briefly might undervalue their importance. Moreover, a brief response might overstate the relative significance of my original contribution to what has turned out to be a discussion ranging much farther and deeper than I had originally anticipated.

But passing is not my style. Even apart from my unfortunate willingness to say just a little bit more, the discussion embodied in this Symposium is one whose style as much as its substance deserves continuation. Unlike far too much of legal scholarship, all of these papers demonstrate charity in interpretation, genuine engagement of issues actually raised, argument by substance and not by label, cooperation in the pursuit of common goals, willing acknowledgement of the contributions of others, and modesty in claims of innovation. That these commentators have taken the time to comment on my work in such a sympathetic and directly engaged way is enormously flattering. Here, I attempt to repay the compliments by trying, although more briefly, to be as generous to their work as they have been to mine.

As I reflected on the contributions of the commentators, certain themes seem linked and recurrent, and I will concentrate on them here. As to those criticisms that I ignore, the omission should not be taken to indicate that I think the arguments unsound or the claims unimportant. Quite to the contrary, I do not discuss in this Reply issues that have caused me to reevaluate my own thinking or that are so large that more extensive treatment is necessary than would be practical here.

I. THE PERILS OF "POSITIVISM"

In talking about "trouser words," J.L. Austin concluded that

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there were some terms whose meaning could be determined only by starting with their negation.[1] Similarly, John Searle's declaration of "No remark without remarkableness" demonstrates the way in which most uses of language take place against a background in which the plausibility of a negation is commonly presupposed by any assertion.[2] Consider, for example, what would be the effect of an entirely correct observation that Professor Alexander was sober throughout the live version of this Symposium.

We can usefully think about "positivism" in much the same way. As a term absent from ordinary language and having a variety of different meanings within different technical discourses,[3] perhaps it is best to consider the meaning of positivism in light of the claims it has sought to challenge.

Historically, positivism has been the counter to natural law, which maintains that moral correctness is a necessary condition for the existence of law in any possible society. If one wishes to deny *that* proposition, then, as Professor Coleman wisely points out, one need identify only one possible legal system in which moral correctness is not a condition of the existence of law.[4] But identifying one (or more) such system is not inconsistent with there being many legal systems, including arguably that of the United States, in which moral correctness is a necessary condition for legality.[5] Thus, if the most germane negation of positivism is natural law, then the "limited-domain conception" of positivism is beside the point, as both Coleman and Gavison maintain.[6]

Suppose, however, that there existed a descriptive thesis maintaining that some or all legal systems empowered their decisionmakers to employ an undifferentiated set of social

1. *See* J.L. AUSTIN, SENSE AND SENSIBILIA 15-19, 70-71 (1962). I expressly disavow the sexist terminology for what remains an important point.

2. *See* J. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 143-45 (1969).

3. Positivism in the philosophy of science, for example, means something quite different from logical positivism, which in turn has virtually nothing to do with any version of legal positivism.

4. *See* Coleman, *Rules and Social Facts*, 14 HARV. J.L. & PUB. POL'Y 703, 715-17 (1991).

5. *See* J. COLEMAN, *Negative and Positive Positivism*, in MARKETS, MORALS AND THE LAW 3 (1988). *See also* Lyons, *Principles, Positivism, and Legal Theory*, 87 YALE L.J. 415 (1977); Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 511 (1977). I also take the best reading of Kelsen to support this perspective, and on this I have benefitted from numerous conversations with Stanley Paulson.

6. *See* Coleman, *supra* note 4, at 724; Gavison, *Comment: Legal Theory and the Role of Rules*, 14 HARV. J.L. & PUB. POL'Y 727, 754-55 (1991).

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norms in making their decisions. Let us call this descriptive thesis the non-differentiation thesis. The denial of this thesis, rather than the denial of the natural law thesis, is what Dworkin (who, with qualifications, holds the non-differentiation thesis) calls "positivism." Eliminating the double negative produces the view that positivism is a descriptive thesis about differentiation (or "limited domain"),[7] and this is what Dworkin (who denies its descriptive correctness), Raz, Hart, and I all maintain. Of these only Raz maintains that differentiation is a necessary feature of all possible legal systems,[8] and thus Hart, Kelsen, Coleman, and I agree that a society could contingently designate its legal officials to treat as law the full range of extant social norms, with the conditions for social recognition being sufficient for legal recognition as well.

So it turns out that, as a matter of linguistic sociology, how one uses the word "positivism" is largely a function of the debate in which one is involved. When asking questions of what Coleman calls "general jurisprudence," questions about what must be true for all possible legal systems, the term designates the position that moral correctness does not have to be a condition for the identification of law in all possible legal systems. But when asking questions about what is true in some legal systems, the word "positivism" marks the position that there is a domain of legal norms not coextensive with the domain of moral or political norms then accepted in the society within which the legal system exists.

I do not claim that positivism in the latter sense is derived from positivism in the former, and thus Coleman is correct that one cannot "get" to the latter from the former, although incorrect in supposing that I try to do so. The latter debate, of which positivism represents one side, is a debate what Hart calls "descriptive sociology," and thus one could derive a descriptive position about some legal systems from what necessarily must be true in all legal systems, but not a position about what is true about this or some legal systems from what need not necessarily be true in all legal systems.

All of this is largely about terminology. Coleman, first in

7. I agree with Coleman that, strictly speaking, a pedigree standard does not exhaust the standards that could distinguish the domain of the legal. *See* J. COLEMAN, *supra* note 5, at 343 n.1.

8. *See* J. RAZ, *Legal Positivism and the Sources of Law*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 37 (1979).

"Negative and Positive Positivism,"[9] and now here, has importantly clarified different conceptions of positivism. Gavison, with her reference to first-stage law,[10] has shown that one can talk about what Raz, Dworkin, and I want to talk about without using that conception of positivism and without using the word "positivism." If that were all there was to it, I would be happy to concede the terminological turf, albeit with perhaps some regret at the loss of the alliterative attractiveness of "presumptive positivism." But Dworkin has been too influential for that. If one wants to maintain that which Dworkin wants to deny, then it may be necessary to work within Dworkin's terminology. If what he wants to attack is the descriptive thesis he calls "positivism," then it may be necessary, if confusing, to use that name to describe the descriptive thesis that we want (partially in my case and completely in Raz's) to maintain.

II. The Locus of Legal Decisionmaking

As Moore correctly points out, the rules I seek to analyze are different in kind from those foundational moral directives whose very foundationalism prevents them from having background justifications and thus prevents them from being under- or over-inclusive.[11] Instead, I am interested in rules as instrumental components of decision-procedures, in rules that seek to serve other values, where those values may themselves take the form of foundational moral rules.

Thus, I am concerned with decisionmaking and, more specifically in "Rules and the Rule of Law," with legal decisionmaking. But to have that concern is *not* necessarily to have a preoccupation with *judicial* decisionmaking. I am concerned with judicial decisionmaking, but only as one form of legal decisionmaking, and one that is less central than often supposed.

From this broader perspective, the universe of legal decisionmaking includes the decisions of anyone for whom the existence of law is potentially a factor in her decision. I am a legal decisionmaker when I decide whether to stop at a stop sign in

9. *See* J. Coleman, *supra* note 5.

10. *See* Gavison, *supra* note 6, at 740-41. *See also* Gavison, *Comment*, in Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart 21 (R. Gavison ed. 1987).

11. *See* Moore, *Three Concepts of Rules*, 14 Harv. J.L. & Pub. Pol'y 771 (1991).

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the middle of the night with no cars for a mile around.[12] A police officer is a legal decisionmaker when she decides whether to give a *Miranda* warning. The members of Congress are legal decisionmakers when they decide whether the Constitution permits them to pass a statute outlawing desecration of the flag, and judges are legal decisionmakers when they decide the typically hard cases that lawyers present to them. The preoccupation with courts and judges is the conceit of the American lawyer, perhaps a justifiable conceit in light of the importance of judges in the United States, but a conceit nonetheless.

When I consider (descriptively or normatively) the possibility of rules being important in legal decisionmaking, I thus do not restrict myself to judging, especially because I do not believe that other forms of legal decisionmaking are parasitic on judicial decisionmaking. With great frequency, the law intrudes on decisionmaking, even when the possibility of ultimate adjudication in a court is slight.

Moore thus moves more quickly from legal decisionmaking to judicial decisionmaking than is warranted either by my perspective or the evidence.[13] In addition, Moore draws a problematic, albeit interesting, distinction between the idea of a correct judicial decision and the procedure that some judge might employ to reach it. Moore claims a lack of interest in the latter,[14] but that does not eliminate questions about the relationship of a correct judicial decision to a hypothetical correct decision for all decisionmakers regardless of situation or role. Because Moore is still concerned with the idea of a correct judicial decision, and with the obligation of a judge to reach (by whatever procedure) the morally correct decision, this begs the question whether, as a matter of institutional design, it is appropriate that we empower or instruct any given class of decisionmakers to reach the morally correct decision. Occasionally, however, for reasons such as separation of powers or distrust of a given class of decisionmakers, we might not want every decisionmaker to seek the all-things-considered morally correct

12. *See* Regan, *Law's Halo*, in PHILOSOPHY AND LAW 15 (J. Coleman & E.F. Paul eds. 1987).

13. Coleman is entirely correct in saying that I do *not* here provide an account of adjudication, for such an account would have to deal with a range of empirical questions, especially ones relating to the actual (as opposed to articulated) grounds for judicial decisions.

14. *See* Moore, *supra* note 11; *see also* Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 396 n.218 (1985).

decision. When this is the case, we employ methods, such as sanctions, that attempt to create an environment in which reaching the all-things-considered morally correct result is not the goal for certain decisionmakers.

Moore claims to find these questions of role allocation and institutional design "uninteresting." For him, the interesting questions are about what an unsanctioned morally autonomous decisionmaker, including a judge, should do. In being concerned solely with this question, Moore places himself well within the traditions of most of contemporary moral philosophy. This tradition, however, has commonly ignored the equally important question of the moral responsibilities of an agent who confronts the possibility of immoral behavior on the part of another. It is possible that one has a moral obligation to prevent another from acting immorally, especially if third parties are involved. If that is so vis-à-vis individuals and particular cases, then someone confronting the possibility that some class of people might act immorally in some large number of cases might also have such a moral responsibility to prevent or lessen the impact of the moral mistakes of others. Then rules come into play, for rules are the implements of generalized, rather than particular, control. This perspective may be uninteresting to Moore, but we should not take Moore's interests (as he himself would not) as coincident with the realm of important questions about morality. One such question is that of institutional design to minimize moral error, and another is the question of the responsibility of one who sees another committing moral error. Both of these questions are important, and both are interesting to me, but we can address neither very well by focusing only on decisionmaker obligation. Thus, even if we distinguish judicial decision-procedure from judicial obligation, I still want to deny the conflation of judicial obligation with moral correctness that Moore takes to be self-evident.

III. The Problem of Presumptions

These issues of role allocation explain much of my disagreement with Postema, and explain as well why the disagreement is smaller than may initially appear. Postema purports to demonstrate, as a logical matter, that presumptive rule-based decisionmaking is logically identical and extensionally equivalent to rule-sensitive particularism, because the weight of

the presumption will be identical to the weight that the rule-sensitive particularist will give to the value of having rules.[15]

Postema's position assumes that the weight placed on having rules in both procedures is necessarily the same, but that is exactly what I deny. I can deny it, however, only by focusing again on standpoints other than that of the morally autonomous decisionmaker deciding what to do when operating as the addressee of rules set forth by others. I cheerfully admit that the morally autonomous decisionmaker deciding what presumption to give to a rule will give that presumption the same weight that she would give to rule-based values in deciding what to do in this case, taking everything, including the value of having a rule, into account. I also maintain, however, that the morally autonomous decisionmaker is often likely to undervalue rule-based values, especially when they are values of separation of powers and decisionmaker disability, rather than values of predictability and certainty. When such an undervaluation of rule-based values is expected, the designer of a decisionmaking environment might wish to have a decisionmaker apply a presumption heavier than the weight that that decisionmaker might herself give to rule-generating values if she were evaluating the importance of those values in each individual case.

In theory, this diversity in weight, which defeats Postema's claim of extensional equivalence between rule-sensitive particularism and presumptive rule-based decisionmaking, could exist within a single decisionmaker. A decisionmaker conceivably could decide to impose upon herself a presumption stronger and more opaque to case-by-case reevaluation than the weight that rules would have in a more particularistic decision procedure. Consider breaking a rule in secret. Under a standard view of what I call rule-sensitive particularism, the fact that a rule can be broken in secret and would thus be substantially less likely to encourage future and possibly less justified rule-breakings is relevant in determining whether a rule should be broken.[16] But under a view rejecting rule-sensitive particularism, the lessened consequences of secret violations would not be

15. *See* Postema, *Positivism, I Presume? . . . Comments on Schauer's "Rules and the Rule of Law"*, 14 HARV. J.L. & PUB. POL'Y 797, 813-17 (1991).

16. *See* Regan, *supra* note 12. *See also* Regan, *Reasons, Authority, and the Meaning of "Obey": Further Thoughts on Raz and Obedience to Law*, 3 CAN. J.L. & JURISPRUDENCE 3 (1990); Regan, *Authority and Value: Reflections on Raz's "Morality of Freedom"*, 62 S. CAL. L. REV. 995 (1989).

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open for case-by-case determination. Instead, a decisionmaker might determine in advance that she is systematically prone to underestimate the likelihood that rule-breakings would encourage future rule-breakings, and therefore decide in advance that the weight of a rule will always be x in the decisionmaking process, *even if it subsequently seems to her that the reasons for that weight are inapplicable in this case.* This presumptive rule-based decisionmaking procedure makes the presumption, whatever its weight, opaque to the reasons for having the presumption, in much the same way that rules can be opaque to the substantive justifications behind them. So long as this opacity can exist, and so long as we can imagine at least one case in which a rule would carry a strong presumption even if there were no reason in the particular case to give it any presumption at all, then the claim of extensional equivalence fails.

I do not find this picture of divergence implausible even for an individual decisionmaker. As Hare has explained in *Moral Thinking*,[17] we operate in more or less reflective modes at different times, and it may be that we can in our more reflective modes adopt rule-sensitive particularism, and in our less reflective modes refrain from evaluating the applicability of rule-generating justifications in each case. But even if this possibility seems psychologically implausible to some, it becomes much more plausible if we focus on presumptiveness not as a strategy that a decisionmaker might adopt for herself, but rather as one that might be imposed upon her.

Postema concedes that a totally opaque rule-based decisionmaking procedure would be different from rule-sensitive particularism. Suppose then that a decisionmaker is instructed to operate in a strictly rule-based manner. Further suppose that there is an array of sanctions supporting those instructions, such that the decisionmaker would be punished when she did not follow the rule, even if it appeared to her to be best at the time of the decision to ignore the rule, and even if it turned out best in the end to have ignored the rule. All agree that this is a different procedure from one in which the decisionmaker decides in each case whether to follow the rule, taking into account the value of having a rule. But now suppose we add what we might call the "Nuremberg rider." Suppose the deci-

17. R.M. HARE, MORAL THINKING: ITS LEVELS, METHOD AND POINT (1981).

sionmaker is instructed and sanctioned to follow the rules in all cases, except when following the rules would produce moral horrors equivalent to those that led to the rejection of the "I was only following orders" defense in the Nuremberg trials.

Obviously, this is a presumption of enormous strength. Indeed, I would expect that in normal operation it would produce the same outcomes as strict rule-based decisionmaking. But it is a presumption nevertheless, rather than a strict rule; and if total opacity and rule-sensitive particularism are different, it is implausible to suppose that the mere addition of this quite remote qualification produces extensional equivalence where before none had existed. And if the Nuremberg rider does not produce extensional equivalence, then there is nothing about the change from opacity to presumptions of lesser strength that necessarily produces extensional equivalence. Extensional equivalence between presumptive rule-based decisionmaking and rule-sensitive particularism is thus psychological and not logical. As the presumption weakens, the point at which extensional equivalence attaches will vary from decisionmaker to decisionmaker. Consequently, there is no basis for assuming that the two decisionmaking procedures are extensionally equivalent for all or even most decisionmaking environments.

Radin shares Postema's sympathy with rule-sensitive particularism, but appears to agree with me that presumptive rule-based decisionmaking is different.[18] She is concerned, however, that this latter procedure may have less decisional bite than I suppose. This concern is reflected by her belief that decisionmakers are likely to override the presumption when the moral stakes are largest, the result being that the weight of the rule will matter most in a morally trivial array of cases.

I am largely in agreement with this point, subject to a clarification of the idea of "triviality." I think that what Radin means to get at is the range of cases in which the moral differential between the opposing positions is small. This state of moral equipoise might arise in any of three ways. One is the case that is simply trivial by any calculation, such as where the stakes are low and the issues largely technical, rather than moral.[19] An-

18. *See* Radin, *Presumptive Positivism and Trivial Cases*, 14 HARV. J.L. & PUB. POL'Y 823 (1991).

19. *See* Schauer, *Statutory Interpretation and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. —.

other is where the stakes are large but the moral component will appear to the decisionmaker to be negligible. *Pennzoil Co. v. Texaco, Inc.*,[20] comes immediately to mind, but others can substitute their own examples. Finally, there is the case in which the moral stakes are large, but where those stakes, or the moral worth involved, are approximately equivalent. Here, I am thinking of some variant on the classical moral dilemma.[21] If the moral issues are truly as strong on one side as the other, then non-moral factors may operate as tie-breakers, even though the moral import of the outcome is far from trivial.

With this qualification about the meaning of "trivial," I believe that Radin is basically correct. We can see a good example in a number of recent Supreme Court cases, where reliance on plain meaning, a variant on rule-based decisionmaking, seems to exert substantial decisional weight in comparatively technical cases involving what the justices are likely to perceive as morally uninteresting cases.[22] Plain meaning, however, exerts virtually no substantial weight in statutory construction cases involving issues of great moral import, such as affirmative action and gender discrimination.[23]

Radin appears to take this phenomenon as a given. Her point about the instability of rule-following (or rule-avoidance) reinforces her conclusion that we should expect a decisionmaker's strong moral views to be dominant in all decisionmaking environments. The strength of those beliefs may indeed be fixed, but neither the firmness nor the weight of a decisionmaker's moral beliefs need be determinative of the degree to which a decisionmaking environment might be structured, with suitable incentives, to suppress those beliefs to a greater or lesser degree. The more we reward decisionmakers for following rules and punish them for breaking rules, the more we should expect that the strength of their moral beliefs will have to increase in order to outweigh the rule-following incentives. As a result, the degree of triviality will not be a given, but will rather be a function of the weight of rule-based values in the process of deci-

20. 481 U.S. 1 (1987).

21. *See generally* W. SINNOTT-ARMSTRONG, MORAL DILEMMAS (1988).

22. *See, e.g.*, Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1990); Hallstrom v. Tillamook County, 493 U.S. 20 (1989). *See generally* Schauer, *supra* note 19.

23. *See, e.g.*, California Federal Savings & Loan Ass'n v. Guerra, 479 U.S. 272 (1987); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984); Steelworkers v. Weber, 443 U.S. 193 (1979).

sion. No matter how fixed that weight might be for an uninfluenced decisionmaker, it is less likely to be fixed for decisionmakers responding to various incentives, and thus the degree of triviality of the cases in which rules matter will vary inversely with the extent of rule-promoting incentives.

IV. Alexander's Gap

Most of my comments in this Reply have coalesced around a single theme, the same theme explored by Alexander, with whom I am largely in agreement.[24] In fact, my only major disagreement is with Alexander's claim that I am attempting to eliminate "the gap" between how authority looks from the perspective of the subject and how it looks from the perspective of the authority. I am not, and I agree that the gap is essentially unbridgeable.

It is ordinarily the case that correct views are commonplace and novel ones mistaken, but Alexander's position has the dual virtues of soundness and originality. This is apparent if we examine a recent series of exchanges about the perspective offered by Hare.[25] Substantially abetted in this understanding by Hare's distinction between "archangels" and "proles," Bernard Williams objected to distinctions among better or worse moral reasoners, calling that position "Government House utilitarianism," although ultimately concluding that this despicable view was not Hare's. T.M. Scanlon similarly objected to the purported distinction among classes of moral agents, although also concluding that a charitable reading of Hare's view (although not Hare's terminology) would reject the view. And Hare himself disavowed what he called the "libel," saying that he was talking only about the different moral postures that individuals might take at different times.

It seems strange that prominent moral philosophers are huffing and puffing to distance themselves from the possibility that some people might be better at moral reasoning than others, and that bad moral reasoning might have unfortunate consequences. It is true that some notion of equality requires that all

24. *See* Alexander, *The Gap*, 14 Harv. J.L. & Pub. Pol'y 695 (1991).

25. I refer here to Hare, *Comments*, in Hare and His Critics: Essays on Moral Thinking 199 (D. Seanor & N. Fotion eds. 1988); Scanlon, *Levels of Moral Thinking*, in Hare and His Critics: Essays on Moral Thinking, *supra*, at 129; and Williams, *The Structure of Hare's Theory*, in Hare and His Critics: Essays on Moral Thinking, *supra*, at 185.

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be treated as morally autonomous agents. But what is the moral responsibility of the morally autonomous agent when she has the power to prevent another from acting immorally to the detriment of third parties? It is far from evident that passively allowing another to do moral damage in the name of moral respect for the damage-causer is the appropriate course of action, and the opposite position seems in fact much more justifiable.

If I am right about this, then I see no reason why it would be inappropriate for someone in a position of authority to take the same view with respect to classes of potential moral damage-causers. Indeed, this is what much of criminal law is all about. But not only criminals cause moral damage, so too do others who might be more well-meaning but mistaken, and perhaps here the model should include the conscientious police officer systematically undervaluing the protections of suspects. If (as a court or supervisor, for example) I have reason to believe that police officers will make mistakes to the detriment of other moral values, I have good reason to try to induce police officers to relinquish their own judgment, even though, from the perspective of police officers, it would be wrong for them to relinquish their moral autonomy. No matter how much the introduction of sanctions from the perspective of the authority may cloud the purity of Moore's subject-based moral inquiry, it is hardly apparent that thinking about ways of preventing moral error is not itself a morality-based enterprise. As a result, even putting the proposition in its most pejorative way, authorities may occasionally have good moral reasons to treat subjects as proles even as those subjects should treat themselves as archangels, which is just what Alexander and I are trying to claim.

V. The Rules of Jurisprudence

At its most patent level, this Symposium has hopefully demonstrated the relevance of thinking about rules in confronting many of the enduring questions of jurisprudence. At a less obvious level, however, it may demonstrate as well that jurisprudence is a practice, and like other practices it too has rules. These rules determine what is deemed interesting and what is not, what is considered important and what is regarded as epiphenomenal, what questions are central and what are pe-

ripheral, and what the practice of jurisprudence is about and what it is not.

Gavison's paper well demonstrates the contingency and contextuality of these rules. Where to an American jurisprude the claims for particularism seem ever-present, Gavison gently chides me for taking them too seriously. Even with respect to my tentative defense of presumptive rule-based decisionmaking, she takes me to task for concentrating excessively on the presumption-overcoming components of that procedure and insufficiently on the virtues of rules in stronger form.

I have no reason to defend myself against criticisms coming from that direction, for I agree with Gavison that, in many contexts, strong or even totally opaque rules have their importance. I also agree with her that, in a very important way, rights are rules,[26] and that only if we consider rights unimportant (a position not so implausible, albeit not mine) should we consider rules unimportant.

Gavison's comments illustrate, however, that the questions that jurisprudential communities take to be important are quite contingent. It may thus be valuable to consider the exchanges in this Symposium in two ways. Some of the exchanges are about the right answers to some of the traditional questions of jurisprudence. Others, however, are best seen as exchanges about what those questions should be, and as exchanges generated by the attempts of some of us to reorient the jurisprudential terrain. For some of us, the traditional concentrations on the subject and not on the authority, on the addressee of a rule and not its maker, on ideal theory and not on non-ideal theory, on individual responsibility and not on institutional design, and on what is necessarily true of all legal systems and not on what is true and interesting about a particular system, are all contingent and all in need of reexamination. Other concentrations, in particular the reverse of each of the traditional concentrations, are equally legitimate candidates for inclusion within the realm of analytical or philosophical jurisprudence, and debates about the scope or focus of jurisprudence are very much a part of this Symposium. When Coleman writes that questions other than those of the necessary conditions for legality in all possible worlds are not part of analytical jurisprudence, or when Moore

26. *See* Schauer, *Rights as Rules*, 6 LAW & PHIL. 115 (1987); Schauer, *The Second Best First Amendment*, 31 WM. & MARY L. REV. 1 (1989).

writes that questions about sanctions are not interesting, they are taking sides in a debate about the rules of the practice of jurisprudence that I and others (and they at other times) seek to question. If the result of the exchange that this Symposium introduces is to put some of those rules into question, it will have done even more good than the good it may do in advancing thinking about what have always been the questions of jurisprudence.

NOTE

FOOTNOTE 6: JUSTICE SCALIA'S ATTEMPT TO IMPOSE A RULE OF LAW ON SUBSTANTIVE DUE PROCESS

GREGORY C. COOK*

INTRODUCTION

Most commentators agree that the Supreme Court began the modern era of substantive due process with its famous footnote in *United States v. Carolene Products*.[1] Since *Carolene Products*, the Court has struggled to define the limits of modern substantive due process. Perhaps the most comprehensive attempt to define those limits occurred recently—again in a footnote—in *Michael H. v. Gerald D.*[2] In footnote 6 of *Michael H.*, Justice Scalia proposed a new test for substantive due process. In essence, Justice Scalia said that to decide whether a right is fundamental (and thus protected), courts should focus on the most specific level of tradition that can be identified.[3]

This Note does not address the normative legitimacy of substantive due process; it takes as given the Court's continued acceptance of substantive due process doctrine at least for the

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1. 304 U.S. 144, 152 n.4 (1938). *See, e.g.*, Powell, Carolene Products *Revisited*, 82 COLUM. L. REV. 1087 (1982); Lusky, *Footnote Redux: A* Carolene Products *Reminiscence*, 82 COLUM. L. REV. 1093 (1982).

2. 491 U.S. 110 (1989).

3. *See Michael H.*, 491 U.S. at 127 n.6. Chief Justice Rehnquist joined Justice Scalia's plurality opinion in full. Justices O'Connor and Kennedy also joined Justice Scalia's opinion but refused to join in footnote 6, because of fears that its test is too rigid and possibly inconsistent with precedent.

Because they agreed with the application of the most specific tradition approach in *Michael H.*, Justices O'Connor and Kennedy apparently agree that the most specific tradition should at least be *considered* in substantive due process analysis. Justice Stevens does not seem to agree, however. He concurred on separate grounds to provide the fifth vote in *Michael H. See id.* at 132-36 (Stevens, J., concurring in judgment). Justice Souter, who was not yet on the Court when *Michael H.* was decided, seemed to agree with Justices O'Connor and Kennedy when questioned about the matter during his confirmation hearings. *See Nomination of David Souter to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990). At this writing, the views of the justice who will replace Justice Marshall are unknown.

foreseeable future.[4] Instead, the Note argues that Justice Scalia's formula will provide a discernable, constraining standard for evaluating substantive due process claims that the Court's emerging conservative majority has thus far lacked. Scalia's approach, while not overly rigid,[5] is sufficiently binding so as to make substantive due process compatible with the rule of law.

The Note begins with a brief history of substantive due process. Part II discusses the holding in *Michael H.* and outlines the approach to substantive due process that Justice Scalia proposed in footnote 6. Part III addresses some theoretical issues that footnote 6 leaves unresolved, responds to some criticisms of Justice Scalia's approach, and discusses the use of the doctrine of equal protection to address many of the wrongs raised in substantive due process cases.

I. History of Substantive Due Process

Although the Supreme Court in its early years occasionally invoked "natural law,"[6] it never considered whether the Due Process Clause of either the Fifth or Fourteenth Amendment has substantive content until the *Slaughter-House Cases*[7] in 1873. There, the Court refused to use the Privileges or Immunities Clause of the Fourteenth Amendment[8] as a guarantor of common-law rights and dismissed, with little discussion, the concept of substantive due process.[9]

By the turn of the century, the Court's attitude had changed. It decided that the Due Process Clause of the Fourteenth

4. *See* R. Bork, The Tempting of America: The Political Seduction of the Law 240 (1990).

5. As will be shown below, Justice Scalia's approach is not inflexible, thus allaying the concerns of Justices O'Connor and Kennedy. *See supra* note 3. In fact, the approach has been criticized as being too open-ended or indeterminate, allowing the Court to assume "illegitimate power." *See* R. Bork, *supra* note 4, at 236-40. Bork is alleged to have inscribed Justice Scalia's copy of *The Tempting of America*, "Nino, tighten footnote 6."

6. *See* Terrett v. Taylor, 13 U.S. (9 Cranch) 43 (1815); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810); Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798). *See generally* Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 Harv. L. Rev. 5, 22 (1978) (pointing out that at the time of the drafting of the original United States Constitution and of the Fourteenth Amendment, there were many who believed that such natural law principles existed).

7. 83 U.S. (16 Wall.) 36 (1873).

8. U.S. Const. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .").

9. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) at 80-81.

Amendment does have substantive content, at least where economic rights are at stake.[10] This era cast the conservatives as judicial activists, striking down laws that protected workers because they were said to infringe on economic liberty.[11] Progressive critics at the time, however, debated the wisdom of the economic theories the Court had adopted,[12] rather than focusing on the then-novel use of the Due Process Clause to enforce those rights.[13]

The era of economic substantive due process lasted until 1937.[14] When the Court renounced economic substantive due process, many of the justices wanted to retain the use of substantive due process for civil liberties.[15] This concern led to the *Carolene Products* footnote.[16]

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10. *See, e.g.,* Allgeyer v. Louisiana, 165 U.S. 578 (1897). The most famous of these cases is Lochner v. New York, 198 U.S. 45 (1905).

11. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-4 (2d ed. 1988) (collecting cases).

12. *See, e.g.,* Powell, *The Judiciality of Minimum Wage Legislation*, 37 HARV. L. REV. 545, 572 (1924).

13. *See* Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934). This understanding of the debate during the *Lochner* era is undoubtedly correct. *See* Moore v. East Cleveland, 431 U.S. 494, 541 (1977) (White, J., dissenting); Poe v. Ullman, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting). Nevertheless, the *Lochner* era forever became synonymous with substantive due process. *See* Craven, *Personhood: The Right to be Let Alone*, 1976 DUKE L.J. 699, 700 n.4.

14. *See* Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949) (explicitly repudiating economic substantive due process); West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (implicitly abandoning economic substantive due process).

15. Indeed, the two major substantive due process cases of the *Lochner* era that have survived dealt with personal rather than economic liberties. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (a state may not prevent parents from sending their children to private schools); Meyer v. Nebraska, 262 U.S. 390 (1923) (a state may not restrict parents' rights to teach their children a language other than English).

16. *See* Lusky, *supra* note 1, at 1095. Footnote 4 states in relevant part:

> 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 national . . . 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.

United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938). The footnote was

Even if civil liberties were to be accorded special protection, as *Carolene Products* suggested, there remained the question of *which* civil liberties would be protected, and to what extent. In the *Carolene Products* era, the Court was divided on that question. For instance, Justice Black believed that civil rights needed protection, but he feared allowing the Court to make unguided value judgments.[17] One commentator has stated that his fear sprang from the Court's virulent opposition to President Roosevelt's economic program.[18] Therefore, Justice Black favored merely incorporating the Bill of Rights, making it both the ceiling and the floor of substantive due process.[19]

The Court's majority during that period preferred a less clear-cut definition of substantive due process, declaring that it would protect "principle[s] of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental" and thus "implicit in the concept of ordered liberty."[20] In application, this definition sometimes protected fewer liberties than Justice Black's definition would have.[21]

Justices Murphy and Rutledge took yet a third view. They believed that the Bill of Rights sets a minimum standard for due process.[22] Under this view, the Bill of Rights is seen as the floor, but not the ceiling, of substantive due process. Although full incorporation has not occurred, the law as it stands today is probably closest to the views of these two justices.[23]

The tension among these three viewpoints persisted through the 1960s, as the Court incorporated most of the Bill of Rights. Until that time, the Court had never explicitly addressed

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intended as a proposal rather than a formulated doctrine. As the text of the footnote indicates, it contains two divergent theories. One theory leads to the conclusion that the rights of process and the rights of "discrete and insular minorities" should be given special attention in reviewing laws, apparently resting on an equal protection theory. *See* J. ELY, DEMOCRACY AND DISTRUST 135-37 (1980). The other theory is that rights that are similar to those in the Constitution should be protected.

17. *See* Lusky, *supra* note 1, at 1097 (discussing Justice Black's refusal to join the footnote in *Carolene Products*).

18. *See id.*

19. *See* Adamson v. California, 332 U.S. 46, 74-75 (1947) (Black, J., dissenting). Justice Black never veered from this view of due process. *See* Griswold v. Connecticut, 381 U.S. 479, 507 (1965) (Black, J., dissenting).

20. Palko v. Connecticut, 302 U.S. 319, 325 (1937) (Cardozo, J.). *See also Adamson*, 332 U.S. at 60 (Frankfurter, J., concurring).

21. *See, e.g., Adamson*, 332 U.S. 46 (state action violated Bill of Rights but not Due Process Clause).

22. *See id.* at 124 (Murphy, J., dissenting).

23. *See* L. TRIBE, *supra* note 11, § 11-2, at 772, 773 (collecting cases showing the nearly complete incorporation of Bill of Rights).

whether due process provides constitutional protections beyond those explicitly provided in the Bill of Rights.[24] Finally, in *Griswold v. Connecticut*,[25] the Court explicitly recognized rights beyond the Bill of Rights. Although Justice Douglas's *Griswold* opinion attempts to avoid substantive due process, both commentators and the Court itself have ultimately seen *Griswold* as a substantive due process decision.[26] The first Court opinion openly to extend substantive due process beyond the Bill of Rights was *Roe v. Wade*.[27] Since *Roe*, the Court has continued to expand the use of substantive due process to new areas, including fathers' rights,[28] contraceptives,[29] and marriage of prisoners.[30]

The expansion of substantive due process during the Warren and Burger Courts evoked criticism from conservative and moderate legal scholars.[31] These critics face a difficult and complex task, however, because many of the substantive due process decisions reached popular results and have become entrenched by stare decisis. Certainly, the academic debate over the legitimacy of substantive due process continues,[32] but the Court and society have marched onward, apparently accepting the doctrine. It is in this context that Justice Scalia formulated a new tool for judicial restraint in substantive due process cases.

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24. *But see* Ferguson v. Skrupa, 372 U.S. 726 (1962) (indicating that substantive due process does not extend beyond Bill of Rights).

25. 381 U.S. 479 (1965).

26. *See* Moore v. East Cleveland, 431 U.S. 494, 503 (1977); Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 994 (1979).

27. 410 U.S. 113 (1973).

28. *See* Stanley v. Illinois, 405 U.S. 645 (1972).

29. *See* Carey v. Reproductive Health Servs., 431 U.S. 678 (1977).

30. *See* Turner v. Safley, 482 U.S. 78 (1987). *See also* Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (abortion); *Moore*, 431 U.S. 494 (family rights); Ingraham v. Wright, 430 U.S. 651 (1977) (corporal punishment in schools); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) (abortion).

31. *See, e.g.*, R. BORK, *supra* note 4; Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Christie, *A Model of Judicial Review of Legislation*, 48 S. CAL. L. REV. 1306 (1975); Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87 (1984); Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973); McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law* (Book Review), 98 YALE L.J. 1501, 1524 (1989). These criticisms come from a wide variety of perspectives.

32. *Compare* sources cited *supra* note 31 (academic criticism of substantive due process) *with, e.g.*, Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 91 (1989) (criticizing each strand of constraints on substantive due process); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980) [hereinafter Brest]; Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1089 (1981) [hereinafter *Fundamental Rights*].

II. A New Era For Substantive Due Process?

A. *The* Michael H. *Decision*

In *Michael H.*, the Court confronted a complex claim of parental rights. The plaintiff, Michael H., claimed to be the biological father of Victoria D., and sought to be declared her legal father and ultimately to be awarded visitation rights.[33] Victoria's mother, Carole, however, was married to Gerald D., and Victoria's birth certificate lists Gerald as her father. At various times after Victoria's birth, Gerald and Carole were separated. During some of these separations Carole and Victoria lived with Michael. Carole and Gerald eventually reconciled and refused Michael's requests for visitation rights.

In response, Michael filed an action to establish his paternity and visitation rights. Although blood test showed a ninety-eight percent probability that Michael is Victoria's father, California's evidence law conclusively presumes that the husband of a child's mother is its father, provided the husband and wife are cohabiting and the husband is not impotent.[34] This presumption can only be rebutted by the husband or the wife.[35] Accordingly, the California courts dismissed Michael's suit.[36]

A divided Supreme Court affirmed. Justice Scalia wrote the plurality opinion, in which only Justice Rehnquist fully joined.[37] In doing so, he both dismissed Michael's claims and announced a new rule of law establishing the manner in which fundamental rights are defined.[38] In dismissing Michael's substantive due process claim, Justice Scalia found it dispositive that there was no evidence that "the relationship between persons in the situation of Michael and Victoria has been treated

33. *See* Michael H. v. Gerald D., 491 U.S. 110, 114 (1989). The facts are drawn from the Court's opinion, *see id.* at 113-15.

34. *See* Cal. Evid. Code § 621 (West Supp. 1989).

35. *See id.*

36. Victoria, via a guardian *ad litem*, joined Michael's action requesting visitation, asserting the same claim and an equal protection claim. *See Michael H.*, 491 U.S. at 130-31. The state trial court rejected the claim that the evidence law violates the United States Constitution; the California Court of Appeals affirmed. *See* Michael H. v. Gerald D., 191 Cal. App. 3d 995, 236 Cal. Rptr. 810 (Cal. Ct. App. 1987). The California Supreme Court denied petition for review on July 30, 1987. *See Michael H.*, 491 U.S. at 115.

37. The plurality included Justice Scalia, Chief Justice Rehnquist, Justice O'Connor, and Justice Kennedy. Justices O'Connor and Kennedy concurred in all of the opinion except the disputed footnote 6. Justice Stevens concurred only in the judgment.

38. Justice Scalia quickly dismissed the procedural due process claim, insisting that Section 621 is really a substantive rule. *See Michael H.*, 491 U.S. at 119.

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as a protected family unit under the historic practices of our society."[39] Indeed, he found just the opposite to be true.[40]

More importantly, Justice Scalia outlined a rule of law for determining which historical practices and beliefs the Court should consider in due process analysis. He argued that the Court should examine the most specific level at which a relevant tradition can be identified protecting or denying protection to the asserted right.[41]

Justices O'Connor and Kennedy agreed with Justice Scalia's analysis almost entirely. Most importantly, they agreed with his characterization of the issues in footnote 4,[42] his use of tradition, and his *application* of the footnote 6 theory. They objected only to footnote 6 as a general rule of law for deciding substantive due process claims. Justice O'Connor wrote that Justice Scalia's rule "may be somewhat inconsistent with our past decisions in this area,"[43] and argued that prior decisions had not

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39. *Id.* at 124.

40. *See id.* Justice Scalia also rejected Victoria's claims of a liberty interest in maintaining a relationship with her father, observing that there is no historical right to maintain a relationship with two fathers. *See id.* at 131. He refused her equal protection claims because this law meets the rational relationship test and does not discriminate against a suspect class. *See id.*

41. *See id.* at 127 n.6. The footnote, which is lengthy, states in part:

> Justice Brennan criticizes our methodology in using historical traditions specifically relating to the rights of an adulterous natural father, rather than inquiring more generally "whether parenthood is an interest that historically received our attention and protection." . . .
>
> We do not understand why, having rejected our focus upon the societal tradition regarding the natural father's rights vis-à-vis a child whose mother is married to another man, Justice Brennan would choose to focus instead upon "parenthood." Why should the relevant category not be even more general—perhaps "family relationships"; or "personal relationships"; or even "emotional attachments in general"? Though the dissent has no basis for the level of generality it would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified. If, for example, there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general. But there is a more specific tradition, and it unqualifiedly denies protection to such a parent.
>
> . . . The need, if arbitrary decisionmaking is to be avoided, to adopt the most specific tradition as the point of reference . . . is well enough exemplified by the fact that in the present case Justice Brennan's opinion and Justice O'Connor's opinion . . . *both* appeal to tradition, but on the basis of the tradition they select reach opposite results. Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all.

Id. (emphasis in original).

42. *See infra* note 68.

43. *Michael H.*, 491 U.S. at 132 (O'Connor, J., concurring in part and concurring in

necessarily characterized the issue at the most specific level in every case.[44]

Justice Brennan dissented.[45] He spent most of his opinion passionately denouncing Justice Scalia's footnote 6. Justice Brennan did not present an alternative theory but instead emphasized that the Constitution should not become a "stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past."[46] Justice Brennan argued that the Due Process Clause's protection of liberty was "purposely left to gather meaning from experience."[47] He contended that liberty "must include the freedom not to conform," and that defining protected liberties by reference to tradition "squashes this freedom by requiring specific approval from history before protecting anything in the name of liberty."[48]

More specifically, Justice Brennan argued that reasonable people can disagree about the content of traditions. He asserted that if a right has been traditionally protected by society, there is no need for the Supreme Court to protect it.[49] To prove his point that footnote 6 was a significant departure from precedent, Justice Brennan cited prior cases that he claimed would have come out differently under this rule of law.[50] Justice Brennan claimed that the Court should protect Michael's relationship with Victoria because the Court has determined that "certain interests and practices," including marriage, childbearing, and childrearing, "form the core of our definition of liberty."[51] Because Michael's interest was thought "suffi-

judgment) (citing Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965)).

44. *See id.* (O'Connor, J., concurring in part and concurring in judgment) (citing United States v. Stanley, 483 U.S. 669, 709 (1987) (O'Connor, J., concurring in part and dissenting in part); Turner v. Safley, 482 U.S. 78, 94 (1987); Loving v. Virginia, 388 U.S. 1, 12 (1967)).

45. Justices Marshall and Blackmun joined in Justice Brennan's dissent.

46. *Michael H.*, 491 U.S. at 141 (Brennan, J., dissenting).

47. *Id.* at 138 (Brennan, J., dissenting) (quoting National Ins. Co. v. Tidewater Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting)).

48. *Id.* (Brennan, J., dissenting).

49. *See id.* at 140-41 (Brennan, J., dissenting).

50. *See id.* at 139 (Brennan, J., dissenting) (citing Vitek v. Jones, 445 U.S. 480 (1980) (freedom from arbitrary transfer from a prison to a psychiatric facility); Ingraham v. Wright, 430 U.S. 651 (1977) (freedom from corporal punishment in schools); Stanley v. Illinois, 405 U.S. 645 (1972) (right to raise one's natural but illegitimate children); Eisenstadt v. Baird, 405 U.S. 438 (1972) (use of contraceptives by unmarried couples); Griswold v. Connecticut, 381 U.S. 479 (1965) (use of contraceptives by married couples)).

51. *Id.* (Brennan, J., dissenting).

ciently substantial to qualify as a liberty interest under . . . prior cases,"[52] Justice Brennan would have found a liberty interest in Michael's relationship with Victoria.

A headcount of the justices does not make clear whether the views of *either* Justice Brennan or Justice Scalia, or some third view, will ultimately prevail in this debate. It is doubtful that a majority of the Court would agree with Justice Brennan's conclusion that the purpose of the Due Process Clause is to protect nonconforming acts or groups.[53] On the other hand, only one other justice (Chief Justice Rehnquist) has expressly endorsed Justice Scalia's theory of fundamental rights, though two others (Justices O'Connor and Kennedy) support the *application* of his theory in at least some cases. At the very least, Justice Scalia has the support of the majority of the present Court for the use of *tradition* in the aid of defining substantive due process.[54]

B. *Justice Scalia's Approach*

Justice Scalia takes three steps in his quest to place a limit on substantive due process. First, he concedes the existence of the concept of substantive due process. Second, he emphasizes the Court's repeated use of tradition in substantive due process jurisprudence and in constitutional interpretation generally. Finally, he argues that the Court should use only the most specific level of tradition it can identify in order to determine whether a particular right or liberty is to be protected.

1. *Conceding the Existence of Substantive Due Process*

By accepting that substantive due process represents current legal doctrine, Justice Scalia loses nothing. It is clear that the advocates of judicial restraint, at least for now, have lost the debate over the existence of substantive due process.[55] Perhaps

52. *Id.* at 142 (Brennan, J., dissenting).

53. Justice White dissented on different grounds and did not comment on footnote 6. He has repeatedly voiced hesitancy about the use of substantive due process, meaning that the number of present justices holding Justice Brennan's views is *at most* four (even counting soon-to-depart Justice Marshall and assuming that Justice Souter shares Justice Brennan's views). *See* Bowers v. Hardwick, 478 U.S. 186 (1986); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 785 (1986) (White, J., dissenting); Doe v. Bolton, 410 U.S. 179, 221 (1973) (White, J., dissenting) (companion case to Roe v. Wade, 410 U.S. 113 (1973)).

54. *See infra* note 59.

55. *But see* Moore v. East Cleveland, 431 U.S. 494, 543 (1977) (White, J., dissenting); R. BORK, *supra* note 4, at 240.

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the *Michael H.* case itself is the best example of that defeat. Justices O'Connor and Kennedy were hesitant even to limit the doctrine's flexibility, much less abolish it altogether.

2. *Arguing for Use of Tradition*

Justice Scalia avoids engaging in the futile debate over the existence of fundamental rights and substantive due process by invoking the views of Justices Cardozo, Frankfurter, Harlan, and Powell, who all tied the two concepts to tradition. He spends much of footnote 6 relating his rule to famous substantive due process cases that invoked tradition.[56]

Justice Scalia is correct that the Supreme Court has almost invariably invoked tradition as a consideration in deciding whether a fundamental right exists.[57] Even so, it is unclear whether some justices would agree that tradition is a valid tool in defining substantive due process.[58] As a practical matter, however, a majority of the Court has adopted tradition as a tool in analyzing substantive due process claims; Justices Rehnquist,

56. Justice Scalia emphasized that in both Roe v. Wade, 410 U.S. 113 (1973), and Bowers v. Hardwick, 478 U.S. 186 (1986), the Court spent a substantial portion of its opinion exploring tradition. He quoted Snyder v. Massachusetts, 291 U.S. 97, 105 (1934), for the proposition that only rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental [should be protected]."

57. *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302, 330-31 (1989); Bowers v. Hardwick, 478 U.S. 186, 192-94 (1986); Tennessee v. Garner, 471 U.S. 1, 12-19 (1985); Marsh v. Chambers, 463 U.S. 783, 787-92 (1983); Richmond Newspaper, Inc. v. Virginia, 448 U.S. 555, 565-80 (1980); Moore v. East Cleveland, 431 U.S. 494, 503 (1977); Ingraham v. Wright, 430 U.S. 651, 659-66 (1977) (using the most specific tradition); Roe v. Wade, 410 U.S. 113, 148 (1973); Wisconsin v. Yoder, 406 U.S. 205, 220-29 (1972); Duncan v. Louisiana, 391 U.S. 145, 151-56 (1968); Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring); Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting); International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945); Synder v. Massachusetts, 291 U.S. 97, 118 (1934); Lochner v. New York, 198 U.S. 45, 74, 76 (1905) (Holmes, J., dissenting); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 277 (1855) (content of Due Process Clause defined by "those settled usages and modes of proceeding existing in the common and statute law of England"). *See generally* A. BICKEL, THE LEAST DANGEROUS BRANCH 236 (1962). *But see* Rutan v. Republican Party of Ill., 110 S. Ct. 2729, 2741 (1990) (specifically repudiating the tradition of patronage because it violates the First Amendment, despite Justice Scalia's protests to the contrary).

58. *Compare Bowers*, 478 U.S. at 210 (Blackmun, J., dissenting) (apparently rejecting entirely the concept of tradition) *and Michael H.*, 491 U.S. at 138-41 (Brennan, J., dissenting) (apparently arguing that a tradition exists, but then arguing that tradition is not determinative) *with Moore*, 431 U.S. at 507-10 (Brennan, J., concurring) (indicating that a substantive due process right exists *because of* tradition) *and* Richmond Newspaper, Inc. v. Virginia, 448 U.S. 555, 589 (1980) (Brennan, J., concurring in judgment) ("[T]he case for a right of access has special force when drawn from an enduring and vital tradition . . . . Such a tradition commands respect in part because the Constitution carries the gloss of history. More importantly, a tradition . . . implies the favorable judgment of experience.").

O'Connor, Kennedy, and White clearly share Justice Scalia's view that tradition should be used, at least to some extent, as a guide in substantive due process cases.[59]

Though the Court frequently invokes tradition, it rarely acknowledges its inherent plasticity, leading critics to claim that the Court simply uses tradition to rationalize the result that it reaches.[60] To be sure, it is not clear exactly what qualifies as tradition. At one extreme, tradition could be defined only as that found in positive law. But would this include only laws at the national level, or at the state and local levels, too? Would longstanding social practices, customs, or beliefs in a majority of the country suffice? In a small community? In many situations, each party can find a tradition to support its argument, either by varying the level of generality or recharacterizing the issue.[61] These concerns necessitate Justice Scalia's third step—limiting the Court's application of tradition.

3. *Identifying and Applying the Most Specific Level of Tradition*

Justice Scalia agrees with those critics who have argued that tradition is an extremely malleable concept.[62] As he pointed out in *Michael H.*, both the dissenting and concurring justices relied on tradition but reached opposite results.[63] Justice O'Connor and Justice Brennan did not have a factual disagree-

59. Justice Rehnquist joined fully in Justice Scalia's *Michael H.* opinion. Justices O'Connor and Kennedy concurred in all of the opinion except footnote 6; the entire opinion repeatedly emphasized tradition. Justice White's opinion in Bowers v. Hardwick, 478 U.S. 186 (1986), in which Justice O'Connor joined, based its holding, at least in part, on tradition. *See id.* at 192-94. *See also* Penry v. Lynaugh, 492 U.S. 302, 330-31 (1989) (O'Connor, J.) (in construing the Eighth Amendment in a death penalty case, applying reasoning nearly *identical* to that suggested by this Note). Justice Kennedy specifically invoked tradition as a guide in an Establishment Clause case, County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 662 (1989) (Kennedy, J., concurring in part and dissenting in part), and in a procedural due process case, Pacific Mutual Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1054 (1991) (Kennedy, J., concurring in judgment) ("Justice Scalia's historical approach to questions of procedural due process has much to commend it.").

60. *See Moore*, 431 U.S. at 549 (White, J., dissenting); J. ELY, *supra* note 16, at 60-63; Ely, *supra* note 6, at 39; Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 327 (1957).

61. *See, e.g.*, L. TRIBE, *supra* note 11, § 15-21, at 1427-28.

62. *See, e.g., id.*; Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 827 (1986); Chemerinsky, *supra* note 32, at 94; Ely, *supra* note 6, at 39-42 (noting the common "trick of varying the relevant tradition's level of abstraction to make it come out right"); Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1173 (1988) ("Traditions can be described at varying levels of generality."); *The Supreme Court, 1988 Term—Leading Cases*, 103 HARV. L. REV. 137, 184-85 (1989).

63. *See Michael H.*, 491 U.S. at 128 n.6.

ment; they agreed on the existence and content of various traditions. Their disagreement was on the level of generality at which tradition should be viewed.[64] Without confining that level of generality, this debate will reappear in nearly every substantive due process case.[65]

To resolve the debate, Justice Scalia proposes a standard for determining the level of generality the Court should use in applying tradition.[66] He proposes that the Court "refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[67] Thus, in resolving *Michael H.*, the Court is to look to tradition relating to the rights of natural adulterous fathers, as opposed to tradition relating to the rights of all natural fathers.[68]

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64. *See id.* at 127 n.6 ("We do not understand why . . . Justice Brennan would choose to focus instead upon 'parenthood.' Why should the relevant categories not be even more general . . . ?").

65. For example, in Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 777 (1986) (Stevens, J., concurring), Justice Stevens argued that there had traditionally been a protection of private decisions regarding childbearing. Justice White dissented, arguing that there was a tradition banning abortion. *See id.* at 792 (White, J., dissenting).

66. Justice Scalia's formulation may be seen as an outgrowth of that of Dean Wellington. *See* Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 265-311 (1973). Dean Wellington argues that constitutional adjudication resembles common-law adjudication in its reasoning from conventional morality. Wellington quotes H.L.A. Hart's definition of conventional morality as "standards of conduct which are widely shared in a particular society." *Id.* at 244. He argues that *Griswold v. Connecticut* was probably decided correctly, but that *Eisenstadt v. Baird* is problematic because he doubts the existence of a consensus favoring the sexual intimacy of unmarried couples. Finally, he finds *Roe v. Wade* indefensible, citing the American Law Institute's Model Penal Code as evidence of an opposing moral consensus. In contrast to Justice Scalia and Dean Wellington, Professor Michael Perry would also consult contemporary consensus, but would consult society's moral consensus at an abstract level. *See* Perry, *Abortion, The Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689 (1976).

67. *Michael H.*, 491 U.S. at 127-28 n.6.

68. Directly related to the question of how specific a level of tradition to consult is whether substantive due process involves a one-step or two-step test. Justice Brennan asserts that substantive due process is a two-step test: (1) From the perspective of the plaintiff, does a liberty interest exist and is that interest a fundamental one? (2) Does the state have a compelling justification for its limitation of this fundamental liberty interest? *See Michael H.*, 491 U.S. at 145-46 (Brennan, J., dissenting). By contrast, Justice Scalia treats substantive due process as a one-step test, asking only whether the plaintiff has a fundamental interest *in the specific situation*, thereby collapsing the two steps into one. *See id.* at 124 n.4.

Were this simply a matter of defining the terms of the debate, it might not affect the substantive outcome. In this case, however, changing the terms may change the substantive outcome, as well. *See* Tribe & Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1090 (1990). Justice Brennan argues that his approach simply defines the liberty interest first, and then considers the competing factors. This is wrong for two reasons.

First, once a fundamental liberty interest exists, the Court virtually never finds the

Justice Scalia's methodology sidesteps most of the criticisms of tradition while capturing its advantages. By putting forth explicitly a rule requiring courts to look to the most specific level of tradition, he has created a rule of law and thus answered those critics who claim that the Court simply uses tradition as a tool for rationalization.[69] By creating a rule of law, Justice Scalia has given lower courts and litigants guidance in an area of law that has been muddled.[70] By choosing the most specific level of tradition, Justice Scalia has captured the major advantage of tradition: its inherently democratic nature. If such a tradition exists, society has made a conscious choice. As he stated in footnote 6: "Because . . . general traditions provide such imprecise guidance, they permit judges to dictate rather than dis-

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state interests to be compelling. *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Roe v. Wade, 410 U.S. 113 (1973); *cf.* Tribe & Dorf, *supra*, at 1096 (arguing that, under a one-step test, the fundamental nature of abortion nearly vanishes; "it will render that liberty so specific as to seem insupportable"). In other words, Justice Brennan in actuality urges a de facto one-step liberty test in which state interests are ignored.

Second, and more importantly, Justice Brennan's method will *never* consider the existence of a longstanding and still extant tradition contrary to the allegedly fundamental liberty interest. *See, e.g.*, Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 776 n.4 (1986) (Stevens, J., concurring) ("Finally, I fail to see how the fact that 'men and women of good will and high commitment to constitutional government' are on both sides of the abortion issue helps to resolve the difficult constitutional question before us."). Justice Brennan admitted that his method is a balancing test to determine whether the state's interest is sufficiently compelling to overcome the fundamental liberty interest. If Justice Brennan wants the Court to balance interests, how can he justify leaving out even the *consideration* of a longstanding tradition in his balancing test?

Justice Brennan is also incorrect that his two-step characterization of the test of due process has been authoritatively adopted by the Court. Although it has sometimes used a two-step test in the past, the Court has been non-committal as to whether the liberty interest must be defined in isolation from the rest of society. This is simply Justice Brennan's judicial gloss. Why should the Court consider some facts in determining the liberty interest but not others?

In any event, even if Justice Brennan's account of the Court's test for substantive due process were completely correct, the Court has not hesitated in the past to overrule precedent when it was incorrectly decided. This is especially true for constitutional precedents. *See Thornburgh*, 476 U.S. at 787-88 (White, J., dissenting) (discussing the legion of cases in which the Court has overruled precedent or even whole lines of cases); *id.* at 777 (Stevens, J., concurring) (Court has not "hesitated to overrule decisions, or even whole lines of cases, where experience, scholarship, and reflection demonstrated that their fundamental premises were not to be found in the Constitution").

69. *See Michael H.*, 491 U.S. at 127 n.6 ("[A] rule of law that binds neither by text nor by any particular, identifiable tradition, is no rule of law at all."). It is important to note, however, that footnote 6 does not resolve all of the shortcomings of tradition. *See infra* notes 100-27 and accompanying text.

70. *See infra* notes 189-202 and accompanying text (discussing the absence of reasoning in prior substantive due process cases and the use of footnote 6 as a heuristic to litigants and lower courts).

cern the society's views."[71] Thus, following specific tradition will force the Court to consult the nation's morality rather than its own, providing a more legitimate decision. It will also be a more informed and experienced decision, as well as one consistent with lay and legal understanding of the function of the Court.[72] Furthermore, unless restricted to its most specific level, tradition cannot effectively confine the range of choices to the Court.

C. *Justice Brennan's Counter-Vision*

After offering his proposal in footnote 6, Justice Scalia proceeded to criticize Justice Brennan for failing to provide an alternative test for choosing the level of generality in determining tradition.[73] Indeed, Justice Brennan's *Michael H.* dissent seems to indicate that he believes that the Court should be able to select its level of generality ad hoc.[74] This belief appears to be rooted in his novel view of the role that the Due Process Clause plays in the Constitution. In *Michael H.*, he stated that the Due Process Clause would be a "redundancy" if it only protected "interests already protected by a majority of the States."[75] He would prefer that the Due Process Clause guarantee the freedom "not to conform."[76] He emphasized that our society is a "pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellant practice."[77]

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71. *Michael H.*, 491 U.S. at 128 n.6.

72. *See* Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1074 (1988) (the authority of the Court itself must flow from the consent of the people). *See also infra* notes 85-99 and accompanying text.

73. *See Michael H.*, 491 U.S. at 128 n.6. This criticism also seems to apply to Justices O'Connor and Kennedy.

74. It is possible to argue that Justice Brennan did formulate a rule for the level of abstraction to use in evaluating tradition. He apparently would use the level of abstraction used in precedent. *See Michael H.*, 491 U.S. at 142 (Brennan, J., dissenting) ("The better approach . . . is to ask whether the specific parent-child relationship under consideration is close enough to the interest that we already have protected to be deemed an aspect of 'liberty' as well."); Tribe & Dorf, *supra* note 68, at 1068-71. Of course, it is no rule at all to follow precedent blindly without ever asking whether it was correctly decided.

75. *Michael H.*, 491 U.S. at 140-41 (Brennan, J., dissenting).

76. *Id.* at 141 (Brennan, J., dissenting). *See generally* West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 643 (1990) (discussing progressive constitutionalists, who view the Constitution as a mechanism for challenging entrenched social orders, and conservatives, who see those social orders as important sources of communitarian wisdom and legitimate authority).

77. *Michael H.*, 491 U.S. at 141 (Brennan, J., dissenting).

From this perspective, it is easy to see why Justice Brennan saw Justice Scalia's formula as a redundancy. Footnote 6 would indeed allow the majority to create laws that prohibit the practices of nonconformist groups, so long as the majority has a specific tradition on its side and so long as that law does not violate the specific enumerated rights of the Constitution. Justice Brennan is thus clearly correct that existing laws that are rooted in history, such as laws against adultery, could, at least for the present, be impervious to substantive due process challenges.

It is Justice Brennan's, rather than Justice Scalia's, vision of the Due Process Clause that is novel, however. The idea that due process was intended to protect nonconformist groups or acts against laws imposing accepted national norms is simply irreconcilable with a great body of precedent and the clear intent of the Framers of the Constitution and the Fourteenth Amendment. Rights do not become fundamental simply because they are asserted by nonconformist groups. If the text of the Constitution is silent on an issue and the entire country has a longstanding norm opposing the asserted right, by what standard can Justice Brennan claim that this asserted right is *fundamental*?

Moreover, Justice Brennan may have confused his constitutional provisions. His rhetoric appeals to the fear of persecution of minority groups, but such persecution is normally the focus of the Equal Protection Clause or other constitutional provisions—not the Due Process Clause.[78] Justice Brennan also failed to provide any reasons why or how the Due Process Clause should protect *all* nonconformist groups and *all* nonconformist acts, or why the majority should not be able to proscribe conduct absent compelling reasons or express constitutional prohibitions.[79]

78. *See infra* notes 176-88 and accompanying text (discussing the use of the Equal Protection Clause to alter society's practices). *Compare* L. TRIBE, *supra* note 11, § 15-21, at 1428 (arguing for use of abstract level of generality when evaluating tradition because otherwise the majority will be able to discriminate *sub rosa* against the minority) *with* Bork, *supra* note 62, at 827 (reiterating the idea that the Court discriminates against the majority when overruling majoritarian laws without authority) *and* Sunstein, *supra* note 62, at 1167 (constitutional entitlement must be evaluated separately).

79. It is also important to note the lack of connection between Justice Brennan's rhetoric and the facts of *Michael H. Michael H.* was not about nonconformity and the attempts of the majority to squash freedom, unless Justice Brennan meant that California's decision to favor marriage when declaring parentage was a decision to squash freedom. Certainly, the California legislature had no intention to "squash" freedom

Justice Scalia's approach embodies the view that due process is intended to protect established values and not to create new ones. Contrary to Justice Brennan's contention, Justice Scalia's theory would not reduce the Due Process Clause to a redundancy. For example, a community might pass a law that violates established traditional values, such as marital privacy. The Court would apply the most specific level of tradition and invalidate the law. In short, Justice Scalia's philosophy seems closer to precedent and to the Framers' intentions.[80]

III. Theoretical Issues and Some Applications of Footnote 6

A. *Introduction*

As Justice Scalia would certainly acknowledge, the use of tradition as a guide in substantive due process cases does not provide a conclusive answer in every case. On the other hand, tradition is a useful mechanism to delimit the authority of the Court in deciding such cases. In this Part, I consider the justifications for the use of tradition in substantive due process and some special problems that arise in the use of tradition. I also discuss Justice O'Connor's criticisms of footnote 6 in her concurrence in *Michael H.*, as well as a more recent criticism of Justice Scalia's approach. Finally, I discuss the utility of the Equal

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when it enacted such a law. The courts of California likewise had no intention to "squash" freedom when they decided the case. Rather, in enacting and enforcing the law, the California legislature and courts were focused entirely on the child's interest.

80. Justice Scalia correctly noted that Justice Brennan's vision would interject the Court into still more value-balancing, in addition to that that has already been done by other institutions. Were Michael H. given the "freedom" urged by Justice Brennan not to conform, Gerald D.'s freedom would be correspondingly reduced. As discussed *infra* notes 85-99 and accompanying text, the legislature is better equipped and a more legitimate institution to do such balancing. As Justice Scalia stated: "Our disposition does not choose between these two 'freedoms,' but leaves that to the people of California. Justice Brennan's approach chooses one of them as the constitutional imperative, on no apparent basis except that the unconventional is to be preferred." *Michael H.*, 491 U.S. at 130.

It is unlikely that such a corresponding counter-freedom will always be present. At least, in some contexts, the counter-freedom may be less tangible (for example, only a freedom of society as a whole). For example, in birth control cases, the only counter-freedom is the freedom of society at large to set a moral standard for all its people. In cases involving such an attenuated counter-freedom, this aspect of Justice Scalia's argument packs limited force. *See* Roe v. Wade, 410 U.S. 113, 159 (1973) ("The pregnant woman cannot be isolated in her privacy . . . . The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation or education . . . .").

Protection Clause, as opposed to the Due Process Clause, in addressing broad societal inequities.

B. *Arguments for Tradition*

Despite its shortcomings, tradition must have *some* place in liberty analysis. Whether society has traditionally protected a particular right must be at least *relevant* in determining whether the Constitution protects that right.[81]

A number of arguments support the Supreme Court's repeated practice of consulting tradition.[82] Tradition provides perspective and confines the range of acceptable solutions. One scholar has written that tradition thus allows the Court a "better understanding of the choices that must now be made and of the risks attendant upon alternate solutions."[83] Another has pointed to the socialization function that the Supreme Court's use of tradition performs, broadening public acceptance of the Court and its decisions.[84]

Perhaps the strongest argument for the Supreme Court's use of tradition is its inherently democratic character.[85] When testing a particular law, it is more democratic for the Court to consult the laws, customs, and practices prevailing throughout the majority of the country than it is for the Court to decide solely by its members' own moral guidelines.[86] Because it is impossible to give content to the open-ended guarantees of the Due

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81. Perhaps Justice Rehnquist put this argument most eloquently in his dissent in *Roe v. Wade*:

> The fact that a majority of the States, reflecting, after all, the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Roe v. Wade, 410 U.S. 113, 174 (Rehnquist, J., dissenting) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

82. In this discussion of tradition, the term is used very broadly to include laws at the national, state, and local levels; societal practices; customs; common law; and current consensus. Each of the arguments for consulting tradition has relevance to each of these types of tradition, but obviously, the degree of relevance will vary with the argument.

83. Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1070 (1981).

84. *See* Blumoff, *The Third Best Choice: An Essay on Law and History*, 41 HASTINGS L.J. 537, 572-74 (arguing that the Court has a public education role to fill in justifying its decisions and that the use of history fulfills that function).

85. Because tradition is majoritarian, it fits neatly with the Court's recent jurisprudence, which has been more and more deferential to legislative choices. *See* West, *supra* note 76, at 667 (citing *Michael H.*). *See also* Chemerinsky, *supra* note 32, at 46.

86. As Justice Brennan has stated: "Justices are not platonic guardians appointed to wield authority according to their personal moral predilections." *Excerpts of Brennan's*

Process Clause without reference to *some* set of moral or ethical guidelines,[87] the question must be whether that set of moral guidelines will be merely those of the individual justices or whether the justices should seek *guidance* from the traditions established by the majority of Americans.[88]

The traditions of the people represent a more legitimate source than solely the morality or politics of individual justices.[89] The authority of the Constitution, and thus the Supreme Court itself, must flow from the consent of the people.[90] Deference to the majority, except when the majority has made irrational or extreme decisions, is consistent with the framers' intentions and with the jurisprudence of generations of Supreme Court justices.[91] In the words of Justice Holmes:

> [T]he word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a fair and rational man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the *traditions* of our people and our law.[92]

In addition to being a more legitimate source, the people collectively, by speaking through tradition, offer a more in-

Speech on Constitution, N.Y. Times, Oct. 13, 1985, at 36, col. 3 (quoting remarks by Justice Brennan at Georgetown University, October 12, 1985).

87. *See, e.g.*,Chemerinsky, *supra* note 32, at 90 (arguing that the balancing process in substantive due process is a reflection of the justices' personal values); Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 5 (1984) ("[W]hile the broad language of the Constitution delegates to judges the power to make [substantive due process decisions], their major premises come from such extra-textual sources as judicial precedent and the practices and ideals of social life."). *But see* R. DWORKIN, TAKING RIGHTS SERIOUSLY 81-130 (1977) (arguing that judges can decide such cases based on a common-law adjudicative method without merely implementing personal morals); L. TRIBE, *supra* note 11, §§ 15-1 to 15-4 (arguing that a sort of natural law exists that establishes certain rights as fundamental).

88. Reasoning that yesterday's majority should not control today's populace, some scholars have charged that tradition is an undemocratic doctrine. *See* Ely, *supra* note 6, at 42. This criticism seems ill-founded. Court decisions unguided by tradition are inherently undemocratic. By contrast, because today's majority can more easily change a law than a constitutional ruling by the Court, tradition is necessarily more democratic.

89. *See* Wellington, *supra* note 66, at 311.

90. *See* Amar, *supra* note 72, at 1074.

91. *See* Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976); Easterbrook, *Method, Result, and Authority*, 98 HARV. L. REV. 622, 627 (1985) ("Doubt and ambiguity about the authority granted by the Constitution and statutes should lead judges to let the decisions of private and political actors stand."). *But see* Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984) (arguing that representative democracies fail to represent the will of the people and that little deference should be paid to legislative judgment absent a strong popular mandate).

92. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (emphasis added).

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formed choice. Conservative scholars often argue that the wisdom culminated in legislation, often after extensive study, is superior to any that nine justices can fashion.[93] Professor Michael McConnell has written:

> [J]udicial decisionmaking contains very little serious deliberation on moral issues. . . . [T]he discussion of gay rights in and around the Chicago City Council had more substance than the opinions in *Bowers v. Hardwick*. . . . In contrast to the months, even years, that are devoted to major legislative deliberation, the Justices devote one hour to oral argument and somewhat less than that to discussion at conference.[94]

This institutional competence argument is even more compelling when the comparison is between the richness of tradition and the the limited deliberations of nine justices: on the one hand, the deliberation and consensus of countless individuals, courts, and legislatures over hundreds of years; on the other, a short oral argument and even shorter discussions in judicial conference.

The institutional competence argument for tradition is particularly powerful with respect to cases requiring balancing among a number of competing individual interests.[95] The Court cannot create subcommittees, take testimony, commission studies, or quickly revise incorrect rulings; numerous state courts and legislatures may have already done those things in the process of establishing a tradition. Moreover, parties often do not address broad social concerns in their arguments. For example, in *Michael H.*, the appellants were asking the Court to balance the best interests of Michael, Victoria, Gerald, Carole, and the general society in a situation in which any number of possible resolutions was possible.[96] Only Victoria extensively

93. Justice Frankfurter once observed, "Invalidating legislation is serious business . . . ." Morey v. Doud, 354 U.S. 457, 474 (1957) (Frankfurter, J., dissenting). *See* Easterbrook, *supra* note 91, at 627.

94. McConnell, *supra* note 31, at 1536-37.

95. An instance of the difficulty and complexity of such balancing is provided by Griffith v. Johnston, 899 F.2d 1427 (5th Cir. 1990). The Fifth Circuit, after citing footnote 6, stated:

> When does the "fundamental right to adopt" overcome the right of privacy of the birth parents? May the state decide that certain kinds of children, contrary to the wishes of particular prospective parents, may not be adopted? To assert that such an individualized "fundamental right" exists is sloganistic and oxymoronic, since society must balance the interests of at least three parties—birth parents, child, adoptive parents—when legitimating adoptions.

Id. at 1437.

96. For instance, the Court could have declared that Michael had a substantive due

addressed sociological studies.[97]

The use of tradition can also help to avoid many of the perceived shortcomings of representative democracy.[98] Because a considerable number of communities will need to have adopted a law or practice in order for it to qualify as a tradition, the use of tradition permits a consensus of several communities, rather than a majority of a single one, to decide which rights are fundamental. The fact that many communities maintain a tradition reduces the chance of prejudice or mistake.[99] It also greatly increases the likelihood that the tradition reflects the collective will of the people rather than that of interest groups.

In sum, the Court invariably uses tradition as a tool in defining protected liberties. Tradition reflects the collective conscience of the people and provides a discernable standard to restrain judicial discretion. Tradition is easily reconcilable with judicial review to protect special classes and to protect against aberrant and irrational laws.

C. *Special Problems Associated With Use of Tradition*

1. *Whose Tradition?*

One special problem that must be addressed in the use of tradition in substantive due process cases is whose tradition the Court should use. Under Justice Scalia's new rule, the Court would need to choose among the individual state's tradition,[100] the tradition within the United States, or the tradition of the "English-speaking peoples."[101] Under current law, the Court

process right, but Victoria did not, or vice versa. Alternatively, the Court could have decided that Michael had such a right, but Gerald's rights outweighed Michael's, or that Michael had such a right but only to visitation and not to custody.

97. *See* Brief for Appellant Victoria D., Michael H. v. Gerald D., 491 U.S. 110 (1989) (No. 87-746).

98. *Cf.* Ackerman, *supra* note 91, at 1027-31. Professor Ackerman concentrates on the Congress and ignores state legislatures, the members of which represent smaller numbers of people and are thus presumably better representatives of "the people." In fact, state legislatures usually incorporate the traditions of which we speak. Relatively few laws enacted at the federal level are likely to become the subject of substantive due process attack.

99. Exceptions clearly exist. For example, traditions of prejudice are certainly not to be endorsed merely because they have been widely shared for a long time. As discussed *infra* notes 176-88 and accompanying text, however, the Equal Protection Clause is the appropriate tool for rectifying such misguided traditions.

100. It is unlikely that state tradition would apply because fundamental constitutional rights would normally be federal issues. *But see* Miller v. California, 413 U.S. 15, 30 (1973) (local standards for obscenity are permissible under the First Amendment).

101. *See* Wolf v. Colorado, 338 U.S. 25, 28-30 (1949).

focuses on the tradition within the United States.[102]

The Court, however, has deliberately avoided the problem of choosing between competing traditions within the United States. When the social standards and laws are not uniform throughout the country but vary from state to state, the Court could count states (for example, thirty states have one tradition, ten have an opposing tradition, and ten have no tradition).[103] The Court could also examine whether states have a long historical tradition, have modified their tradition, or have had no history of a certain tradition until they enacted a new law. Although traditions may vary across the country, in most cases, a public consensus exists.[104]

Thus, even if the Court adopted footnote 6, it would need to decide whether to focus on the traditions of a state or the nation, and how to choose between conflicting traditions. Obviously, the resolution of these questions would largely be determined by the nature of the case in dispute.

2. *Time Frame*

Footnote 6 also leaves unanswered the question whether the Court should focus on traditions that existed at the time of the ratification of the Fourteenth Amendment, or ones that exist today. Although he is unclear on the point, it appears that Justice Scalia believes that traditions develop and evolve and that the Due Process Clause does not only protect rights or traditions that existed at the framing of the Fourteenth Amendment in 1868. Other advocates of judicial restraint, such as Justices Frankfurter and Harlan, have also viewed tradition, for pur-

102. In Duncan v. Louisiana, 391 U.S. 145 (1968), the Court moved away from Justice Frankfurter's "English-speaking peoples" standard. The Court explained that it would no longer evaluate whether rules are fair to defendants in a hypothetical criminal justice system but whether they are fair in the context of the criminal justice system adopted in the United States.

103. Perhaps the only case in which the Court confronted this problem was Tennessee v. Garner, 471 U.S. 1 (1985). There, the Court considered the common-law doctrine allowing the use of deadly force against a non-dangerous felon and, among other things, counted the states that used the common-law rule and those that did not. *See also* Stanford v. Kentucky, 492 U.S. 361, 378 (1989); Penry v. Lynaugh, 492 U.S. 302, 330 (1989).

A similar idea has been proposed by some scholars for use in choice of law. *See* Trautman, *The Relation Between American Choice of Law and Federal Common Law*, LAW & CONTEMP. PROBS., Spring 1977, at 105 (arguing that courts should determine the "normal" law in the nation and apply it in most conflict-of-law cases).

104. *See* Blumoff, *supra* note 84, at 539.

poses of Fourteenth Amendment analysis, as evolving.[105] In addition, the view that rights were fixed in 1868 seems exceptionally difficult to reconcile with numerous precedents, many of which Justice Scalia has not advocated overruling.[106]

Justice Scalia hinted in *Michael H.* that footnote 6 refers to *extant* traditions. He repeatedly alluded to the fact that the tradition opposing Michael's interest exists "even in *modern* times."[107] He wrote that "we are not aware of a single case old or *new*, that has [recognized father's rights in Michael's situation]."[108] Later, in distinguishing previous cases, he asserted: "None of those cases acknowledged a longstanding and *still extant* societal tradition . . . ."[109] Finally, he wrote that, "[i]n this case, the existence of . . . a tradition [denying Michael H.'s right], continuing to the *present day*, refutes any possible contention that the alleged right is . . . 'fundamental.' "[110] Although none of these passages commits Justice Scalia to a framework using evolving rather than purely historical tradition, they suggest that Justice Scalia envisioned the implementation of footnote 6 in that way.[111]

105. For example, Justice Frankfurter observed: "Great concepts like . . . 'liberty' . . . were purposely left to gather meaning from experience. . . . The statesmen who founded this nation knew too well that only a stagnant society remains unchanged." National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting). Justice Harlan argued that the Court should consult tradition in evaluating substantive due process claims but that "tradition is a living thing." Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

106. *See, e.g.*, Turner v. Safley, 482 U.S. 78 (1987); Moore v. East Cleveland, 431 U.S. 494 (1977); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). Although Justice Scalia has elsewhere advocated overruling *some* of these cases, *see, e.g.*, Webster v. Reproductive Health Servs., 492 U.S. 490, 532 (Scalia, J., concurring in part and concurring in judgment), he has never advocated overruling all of them. In fact, he joined the Court's opinion in *Turner* only two terms before *Michael H.* Furthermore, he spent part of footnote 6 explaining how his method can be reconciled with *Griswold* and *Eisenstadt*. *See Michael H.*, 491 U.S. at 127 n.6.

107. *Michael H.*, 491 U.S. at 125 (emphasis added).

108. *Id.* at 127 (emphasis added).

109. *Id.* at 128 n.6 (emphasis added).

110. *Id.* (emphasis added) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). Justice Brennan thought that Justice Scalia would allow traditions to evolve, writing that footnote 6 would require the Court "to identify the point at which a tradition becomes firm enough to be relevant to our definition of liberty and the moment at which it becomes too obsolete to be relevant any longer." *Id.* at 138 (Brennan, J., dissenting). *But cf. id.* at 141 (Brennan, J., dissenting) (emphasis in original) ("[Justice Scalia's Constitution is] a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past. *This* Constitution does not recognize that times change . . . .").

111. Another explanation is that Justice Scalia believes that the Due Process Clause protects or denies rights based on societal traditions that existed in 1868 *and* continue

If the Court decides to use evolving rather than static traditions, additional questions are raised during transition periods for a tradition. For example, several states have repealed sodomy laws and have enacted laws that protect homosexuals from discrimination.[112] By contrast, many states still have laws that criminalize sodomy.[113] Footnote 6 leaves unclear how many states must repeal their sodomy laws, enact antidiscrimination laws, or do both, and how long these changes must be in place, before the Court will deem a new tradition to have been established regarding a right of homosexual intimacy.[114]

3. *Absence of Positive Law*

The above discussion suggests that in certain instances states may have passed no law respecting a certain "tradition." The question arises whether this constitutes an absence of tradition and what the Court should do to deal with such a situation.

The first question to ask is whether tradition can exist in the absence of codified laws. It seems clear that it can. Justice Scalia speaks of "societal tradition" and only examines laws to assist in determining what that "societal tradition" is.[115] In *Moore*, Justice Powell examined the traditions of extended families living together,[116] and in *Wisconsin v. Yoder*,[117] the Court examined the traditions of the Amish. Presumably, however, Justice Scalia would normally look to positive laws before consulting less concrete societal traditions.[118]

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to exist today. This test could produce either broader or narrower protection of rights than the purely historical test. On the one hand, the number of rights protected would be reduced by the fact that a tradition protecting the right must exist at both points in time. On the other hand, the number of rights denied under this test would be reduced, because relatively few traditions denying rights both existed historically and exist today.

112. *See, e.g.*, MASS. GEN. L. ch. 151B, § 4 (1982) (employment discrimination).

113. *See, e.g.*, GA. CODE ANN. § 16-6-2 (1988).

114. Advocates of the theory of legislative impairment might argue that the national tradition has actually changed, but that the legislatures of the states that have not changed their laws were impaired in some way, and that the majority of people really supported a change in the law. *See* Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 5-17 (1979). To the extent that this argument is valid, this "slippage" must be taken into account by the Court when examining traditions in transition.

115. *See Michael H.*, 491 U.S. at 127 n.6.

116. *See* Moore v. East Cleveland, 431 U.S. 494, 503-06 (1977).

117. 406 U.S. 205, 209-19 (1972). *Yoder* is often read as only a First Amendment case, but its implications for tradition are much broader.

118. An interesting problem could arise should societal *practices* contradict concrete laws. I have assumed for purposes of this Note that laws are the best evidence of tradition. They are clearly the easiest to test. Presumably, laws reflect the will of a majority

Determining societal traditions will present difficulties for the Court. Rather than simply counting state laws, the Court must consult religion, pop culture, conventional morality, the press, sociological studies, polls, and even politics. In some cases, these sources will yield conflicting answers as to whether a certain tradition exists. Generally speaking, however, they will provide probative information on the question.

To probe this problem in the context of a real-life example, suppose that a state enacts a law forbidding artificial insemination of unmarried women.[119] Assuming that other states do not have laws that specifically authorize such insemination,[120] has the state violated a substantive due process right under the test of footnote 6?

a. *Societal Tradition*

Because there is no legal tradition protecting artificial insemination of unmarried women, the Court would examine the question whether there is any societal tradition. Although opposition exists in the medical community,[121] some clinics do perform artificial insemination of unmarried women.[122] Be-

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of society. If not, society would change them—at least to the extent that our representative democracy functions. Were a specific societal tradition to be very strong and a legal tradition very weak, however, it could be argued that the societal practice should overcome the legal tradition. For instance, this may have been the case in *Griswold*. *See infra* notes 130-36 and accompanying text. Footnote 6 does not appear to address this possibility. For an interesting article addressing a particular clash between a societal tradition and the law, see Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899.

119. An Oklahoma statute has actually been so interpreted. *See* 15 Op. Okla. Att'y Gen. 277 (1983) (interpreting Artificial Insemination Statute, OKLA. STAT. tit. 10, §§ 551-553 (1981)).

120. Although for purposes of illustration I assume that no other states have laws authorizing or recognizing such insemination, six states currently have laws that apparently contemplate artificial insemination of unmarried women. *See* CAL. CIV. CODE § 7005(b) (Deering 1990); COLO. REV. STAT. § 19-4-106(2) (1986); N.J. STAT. ANN. § 9:17-44 (West 1983); OR. REV. STAT. § 109.239(1) (1987); WASH. REV. CODE ANN. § 26.26.050(2) (Supp. 1985); WYO. STAT. § 14-2-103(b) (1986). The laws of only six states, however, would almost certainly not qualify this privilege as a tradition of our country. *Cf.* Tribe & Dorf, *supra* note 68, at 1068 (using same example).

121. *See* Note, *Reproductive Technology and Procreating Rights of the Unmarried*, 98 HARV. L. REV. 669, 670 n.8 (1985) (only 10 percent of doctors practicing artificial insemination would perform artificial insemination for unmarried women). One basic medical text on artificial insemination states that "any display of interest in [artificial insemination] by an unmarried woman is indicative of psychological distress . . . ." W. FINEGOLD, ARTIFICIAL INSEMINATION 101 (2d ed. 1976).

122. *See, e.g.*, Kritchevsky, *The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family*, 4 HARV. WOMEN'S L.J. 1, 3-4 (1981). *See also* Lacey, *The Law of Artificial Insemination and Surrogate Parenthood in Oklahoma: Roadblocks to the Right to Procreate*, 22 TULSA L.J. 281 (1987) (discussing the growing number of single women who desire artificial insemination); Note, *supra* note 121, at 670 (same).

cause such practices, however, are isolated and have existed for only a short period of time, it is difficult to argue that this constitutes a tradition, although it is conceivable that the practice might become a tradition, recognized as fundamental, in the future.

b. *Traditions by Legislative Inaction*

If there are no laws regarding artificial insemination of unmarried women and no societal tradition exists, the Court might also ask whether the federal and various state legislatures had considered the issue. Justice Scalia proposed that the Court test whether there is a "relevant tradition *protecting or denying protection to*, the asserted right . . . ."[123] Assuming that a legislature addresses an activity at all, it can take four possible actions respecting the activity: (1) pass a law protecting the activity; (2) pass a law outlawing the activity; (3) decide not to pass a law protecting the activity; or (4) decide not to pass a law outlawing the activity.

Clearly, the enactment of a law would establish a tradition. If states have enacted laws protecting a right, the Court could decide that a tradition of *protecting* that right exists. By contrast, if many state legislatures have passed laws outlawing an activity, it seems clear that a tradition exists that *denies protection* of that right.

When the legislature takes no action, the existence of tradition is less clear. If a number of state legislatures have considered the matter and decided not to protect an activity, there might be a tradition *denying protection*, even though no laws prohibiting the activity existed. Analogously, in case (4), it can be argued that the legislature has established a tradition of *protecting* a right by not outlawing it.[124] In all four of these cases, the Court can still rely on society's choices (inferred from legislative action or inaction), rather than creating or disallowing a tradition on its own.

In the artificial insemination example, if most other states had considered and rejected legislation authorizing artificial in-

123. *Michael H.*, 491 U.S. at 128 n.6 (emphasis added).

124. This is a relatively weak argument, however. When a legislature specifically rejects a law protecting an activity, it has denied protection. When a legislature simply decides not to outlaw an activity, on the other hand, it is not clear that it has protected that activity. This is made clear by the observation that the same legislature can take both actions, by rejecting legislation protecting *and* legislation outlawing an activity.

semination of unmarried women, a state's action forbidding the activity would be consistent with this tradition. If most other states had considered and rejected laws forbidding artificial insemination of unmarried women, the state's action in question would break from tradition.

c. *The Next Level of Abstraction*

Assuming that no societal tradition can be identified at the most specific level of abstraction, Justice Scalia's answer is to refer to the next, more general level of tradition. Unfortunately, this is sometimes easier said than done.[125] In *Michael H.*, Justice Scalia suggested that had there been no tradition regarding the rights of natural fathers of a child adulterously conceived, the Court should "consult, and (if possible) reason from, the traditions regarding natural fathers in general."[126] Applying this rule in the artificial insemination example, it would appear that the next level of generality would be artificial insemination laws generally,[127] though it might be argued that the next level of generality would be societal traditions of nuclear families or the developing tradition of single-parent homes. Although footnote 6 does not resolve with certainty which tradition to choose in this case, it leaves the Court with a framework within which to operate: which tradition is more specific, that is, which tradition best reflects the consensus of the country's population on the issue. In this example, the legal treatment of artificial insemination generally seems more specific to the matter at hand than general childbearing and childrearing practices.

D. *Response to Justice O'Connor's Concurrence*

In her concurrence, in which Justice Kennedy joined, Justice O'Connor cited a number of cases, the holdings of which she found inconsistent with footnote 6's "most specific level of tradition" test.[128] Although the reasoning in those cases was at times inconsistent with the footnote 6 test, often the end result was the same as it would have been, had the Court applied

125. *See, e.g.*, Tribe & Dorf, *supra* note 68, at 1090. *See also infra* notes 166-75 and accompanying text (discussing Tribe and Dorf's criticisms).

126. *Michael H.*, 491 U.S. at 128 n.6.

127. *See* UNIF. PARENTAGE ACT, § 5(b), 9B U.L.A. 301 (1987).

128. *See Michael H.*, 491 U.S. at 132 (O'Connor, J., concurring in part and concurring in judgment).

footnote 6. In other cases, the footnote 6 methodology would have prevented the Court from reaching erroneous or premature decisions to establish fundamental rights.[129]

1. *General Consistency with Past Decisions*

The first case that Justice O'Connor cited as possibly "inconsistent" with footnote 6 is *Griswold v. Connecticut*.[130] It is relatively simple, however, to reconcile Justice Douglas's majority opinion in *Griswold* with Justice Scalia's reasoning in footnote 6. First, Justice Douglas represented that *Griswold* was not a substantive due process case. He went to great lengths to identify specific references in the Bill of Rights that the Connecticut law violated. He never mentioned the concept of substantive due process except to dismiss it, nor did he mention the fundamental nature of sexual rights.[131] Today, however, the Court and most scholars agree that Justice Harlan's concurrence, using substantive due process reasoning, best represents the proper understanding of *Griswold*.[132]

Even seen as a substantive due process decision, though, the result in *Griswold* would be the same using footnote 6. The Connecticut law that the Court invalidated was unique in the country. Because no tradition existed at the most specific level—that is, prohibiting the use of contraceptives—the Court would have been left to examine traditions at a more general level. The strong tradition of marital privacy, and the fact that no other state or country had ever enacted such a law,[133] suggest a tradition protecting childbearing decisions within a marriage.[134]

In addition, Justice White argued in his concurrence to *Griswold* that this law lacked minimum rationality.[135] To support

129. Justice O'Connor's criticisms are ironic in that she has used reasoning in other contexts that closely parallels the footnote 6 approach. She has applied reasoning nearly *identical* to that used in footnote 6 in the Eighth Amendment context, *see* Penry v. Lynaugh, 492 U.S. 302, 330 (1989), and joined Justice Scalia's opinion in another Eighth Amendment decision that used the footnote 6 approach. *See* Stanford v. Kentucky, 492 U.S. 361, 378 (1989).

130. 381 U.S. 479 (1965).

131. *See Griswold*, 381 U.S. at 481-96.

132. *See id.* at 499 (Harlan, J., concurring). *See also* Moore v. East Cleveland, 431 U.S. 494, 503 (1977); Lupu, *supra* note 26, at 994.

133. *See* Poe v. Ullman, 367 U.S. 497, 554 (1961) (Harlan, J., dissenting).

134. *See Michael H.*, 491 U.S. at 128 n.6 (Justice Scalia arguing that footnote 6 is consistent with *Griswold*).

135. *See Griswold*, 381 U.S. at 502 (White, J., concurring).

this conclusion, he asserted that no possible reason could support this law and that Connecticut had not even enforced the law. Justice Scalia did not claim that footnote 6 would foreclose the minimum rationality test for substantive due process; indeed, Justice Scalia has argued repeatedly for its use.[136] In sum, even as a pure substantive due process case, the result in *Griswold* would be the same using footnote 6.

The second decision that Justice O'Connor claimed reached a result inconsistent with footnote 6 is *Eisenstadt v. Baird*.[137] In *Eisenstadt*, the Court decided that a Massachusetts law prohibiting the sale or distribution of contraceptives to unmarried individuals was unconstitutional. Justice Brennan specifically used the Equal Protection Clause as the basis for his decision.[138] Therefore, the footnote 6 approach would not necessarily have been used in *Eisenstadt*. Justice Brennan's opinion, however, did also raise the question whether the Massachusetts law would pass the minimum rationality test of due process, and concluded that it would not.[139] As mentioned above, footnote 6 would allow this test, as well.

If treated as a substantive due process case[140] under footnote 6, the result may have changed. Many, perhaps even most, scholars have read *Griswold* and *Eisenstadt* as establishing a right of access to contraceptives. The Court later agreed with this reading.[141] *Eisenstadt* contains some language that indicates that Justice Brennan intended such a result.[142] It is unlikely that the Court agreed that an absolute right to contraceptives existed

136. *See, e.g.*, Stanford v. Kentucky, 492 U.S. 361, 378 (1989); United States v. Cohen, 733 F.2d 128, 133 (D.C. Cir. 1984).

137. 405 U.S. 438 (1972).

138. *See Eisenstadt*, 405 U.S. at 443 ("And we hold that the statute, viewed as a prohibition on contraception *per se*, violates the rights of single persons under the Equal Protection Clause of the Fourteenth Amendment.").

139. *See id.* at 443, 448, 454-55. In discussing the rationality requirement under the Equal Protection Clause, Justice Brennan concluded that "the goals of deterring premarital sex and regulating the distribution of potentially harmful articles cannot reasonably be regarded as legislative aims . . . ." *Id.* at 443.

140. The *Eisenstadt* Court twice stated that it was holding that the regulation violated the Equal Protection Clause, and never that it violated the Due Process Clause. *See id.* at 443, 454. By the time of Carey v. Reproductive Health Servs., 431 U.S. 678 (1977), however, Justice Brennan apparently decided that his opinion in *Eisenstadt* had indeed been based on substantive due process. *See Carey*, 431 U.S. at 684-86.

141. *See* Carey v. Reproductive Health Servs., 431 U.S. 678 (1977).

142. *See Eisenstadt*, 405 U.S. at 453 (emphasis in original) ("If the right of privacy means anything, it is the right of an *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."). It also seems that by the time of *Eisenstadt* the Court had decided that the holding in *Griswold* that a prohibition on the *use* of

when it decided *Griswold* in 1965. All of the opinions in that case avoided such sweeping language. The Court did not establish this absolute right until 1972 at the earliest, in *Eisenstadt,* and possibly not until 1977 in *Carey*. The traditions that existed in 1965 concerning sexual conduct changed radically by 1972. In 1965, a number of states had laws barring the distribution of contraceptives, especially to unmarried individuals.[143] Under footnote 6, the Court could not have found such a sweeping right in 1965. By 1972, however, many of these state laws had been repealed; such a drastic change of so many laws might imply that the nation had come to a consensus that such a right existed.[144] The case thus involves an instance of a tradition in transition. In view of the limited longevity of the tradition of granting a right to unmarried individuals to purchase contraceptives, the Court, using footnote 6, would likely have reached the opposite result.

2. *Different Levels of Generality*

Justice O'Connor also argued that several prior decisions of the Court had characterized rights at levels of generality that were not the most specific available. The first case she cited in this regard is *Loving v. Virginia*,[145] which held that a Virginia law banning interracial marriage violated both the Equal Protection Clause and the Due Process Clause.

Loving, of course, need not be reconciled at all with footnote 6, because the Equal Protection Clause is clearly applicable to the case. It is important to note in this regard the firm historical basis that *Loving* has in the Fourteenth Amendment. That amendment was specifically directed at racial prejudice.[146] Accordingly, the due process language in *Loving* could be dismissed as dictum. Raising a question respecting substantive due process jurisprudence based upon the *Loving* decision ap-

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contraceptives by married couples was unconstitutional also meant that a prohibition on the *distribution* of contraceptives to married couples was unconstitutional. *See id.*

143. *See* NAT'L CENTER FOR FAMILY PLANNING SERVS., FAMILY PLANNING, CONTRACEPTION AND VOLUNTARY STERILIZATION: AN ANALYSIS OF LAWS AND POLICIES IN THE UNITED STATES, EACH STATE AND JURISDICTION 58-60 (U.S. Dep't of Health, Educ., & Welfare, Pub. No. (HSA) 74-16001, 1972) (approximately one-third of the states permitted only physicians or pharmacists to dispense contraceptives, and more than half the states prohibited their advertisement).

144. *See id.* at 58 (approximately 13 states repealed or substantially liberalized birth control laws between 1965 and 1972).

145. 388 U.S. 1 (1967).

146. *See, e.g.*, R. BORK, *supra* note 4, at 180.

pears to misplace the import of that case.[147]

Justice O'Connor also raised *Turner v. Safley*[148] as an example of a case in which a more general level of tradition was applied. In *Turner*, the Court ruled unanimously[149] that a Missouri regulation prohibiting marriage of prisoners violates the Constitution. In so ruling, the Court held that the right to marry is a fundamental right, citing *Zablocki v. Redhail*[150] and *Loving v. Virginia*.[151] The Court did not inquire whether the right to marry in the circumstances (prison) was fundamental; thus, it did not characterize the right at the most specific level.

Had the Court examined the most specific level of tradition, however, the result would have been the same. The rule in question restricting prison marriage—a government regulation, not a statute—was contrary to longstanding practice.[152] Besides marking a departure from Missouri tradition, this regulation was inconsistent with federal regulations.[153] Accordingly, the Missouri regulation violated an interest that had been traditionally protected. At the very least, the tradition of protecting marriage in prison is unclear because of this conflict in rules. Such a conflict, under Justice Scalia's framework, would lead the Court to examine tradition at a more general level (the right to marry in general). Alternatively, the Court could have relied on the rational relationship test of due process or the Equal Protection Clause to invalidate this regulation.[154]

In conclusion, although the Court in *Turner* did not characterize the right at the most specific level, the results would have been the same had they done so, because they would eventually have arrived at the same level of abstraction that was actually employed.[155]

147. *Loving* also illustrates a tradition in transition. During the 15 years before *Loving* was decided, 14 states had repealed their antimiscegenation statutes. When *Loving* came down, such statutes remained on the books in only 16 states. *See Loving*, 388 U.S. at 6 n.5.

148. 482 U.S. 78 (1987).

149. This unanimous Court included Justice Scalia, who did not even write a concurring opinion. *Turner* was decided in Justice Scalia's second term on the Court.

150. 434 U.S. 374 (1978).

151. 338 U.S. 1 (1967).

152. *See Turner*, 482 U.S. at 82.

153. *See id.* at 97-98 (citing 28 C.F.R. § 551.10 (1986) (marriage by inmates in federal prisons permitted)).

154. *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (discrimination against mental patients struck down on equal protection grounds, merely on the rational relationship test).

155. Justice O'Connor also cited United States v. Stanley, 483 U.S. 669 (1987), for

3. *Limiting the Court to One Mode of Analysis*

Finally, Justice O'Connor worried that footnote 6 would foreclose the unanticipated by imposing a single mode of historical analysis. She cited Justice Harlan's famous dissent in *Poe v. Ullman*[156] for the proposition that such a formula is unattainable. A close reading of Justice Harlan's dissent, however, confirms that he might well have agreed with Justice Scalia. Justice Harlan did argue that "there is no 'mechanical yardstick,' no 'mechanical answer' "[157] to whether a right is protected by substantive due process. Furthermore, he contended that "[due process]'s content cannot be determined by reference to any code."[158] Justice Harlan, however, had an eye on tradition at all times in exercising the Court's "limited and sharply restrained judgment":[159]

> The best that can be said is that through the course of this Court's decisions, it has represented the *balance* which our *Nation*, built upon postulates of respect for the individual, has *struck* between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has *not* been one where *judges have felt free to roam* where unguided speculation might take them. The *balance* of which I speak is the balance *struck by this country*, having *regard to what history* teaches are the *traditions* from which it developed as well as the *traditions* from which it broke.[160]

Justice Harlan believed that the traditions that the country had established, through its people, were the key to determining the existence of a substantive due process right. He also commented that "[w]e may not draw on our merely personal and private notions and disregard the limits that bind judges in

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the point that the Court had not always defined rights at the most specific level. The relevance of *Stanley* in this context is not immediately obvious, because it dealt with claims for clear constitutional deprivations, rather than substantive due process claims. The portion of the opinion in *Stanley*, which Justice Scalia authored, to which Justice O'Connor referred appears to be that discussing the level of generality that the Court should choose when applying the "special factors" test of Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), respecting the immunity for federal employees. The level of generality to be used in this substantive law test appears to be simply irrelevant to the substantive due process context.

156. 367 U.S. 497 (1961).

157. *Poe*, 367 U.S. at 544 (Harlan, J., dissenting).

158. *Id.* at 542 (Harlan, J., dissenting).

159. *Id.* at 544 (Harlan, J., dissenting).

160. *Id.* at 542 (Harlan, J., dissenting) (emphasis added).

their judicial function."[161] He believed that the Court should "hesitate long"[162] before striking down a law that simply chose among a number of moral viewpoints that the nation had accepted. From Justice Harlan's opinions, it is clear that he respected tradition and consulted it often.

The only question is whether he would have accepted Justice Scalia's invitation to consult the most specific level of tradition. In his *Poe* dissent, Harlan spoke of the generality of liberty, but then applied tradition at the *most specific* level. He found that "conclusive, in my view, is the utter novelty of this enactment [in regulating the use of contraceptives]."[163] Justice Scalia seems on firm footing in basing his substantive due process jurisprudence on Harlan's *Poe* dissent, often characterized as the fountainhead of modern privacy doctrine.

Justice O'Connor's concerns about the limiting effect of one mode of analysis are not warranted. The footnote 6 approach would leave the Court with flexibility when considering evolving traditions and identifying the most specific level of tradition, and would not affect the broad applicability of the Equal Protection Clause.[164] Her concerns stand in stark contrast to those expressed by others; no other commentator has criticized footnote 6's inflexibility. Rather, those who have criticized the footnote have emphasized—incorrectly, I believe—its *indeterminacy*.[165]

E. *Response to One Recent Criticism of Footnote 6*

In a comprehensive article, Professor Laurence Tribe and Michael Dorf harshly criticize footnote 6.[166] Although Tribe

161. *Id.* at 544 (Harlan, J., dissenting).

162. *Id.* at 547 (Harlan, J., dissenting). Justice Harlan also stated:

> If we had a case before us which required us to decide simply, and in the abstraction, whether the moral judgment implicit in the application of the present statute to married couples was a sound one, *the very controversial nature* of these questions would, I think, require us to hesitate long before concluding that the Constitution precluded Connecticut from choosing as it has among these various views.

Id. (Harlan, J., dissenting) (emphasis added).

163. *Id.* at 554 (Harlan, J., dissenting).

164. *See supra* notes 105-14 and accompanying text (evolving traditions); *supra* notes 125-27 and accompanying text (levels of abstraction); *infra* notes 176-88 and accompanying text (Equal Protection Clause).

165. *See* R. BORK, *supra* note 4, at 236-40; Chemerinsky, *supra* note 32, at 90-93; Tribe & Dorf, *supra* note 68, at 1087-95.

166. A complete response to Tribe and Dorf is beyond the scope of this Note; however, two points are important to mention. First, Tribe and Dorf argue that it is incor-

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and Dorf provide insight on a variety of constitutional law topics, they reach a flawed conclusion about footnote 6. The two major components of Tribe and Dorf's criticism are discussed in turn below.

The first aspect of Tribe and Dorf's argument contends that footnote 6 represents faulty policy and faulty constitutional law. I have addressed most of these arguments in earlier sections of this Note.[167] None of these constitutional or policy ar-

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rect to characterize precedent at the most specific level possible. *See* Tribe & Dorf, *supra* note 68, at 1059-71. This argument is important and interesting but is *not directly relevant* to footnote 6, which argues for the most specific level of *tradition*. As discussed later, there are important differences between tradition and precedent. This argument is simply a repeat of the stare decisis argument. In other words, limiting a case to its facts is a method of overruling it, and abstracting a case to new situations is a way of *extending* its holding to new situations not originally part of the holding. Because the substantive due process debate is currently centered on rulings by a "liberal" Court, advocates of that "liberal" set of rulings would naturally wish to characterize the holdings more broadly than would the rulings' opponents. The reverse might be true for other cases. *See, e.g.*, United States v. Stanley, 483 U.S. 669 (1987); Sherbert v. Verner, 374 U.S. 398 (1963) (Brennan, J.) (limiting Braunfeld v. Brown, 366 U.S. 599 (1961), to its facts).

Second, Tribe and Dorf fail to distinguish the task of interpreting textual provisions of the Bill of Rights from the task of interpreting the open-ended Due Process Clause. Even given their broadest interpretation, the specific commands of the Bill of Rights have limited scope. For instance, no one would argue that the right to a speedy trial in the Sixth Amendment also guarantees the right to an abortion. By sharp contrast, an activist Court could read the word "liberty" (and arguably has) to supply the constitutional right to virtually anything. *But see* Tribe & Dorf, *supra* note 68, at 1063-65 (precedent and internal limits of Constitution bind liberty). In both cases, the Court must abstract beyond the literal language and should use care before ruling a law unconstitutional. Precedents dealing with provisions of the Bill of Rights, however, have a circumscribed impact, while precedents dealing with due process may have almost limitless impact. The prospect of such a powerful and often unforeseen impact suggests that the Court should take greater care in substantive due process analysis than in analysis of specific constitutional provisions. It also suggests the propriety of attention to tradition as a source of guidance.

167. Tribe and Dorf first note the lack of agreement on the content of tradition. *See* Tribe & Dorf, supra note 68, at 1087. This criticism is accurate in *some* but not all instances. When an undisputed tradition does exist, the criticism is inapplicable; moreover, as illustrated below, even when there is disagreement, footnote 6 remains useful as a tool of analysis. *See supra* notes 125-27 and accompanying text (discussing the indeterminate content of tradition); *infra* notes 193-97 and accompanying text (discussing the cases where tradition is determinate); *infra* notes 198-202 and accompanying text (discussing footnote 6 as a heuristic).

Second, citing the emergence of minimum wage laws, they argue that the absence of a positive law encroaching on a right does not prove that a right is fundamental. *See* Tribe & Dorf, *supra* note 68, at 1087-88. This is true, but it does not diminish footnote 6's validity when a positive tradition exists. *See supra* notes 123-24 and accompanying text (discussing legislative inaction). This also seems to be an extremely ironic criticism for a proponent of judicial activism to be making of an opponent of judicial activism.

Third, they argue that a government does not gain a vested right to continue violations of the Constitution. *See* Tribe & Dorf, *supra* note 68, at 1088. This is also true, but it begs the question. The existence of a widely held and still extant tradition makes it *extremely unlikely that there is actually any violation* of the Constitution, at least when it comes to the Due Process Clause. Justice Scalia has specifically confined footnote 6 to

guments forecloses footnote 6 nor diminishes its usefulness.

Tribe and Dorf's argument that footnote 6 is illogical also fails. They begin with the correct premise that *no single dimension of specificity exists*.[168] They argue that when a tradition does not exist for the most specific characterization of a purported right, the next level of abstraction of the right is indeterminate.[169] Next, they argue that Justice Scalia has failed to identify the most specific characterization of the right in *Michael H.* To be most specific we would need to add all of the details of this case (for example, hair color, age of the parties, and so forth).[170] Many of these additional details are arguably relevant, such as the fact that Michael H. had established a relationship with Victoria (a detail that Justice Scalia omitted in defining the right at issue).[171] Therefore, because Justice Scalia had not defined the right as specifically as possible, other equally plausible candidates exist for the next most specific tradition, such as a tradition protecting fathers who have established relationships with children.

This reasoning confuses essential details with nonessential details. The best example of this mistake is to examine the *Michael H.* case itself. In fact, the tradition that Justice Scalia examined was the most specific available. The reason the tradition did not refer to the existing relationship was because this

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"ambiguous" constitutional provisions. *See* Rutan v. Republican Party of Ill., 110 S. Ct. 2729, 2748 n.1 (Scalia, J., dissenting). These traditions are the guideposts for determining the constitutionality of laws, not vice versa. *See id.* at 2748 (Scalia, J., dissenting).

Finally, Tribe and Dorf ask "how do we know when to reject an historical pattern or understanding?" Tribe & Dorf, *supra* note 68, at 1090. If, however, Justice Scalia intends footnote 6 to apply only to *extant* traditions, it seems unlikely that the Court would ever need to reject an outmoded tradition—for example, flogging—especially if it does not violate a textual command of the Constitution (including the Equal Protection Clause). Flogging would violate the Eighth Amendment's prohibition of cruel and unusual punishment. Furthermore, if we regard tradition as evolving, it seems even less likely that the Court should need to act. *See supra* notes 105-14 and accompanying text. *See also* J. ELY, *supra* note 16, at 183 (noting that "it can only deform our constitutional jurisprudence to tailor it to laws that couldn't be enacted, since constitutional law appropriately exists for those situations where representative government cannot be trusted, not those where we know that it can").

168. *See* Tribe & Dorf, *supra* note 68, at 1090.

169. *See id.* at 1091 ("In other words, when we find that there is no relevant tradition concerning asserted right X under conditions 1 and 2, do we consult traditions concerning right X under condition 1 in general, or do we consult traditions concerning right X under condition 2 in general?"). *See also supra* notes 125-27 and accompanying text (discussing this failure of footnote 6).

170. *See* Tribe & Dorf, *supra* note 68, at 1091-92.

171. *See id.* at 1092.

detail was nonessential. The tradition existed regardless of an existing relationship. The California law presumed legitimacy regardless of whether such a relationship existed (and regardless of the hair color of the litigants or the age of the parties). Tribe and Dorf could rephrase the tradition in their own terms, and the decision would still be the same.[172]

Tribe and Dorf confront this essential-versus-nonessential debate later in their article. They argue that in determining *precedent*, it is debatable as to which facts are essential and which facts are nonessential. Were this also true for *tradition*, Tribe and Dorf would save their argument. In other words, if the existing relationship between a father and his children were essential, Tribe and Dorf would be correct that Justice Scalia had not found the most specific level of tradition, because his tradition would not have addressed that detail.

Traditions, however, *differ* from *precedent* in this regard. Traditions often define which of their elements are essential. Precedents rarely do.[173] Using the California law addressed in *Michael H.* as an example, the law explicitly stated the conditions that were required to invoke the presumption (that is, the husband and wife must cohabitat, and he must not be impotent or sterile). All other facts are irrelevant. Laws define their own essential elements, often at a very high level of abstraction,[174] whereas cases adjudicate controversies with very specific facts. Tribe and Dorf have therefore made a logical error in arguing that the most specific level of tradition is unattainable.[175]

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172. *See id.* at 1092 (emphasis in original) ("*What are the rights of the natural father of a child conceived in an adulterous but longstanding relationship, where the father has played a major, if sporadic, role in the child's early development?*"). The answer to this question is that California's evidence law presumes legitimacy in this situation *also*, as do the laws of virtually all other states. *See* CAL. EVID. CODE ANN. § 621 (West Supp. 1989).

173. When statutes embody the most specific tradition, it is not possible to argue that a statute has "gravitational" force as a precedent might. *Cf.* R. DWORKIN, *supra* note 87, at 111 ("Judges and lawyers do not think that the force of precedents is exhausted, as a statute would be, by the linguistic limits of some particular phrase."). Societal traditions spell out their essential elements less clearly than do statutes. Admittedly, some of the time, the most specific level of societal tradition will be unattainable because the tradition is ambiguous regarding whether an element is essential or not. For instance, returning to the example of societal traditions, *see supra* notes 121-22 and accompanying text, no one would argue that the hair color of a unmarried woman seeking artificial insemination is a relevant factor in societal tradition. Whether the woman intended to raise the child in a same-sex household might be essential to the societal tradition, however.

174. Legislatures often define laws at too high a level of abstraction. *See, e.g.*, Board of Airport Comm'rs for Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569 (1987) (law prohibiting all First Amendment activity in airport overbroad).

175. Having satisfied themselves that footnote 6 is theoretically incoherent, Tribe

F. *Redressing Societal Inequities Through the Equal Protection Clause*

In addition to substantive due process, the Equal Protection Clause provides the Court an affirmative tool to redress broad societal inequities.[176] As discussed earlier, Justice Scalia reasoned from the Supreme Court's repeated use of tradition that the purpose of due process is to protect the traditional values of society and to "prevent future generations from lightly casting aside important traditional values—not to enable this Court to invent new ones."[177] This is in stark contrast to the assertion of Justice Brennan that " 'liberty' must include the freedom not to conform."[178]

A number of scholars, including many of whom Justice Brennan might have expected to agree with him, have begun to articulate the same vision for the Due Process Clause as Justice Scalia, while arguing that the Equal Protection Clause was intended to require alterations in societal practices.[179] For instance, Professor Sunstein has written:

> The Due Process Clause often looks backward; it is highly relevant to the Due Process issue whether an existing or time-honored convention, described at the appropriate level of generality, is violated by the practice under attack. By contrast, the Equal Protection Clause looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure.[180]

He observes further that "the Equal Protection Clause is a self-

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and Dorf then criticize any use of it as a valuable heuristic. *See* Tribe & Dorf, *supra* note 68, at 1095. They argue that, although they support methodologies that might control the biases of judges, footnote 6 would allow the importation of "values surreptitiously." *Id.* at 1096. Unfortunately, Tribe and Dorf fail to explain what values footnote 6 imports, other than democracy.

176. *See* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841, 2863 (Scalia, J., concurring) ("Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.").

177. *Michael H.*, 491 U.S. at 122 n.2.

178. *Id.* at 141 (Brennan, J., dissenting).

179. *But see* Tribe & Dorf, *supra* note 68, at 1093-95. Tribe and Dorf find the Equal Protection Clause to be a "manifestly inadequate means of protecting many individual rights." *Id.* at 1094.

180. Sunstein, *supra* note 62, at 1163; *see also id.* at 1171 ("The Due Process Clause is thus closely associated with the view that the role of the Supreme Court is to limit dramatic and insufficiently reasoned change, to protect tradition against passionate majorities, and to bring a more balanced and disinterested perspective to bear on legislation."). Professor Sunstein does not believe, however, that tradition can control in close cases. *See id.* at 1173.

conscious repudiation of history and tradition as defining constitutional principles."[181] Judge Easterbrook agrees, arguing that the Fifth Amendment and the Bill of Rights generally were understood as a "nondegradation principle" designed to ensure that things would not "get worse."[182]

The vision of the Equal Protection Clause protecting rights that the Due Process Clause fails to protect is consistent with precedent. For instance, the Equal Protection Clause prohibits "discrimination with respect to the right to vote and the right to appeal . . . even though the states may eliminate both rights"[183] without violating due process. "The Court has [also] barred distinctions affecting the right to marry and the right to procreate while assuming that those rights are substantively unprotected by the Due Process Clause."[184] Professor Sunstein, who would advocate a more active role for the Supreme Court, does not worry about relying primarily on the Equal Protection Clause. He asserts that "[i]t may be that the Equal Protection Clause will ultimately prove to be a preferable source of decision, though in order to defend the outcome in *Roe*, the argument would have to be quite elaborate."[185]

From a perspective advocating judicial restraint, using the Equal Protection Clause rather than the Due Process Clause to effect broad changes in societal practices might not be seen as much of an improvement.[186] However, using the Equal Protection Clause is inherently more democratic than using the Due Process Clause. For the Court to find a right to engage in such activities as birth control, abortion, and marriage, it would first need to identify some comparable right given to others. There would need to have been some *legislative* decision to grant such a right to some group or person before the Court could decide

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181. *Id.* at 1168.

182. Easterbrook, *supra* note 31, at 95.

183. Sunstein, *supra* note 62, at 1169 (citing Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Griffin v. Illinois, 351 U.S. 12 (1956)).

184. *Id.* (citing Zablocki v. Redhail, 434 U.S. 374 (1978); Skinner v. Oklahoma, 316 U.S. 535 (1942)).

185. *Id.* at 1175 (citing a number of authorities that have made cogent arguments that the Equal Protection Clause holds great potential for shattering traditions). *See, e.g.,* C. MacKinnon, Feminism Unmodified 93-102 (1987); L. Tribe, *supra* note 11, § 15-10, at 1353-56; Ginsburg, *Some Thought on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C.L. Rev. 375 (1985); Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 Harv. L. Rev. 1, 53-59 (1977).

186. *See, e.g.,* Bork, *supra* note 31, at 12 (suggesting that Equal Protection Clause is overused).

that another group or person deserved that right.[187] Advocates of judicial restraint should much prefer a tool that imposes standards on the Court's actions to one that does not.[188]

G. *Footnote 6—A Useful Tool for Judicial Restraint*

Although not providing fully determinate results in all cases, footnote 6 would still provide considerable guidance to the Court. There are many constitutional scholars, however, who argue against any constitutional theory, such as that suggested by footnote 6, that purports to provide "objective standards."[189] These scholars posit that because the Constitution is written in such broad terms, it is inevitable that judges will interject their personal values when interpreting the broad terms, when discerning the intentions of the Framers, or, as in this case, when determining the existence and content of historical traditions.[190] "The Court has discretion in most constitutional cases and the exercise of discretion is inescapably influenced by a Justice's views."[191] These scholars reason that any attempt to provide an objective constitutional theory is doomed and futile.[192]

This argument is flawed when applied to the footnote 6 approach for two reasons. First, although footnote 6 would not always yield a dispositive answer, it often would. Second, even if footnote 6 were not dispositive, it would provide a tool to

187. As Justice Jackson once wrote: "Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable. Invocation of the Equal Protection Clause, on the other hand, does not disable any governmental body from dealing with the subject at hand." Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112 (1949). *See also* L. TRIBE, *supra* note 11, § 16-1, at 1436; Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 41-43 (1972).

188. This argument is a simplification. In fact, an overly aggressive Court could find that rights were dictated by the Equal Protection Clause when there had been no such explicit legislative action granting the right to another group. Such a situation would occur where the Court decided that the Equal Protection Clause dictated a certain result even though the corresponding groups were not similarly situated. Abortion is an excellent example of such a case. *See* C. MACKINNON, *supra* note 185, at 93-102 (arguing that the Equal Protection Clause would invalidate anti-abortion laws). Current equal protection jurisprudence cannot be read so broadly, however. *See* Sunstein, *supra* note 62, at 1175.

189. *See, e.g.*, Chemerinsky, *supra* note 32, at 90-93; Ely, *supra* note 6, at 42; Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 784-85, 802 (1983); *The Supreme Court, 1988 Term—Leading Cases*, *supra* note 62, at 186.

190. *See* Chemerinsky, *supra* note 32, at 90.

191. *Id.*

192. *See generally id.* at 94-95.

structure the inquiry.[193]

In many situations, Justice Scalia's new test would determine the outcome of a case. The tradition at the most specific level may be so overwhelmingly clear that no amount of manipulation can distort that tradition. One clear example of such a situation is the *Michael H.* case itself. Justice Scalia presented a devastating historical case for the relevant tradition in that case. Not only had the presumption of legitimacy been the law for 500 years, but California had repeatedly amended the law without changing the general rule, thus implicitly giving it the stamp of approval of current citizens.[194]

Another example of a case involving an overwhelming societal tradition is *Roe v. Wade*. Before *Roe* was decided, there were only four jurisdictions that could be said to have legalized abortion, and most abortions were illegal under the American Law Institute's Model Penal Code.[195] Under no set of circumstances could four states be said to have changed the longstanding tradition of the country prohibiting abortion.[196] Accordingly, using Justice Scalia's footnote 6 approach, the Court in *Roe v. Wade* would have likely reached the opposite result.

It is overly simplistic, therefore, for constitutional scholars to assert that a constitutional theory is indeterminate because the justices can interject personal values into *some* cases.[197] Foot-

193. *See* Easterbrook, *supra* note 31, at 92 ("That these tools of interpretation do not answer all questions does not mean that they are useless."). *Cf.* Fried, *Sonnet LXV and the "Black Ink" of the Framers' Intention*, 100 HARV. L. REV. 751, 757-59 (1987) (arguing that the words of the Constitution do have meaning and can often control concrete cases).

194. *See Michael H.*, 491 U.S. at 117-18, 124-25.

195. *See* Note, *Abortion: The Five-Year Revolution and Its Impact*, 3 ECOLOGY L.Q. 311, 313-18, 345 (1973). The four jurisdictions legalizing abortion before *Roe* were Alaska, Hawaii, New York, and Washington.

196. Advocates of the theory of legislative impairment would argue, of course, that it is likely that national views on abortion had actually changed and that the legislatures of the other 47 jurisdictions were impaired from implementing this change. *See* Fiss, *supra* note 114, at 5-17. Had a more sizable number of states changed their laws, this argument might gain plausibility. When 47 of 51 jurisdictions retain abortion prohibitions on the books, however, the argument has limited force.

197. As Justice White has stated:

> These distillations of the possible approaches to the identification of unenumerated fundamental rights are not and *do not purport to be precise legal tests* . . . . Their utility lies in their effort to *identify some source* of constitutional value that reflects not the philosophical predilections of individual judges, but *basic choices made by the people* themselves in constituting their system of government . . . .

Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 791 (1986) (White, J., dissenting) (citations omitted) (emphasis added). He went on to ar-

note 6 is significant in that, in many cases, it would require that *someone* other than five justices of the United States Supreme Court decide that a right is fundamental *before the Court does so.*

The second reason that footnote 6 does not represent an empty gesture is that it provides guidance to the Court and the rest of the American court system (not to mention state and local governments) by structuring the inquiry to be made, even when providing no conclusive answer. In many past substantive due process cases, the Court has simply declared that a right was fundamental by fiat, providing virtually no reasoning.[198] *Roe* provides a good example of such jurisprudence.[199] Many substantive due process cases use tradition to support their result but avoid any in-depth discussion of the existence, level of generality, or content of those traditions.[200]

The Court has carefully avoided creating a definable jurisprudence in the substantive due process area.[201] A review of the majority and dissenting opinions in these cases reveals a virtual lack of reasoned discussion. Lower courts, which in aggregate encounter a far greater number of substantive due process claims than the Supreme Court, have been left with nothing but the individual results of substantive due process cases from which to reason.[202] State and local governments

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gue that such sources of constitutional values can be found in "traditions and consensus of our society." *Id.* (White, J., dissenting).

198. Christie states:

> [T]his discretionary authority is broadened by the fact that it is often difficult to determine what these cases stand for, either collectively or individually, and therefore to determine what their precedential value is over and above the proposition that it is proper to carve out new rights whenever it seems necessary.

Christie, *supra* note 31, at 1325-26. He goes on to write that "[t]hus, on its face, each of these landmark decisions provides little more than an assertion of its result." *Id.* at 1334. *See also* Loewy, *Abortive Reasons and Obscene Standards: A Comment on the Abortion and Obscenity Cases*, 52 N.C.L. REV. 223 (1973).

199. *See* Ely, *supra* note 31 (criticizing *Roe* as an unprincipled decision).

200. *See, e.g.*, Moore v. East Cleveland, 431 U.S. 494 (1977); Roe v. Wade, 410 U.S. 113, 148 (1973); Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring).

201. Even Professor Chemerinsky recognizes this void, although he seems to argue, inexplicably and ironically, that advocates of judicial restraint who have proposed constitutional theories are to blame for the Court's failure to develop a coherent theory. *See* Chemerinsky, *supra* note 31, at 95 ("First, the Court's insistence on constitutional principles that exist entirely apart from the preferences of the Justices will prevent the development of a theory of interpretation.").

202. *See, e.g.*, Griffith v. Johnston, 899 F.2d 1427, 1438 (5th Cir. 1990) ("The Supreme Court's decisions regarding 'fundamental interests' are more easily enumerated than analyzed.").

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have often had no idea whether the ordinances they have enacted or enforced are constitutional.

The need for an analytical framework for the Court is now the problem of the new "conservative" wing of the Court. No longer does this wing have the luxury of criticizing Court decisions; it must now justify its criticisms in a consistent fashion. In the substantive due process context, footnote 6 provides this consistency.

Conclusion

Justice Scalia may have initiated a new era of substantive due process in footnote 6. His test would provide much-needed guidance for lower courts and will provide a structure for future debates in the Court. Most importantly, footnote 6 would prevent the Court from reaching decisions that completely contradict society's views. The Court has no authority or standard for changing society's practices except through the text of the Constitution. Balancing competing interests should be the privilege of society and not the Court. This approach is reconcilable with precedent, but more importantly, it is reconcilable with our most cherished of democratic principles: the rule of law. The Court should therefore adopt it explicitly.

RECENT DEVELOPMENTS

EXTENSION OF THE RIGHT TO COUNSEL: *Minnick v. Mississippi*, 111 S. Ct. 486 (1990).

In *Miranda v. Arizona*,[1] the Supreme Court set forth a number of procedural safeguards to protect the Fifth Amendment right against self-incrimination of individuals suspected of criminal activities. The *Miranda* Court ruled that

> prior to any questioning, the [suspect] must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The [suspect] may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.[2]

Although the Fifth Amendment does not specifically require this prophylactic rule, the Court reasoned that the rule was necessary to overcome the inherent coercion of the custodial police setting, which can produce compelled, self-incriminating statements.[3] In *Edwards v. Arizona*,[4] the Court expanded the scope of the Fifth Amendment protection in ruling that once a suspect invokes the right to counsel, all police questioning must cease until counsel has been made available to him, unless the suspect himself initiates further communication with the police.[5]

Recently, in *Minnick v. Mississippi*,[6] the Court further broadened a suspect's right to counsel under the Fifth Amendment.[7] Claiming merely to be following the logical implications of *Miranda* and *Edwards*, the Court held that once a suspect requests counsel, "interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney."[8]

Neither the U.S. Constitution nor the *Miranda* and *Edwards* decisions required the broad, prophylactic rule adopted by the

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1. 384 U.S. 436 (1966).
2. *Miranda*, 384 U.S. at 444.
3. *See id.* at 467.
4. 451 U.S. 477 (1981).
5. *See Edwards*, 451 U.S. at 484-85.
6. 111 S. Ct. 486 (1990).
7. The Court did not reach the Sixth Amendment issues in its decision. *See Minnick*, 111 S. Ct. at 489.
8. *Id.* at 491.

Minnick Court. The Court, by focusing on the need to ensure the voluntariness of confessions rather than on a suspect's ability to make a knowing and intelligent waiver of his rights, ignored the justification for the extension of the right to counsel originally provided in *Edwards*. *Minnick* also creates a disparity between the protection provided to a suspect who invokes the right to remain silent (police are allowed to reinitiate questioning at a future time),[9] and one who invokes the right to counsel (police may not reinitiate questioning).[10] Combined, these criticisms demonstrate that the decision in *Minnick* has no basis in the Constitution or the reasoning of prior cases.

Minnick involved the trial of Robert Minnick for murder in Mississippi. Minnick and a fellow prisoner had escaped from a county jail in Mississippi. They broke into a mobile home in search of weapons and subsequently shot the owner and a friend. The two fled to Mexico, but Minnick proceeded to California, where he was arrested four months after the murders. He was initially interrogated by FBI agents. He answered some questions but refused to sign a waiver form. The interrogation ceased when Minnick requested a lawyer.[11] Minnick consulted with his lawyer a number of times within the next few days. Two days after the initial interrogation, a sheriff from Mississippi arrived in California to question Minnick. After reminding Minnick of his *Miranda* rights, the sheriff asked Minnick questions concerning his escape. Minnick gave a statement that implicated him in the murders at the mobile home.[12]

At trial, Minnick moved to suppress the statements made to the sheriff. The trial court denied this motion, and, on appeal, the Mississippi Supreme Court affirmed the decision.[13] Relying on language in *Edwards* stating that the prohibition against po-

9. *See* Michigan v. Mosley, 423 U.S. 96 (1975). In *Mosley*, the Court held that after a suspect invokes the right to remain silent, police can reinitiate questioning, provided they have fully respected the suspect's right to terminate questioning. *See id.* at 104.

10. Arguably, this disparity existed before *Minnick*. After *Edwards*, police could not reinitiate questioning once the suspect had invoked the right to counsel until counsel was made available. *Mosley* allowed police to reinitiate questioning, provided they had fully respected the suspect's right to cut off questioning. *See Mosley*, 423 U.S. at 104. *Edwards* and *Mosley* can be reconciled because *Mosley* requires police to allow the suspect to effectuate his right to remain silent. A suspect invoking the right to counsel cannot effectuate this right until counsel has been provided.

11. The information Minnick gave to the FBI was suppressed at Minnick's trial and was therefore not at issue in the case. *See Minnick*, 111 S. Ct. at 489.

12. *See id.* at 488-89.

13. *See* Minnick v. State, 551 So. 2d 77 (Miss. 1988).

lice interrogation applies "until counsel has been made available,"[14] the court held that "[s]ince counsel was made available to Minnick, his Fifth Amendment right to counsel was satisfied."[15]

The Supreme Court reversed the decision of the Mississippi Supreme Court. Writing for the majority, Justice Kennedy[16] stated that "the Fifth Amendment protection of *Edwards* is not terminated or suspended by consultation with counsel."[17] Justice Kennedy argued that the *Edwards* and *Miranda* decisions focused on the presence of counsel, rather than the mere availability of counsel. He noted that the *Miranda* decision provides that, once a suspect asserts his right to counsel, "interrogation must cease until an attorney is present."[18] In *Edwards*, the defendant's conviction was overturned because the defendant had not waived his right "to have counsel *present* during custodial interrogation."[19] Justice Kennedy cited a number of cases that are consistent with this emphasis on the presence of counsel during interrogation.[20] The rationale for this emphasis, Justice Kennedy stated, derives from *Miranda*, in which the Court stated that " '[t]he presence of counsel . . . would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the [Fifth Amendment] privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion.' "[21] Accordingly, Minnick's statements, made after he had invoked the right to counsel but without his attorney present, should have been suppressed, notwithstanding the prior consultations he had with his attorney.

Justice Kennedy also argued that the benefits of this bright-line rule outweigh any burdens it places on police interrogation. As with other bright-line rules, Justice Kennedy observed,

14. Edwards v. Arizona, 451 U.S. 477, 484-85 (1981).

15. Minnick v. State, 551 So. 2d at 83.

16. Justice Kennedy was joined by Justices White, Marshall, Blackmun, Stevens, and O'Connor.

17. *Minnick*, 111 S. Ct. at 489.

18. *Id.* (quoting Miranda v. Arizona, 384 U.S. 436, 474 (1966)).

19. *Id.* at 490 (quoting Edwards v. Arizona, 451 U.S. 477, 482 (1981) (emphasis by the *Edwards* Court)).

20. *See, e.g.*, Patterson v. Illinois, 487 U.S. 285, 291 (1988); Arizona v. Roberson, 486 U.S. 675, 680 (1988); Shea v. Louisiana, 470 U.S. 51, 52 (1985); Oregon v. Bradshaw, 462 U.S. 1039, 1043 (1983).

21. *Minnick*, 111 S. Ct. at 490 (quoting *Miranda*, 384 U.S. at 466).

the *Minnick* rule provides specificity by which courts can judge police conduct.[22] In addition, Justice Kennedy noted a number of vagaries that adoption of the rule would prevent. First, Fifth Amendment protection will not "pass in and out of existence multiple times."[23] Without the *Minnick* rule, each consultation with counsel would remove the protection guaranteed in *Edwards*. Second, under *Minnick*, courts will not have to make determinations concerning the existence or adequacy of consultations.[24] Third, like *Edwards*, the new rule will "conserve judicial resources which would otherwise be expended in making difficult determinations of voluntariness."[25] Finally, the rule will provide equal protection to suspects, because a suspect whose attorney reached the police station quickly and consulted with the suspect would continue to receive the same protection as the suspect whose counsel was more tardy.[26]

Justice Scalia dissented.[27] He decried the Court's establishment of "an irrebuttable presumption that a criminal suspect, after invoking his *Miranda* right to counsel, can *never* validly waive that right during any police-initiated encounter, even after the suspect has been provided multiple *Miranda* warnings and has actually consulted his attorney."[28] Rather than focusing on the right to have counsel present during questioning, a right he did not deny, Justice Scalia argued that the Court should have focused on the circumstances in which a suspect could waive that right. Justice Scalia pointed to language in *Johnson v. Zerbst*,[29] which defined a waiver as "an intentional re-

22. *See, e.g.*, Fare v. Michael C., 442 U.S. 707, 718 (1979) (explaining the rationale underlying the *Edwards* rule):

> Whatever the defects, if any, of this relatively rigid requirement that interrogation must cease upon the accused's request for an attorney, *Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible. This gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts [because of the suppression of truthful evidence].

23. *Minnick*, 111 S. Ct. at 492.

24. *See id.*

25. *Id.* at 489.

26. *See id.* at 492.

27. Justice Scalia was joined in his dissenting opinion by Chief Justice Rehnquist. Justice Souter took no part in the consideration or decision of the case.

28. *Id.* at 492 (Scalia, J., dissenting) (emphasis in original).

29. 304 U.S. 458 (1938).

linquishment or abandonment of a known right or privilege."[30] Justice Scalia stated that the Court should allow the government to prove a waiver, as the Court had ruled in many previous cases,[31] rather than create a category of confessions that are involuntary per se.[32]

In addition, Justice Scalia thought that the establishment of this bright-line rule would do more harm than good. He argued that "[t]he value of any prophylactic rule . . . must be assessed not only on the basis of what is gained, but also on the basis of what is lost."[33] One negative consequence that Justice Scalia noted is that the prohibition against using waivers obtained from police-initiated conversations would extend perpetually, regardless of when police reinitiated questioning,[34] and in cases in which there is no doubt that the suspect made a voluntary and knowing waiver.[35] Another consequence is that the rule would decrease the number of admissions of guilt, which are "essential to society's compelling interest in finding, convicting, and punishing those who violate the law."[36] Addressing the Court's fears of what would happen if it did not adopt a bright-line rule, Justice Scalia commented that a specific definition of consultation is not necessary, because any discussion between a suspect and an attorney would "eliminate the suspect's feeling of isolation" and "assure him the presence of legal assistance."[37] Less protection for suspects whose lawyers are diligent is acceptable, according to Justice Scalia, because once a suspect has consulted with his lawyer, he does not require the additional protection.[38] Justice Scalia also argued that, in the absence of the majority's new rule, *Edwards* would not pass in and out of existence multiple times, but would sim-

30. *Zerbst*, 304 U.S. at 464.

31. *See, e.g.*, Fare v. Michael C., 442 U.S. 707, 723-27 (1979); North Carolina v. Butler, 441 U.S. 369 (1979); Michigan v. Mosley, 423 U.S. 96 (1975).

32. Justice Scalia argued that *Edwards* had already created such a category of confessions. *See Minnick*, 111 S. Ct. at 495 (Scalia, J., dissenting). The discussion above, *see supra* note 10, suggests that *Edwards* merely provided that a confession obtained after denial of a right to counsel is a violation of *Miranda* rights. Thus, *Edwards* did not create a new category of involuntary confessions, but merely reiterated the presumption of involuntariness raised in *Miranda*.

33. *Minnick*, 111 S. Ct. at 495 (Scalia, J., dissenting).

34. *See id.* at 496 (Scalia, J., dissenting).

35. *See id.* at 495 (Scalia, J., dissenting).

36. *Id.* (Scalia, J., dissenting) (quoting Moran v. Burbine, 475 U.S. 412, 426 (1986)).

37. *Id.* at 497 (Scalia, J., dissenting).

38. *See id.* (Scalia, J., dissenting).

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ply cease to exist once consultation occurred.[39]

Throughout his dissent, Justice Scalia was troubled by the Court's apparent lack of authority to adopt the rule. He stated that the rule in *Minnick* is supposedly "needed to avoid 'inconsisten[cy] with [the] purpose' of *Edwards*' prophylactic rule, which was needed to protect *Miranda*'s prophylactic right to have counsel present, which was needed to protect the right against *compelled self-incrimination* found (at last!) in the Constitution."[40] Although Justice Scalia accepted *Miranda*'s prophylactic rule as necessary to prevent the "inherently compelling pressures"[41] of police custody from producing violations of suspects' rights under the Fifth Amendment, he saw nothing in the Fifth Amendment that should preclude a suspect from waiving his right to counsel. In addition, he saw nothing in the Constitution to prevent police from simply asking suspects to reconsider their decision not to confess, and yet, the rule in *Minnick* does just that, under the guise of prohibiting coercion.[42] Justice Scalia stated that "this protective enterprise is beyond our authority under the Fifth Amendment or any other provision of the Constitution . . . ."[43]

Justice Scalia was correct in observing that the rule adopted by the Court in *Minnick* has no foundation in the United States Constitution, nor did the *Miranda* and *Edwards* decisions require adoption of the rule. There is no language in the Fifth Amendment that requires the government to provide a suspect with counsel.[44] The Court in *Miranda* believed that the right to counsel was necessary to uphold the Fifth Amendment right against compelled self-incrimination. Any further extension of the *Miranda* rule must accordingly be justified not on the basis of whether it is necessary to protect the suspect's right to counsel, but whether it is necessary to protect the individual's right against compelled self-incrimination. Arguably, the rule in *Edwards* is necessary to protect against compelled self-incrimination. It is a rare case when a confession obtained after a request

39. *See id.* (Scalia, J., dissenting).

40. *Id.* (Scalia, J., dissenting) (emphasis in original) (quoting majority opinion, 111 S. Ct. at 491).

41. Miranda v. Arizona, 384 U.S. 436, 467 (1966).

42. *See Minnick*, 111 S. Ct. at 496 (Scalia, J., dissenting).

43. *Id.* at 498 (Scalia, J., dissenting).

44. The Fifth Amendment provides, in part, that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

for counsel, but before that counsel arrives, is not the product of some police overreaching or coercion. As the Court stated in *Michigan v. Harvey*,[45] the *Edwards* rule was specifically designed "to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights."[46] The *Minnick* rule would apply, however, in instances where there is no evidence of coercion. In the absence of coercion, the suspect's statement is not compelled, and thus does not violate the Fifth Amendment. The traditional standard advanced under *Miranda* to determine the voluntariness of a waiver and confession can be applied where voluntariness is at issue, but the Fifth Amendment does not require the expansive prophylactic rule adopted in *Minnick*.[47]

The Court's reasoning in *Minnick* is flawed because it focuses on the voluntariness of the confession, rather than on the suspect's ability to give a knowing and intelligent waiver.[48] In *Edwards*, the Court assumed that the suspect's confession was voluntary. The Court reached its holding on the basis that Edwards had not made a knowing and intelligent waiver of his rights, because counsel was not made available to him upon his request.[49] Any extension of the *Edwards* rule must be predicated upon a showing that additional protection is needed to ensure a knowing and intelligent waiver. The *Minnick* decision, however, focuses on the need to protect against "badgering,"[50] "compulsion,"[51] and "coercive pressures."[52] The Court ignored the obvious fact that once consultation with counsel has taken place, a suspect will understand his rights, because the attorney will explain them to him. If afterwards, the suspect

45. 110 S. Ct. 1176 (1990).

46. *Harvey*, 110 S. Ct. at 1180.

47. Similar criticism can be raised concerning any prophylactic rule, that is, that it sweeps too broadly and outlaws permissible conduct. The difference between the rule in *Minnick* and the rule in, for example, *Miranda*, is that in *Miranda*, the Court thought the rule was necessary to protect against violations of the Constitution. In *Minnick*, no such constitutional foundation or necessity was present.

48. In *Edwards*, the Court said that "the voluntariness of a . . . [confession] on the one hand, and a knowing and intelligent waiver on the other, are discrete inquiries." Edwards v. Arizona, 451 U.S. 477, 484 (1981).

49. Although the Court did not question the state courts' determination of voluntariness in the case, the Court reversed the Arizona Supreme Court's decision because none of the state courts considering the case "undertook to focus on whether Edwards understood his right to counsel and intelligently and knowingly relinquished it." *Id.*

50. *Minnick*, 111 S. Ct. at 489 (quoting *Harvey*, 110 S. Ct. at 1180).

51. *Id.* at 490 (quoting Miranda v. Arizona, 384 U.S. 436, 466 (1966)).

52. *Id.* at 491.

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chooses to waive those rights, there can be no doubt that the waiver was intelligently and knowingly given. Of course, if the suspect can show that police coercion made the subsequent waiver involuntary, any statements he made following the waiver will be suppressed. However, such a determination can be made under traditional tests of voluntariness, without need for the *Minnick* rule, which raises an irrebuttable presumption of involuntariness.[53]

The holding in *Minnick* establishes incongruous standards for those suspects who invoke the right to remain silent and those who invoke the right to counsel. In *Michigan v. Mosley*,[54] the Court held that once a suspect has expressed a desire to remain silent, police may reinitiate interrogation, provided that they have allowed for an adequate "cooling-off" period and readvised the accused of his *Miranda* rights. The *Mosley* Court rejected any blanket prohibition of obtaining voluntary statements from suspects.[55] In *Minnick*, however, the Court held that *Miranda* and *Edwards* did allow the creation of a "*per se* proscription of indefinite duration."[56] There is no rationale for this disparity. There is no reason to believe that police reinitiation of interrogation after counsel has been provided is any more coercive than reinitiation after the "cooling-off" period. In fact, there may be less coercion after counsel has been provided because, in that case, the suspect has received legal advice. The ultimate result of *Minnick* is to provide a suspect with vastly different levels of protection, depending on which part of

53. The Court argued that a suspect, " 'having expressed his desire to deal with the police only through counsel,' " was not subject to further interrogation unless counsel was present. *Id.* at 490 (quoting *Edwards*, 451 U.S. at 484). The idea that a suspect can limit all contact with police by insisting on communicating through counsel can be inferred from *Miranda*. However, unless the suspect is incompetent, that is, unable to make an intelligent and informed decision for himself, there is no logic in also inferring that a suspect can not retract this limitation. Only in those rare cases where a suspect's lack of mental capacity requires the actual *presence* of counsel is there a justification for prohibiting a suspect from waiving that right.

54. 423 U.S. 96 (1975).

55. [A] blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests. Clearly, therefore, neither this passage nor any other passage in the *Miranda* opinion can sensibly be read to create a *per se* proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent.

Mosley, 423 U.S. at 102-03.

56. *Id.*

his *Miranda* rights he invokes.[57]

We should not ignore the fact that a large majority of people whom the police interrogate are the poorly educated and minorities, persons for whom the police station presents an extremely coercive environment. Unwittingly, these people may confess to crimes when, if fully informed, they would refrain from speaking to the police. Perhaps for this reason, the Supreme Court has adopted prophylactic rules that tend to suppress truthful confessions but serve the important function of protecting the individual's constitutional rights. In *Minnick*, however, the Court established a prophylactic rule without showing how it was necessary to further constitutional rights. The Court extended the *Edwards* rule based on reasoning totally divorced from the justification underlying that rule. The result is the creation of an irreconcilable contradiction in the Court's jurisprudence that will cause as much confusion as the bright-line rule of *Minnick* was intended to prevent. In sum, the Court's reasoning in *Minnick* fails to justify this extension of Fifth Amendment protection for criminal suspects.

Stephen L. Coco

REGULATION OF RACIST SPEECH: *In re Welfare of R.A.V.*, 464 N.W.2d 507 (Minn. 1991).

Judicial treatment of extremist speech under the First Amendment has traditionally held fast to two related principles: a refusal to evaluate the ideas expressed on their merits,[1] and a refusal to deny protection for those ideas because of their

57. One possible distinction may derive from the Court's opinion in Arizona v. Roberson, 486 U.S. 675 (1988), in which the Court stated that "the presumption raised by a suspect's request for counsel . . . [is] . . . that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance." *Id.* at 683. The Court stated that a suspect's decision to cut off questioning does not raise the same presumptions. Invoking the right to remain silent could mean that a suspect feels comfortable dealing with the police on his own. On the other hand, it could mean that the suspect invoking the right to remain silent does not understand enough to ask for counsel. Such speculation about the mental states and capacities of numerous and unknown suspects provides a very flimsy basis for creating such disparate levels of constitutional protection.

1. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

tendency to offend others.[2] Because they safeguard the rights of unpopular groups to criticize the existing order and put forward agendas for change, these principles have been considered critical to the liberation of oppressed groups. The problem of racist speech, however, brings the interests of free speech and protection of minorities into conflict. In response both to a perception that racial harassment is on the rise in America[3] and to a growing body of empirical work that documents the physical, psychological, and social harms of racist speech,[4] many traditional supporters of free speech have begun to advocate restrictions on speech that harasses or degrades members of minority groups.[5] The courts, however, have not been nearly so willing to abandon First Amendment orthodoxy.[6] In *Doe v. University of Michigan*,[7] a federal district court struck down a university policy aimed at harassment of members of minority groups as unconstitutionally overbroad and vague. In its opinion, however, the court noted that a more narrowly-drawn regulation might be constitutional under the "fighting-words" doctrine, which holds that words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace"[8] are not protected by the First Amendment.

The Supreme Court of Minnesota recently pursued this approach in the case of *In re Welfare of R.A.V.*,[9] in which the court

2. *See* Street v. New York, 394 U.S. 576, 592 (1969) (citations omitted) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.").

3. *See generally* Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 431-34; Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2326-33 (1989); Recent Development, *Bringing Hate Crime Into Focus—The Hate Crime Statistics Act of 1990*, 26 HARV. C.R.-C.L. L. REV. 261, 261-62 (1991).

4. For reviews of this literature, see Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 135-49 (1982); and Matsuda, *supra* note 3, at 2336-41.

5. *See* Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 383. For convenience, this Recent Development refers primarily to racist speech, although much of the discussion also applies to harassment based on religion, ethnicity, gender, or sexual orientation.

6. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

7. 721 F. Supp. 852 (E.D. Mich. 1989).

8. *Doe*, 721 F. Supp. at 862 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

9. 464 N.W.2d 507 (Minn. 1991) (*R.A.V.*).

construed a general bias-motivated disorderly conduct statute narrowly to prohibit only conduct that could be characterized as "fighting words" or incitement to imminent lawless action. Nevertheless, the Minnesota court failed to confront directly the controversy that has arisen since *Chaplinsky* over the meaning of the "fighting-words" standard; successful use of the "fighting-words" doctrine to combat racist speech requires a careful reappraisal of the doctrine itself.

The events that gave rise to the *R.A.V.* case began when Russell and Laura Jones, a black couple with five children, moved into a predominantly white, working-class neighborhood on the east side of St. Paul, Minnesota.[10] The Joneses were subjected to a pattern of harassment that included slashed tires and racial epithets directed toward the children by white "skinheads" on the street and culminated in the burning of a cross on the Joneses' lawn in the early morning of June 21, 1990.[11] Subsequently, a seventeen-year-old boy was arrested[12] and charged with violating a St. Paul ordinance providing that

> [w]hoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender commits disorderly conduct and shall be guilty of a misdemeanor.[13]

The trial court dismissed the charges on the ground that the ordinance prohibited expressive conduct protected under the First and Fourteenth Amendments, and was thus unconstitutionally overbroad.[14] The city appealed the ruling, arguing that

10. *See Burning Cross Greets Black Family on St. Paul's East Side*, Minneapolis Star Tribune, June 22, 1990, at 1A, col. 5.

11. *See id.*

12. *See Ordinance on Cross Burnings is Upheld*, Minneapolis Star Tribune, Jan. 18, 1991, at 1B, col. 6.

13. ST. PAUL, MINN., LEG. CODE § 292.02 (1990).

14. *See R.A.V.*, 464 N.W.2d at 508. Under the Supreme Court's overbreadth doctrine,

> an individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens . . . those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.

Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985). If the challenged provision is substantially overbroad, "the law may not be enforced against anyone, including the party before the court, until it is narrowed to reach only unprotected activity, whether by legislative action or by judicial construction . . . ." *Id.* at 503-04.

its ordinance could be narrowly construed to reach only conduct that falls outside First Amendment protection.[15] The Minnesota Supreme Court agreed, holding that the ordinance could withstand constitutional challenge if read to apply only to conduct that constitutes "fighting words" or incitement to imminent lawless action.[16] "So interpreted," the court stated, "the ordinance is a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order . . . and therefore is not prohibited by the first amendment."[17]

In its holding, however, the *R.A.V.* court failed to come to grips explicitly with the controversy that surrounds the meaning of the "fighting-words" standard. The court defined "fighting words" only by quoting the classic formulation of *Chaplinsky*: "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[18] Originally, this standard was believed to be based on the content of the speech itself; the legislature was allowed to presume that certain words would almost certainly bring about the outbreak of violence without close examination of the context in which they were uttered.[19] More recent Supreme Court decisions, however, show a trend toward a standard that focuses on the context in which the speech occurs[20] and protects offensive speech unless it is actually likely to cause a breach of the peace.[21]

15. *See R.A.V.*, 464 N.W.2d at 508. Statutes are generally voided for overbreadth only if they cannot be narrowed in order to restrict only unprotected speech. As the Supreme Court noted in Broadrick v. Oklahoma, 413 U.S. 601 (1973), facial invalidation is "strong medicine," to be applied "sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute." *Id.* at 613.

16. *See R.A.V.*, 464 N.W.2d at 510.

17. *Id.* at 511 (citations omitted).

18. *Id.* at 510 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

19. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-10, at 850 (2d ed. 1988).

20. *See* Gooding v. Wilson, 405 U.S. 518 (1972). In *Gooding*, the Court invalidated a Georgia statute that prohibited the use of "opprobrious words or abusive language tending to cause a breach of the peace." *Id.* at 519. One factor that the Court cited as demonstrating the statute's overbreadth is that the statute had been interpreted by the Georgia courts to permit the conviction of a speaker even if the abusive language was directed to "one who, on account of circumstances or by virtue of the obligation of office, can not then and there resent the same by a breach of the peace." *Id.* at 526. *See also* Hess v. Indiana, 414 U.S. 105, 107 (1973) (shouting "We'll take the f—ing street later" was not fighting words where the expression was not directed at any particular person).

21. *See* L. TRIBE, *supra* note 19, § 12-10, at 850-51; Note, *The Fighting Words Doctrine—Is There a Clear and Present Danger to the Standard?*, 84 DICK. L. REV. 75, 86-90 (1979).

The *R.A.V.* court's treatment of "fighting words" shows an implicit preference for the content-based approach.[22] This preference is evident in the court's statement that

> [b]urning a cross in the yard of an African American family's home is deplorable conduct that the City of St. Paul may without question prohibit. The burning cross is itself an unmistakable symbol of violence and hatred based on virulent notions of racial supremacy. It is the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear.[23]

Although the court referred to some aspects of the context in which the city may "without question prohibit" cross-burnings, it did not seem to require any further inquiry into the circumstances in order to determine whether R.A.V.'s act was actually likely to bring about a breach of the peace. It would not seem to make a difference, for example, whether Mr. Jones was home at the time, although an actual violent response would presumably be more likely to result if he was present. Similarly, the court ignored the fact that the identity of the perpetrator was unknown at the time of the incident, indicating that R.A.V. and the Joneses never came into such close contact as to risk actual violence.[24] Moreover, the court's application of the standard of *Brandenburg v. Ohio*[25] to situations in which the speaker incites violence against himself signifies that the court intends "fighting words" to represent a content-based analysis, while "incitement" represents a context-based analysis of the likelihood of actual violence.[26] By making contextual analysis an explicitly separate category, the court reserved a content-based meaning for "fighting words."

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22. Use of the terms "content-based" and "context-based" with reference to alternative approaches to "fighting words" should not be confused with the distinction between "content-based" restrictions, which regulate speech based on the nature of what is said, and "facially neutral" restrictions, which regulate the time, place, and manner of speech based on a governmental interest independent of the content of the speech itself. Both "fighting-words" approaches are "content-based" in this second sense of the term. *See* L. TRIBE, *supra* note 19, § 12-2, at 789-94, § 12-10, at 837-41.

23. *R.A.V.*, 464 N.W.2d at 508 (footnote omitted).

24. As of the day following the cross-burning, police had not identified R.A.V. as the responsible party. *See Burning Cross Greets Black Family on St. Paul's East Side*, Minneapolis Star Tribune, June 22, 1990, at 1A, col. 5.

25. 395 U.S. 444 (1969).

26. The *Brandenburg* standard has traditionally been applied to situations in which the speaker incites violence by his supporters against others. Some commentators argue, however, that the trend toward context-based analysis of "fighting words" imports the *Brandenburg* idea of "clear and present danger" into the area of "fighting words." *See* Note, *supra* note 21, at 95.

If the goal is to protect people from racist attacks, then a content-based "fighting-words" standard has clear advantages over a standard that focuses on the actual likelihood of a violent response. Focusing on the content of the speech avoids a situation in which the victim's right to protection depends on his propensity or ability to resort to violence. It seems counter-intuitive, for example, that Mr. Jones should be protected from being called a "nigger" by virtue of his ability to carry out a violent response, while his wife or small children should not be so protected.[27] The children in particular seem most in need of protection despite their inability to credibly threaten violence against the speaker. Even for adults, the unique psychological impact of racist epithets and symbols on a person who has experienced racial oppression may intimidate the victim rather than provoke him to violence. As Matsuda observes, "the effect of dehumanizing racist language is often flight rather than fight. Targets choose to avoid racist encounters whenever possible, internalizing the harm rather than escalating the conflict. Lack of a fight and admirable self-restraint then defines the words as nonactionable."[28]

The argument for a content-based standard rests on the understanding that the real harm to be prevented in restricting certain types of "fighting words" is not physical violence but the damage inflicted by the words themselves. *Chaplinsky* apparently allows restriction of those words that "by their very utterance inflict injury," as well as those that "tend to incite an immediate breach of the peace."[29] No court, however, has ever explicitly based a restriction on the "injury" prong of the *Chaplinsky* test, and some commentators have dismissed it as dictum.[30] Moreover, restriction of speech because of its emo-

27. The context-based version of the standard has been criticized as "a paradigm based on a white male point of view" because it assumes "an encounter between two persons of relatively equal power who have been acculturated to respond to face-to-face insults with violence." Lawrence, *supra* note 3, at 453-54 (footnote omitted).

28. Matsuda, *supra* note 3, at 2355-56 (footnotes omitted). *See also* Balkin, *supra* note 5, at 421 (*Brandenburg* and *Chaplinsky* "do not concern speakers who browbeat their opponents into silence"). A more simple explanation for a passive response to racist speech is that "[i]t is both uncommon and unlikely that whites will insult minorities with racial epithets in contexts where they are outnumbered or overmatched." Lawrence, *supra* note 3, at 454 n.94. Again, it seems unfair to protect the speaker's abuse simply because he has taken care to assemble a gang of fellow thugs.

29. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

30. *See* Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 508 (emphasizing that the New Hampshire statute at issue in *Chaplinsky* had been

tional impact upon the listener appears to fly in the face of the longstanding refusal to prohibit speech simply because "the ideas are themselves offensive to some of their hearers."[31] Nevertheless, the Supreme Court has never squarely rejected the "injury" prong of *Chaplinsky*.[32] The question, then, is under what circumstances can a content-based standard be reconciled with the more general trend in First Amendment doctrine toward protecting offensive speech?

A closer look at three cases that are representative of this trend can provide the beginning of an answer. In *Street v. New York*,[33] the United States Supreme Court reversed the conviction of a man who protested the shooting of civil rights leader James Meredith by burning an American flag. In *Cohen v. California*,[34] the Court reversed the conviction for disturbing the peace by "offensive conduct" of a man who appeared in a Los Angeles courthouse wearing a jacket with the words "F— the Draft" emblazoned on the back. Finally, in *Collin v. Smith*,[35] the Seventh Circuit struck down an ordinance passed by the predominantly Jewish Village of Skokie in anticipation of a march by American Nazis; the ordinance prohibited all public demonstrations that "incite violence, hatred, abuse or hostility toward a person or group of persons by reason of reference to religious, racial, ethnic, national or regional affiliation."[36] What is important about these cases is that none of them involved face-to-face harassment directed at particular individuals.[37] De-

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construed so as to prohibit only those words that had a direct tendency to cause acts of violence by the addressee).

31. Street v. New York, 394 U.S. 576, 592 (1969). *See also* Texas v. Johnson, 491 U.S. 397 (1989); Hustler Magazine v. Falwell, 485 U.S. 46 (1988); Terminiello v. Chicago, 337 U.S. 1 (1949).

32. In Rosenfeld v. New Jersey, 408 U.S. 901 (1971), Justice Powell argued that "the exception to First Amendment protection recognized in *Chaplinsky* is not limited to words whose mere utterance entails a high probability of an outbreak of physical violence. It also extends to the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience." *Id.* at 905 (Powell, J., dissenting from decision to vacate and remand). Similarly, Professor Tribe acknowledges that "[t]he Constitution may well allow punishment for speaking words that cause hurt just by their being uttered and heard." L. TRIBE, *supra* note 19, § 12-10, at 856.

33. 394 U.S. 576 (1969).

34. 403 U.S. 15 (1971).

35. 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

36. *Collin*, 578 F.2d at 1199 (quoting SKOKIE, ILL., ORDINANCES No. 77-5-N-994, § 27-56(C)). *See also* Village of Skokie v. National Socialist Party of America, 69 Ill. 2d 605, 373 N.E.2d 21 (1978) (striking down injunction that prohibited Nazis from displaying the swastika in their march).

37. In *Street*, the defendant was making an overtly political statement directed to the public in general. Similarly, in *Cohen*, the court refused to hold that the defendant's use

spite the latitude given to offensive speech in recent decisions, then, the possibility of restricting direct verbal or symbolic assaults on particular individuals remains an open question.[38]

In the absence of controlling precedent, this question may be resolved by appealing to the principles that are embodied in the First Amendment.[39] Legal scholars have articulated a number of philosophical justifications for free speech. Two of these—the "free marketplace of ideas"[40] and the notion of "self-government"[41]—assume that free speech takes place in the form of rational dialogue; the only sort of speech that is protected is "communication in which the participants seek to persuade, or are persuaded . . . ."[42] "It is reasonable to distinguish," according to Professor Tribe, "between contexts in which talk leaves room for reply and those in which talk triggers action or causes harm without the time or opportunity for response. It is not plausible to uphold the right to use words as projectiles where no exchange of views is involved."[43] Direct verbal attacks have exactly this effect of preempting any further exchange of views; according to Professor Lawrence, such speech "functions as a preemptive strike. The racial invective is experienced as a blow, not a proffered idea, and once the blow

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of vulgarity was "fighting words" because no one "could reasonably have regarded the words on appellant's jacket as a direct personal insult." *Cohen*, 403 U.S. at 20. The district court in *Collin* likewise noted that the Skokie ordinance was "clearly not aimed solely at personally abusive, insulting behaviour." Collin v. Smith, 447 F. Supp. 676, 690 (N.D. Ill. 1978).

38. A direct verbal assault on an individual *was* at issue in Gooding v. Wilson, 405 U.S. 518 (1972), in which the defendant was convicted for using abusive language. The defendant told police officers: "White son of a bitch, I'll kill you," "You son of a bitch, I'll choke you to death," and "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces." *Id.* at 519 n.1. The Court did not reach the constitutionality of punishing such statements, however, voiding the statute as overbroad on its face because the Georgia courts had construed it to prohibit language that was merely "harsh and insulting," including even statements such as "You swore a lie." *See id.* at 525-27. Moreover, the Court indicated that, had it not disposed of the case on overbreadth grounds, the defendant's speech might have been protected because the addressee was a police officer. *See id.* at 519 n.1, 526.

39. For a jurisprudential defense of this method of resolving formally indeterminate or "hard" cases, see R. DWORKIN, TAKING RIGHTS SERIOUSLY 81-130 (1977).

40. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas . . . . [T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."). *See also* J.S. MILL, ON LIBERTY 19-67 (C. Shields ed. 1956).

41. *See* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26-27 (1948) ("[T]he fact that the citizens of the United States must decide political questions by universal suffrage means that they cannot be denied access to any political argument, right or wrong, that might aid their deliberations.").

42. L. TRIBE, *supra* note 19, § 12-8, at 837.

43. *Id.*

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is struck, it is unlikely that dialogue will follow."[44] Racist verbal assaults thus inhibit the operation of both the free marketplace of ideas and democratic self-government.

Two additional rationales for free speech, however, do not necessarily depend on dialogue. The first focuses on the value of free speech to individual self-fulfillment,[45] while the second emphasizes that free speech may teach the virtue of tolerance by restraining members of society from silencing offensive speakers.[46] If self-fulfillment is the value behind the First Amendment, though, there is no reason that the fulfillment of the speaker should outweigh that of the listener, which is hampered by racism.[47] The tolerance theory, on the other hand, fails to provide a reason why other values, such as equality and respect for others, may not outweigh tolerance in particular cases.[48] Moreover, it seems possible to teach tolerance by requiring that racist *ideas* be tolerated, while protecting civility by disallowing them in the form of direct assaults on particular individuals.[49]

Burning a cross in front of a black family's home thus invokes none of the values associated with the First Amendment, despite the fact that immediate violence is unlikely to result. The

44. Lawrence, *supra* note 3, at 452.

45. *See* T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 5 (1963) ("[E]xpression is an integral part of . . . the affirmation of self. The power to realize [man's] potentiality as a human being begins at this point and must extend at least this far if the whole nature of man is not to be thwarted."). The Supreme Court has recognized that even vulgarities like "F— the Draft" can advance this goal; as Justice Harlan wrote in *Cohen*, expression "conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well." Cohen v. California, 403 U.S. 15, 26 (1971).

46. *See* L. BOLLINGER, THE TOLERANT SOCIETY 10 (1986) ("[F]ree speech involves a special act of carving out one area of social interaction for extraordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters.").

47. *See* Matsuda, *supra* note 3, at 2339-40; Delgado, *supra* note 4, at 136-43. Professor Delgado argues that the speaker's self-fulfillment is hampered as well, because "[b]igotry . . . reinforc[es] rigid thinking, thereby dulling [his] moral and social senses and possibly leading to a 'mildly . . . paranoid' mentality." *Id.* at 140 (footnotes omitted) (quoting Allport, *The Bigot in Our Midst*, 40 COMMONWEAL 582 (1944), *reprinted in* ANATOMY OF RACIAL PREJUDICE 161, 164 (G. Huszar ed. 1946)).

48. *See* Delgado, *supra* note 4, at 141 ("The failure of the legal system to redress the harms of racism, and of racial insults, conveys to all the lesson that egalitarianism is not a fundamental principle; the law, through inaction, implicitly teaches that respect for individuals is of little importance.").

49. *See* D. DOWNS, NAZIS IN SKOKIE: FREEDOM, COMMUNITY, AND THE FIRST AMENDMENT 6-8 (1985). Downs's argument for civility is much stronger with respect to direct assaults than in the context of the Skokie case itself. On the general necessity of civility and good manners to the functioning of society, see E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 86-88 (T. Mahoney ed. 1955) (1790).

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case demonstrates that it makes sense to use a content-based standard for "fighting words" in cases of direct verbal or symbolic assault. It is also important, however, that the lines be drawn as narrowly as possible. The content-based standard should cover only a narrow set of racial epithets, as well as such symbols as the burning cross and swastika. These words and symbols are uniquely harmful because of their historical association with oppression and violence; as Justice Jackson wrote in *Kunz v. New York*:

> These terse epithets come down to our generation weighted with hatreds accumulated through centuries of bloodshed. . . . They are always, and in every context, insults which do not spring from reason and can be answered by none. Their historical associations with violence are well understood, both by those who hurl and those who are struck by these missiles . . . .[50]

A general prohibition may be further limited by allowing the application of a content-based standard only if certain contextual factors are present that strengthen the interests of the listener in avoiding the speech. For instance, the Supreme Court has recognized that these interests may become compelling when the listener is in his own home,[51] when he is a "captive audience" outside the home,[52] or when children are likely to be exposed to the speech.[53]

Whatever the shape of the standard eventually adopted, it is important that it be clearly delineated so as to avoid the potentially "chilling" effects of an ambiguous rule. Moreover, a renewed emphasis on the content-based approach to "fighting words" would mark a shift in First Amendment law that should be accompanied by thorough consideration of the issues and a well-articulated judicial rationale. The issue thus deserves a far

50. Kunz v. New York, 340 U.S. 290, 299 (1951) (Jackson, J., dissenting).

51. *See* Federal Communications Comm'n v. Pacifica Found., 438 U.S. 726, 748-49 (1978) (upholding Commission's authority to proscribe radio broadcasts that it finds "indecent but not obscene," in part because the broadcast intrudes into the privacy of the home); Kovacs v. Cooper, 336 U.S. 77 (1949) (upholding ordinance proscribing the operation of sound trucks in a "loud and raucous" manner, in part because the sound intrudes into the home without the owner's consent).

52. *See, e.g.*, Lehman v. City of Shaker Heights, 418 U.S. 298, 307 (1974) (Douglas, J., concurring) (commuters are captives of advertising on municipally-owned buses).

53. *See Pacifica*, 438 U.S. at 749-50; *id.* at 758-59 (Powell, J., concurring) (Federal Communications Commission's authority to restrict indecent speech on the radio also upheld in part because of potential exposure of children). Racist speech is particularly harmful to children, who "possess even fewer means for coping with racial insults than do adults." Delgado, *supra* note 4, at 147.

more thorough treatment than it was given by the Minnesota Supreme Court in *R.A.V.*

Nevertheless, *R.A.V.* is an important first step. Reflexive rejection of "even a symbolic or perceived diminution of our impartial commitment to free speech"[54] is faithful neither to the values that undergird free speech nor to the precedents; as the Supreme Court noted in *Cantwell v. Connecticut*,[55] "[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution."[56] Although the difficulty of drawing lines should caution courts to move slowly and carefully in this area, Minnesota's attempt to protect both speakers and listeners is worth pursuing.

Ernest A. Young

SANCTIONING CLIENTS UNDER RULE 11: *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 111 S. Ct. 922 (1991).

Rule 11 of the Federal Rules of Civil Procedure was amended in 1983 in response to increasing concern over frivolous litigation, pre-trial abuses, and mounting caseloads. Part of a package of changes designed to curb abuse of the litigation process, the amended rule has generated tremendous controversy, commentary, and litigation.[1] Recent commentators have expressed hope that the Supreme Court would bring a measure of clarity and uniformity to Rule 11 jurisprudence and resolve some of the more persistent conflicts generated by the rule.[2] The Court's decision in *Business Guides, Inc. v. Chromatic Communica-*

54. Strossen, *supra* note 30, at 522.

55. 310 U.S. 296 (1940).

56. *Cantwell*, 310 U.S. at 309-10.

1. Rules 7, 16, and 26 were also revised in 1983. Amended Rule 11 has been by far the most controversial of these, generating 688 reported cases at the district court and court of appeals levels by the end of 1987. In 1988 alone, 387 Rule 11 cases were reported at the district court level, and 75 at the appellate level. *See* Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 HASTINGS L.J. 383, 388 (1990). These figures do not include the many Rule 11 decisions that are not published.

2. *See* Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925 (1989). Between 1983 and 1991, the Supreme Court decided only two Rule 11 cases: Cooter & Gell v. Hartmarx, 110 S. Ct. 2447 (1990), and Pavelic & LeFlore v. Marvel Entertainment Group, 110 S. Ct. 456 (1989).

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tions Enterprises, Inc.,[3] however, is likely to prove disappointing. The majority's holding does little to dispel the confusion surrounding the rule, and invites the same criticisms that have plagued it since its revision.

The most important change made to Rule 11 in 1983 was the adoption of a more stringent standard of behavior for attorneys. The old rule required simply that an attorney have a subjective, good-faith belief that a signed document had a sound legal and factual basis.[4] Under the amended rule, attorneys must make an objectively reasonable inquiry to make sure that a document is well grounded in fact and law and advanced for no "improper purpose."[5] The amended rule also authorizes courts to sanction parties represented by attorneys. The rule does not explicitly state, however, whether represented parties are to be held to the same objective standard of reasonable inquiry or to a less strict, subjective standard. This is the question addressed in *Business Guides*.

The ambiguity arises from the juxtaposition of four key sentences in Rule 11. The rule provides in pertinent part:

> [1] Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. [2] A party who is not represented by an attorney shall sign the party's pleading, motion or other paper and state the party's address . . . . [3] The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose . . . . [4] If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable at-

3. 111 S. Ct. 922 (1991).
4. *See* FED. R. CIV. P. 11 (1938).
5. FED. R. CIV. P. 11.

torney's fee.[6]

Read in isolation, sentence [3] appears to hold *any* signer of a paper filed with a federal court to an objective standard of reasonable inquiry. In the context of the rule as a whole, however, the reach of the term "signer" is much less broad. Sentences [1] and [2] require papers to be signed by an attorney or, where a party is unrepresented, by the pro se litigant. There is no signature requirement for parties represented by attorneys. Viewed in context, sentence [3] thus seems to place a duty of reasonable inquiry only on those whose signatures are required by sentences [1] and [2]. Because clients are not required to sign, they are not "signers" for the purposes of the rule, and the duty of reasonable inquiry does not apply to them. The disjunction in sentence [4] between "person who signed" and "represented party" supports the conclusion that the writers of the amended rule did not view represented parties as "signers." Sentence [4] does state that if a signer violates the rule, not only the signer, but also the signer's client, may be sanctioned. No standard is provided, however, for determining when such a sanction is appropriate.

Only two circuits have dealt directly with the question of what standard applies to represented parties under Rule 11. In *Calloway v. Marvel Entertainment Group*,[7] the Second Circuit Court of Appeals held that a subjective, good-faith standard is the appropriate one for represented parties. It ruled that represented parties may be sanctioned only when they have "actual knowledge" that a paper contains false statements or is filed for an improper purpose.[8] In its consideration of *Business Guides*, the Ninth Circuit held that the objective standard is the correct one for represented parties as well as attorneys.[9] In its review of *Business Guides*, the Supreme Court agreed with the Ninth Circuit's position, holding that "Rule 11 imposes an objective standard of reasonable inquiry on represented parties who sign papers or pleadings."[10]

6. *Id.* The sentences are numbered to facilitate references to the rule's language in the text.

7. 854 F.2d 1452 (2d Cir. 1988), *rev'd in part on other grounds sub nom.* Pavelic & LeFlore v. Marvel Entertainment Group, 110 S. Ct. 456 (1989).

8. *See Calloway*, 854 F.2d at 1474.

9. *See* Business Guides, Inc. v. Chromatic Communications Enters., Inc., 892 F.2d 802, 811 (9th Cir. 1989), *aff'd*, 111 S. Ct. 922 (1991).

10. Business Guides, Inc. v. Chromatic Communications Enters., Inc., 111 S. Ct. 922, 934-35 (1991).

Business Guides arose out of a copyright infringement suit by Business Guides, Inc., a publisher of trade directories, against a competitor, Chromatic Communications Enterprises (Chromatic).[11] Business Guides alleged that its 1984 directory of computer products and services had been copied by Chromatic, and sought a temporary restraining order (TRO) to prevent the promotion and sale of the Chromatic guide. In a departure from usual practice, the TRO application was signed by the president of Business Guides, as well as by the company's attorney.[12]

Business Guides supported its complaint by alleging that Chromatic's guide duplicated errors that had originally appeared in the Business Guides directory. Business Guides routinely plants such errors, known as "seeds," in its own directories to help it detect copying, and it claimed that the only way Chromatic's guide could have contained precisely those errors was for it to have copied entries from the Business Guides directory. Before the TRO hearing, however, the court discovered that the entries alleged to be copied contained no incorrect information,[13] and thus, Business Guides's claim lacked a factual basis. Although a magistrate concluded that Business Guides "did not take part in any intentional misrepresentation or coverup,"[14] the district court ordered the firm to

11. *See* Business Guides, Inc. v. Chromatic Communications Enters., Inc., 119 F.R.D. 685 (N.D. Cal. 1988).

12. Personnel from Business Guides also signed affidavits accompanying the TRO application. It is not clear from the Supreme Court's opinion whether the relevant signature was the one on the TRO application or the one on the affidavit. As the dissent noted, this makes an important difference to the clarity and impact of the majority's holding. If affidavits are now "papers" for the purposes of Rule 11, then they must henceforth be signed by an attorney. Because affidavits are evidentiary documents, though, it would be meaningless to inquire whether they are "well grounded in law." In addition, this extension of Rule 11 would make Rule 56's "good faith" standard for affidavits superfluous. *See Business Guides*, 111 S. Ct. at 938-39 (Kennedy, J., dissenting).

13. One of the entries did contain false information; indeed, the entire entry was fictitious, and it was never satisfactorily explained how this listing got into Chromatic's directory. Chromatic alleged that Business Guides had "planted" the false entry in Chromatic's guide by filling out and mailing to Chromatic a false questionnaire. The district court found that Business Guides's failure to deny this charge was a "tacit admission" of its truth. Business Guides, Inc. v. Chromatic Communications Enters., Inc., 121 F.R.D. 402, 404 (N.D. Cal. 1988). According to petitioner's brief, however, Business Guides was unable to refute the charge because it was given no opportunity for discovery. *See* Reply Brief for Petitioner at 3-4, Business Guides, Inc. v. Chromatic Communications Enters., Inc., 111 S. Ct. 922 (1991) (No. 89-1500). There is some hint in Justice O'Connor's opinion that the Court believed Business Guides had acted in bad faith, but this conclusion was not necessary for purposes of the holding. *See Business Guides*, 111 S. Ct. at 927.

14. Business Guides, Inc. v. Chromatic Communications Enters., Inc., 119 F.R.D. at

pay Chromatic's legal expenses and out-of-pocket costs. It held that Business Guides "failed to conduct a proper inquiry, resulting in the presentation of unreasonable and false information to the court."[15] The Ninth Circuit affirmed.

Business Guides challenged the appellate decision on two grounds. First, it claimed that the Ninth Circuit wrongly applied an objective standard to represented parties, rather than the subjective, good-faith standard of *Calloway*. Second, it argued that the use of Rule 11 to require a client who acts negligently, but in good faith, to pay attorney's fees exceeds the authority of the Rules Enabling Act.[16]

In a five-to-four decision, the Supreme Court affirmed. The majority opinion, written by Justice O'Connor,[17] relied heavily on the language of Rule 11, and touched only briefly on policy issues. Justice O'Connor rejected as "unnatural" the view that only attorneys and pro se litigants are "signers" for purposes of the rule. While represented parties are not usually required to sign court papers, she conceded, this does not mean that when they do so voluntarily they are not bound by the rule's duty of reasonable inquiry. If the Advisory Committee had intended to hold represented parties to a different standard, she said, it would have done so explicitly.[18] Although Justice O'Connor invoked the "plain meaning" of the rule,[19] she focused almost entirely on the language of a single sentence—the sentence designated above as sentence [3]. Key to her analysis was her belief that the rule is directed primarily to signatures: "The essence of Rule 11 is that signing is no longer a meaningless act; it denotes merit. A signature sends a message to the district court that this document is to be taken seriously."[20] The idea that a represented party's signature has less "merit" than a pro se litigant's simply because it is voluntary, Justice

687. The district court accepted Business Guides's explanation that it had relied in its allegations on "seeds" prepared using a faulty method—a method that was not discovered until well after the suit was filed. *See Business Guides*, 111 S. Ct. at 926.

15. *Business Guides*, 111 S. Ct. at 927. Chromatic also moved for, and was granted, sanctions against Business Guides's counsel, but withdrew the motion after the law firm went bankrupt.

16. 28 U.S.C. § 2072 (1988).

17. Chief Justice Rehnquist joined in the majority opinion, as did Justices White, Blackmun, and Souter. Justice Kennedy wrote a dissenting opinion in which Justices Marshall and Stevens joined. Justice Scalia joined in Parts I, II, and IV of the dissent.

18. *See Business Guides*, 111 S. Ct. at 930.

19. *See id.* at 928.

20. *Id.* at 930.

O'Connor contended, conflicts with this reading of the rule.[21]

Justice O'Connor argued that the authority to sanction represented parties who fail to make a reasonable inquiry is also required by Rule 11's main purpose, deterring frivolous litigation. Often—as in this case, Justice O'Connor contended—it is the client, not the attorney, who is in the best position to make an inquiry into the facts underlying a claim. A good-faith standard for represented parties would create a "safe harbor" in those cases, because it would prevent sanctions when an attorney reasonably relies on the negligent statements of a client.[22] Justice O'Connor recognized that clients are often less able than attorneys to investigate the *legal* bases of documents, but she claimed that the objective standard is flexible enough to accommodate the difference in expertise. " 'What is objectively reasonable for a client may differ from what is objectively reasonable for an attorney,' "[23] she stated, quoting the Ninth Circuit decision. The correct standard is one of "reasonableness under the circumstances."[24] Justice O'Connor did not elaborate on what the relevant "circumstances" might be.

Finally, Justice O'Connor ruled that holding clients to an objective standard does not exceed the authority of the Rules Enabling Act. The Act authorizes the Court to "prescribe general rules of practice and procedure," so long as these do not "abridge, enlarge, or modify any substantive right."[25] Business Guides had claimed that the majority's interpretation of Rule 11 modifies substantive rights in two ways: (1) by impermissibly shifting attorney's fees,[26] and (2) by creating a federal tort of malicious prosecution.[27] Justice O'Connor based her argument

21. *See id.* at 931.

22. *See id.* at 932-33.

23. *Id.* at 933 (quoting Business Guides, Inc. v. Chromatic Communications Enters., Inc., 892 F.2d 802, 810 (9th Cir. 1989)).

24. *Id.*

25. 28 U.S.C. § 2072 (1988).

26. Professor Stephen Burbank has argued that because amended Rule 11 allows awarding of attorney's fees for negligence, not merely bad faith, it goes beyond the intent of Congress, which, in its 1980 amendment to Section 1927 of Title 28, forbade fee-shifting absent a finding of bad faith. *See* Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions about Power*, 11 HOFSTRA L. REV. 997 (1983). In Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), the Court struck down an award of attorney's fees to a litigant acting as a private attorney general. Under the American rule, the Court held, prevailing parties are not entitled to collect attorney's fees; only Congress, not the courts, can authorize an exception to this rule. *See id.* at 247, 249.

27. *See* Cooter & Gell v. Hartmarx, 110 S. Ct. 2447, 2454 (1990).

on *Burlington Northern Railroad Co. v. Woods*,[28] in which the Court held that "rules which *incidentally* affect litigants' substantive rights" do not exceed the authority of the Act if they are "reasonably necessary to maintain the integrity of [the] system of rules."[29] The primary purpose of Rule 11, Justice O'Connor argued, is neither to shift attorney's fees nor to compensate victims of frivolous litigation, but to deter baseless filings. Any effects on substantive rights are merely "incidental"[30] to this purpose. The majority's holding, she concluded, does not exceed the authority of the Act.[31]

In his dissent, Justice Kennedy rejected the majority's interpretation of the rule's "plain meaning." In his view, the signature requirements set out in the first two sentences of the rule clearly limit its scope to attorneys and pro se litigants. "If the Rule 11 certification requirements were intended to apply to represented parties," he argued, "its provisions would require them to sign papers covered by the Rule, not leave it as an option."[32] Justice Kennedy noted that the majority's reading makes Rule 11 coverage for represented parties essentially voluntary. Informed clients will simply "opt out" of the rule by choosing not to sign. Those who are "caught" will be the rare few who are required to sign, as well as persons who sign in ignorance of the rule and its standards. The resulting arbitrariness undermines the majority's claim that its holding will have a deterrent effect.[33] Instead, Justice Kennedy feared, the holding is likely to have a severe chilling effect on legitimate litigation, an effect that will be even greater if the Court chooses to extend the duty of reasonable inquiry to clients who do not

28. 480 U.S. 1 (1987).

29. *Business Guides*, 111 S. Ct. at 934 (emphasis in original) (citing *Burlington Northern*, 480 U.S. at 5). In *Cooter & Gell*, the Court found Rule 11 necessary to maintain the integrity of the system of procedural rules. *See Cooter & Gell*, 110 S. Ct. at 2454.

30. *Business Guides*, 111 S. Ct. at 934.

31. *See id.* Justice O'Connor also pointed out that because Congress participates in the rulemaking process, any Rules Enabling Act challenge faces an initial burden of showing that "Congress erred in its prima facie judgment that the Rule . . . transgresses neither the terms of the Enabling Act nor constitutional restrictions," *id.* at 933, a burden Business Guides failed to carry.

32. *Id.* at 938 (Kennedy, J., dissenting). Justice Kennedy argued that his reading, unlike the majority's, is consistent with the Court's reasoning in Pavelic & LeFlore v. Marvel Entertainment Group, 110 S. Ct. 456 (1989). In that case, the Court held that law firms could not be sanctioned under Rule 11 because the rule's signature requirement specifies individual attorneys. If the same reasoning were used here, Justice Kennedy suggested, the Court would have to exclude represented parties from the reach of the objective standard. *See Business Guides*, 111 S. Ct. at 935-36 (Kennedy, J., dissenting).

33. *See Business Guides*, 111 S. Ct. at 938 (Kennedy, J., dissenting).

sign.[34] Justice Kennedy also expressed concerns about the fairness of applying rules to represented parties who are not aware of their content.

The primary purpose of Rule 11, Justice Kennedy argued, is "to control the practice of attorneys, or those who act as their own attorneys, in the conduct of litigation in the federal courts."[35] In Justice Kennedy's view, a represented party may be sanctioned under Rule 11 only derivatively, when an *attorney*'s duty of reasonable inquiry is violated, and even then, the client should be judged by a subjective rather than an objective standard.[36]

Although Justice Kennedy stopped short of claiming that the majority's holding exceeds the authority of the Rules Enabling Act, he did argue that it "raises troubling concerns with respect to both separation of powers and federalism."[37] Holding attorneys to an objective standard of reasonable inquiry is well within the Court's power to regulate federal practice and procedure, Justice Kennedy acknowledged. But the Court approaches the limits of its authority when it extends this standard to clients. Justice Kennedy argued that these concerns weigh in favor of a more conservative reading of the rule, a reading that is in any event more consistent with the text than that of the majority.[38]

Amended Rule 11 is one of the most controversial of the judicial tools used to curb abuse of the litigation process. Critics have charged, among other things, that it chills legitimate advocacy, creates excessive "satellite litigation," and is applied in an inconsistent and arbitrary way.[39] In *Business Guides*, the Supreme Court had an opportunity to lend some consistency to

34. *See id.* at 941 (Kennedy, J., dissenting).

35. *Id.* at 935 (Kennedy, J., dissenting).

36. *See id.* at 942 (Kennedy, J., dissenting). Justice Kennedy cited the Advisory Note to the Rule in support of this interpretation: "[E]ven though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances to impose a sanction on the client." *Id.* at 937 (Kennedy, J., dissenting) (quoting FED. R. CIV. P. 11 advisory committee's note).

37. *Id.* at 940 (Kennedy, J., dissenting). Justice Kennedy argued that the majority's holding created a new tort of "negligent abuse of process," the authority for creation of which resides in the Congress, not the Court. He also argued that the majority by its decision authorized fee-shifting in a way indistinguishable from that struck down in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). *See supra* note 26. Justice Scalia did not join this part of the dissent.

38. *See Business Guides*, 111 S. Ct. at 942 (Kennedy, J., dissenting).

39. For an overview of the main criticisms of the rule, see 5A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1332 (2d ed. 1990).

the rule and to address these persistent problems. Instead, hiding behind a "plain meaning" analysis, the majority issued an opinion that does little to clarify Rule 11 jurisprudence and is likely to increase criticism of the rule.

Since Rule 11's revision, commentators have warned of its potential chilling effect on meritorious claims.[40] The Advisory Committee took this fear seriously enough to include in its Note a statement that Rule 11 "is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."[41] Unless this statement is taken seriously by judges interpreting the rule, however, it becomes meaningless. In *Business Guides*, the Supreme Court had an opportunity to give effect to the Advisory Committee's intent, but failed to do so.

Fear that Rule 11 will over-deter becomes particularly grave when sanctions under the rule are extended to represented parties. As the dissent in *Business Guides* points out, most citizens are unfamiliar with the contents of the Federal Rules of Civil Procedure. Even after they have been made aware of a duty of inquiry, they are unlikely to understand what kind of inquiry is legally required. A "reasonable inquiry" into the basis of a claim requires an understanding of not only the facts, but also the legal significance of the facts. While attorneys have this understanding, clients for the most part do not. Holding clients to a duty of "reasonableness" they do not understand, and requiring them to pay large attorney's fees if they transgress, is likely to discourage them from legitimate attempts to vindicate their rights. The risk of chilling is much less if sanctions are available only for breaches of good faith.

The majority claimed that the objective standard is one of "reasonableness under the circumstances," and thus takes account of a client's lesser legal expertise. This contention is unpersuasive because Justice O'Connor failed to give any content to this formula. Indeed, the Court's failure to suggest circumstances that might be relevant to the objective reasonableness of a client's behavior may heighten the chilling effect of the holding, because it creates a zone of uncertainty into which clients will be hesitant to venture.

40. *See, e.g.*, Nelken, *Sanctions Under Amended Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986); Nelken, *supra* note 1.

41. FED. R. CIV. P. 11 advisory committee's note.

One of the purposes of amended Rule 11 was to reduce the bulk of litigation and relieve over-burdened federal courts. The rule defeats this purpose if, as has frequently been charged, it generates more litigation than it prevents.[42] The Court's holding in *Business Guides* is likely to add to the level of "satellite litigation," and thus runs counter to the purpose of the rule. Because the standard is one of "reasonableness under the circumstances," a determination that a client has violated the rule requires an examination of the relevant circumstances and an expenditure of judicial resources. The inquiry is complicated by the fact that judges are less well equipped to assess the reasonableness of clients' behavior than they are that of attorneys. Judges and attorneys share a professional background. Both are officers of the court. Clients, in contrast, have widely divergent backgrounds and levels of expertise. In *Business Guides*, three hearings were required before a magistrate concluded that the firm had failed in its duty of reasonable inquiry. A good-faith standard for clients would be far more efficient.

One of the most serious criticisms of amended Rule 11 is that it has been inconsistently and arbitrarily applied.[43] What one judge perceives as frivolous, another may see as a legitimate claim. Inconsistency increases the rule's chilling effect and adds to satellite litigation. It also raises questions about fairness and abuse of judicial power. *Business Guides* provides little help here. On the contrary, requiring judges to decide whether clients have acted "reasonably under the circumstances," particularly where the relevant circumstances are not defined, is likely to increase the instances of arbitrariness and abuse.

The majority's decision leaves several important issues unresolved. Perhaps the most important of these is Rule 11's treatment of represented parties who do not sign documents, an issue expressly left open by the majority.[44] If only signers

42. The Advisory Committee expressed its desire that "the efficiencies achieved by [the rule] . . . not be offset by the cost of satellite litigation over the imposition of sanctions." FED. R. CIV. P. 11 advisory committee's note. For a discussion of the problem of satellite litigation, see Nelken, *supra* note 1.

43. *See* Burbank, *supra* note 2; S. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS (Federal Judicial Center, 1985); Shaffer, *Rule 11: Bright Light, Dim Future*, in SANCTIONS: RULE 11 AND OTHER POWERS 1 (C. Shaffer & P. Sandler eds. 1988).

44. *See Business Guides*, 111 S. Ct. at 935. A second question left dangling is whether affidavits are now "papers" for purposes of Rule 11, and must henceforth be signed by an attorney. *See supra* note 12.

are bound by the rule, well-counseled clients will place their signatures on as few documents as possible, leading to intermittent deterrence at best. Yet, given Justice O'Connor's reliance on sentence [3] of the rule and her perception of it as a signature requirement, it is difficult to see how she could justify extending liability to non-signers.[45] While resolution of this issue was not necessary to the majority's holding, failure to address it adds to the confusion surrounding the rule.

The *Business Guides* majority claimed to do nothing more than analyze the "plain meaning" of Rule 11: "Even if we were convinced that a subjective bad faith standard would more effectively promote the goals of Rule 11, we would not be free to implement this standard outside the rulemaking process. 'Our task is to apply the text, not improve on it.' "[46] Yet a careful examination of the rule's language shows that it is simply silent on the matter of a standard of behavior for represented parties. As Justice O'Connor points out, the rule does not explicitly provide a separate standard for clients. But neither does it explicitly assign clients a duty of reasonable inquiry. In light of this ambiguity, the Court would have been justified in holding clients to a subjective, good-faith standard. Far better than the objective standard, a subjective standard for clients would give effect to the Advisory Committee's intent, would be consistent with the purposes of the rule, and would bring the uniformity and consistency so long missing in Rule 11 cases within closer reach.

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45. If the Court later decides that non-signers may be sanctioned, it will face the difficulty of what standard to apply. Because sentence [3] was regarded as the source of the standard in *Business Guides*, it will require some reaching to apply to non-signers. On the other hand, holding non-signing clients to a subjective standard would result in inconsistent treatment of them, something that troubled the Court in this case. If Justice O'Connor had based her authority to sanction clients on sentence [4], the status of non-signers would not pose such a problem. Sentence [4] seems to authorize courts to sanction clients who do not sign, though it specifies no standard of behavior.

46. *Business Guides*, 111 S. Ct. at 932 (quoting Pavelic & LeFlore v. Marvel Entertainment Group, 110 S. Ct. 456, 460 (1989)).

SECTION 1983 CLAIMS INVOLVING COMMERCE CLAUSE VIOLATIONS: *Dennis v. Higgins*, 111 S. Ct. 865 (1991).

In *Dennis v. Higgins*,[1] the United States Supreme Court extended the cause of action established by the Civil Rights Act of 1871 (Section 1983)[2] to include challenges to Commerce Clause violations. The Court's ruling entitles prevailing plaintiffs in such suits to attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976 (Section 1988).[3] In his dissent, Justice Kennedy predicted that this decision would have severe adverse consequences for the balance of power between states and taxpayers in state tax litigation. In reality, though, the impact of *Dennis* on state tax challenges will be minor, and what new incentives it does create will be positive.

Dennis arose out of a challenge to retaliatory taxes and fees that Nebraska imposed on out-of-state vehicles that operated in Nebraska. The trial court found the taxes in violation of the Commerce Clause and enjoined their collection, but dismissed the taxpayer's Section 1983 claim.[4] The Nebraska Supreme Court affirmed, holding that Commerce Clause violations are not actionable under Section 1983.[5]

The United States Supreme Court, by a seven-to-two vote,[6] reversed the Nebraska Supreme Court's decision that violations of the Commerce Clause are not actionable under Section 1983. Justice White, writing for the majority, concluded that the Commerce Clause confers individual rights against impermissible state regulation of interstate commerce, and that the

1. 111 S. Ct. 865 (1991).

2. Section 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

42 U.S.C. § 1983 (1988).

3. Section 1988 provides that "[i]n any action or proceeding to enforce a provision of section[] . . . 1983, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1988).

4. *See* Dennis v. Nebraska, 234 Neb. 427, 428-29, 451 N.W.2d 676, 678 (1990), *rev'd sub nom.* Dennis v. Higgins, 111 S. Ct. 865 (1991).

5. *See id.* at 430-41, 451 N.W.2d at 678-84.

6. Justices Marshall, Blackmun, Stevens, O'Connor, Scalia, and Souter joined in Justice White's majority opinion. Justice Kennedy dissented, joined by Chief Justice Rehnquist.

statutory language of Section 1983 creates a cause of action for the protection of such rights.

The Court held that the statutory language, which provides a cause of action for the deprivation of "any rights, privileges, or immunities secured by the Constitution,"[7] compels "a broad construction of § 1983."[8] Justice White noted that the Court "has never restricted the section's scope to [protecting Fourteenth Amendment rights]. Rather [it has] given full effect to its broad language, recognizing that § 1983 'provide[s] a remedy, to be broadly construed, against all forms of official violation of federally protected rights.' "[9]

Although the Court acknowledged that "the 'prime focus' of § 1983 and related provisions was to ensure 'a right of action to enforce the protections of the Fourteenth Amendment,' "[10] it pointed out that the legislative history cited by the dissent does not amount to " 'a clearly expressed legislative intent contrary to the plain language of [Section 1983].' "[11] The Court reasoned that Congress would have explicitly limited the scope of Section 1983 had it intended such a limitation.[12]

Having concluded that Section 1983 is to be broadly construed, the Court examined the Commerce Clause to determine whether it "confers 'rights, privileges, or immunities' within the meaning of § 1983."[13] The Court rejected the respondents' argument that the Commerce Clause merely allocates power between the federal and state governments and does not confer substantive rights on individual plaintiffs. Instead, the Court held that the combination of restricted state power to regulate interstate commerce[14] and individual entitle-

7. 42 U.S.C. § 1983 (1988).

8. *Dennis*, 111 S. Ct. at 868.

9. *Id.* at 869 (quoting Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 700-01 (1978)). *See also* Maine v. Thiboutot, 448 U.S. 1, 4, 6-8 (1980) (refusing to limit the "laws" referred to in Section 1983 to civil rights or equal protection laws); Lynch v. Household Finance Corp., 405 U.S. 538 (1972) (refusing to exclude property rights from the scope of Section 1983).

10. *Dennis*, 111 S. Ct. at 869 (quoting Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 611 (1979)).

11. *Id.* at 869 n.4 (quoting American Tobacco Co. v. Patterson, 456 U.S. 63, 75 (1982)).

12. *See id.* (quoting St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 550 (1978)).

13. *Id.* at 870 (quoting 42 U.S.C. § 1983 (1988)).

14. *See id.* (citing South-Central Timber Dev. v. Wunnicke, 476 U.S. 82 (1984); Hughes v. Oklahoma, 441 U.S. 322 (1979)).

ment to relief from an unconstitutional state regulation[15] constitutes a right, privilege, or immunity.[16] Finally, the Court noted previous decisions in which it recognized that the Commerce Clause confers "a 'right' to engage in interstate trade free from restrictive state regulation."[17]

The majority then applied the three-part test articulated in *Golden State Transit Corp. v. Los Angeles*[18] to determine whether those rights are within the scope of Section 1983.[19] The respondents admitted that the first two prongs of the test were satisfied, which the Court accepted without discussion. The respondents argued, however, that the third prong was not satisfied because the Commerce Clause was intended to benefit the national economy, not individual interstate businesses. In response, the Court provided two reasons why the third prong was satisfied. First, the Court has recognized that the Commerce Clause protects a "zone of interests," which includes the interests of individuals engaged in interstate businesses.[20] Second, "the Court's repeated references to 'rights' under the Commerce Clause constitute a recognition that the Clause was intended to benefit those who . . . are engaged in interstate commerce."[21]

Justice Kennedy dissented, arguing that the Commerce Clause does not confer rights within the meaning of Section 1983. He contended that the legislative history of Section 1983 demonstrates that it was not intended to provide a private cause of action for state violations of the power-allocating pro-

15. *See id.* (citing McKesson Corp. v. Division of Alcoholic Beverages, 448 U.S. 954 (1980)).

16. *See id.* at 871 & n.7.

17. *Id.* at 871 (citing Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977); Garrity v. New Jersey, 385 U.S. 493 (1967); Western Union Tel. Co. v. Kansas *ex rel.* Coleman, 216 U.S. 1 (1910); Crutcher v. Kentucky, 141 U.S. 47 (1891)).

18. 493 U.S. 103 (1989).

19. *See Dennis*, 111 S. Ct. at 871. The three prongs of the *Golden State* test are: (1) "whether the provision in question creates obligations binding on the governmental unit," (2) whether "the interest the plaintiff assert[ed] . . . [is] 'too vague and amorphous' to be 'beyond the competence of the judiciary to enforce,' " and (3) "whether the provision in question was 'intend[ed] to benefit' the putative plaintiff." *Id.* The prongs of the test are derived from Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981) (first prong); and Wright v. Roanoke Redevelopment and Hous. Auth., 479 U.S. 418 (1987) (second and third prongs).

20. *See Dennis*, 111 S. Ct. at 872 (quoting Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 321 n.3 (1977)).

21. *Id.* (citing Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977); Garrity v. New Jersey 385 U.S. 493 (1967); Western Union Tel. Co. v. Kansas *ex rel.* Coleman, 216 U.S. 1 (1910); Crutcher v. Kentucky, 141 U.S. 47 (1891)).

visions of the Constitution.[22] Justice Kennedy maintained that the Commerce Clause does not secure individual rights against the States and that applying the *Golden State* test was therefore unnecessary.[23]

Furthermore, Justice Kennedy questioned the Court's reasons for holding that the Commerce Clause satisfies the third prong of the *Golden State* test. He challenged the Court's reliance on *Boston Stock Exchange v. State Tax Commission*[24] to show that the Commerce Clause was intended to benefit the putative plaintiff. That a plaintiff is within the "zone of interests," he argued, does not imply that the Commerce Clause was intended to benefit that person. Indeed, he noted that the Court previously had held that legislative intent to benefit the plaintiff is not necessary for the plaintiff to be within the "zone of interests" protected.[25]

Justice Kennedy also attacked the Court's reliance on "scattered statements in our cases that refer to a 'right' to engage in interstate commerce."[26] He countered those statements with a discussion of the legislative history of the Commerce Clause, tending to prove that it was not intended to benefit individuals engaged in interstate commerce.[27]

In closing his dissent, Justice Kennedy predicted that the Court's holding will have adverse consequences,[28] particularly in the area of state taxes. The decision, he argued, "raises far more questions about the proper conduct of challenges to the

22. *See id.* at 874-76 (Kennedy, J., dissenting). The majority rebutted this point by arguing that the legislative history that Justice Kennedy quoted refers to a different part of the Civil Rights Act of 1871 than the part that became Section 1983. *See id.* at 868 n.4.

23. *See id.* at 873 (Kennedy, J., dissenting). Justice Kennedy explained later in his opinion that individuals can bring actions for violations of the Commerce Clause without its conferring any rights on them, because they can have standing to challenge the violation in the absence of individual rights. In using the ability of individuals to challenge violations of the Commerce Clause as evidence of a right within the meaning of Section 1983, he argued, the majority "confuses the concept of standing with that of cause of action." *Id.* at 878 (Kennedy, J., dissenting).

24. 429 U.S. 318 (1977) (recognizing that the interests of individuals engaged in interstate business are within the "zone of interests" protected by the Commerce Clause). *See supra* note 20 and accompanying text.

25. *See Dennis*, 111 S. Ct. at 878 (Kennedy, J., dissenting) (citing Clarke v. Securities Indus. Ass'n, 479 U.S. 388 (1987)).

26. *Id.* at 873-74 (Kennedy, J., dissenting).

27. *See id.* at 874-76 (Kennedy, J., dissenting).

28. One consequence Justice Kennedy suggested is that the test that the majority used for determining whether a Section 1983 claim is appropriate may be successfully applied by plaintiffs to other substantive rights, further expanding the Section 1983 cause of action beyond its proper scope. *See id.* at 879 (Kennedy, J., dissenting).

validity of state taxation than it answers."[29] Although he was not very specific about what effects *Dennis* might have on challenges to state taxes, Justice Kennedy suggested that the impact will be substantial and invidious. He characterized the Court's decision as "risk[ing] destruction of state fiscal integrity in a manner which may require congressional correction."[30]

Justice Kennedy's dire predictions, however, appear to be overstated. Many plaintiffs will still be unable to use Section 1983 to challenge state taxes that violate the Commerce Clause. In fact, any effect on state fiscal policy and even state finances is likely to be positive.

Challenges to the validity of state taxes cannot originate in any federal forum,[31] leaving state courts as the only fora for Section 1983 tax claims. For several reasons, courts in a number of states have refused to hear Section 1983 tax claims.[32] Because Commerce Clause challenges to state taxes are so common and are restricted to state courts, it is tempting to conclude that the Court's decision in *Dennis* mandates that state courts entertain tax claims that arise under the Commerce Clause as Section 1983 actions.

The *Dennis* Court, however, did not address whether state courts are required to hear Section 1983 tax claims.[33] Accordingly, state courts previously refusing to hear tax claims under

29. *Id.* at 880 (Kennedy, J., dissenting).

30. *Id.* (Kennedy, J., dissenting).

31. The Tax Injunction Act, 28 U.S.C. § 1341 (1988), and the principle of comity prevent challenges to state taxes in federal courts. *See, e.g.*, Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981); Note, *Section 1983 in State Court: A Remedy for Unconstitutional State Taxation*, 95 YALE L.J. 414, 417-20 (1985).

32. *See, e.g.*, Backus v. Chivilis, 236 Ga. 500, 224 S.E.2d 370 (1976) (county taxpayers could not bring a Section 1983 action alleging unequal tax assessments in state court when Georgia provides statutory remedy for this offense); Johnson v. Gaston County, 71 N.C. App. 707, 323 S.E.2d 381 (1984) (taxpayer did not have Section 1983 cause of action in state court because adequate remedy existed under North Carolina property tax statutes); Spencer v. South Carolina Tax Comm'n, 281 S.C. 492, 316 S.E.2d 386 (1984), *aff'd*, 471 U.S. 82 (1985) (per curiam) (taxpayer not allowed to bring Section 1983 action where sole reason for suit was to justify allowance of attorney's fees, which were not allowed under South Carolina law).

33. The Court has never decisively answered the question whether state courts must hear Section 1983 tax claims. In Spencer v. South Carolina Tax Comm'n, 471 U.S. 82 (1985), the Court affirmed a state court's refusal to hear Section 1983 tax claims, but the justices were equally divided, so the affirmance has no weight as precedent. *See* Neil v. Biggers, 409 U.S. 188, 192 (1972). In a more recent case, the Court characterized the question as "not entirely clear." Arkansas Writer's Project, Inc. v. Kansas, 481 U.S. 221, 234 n.7 (1987).

Section 1983 can continue to do so despite *Dennis*.[34] In the area of tax challenges, the impact of *Dennis* should be seen exclusively in states that have refused Section 1983 actions for violations of the Commerce Clause[35] but have allowed Section 1983 tax challenges.

Even in those states affected, the changes in tax challenges for Commerce Clause violations will not be overwhelming.[36] The most notable change is that substantially prevailing plaintiffs will be entitled to recover reasonable attorney's fees under Section 1988.[37] In *Will v. Michigan Department of State Police*,[38] though, the Court limited this advantage by holding that states are persons for purposes of Section 1983 claims for prospective and injunctive relief, but not for retrospective relief.[39] The Court's opinion in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*[40] requires some kind of retrospective relief for unconstitutional state taxes. Because most of the elements of a retrospective claim will overlap with a prospective Section 1983 claim, a prevailing plaintiff, though unable to recover attorney's fees for the retrospective claim, will cover most of the costs of attorney's fees through the prospective claim.

Once a state is enjoined from or voluntarily ceases collecting

34. The requirement that plaintiffs exhaust state remedies before commencing a Section 1983 action, a frequently used barrier to Section 1983 tax claims, might no longer be effective. In Felder v. Casey, 487 U.S. 131 (1988), the Court held that "those who [seek] to vindicate their federal rights in state courts [should not] be required to seek redress in the first instance from the very state officials whose hostility to those rights precipitated their injuries." *Id.* at 147.

35. *See, e.g.*, Consolidated Freightways Corp. of Del. v. Kassel, 730 F.2d 1139 (8th Cir. 1984); Private Truck Council of Am. v. Secretary of State, 503 A.2d 214 (Me. 1986); Private Truck Council of Am. v. New Hampshire, 128 N.H. 466, 517 A.2d 1150 (1986); Private Truck Council of Am. v. Oklahoma Tax Comm'n, 806 P.2d 598 (Okla. 1990).

36. *See generally* Note, *Clarifying Comity: State Court Jurisdiction and Section 1983 State Tax Challenges*, 103 HARV. L. REV. 1888, 1899-1902 (1990) (discussing advantages of bringing a tax claim under Section 1983).

37. Under Section 1988, a court may award attorney's fees to plaintiffs who substantially prevail on their Section 1983 claims.

38. 491 U.S. 58 (1989).

39. Section 1983 provides a cause of action against any "*person* [acting] under color of any statute, ordinance, regulation, custom, or usage, of any State." 42 U.S.C. § 1983 (1988) (emphasis added).

40. 110 S. Ct. 2238 (1990). At the option of the state court, retrospective relief can be achieved by "assess[ing] and collect[ing] back taxes from . . . competitors who benefited from the" unconstitutional tax scheme. *Id.* at 2252. Because state courts have this option, plaintiffs suffering from unconstitutional taxes have a reduced incentive to bring an action unless attorney's fees are available. Also, a state that uses such a remedy can actually increase its revenue as a result of the litigation that *Dennis* encourages, despite Justice Kennedy's dire predictions.

a tax, a plaintiff will not be able to initiate a Section 1983 action. This situation may encourage plaintiffs who suffer damages from a common unconstitutional tax to race to the courthouse in order to be the first to challenge the tax.[41] In such a case, a state could test its tax against a single plaintiff with relatively low exposure to attorney's fees. Alternatively, class actions seem a more attractive means to challenge taxes that violate the Commerce Clause because the entire class would benefit from attorney's fees awards. States faced with class actions may feel more pressure to stop collecting (but not to refund) the tax to avoid a judgment for substantial attorney's fees.

Another effect that *Dennis* may have is to extend the statute of limitations for claims challenging a tax as violative of the Commerce Clause. States allowing Section 1983 tax claims, except for violations of the Commerce Clause, will be required to change the limitations period for Commerce Clause tax challenges to the same limitations period as for personal injury actions.[42] Regardless of the limitation period established, however, the effect of lengthening it would be negligible. The vast majority of Commerce Clause violations in taxation are attributable only to the state and state employees acting in their official capacities. Therefore, under *Will*, only prospective relief is available under Section 1983.[43] The statute of limitations is relevant only in those cases in which the defendant is sued in his individual capacity. Such an action is appropriate for challenging discretionary acts of state tax officials that violate the Commerce Clause, such as discriminating against interstate businesses by over-assessing their in-state property.[44] In cases of this sort, the individual is personally liable for damages.[45] Because states cannot be liable for retrospective relief under Section 1983, the stakes in such cases are limited to the per-

41. If offensive non-mutual collateral estoppel were permitted, the incentive to be the first challenger would be greatly diminished. A court, however, may deny collateral estoppel to avoid encouraging plaintiffs to adopt a "wait-and-see" approach to litigation. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330 & n.13 (1979).

42. *See* Wilson v. Garcia, 471 U.S. 261 (1985) (holding that applicable statute of limitations for Section 1983 claims is the state statute of limitations for personal injury claims).

43. Statutes of limitations, obviously, are not relevant in actions for prospective relief.

44. *See* Note, *supra* note 31, at 432.

45. *See* Kentucky v. Graham, 473 U.S. 159 (1985).

sonal resources of state officials.[46]

Even if they are extensive, the changes that *Dennis* creates will probably benefit both the state and the taxpayer. If the prospect of paying attorney's fees deters a state legislature from imposing questionable taxes, the state will save the cost of arguing and adjudicating the controversies. The attorney's fees available under Section 1988 may encourage litigation, but only of meritorious cases, because only prevailing plaintiffs are entitled to recovery.[47] Justice Kennedy observed that "[t]he pages of the United States Reports testify to the ability of major corporations . . . to commence and maintain dormant Commerce Clause litigation."[48] The reports give no indication, however, of how many small businesses have been victimized by unconstitutional taxes that they could not afford to challenge.

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WILLFULNESS IN CRIMINAL TAX CASES: *Cheek v. United States,* 111 S. Ct. 604 (1991).

In an area of popular concern—federal income taxes—the Supreme Court recently held that a defendant's good-faith belief that the income tax laws did not apply to him did not have to be objectively reasonable to avoid criminal conviction.[1] At the same time, however, the Court held that a belief that the income tax laws are unconstitutional—as opposed to inapplicable—is not a shield against criminal liability.[2] Although the decision invited speculation and concern about the support given to so-called tax protesters, observers noted that the tax protester's victory "may be short-lived" and that the impact is

46. Another possible but unlikely effect of *Dennis* is that some plaintiffs may not be precluded from reopening decided Commerce Clause cases to make claims for attorney's fees. Generally, changes in the law do not relieve plaintiffs from the preclusive effects of adverse judgments. *See* Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394 (1981). In rare cases, however, claim preclusion is not applied when there is a change in the law such that the plaintiff would have thought the new claim impossible when the original claim was made. *See, e.g.*, Henn v. Henn, 26 Cal. 3d 323, 605 P.2d 10, 161 Cal. Rptr. 502 (1980) (permitting new claim three years after final divorce decree).

47. *See* 42 U.S.C § 1988 (1988).

48. *Dennis*, 111 S. Ct. at 880 (Kennedy, J., dissenting).

1. *See* Cheek v. United States, 111 S. Ct. 604, 611 (1991).

2. *See id.* at 613.

likely to be "limited."[3] The decision merely allows the jury, and not the judge, to evaluate all of the evidence to decide whether the defendant was sincere in his beliefs.[4] In doing so, the fundamental policies underlying the "willfulness" requirement for criminal tax convictions are maintained.

John L. Cheek had been a pilot for American Airlines since 1973.[5] After 1979, Cheek ceased to file tax returns. From 1981 to 1984, Cheek indicated on his W-4 forms that he was exempt from federal income tax, and he was claiming up to sixty withholding allowances by the mid-1980s. During those years, American Airlines withheld substantially less than the amount required because of the numerous allowances and exempt status claimed on Cheek's tax forms.

Consequently, Cheek was charged with six counts of willfully failing to file a federal income tax return in violation of Section 7203 of the Internal Revenue Code[6] for the years 1980, 1981, and 1983 through 1986. In addition, he was charged with three counts of willfully attempting to evade income taxes for the years 1980, 1981, and 1983, in violation of Section 7201 of the Internal Revenue Code.[7]

Cheek, representing himself at the trial hearing, admitted that he had not filed personal tax returns during the years in question. He testified that as early as 1978, he had begun to attend seminars sponsored by a "tax patriot" group, which dispensed as gospel such dubious tax advice as the notion that wages are not income. During this time, Cheek was also involved in civil suits against American Airlines and the Internal Revenue Service.[8] In all of these cases, the arguments that

3. *Supreme Court Ruling Supports Tax Protester*, N.Y. Times, Jan. 9, 1991, at D2, col. 5.

4. *See id.*

5. The facts of the case are drawn from the Court's opinion. *See Cheek*, 111 S. Ct. at 606-09.

6. I.R.C. § 7203 (1988) ("Any person . . . required by this title or by regulations made under authority thereof to make a return, . . . who *willfully* fails . . . to make such a return, . . . shall in addition to other penalties provided by law, be guilty of a misdemeanor.") (emphasis added).

7. I.R.C. § 7201 (1988) ("Any person who *willfully* attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall in addition to other penalties provided by law, be guilty of a felony.") (emphasis added).

8. The suit against American Airlines claimed that Cheek's taxes were wrongly being withheld from his paychecks. The suit against the Internal Revenue Service involved Cheek's claim that he was not required to pay taxes for various reasons. In one of these cases, the district court found Cheek's position frivolous and fined him $10,000 for filing the suit (subsequently reduced on appeal to $5,000). *See* Cheek v. Doe, 828 F.2d 395 (7th Cir.), *cert. denied*, 484 U.S. 955 (1987).

Cheek was not a taxpayer under the Internal Revenue Code, that wages are not income, and that the Sixteenth Amendment[9] is unconstitutional, were declared frivolous and were repeatedly rejected by the courts. Cheek also produced a letter at trial from an attorney advising him that a tax on gains or profits is authorized, but that a tax on wages or salaries is not.

Cheek argued that, based on his indoctrination by the group, he sincerely believed in the lawfulness of what he was doing and thus could not be convicted for "willfully" violating the tax code. The trial court advised the jury that to prove "willfulness," the government had to prove the voluntary and intentional violation of a known legal duty. In addition, the court advised that an objectively reasonable, good-faith misunderstanding of the law would negate willfulness, but that mere disagreement with the law would not. The court then described Cheek's beliefs about the tax system and instructed the jury that if it found that Cheek "honestly and reasonably believed that he was not required to pay income taxes or to file tax returns,"[10] a not-guilty verdict should be returned.

After some confusion arose as to the meaning of the word "willful," the judge finally sent the jury a statement that "an honest but unreasonable belief is not a defense and does not negate willfulness."[11] Based on this instruction, the jury returned a verdict of guilty on all counts. Several jurors, however, undertook the extraordinary step of submitting with their verdict a written criticism of what they saw to be a "narrow and hard expression" of the law.[12]

Cheek appealed, asserting that the jury instruction requiring an objectively reasonable misunderstanding of the law to negate the statutory willfulness requirement was incorrect. Nevertheless, the United States Court of Appeals for the Seventh Circuit affirmed the conviction.[13] Relying on *United States v.*

9. U.S. CONST. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.").

10. Cheek v. United States, 111 S. Ct. 604, 608 (1991).

11. *Id.*

12. Two notes from jurors expressed the opinion that Cheek lacked the necessary criminal intent because he sincerely believed in his cause, even though his beliefs might have been unreasonable. One note stated: "I know the gentleman is guilty of a crime. However, I honestly believe he believed so deeply in his cause that he has risked everything for this cause and truly does not believe that he is breaking the law." United States v. Cheek, 882 F.2d 1263, 1267 (7th Cir. 1989).

13. *See* United States v. Cheek, 882 F.2d 1263 (7th Cir. 1989).

Buckner,[14] the court concluded that the beliefs advanced by Cheek were not objectively reasonable.[15] With respect to the list of "tired arguments"[16] that the *Buckner* court said were not objectively reasonable as a matter of law and may never be asserted as a defense, no matter what the particular circumstances might be, the Seventh Circuit panel hearing *Cheek* ominously observed: "We have no doubt that this list will increase with time."[17]

By a six-to-two vote, the Supreme Court reversed the decision of the Seventh Circuit and remanded the case for a new trial. Writing for the majority, Justice White[18] noted that although ignorance of the law is usually not a defense, sixty years ago the Court interpreted the term "willfully," as used in criminal tax statutes, "as carving out an exception to the traditional rule."[19] This special treatment, Justice White reasoned, is largely due to the complexity of the statutes and regulations, which make the tax laws difficult for the average citizen to understand.[20] In an early case involving tax code violations, *United States v. Murdock*,[21] the court interpreted the term "willfully" as requiring an "act done with a bad purpose" or with an "evil motive."[22] Subsequent decisions clarified this definition. In *United States v. Bishop*,[23] and still later in *United States v. Pomponio*,[24] "willfully" was defined as "connoting 'a voluntary, intentional violation of a known legal duty.' "[25]

Justice White acknowledged the *Murdock-Pomponio* definition of "willfulness" and concluded that the district court's jury instructions had departed from it by indicating that only an objectively reasonable misunderstanding of the law would negate

14. 830 F.2d 102 (7th Cir. 1987).

15. *See* United States v. Cheek, 882 F.2d at 1264.

16. *Buckner*, 830 F.2d at 103 (quoting Coleman v. Commissioner, 791 F.2d 68, 70 (7th Cir. 1986)).

17. United States v. Cheek, 882 F.2d at 1269.

18. Justice White was joined by Chief Justice Rehnquist and Justices Stevens, O'Connor, and Kennedy. Justice Scalia filed an opinion concurring in the judgment. Justice Blackmun filed a dissenting opinion in which Justice Marshall joined. Justice Souter did not participate in the decision.

19. Cheek v. United States, 111 S. Ct. 604, 609 (1991).

20. *See id.*

21. 290 U.S. 389 (1933).

22. *Murdock*, 290 U.S. at 394-95.

23. 412 U.S. 346 (1973).

24. 429 U.S. 10 (1976).

25. *Cheek*, 111 S. Ct. at 610 (quoting *Bishop*; 412 U.S. at 360).

guilt.[26] However unreasonable his beliefs might have been, the majority said, the jury should have had the opportunity to consider Cheek's assertions; to rule otherwise would raise a serious Sixth Amendment[27] question by changing the question of intent to a legal one, thereby preventing the jury from hearing it.[28] Of course, continued the majority, the more unreasonable the asserted beliefs are, the more likely the jury will be to disregard them.[29]

In another portion of the majority opinion, Justice White addressed Cheek's assertion that he should be acquitted because he had a good-faith belief that the income tax law was unconstitutional. White ruled that "[s]uch a submission is unsound, not because Cheek's constitutional arguments are not objectively reasonable or frivolous, which they surely are,"[30] but because under the *Murdock-Pomponio* line of cases, only innocent mistakes are excused. Indeed, Cheek's assertion implied "full knowledge of the provisions at issue and a studied conclusion,"[31] and therefore, Cheek was in no position to use this claim as a defense.[32]

In his opinion concurring in the judgment, Justice Scalia indicated that he would have supported both of Cheek's claims. Justice Scalia agreed with the Court's ruling that a good-faith belief is not "willful," but disagreed with the Court's conclusion on the invalidity of the constitutional claim.[33] He challenged the Court's ruling by stating that the *Murdock* definition requires a violation of a "known legal duty," and that a statute that one believes to be unconstitutional cannot represent a "known legal duty."[34] By Justice Scalia's reasoning, a duty cannot be *legal* if it is unconstitutional. Finally, the fact that civil penalties also apply to defendants similar to Cheek, "even in the event of a good-faith mistake," means that to "impose in addition *criminal* penalties for misinterpretation of such a com-

26. *See id.*
27. The Sixth Amendment provides in part: "In all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.
28. *See Cheek*, 111 S. Ct. at 611.
29. *See id.* at 611-12.
30. *Id.* at 612.
31. *Id.*
32. Justice White went on to suggest specific mechanisms that Cheek, if he believed the laws to be unconstitutional, should have utilized. *See id.* at 613.
33. *See id.* at 613 (Scalia, J., concurring in judgment).
34. *Id.* at 614 (Scalia, J., concurring in judgment).

plex body of law" would be a "startling innovation indeed."[35]

In a brief dissent, Justice Blackmun, joined by Justice Marshall, expressed his desire to uphold the "objectively reasonable" standard. The focus of the dissenting opinion was that the challenge to the tax code was at the most elementary level: the question whether wages are taxable.[36] After seventy years of the federal income tax system being in place, the dissent found it hard to believe that a person of Cheek's status would assert that he believed that wages are not income.[37] Justice Blackmun expressed his fear that the decision would cause "taxpayers to cling to frivolous views of the law in the hope of convincing a jury of their sincerity."[38]

By its holding, the Court maintained the fundamental policies underlying the "willfulness" requirement. The rampant growth of tax regulations has made them notoriously complicated. In fact, "uncertainty often arises even among taxpayers who earnestly wish to follow the law."[39] Thus, the first policy that the Court reinforced is the protection of taxpayers from unwarranted convictions in criminal tax cases.

In recognition of this policy, courts have consistently interpreted the word "willfully" to require an element of *mens rea*.[40] The purpose of this interpretation is to "separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers."[41] Otherwise, a person, by reason of his good-faith misunderstanding as to his tax liability, might entirely lack criminal intent, and yet be convicted because of "his mere failure to measure up to the prescribed standard of conduct."[42] The obvious effect of this policing of views would be to give prosecutors a free hand in charging those who make mistakes on their tax returns. Such a policy, if adopted in frus-

35. *Id.* (Scalia, J., concurring in judgment) (emphasis in original).
36. *See id.* at 614-15 (Blackmun, J., dissenting).
37. *See id.* at 615 (Blackmun, J., dissenting).
38. *Id.* (Blackmun, J., dissenting).
39. United States v. Bishop, 412 U.S. 346, 360 (1973).
40. *See supra* notes 21-25 and accompanying text. *But cf.* MODEL PENAL CODE § 2.02(10) comment n.47 (1985) (relating Judge Learned Hand's confusion over the meaning of "willfulness"):

> [Willfulness is] a very dreadful word. . . . It's an awful word. It's one of the most troublesome words in a statute that I know. If I were to have the index purged, "willful" would lead all the rest in spite of its being at the end of the alphabet.

41. *Bishop*, 412 U.S. at 361.
42. United States v. Murdock, 290 U.S. 389, 396 (1933). *See also* Morissette v. United States, 342 U.S. 246 (1952).

tration and impatience as a reaction to the tax protesters (as demonstrated by *Buckner*) would lead to the imprisonment of innocent but gullible persons for holding unapproved beliefs.

The majority's approach takes the fundamental intent requirement into consideration. Justice Scalia, however, may have taken this requirement too far in his opinion. The *Murdock-Pomponio* line of cases only supports "frank difference of opinion or innocent errors made despite the exercise of reasonable care."[43] Studying a law at length and then coming to the conclusion that it is unconstitutional cannot be characterized as an innocently gullible act that occurs absent intent.

In a move that diverges sharply from their zealous advocacy of the rights of criminal defendants, the dissenting justices would depart from the *Murdock-Pomponio* requirement of intent, supporting an "objectively reasonable" standard in the federal tax law context. Justice Blackmun, by urging a lower threshold for criminal tax prosecutions, revealed an apparent bias against this type of criminal defendant. Indeed, in another recent case, Justice Blackmun *himself* questioned the "reasonableness" standard, expressing skepticism that one person's views can be considered more reasonable than another's.[44] Certainly, our system of government should accommodate a wide variety of ideas. By asserting that no reasonable person could have believed as Cheek did, the dissent would prescribe a form of negligence standard that would convict a defendant for failing to meet a certain level of tax sophistication. The application of negligence standards should be limited to civil cases.[45] It is easy to ridicule beliefs similar to those held by Cheek, but harboring ridiculous views does not constitute criminal intent.

A second policy recognized by the Court in *Cheek* is that of ensuring all taxpayers the full protection of a jury trial. When intent is an element of an offense, its existence is a question of fact and cannot be taken from the jury simply because one's belief is on a forbidden list.[46] As the majority in *Cheek* recognized, "[w]hether a defendant has been accorded his constitu-

43. *Bishop*, 412 U.S. at 360-61 (quoting Spies v. United States, 317 U.S. 492, 496 (1943)).

44. *See* Pope v. Illinois, 481 U.S. 497, 506 (1987) (Blackmun, J., concurring in part and dissenting in part).

45. Note that "[d]egrees of negligence give rise in the tax system to civil penalties." *Bishop*, 412 U.S. at 361.

46. *See* Morissette v. United States, 342 U.S. 246 (1952).

tional rights depends upon the way in which a reasonable juror *could* have interpreted the instruction."[47] Even when the evidence against him is overwhelming, a defendant may insist on the jury guarantee.[48]

Although the majority and Justice Scalia in *Cheek* upheld this legal guarantee, the dissent expressed its wish to abolish it. This is especially surprising coming from Justice Blackmun, who has repeatedly emphasized the importance of a jury. He has stated, for example, that preventing a jury from considering evidence should be "a rare occurrence in criminal cases."[49] Indeed, a mandatory, judge-determined presumption conflicts with the "overriding presumption of innocence with which the law endows the accused."[50] Justice Blackmun's opinion in *Cheek* shows little faith in the ability and collective wisdom of a jury to distinguish between charlatans and those with good-faith beliefs by arguing that the jury should not be able to consider the sincerity of Cheek's assertions.[51]

Because the decision merely reaffirmed a longstanding legal principle, the actual and practical effect of *Cheek* will be minimal.[52] "Tax patriots" around the country should not breathe a sigh of tax relief, because they still must convince a jury that their beliefs are sincere. Also, because the Seventh Circuit had adopted a unique approach to the "willfulness" requirement,

47. Sandstrom v. Montana, 442 U.S. 510, 514 (1979) (emphasis added). *See also* Boyde v. California, 110 S. Ct. 1190, 1203 (1990); Francis v. Franklin, 471 U.S. 307, 315 (1985).

48. *See, e.g.*, Carella v. California, 491 U.S. 263, 268 (1989) (Scalia, J., concurring); Rose v. Clark, 478 U.S. 570, 593-94 (1986) (Blackmun, J., dissenting); United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977).

49. United States v. Bailey, 444 U.S. 394, 435 (1980) (Blackmun, J., dissenting). Indeed, Justice Blackmun continued in *Bailey* to assert that in an attempt to "conserve" the jury for cases that are worthy of it, the Court has "ousted the jury from a role it is particularly well suited to serve." *Id.* at 436 (Blackmun, J., dissenting).

50. *Carella*, 491 U.S. at 268 (Scalia, J., concurring) (quoting *Sandstrom*, 442 U.S. at 523). *See supra* note 48 and accompanying text.

51. The majority addressed the issue by stating that the jury, if allowed to consider the evidence, would be able to perform its most basic function and discern the guilty from the innocent. *See Cheek*, 111 S. Ct. at 611-12.

52. In the wake of the *Cheek* decision, the Supreme Court vacated and remanded a similar case, United States v. Dunkel, 900 F.2d 105 (7th Cir. 1990), *vacated and remanded*, 111 S. Ct. 747 (1991). In *Dunkel*, the Seventh Circuit held that the defendant's views that taxes are voluntary were unreasonable on an objective standard. The Seventh Circuit expressed surprise at the fact that the district court had allowed Dunkel's lawyer to argue that Dunkel believed that "taxes are voluntary" and to use that belief as a defense. The court observed: "Like the Lord High Executioner in the Mikado, we've 'got a little list' of beliefs that are objectively unreasonable . . . . We add to that list the belief that payment of income taxes is 'voluntary.' " *Dunkel*, 900 F.2d at 108.

the decision has not affected courts in most other circuits. The application of *Cheek* to other statutes may turn on whether the particular statute is so complex that a defendant may well misunderstand it.

Furthermore, one should not forget that civil sanctions can still be applied to defendants such as Cheek. In fact, Cheek has paid more than $60,000 in back taxes and interest since his conviction in 1987.[53] Criminal prosecution is but the "capstone" of this system of sanctions that exists to "provide a penalty suitable to every degree of delinquency."[54] As for the Internal Revenue Service, it certainly will not be chilled from criminally prosecuting tax evaders. Because the Service only pursues the most egregious violations, in which the "willfulness" element is clear, this decision is unlikely to inhibit the IRS.[55] In cases like *Cheek*, the defendant will probably have little hope of convincing a jury of his sincerity. Furthermore, the government may also find a silver lining in the decision. The Court made it clear that the tax protester's assertion that the tax laws are unconstitutional would not be entitled to the sincere belief defense. This may make prosecutions easier for the government in the typical "tax protester" case, in which the defense is usually based on constitutional grounds.[56]

In taking the step of remanding this case, the Court acted entirely reasonably. Hidden beneath the hoopla of Cheek's short-term victory is a decision that upholds fundamental elements of criminal tax law. The Court wisely maintained the "willfulness" requirement as necessary in complex tax cases, and it supported the fundamental right of a defendant to have a jury decide guilt or innocence.

Elizabeth J. Meiers

53. *See Tax Protester: My Way Incorrect, But Sincere*, USA Today, Jan. 11, 1991, at A2, col. 5.

54. Sansone v. United States, 380 U.S. 343, 350 (1965).

55. *See, e.g., Tax Protesters Cannot Be Jailed if Beliefs Are Sincere*, L.A. Times, Jan 9, 1991, at A1, col. 1. In 1989, the IRS audited nearly one million tax returns and assessed extra taxes and penalties on 837,423 taxpayers. Only 171 persons were criminally convicted for tax protests. *See id.*

56. *See Court Limits Definition of Willful Tax Evasion*, Wash. Post, Jan. 9, 1991, at A3, col. 1.

JUDGE NEIL M. GORSUCH

SENATE JUDICIARY COMMITTEE

QUESTIONNAIRE

SUPPLEMENTAL APPENDIX

12(d)

Speeches

Transcript of November 14, 2006 Program in Honor of the opening of the Justice Byron White Exhibit at the Tenth Circuit Byron White Courthouse in Denver

a. Introductory remarks by Tenth Circuit Judge Neil M. Gorsuch

Welcome and thank you for coming this evening to share this wonderful milestone with us. My name is Neil Gorsuch. I'm one of the newer members of the Tenth Circuit. As someone who admired Justice White enormously – and Marion – and treasures the year I spent with them, I'm honored that the Historical Society asked me, the new rookie, to be with you here tonight. We are here to celebrate what may be the most unique, Twenthieth-Century American life. Byron White, who grew up in Wellington, Colorado, a town of 350 souls, was appointed to the Supreme Court at the age of 44; was top of his class in high school, in college, and in law school; served in the Pacific Theater during World War II, and in the Kennedy Justice Department during the beginning of the Civil Rights movement; and went on to serve 31 years on the Supreme Court – that's the eleventh longest tenure in our history. And during that time, he wrote 475 Supreme Court majority opinions, 320 dissents, and 130 concurrences. That's over 900 Supreme Court opinions. And who at the same time was the highest paid NFL football player of his day; led the NFL in rushing; and held the NCAA football record for all-purpose yards in a game for nearly 50 years, a record now held by Barry Sanders. And no wonder that record stood for so long – Justice White averaged a remarkable 246 yards per game.

The exhibit that's been put together will teach you all of these facts and figures, and, I am sure, inspire visitors to our court for years to come. Justice Byron White continues to inspire those of us who were lucky to know him. It teaches how fully a life can be lived. I think the exhibit, as you'll go through it – and I hope you will take some time to meander through it – reminds us not just of the facts and figures of Justice White's life, remarkable though they are. For anyone who spends even a few minutes here, lessons about character and integrity emerge, lessons about a self-made man whose hands forever bore the marks of physical work in the beet fields of northern Colorado. He was someone who took life seriously and excelled at both scholarship and athleticism. And he was someone who believed passionately in public service; someone who implored those of us in private practice to get our rear ends back in public service. He also passionately believed in human equality: the dignity of all persons and civil rights. And a lesson I think you will find about humility, and the one that strikes closest to home to me, he was someone who always, in encouraging a novice law clerk to express a view that the Supreme Court might have got it wrong, would say: "Two heads are better than one." He always wanted to know what someone else thought. He never thought he had a purchase on the truth.

It means the world to me that I come to work every day in a building named after Justice White. It is a very great thing to know that this exhibit will be here for years to come, to inspire young people who visit this building, happen upon this exhibit, and consider modeling their lives on this man.

On a lighter note, I must confess that there are two things I can't walk past every day without smiling. One is the putter you will see in a glass case now forever memorialized. Justice White was a ferocious competitor. He had a golf course that went around chambers every day and you'd have to bet with him –gamble with him on putting. Now that putter is there forever, and that just tickles me. The other thing is the bust of Justice White, now in bronze. I happened to be lucky enough to be there on the day that the artist brought the clay mold into chambers for his approval. And he walked over to it, kind of grunted at it disapprovingly, and said: "My nose never looked that pretty. I've broken it too many times." And then – and I think the artist was just about to lose it – when he started putting his finger up on the nose and pushed a dent into the nose. This fellow had spent I don't know how many hours working on that thing, and that dent is on that bust's nose.

So, at any rate, let me begin by recognizing the remarkable job done by the folks who made this exhibit happen. Tamara Hasenkamp designed everything that you're going to see. David Pachuta, exhibit designer and project manager for 28 years at a local museum, figured out the final design of what's laid out there. Jared Thomson, a graphic designer for 10 years at a local museum, designed all the labels and the signs. Cathy Eason of the Tenth Circuit library chose the objects and artwork that you see displayed; wrote all the text; did the preliminary arrangement of the items; and supervised the installation. Judge Ebel, this project was really his inspiration, and it is his determination that made it happen. Greg Kerwin, Judge Logan, and the Historical Society helped organize all this and made this event possible. But most of all, we owe our thanks to Mrs. White, to Barney, to Nancy and Linda, Judy and Ken Caughey, Barbara and Rike Wootten, and the entire White family, for sharing these materials, and making it possible for people to have a sense of this man for years to come.

I'm also delighted to recognize the enduring White-Stearns connection to CU. With us tonight are professors from the Byron White Center at CU. Professor Richard Collins and Pierre Schlag and the student on the Byron White scholarship funded by his former law clerks and other admirers: Elliot Charles Dickenson.

Now I'd like to introduce to you our speakers. First, tonight, is the Chief Judge of the Tenth Circuit, Deanell Tacha. She has, I very quickly learned, the most difficult job on this court, trying to convince a dozen independently minded judges to get to yes on everything from court cases to carpeting. And thanks to her, this place manages to function somehow, and function very efficiently and effectively. And thanks to her, this project was funded and organized.

White Exhibit Remarks Nov. 14, 2006

Welcome and thank you for coming this evening to share this milestone with us.

My name is Neil Gorsuch and I am one of the new members of the 10th Circuit.

As someone who admires Justice White greatly and treasures the year I spent working for him, I'm honored that the Historical Society asked me to welcome you here tonight.

It is hard to imagine a more remarkable 20th Century American life.

> Byron White, who grew up in Wellington Colorado, a town of 350 souls, was appointed to the Supreme Court at age 44.
>
> Who was top of his class in HS, College, and at Yale LS
>
> Who Served in the Pacific Theater during WW2 and in the Kennedy Justice Dept during the beginnings of the civil rights movement
>
> Who went on to serve 31 years on the Supreme Court, the 11th longest tenure in our history.
>
> And during that time, wrote 475 Supreme Court majority opinions; 320 dissents; and 130 concurrences (for a total of over 900 opinions).
>
> Yet who, at the same time, was the highest paid NFL player of his day, led the NFL in rushing, and held the NCAA football record for all purpose yards per game for nearly 50 years (a record now held by Barry Sanders).

> No wonder that record stood so long: Justice White averaged a remarkable 246 yards in the games he played.

This exhibit will teach, inform and, I am sure, inspire visitors to our court for years to come – just as Byron White continues to inspire those of us who were fortunate to know him.

It teaches how fully life can be lived.

But this exhibit also reminds us not just of the facts and figures of Justice White's life, remarkable though they are.

For anyone who spends even a few minutes here, lessons about character and integrity emerge. Lessons about a -

> Self made man whose hands forever bore the mark of hard physical work growing up in the sugar beet fields of Northern Colorado
>
> About someone who took life seriously and excelled at both scholarship and athletic competition
>
> About someone who believed passionately in public service, our electoral process, human equality and dignity, and civil rights.
>
> And a lesson about humility. Someone who, in encouraging his novice law clerks to offer their views, always said humbly: Two heads are better than one.

It means the world to me that I come to work every day in a building named after Justice White.

And it is a very great thing to know that this exhibit will inspire young persons who visit this building and happen upon this exhibit to

consider living his or her life modeled on the example of Justice White.

On a lighter note, I must also confess that I can't walk past the glass case containing the Justice's golf putter without smiling and remembering just the simple, happy moments spent putting golf balls around chambers in fierce competition with the Justice.

***

Let me begin by recognizing the remarkable job done by the folks who made this exhibit happen.

Tamara Hasenkamp - she designed what you see here

David Pachuta - exhibit designer and project manager for 28 years at a local museum who designed the final layout of the items in the cases

Jared Thomson - graphic designer for 10+ yrs at a local museum who designed all the labels and signs

Cathy Eason, of the 10th Circuit library, chose the objects and art work you see displayed, researched and wrote all the text, did the preliminary arrangement of the items, and supervised the installation

Judge Ebel - the project was his inspiration and his determination helped make it possible.

Greg Kerwin, Judge Logan and the Historical Society for organizing this event.

Most of all to Mrs. White, Barney, Nancy, Linda, Judy and Ken Caughey, Barbara and Rike Wootten, and the entire White Family - for sharing the materials and making it possible to share Justice

White with generations of visitors to this court house.

Also delighted to recognize the enduring White-Stearns family connection with CU. With us tonight are

Professors at the White Center at CU

Richard B. Collins
Pierre Schlag

Students on White Scholarship:

Elliot Charles Dickerson

***

Now, I'd like to introduce to you our speakers.

First is the Chief Judge of the Tenth Circuit, Deanell Tacha. She has, I have quickly learned, the most difficult job on the court – trying to convince a dozen independently minded judges to "get to yes" on everything from court cases to carpeting. Thanks to her, this place manages to function and function efficiently and effectively. And thanks to her, this project was authorized and organized.

***

Our next speaker is Judge David Ebel. Judge Ebel served as Justice White's law clerk during the 1965 Term and he provided the inspiration for this project. In many respects, we consider him the Dean of the White Clerkship Family. Judge Ebel -

***

Finally, I have the honor of introducing Barney White. It is only because of the generosity of Barney, Mrs. White and the White Family

that we are able to be here tonight. They have given us the gift of sharing memories of the man they loved. For that we are very grateful. Barney -

***

Thank you all for coming. Please do feel free to take some additional time exploring the exhibit and enjoying yourselves.

OTHER ANECDOTES

BUST - NOSE

PICTURE OF LAW SCHOOL FRATERNITY AND WHAT HAPPENED TO THEM
PRESIDENT, 2 SCT JUSTICES, SECTY STATE, ETC.

31 YRS BUT EASILY COULD'VE GONE ON LONGER. EXCEED RECORD?

BRONZE STAR FROM WW2. PICTURES FROM BUNKER HILL SHIP OF KAMAKAZE.

NOT JUST FOOTBALL. BASEBALL (450 BATTING AVE). BASKETBALL. TOURNAMENT.

BARNEY ON JO'L PHILOSOPHY - DEFERENCE FOR LEGISLATURE ARISING FROM RESPECT FOR POLITICAL/PUBLIC SERVICE

Investiture Remarks

November 20, 2006

I confess I am pretty embarrassed by all these speeches – it feels something like the corpse who is able to listen to the eulogies at his own funeral.

I don't want to prolong these proceedings any more than necessary, but I do want to take a moment to thank each of you for being here.

As I look around this room, I see so many people to whom I owe so much. So many people I admire. So many people I hold dear.

In a very real way, I would not be here today without your friendship, support, and confidence.

I want to assure you that I will always try to be mindful of the confidence you've placed in me. And I hope I continue to rely on your guidance and support as I face this new challenge. I realize that to whom much is given much will be expected.

As a judge I hope to emulate the respect for the rule of law, for the decisions and judgments of the elected branches of government, and for the equality and dignity of all persons that shines through in the work of two of my former bosses – Byron White and Justice Kennedy.

I want to thank the President for my nomination. And I want to thank the Attorney General for the opportunity of a life time to be a part of his team at the Department of Justice as well as for the trust he always reposed in me.

I am also deeply grateful to Senator Allard and Senator Salazar for ensuring that my confirmation was handled in such a thoughtful, considerate, and bipartisan manner.

To my colleagues and the entire 10th Circuit court staff I owe a very great deal for their warm and gracious welcome over the last few months and all their guidance and help in getting this rookie judge up and running.

I also a special debt to my law clerks – Mike Davis, Jessica Greenston, Jamil Jaffer and Heather Kirby – along with Holly Cody, Vicky Parks, Betsy Shumaker for all they did in making this event possible.

I have been mighty lucky in my draw of law clerks.

Finally, I could not let this moment pass without recognizing the debt I owe to my family – Louise, Belinda, Emma and the rest of my extended family who are here today. I feel an equal debt to those members of the family who are no longer with us, but whose presence is keenly felt right now.

After his father died of tuberculosis when he was still a child, my maternal grandfather went to work to support his mother and his sister as a red cap at Union Station down the street.

My paternal grandfather worked his way through college as a conductor on the original Denver trolley system.

Both went on to great things, professionally and as fathers and husbands. They made a path and left an example for those of us who have followed. But in a very real way, I am sitting here now only because those great men stood there then.

Again, thank you so much for being here. I am honored by your presence, and I look forward to thanking you more personally at the reception.

1. *10th Circuit judge's oath a family affair NEIL GORSUCH DONS ROBES Justice Kennedy presides at a public ceremony for the son of an ex-EPA chief as his wife and daughters watch.*

Content Type
News

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10th Circuit judge's oath a family affair NEIL GORSUCH DONS ROBES Justice Kennedy presides at a public ceremony for the son of an ex-EPA chief as his wife and daughters watch.

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Body

Seven-year-old Emma and 5-year-old Belinda helped their father, ***Neil Gorsuch***, into his judge's robes Monday after the newly appointed 10th Circuit Court judge was sworn in.

Munching on cookies after the formal ceremony, Emma said she thought it "was nice."

Supreme Court Justice Anthony Kennedy, who was in Denver to administer the oath, spoke directly to the little girls before Gorsuch raised his right hand.

"He's doing it to remind all of us that the first obligation any American has is to defend and protect the Constitution of the United States," he said.

Dozens of family members, friends and Colorado's U.S. senators and the U.S. Attorney General packed the federal courthouse. A television monitor showed the proceeding in an overfill room.

Gorsuch's uncle and a friend, who both spoke, described a man with a sense of humor and a commitment to law. A juror once called Gorsuch - 39 years old with a full head of gray hair - Perry Mason after a moving closing argument, said Mark Hansen, a Washington attorney.

"If adversity shows the true character of a person, then Neil showed his resilience, his strength and steadfastness," Hansen said of how Gorsuch handled a difficult case.

Gorsuch was confirmed by the Senate on July 20 and was officially sworn in this summer. The ceremony Monday publicly commemorated his appointment.

Born in Denver, Gorsuch moved to Washington, D.C., as a teenager when President Ronald Reagan appointed Gorsuch's mother, Anne M. Gorsuch, to be the first female administrator of the Environmental Protection Agency.

Gorsuch attended Columbia University, Harvard Law School and Oxford. Most recently he served as principal associate attorney general at the Department of Justice.

"As a judge, I hope to emulate the respect for the rule of law, for the decisions and judgments of the elected branches of government, and for the equality and dignity of all persons that shines through in the work of two of my former bosses, Byron White and Justice Kennedy," Gorsuch said.

The 10th Circuit covers 560,625 square miles, nearly 20 percent of the U.S. land mass, and raises some of the most important legal issues of the time, said U.S. Sen. Ken Salazar.

"Deciding cases involving life and death, the reach of government power, the scope of our freedoms and liberties is the daily task of a federal judge. It is a task that requires intellect, compassion, and a dedication to fairness and impartiality," he said. "He has a sense of fairness and impartiality that is a keystone of being a judge."

PRAISE FOR ***NEIL GORSUCH***

"If adversity shows the true character of a person, then Neil showed his resilience, his strength and steadfastness."

Mark Hansen, a Washington attorney, speaking of how Gorsuch handled a difficult case

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Arrived – Dean of Graduates, Leslie Mitchell

Eminent and much-published historian

Walked into his rooms (aka office)

Met expectations in many ways

Spiral stone staircase
Worn steps

To dark and cosy room with wood panel, roaring coal fire (much warmer)

Dr Mitchell in a wool sweater vest with elbow patches

All that was missing was a pipe

Different in others

Life-size blow-up plastic female doll

Sitting in a chair

Wearing a mink stole and feathery hat, I believe

And I later learned she had resided in that chair for at least a generation

SUPP 12d-000015

At any rate, I mention this because of what LM told me when I arrived

> After the obligatory cup of tea, and a warm welcome, whispered in a sort of wise way that I musn't forget that
>
> > Far from being different people separated by a common language, as the old saying goes,
> >
> > Americans and Brits are DIFFERENT peoples separated by a DIFFERENT language…

So it is, both literally and figuratively –

> Literally, this will become obvious within minutes of your arrival at Oxford, Cambridge, or anywhere else
>
> Battles,
> Gaudy,
> Going Down,
> Coming Up,
> Nought Week,
> Rustication,
> Sub-Fusc,
> Viva,
> The Bod,
> Bumps,

SUPP 12d-000016

Scout
Hilary,

They call it English, though sometimes it very much seems we do speak a different language

But Dr Mitchell was right in a very different sense.

Totally different ways of life

Not just in a geopolitical sense

Indeed, though we are the closest of allies, our daily lives are often lived in very, very different ways

British countryside

So much of Britain is full of small villages, not sprawling suburbs

Corner shops on the High Street, not Wal Marts at the strip mall

Know what I mean when you experience the leisure and comfort associated with a well made cup of tea on a rainy afternoon

Or long walks across ancient rights of way through rolling meadows, not barbed-wire and posted “no trespassing”

Yet filled with a sort of diversity – from India and Pakistan to Eastern Europeans living among them – that is a very different sort of diversity than we experience or imagine in America

The one message I want to impart – the one piece of unsolicited advice, if you will – is this:

Get to know the British and Britain.

Surprisingly, it's very easy not to in 2 or even 3 years living there

Surrounded by interesting Americans

Involved in your studies

With the sights and sounds of all Europe close at hand

Meanwhile, you will be surprised to hear not every British person you'll meet loves Americans

Or our accents

Truth is, some very slow; others won't happen

But don't give up

SUPP 12d-000018

Avoid the temptation to resort always to the easy American friendships, to fly abroad every vacation rather than explore the British countryside

If you make the effort – and it may take a lot of effort – you will be rewarded handsomely with experiences and friends that will change your life in ways that you cannot now imagine.

> I am proof
>
> Grew up in Colorado.
>
> Never been to Europe until I got on the plane you're about to.

Fast-forward 13 years. Who would've imagined that I would've married to a wonderful British woman

> … or that, since moving here, she has become a country music fan, to her parents dismay and amazement…
>
> or that I would have two daughters who call the bathroom the "loo" …

Hardly suggest you all go find British mates.

But I am suggesting that the effort to make British friends and get to know Britain will pay life long dividends in ways hard to fathom sitting where you are.

** *

How to go about seeking this experience out?

First message is: It won't come to you. You must seek it out.

Join the rowing club

No matter how bad

Or any other sporting team

The Brits are fanatical about sport

All participate, regardless of athleticism

You should too

Join the Union or other social club

Don't just attend. Speak up.

Invite people home with you

Show them where you live

When you travel, invite a Brit to come along

Play darts in the college pub

SUPP 12d-000020

In short – the British see us Americans as forward anyway. So you might as well fulfill the expectation.

If you do it with genuine enthusiasm

Good humor

If you do it without too much defensiveness for your own

You can and will have a wonderful experience.

Oral Argument Presentation, ABA Conference Sept 2007

"You are the fish"

As Fly fisher, at first disturbing
But then realize rather apt
fresh vs lunker

Biggest Diff on this side of bench

Easier to ask Qs than answer the,
Sleep well night before

Offense

No introductions
Pick just couple issues; don't try to do too much
First couple minutes; head of steam
Which to pick; which to let go (vs SCOTUS)
Don't repeat brief/new insight but not new argument
Short tags
Keep it short - esp Appellee

Defense

More important
Anticipate every hard question
Short tags
Shuffle cards
Modules v speech (plain language; leg history; policy)
Segues; circle back to themes
Think like fish - legal rules/next case/hypos

Three types of questions: (1) facts (your credibility at stake); (2) legal position; (3) hypos

Moots

2 moots
not cheerleaders; co-counsel; experts
people fresh to issue
be flexible; modify your approach

not 2 days or less before
early - 1st in time to affect briefs

Rebuttal

1 home run; not scattershot
Recency; use the opportunity

Usefulness Generally

5%

Soft landings

Remarks to the American College of Trial Lawyers, Judicial Fellows
October 12, 2007

Welcome to the US Court of Appeals for the 10th Circuit and to its home, the Byron White Courthouse.

I've been asked to share a few words both about the man for whom our courthouse is named, as well as about the building itself. As someone who treasures the year I spent working for Justice White as his law clerk, I am very happy to oblige.

In many ways, it is hard to imagine a more remarkable 20th Century American life.

> Byron White grew up during the Great Depression in Wellington Colorado, a farming community of 350 souls.
>
> His hardened hands bore evidence throughout his life of the physical labor of his youth, and his work on the sugar beet farms and railroad lines of Northern Colorado.
>
> He first rose to national prominence, of course, during college at the University of Colorado. There, he was an All-American football player and perhaps the most famous college player of his day.

In fact, he held the NCAA football record for all purpose yards per game for nearly 50 years (a record now held by Barry Sanders).

And no wonder that record stood so long: Justice White averaged fully 246 yards per game.

But academics were always more important to the Whites than athletics.

Byron White graduated 1st in his class academically from CU.

He then won a Rhodes scholarship to Oxford.

Incredibly, his brother Sam won a Rhodes a few years earlier. I am not sure whether this family feat has ever been repeated.

Before heading off to Oxford, he took a brief sojourn into the National Football League, playing for the Pittsburgh Pirates, now the Pittsburgh Steelers. Justice White hoped to earn a few dollars for subsequent studies at law school.

And boy, did he. His salary was $15,000 – the highest in the league in 1938-39.

To give you a frame of reference, that amount was several times the franchise fee Art Rooney paid for team in 1933.

All White did in return was be the number 1 draft choice in the entire draft; lead the NFL in rushing; and win the Rookie of the Year Award.

Later, at Yale Law School, Byron White showed his performance at CU was no fluke.

He again graduated first in his class academically.

Apparently feeling he had a little too much free time on his hands, he also played two seasons for the Detroit Lions.

There he again led the NFL in rushing yards and later earned election to the Pro Football Hall of Fame.

As World War II heated up, Byron White signed up for the Navy and served in the Pacific Theater.

He served on 2 ships hit by kamikazes and earned a Bronze Star after he went down into the burning hold repeatedly to carry wounded sailors up to the deck to safety.

After the War and finishing law school, he was selected to clerk for Chief Justice Fred Vinson of the U.S. Supreme Court.

A mere 15 years later, Justice White returned to that building to take his own seat. In the process, he became the 1st person ever to serve as both a law clerk and Justice at the Court.

After his clerkship, Justice White spent 14 years in private practice here in Denver at the firm now known as Davis, Graham and Stubbs.

But when Jack Kennedy decided to run for President, Byron White signed up to help run the campaign's outreach to independent voters. White and Kennedy, of course, had known each other from days together in England the South Pacific.

After President Kennedy's victory, he asked White to serve as Deputy Attorney General, Bobby Kennedy's right hand.

As Deputy Attorney General, Justice White helped oversee the Kennedy Administration's civil rights efforts. Indeed, once he checked himself out of the hospital to go to Montgomery, Alabama to confront the Governor and ensure the safety of the Freedom Riders in a very tense situation.

After only little more than a year at the Department, President Kennedy nominated Justice White to the Supreme Court at the tender age of 44. His confirmation hearing lasted less than an hour.

He went on to serve 31 years on the Supreme Court, the 11th longest tenure in our history.

During that time, wrote 475 Supreme Court majority opinions; 320 dissents; and 130 concurrences (for a total of nearly 1000 opinions).

As you well know, the liberals considered him a conservative; the conservatives thought him a liberal. Though a lifelong loyal Democrat, he could've cared less what the pundits had to say.

And he cared little for showmanship. One of his early clerks tells the story of having spent many late nights wordsmithing a draft opinion for the boss and waiting anxiously for the Boss's reaction. The Justice reacted in a characteristic way, telling the law clerk, "You write elegantly. Justice Jackson had that problem, too."

The substance is what Justice White cared about, getting the answer in the case before him absolutely right - or as close to right – as he could employing conventional legal reasoning and principles. And doing so with humility and humanity.

In encouraging his novice law clerks to offer their views - often a daunting proposition to a new lawyer in the face of such a wise and experienced man - Justice White always said humbly and encouragingly: "Two heads are better than one."

If his opinions bear any common theme, it is perhaps the centrality of judicial restraint. Raised during the Great Depression, Justice White had great faith in the elected branches and their constitutional responsibility for making policy decisions. At the same time, he also believed the Constitution required those branches to be fair, and that the powers of government must be exercised without discrimination. Human equality and dignity, and civil rights were to him essential ingredients to fair politics. The Constitution guarantees a level playing field in the procedures and operations of government, Justice White thought, but guaranteed few policy outcomes.

* * *

Thanks to the generosity of the White family, downstairs on the First Floor, you will see an exhibit of some of Justice White's memorabilia.

It tells the story of Justice White, as well how fully life can be lived.

For one, I confess that I can't walk past the glass case containing the Justice's golf putter without smiling and remembering the many happy moments spent putting golf balls around chambers in fierce competition with the Justice.

I hope you will spend some time in the White exhibit.

Beyond that now, a few promised words about our courthouse generally in advance of your tour after lunch.

* * *

The building was constructed in the early part of the 20th century. Denver was then maturing from a rowdy mining camp into the center of commerce for the Rocky Mountain region. With rather grand ambitions for its new role, Denver thought it merited a worthy building to house the Post Office and federal courts.

Previously, the post office and federal offices were located at 16th and Arapahoe, the site now of the Federal Reserve Building. That building – the Tabor building – is named for one of Denver's Silver Kings, Horace Tabor who donated the land to the public for a grand federal building.

And therein lies an interesting footnote to our story. Tabor had started life as a dirt poor Vermont stonecutter. With his stoic wife, Augusta, he labored in the mountain mines of Colorado for 20 years before striking it not just rich but beyond rich.

Indeed, he became one of the richest men in America, and then, as often is the case, he purchased a US Senate seat for himself, quickly

shucked off Augusta, and held a wildly elaborate wedding at the Willard Hotel for his new young bride, Baby Doe, a gauche affair attended by virtually every Washington dignitary, including the President.

But as quickly as Tabor ascended, so he descended. In 1893, the Silver Panic hit, and his holdings became worthless.

He spent the last painful years of his life in a tiny home and serving as postmaster in the very building at 16th and Arapahoe he had helped erect years before.

Baby Doe, incidentally and surprisingly to many, stuck by him faithfully to the end. Indeed, she spent her last years working by hand the one mine left to her. Before he died, Horace told her to hold onto the Matchless Mine. She did just that until she was found frozen to death in her unheated shack atop the Leadville mine at over 10,000 feet.

***

From this brief detour in our story you can see Denver came a mighty long way from its early gold rush days in 1859 to its establishment as a financial and commercial hub in the early part of the 1900s.

Signifying this transition, the city fathers lavished on this building great attention.

It is constructed of marble quarried from the same mine in Colorado that was the source for the Lincoln Memorial. And it has many hidden charms.

The first floor was originally home to the Post Office. You will see names inscribed into marble on the first floor of some of the most famous Pony Express riders who served the West.

You will also see two murals at either end of the hall, one entitled Mining and the other Agriculture. Both are distinctively Colorado scenes, and I cannot look at the rugged shirtless miner with his pack mule on a winding and perilous mountain trail without thinking about poor Horace and Augusta.

On the first floor, as well, are two of our courtrooms. Originally part of the work space for the Post Office, you will see the sky lights that allowed natural light to aid in mail sorting.

The glass ceiling of the en banc court room is now etched with the seals of each of the states encompassed within our circuit – Colorado, New Mexico, Utah, Kansas, Oklahoma, and Wyoming. Six states accounting for over 20% of the continental United States's landmass.

The second floor was the original home to the federal courts. On one end of the building, you will see the original district court, replete with velvet, marble chandeliers, and Latin inscriptions.

That historic courtroom, still in use, has been home to many of the West's most notorious trials, not least of which those of the Oklahoma City bombers.

Half way down the hall, you will see what had been the court's library. Oak paneled, it bears the names of great law givers through history. Recently, it has been converted into a courtroom. I always feel sorry for the lawyers who appear here. They are no more than 5 feet from bench, and you really can see when they sweat!

Finally, on the second floor you will come to the original court of appeals courtroom, restored in the 1990s to its original condition.

It, too, bears the names of a number of law givers and several quotations, including one directly above the bench that stares at the advocates – Reason Is the Soul of All Law. Lawyers seem constitutionally incapable of resisting the urge to work that quote into their oral presentations…

Perhaps my favorite inscription, however, is outside the building, next to one of our formidable granite Rocky Mountain Bighorn Sheep. It

sagely advises all of us that "If thou desirest rest, desire not too much."

By this time, I suspect you are ready for a rest, and I propose now to give it to you. I'd like only to point out Vicky Parks, our Deputy Circuit Executive who would be delighted to give you a tour of the building and the White exhibit.

Thank you so much for the opportunity to be with you this afternoon.

I want to chat with you this evening about what I'll label consequentialism. What is it? By the time you finish law school, you'll have seen plenty of it, in a variety of guises. Roughly, it's a way of analyzing cases and creating legal rules based on assessment of their consequences.

Maybe the first time you encountered this in law school was when you met Judge Learned Hand, one of our greatest appellate judges, and his famous formula $B < PL$. The consequential costs of a legal rule should be less than the probability times the loss of the harm it's aimed to prevent. But this heuristic is taken to whole new level by others today.

So, for example, my 7th Circuit colleague, Richard Posner, urges us to ignore the traditional distinction between intentional torts and unintentional torts. It makes no odds to him whether or not a tort is committed with intent to kill or harm. Perhaps the most notable example of this in his Law and Economics textbook is the case of Bird v Holbrook (I owe John Finnis for highlighting this example in his masterful Cleve St L Rev article). There, the defendant grew tulips. To protect the garden, he set a spring gun to shoot any trespasser. The plaintiff, however, had a stray peahen, followed it onto the defendant's property, and was rewarded with a spray of shotgun pellets. In Bird, English courts finally condemned spring guns and mantraps as responses to poaching. The courts did so on the basis that it is unacceptable to intentionally kill people for poaching.

Posner, however, asks us to analyze the case very differently. Rather than worry about whether anyone is intentionally killed, the issue in the case as he formulates involves "two legitimate activities, raising tulips and keeping peahens." And the challenge to him is to "design a rule of liability that maximize[s] the (joint) value of both activities, net of any protective or other costs (including personal injuries). To him, the intention of the defendant – to kill or harm – " is neither here nor there." All our effort in the Model Penal Code and Restatement of Torts to clarify and specify mens rea elements and articulate different degrees of liability based on them (more for intentional, less for merely knowing, reckless, or negligent) goes out the window.

But this is like a loaded spring gun. Unwary might be blasted. Conflating mental element to focus exclusively on consequences flawed for a number of reasons.

First, it fails to account for a basic feature of human existence. In a purely consequentialist account, there is no distinction between the 2 following circumstances. One, the decision to build a new highway tunnel through the continental divide to speed your trip across the country or from the Denver airport to Vail, knowing that the job is dangerous and likely to result in one or more deaths. Second, the decision to kill a worker or two to inspire the rest to complete the tunnel on schedule. As Finnis has put it, it's like saying that those who fly the Atlantic foreseeing jet lag intend to get it; that those who walk intend to wear out their shoes – one he calls a "psuedo masochistic" theory of intention. It just doesn't fit with our conception of human experience where intent matters because to intend something is to choose it. To endorse it. Our choices are reflections of our character, who we are and wish to be, in ways that unwanted consequences can't be. As Justice Holmes once put the point, even a dog knows the difference between being tripped over accidentally and being kicked deliberately.

But that's just one difficulty. There are two others I want to mention. The second revolves around the incommensurability problem. If we limit ourselves to toting up the costs and benefits of a legal rule, how are we to do when those costs and benefits are, as is sometimes at least the case, radically different? Or fundamentally incomparable or incommensurate? Having picked a bit on Judge Posner already, let's choose another focal point – Ronald Dworkin. He tells us that every single legal case has a *single* right answer. Even in the hardest and most mind numbing ERISA or tax case, where reasonable judges disagree. In Dworkin's account, they disagree not because reasonable minds can differ over the best among a range of good choices. They disagree, Dworkin tells us, because some of these judges just can't see the Truth.

How are we to find the Single Right Answer? Dworkin says we do it by picking the legal rule that meets two criteria: first, it must "fit" with existing precedent and legal principles; second, it must meet the requirement of "justification," which, to simplify, means it's morally sound. But surely different potential legal choices facing the judge or the legislator have different degrees of fit and justification. We have two totally different axes on which to judge legal rules. How much fit is necessary to make a rule the best one? How much justification for a choice to be the best? Dworkin struggles to answer these questions and his struggle is beyond the scope of our chat. But at the end of the day, the trouble is, we have two incommensurate goods we are trying to accommodate and no way to

commensurate them on a single scale. It's like saying: which is better, the *taste* of a steak or the *look* of a mountain? It brings to mind an example by John Hart Ely, one of your remarkable graduates, though it arose in a different context: it's like saying pick the best shade of green pastel redness...

Now, a third problem. When you insist that consequences determine legal rules, some strange things happen to what we call human rights, including our conviction about human equality. Intending to kill or maim people is, on a consequentialist's account, neither here nor there. What matters is the consequences in the world. The upshot of this, of course, is that human beings have no intrinsic value. No inherent equality. Rather, their value derives from, and extends only, to their instrumental capacities to bring about valued consequences. Now, this is a generalization and a rather abstract sketch. Give me an example, you might say.

Well, so far, I've avoided my book and the difficult subject of assisted suicide and euthanasia. But it supplies such good illustrations of this point that here I think it's worth raising the subject. And, anyway, what author can pass up a chance for to plug his book? In Posner's account of assisted suicide, the question of legalization turns, at the end of the day, on social costs. He submits that legalization of assisted suicide would actually decrease the number of suicides. (This hypothesis, as it turns out, is based on a flawed regression with a sampling error rate of about 40%. But let's pass that problem for the moment). Against the possible social benefit of decreased suicides, he says that legalization might also, by encouraging people to live longer may raise our social costs of having to care for more older folks. Whether to legalize assisted suicide, he concludes, depends on whether it's more efficient for society as a whole to keep folks around or let them die because of - quote "costs borne by people who through their taxes, health insurance premiums, or doctors' bills are forced to pay other people's medical expenses." That is, we might not want to legalize assisted suicide because it might be cheaper for society to have more people commit suicide and thus not live long enough to raise our health insurance premiums.

Consequentialist accounts of euthanasia take other forms. Ronald Dworkin seems to suggest that human life derives its value from and to the extent of the individual's capacity to function autonomously – making and executing a life's plan. In Dworkin's phrase, to be the author

of one's own life story. It involves the ability to make what Dworkin calls a "creative investment" in your own life. But if human life derives its value only from its consequential ability to be a creative author one's own life plan, what about those who cannot? The young, the old, the physically or mentally disabled? Dworkin suggest that respect for autonomy means that we must honor a competent patient's advance request to be killed when dementia sets in – and do so even if the patient later retracts her request after the disease strikes. Because the patient after Alzheimer's has set in is no longer autonomous, her life holds less value. They tell us that it is the autonomous request, not the one infected by dementia, that counts. And they would seemingly force patients to abide by their original requests – that is, submit to be killed against their current wishes.

From that perspective, we might also ask: How much of a step really remains before we conclude that persons incapable of exercising autonomy are better off dead? Peter Singer of Princeton, for one, insists that respect for autonomy means that it is a positive good for parents to kill infants suffering from Down's Syndrome, hemophilia, or any other inconvenient malady, and to, quote, "replace" them with better candidates. Professor Singer reasons that doing so would allow parents to fulfill their own autonomous life plans and inflict no real harm on infants because small children do not enjoy the basic prerequisites necessary to exercise autonomy or self-determination. Neither can Professor Singer be easily dismissed as a quack. The New England Journal of Medicine has hailed him as one of the most influential philosophers since Bertrand Russsell, and he holds an endowed chair in Bioethics at the University Center for Human Values at Princeton.

On Singer's reasoning, we might continue along the slippery slope and ask, too: Why not allow baby boomers to decide when to "divest themselves" of their burdensome Alzheimer-inflicted parents – and do so even without their parents' consent, at any point? At least one

leading Dutch scholar, John Griffiths, has already begun pushing for the regularization of non-consensual adult euthanasia to supplement the existing infanticide protocol. And it has long been clear that several mainstream leaders of the euthanasia movement support not only consensual assisted suicide for (all) competent persons but also the non-consensual destruction of unwanted infants and the demented elderly, among others. This has indeed been the stated goal of many in the American euthanasia movement since its own birth in the Social Darwinian eugenics era of the latter part of the 19th century. Remember Justice Holmes' infamous dictum in Buck v Bell, where the Supreme Court upheld Virginia's Eugenical Sterilization Act with these words: "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind...Three generations of imbeciles are enough."

And look at Singer's own work. In his mind, adult chimpanzees, dogs, and cats are "rational and self-conscious beings" with sufficient instrumental capacities for self realization that they are what he calls "non-human persons" whose lives should be protected. Indeed, Singer is a well known animal rights activist. At the same time, he tells us, human children lack the same capacity for reason and autonomous decisionmaking as these animals, and so are, we might say using Singer's strained idiom, non-person humans. Singer's instrumentalist account of human rights thus grants a right to life to adult animals, but not human babies. Though he never discusses it, under Singer's account, it would seem to be acceptable for humans to kill not only their own young but also young animals – to engage in the cruelty necessary to prepare veal, to eat spring lambs – but not adult cows or sheep. One cannot help but wonder whether Singer would really want to so limit his defense of animal lives, even if he sees littler value in infant human life. But there we are.

I mean to suggest by all this that consequentialist accounts focus us on the instrumental worth of human beings. In doing so, they call into question our conception of human persons as fully equal. It's a radical attack on the understanding of human rights embodied in our own Declaration of Independence which expresses a commitment to the ideal of human equality. It is utterly

inconsistent with our common law which embodied this same understanding. Remember the case of Dudley and Stephens? You can't eat the cabin boy, even if it means starving yourself. You may not take an intentional act to kill an intrinsically equal human being. Even if the cabin boy is sure to die soon anyway, or has lesser capacity for autonomous self creation, or if doing so would enhance overall social welfare by enabling a brilliant scientist to survive. It is also at odds with our Fourteenth Amendment right to equal protection of the laws. Our laws do not protect infants, the elderly, those with maladies or illnesses, as less equal than the productive, fit, creative authors of their own lives.

Well, I could go on. But three troubling consequences of consequentialism seem enough. Any more, and I know I risk putting you to sleep. Of course, I haven't addressed all the subtleties and complications that might occur to you. For example, you might wonder: do I mean to say that law and economics has no valuable role? Hardly. Focusing on the costs and benefits of our choices is a very useful heuristic device. It focuses our thinking. And in the many areas of life where we have to choose between competing goods or lesser evils, it can help us bring greater clarity to the nature of the choice we confront. But that is not to say it that it fully describes our choices or our law, that it can commensurate the incommensurable, or that it is perhaps always entirely consistent with our founding principles. Likewise, you might wonder: well, given your critique of consequentialism, what would you have us do in its place. That's a complex question that would require much more time that we have. Which is to say: buy the book. I hope only that I've perhaps whetted your appetite a bit. And invited the possibility that there may be other ways to thinking about hard questions.

I. BRIEFS

- **What makes an appellate brief a good brief**: what are the top three or four things lawyers need to know about how to write an effective brief?
  - Better to have **separate appellate counsel** vs. counsel who worked on trial or summary judgment?
  - **Is a good appellate brief fundamentally any different than a good trial brief** – i.e. a brief in support of a motion for summary judgment or motion to dismiss?

- **What makes a bad brief bad**: what are the top three or four things lawyers should avoid in brief writing?

  - Recurring problems?

- **Is there a particular section of a brief that you turn to first?**

  - Are there sections of the brief that you think get short shrift from lawyers – **sections that could be used more effectively**?

- **Tips for reply briefs**: what makes an effective reply brief? What makes a bad reply brief? Are there times an appellant shouldn't file a reply brief?

- What about supplemental submissions: what types of supplemental submissions are helpful to the Court?

  - Do you find law review articles useful in deciding cases? What about blogs? Have they attained enough credibility to be cited in the same way as law review articles?

- Are there any **special rules of thumb that apply to briefs filed in criminal cases vs. civil cases or to briefs filed by the government vs. a private party?**

- **What about amicus briefs?**
  - How often are they filed?
  - What makes an amicus brief effective?

II. ORAL ARGUMENT

- What do you hope to get from oral argument?

- What are top three or four things a lawyer can do to present an effective oral argument?

- What are the top three or four things lawyers should avoid doing during oral argument?

- How should lawyers prepare for oral argument?

- What do you do to prepare to hear a case?

- How often does oral argument change your mind about a case?

III. THE PROCESS

- How does the Court decide which cases to schedule for oral argument?

  - Should lawyers always request oral argument on the theory that it can only help?
  - Does the Statement Regarding Oral Argument really matter?

- How do cases get assigned to specific judges?

- Talk a little about the decision-making process: bench memos, conference, etc.

IV. MISCELLANEOUS ISSUES

- Certification to CO Supreme Court

- Petitions for rehearing en banc

- Are there common mistakes made in preparing the appendix? In preparing the appendix, should counsel err on the side of inclusion or exclusion?

V. CONCLUSION

- If you could give lawyers who are new to practicing in the Tenth Circuit one piece of advice, what would it be?

- What do you know now about how the federal court of appeals works that you wish you'd known when you were practicing?

SOME TIME AFTER I JOINED THE TENTH CIRCUIT, THE UNIVERSITY OF COLORADO LAW SCHOOL ASKED ME TO TEACH LEGAL ETHICS. MY FIRST REACTION WAS: BUT I THOUGHT *THAT* COURSE WAS SUPPOSED TO BE TAUGHT BY SOME GREYING, BATTLE WORN PRACTITIONER WHO TOLD A BUNCH OF WAR STORIES TO SCARE STUDENTS STRAIGHT. THEN I LOOKED IN THE MIRROR. . . . AND THEN I RELUCTANTLY SIGNED UP. . . .

* * *

THE ISSUE MY ETHICS STUDENTS SEEM TO STRUGGLE WITH MOST CONCERNS HOW FAR THEY SHOULD GO TO PURSUE A CLIENT'S INTEREST. THE MODEL RULES TELL US THAT A LAWYER HAS A DUTY TO REPRESENT THE CLIENT'S INTERESTS "DILIGENTLY." BUT THAT DOESN'T REALLY ANSWER MY STUDENTS' QUESTION. THEY KNOW THEY HAVE TO BE DILIGENT. BUT WHAT DOES THAT *MEAN*, THEY ASK?

THE COMMENTS TO THE RULES OFFER A LITTLE MORE GUIDANCE, EXHORTING MEMBERS OF THE PROFESSION TO ACT WITH ZEAL FOR THEIR CLIENTS.[1] BUT IMMEDIATELY AFTER TELLING US TO ACT ZEALOUSLY, THE COMMENTS ADD THAT LAWYERS *MAY* CHOOSE NOT TO EMPLOY WHAT THEY CALL "OFFENSIVE TACTICS." THE COMMENTS LIKEWISE TELL US THAT LAWYERS DON'T HAVE TO "PRESS FOR EVERY LEGALLY AVAILABLE ADVANTAGE" FOR THEIR CLIENTS.

NOTE HOW THE COMMENTS ARE WORDED. WE ARE TOLD LAWYERS SHOULD BE ZEALOUS AND *MAY* CHOOSE NOT TO USE OFFENSIVE TACTICS. NOW... THAT'S NOT EXACTLY A RINGING ENDORSEMENT OF TAKING THE HIGH ROAD, IS IT? DOESN'T IT INTIMATE THAT A ZEALOUS LAWYER *MAY ALSO* CHOOSE TO USE OFFENSIVE TACTICS? IN FACT, COULD IT EVEN SUBTLY SUGGEST THAT *MOST*

[1] Note change from prior version

SUPP 12d-000045

LAWYERS WILL EMPLOY SUCH OFFENSIVE TACTICS, AND YOU'RE A BIT OF A COWARD IF YOU DON'T?

THESE ARE QUESTIONS MY STUDENTS STRUGGLE WITH. NOT WHEN *MAY* THEY CHOOSE TO AVOID OFFENSIVE TACTICS, BUT WHEN, IF EVER, THEY *SHOULD* DO SO.

* * *

AS IT HAPPENS, MANY STUDENTS SEEM TO COME TO MY CLASS WITH THE CONVICTION THAT THEY HAVE SOME OBLIGATION TO USE EVERY LAWFUL MEANS AVAILABLE TO VINDICATE THEIR CLIENT'S INTERESTS, WHETHER OFFENSIVE OR NOT. THEY SEE LITIGATION AS SOMEWHAT BETTER-GROOMED VERSION OF A RAMBO MOVIE.

HOW IS IT THAT SO MANY LAW STUDENTS, SO EARLY IN THEIR PROFESSIONAL LIVES ALREADY HARBOR THIS VIEW ABOUT OUR PROFESSION? MY LAW CLERKS SUGGEST THAT POPULAR CULTURE IS A CONTRIBUTING, THOUGH NOT EXCLUSIVE, CAUSE. AND IT'S EASY TO SEE THEIR POINT.

WHEN I WAS GROWING UP, THE LEADING TV LAWYER WAS PERRY MASON AND NO DOUBT HE INSPIRED A LOT OF FUTURE LAWYERS TO HIGH PROFESSIONAL STANDARDS. TODAY, WHO IS MODELING THE PROFESSION FOR OUR FUTURE LAWYERS? MAYBE DENNY CRANE OF BOSTON LEGAL? OR LIONEL HUTZ OF THE SIMPSONS? I CONFESS I ENJOY WATCHING THEM, BUT THEY'RE NOT QUITE PERRY MASON, ARE THEY?

DENNY CRANE TELLS US THAT THE FIRST RULE OF THUMB IN PRACTICING LAW IS THIS: "*ALWAYS*, *ALWAYS* PROMISE THE CLIENT *MILLIONS* ... *AND MILLIONS* OF DOLLARS - IT'S GOOD BUSINESS."

MEANWHILE, LIONEL HUTZ'S BUSINESS CARD READS: "LIONEL HUTZ, ATTORNEY AT LAW, *AS SEEN ON TV*... YOUR CASE WON IN 30 MINUTES, OR YOUR PIZZA'S FREE."

IF YOU THINK I'M PICKING ON LAWYERS, CONSIDER HOW WE JUDGES ARE TREATED. IN ADDITION TO LIONEL HUTZ, THE SIMPSONS FEATURES JUDGE CONSTANCE HARM. WHAT A NAME. AND SHE'S SO TOUGH THAT, WHEN SHE SENTENCES A DEFENDANT, SHE LIKES TO TELL THEM THAT THEY WILL BE IN JAIL "UNTIL FROGS CAN DO FRACTIONS." AND THAT'S A STEP UP FROM THE JUDGE ON BOSTON LEGAL WHO'S SO SENILE HE SEEMS TO DROOL WHILE ISSUING HIS ERRATIC ORDERS.

IN A DISPIRITED MOMENT ONE MIGHT WORRY THAT THE TERM LEGAL ETHICS HAS, AT LEAST AS IT IS VIEWED IN POPULAR CULTURE, BECOME SOMETHING CLOSE TO AN IRONY, A CONTRADICTION IN TERMS. OR ONE MIGHT WONDER WHETHER IT HAS COME TO MEAN ONLY THIS: DO IN YOUR OPPONENT BEFORE HE CAN DO IN YOU.[2]

OF COURSE, WE CAN'T BLAME THE MEDIA FOR OUR PROFESSIONAL IMAGE. THE MEDIA HOLDS THE MIRROR. THE REFLECTION IS OUR OWN. SO, WHERE DOES THIS LAWYER-AS-LAND-SHARK VIEW OF LEGAL ETHICS COME FROM?

SOME SUGGEST THAT MANY LAW STUDENTS GET THEIR ETHICAL CUES DURING INTERNSHIPS OR SUMMER ASSOCIATE WORK OR DURING THEIR EARLY YEARS IN PRACTICE.[3] WHAT THE STUDENT LEARNS ABOUT ETHICS IN THE WORKPLACE TENDS TO OVERSHADOW WHATEVER IS TAUGHT IN THE CLASSROOM.

AT THE SAME TIME, THERE IS ALSO SOME EVIDENCE SUGGESTING

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[2] Dickens

[3] 539 et seq

THAT LAW SCHOOL ITSELF TENDS TO HAVE A CORROSIVE EFFECT ON STUDENTS' VALUES – IN SOME WAYS, LAW SCHOOL SEEMS TO BE LEAVING STUDENTS WITH LOWER STANDARDS THAN THOSE THEY ARRIVE WITH.[4]

TONIGHT, I HOPE TO CHALLENGE YOU TO CONSIDER CAREFULLY WHAT KIND OF LAWYER AND PERSON YOU MIGHT WISH TO BECOME WHEN YOU ENTER THE PRACTICE OF LAW. SAYING "BUT MY CLIENT MADE ME DO IT" DOESN'T MEAN WE *ALWAYS* ESCAPE MORAL CULPABILITY FOR OUR ACTIONS.[5]

WHEN MY STUDENTS RAISE THEIR "CLIENT MADE ME DO IT" HIRED GUN VIEW OF THE LAWYER'S ROLE, I ASK THEM ABOUT THE AFTERMATH OF WORLD WAR II WHEN NAZI WAR CRIMINALS SOUGHT TO DEFEND THEIR ACTIONS ON THE BASIS THAT THEIR SUPERIORS MADE THEM DO IT. THE CHARTER GOVERNING THE CONDUCT OF THE NAZI WAR TRIALS REJECTED THIS DEFENSE AS A MATTER OF LAW, EXPLAINING THAT "THE FACT THAT THE DEFENDANT ACTED PURSUANT TO AN ORDER OF HIS GOVERNMENT OR OF A SUPERIOR" WOULD NOT, CATEGORICALLY AT LEAST, "FREE [THE DEFENDANT] FROM RESPONSIBILITY."[6]

SO I ASK MY STUDENTS: WE HELD THAT NAZI GENERALS COULDN'T ESCAPE CULPABILITY FOR THEIR ACTIONS JUST BECAUSE A SUPERIOR OFFICER "TOLD THEM TO DO IT." AND THAT'S IN THE MILITARY WHERE CHAIN OF COMMAND PRINCIPLES ARE AT LEAST AS STRONG AS THE FIDUCIARY DUTY GOVERNING LAWYERS IN THE

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[4] 548

[5] This is what David Luban once aptly described as the "positivist excuse" – an excuse that, because positive law permits the action and a superior requested it, an agent is morally blameless for pursuing it. Lucan 2351

[6] Charter quoted id.

PRACTICE OF LAW, RIGHT? SO WHERE DOES THAT LEAVE YOU, PRACTICING LAW IN A CIVIL SOCIETY, I ASK?[7] BY THE END OF THE SEMESTER, I HOPE I HAVE CONVINCED AT LEAST A FEW PEOPLE IN THE CLASS THAT THERE ARE *SOME* CIRCUMSTANCES WHEN A GOOD LAWYER SHOULD NOT BLINDLY FOLLOW THE CLIENT'S ORDERS.

* * *

NOW, TO BE CLEAR, I DON'T MEAN TO SUGGEST A LAWYER SHOULD DISREGARD A CLIENT'S ORDERS. SOME, OF COURSE, HAVE ADVOCATED FOR SUCH A VIEW OF THE LAWYER'S ROLE. THE LAWYER'S JOB IN SOVIET SYSTEMS, FOR EXAMPLE, WAS SOMETIMES DESCRIBED AS INVOLVING "NO DIVISION OF DUTY BETWEEN THE JUDGE, PROSECUTOR, AND DEFENSE COUNSEL" BECAUSE "THE DEFENSE COUNSEL [WAS] REQUIRED TO ASSIST THE PROSECUTION" IN A PURPORTED COLLECTIVE SEARCH FOR THE "TRUTH" TO PROMOTE OVERALL SOCIAL WELFARE.[8]

SUCH A REGIME, OF COURSE, WORKS SERIOUS INJUSTICES. A JUST LEGAL ORDER SEEKS, AMONG OTHER THINGS, TO ASSURE EQUAL TREATMENT FOR INDIVIDUALS AND TO ENSURE THAT AN INDIVIDUAL'S CLAIMS AND DEFENSES RECEIVE DUE PROCESS. LAWYERS SERVE A CRITICAL INSTRUMENTAL FUNCTION IN OUR ADVERSARIAL LEGAL SYSTEM BY ENSURING THAT THEIR CLIENT'S POSITIONS ARE PRESENTED AND HEARD.[9] TO USURP THE CLIENT'S VOICE, TO BECOME NOT JUST THE CLIENT'S ADVOCATE BUT THE JUDGE AND JURY OF THE CLIENT'S CAUSE IS TO DO SERIOUS DAMAGE TO THE INTEGRITY OF OUR ADVERSARIAL

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[7] We usually follow that discussion by looking at the ABA Model Rule noting that instructions from a superior will not always absolve a junior lawyer from the consequences of following orders. ABA Model Rule 5.3

[8] Kaplan. criminal justice - introductory cases and materials 264-65 (1973)

[9] QUOTE Donagan at 128

LEGAL ORDER AND, WITH IT, TO THE DIGNITY OF THE INDIVIDUAL CLIENT.

NEITHER IS THERE ANYTHING IMMORAL IN PREFERRING THE CLIENT'S INTERESTS TO THE INTERESTS OF OTHERS. THE FACT THAT YOU MIGHT CHOOSE TO SPEND THIS WEEKEND HOME WITH YOUR CHILDREN MAY PRECLUDE YOU FROM SPENDING TIME VOLUNTEERING. BUT THAT DOESN'T MAKE YOUR CHOICE IMMORAL. YOUR CHOICE TO PURSUE ONE GOOD (FAMILY, OR A CLIENT'S INTERESTS) MAY DO INCIDENTAL, UNINTENDED, EVEN IF FULLY FORESEEABLE, HARM TO ANOTHER GOOD (VOLUNTEERING, OR THE INTERESTS OF OTHERS). BUT WE LIVE IN A WORLD WHERE THERE ARE MANY UPRIGHT WAYS TO LIVE LIFE, AND CHOOSING ONE GOOD UNAVOIDABLY MEANS YOU WILL DO INCIDENTAL, IF NOT INTENTIONAL, HARM TO OTHER GOODS.

SO I AGREE THAT WE CAN AND SHOULD GENERALLY PREFER OUR CLIENT'S INTERESTS TO OTHER INTERESTS. BUT, JUST AS WITH THE CASE OF THE NAZIS AT NUREMBERG, WE SHOULDN'T ***ALWAYS*** DO SO. SOMETIMES, A SENSE OF PERSONAL ETHICS REQUIRES US TO SAY NO.

Now, you might ask, what do I mean by ethics? Let me be clear what I DON'T mean. I don't mean what is tested on the multiple choice ethics bar exam you will all take to become lawyers. You will hear the joke about that exam – the right answer seems always to be the <u>second</u> most ethical choice.

Instead, I mean what Aristotle meant by ethics – a state of character displayed in <u>good</u>, that is morally upright, actions. WHAT ALL DOES THIS ENTAIL? THAT'S MORE THAN I CAN BITE OFF TONIGHT BUT FOR OUR PURPOSES IT 'S ENOUGH TO SAY THAT MOST OF THE ANSWER TO THE QUESTION WE ALL PROBABLY LEARNED A LONG TIME AGO. THE GOLDEN RULE, TOLERANCE, CIVILITY, AND SELF-DISCIPLINE COME TO MIND AS SOME OF THE CARDINAL VIRTUES OF THE GOOD LAWYER AS WELL AS GOOD PERSON. Or, to put it more plainly, when facing a dilemma ask yourself – would your grandmother approve of your behavior? If so, that's ethical

conduct ....unless of course your grandmother was Cruella DeVille or Lizzy Borden.

NOW LET'S ADMIT THAT WE ALL MAKE MISTAKES AND GO AWRY. AND, YES, THAT MOST ASSUREDLY INCLUDES US JUDGES. I CERTAINLY DO. NO ONE IS PERFECT AND ALL OF US IN THIS PROFESSION, AND MAYBE ESPECIALLY US JUDGES, ARE MORE IN NEED OF PENANCE THAN PRAISE WHEN IT COMES TO ETHICS AND CIVILITY. THERE ARE FEW WHO CAN AFFORD TO LIVE IN GLASS HOUSES. CERTAINLY I CAN'T...

THE FACT IS THAT THE ETHICAL VIRTUES TAKE HARD WORK. ARISTOTLE TAUGHT THAT ETHICS IS A **HABIT**, SOMETHING THAT INVOLVES NOT JUST BELIEF BUT ACTION, REPETITION, REINFORCEMENT, SUCCESS, FAILURE, AND LEARNING FROM OUR MISTAKES.

AND LET ME ASSURE YOU, TOO, THAT YOU WILL FACE MANY ETHICAL CHALLENGES IN THE PRACTICE OF LAW. I GUARANTEE IT.

CONSIDER THIS: YOUR OPPOSING COUNSEL SHADES FACTS OR CASE HOLDINGS IN HIS OR HER BRIEF. HOW TEMPTING IS IT TO RESPOND BY CALLING THAT A "LIE," RATHER THAN SIMPLY POINT OUT TO THE COURT THAT COUNSEL ERRED AND THEN CITE THE TRUE FACTS AND LAW TO THE COURT?

OR MAYBE OPPOSING COUNSEL WON'T PRODUCE ANY DISCOVERY TO YOUR SIDE, YET DEMANDS MASSIVE DISCOVERY FROM YOUR CLIENT. YOUR CLIENT DOESN'T WANT TO INCUR THE EXPENSE OF PROVIDING DISCOVERY WITHOUT GETTING SOMETHING IN RETURN. HOW EASY IS IT TO REFUSE PRODUCTION AND ENGAGE IN A GAME OF TIT FOR TAT?

AT THE END OF THE DAY, THOUGH, YOUR INTEGRITY – YOUR STATE OF CHARACTER, AS ARISTOTLE WOULD HAVE IT – IS AMONG THE MOST VALUABLE THINGS IN YOUR POSSESSION. NOT THE MONEY OR THE

CLIENTS, THE WINS OR THE LOSSES.....THE REWARD OF ETHICAL PRACTICE IS THE EASE OF MIND YOU WILL ENJOY WHEN YOU GO TO SLEEP, WHEN YOU TELL YOUR CHILDREN ABOUT YOUR CAREER, WHEN YOU RETIRE WITH A CLEAR CONSCIENCE. AND, LET ME ASSURE YOU, THESE ARE NO SMALL THINGS....

FOR ME, ONE GREAT REMINDER OF ALL THIS IS THE SCENE IN ROBERT BOLT'S PLAY A MAN FOR ALL SEASONS WHEN THOMAS MORE IS BETRAYED BY HIS PROTÉGÉ, RICHARD RICH. AFTER RICH OFFERS PERJURED TESTIMONY AT THE TRIAL AGAINST MORE, MORE SEES RICH WEARING A NEW CHAIN OF OFFICE – ONE THAT SIGNIFIES RICH HAS BECOME ATTORNEY GENERAL FOR THE RELATIVELY SMALL PRINCIPALITY OF WALES. MORE ASKS, "RICHARD, THE LORD SAID THAT IT DID NOT PROFIT A MAN TO GAIN THE WHOLE WORLD IF HE LOST HIS SOUL. THE WHOLE WORLD, RICHARD ... BUT FOR WALES?" TODAY, WE MIGHT ASK OURSELVES: OUR SOUL FOR A *TRIAL*? OR SOME LOUSY *DISCOVERY MOTION*?

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TOWARD THE END OF THE SEMESTER WHEN MY LEGAL ETHICS CLASS IS GRAPPLING WITH THE QUESTION WHAT IT MEANS TO BE A GOOD PERSON AND A GOOD LAWYER, I ASK THEM TO DO THIS EXERCISE. I ASK THEM TO TAKE TIME TO WRITE THEIR OBITUARY AS THEY HOPE IT WILL APPEAR IN THE LOCAL NEWSPAPER.[10] I THEN ASK THEM: DID YOUR OBITUARY EXTOL YOUR VIRTUES AT USING RAMBO LITIGATION TACTICS FOR YOUR CLIENT? YOUR ABILITY AND WILLINGNESS TO WIN AT ANY COST?

THEN I SOMETIMES READ TO THEM ONE OBITUARY I CAME ACROSS

[10] Lerman Schrag suggestion

MANY YEARS AGO AS A LAW STUDENT, WALKING THROUGH THE OLD GRANARY BURIAL GROUND IN BOSTON. IT'S WHERE PAUL REVERE, JOHN HANCOCK, AND SO MANY OTHER LEADERS OF OUR FOUNDING GENERATION ARE BURIED. AND THERE, I CAME ACROSS THE TOMBSTONE OF A LAWYER WHO TODAY IS FAR LESS WELL-KNOWN.[11] HIS NAME WAS INCREASE SUMNER. HE SERVED AS A JUDGE AND PUBLIC SERVANT AND ALSO AS A PRIVATE PRACTITIONER. ETCHED INTO HIS TOMBSTONE OVER 200 YEARS AGO WAS THIS DESCRIPTION OF THE MAN --

> AS A LAWYER, HE WAS FAITHFUL AND ABLE;
> AS A JUDGE, PATIENT, IMPARTIAL, AND DECISIVE;
> AS A CHIEF MAGISTRATE, ACCESSIBLE, FRANK, AND INDEPENDENT.
>
> IN PRIVATE LIFE, HE WAS AFFECTIONATE AND MILD;
> IN PUBLIC LIFE, HE WAS DIGNIFIED AND FIRM.
>
> PARTY FEUDS WERE ALLAYED BY THE CORRECTNESS OF HIS CONDUCT;
> CALUMNY WAS SILENCED BY THE WEIGHT OF HIS VIRTUES;
> AND RANCOR SOFTENED BY THE AMENITY OF HIS MANNERS.

THOSE WORDS HAVE STUCK WITH ME OVER THE YEARS. THEY SERVE, AT LEAST FOR ME, AS A REMINDER OF THE GOOD LIFE THAT CAN BE LED IN THE LAW, A REMINDER OF THE WORK AND PRACTICE THAT IT TAKES TO MAKE THAT HAPPEN, AN ENCOURAGEMENT TO GOOD HABITS WHEN I FAIL AND FALTER, AND AN ASSURANCE THAT IT *IS* POSSIBLE TO BE BOTH A GOOD LAWYER ***AND*** A GOOD PERSON.

THANK YOU FOR HEARING ME OUT AND THE PRIVILEGE TO BE WITH

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[11] Work in Lyceum address.

YOU THIS EVENING.

They say a country's prosperity depends on 3 things - sound money, private property, and the rule of law.

This crowd hardly needs to hear from me about the first two or the problems we face on those scores

Chat with you briefly tonight about some threats to 3d item on the list and some nascent threats I see to the rule of law

Don't mean to offend anyone or sound an undue alarm.

We enjoy one of the great legal systems on earth.

But just as other elements essential to our prosperity are facing their problems today, the rule of law isn't immune from its challenges...

Discuss briefly three such problems with you...

1. The discovery process associated with civil litigation in our country has become way too expensive and takes way too long

Archetype - US v IBM.

Lasted 13 years
66 million pages produced
Some say 2000 depositions taken
All over charge IBM monopolized computer market - quaint
No trial ever took place
Just quietly dropped. No public vindication...

Not that long ago, we used to have trials without discovery. Now we have discovery without trials

What are consequences of this?

First, it prices many out of court. Can't afford to bring meritorious suits.

Second, encourages people to settle nonmeritorious suits rather than try them. It's cheaper to settle than win.

So we have created a sort of tribute system to the lawsuit entrepreneurs. Like the Barbary Pirates, easier to pay than fight...

Other problems, too. Lose involvement by juries. The jury trial is our most democratic institution. Now, most cases never get there. Reduced involvement of

citizens in justice system
And there's now a lack of transparency. Justice is dispensed in confidential settlement, not courtroom verdict.

Hate to say it, but my brothers and sisters at the bar benefit from all this. Today, it's estimated that half of law firm revenues come from discovery. I wonder if that understates it.

Many lawyers don't even know how to try cases anymore. The courts' case loads are up, hugely. But the civil trial is virtually extinct.

We have litigation partners at law firms who have never tried a case to verdict. But they do know how to fight over discovery.

So a case I was involved in as a lawyer, called in to help at trial at the last minute, Ronald Perelman v Morgan Stanley, a multi-billion dollar fraud case became a trial not on the merits of the fraud, but one over discovery compliance by MS and its predecessor lawyers.

Dickens Bleak House... suit over an inheritance...

> Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. Fair wards of court have faded into mothers and grandmothers; a long procession of [judges] has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality . but Jarndyce and Jarndyce still drags its dreary length before the court, perennially hopeless." Charles Dickens, Bleak House 4-5 (Bantam 2006) (1853).

Reality imitates fiction now perhaps more than ever

2. Recent efforts to sidestep legal process

As expense and burdens grow, litigants seek to escape the system and create ad hoc private justice. So private parties increasingly rely on arbitration and mediation.

Can debate wisdom of that between private parties, but I want to focus on what happens when Govt gets into the act.

Increasingly, we've seen efforts by Govt to sidestep normal legal dispute resolution processes to create its own ad hoc private justice programs.

So, for example, Chrysler, Govt sought to overcome normal Bkptcy processes and priorities.

And in BP the Govt created a wholly independent judicial system headed by a private hire-a-judge who feels unconstrained to write and speak publicly about the case

Not to suggest you need to have sympathy for those companies

But it's a notable new development when Govt sidesteps normal legal processes and worth keeping an eye on.

Of course not unprecedented.

> Lincoln in civil war suspended Habeas over objection from courts that he was acting unconstitutionally.

But it's worth asking whether Govtl ad hoc private justice systems are a short term blip or a portent of long term trend?
Justice is supposed to be blind. Outside our courthouses she is depicted holding scales w blindfold.

Ours isn't an ad hoc justice system, one for people we like and another for those we don't. Nature of justice shouldn't depend on popularity of cause.

3. Nomination and confirmation of judges

Understandable political branches want to take a close look at nominees for jobs with life tenure

Esp when we live in system where judges have last word on constitution, empowered to strike down legislation – concept foreign even to our English friends and most other Western countries

At same time, degree and vitriol associated with nom and confim of judges has changed dramatically in recent years

Supreme court level you see. Weeks of debate and speechifying followed by partisan votes.

Not that long ago, qualifications was focus and these things were much shorter.

BRW 15 mins.
Warren Burger 45 mins.
R Ginsburg in 1993 1 hour

As recently as 1986, Scalia confirmed 97-0.

Lately, he's questioned whether he could be confirmed by ANY vote in today's environment, let alone a unanimous one.

Tip of iceberg. What you don't see is larger portion of the behemoth swimming beneath surface.

In recent years, the vitriol has spread even to appellate judges like myself (150 nation) and even to trial court judges (1000).

So, we have 2 unfilled positions for years here in Colo. Slowing down an already slow process even further.

And justice delayed is justice denied.

Now, I don't mean to offend anyone with these observations, or to overstate my case

Our legal system still envy of much of world.

Compared to other immediate threats to prosperity, these may not sound the most urgent

But speaking candidly, nothing is inevitable and we can't take the rule of law in our socy for granted.

Can't assume these problems will take care of themselves.

Already longest lived democracy in history. Other demos to reach our age lost control, decayed, given in to despotic rule.

Things don't have to be as they are.

Our Founders knew that.
Seems inevitable today that they should have prevailed.

But at time, they didn't know that. Fighting most powerful nation on Earth. If they lost - and lose they might - they knew for a certainty that they'd be hanged.

BF if we don't hang together hang separately. Sounds like a nice turn of phrase now, but it was deadly serious.

Nothing's inevitable.

It is not inevitable our rule of law will remain intact for future generations.

It is not inevitable we will hand our children a better country than was handed to us.

It is not inevitable that we should succeed where history tells us other democratic experiments have failed.

So I ask you tonight to be vigilant to all threats to our prosperity including those emergent threats to our rule of law.

5 things talk w TMT to FFA

Promised 5 things.
TMT will take turns.
3 each
So really getting extra bonus.
Be quick, leave time for questions

Risks

- You know it. Lawyers are risk averse. Success for us always meant jumping through next hoop placed before us. College. Law school. Practice.

- No one says it this way, but message is. Conform, be obsequious, don't say or write anything that might be controversial, and stay in the same job forever. That way, when everyone else retires or dies off you'll be left on top and make out like a bandit.

- WE ALL KNOW THE GOLDEN HANDCUFFS ARE REAL. AND THEY GET TIGHTER OVER TIME, AS YOUR INCOME INCREASES AND YOU TAKE ON RESPONSIBILITIES FOR FEEDING OTHER PEOPLE, BOTH AT HOME AND AT THE OFFICE. NOTHING IS WRONG WITH THAT. IT IS THE NATURE OF LIFE, AND WE ALL HAVE OBLIGATIONS TO TAKE CARE OF THOSE WHO DEPEND ON US.

- BUT DON'T ALWAYS SUCCUMB TO THE MOST OBVIOUS PATH. YOU DON'T WANT TO FIND YOURSELF HEADED INTO RETIREMENT WONDERING: WHAT IF YOU HAD RUN FOR

OFFICE? STARTED YOUR OWN LAW FIRM? JOINED THAT NONPROFIT?

I've found that taking risks has made me wildly happy when I've succeed and wise when you fail.

- Best things I've done involved taking risks.

  Doctorate after law school; everyone else making money. Dad told me - really think looking back wish 30 v 28 yrs in practice

  Joining start up small firm v. big ones

  Trying cases, arguing appeals immediately. Won some, lost some. But beat the heck out of training sessions and watching others.

    Read Irving Younger. All you need to know.

  Quit lucrative practice to take govt job. Never in wildest dreams thought it would lead to this.

- It does mean you will incur a lot of anxiety along the way

  Grey hair, sleepless night
  Risks don't pay off wo lots of work.

If you don't want that, don't worry. For the safe and easy path to the top of the mountain, follow the herd.

It'll get you there. But there's truth in the maxim that you regret risks didn't try, not those you did.

How Important It is to Always, Always work on your writing

Writing is most of what we do, as litigators. But it's hard. Anyone who says it's easy is boasting or not really very successful at it.

I think success comes from trained dismay. Train yourself to put down you brief, maybe day or 2, return to it. And then come at it again with a critical eye. Train yourself to like nothing you see. Soon enough, it'll come easy. I'd de dismayed how so much of what I had written would read like a parrot mimicking lines from other sources. How lines snuck their way in that might please the client but surely would not hold up to scrutiny from an independent decision-maker. How altogether one-sided, rhetorical, auto-pilot so much of it appeared.

Only after identifying every logical hole, every easy assumption, every mistake — only then I found I could begin to write something that approached a thoughtful and reflective dialogue with my opponent. Usually from scratch

What does a brief with that sort of integrity look like and what traits distinguish it from lesser breeds? Here are a few clues

> There's the brief that begins with a statement of the case and a statement of the facts that, between them, describe every nuance in the life of the case, however obscure, aged, and irrelevant. Sometimes twice. But while awash in detail, no unifying message or theme. No introductory paragraph offering an overview and theory of the case.
>
> Or take argument headings or statements of the issue. Some say almost nothing, like:
>
> > Argument 1
>
> while others try to say everything, full para in bold and caps.
>
> > Both extremes suggest a reflexive, by-the-numbers approach. Writing like this may be relatively easy but it makes reading and understanding a good deal harder.

> Then there's how the brief handles cases. When a word search on an electronic database yields a sentence from an earlier case that support the client's cause, how tempting is it to slap into the brief? After all, isn't an idea always better coming out of someone else's mouth? And what's another citation in a string already a half-dozen long? Better yet, make it a block quote.

There come other clues, too,

> The brief that substitutes case analogy after case analogy for reasoning
>
> The brief that nests could-be and should-be topic sentences and other key arguments in parentheticals after case citations or, better yet, in footnotes.
>
> The brief that suggests the able if human district judge committed 33 reversible errors . . . all before summary judgment (yes, I have seen that).
>
> The brief that buries colorable arguments among ones that can only be described as frivolous — like there's insufficient evidence to support my client's conviction even though witnesses saw him rob the bank, police chased and tackled him, and the loot was found in his dye-stained hands.
>
> A painful writer questions the necessity and impact of each word, aware that less is often more, that appeals can be lost by overstatement, exaggeration, and sometimes just by saying too much.

The painful writer remembers the apocryphal tale about Earnest Hemingway winning a bet to tell a story in fewer than ten words by writing, "For sale: baby shoes, never worn." He did it with four words to spare. That kind of evocative terseness is hard won.

Mentors/Self Serious

Teach legal ethics at CU. Important that it's taught but studies show who you become as a lawyer is largely determined by first boss or two you encounter.

> Some call this an "unhappy, unhealthy, and unethical profession." If that's who you're surrounded by, that's who you're likely to become.

Be picky. Ethics, of course; smarts, too. Surround yourself with people better than you, you will become better too. Maybe economy makes that hard. But you can't afford not to take this one seriously.

> At home as well as the office. Doubly hard to be successful here if life there is falling apart.

As you go along, head stuck in cases, in the middle of your career and so many things, sometimes take a deep breath to remember the beginning or end of your legal career.

What do I mean?

It's just this: Don't ever forget *why* you wanted to become a lawyer in the first place. Was it only to make money and rack up wins, or did you also want to find a way, some way, to make a difference in the lives of your clients, community, and country? I *know* you came to the law hoping to make a difference. Remember that. And remember that the law is abundant with many different and rewarding ways to live that kind of life. If they aren't at hand right now, go seek them out.

And live with the end in mind. So that when the time comes to hang up your gloves you aren't wandering alone through your mansion wondering what it was all for, but sitting in a warm home surrounded by a family proud of your life's story. It's a short journey from here to there.

JUDGE NEIL M. GORSUCH

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE

SUPPLEMENTAL APPENDIX 12(e)

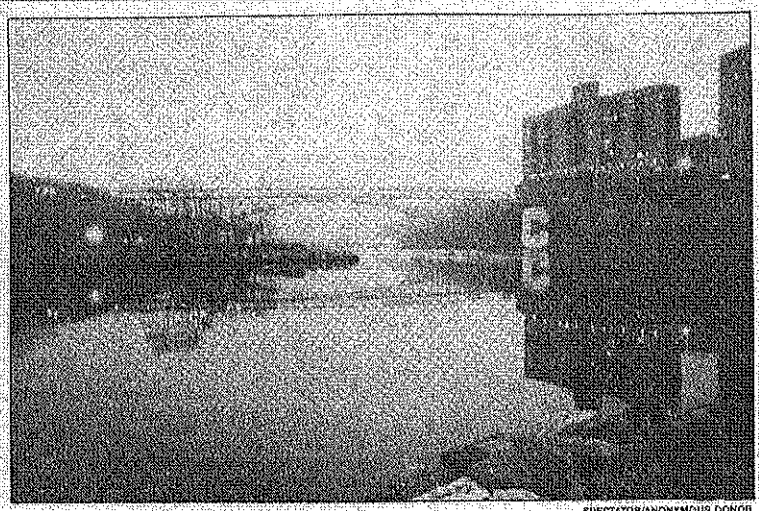
Interviews

COLUMBIA DAILY SPECTATOR

FOUNDED 1877

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SPECTATOR/ANONYMOUS DONOR

ON A CLEAR DAY, YOU CAN SEE...Do you ever wonder whether you are standing right-side up or upside down?

Committee will study student/fac. trustees

By SARA JUST

The University Senate voted Friday to appoint a committee to create a proposal for establishing student and faculty trustees.

The committee, which will be appointed by the Senate's Executive Committee, will combine two previous resolutions on the issue and expects to make its report at the Senate's April meeting, said Senator Steve Cancian, CC '86.

According to Cancian, the resolutions to be combined include one created by the Faculty Affairs Committee in December, 1984, and one introduced by the Student Affairs Committee in January.

Cancian said he and Professor of History William Roff, who co-sponsored the proposal to establish the faculty and student trustee spots, did not expect so much faculty support for the idea of faculty and student trustees.

"We were surprised," Cancian said. "We didn't expect there would be as much positive faculty input as there was."

Cancian argued that putting students and faculty on the Board of Trustees would increase communication and cooperation between the bodies. "Even if it is only a symbolic role, the students and the faculty ought to have a role in that symbolism," he said.

But many administrative Senators did not support the idea of faculty and student senators.

"I'm not sure we want to say the faculty was part of this process just because one or two of the faculty are on the Board," said Provost Robert Goldberger.

"I can understand the desire of this proposal, but I can't see their (students and faculty) attendance as really improving communication," said Executive Vice President for Academic Affairs Norman Mintz. He noted that there are presently faculty members who attend Trustee committee meetings. "This hasn't in any way improved communication," Mintz asserted.

Professor of History Richard Bulliet said the confidentiality of the trustee meetings might damage the student-faculty representatives' pur-

See SENATE, 13►

Two election hopefuls disqualified

By JILL LEVEY

The Columbia College Student Council upheld the disqualification of two candidates from the upcoming student elections at a hearing last night.

The Columbia College Elections Commission had earlier recommended that Neil Gorsuch, CC '89, be disqualified from the University Senate race because he broke postering rules, and that Jonathan Skolnik, CC '89, be eliminated from the race for class president because he printed a symbol on some of his posters that had appeared on previous occasions in connection with criticisms of another candidate.

Although over half the student council voted to reinstate Gorsuch as a candidate, a three-fourths vote is needed to overturn a recommendation of the elections commission.

The student council's ruling on the matter is final, according to At-Large Representative Stuart Gallant, CC '87. Gallant said that Director of Student Activities Chuck Price was removed from the appeals process last year after he overturned the student council in an election case.

"We [the student council] apply our rules very strictly," said University Senator Steve Cancian, CC '86. "There were blatant violations of the rules in both cases."

Members of the elections commission said they had found several of Gorsuch's posters in East Campus elevators, more than two posters on several floors in various dorms, and posters taped to the glass portions of doors in dorms—all violations of election postering rules.

Gorsuch claimed that he did not

See ELECTION, 6►

Health scientists ordered quiet on NIH ruling effect

By JOHN A. OSWALD

Health Sciences researchers say they have been instructed by Columbia administrators not to discuss publicly the effects the suspension of National Institutes of Health funding has had on University animal research.

Three Columbia Daily Spectator staff members were asked to leave the College of Physicians and Surgeons building by University Security Friday afternoon after attempting to speak with researchers affected by the NIH's recent suspension of funding for research involving animals above the rodent level.

News Editor Jennifer Lynch, CC '87, Academic Affairs Beat Chief Alison Craiglow, BC '88, and photographer Dennis Yu, CC '89 were escorted to the main Health Sciences Security by Dr. Wendell Neimann, director of veterinary services at Health Sciences.

According to Craiglow, who has been covering the NIH's funding cutoff to the University, she had been told by several researchers over the phone that Health Sciences administrators have asked them not to speak to reporters about the issue.

According to Lynch and Craiglow the three Spectator staff members

See ANIMAL, 5►

Conference draws local politicos

By MILES POMPER

Top state and city leaders met with 250 community members Saturday afternoon in Ferris Booth Hall to discuss the widening gap between the advantaged and disadvantaged in New York City.

Manhattan Borough President David Dinkins, New York's Secretary of State Gail Shaffer, New York State Commissioner of Health David Axelrod, former City Council President Carol Bellamy and State Senator Franz Leichter, who sponsored the event, agreed that state and city government officials were responsible for narrowing the disparity between rich and poor.

While the politicians present said they were unified in their general commitment to increasing the efficiency of the public sector, a group of community activists used the occasion to protest the inadequacy of the planned Presbyterian Hospital at 218th St. and Broadway.

In a panel discussion entitled, "Urban Plight: New YUork City Development in the Next Decade," Dinkins said that "While we are having an enormous economic boom, a lot of people are not doing very well otherwise." Dinkins contrasted the creation of 300,000 new jobs since 1978 with the loss of small business, manufacturing jobs, the high level of teenage unemployment, and the lack of affordable housing, "a situation with which we cannot survive."

Leichter, Bellamy and Shaffer stressed the corrupting influence of money in city and local campaigns, particularly with regard to the recent city corruption scandal. "Money sometimes brazenly and sometimes subtly determines government decisions," Leichter said during his welcoming speech.

Leichter pressed for endorsement of his state Senate bill which would limit campaign contributions to $1,000. He also supported public

See CONFER, 6►

Community group protests Baker hospital construction

By SPENCER HARRINGTON

Twenty residents of the Washington Heights-Inwood area picketed in front of Ferris Booth Hall Saturday to protest the construction of a community hospital on Columbia's Baker Field.

Members of the North Manhattan Coalition used the occasion of a conference inside FBH of city and state Democratic politicians, including State Commissioner of Health David Axelrod, to express their opposition to the building of Presbyterian Community Hospital. They are charging that the limited emergency room facilities and lack of an outpatient clinic demonstrate the planners' insensitivity to the needs of the community.

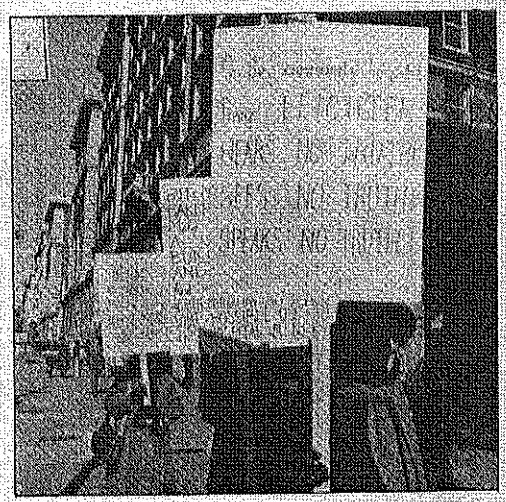
"Presbyterian's 'Community' Hospital is a charade, an attempt to look responsive to the community's needs. It is, in effect, a hospital for the well-to-do, the well insured," coalition chair Barry Dunleavy said in a recent press release.

The 300-bed hospital, which is being built on property at 216th and Broadway sold by the University to Presbyterian Hospital, will be partially staffed by Columbia medical students and faculty. The new facility is an extension of the current Columbia/Presbyterian Medical Center at 168th St. and Broadway.

Dunleavy cited the lack of outpatient clinics and the tiny emergency room in the planned hospital as evidence of a "racist attitude" on the part of Presbyterian Hospital officials.

"There are no admitting privileges for community physicians, who

See RALLY, 5►



SPECTATOR/JACQUELINE SHEA MURPHY

SIGN LANGUAGE: Community members protest the construction of Presbyterian Hospital at a picket line outside Ferris Booth Hall Saturday.

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Confer

continued from page one

financing and limiting campaign spending, as well as suggesting that the members of the Board of Estimate be appointed solely by the mayor after a thorough screening process.

Shaffer emphasized political empowerment as the major issue facing the disadvantaged in New York City today. "It [political empowerment] supercedes every other public issue of the day," she said. Furthermore, Shaffer said, the primary means to this power is money, so the rules involving campaign financing and spending must be changed.

"Daniel Webster and the power of ideas has been replaced by the David Garths and the power of money," Shaffer said.

She proposed that state and city campaigns be publicly financed on a matching funds basis, the same process used to finance presidential campaigns. Shaffer also suggested that campaign spending should be limited and individual contributions be restricted to much lower levels. Some of the candidates' cost should be borne by the state in the form of lower mail rates and lower television advertising rates on federally regulated channels.

Bellamy, now a vice-president of Morgan Stanley, said incumbents weren't being threatened for re-election because potential opponents couldn't raise enough funds to challenge them. Although she supported public financing as well as limiting contributions and spending, Bellamy said such measures would not completely eliminate the problems.

Axelrod examined the contemporary issues confronting the health care system in New York State, especially the contrast in the quality of medical care offered the rich and the poor. According to Axelrod, our society must insure high quality standards for both groups.

In addition, the payment system in New York State is haphazard. Axelrod said some better arrangement must be made for payment from the government hospitals, charities, and individuals.

Election

continued form page one

know about the rule stating that no more than two posters can be put on a floor. He said the friends who helped him poster were responsible for most of the violations. Gorsuch argued that his violations were minor, and not done with malicious intent.

Mark Berman, CC '86, a member of the elections commission, said he believes the postering violations did a "decent amount of damage" to the elections.

Skolnik was charged with harrassing Ajay Dubey, CC '89, also a candidate for class president. Snolnik printed a small graphic symbol that Dubey said was an "evil looking face," on his posters.

The same symbol had appeared on stickers along the walls and bathrooms of the seventh floor of John Jay about four weeks ago, council members said. Slogans on the stickers said, "Ajay is the anti-christ," "Ajay is Hilberg's friend," and "Neil and Ajay are evil twins."

"People would walk up to me and say, 'you're the anti-christ,'" Dubey said. He said he was upset by Skolnik's posters, claiming that people might link them with the stickers, producing a negative effect on his campaign.

"I never intended to harrass anyone," Skolnik said. He said he knew about the stickers and their link to his poster, but explained, "I took it as kind of a joke. I took it lightly."

Cancian said the symbol was of a third-world face, and that it was associated with racism.

"Harrassment has no place in student council elections," maintained student council chair David Lebowitz, CC '86. "It's not a common symbol by any means. It's obvious that some connection was made. That symbol would definitely offend Ajay."

Gorsuch criticized the harshness of the election committee rules, which, in many cases, call for disqualification of a candidate before any warnings are given.

At-Large Representative Alex Navab, CC '87, agreed. "It was unfortunate and severe to throw him out of the election," he said.

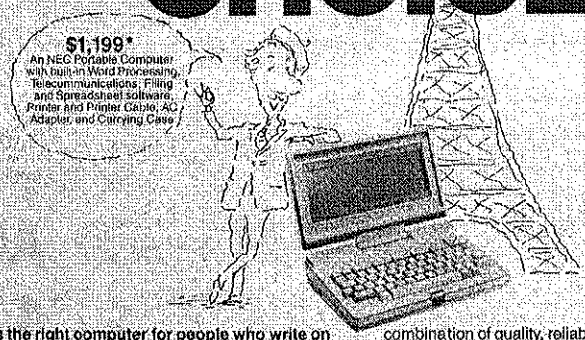
Cancian said because the campaigning period for elections lasts for only five days, there is not enough time to give people warnings instead of disqualifying them.

Candidates are disqualified from the elections each year, he added. "Every year people say you are penalizing these people too much, but if there aren't these kinds of things, people will break rules all the time."

Lebowitz said that "after the elections, there will definitely be a review of the [elections] rules." He added that last night's hearing was not the appropriate occasion for it.

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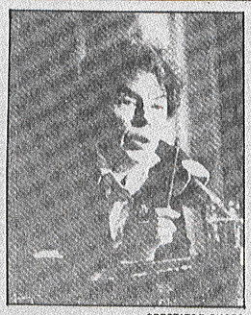
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FIFTEEN CENTS



SPECTATOR PHOTO
Jeane Kirkpatrick

Kirkpatrick rejects grad alumni award

By JOHN A. OSWALD

Former United Nations Ambassador Jeane Kirkpatrick announced late Friday that she will reject the award offered to her by an organization of Columbia alumni in response to vocal opposition by University students, faculty and staff.

"In light of the protest that has arisen, what should be a pleasant occasion will be an ugly and divisive affair," Kirkpatrick wrote to the Graduate Faculties Alumni Association (GFA), the group planning to award her.

"I trust you will understand why I have then decided to decline the dinner and the award."

According to Mark Salter, staff assistant to Kirkpatrick in her Georgetown University office, the former ambassador decided to reject the award after hearing of the protest at Columbia. In recent weeks, the Ad Hoc Committee Against the Jeane Kirkpatrick Award, a group of students, faculty and staff, had gathered more than 1,000 signatures opposing the award.

The group had also organized a protest that was to take place this Thursday.

Group leaders said they will meet tomorrow to decide whether or not they will hold the rally anyway.

Kirkpatrick, a Barnard alumna who received her M.A. in 1950 and her Ph.D. in 1968 from Columbia's Graduate School of Arts and Sciences, was to be awarded along with former Carter administration official Harold Brown and English and Comparative Literature Professor Carolyn Heilbrun in a gala ceremony in Low Library October 21.

When University President Michael Sovern was informed by Spectator reporters of Kirkpatrick's announcement, he said he had supported the GFA's right to award the former ambassador, and had been looking forward to demonstrating his and Columbia's committment to freedom of expression.

"I was looking forward to the opportunity to show the world that Columbia is a place where anyone could speak," he said. "Her coming would have given us a chance to demonstrate that."

The GFA, however, had invited Kirkpatrick to receive the award, and not to speak.

GFA President Judith Lipsey said members of her group were disappointed by Kirkpatrick's decision. "We are dissapointed, but we understand."

Assistant Professor of Sociology Eric Hirsch, a member of ad-hoc committee, said he was not surprised by Kirkpatrick's decision. He pointed out that Kirkpatrick has in the past refused awards and speaking engagements from a number of universities following protests from

See KIRKPATRICK, 7►

Deportation threat cancels lecture

By STEPHEN WEST

A member of the Palestinian Liberation Organization's Executive Committee cancelled a talk at the School of International and Public Affairs last week after he was informed by United Nations diplomats that he could be deported for making the speech.

Professor of History and Director of Columbia's Middle East Institute Richard Bulliet said PLO officials told him late Tuesday morning that Mohammed Milhelm, a member of the PLO's United Nations delegation, was cancelling a scheduled speech because his visa prohibited him from making any public appearances not related to his U.N. work.

Milhelm was scheduled to speak on "Prospects for Peace" at a noon luncheon seminar last Tuesday sponsored by the Middle East Institute. Last week's cancellation marked the second consecutive cancellation of a speech in the Institute's Brown Bag Luncheon series.

According to Associate Professor of Political Science Rasheed Khalidi, two of the Institute's graduate students and an administrative assistant cancelled a September 23 talk on current events in Iran after saying that they feared they would suffer reprisals from government officials upon returning to Iran.

According to a U.S. state department official, Milhelm's speech was cancelled for national security reasons.

"One half hour before the Brown Bag Luncheon the plug was pulled," Bulliet said, adding that at least 10 to 12 students had shown up for Milhelm's appearance. "I got a call and they said it's off—the U.S. mission to the U.N. has vetoed it."

According to Bulliet, Middle East Institute officials offered to change the speech to a question and answer session but were told by PLO representatives that any appearance would violate the restrictions in Milhelm's visa. Bulliet said he was unsure whether the final decision was made by U.S. officials at the U.N. or by the U.S. Embassy in Amman, Jordan, where Milhelm, former mayor of the West Bank town of Halhoul, was issued the visa.

"These people are expected in their speeches to express opinions or

See LECTURE, 5►

Chapin to step down as arts school leader

By STEPHEN WEST

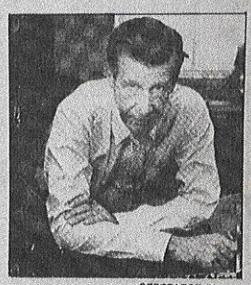
The Dean of Columbia's School of the Arts said he is stepping down from his post this spring to avoid having to serve as a "lameduck" administrator as he approaches the University's mandatory retirement age.

Schuyler Chapin, a former general director of the Metropolitan Opera who has served as the school's dean for the last 10 years, said he informed University President Michael Sovern last spring of his plans to resign.

"When I turned 63 [last February], I realized that 65 was the mandatory retirement age for administrators," he said. "I thought to myself, 'I don't want to wait two years. I don't want two years of a lameduck administration.'"

While Chapin said he was uncertain why the University had delayed the announcement of his resignation until now, he speculated that administrators may not have wanted to announce his departure late in the semester or may have hoped he would change his mind.

Chapin said he feels comfortable leaving the school now because he believes it has sense of purpose it lacked when he began as dean 10 years ago.



SPECTATOR PHOTO
Schuyler Chapin

See CHAPIN, 13►



SPECTATOR/CHRISTOPHER NOBLE
NEXT COURSE, PLEASE: Residents of Manhattan Valley await an uncertain future as their neighborhood is transformed.

Valley bridges newness and decay

By ANDREA CHIPMAN

Manhattan Valley. The words mean little to most people at Columbia, who consider Morningside Heights and the oft-traveled streets of Broadway their home.

Students know that Harlem, to the east, is Columbia's neighbor—even if most steer clear of all it has to offer. But few even think of traveling south of 110th St. at Amsterdam, where, in the predominantly black and Latino neighborhood of Manhattan Valley, the gap between the rotting and the renovated that characterizes so much of New York is rapidly increasing.

Until 1982, homelessness, drug trafficking, crime and the instability of Manhattan Valley created an air of abandonment that is still prevalent on many of the boarded-up, decaying streets in the area.

Since then, a spurt of renovations and real estate development has given new hope to the Valley and its dark and crimé-ridden history.

But the renovations have also threatened to transform the area into a middle-income neighborhood without the Valley's character and without the mostly working-class residents who now inhabit it.

Manhattan Valley is at a juncture, struggling both to save itself from the problems that have plagued it and to maintain the character that still pervades its streets and the people who play and work and live their lives along

See VALLEY, 11►

Manhattan Valley:
The Forgotten Neighbor

first in a series



Sovern discusses issues of speech and drug tests

By SHARON STERN

University President Michael Sovern said Friday he "would not have been offended," if the University Senate had passed a proposed Student Affairs Committee resolution at its September meeting explicitly separating the proposed Graduate Faculty Alumni (GFA) award to Jeane Kirkpatrick from the Columbia community.

"I regarded it as a natural and understandable response," Sovern said in his second interview of the academic year with Spectator reporters. "They did not want to be associated with this award, so they sought a resolution that would express that."

In other matters, Sovern said he is uncertain if the University will have to implement additional drug abuse prevention programs to be in line with federal policy.

Last week, Reagan signed the reauthorization of the federal Higher Education Act. The act requires institutions receiving federal funding to have drug abuse prevention programs, but does not specify the type of program needed for authorization.

Even so, Sovern said, the practice of basing federal student aid appropriations on the existence of drug abuse programs is potentially dangerous.

"The precedent seems to me to be an unfortunate one. It wouldn't take

[illegible]

SUPP 12e-000004

Kirkpatrick

continued from page one

students and faculty at those schools.

"People will feel good that this effort to deny her the award was successful," Hirsch said.

In May, 1983, Kirkpatrick turned down Barnard College's Medal of Distinction after the announcement of the award sparked a flurry of protest from students and faculty.

At that time, Kirkpatrick wrote a letter to the Barnard Board of Trustees explaining her decision to reject the award: "I feel deeply that a university or college is in the most basic sense defined by its faculty and students."

The Barnard faculty voted in late April of that year that they were "opposed to and deplored" the award.

Sovern has been criticized for his failure to announce, at the Sept. 26 Senate meeting, his plans to speak at the ceremony at which Kirkpatrick was to be awarded.

At the Senate meeting, Sovern read a statement apparently disassociating the University from the award. The full Senate then passed a resolution affirming Sovern's letter.

But Sovern insisted Friday that his letter was meant to be an affirmation of the University's dedication to free speech, and not an attempt to disassociate the University from the award.

He cited the last paragraph in his letter, which was a response to a letter condemning the award he received from Doug Kremmer, CC '90.

The last paragraph in Sovern's letter read: "One of Columbia's great strengths is the astounding diversity of groups nestling under her umbrella. Though I have never tried to count them, I would guess that every year we honor with awards of one kind or another and hear from literally dozens of people with whom I disagree most profoundly. I would not have it any other way."

"The fact that the grad facs association is independently incorporated is one of the elements that is not an important one is this," Sovern said this Friday. "The proposition that any Columbia group is free to express its esteem and will not be denied the use of facilities because it picks an unpopular spokesman is the central message. That's what I said, and that's what the Senate said," Sovern explained.

Sovern also maintained that he was not being misleading in failing to inform the Senate of his plans to speak at the October 21 awards assembly.

"You think that's a secret?" he said in reference to his scheduled speech. "That program is out and presumably in thousands of copies. I try not to say the obvious."

But Senator Emira Woods, CC '87, blasted Sovern for failing to make public his plans to speak. "I think it was so hypocritical," Woods said. She and members of the ad hoc committee rejected Sovern's interpretation of the Kirkpatrick controversy as a free speech issue.

Woods described the first paragraph in Sovern's letter as "just garbage about free speech."

Sovern maintained that the Senate voted more for the sentiments expressed in Sovern in the opening of his letter, in which he assured Kremmer that "neither the Trustees nor I have ever approved an award to her."

Senator Ellen Ostrick, CC '88, chair of the Senate Student Affairs Committee, agreed that the basic point of the resolution that affirmed the sentiments in Sovern's letter was the separation of the decision of the GFA to honor Kirkpatrick from the University.

Ostrick also criticized Sovern for claiming that the Senate's resolution was nothing more than an affirmation of free speech. She said, however, that she thinks the letter could be manipulated in several ways.

"The letter was perfectly political. When manipulated, it says nothing," she said.

Members of the ad hoc committee also said they believe it was misleading of Sovern to imply that the GFA is unaffiliated with Columbia, and to conceal the fact that he personally planned to speak at the awards dinner.

Ad hoc committee member Rita Costabile, also a member of the GFA, said the invitation to the awards dinner clearly shows Sovern's name as primary speaker. This, she said, demonstrates the close relationship between the GFA and Columbia.

Costabile added that the GFA has a mailbox in Low Library, is one of the major fundraising organizations for GSAS, has access to the list of GSAS alumni and coordinates its activities with the school and its officers.

But some students s[illegible]ney were not so pleased to hear that Kirkpatrick would not accept her award. Neil Gorsuch, CC '89, editor of the newly established Federalist papers, a conservative journal, criticized the members of the ad hoc committee.

He called them a "radical fringe element," and said they harrassed Kirkpatrick out of coming to receive her award. He also called the anti-Kirkpatrick movement an example of partisan protest. He said they should have criticized Brown, as he was just as guilty for some of the things that they criticized Kirkpatrick for.

"The crux of this issue is why can't we be open to an intellectual dialog with those with whom we disagree," Gorsuch added.

Costabile denied the ad hoc committee was avoiding any dialog on the right-wing politics of Kirkpatrick. "Personally, I think she should come and debate her opponents," Costabile said.

Lipsey expressed anger about the protest over the award. "We are an apolitical organization and they [the protestors] completely ignored the others [Brown and Heilbrun] and pounced on this poor lady," she complained.

Kirsten Wilson, BC '88, a member of the ad hoc committee, said she is angry at for describing the protest as an attempt to deny Kirkpatrick the right to free speech. "We are trying to get people to stop and think about the issues," she said.

"I'm glad she's not coming," Wilson said. "She does not deserve the award."

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SPECTATOR/ANDREW HILL

TAKE HIM AWAY: Police physically escort Jordan Kushner, CC'87, away from yesterday's attempt to block an eviction.

Police arrest 30 protesters at first eviction attempt

By Tracy Connor

Thirty tenants, community members and students were arrested yesterday morning while attempting to block what would have been an eviction of long-time tenant Susan Acosta-Jaafar from her University-owned apartment.

Acosta-Jaafar's lawyer Ken Schaeffer had obtained a stay of eviction from the New York City Civil Court Saturday, but did not present the restraining order until after the police had arrested the protestors.

Schaeffer said he waited until the demonstration and arrests were over to present the restraining order to the marshal to insure there was no eviction. "This particular marshal has demonstrated in the past that he doesn't follow the rules. He might not have been stopped by a piece of paper, he was by the show of support," Schaeffer said.

However, University Institutional Real Estate (IRE) Director Bill Scott objected to the tactic. "One could have done it before they arrested 30 people," he said. "The police waited here for many hours before they [the marshal] got up to the door and were told they could not evict. Our view is that this entire thing was staged."

The rally was organized by community-tenant group Housing For All Federation (HFA).

Scott said the University would proceed with eviction as soon as possible. According to Director of Public Information Fred Kruble, that decision will be left up to the marshal.

HFA members say they are expecting the marshal to arrive as early as this morning.

Police arrested the demonstrators as they attempted to prevent city marshal Louis Giachetta from entering the lobby of Acosta-Jaafar's building at 536 W. 113th street. The demonstrators were led individually from the building into two police

See *Evict*, p. 4

CC suspends uranium thief for a year

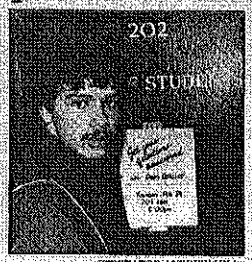
By Josh Gillette

The student who allegedly stole uranium from an abandoned physics lab and stored it in his dorm room was suspended for a year, stripped of housing rights, and placed on disciplinary probation for the rest of his undergraduate years yesterday.

Kenneth Hechtman, CC '90, who was accused of stealing the uranium and other chemicals, was informed yesterday in a letter signed by Columbia College Associate Dean of Students Karen Blank he must be out of his 10th-floor Carman room by Friday. He may reapply for admis-

See *Uranium*, p. 8

Students against ADHOC protest theft of uranium



SPECTATOR/ANDREW HILL
Ken Hechtman

By Scott Susin

The theft of depleted uranium 238 by Kenneth Hechtman, CC '90, has stirred up vocal reaction, both negative and sympathetic, around campus.

Perhaps the most outspoken has been a group of students called Students Against ADHOC, who passed out a flyer which says "expel the menace" and charges Hechtman with seven offenses, including "possession and distribution

See *SADHOC*, p. 2

Woods blasts council's ignorance on evictions

By Elana Amsterdam

Senator Emira Woods, CC '87, said she was surprised by the ignorance of her fellow council members when she reported on yesterday's University attempt to evict a tenant at last night's Columbia College Student Council meeting.

Woods said she was surprised that the council members were ill-informed. "If you are a representative of the student body I think you should be informed people," she told the other council members.

At-Large-Representative James Hunter, CC '87, also emphasized the importance of the potential evictions.

"Evictions are equivalent to gentrification," Hunter said.

Woods' response was to a variety of questions from council members ranging from "Why couldn't the lease be changed to her name?" to "What exactly is an affiliate?" The Council then argued over whether the eviction marshal had the legal right to physically remove protestors.

Hunter said he was also dismayed by the lack of knowledge among the council members.

"As a representative these people have not right to remain ignorant," he said.

"Not being informed of the issues that directly affect students is dangerou sand it scares me," Hunter said.

Council Chair Alex Navab, CC '87, limited discussion to "go on with the agenda." After the meeting he said "the student body does not know what's going on," adding "I don't know enough about the situation to make a judgment."

Navab closed the discussion on evictions after only ten minutes.

Hunter said he was interested in the evictions both as a member of the

See *Council*, p. 8

Scandal forces new B-school elections

By Maria Nieves

The Graduate Business Association (GBA) will hold new student elections starting today because of allegations that its president used inside information to endorse one of the candidates in the recent student elections.

Information about the election's daily tallies was not kept confidential and the race between the top two candidates for president was so close that the current GBA president's endorsement of a candidate may have altered the outcome of the election, according to a statement issued yesterday by GBA.

"The elections were poorly conducted," read the statement, which was signed by GBA officers and second year students Edward Ellis, Alison Schmults, Karen Russo and Colin Cooper.

John Featherman, a first year student, accused Ellis, GBA's outgoing president, of calling students during the five-day election period last week to tell them to vote for Victoria Brown, who ran against Featherman for GBA President.

Brown won the election with 280 votes, while Featherman received 276 votes.

The new election will be held today through Friday, and the results will be announced Friday.

In addition to holding new elections, GBA will also hire proctors from outside the student body to conduct the election, Schmults said. The votes will not be counted until after the election has ended, Schmults said. In the first election, the votes were tallied at the end of each day.

"We are all taking this very seriously. We want to correct any problems as quickly as possible," Schmults added.

See *Elect*, p. 2

Student finds intruder in her Johnson double

By Lori Levy

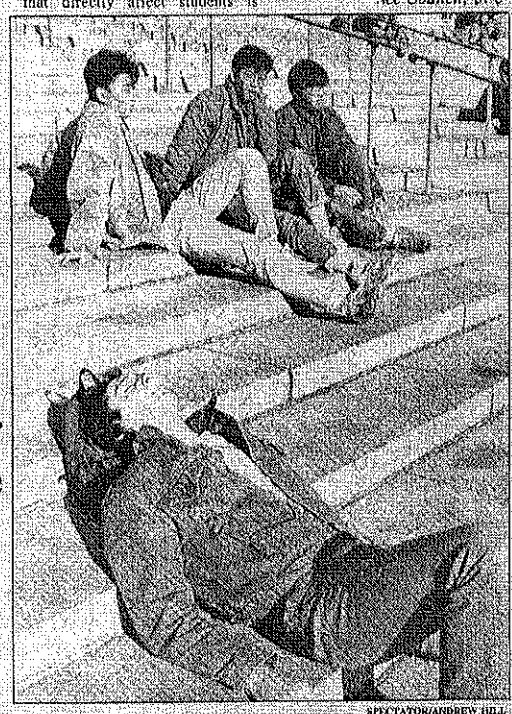
An unidentified woman was found rummaging through a student's belongings in a Johnson Hall room yesterday afternoon but fled as soon as security was notified, according to Michelle Henshaw, CC '89.

Henshaw claimed she left her room on the fifth floor of Johnson unlocked at 12:30 p.m. yesterday when she went down the hall to the bathroom. When she returned a few minutes later, she said she heard sounds as if someone was going through her belongings on her side of the walk-through double.

"I could hear someone rummaging through my things from the other room," said Henshaw. "I called my roommate's name, but this woman answered saying she was there to meet my roommate."

Henshaw said she then saw the woman, described as 5'6" or 5'7"

See *Robbery*, p. 2



SPECTATOR/ANDREW HILL

HANGIN': Yesterday's snow cut some key time for catching some rays dude.

SUPP 12e-000006

Evict

continued from page one

vans while they and the remaining protesters chanted and yelled "Shame, Shame on you" at Giachetta and Byron Golden, a lawyer representing the University.

The blockaders were brought to the 26th precinct police station, where they were charged with disorderly conduct and released. According to community affairs officer Phillip Moog of the 26th precinct, Jordan Kushner, CC '87 was to be charged with resisting arrest, but the charge was reduced to disorderly conduct.

Kushner, who refused to walk to the police van like the other protesters, had to be carried away from the building by the police.

"They handcuffed us and chained us on one side," tenant Lenore Sambur said. Sambur also said the tenants were instrumental in getting Kushner's charge changed. "We stood fast, said we would not show ID's unless the ruling was changed," she said. According to Sambur, those arrested will have to appear at a hearing in Criminal Court on April 1.

While thirty protesters were arrested, about 100 people gathered outside of Acosta-Jaafar's building with banners and signs protesting this eviction and the University's housing policies in general.

Acosta-Jaafar's case is one of four ruled against by the New York State Appellate Court in November. The appellate decision reaffirmed Columbia's legal right to enforce it's affiliation clause, which restricts affiliation status to full-time students, faculty, and administrators with a grade-14 rating or higher.

Acosta-Jaafar is a full-time senior accountant in the University Comptroller's office.

The University says it's evicting Acosta-Jaafar because she lives in an apartment with a lease in her brother's name, a former Columbia affiliate who left the University in 1974.

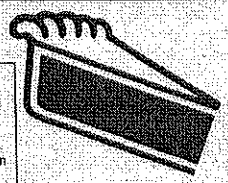
"Tenants have been in these apartments for many years. Why are they evicting these people? What is the morality in that?," Schaeffer said.

The University served Acosta-Jaafar with a 72-hour eviction notice this past November, but Schaeffer was able to obtain a stay of the eviction, while he appealed the Appellate Court's decision.

According to Scott, another eviction notice was served to

See *Evict*, p. 11

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Evict

continued from page 4

Acosta-Jaafar last Tuesday. "Kenny Schaeffer then went to a judge of the Civil Court and got an order to show cause signed," he said. An order to show cause would have forced Columbia to legally explain its reasons for eviction.

"I am told that the basis for this was that Schaeffer was to seek permission of the State Court of Appeals to appeal the decision," Scott explained.

Last Friday the University obtained an order from the New York State Appellate Court to overturn the order to show cause, according to Scott. "The appellate division found that the civil judge had no authority to issue the show of cause [which prevented the eviction from occurring last week]," he said.

Schaeffer said he obtained a second stay of eviction on Saturday. After the protesters were arrested, the marshal entered the building with several police officers and Golden and climbed the stairs to Acosta-Jaafar's apartment.

Schaeffer was waiting outside the apartment, and he presented copies of the restraining order to Golden and Giachetta. Schaeffer said the order was issued by Civil Court judge Lou York on the grounds that a new 72-hour notice had not been issued.

After examining the order, Golden said, "We've been stayed by the court. Of course we will abide."

Last night tenants held a meeting attended by over 60 people in the Malcolm X Lounge to discuss the day's events and future planning strategies. Members of HFA asked Spectator to leave before they discussed strategies.

"There is a marshal maybe coming tomorrow," HFA member Gillian Kaye said. "Almost definitely a marshal on Wednesday morning."

At the meeting HFA members fielded questions and blasted the University for its housing policies. HFA Members claim that IRE is warehousing about 400 apartments. "They don't want to fill up those empty units," Schaeffer said at the meeting. "They want to kick anyone out of housing who they don't want."

However, Scott claims the University is not warehousing any apartments. He said that some apartments are vacant at all times, because they are being renovated. "These are old [apartments]," he said. "We have got to do this work. We can't keep putting out this unrenovated stuff."

"To renovate them, you have to take it off line for awhile," he added. "We are not losing track of these things."

Scott said that in general, tenants who were in danger of being evicted were not entitled to Columbia apartments, or were illegally occupying them.

HFA members claim that University housing policies are discriminatory against lower-grade administrators, and that Columbia has changed the rules concerning affiliation status retroactively.

"She [Acosta-Jaafar] is an illegal tenant," Scott said. "Our view is that we cannot allow people who have [University-owned] apartments to pass them along to people who have not gone through the process [of applying for University housing]."

"The issue here [Acosta-Jaafar's case] is not the grade she is, but that her brother cannot convey the apartment to her," he added.

"The University has increased the priority that students have for housing," Scott said. Scott said that in order to make housing available for students, the University had to restrict housing for other Columbia affiliates.

Scott also thought people were under the misconception that the University was systematically evicting tenants with a rating lower than grade-14.

"We have no instance [of eviction] when someone who was a full-time affiliate, and remains so, with a lease, and paying their rent," Scott said.

"Thousands of people who signed affiliation clauses have honored them," Scott said. "If we don't enforce it for them [the tenants who are protesting], then who do we enforce it for?

"They are trying to make it into an issue it's not," he added. "They are making it an issue of Columbia against the community."

Members of HFA said they plan to hold a rally this morning in support of Acosta-Jaafar. "It seems that we have really solid student support that's growing," Kaye said.

"I think it's critical. I think the language of the students is militant," Kaye added. "We have to force the University to re-examine their housing policies. They better pay attention to the students."

Kushner, one of the fewer than 10 students arrested yesterday, criticized Columbia at yesterday's rally.

"Columbia's policies on housing, as on everything, are completely disgusting. Human Beings don't exist at Columbia. All they care about is increasing their endowment," he said.

But some students last night were less sympathetic about the tenants' plight.

"I think the fact that they had the stay of eviction but nonetheless went forward to get themselves arrested in front of Newsday, the Times, and Spectator proves the overwhelming superficiality of both their cause and really the people themselves involved," charged Neil Gorsuch, CC '89.

Andrew Levy, CC '88, described the demonstrators as "a bunch of liberal fucks."

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Uran

—continued from page eight

However, Novick said members of the physics department staff are currently removing all chemicals from Pupin Hall.

He said he does not know what chemicals are stored in Pegram, but that the removal project will include getting rid of old electronics equipment stored in the basement room.

According to Novick, the cleanup effort is a direct result of the theft of uranium and other chemicals from the lab.

"A massive cleanup of chemicals began since these kids broke in," Novick said. He added the cleanup was initiated because the chemicals were an "attractive nuisance" to the students and other potential thieves.

Novick said chemicals have already been removed from a chemistry lab in the basement and another on the 13th floor of Pupin. He said there is no reason to have chemicals in Pupin now, nor has there been any reason for several years.

"We have very little need for chemicals in the research we're doing now in Pupin. There used to be a time when we used more [chemicals]," Novick said.

Pegram will be torn down within a year to make way for a technology building for the School of Engineering and Applied Sciences. The astrophysics lab and the electronics lab that Pegram now houses will move into Pupin, Novick said.

Hechtman bemoaned the system under which he was found guilty.

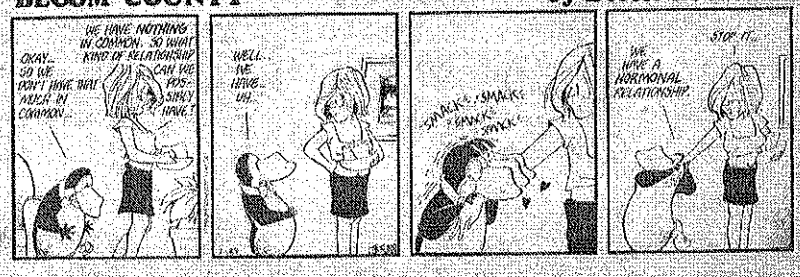
"There's no justice in this world," he said.

Hechtman's suitemate, Sam Zucker, CC '90, said he is sorry to see Hechtman leave the school, but hopes that he will not be forgotten.

"Columbia can kick out Ken, but they can't expel his legacy. Alexander Hamilton, Jack Kerouac, and Allan Ginsberg were removed from the list of the Columbia registrar, only to be inscribed in the ledger of the famous. So Ken," Zucker said.

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FIFTEEN CENTS



SPECTATOR/ANDREW HILL

TO LEAD OR NOT TO LEAD: Students discuss the leadership of the movement against institutional racism at forum last night.

CC disciplinary hearings proceed without key input

By John A. Oswald

Columbia College administrators will continue to investigate Sunday morning's alleged racially-motivated violence despite the failure of black students to formally press charges with the college against their alleged attackers.

"The college's disciplinary procedure will proceed on as a matter of course," Columbia College Dean Robert Pollack said yesterday.

While Columbia College deans continue to express the desire that all parties and witnesses to a 2 a.m. brawl outside Ferris Booth Hall (FBH) between black and white students meet with them, the blacks involved have so far only chosen to press charges against four of their alleged assailants with the New York City Police Department.

With or without the input of the black students who participated in the fight with whites, Assistant Dean of Students Peter Johnson said the deans' office will make some sort of disciplinary decision following this and next week's hearings.

Johnson said he still hopes the students who are charging they have been victims of a racially-motivate assault make use of the college's disciplinary procedure.

The students who were allegedly beaten by white males at Columbia could not be reached for comment last night. Black student leaders in Concerned Black Students of Columbia (CBSC) last night refused to speak to Spectator about their rejection of the college's disciplne procedures.

"I'm not certain they have rejected it at this point. They are consulting with their legal counsel," Johnson said.

Civil-rights lawyer C. Vernon Mason advised as many as 10 victims of the alleged attacks Monday to file the criminal assault charges against the alleged known attackers, according to Tanaquil Jones, GS '87.

Mason too has refused to return repeated calls to his office and home in recent days.

Johnson, along with Associate Dean of Students Karen Rank, did

See *Discipline*, p. 7

Black leaders say whites cannot lead anti-racist group

By Josh Gillette

Moderate students who are not black and want to fight racism should work under the leadership of blacks and support Concerned Black Students at Columbia (CBSC) in its efforts to educate the community, organizers of a meeting billed as "The Ad Hoc Committee to Combat Racism" in McIntosh concluded last night.

The CBSC steering committee told the forum of about 30 students they were concerned about what they thought was the formation of a group separate from the coalition of blacks and other races gathered under the aegis of the CBSC's black leadership.

The CBSC formed in response to last weekend's allegedly racially-motivated fight between black students and white students outside of Ferris Booth Hall. The CBSC has subsequently issued 15 demands of the University ranging from the immediate expulsion of the four white students who CBSC organizers say attacked black students early Sunday morning to the inclusion of a required course on racism in the core curriculum to the immediate increase of black faculty by 50 percent.

Cheryl Dericoute, BC '87, a member of the steering committee of CBSC told the organizers of the Ad Hoc committee forum that by posting flyers calling a meeting of such a committee, they were taking a political stand. Dericotte then demanded to her the group's platform.

"When we see a group of whites setting a political agenda, we've seen from history that there's a group of whites trying to take over our struggle," Dericotte said. She added, "By making a separate organization, you are viewing black leadership as unacceptable. We don't want you coming together supporting partial demands."

"When an individual becomes aware of racism and wants to un-

See *Ad Hoc*, p. 4

COI to consider black studies major

By Melissa Michelson

The Interdepartmental Committee for Afro-American Studies will discuss a proposal for a major in the program with Dean of Columbia College Robert Pollack and Associate Dean Michael Rosenthal Monday morning, according to Rosenthal.

A report and suggestions for expanding the program to allow for majors and concentrations were submitted to the deans several weeks ago, according to committee chair Professor Hollis Lynch.

Professor of History Eric Foner, a committee member, said the committee is hoping to get its suggestions approved by the Columbia College Committee on Instruction (COI) this semester so that the major can be implemented by next fall.

"We're hoping it will be applied fairly soon," he said.

Rosenthal said the proposal will probably be passed on to the COI following Monday's meeting.

"It's a perfectly reasonable proposal," Rosenthal said. "It looks very sensible to me."

Pollack refused to comment.

Current demands by a group calling itself Concerned Black Students at Columbia formed after last weekend's allegedly racially motivated fight outside Ferris Booth Hall, include the implementation of a mandatory course on racism to be

See *Black Studies*, p. 7

Fed Paper may sue Coors poster writers

By Asha Badrinath

The Federalist Paper might sue the authors of a poster, which alleges that the paper is funded by the right-wing Heritage Foundation, according to Neil Gorsuch, CC '89, a member of the paper's editorial board.

The poster states that students should boycott Coors beer and the Federalist Paper. It also accuses Coors of union busting and unfair labor practices and states that the Coors family supports right-wing reactionary groups such as the John Birch Society and the Moral Majority.

"If we find out who did it, there's a possibility of a libel suit," Gorsuch said.

The students who made and put up the poster said they got their information from a member of the staff of the Federalist Paper, a campus publication.

"Someone at the FP (Federalist Paper) told me, when I asked, where they got their funding. When I asked, he mentioned the Heritage Foundation," Andrea Miller, CC '89, said. Miller said she had heard rumours of the Heritage Foundation's donations to the paper, and

See *Coors*, p. 7

Gay and lesbian conference still short on housing space

By Josh Gillette

The Columbia Gay/Lesbian Alliance (CGLA) has found housing for only about half of the more than 400 gay and lesbian students expected to come to Columbia from as far away as University of Saskatchewan this weekend for the Fourth Annual North East Lesbian and Gay Student Union (NELGSU) Conference.

CGLA Treasurer Roderick Dial, CC '89 said about 350 gay and lesbian students have pre-registered for the conference. Of the 450 expected, 180 had definitely been assigned space yesterday afternoon in places ranging from students' rooms to a gymnasium in St. John the Divine's Cathedral, with more space being volunteered "every hour," Dial said.

Murray Sexton, CC '87 conference coordinator last night estimated that housing has been found for about 220 students.

Sexton said the expected turnout is only about half of an earlier estimate.

See *CGLA*, p. 7



SPECTATOR/ANDREW HILL

A FEMINIST PERSPECTIVE: "Women and Revolution in Central America and the Carribean" speakers Dr. Cecelia McCall, of Women for Racial and Economic Equality, Digna Sanchez, of the Puerto Rican Socialist Party, Tracy Scott of Somos Hermanos and Nancy Lorence of the Committee in Solidrity with the People of Guatemala, discuss the topic at last night's session of Central America Week. The Institute for Research on Women and Gender and the Barnard Women's Center co-sponsored the event.

SUPP 12e-000009

Discipline

on the two-member Columbia College disciplinary committee investigating an incident which members of the Concerned Black Students of Columbia (CBSC) have pegged as a race riot that started in front of FBH and spilled out onto Broadway.

In a Sunday afternoon rally quickly organized by members of the Black Students Organization (BSO), United Minorities Board (UMB), Coalition for a Free Southern Africa (CFSA), and black alumni, four white Columbia College students were publicly charged with having instigated a racial brawl that sent Michael Jones, CC' 87, to St. Luke's hospital and has since dramatically brought to the surface campus racial tensions.

CBSC identified Matt Sodl, CC '88, Drew Krause, CC '88, Michael Bogaki, CC '89, and Don Chiesa, CC '88, as four of us many as 30 white Columbia students who, without provocation, physically and verbally assaulted blacks as they left the 'plex at closing time on Sunday at 2 a.m.

Both Sodl and Krause maintain that the brawl was instigated by Jones and a group of 10 blacks who waited fro Sodl and his friends outside of FBH. Bogacki has vigorously denied his involvement with the incident and claims he was the victim of an unprovoked attack by blacks.

"I was coming out of the 'plex and didn't know what was going on when this guy hit me. My hat fell and he grabbed it and I ran after him to Broadway, he had two friends and they just started beating mow up. I've got bruises on my head and shins from them kicking me when I was down and I have a black eye," he said.

Chiesa has refused to comment.

continued from page one

Johnson and Blank have so far taken statements about the incident from eight people, according to Blank. Ten more witnesses are scheduled to appear before the deans next week, including the two or three black security guards who were struck while attempting to break up the fight outside of FBH.

CBSC have also charged that the guards who responded to the beatings were themselves the victims of racially-motivated violence. Security has been tight-lipped about the incident and ordered by upper level administrators not to discuss the event, according to one guard who asked that his name not be used.

Blank stressed that the group her office is interviewing is diverse and represents more than just two positions on what exactly took place during the early hour brawl outside FBH Sunday.

Among the group of students are athletes, fraternity members, and black and hispanic students, she said. Johnson added, "We are interviewing people who are affiliated with Columbia University and people who were simply in the area."

The status of the police investigation of the incident is still unclear. According to Tanquil Jones, The police have done nothing so far to move on an investigation of the charges. "The failure of the New York City police department to respond is typical of their response" to cases involving minorities, she said.

The 26th Precinct's Detective Lefkowitz said yesterday that the officer assigned to the case, Detective McCarthy, would not be back to the precinct until late Friday afternoon.

Plans for a meeting between CBSC and University President Michael Sovern have yet to be finalized.

CGLA

He said based on the annual increase in attendance at the three previous NELGSU conferences, he expected about 1000 gay and lesbian delegates to this year's forum.

"We expected 1000 based on the exponential growth rate of previous conferences—it doubled every year," Sexton said.

He explained that the first conference in 1984 drew about 150 delegates to Harvard, the next year 300 went to Cornell, and last year Brown hosted 600 gays and lesbians. He said based on Columbia location in New York City, CGLA expected more registrants. However, walk-in registration, particularly that available free of charge to Columbia students who offer to house visitors, could dramatically increase the number of participants.

"We could go up to 700—it would happen overnight," Sexton said.

Sexton attributed both the low turnout and the lack of housing to a lack of publicity about the conference. He also said he believes there may not be any more people to attend.

"It may be that we've reached a saturation point of lesbian and gay activists in the Northeast," Sexton said.

Sexton said the previous NELGSU conference hosts "was similarly last minute."

Dial said CGLA did not guarantee housing to participants, but offered space to be volunteered by Columbia students and members of other New York Gay/Lesbian groups. However, Dial said, CGLA failed to canvass enough students to obtain adequate space.

"Maybe we haven't done a good enough job getting out around campus. We really need volunteers," Dial said.

The students need space to sleep Friday and Saturday nights only, Dial said.

"All we need is floor space," he said.

He explained Columbia normally offers some limited conference housing, but at too high a cost for most of the students coming to the conference.

"That may be our downfall- people aren't paying for housing. We're trying to minimize costs and offer free housing," he said.

The University has also never housed a conference this large, he noted.

"I don't know of any conference this la- s that offered housing. We didn t have anything to go on as far as experience in conference housing," Dial said.

Sexton said CGLA on about 100 events "of, by, and for lesbians and gay men." The money will go primarily for space rental for events, security, janitorial services, signs, banners, food, etc. None of that money which he said came from foundation donation, gay alumni, benefit dances, registration fees, CGLA funds, and advertisements, is available to subsidize housing costs.

"We're already charging a subsidized rate. We're charging $30 person and spending a lot more," Sexton said.

CGLA requested floorspace in an auditorium in Earl Hall to sleep 100 students, Dial said, but was turned down because they would pose a fire hazard. However, this setback was offset by the acquisition of space in Barnard's Reid Hall, where 40 students will stay in a lounge. Dial said he is working to get two more lounges to accomodate ten people each.

"It looks as if 100 places we lost at Earl Hall we made up about 60 of them," Dial said.

CGLA Women's Coordinator Debbie Chang, BC '90, said CGLA tried to get housing by approaching students, setting up tables on College Walk and in Macintosh, and taking ads in Spectatorbut had few results.

"We're kind of in big trouble. It seems people on this campus are pretty apathetic," Chang said.

Dial said on average, students have volunteered to house one or two visitors; in rare cases, one room will house four to eight guests. He added alumni have offered to host only about 20 conferees, opting to send CGLA donations instead.

He said CGLA, in seeking space, has run into "obvious problems with security at the University about using common areas."

He said there is a "very definite possibility" CGLA will have to turn visitors away from the conference for lack of housing.

"I'm very worried about it, quite frankly. The conference would suffer by turning people away," Dial said.

He said he hopes gays and lesbians from all over the northeast will attend the conference. It is important that many of the students witness Columbia's strong lesbian/gay organization, he said, because many of them come from schools where homosexuals are not organized.

"It's important to network different schools, and to find out where the gay/lesbian movement, which is 20 years old, is going to go in the next 20 years," Dial said.

Coors

considered this confirmation.

Miller said she mentioned the information to someone else, whom she refused to identify, and that person made up the posters.

Gorsuch said he believes this other person is Jordan Kushner, CC '87. "We know it's Jordan Kushner," he said.

Kushner refused to comment on the accusation, but said he did not believe Gorsuch could prove who had made the poster. "I'd like to know where they got that from. I defy them to provide any witnesses."

Adele Olpman, GS '87, a member of Columbia Students in Solidarity with Nicaragua, said that a Federalist Paper writer also told her that the paper is funded by the Heritage Foundation. Olpman said that Eric Prager, CC '90, told her of the Heritage Foundation connection when he interviewed her for a Federalist Paper story about the funding of campus political groups.

Prager denied the charge. "I told her I don't know where we get our funding. You might look to foundations, for example the Heritage Foundation funds conservative ventures. Now I do know that we receive no funding from any foundations," he said.

Gorsuch denied that the paper has ever received money from the Heritage foundation or its founder, the Coors family, although the Federalist Paper once ran an ad for Coors Beer. "We got an advertisement but other than that, no," Gorsuch said.

"We get our funding from private individuals. They are alumni of this University," Gorsuch said.

Gorsuch accused the students who made the poster of violating University rules, which require that the sponsors of a poster put their names on it.

"I think the real issue is why these people are so fucking chicken and won't put their names on this poster," he added.

Although he said the paper considered the poster libelous, he said he wasn't angry about it. "I'm happy to see them up. It's good advertising," he said.

Miller cited information from the National Organization of Women and the Gay Labor Network as sources for the poster.

The poster was not officially sponsored by any campus organization, Miller said.

"The focus of this was Coors, not the Federalist Paper," Miller added.

"This has turned into a proverbial shouting match and a show of strength between the 'left' and the 'right' on campus, and that is a real shame," she said.

Gorsuch added, "I think the real story here is that you have a typical example of a radical group looking for a new issue. They don't know Coors' hiring policies and they don't know our advertising policies."

continued from page one

Black Studies

taught by a black faculty member.

But Rosenthal said the demands were unrelated to the program's development.

"The issue of the Afro-American Studies has been developed individually from the racial tensions that are now occuring," Rosenthal said. "The committee has been deliberating for a couple of years."

According to Rosenthal, most courses that would make up the Afro-American Studies major already exist and have healthy enrollments.

Currently, students may petition for permission to do a concentration in Afro-American studies, but there is no major available.

"I recommend the establishment of a major," Rosenthal said.

According to Lynch, the committee was formed in response to requests from a number of students for a major in Afro-American studies and met about once every three weeks for two years.

Lynch said the committee has had the cooperation of the administration throughout. However, he said the administration should acknowledge that there are no works by black Americans currently included in the core curriculum.

"There should be some representation," Lynch said.

Committee member Winston Willis, CC '87, president of the Black Students Organization, said he would also like to see some such representation in the core.

"I think that it's very important that not only blacks or Africans or Latinos be represented in the core curriculum but that there also be a demand in light of the recent racism that a course on racism be taught by a black professor in the core curriculum," Willis said.

Rosenthal said he did not expect that many students would actually major in the program.

Lynch agreed. "We don't anticipate that there are going to be a large number of majors," he said. "What is more important is that the curriculum be enriched and these courses be available for people who want to take them."

Willis, however, said he thought many students will want to major in the program.

"I think that an Afro-American Studies major would excite all students because in finally implementing that major Columbia College addresses the need to have diverse and more representative curriculum," he said.

Lynch said there are already a large number of students enrolled in Afro-American history and Afro-American literature classes.

"It's not just black students taking them. As courses they are attractive," he said. "There's a richness in Afro-American literature, Afro-American History."

"We've had these courses, many of them, for years," Lynch said. "We're just expanding them."

Lynch said there are many areas of the current Afro-American Studies program that should be improved.

"We feel that in order to make it into a viable program certain areas need to be better represented," Lynch said. "The courses available we pulled together and that represents a good core."

"We don't have, for example, a full time person that teaches Afro-American music, which is so important," he said.

According to committee member Foner, the committee also recommended the establishment of a basic course on the Afro-American experience in general. "Sort of an introduction to the field," he said.

Lynch said the establishment of a department of Afro-American studies should entail hiring some new faculty. However, Rosenthal said there has been no call for a new department to be developed.

Rosenthal said if the final proposal from the committee is adopted and entails the hiring of additional faculty, that faculty will be hired through individual departments of the interdepartmental program which currently exists.

According to Rosenthal, money to pay for any new faculty members would have to be obtained through the collective Arts and Sciences budget.

Willis said the proposal submitted to the deans was not a final draft.

"There's still some of us who are working on revisions on that proposal," he said. "Lately we've been involved in reworking some of the language of the report.

"A lot more light will probably be shedon the whole subject after Monday," he added.

continued from page one

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SPECTATOR/ANTHONY CHING

ANCHOR TO ANCHOR: Koppel defended rival anchor Dan Rather at last night's gaPoint Awards (See story page 5).

Spanish department hires professor charged with harassment at Harvard

By Melissa Michelson

A University Spanish professor recently hired from Harvard is currently under investigation for allegedly harassing a Harvard student, Graduate School of Arts and Sciences Dean Gillian Lindt confirmed yesterday.

Per Nykrog, chair of the Romance Languages department at Harvard, also confirmed that charges of sexual harassment have been filed within Harvard's graduate school against Professor Jaime Alazraki.

The Harvard student handbook defines sexual harassment as "unwanted sexual behavior, such as physical contact or verbal comment or suggestion which adversely affect the working or learning environment of an individual."

Both Lindt and Nykrog said they were unaware of the details of the charges against Alazraki.

Columbia made Alazraki a formal offer several months ago, which he accepted late last fall, Lindt said. She added that she did not hear rumors of the alleged harassment until just before Christmas.

"At that, I called Harvard [and learned] two students had filed charges in relation to matters of sexual harassment," Lindt said. "I also learned that one case had just been concluded, and that the charges were found to be unsubstantiated and the charges were dropped.

"The other case I believe is still going on. My understanding is that as of this time charges have not been substantiated. Investigations are still going on," Lindt said.

"Nothing has clearly been proven," she added. "We are very concerned and we'll await the outcome."

Lindt declined to comment on what action Columbia will take if the charges are proven, or whether Alazraki would have been hired had Columbia learned of the charges before his appointment.

Although Alazraki was first contacted by Columbia this academic year, the search for a senior faculty member for the Spanish department has been going on for the past two years, she said.

See *Professor*, p. 5

Brokaw to speak at Spec yearly Low celebration

By Robin First

NBC News anchor Tom Brokaw will be the keynote speaker at Tuesday's celebration of Spectator's 25th year of independence from the University next Tuesday.



SPECTATOR/ANTHONY CHING

Tom Brokaw

The independence celebration, which starts at 7 p.m. in Low Library, features Brokaw's address and a question and answer session.

"This is the first time we're making an effort to open this event to the entire campus," Editor-in-Chief Sara Just, CC '88, said.

The price of the event is $11 and besides Brokaw includes an open bar, hors d'oeuvres, and a performance by the Kingsmen.

Brokaw has become a household name in recent months. Last month, he interviewed Mikhail Gorbachev during the Soviet premier's visit to the United States. Brokaw has frequently appeared on David Letterman and was also host to the first pre-primary debate of both political parties, featuring all the major candidates.

"We are fortunate to get Brokaw because he's so popular with students and the country in general right now. Up until the Dan Rather fiasco a few days ago, Brokaw was the most talked-about network anchor for the past year," explained Managing Editor John A. Oswald, CC '88.

Spectator, which was founded in 1877, became an independent corporation in 1962. The newspaper is the second oldest college daily in the United States.

Alan Young, CC '63, the editor-in-chief when Spectator became fully independent, said the idea of an independent campus newspaper was a result of pressure from the University. "It was sort of thrust upon us. They [the University] wanted a more

See *BPD*, p. 4

Invalid petitions wreck council referendum

By Julie Zuckerman and A. Cassidy Selgal

The Columbia College Student Council last night removed a referendum from this week's ballot charging petitions were incorrectly distributed.

The binding referendum would have placed Columbia Concerts under the auspices of the Board of Managers (BOM), giving BOM control over Concerts' funding.

Columbia Concerts, which organizes concerts on campus, is currently funded directly by the Joint Budgetary Committee (JBC), as is BOM.

When Columbia College students file their programs this week, they have the opportunity to vote for a revised constitution and two referenda regarding the homeless and low-income housing, according to Adel Aslani-far, the communications officer of the election commission.

Wednesday evening, the night before the voting began, the Council election commission received a petition with 270 signatures requesting Concerts to fall under the auspices of BOM, he said.

Those responsible for circulating the petition refused to identify themselves.

At the council meeting last night, Council Chair Jared Goldstein, CC '89, took issue with the referendum. According to the council constitution, a Columbia College student may bring an issue to vote if he or she has 150 valid signatures on a petition, Goldstein said.

The BOM/Concerts petition is questionable, Goldstein said, because the organizers have not come forward and "put their names on it."

According to Goldstein, a signature can be validated only if it is accompanied by a social security number, and that number is subsequently verified.

Aslani-far said that the elections commission checked the signatures against a list of Columbia College students. According to many members of the council, this was not a valid way of checking the signatures.

Council Representative Jacob Goldberg, CC '88, motioned to overturn the election commission because the signatures were not properly validated, but he added that he would personally call each student and validate his signature.

See *Council*, p. 5

Gala at St. Paul's celebrates opening of student art gallery

By Peter Meier

What was a dark and dusty room just five days ago officially became the Postcrypt Art Gallery last night, when 100 people gathered in the basement of St. Paul's Chapel for the dedication of the new student gallery.

Deans of the undergraduate schools and Earl Hall Director Rabbi Michael Paley joined the student organizers of the gallery for a ribbon-cutting ceremony, followed by a three-hour reception.

The new gallery features the work of two former Columbia students in a newly designed room with track lighting, blue carpeting and free-standing walls.

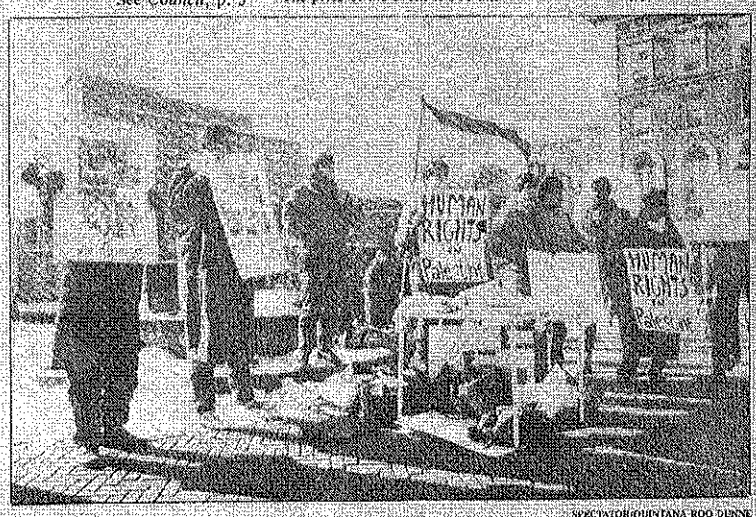
Debra Laefer, GS '88, director of the new gallery, was the driving force behind the project, according to gallery staff member Lisa Rapaport, GS '89.

Before the establishment of the gallery, the only space available for exhibiting student work was a hallway in the basement of St. Paul's.

Laefer, Rapaport, and Jennifer Egert, BC '89, maintained the original space, which opened in 1985, despite logistical and security problems.

Organizers of the gallery raised $8,000 for the project in approximately one month, according to

See *Postcrypt*, p. 7



SPECTATOR/QUINTANA ROO DUNNE

PROTEST: Demonstrators demanded an end to Israeli occupation of the West Bank and Gaza Strip (See story page 9).

SUPP 12e 000011

Network news stars turn out at Low for duPont journalism awards night

By Joshua C. Gillette

Tom Brokaw officiated, Ted Koppel and Bill Moyers awarded, and Dan Rather was ordained to the clergy at a celebration of the little guys of broadcast news at a Low Library ceremony last night.

This was no Battle of the Network Stars. It was the Alfred I. duPont Awards in Broadcast Journalism. The annual event in Low Rotunda was taped for last night's 10 p.m. nationwide public television broadcast.

CBS Evening News Anchor Rather did not appear, although his program "48 Hours on Crack Street" was awarded a silver baton.

Anchor and editorial manager of ABC News' "Nightline" and "Viewpoint" Koppel alluded to what he described as one of the more delicate situations in recent broadcast journalism: Rather's Jan. 25 verbal brawl with Vice President and Republican presidential contender George Bush during a live broadcast.

"What was wrong with the now famous Bush/Rather confrontation was not Dan Rather's demeanor, or the vigor with which he pressed his questions; it was the unintentional—indeed, the almost certainly unwitting—collaboration of CBS News with the Bush political campaign. Although he clearly did not suspect it, Dan Rather had been selected to serve as high priest on the ceremonial dewimpling of the Vice President," Koppel said.

The pressure of live broadcasting which led to the unedited confrontation points up a widespread problem in broadcasting, according to Koppel.

"Live, in the middle of the CBS Evening News, Rather had given up a newsman's most precious prerogative: the chance to edit," he said.

Susan Mercandidy, senior producer of Nightline, called the battle "a great media ploy."

"I think it helped [Bush] because it decided the wimp factor. He got a chance to be strong," she said.

"It was very clever on Bush's part to preplan that. It was pre-planned."

Barbara Matusow, a duPont awards judge and recent editor of "The Evening Stars," said Rather hired a media strategist, a specialist usually employed by politicians to help them prepare for debates, to help him prepare for the interview with Bush.

Rather did appear on one of several monitors around the Rotunda in a clip from the CBS News program 48 Hours on Crack Street, one of three winners in the network television category.

The 48 Hours program provided what Koppel called "a graphic, harrowing, even horrifying look at the latest drug of choice," and featured Diane Sawyer and Rather, who strolled toward the camera saying, "crack users end up in one of two ways: either with drugs as a way of life—and what a way of life—or as a way of death."

Highest honors, the duPont Gold Baton Award for the program judged to have made the greatest contribution to the public's understanding of an important issue or event, went to the television series "Eyes on the Prize: America's Civil Rights Years, 1954-1965," a six-part documentary by the Blackside production company.

University President Michael Sovern presented the award, which carried with it a $10,000 Trustees Prize, to executive producer Henry Hampton and other who worked on the series.

The duPont Awards were established in 1942 to honor newspaper magnate Alfred I. duPont by his wife as awards for excellence in public affairs radio programming. Acting Dean of the Graduate School of Journalism Frederick Yu said the awards have included television broadcasting for 20 years.

The 13 awards were presented by Koppel, anchor and managing editor of "The NBC Nightly News with Tom Brokaw;" Brokaw; CBS News Medical Correspondent Susan Spencer, former producer, correspondent and commentator for CBS News and PBS, now head of Public Affairs Television Bill Moyers; Cable News Network Washington Anchor Bernard Shaw; and University President Michael Sovern.

Moyers and Spencer both recalled their days as correspondents at local stations, stressing the importance of local news.

"Tonight belongs not to the preachers of our craft, not to the pundits, but to the practitioners. Since citizens are able to act more immediately on what they learn about their own neighborhoods, local stations are watering the grass roots," Moyers said.

Spencer also praised local investigative reporters.

"Network correspondents today know that fierce competition can come from the local reporter who might just know what the story is about," she said.

NBC News Anchor Connie Chung sat in the audience and congratulated winners afterward. She said while she had seen the network award winners before the ceremony, the local pieces caught her interest.

"It was nice for me to see the local awards, because there were some terrific investigative reports," Chung said.

When asked why David Letterman had not attended the ceremony, Chung said that "he never goes out." But, she added quickly, "He's the best. He's really funny."

Brokaw backed Koppel's criticisms of reporters that take center stage.

"I think that we should all pay heed to the admonition that we not become prisoners of our technology," Brokaw said.

After the ceremony, he defended the increasing role of the media in the selection of presidential candidates.

"We are the place everyone turns to. You've got to have a kind of common forum, a sort of synergy," Brokaw said.

Brokaw also had comments on the future of journalism.

"It's always fun to come to these awards," he said. "It's fun to walk through the lobby and to be greeted by a gauntlet of graduate students looking for work."

additional reporting by Melissa Michelson

continued from page one

Council

Both the head of BOM and the president of Concerts opposed the referendum.

Erika Lang, BC '90, president of Concerts, said that if Concerts is put under the auspices of BOM, it will lose funding from Barnard College, as well as lose McIntosh Activities Center as a concert location.

Neil Gorsuch, CC '89, Federalist editor, disagreed. He said that if Concerts would be placed under BOM, they would still be able to get money from Barnard, just as several organizations in Polity do.

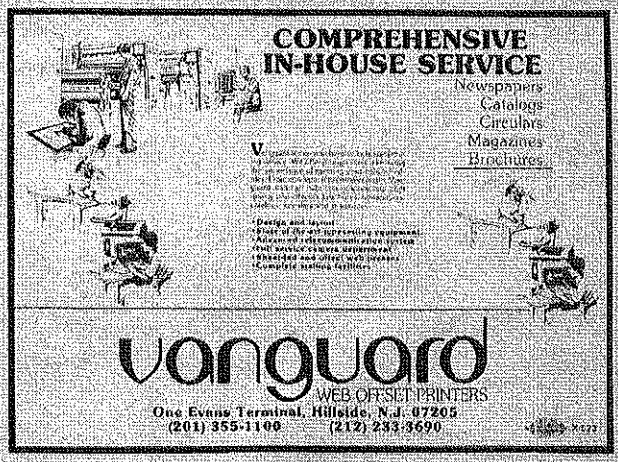
"I'm just a studedot who hasn't heard a good concert in a while," he said. Gorsuch went on to say that BOM runs things very well, and it would be better organizationally for concerts to be a subcommittee of BOM.

Emily Klebanoff, BC '90, of BOM, said, "It's better for concerts and better for BOM if Concerts stays by itself.

"The people that are doing this are saying that Concerts will get more money if they are a subcommittee of BOM. It's not going to make it easier for anyone. I don't even know who's trying to do this," Klebanoff said.

Genice Carroll, BC '91, secretary of Concerts, said she was approached Wednesday night as she was entering John Jay Dining Hall by 12 students, who urged her to sign a petition to bring better concerts to Columbia.

"They asked if I was from Columbia College, and when they found one of my friends who was, they asked him to sign a petition to get more money for Columbia Concerts. I knew something was wrong. When I told them I was a member of Concerts and I wasn't to know what they were talking about, they wouldn't let me see the petition and grabbed it away from me."



Professor

Alazraki said yesterday he left Harvard because of the poor state of the Romance Languages department there and the stronger Spanish department at Columbia.

"It [the charges] has no bearing [on my leaving Harvard]," he said. "It's best for all parties involved [that I don't comment on the charges]."

"For a variety of reasons the department here at Harvard has collapsed. The Spanish department at Columbia, I think, is the best in the country. I think my presence there will help upkeep that reputation," Alazraki said.

Alazraki said he also decided to come to Columbia because he received his Ph.D. here in 1967, and because he was tired of living in "provincial" Cambridge.

Professor of Spanish Joan Ferrante, chair of the Columbia department from 1985 to 1987, agreed that the Harvard department has been degenerating in recent years.

"My understanding was that the people were retiring or otherwise leaving at Harvard," she said. "This [Columbia's] department is in pretty good shape now."

However, the problem of a shrinking Spanish or similar department is not unique to Harvard, according to Harvard Professor of Romance Language Juan Marichal.

"They are not finding good people. All you young people are into making money, not in persuing traditional studies," he said.

"This is part of a general crisis, particularly in Latin American and Spanish-American literature," Marichal said. "There are very few people of quality, like Alazraki, who is an eminent scholar and an excellent teacher. It's a problem that many people are facing."

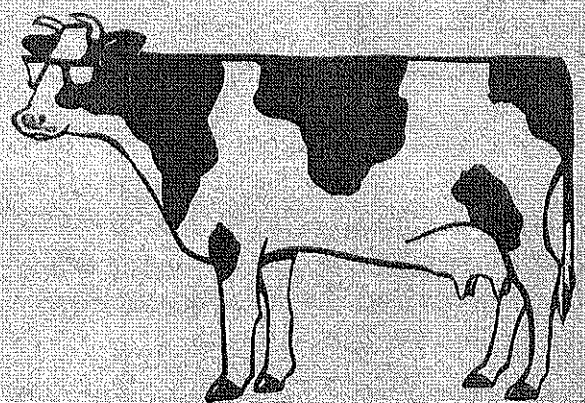
Alazraki said he will become chair of the Columbia department next semester. Department Representative Associate Professor Dwayne Carpenter said that the appointment is "probable."

Although Alazraki said he informed Harvard he would be leaving early this academic year, Dean of Harvard College L. Fred Jewett said yesterday he did not know Alazraki was leaving. Other Harvard deans and administrators refused to comment.

The two courses Alazraki is teaching this semester are the Latin America short story, and a seminar on Julio Cortazar.

Alazraki was a professor at Harvard for 10 years. Before that he was Dean of the University of California at San Diego.

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SUPP 12e 000012

Not with a bang, but a whimper

Campus conservatives rose from the rubble heap of 1968

By Adam J. Levitt

The 1980s have been a time of momentous change both at Columbia and in the United States as a whole. Now, at the close of what has been one of the most important decades in our history, we must pause to take stock of what has happened over the past ten years.

Undoubtedly, the most crucial event of the 1980s was the election of Ronald Reagan as President. Reagan's victory, coupled with major Republican gains in the House and Senate in the early years of decade, fulfilled the conservative legacy that was set in motion sixteen years earlier, in 1964, by Barry Goldwater. Goldwater's conservatism, a cohesive blend of the American dream, American superiority, and a realistic fear of communism, was the single most important factor in Reagan's electoral success in the following years. In fact, it was Reagan's speech, "A Time for Choosing," delivered before a national audience on October 27, 1964, that truly set his political career in motion.

As president, Reagan continued to set forth the ideals propagated by Goldwater. Following the disastrous years of the Carter administration, during which America was degraded and mocked by the world, Reagan's platform of unbridled patriotism and eternal optimism served to set America back on its proper track. Under Reagan's leadership, the United States was able to regain its place as the preeminent nation in the world, and to bring the Soviet Union to the bargaining table through a position of strength and uncompromising security.

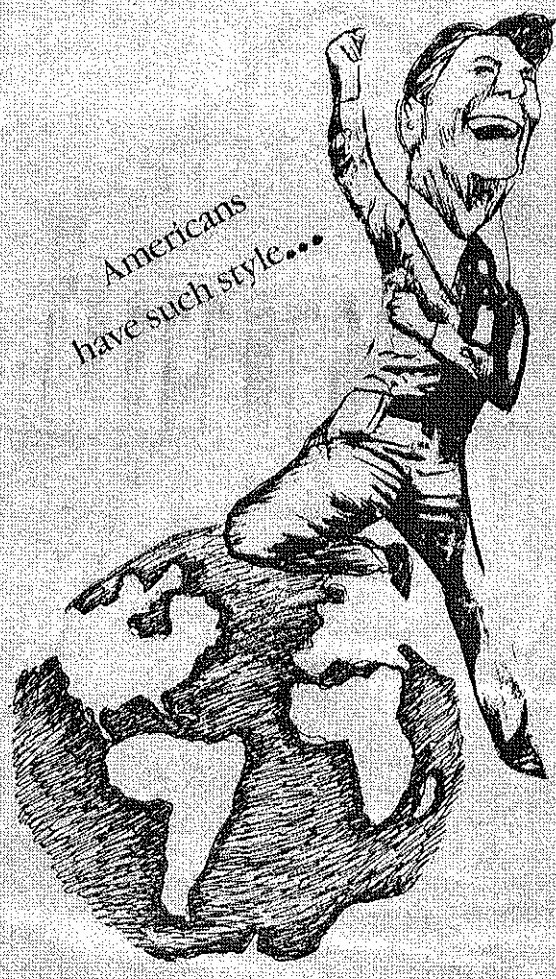
Due to this, event, and many others, it is safe to say that the decade of the 1980s was a boon for American conservatism. Americans were once again proud to be Americans and peace and prosperity were hallmarks of the decade. The events and atmosphere of the 1980s were not lost on the Columbia campus. In fact, the decade was one of tremendous change and upheaval throughout the Columbia community.

The critical change at Columbia was coeducation. In 1983, Columbia College became the last Ivy League school to go co-ed. This single change was the most momentous in Columbia's history, and effectively served to update the University into its present form. The admission of women to Columbia forced change in the overall structure and philosophy of the school - a change that began a half-century earlier when the University began to drop some of its long-standing 'silent quotas' concerning the number of Jews and numerous other minorities.

The arrival of women at Columbia in no small way coincided with the wave of success that the University has enjoyed over the past decade. Columbia today is markedly different from the primarily commuter-oriented, nearly-bankrupt institution of the early to mid-1970s. In fact, if an outside observer were to look at the current status of Columbia, he or she would be hard-pressed to find the near catastrophic cracks that almost destroyed the University some fifteen years earlier. A five-year fundraising drive has recently been completed, raising over $500 million in contributions and pushing Columbia's endowment up over the $1.3 billion mark. Furthermore, Columbia College has come into its own as an almost totally residential institution which expanded the geographic base of its student population to include national and international representation - a far cry from the more local/regional flavor the University in its earlier days.

Most importantly, however, has been the concerted effort by the University to increase the racial and ethnic diversity of its student body and faculty. Putting affirmative action quotas aside, Columbia, in keeping with the push for greater diversity has striven to include a greater representation of Asians, blacks, Latinos, and other ethnic/racial groups in the University community. This effort is undoubtedly in keeping with other successfully proven historical precedents, such as the admission of Jews and women to Columbia.

Another important outgrowth that has occured due to Columbia's diversification has been the growth of a cohesive conservative movement on the campus. While the Columbia community used to take a perverse pride in characterizing itself as a motley collection of liberal bohos dressed in black, who sat and emitted angst over how gloomy the world is when you're a nineteen year-old rich kid, the 1980s have changed this. Partially due to the national composition of the student body and the admission of women, and partially due to the election of Ronald Reagan, the conservative movement at Columbia has been growing in credibility and strength throughout the 1980s. While it is true that the scars and damage caused by 1968 have been long in healing, they are healing and will soon be relegated to the scrap heap of history, along with communism and other pseudo-movements.



Jon Gurmankin/Spectator Photo

In the wake of the demise of these outdated movements, conservatism has found its foothold at Columbia. While other conservative groups have existed at Columbia in the past, such as the Young Americans for Freedom, under the leadership of Howard Lutz, from 1969-1974, Young Republicans, and the American Conservative Union, the national political climate was not ideal for their perpetuation. However, by the 1980s the proper climate existed and the conservatives responded. The key focal point of contemporary conservatism at Columbia was the establishment of the Federalist Paper in 1986 by Neil Gorsuch, Andrew Levy, and P.T. Waters. While the current enactment of the paper may have strayed from its original focus, the Federalist established the validity of a conservative view at Columbia, a view that has only grown in strength since then.

In the years following the inception of the Federalist, numerous conservative groups were established at Columbia. The Columbia Conservative Alliance, the Columbia Conservative Coalition, and College Republicans have all tried to establish conservatism as a viable and vital movement at Columbia. I'd like to think that we succeeded - time will be the judge. If nothing else, the creation of a campus conservative movement has created a more balanced debate. As Neil Gorsuch said, "I'm not sure that conservatism and Columbia can be easily connected. However, the debate has been opened up considerably, and this is good. Due to the expansion of this balanced debate, Columbia is a better place than it was ten years ago. While conservatism may not be the dominant campus belief, its healthy to have the mix that currently exists."

Another movement that has swept the campus throughout the decade has been a growing sense of general apathy expressed by a large segment of the Columbia community. Perhaps in this age of ever-increasing competition and necessary selfishness, people have been shying away from selfless commitments and dedication to a cause. Although it may not seem that way, I have nothing but respect for the so-called "activists" who are out fighting their good fights throughout the year. I may not agree with what they are fighting for, but at least they're committed to a specific set of ideals that they have deemed worthy of personal sacrifice. At the same time, however, I have nothing but contempt for the constantly growing movement that has students picking a protest in the spring and fighting the fight only in nice weather. This is a direct outgrowth of the sense of apathy that has permeated this campus. Any cause, conservative or liberal, right or wrong, requires perpetual dedication; for once dedication wanes, the cause declines with it.

Now, on the cusp of a new decade, Columbia is faced with a number of new challenges. The most glaring one is undoubtedly the revision of the Core Curriculum. While numerous protests have been staged, promoting a major overhaul of the Core, the fundamental reasons for the perpetuation of the canon are being forever overlooked. It is true that the contributions of 'non-western' and female writers must be treated as valid - but not at the expense of our society's foundations. By randomly and indiscriminately cutting whole bodies of thought out of the curriculum for the sole reason of reducing the number of 'white male' works being taught, is both ludicrous and dangerous. Our society has progressed to its current state through the brilliance and foresight of these men.

The 1990s are to be approached with great care, but with great optimism as well. With the downfall of communism throughout the world, as can currently be seen in Czechoslovakia, East Germany, and Poland, and the inevitable growth of freedom, we are on the edge of a new era - an era of unabashed human potential and unblemished optimism. We can only hope that it happens.

Adam J. Levitt, CC '90, is Spectator's longest-lived columnist. He is chair of College Republicans.

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NewsRoom

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July 22, 2004

Section: Metro

Anne Gorsuch Burford, 62, Dies; Reagan EPA Director

Patricia Sullivan

Anne M. Gorsuch Burford, 62, the Environmental Protection Agency director who resigned under fire in 1983 during a scandal over mismanagement of a $1.6 billion program to clean up hazardous waste dumps, died of cancer July 18 at Aurora Medical Center in Colorado.

Her 22-month tenure was one of the most controversial of the early Reagan administration. A firm believer that the federal government, and specifically the EPA, was too big, too wasteful and too restrictive of business, Ms. Burford cut her agency's budget by 22 percent. She boasted that she reduced the thickness of the book of clean water regulations from six inches to a half-inch.

Republicans and Democrats alike accused Ms. Burford of dismantling her agency rather than directing it to aggressively protect the environment. They pointed to budgets cuts for research and enforcement, to steep declines in the number of cases filed against polluters, to efforts to relax portions of the Clean Air Act, to an acceleration of federal approvals for the spraying of restricted pesticides and more. Her agency tried to set aside a 30-by-40-mile rectangle of ocean due east of the Delaware-Maryland coast where incinerator ships would burn toxic wastes at 1,200 degrees centigrade.

Ms. Burford was forced to resign after she was cited for contempt of Congress for refusing to turn over Superfund records, arguing that they were protected by executive privilege. Ms. Burford acted under President Ronald Reagan's orders, with the advice of the Justice Department and against her own recommendation, her colleagues told the press at the time. A few months later, in what one of her aides called a "cold-blooded, treacherous act of political callousness," the Justice Department announced it would no longer represent her because it was involved in investigations into corruption at the EPA.

In her 1986 book, "Are You Tough Enough?" Ms. Burford called the episode her "expensive mid-life education."

"When congressional criticism about the EPA began to touch the presidency, Mr. Reagan solved his problem by jettisoning me and my people, people whose only 'crime' was loyal service, following orders. I was not the first to receive his special brand of benevolent neglect, a form of conveniently looking the other way, while his staff continues to do some very dirty work," she wrote.

A striking woman with jet-black hair, she was described as having television-star looks and perfect manicures. She wore fur coats and smoked two packs of Marlboros a day; her government-issued car got about 15 miles per gallon of gasoline.

She could charm opponents, but she also did not shy away from political combat. Denver's Rocky Mountain News once said, "She could kick a bear to death with her bare feet."

Born Anne McGill in Casper, Wyo., she graduated from the University of Colorado in 1961 and the University of Colorado Law School in 1964. She married David Gorsuch after law school, and they traveled together to India after she won a Fulbright Scholarship. Upon her return to Colorado, she was a deputy district attorney and a lawyer for the regional Bell telephone company. She was elected to the Colorado legislature in 1976 and became known as one of the "House Crazies," conservative lawmakers intent on permanently changing government. She and Gorsuch divorced in 1979.

Reagan was her political hero, and she was thrilled to win an appointment in his administration. She said she considered the EPA director's job the "second-toughest" in government, after the directorship of the Office of Management and Budget.

More than half of the federal regulations targeted for an early review by the Reagan administration's regulatory reform team were EPA rules. Virtually all of her subordinates at the EPA came from the ranks of the industries they were charged with overseeing. Her tenure enraged environmentalists, who tied her to the equally controversial policies of her friend and fellow Coloradan, then-Secretary of the Interior James Watt. Ms. Burford was known as Anne Gorsuch until she married Robert Burford, director of the Bureau of Land Management, just a month before she resigned in March 1983.

Her resignation did not end the political fight. Reagan, seeking to reward a loyalist, appointed her a year later to the chairmanship of the National Advisory Committee on Oceans and the Atmosphere. The Republican-controlled Senate, by a vote of 74 to 19, called on him to withdraw the appointment.

She told a meeting of Colorado woolgrowers that the panel was a "nothingburger" and a "joke" that met three times a year. "They don't do anything," she said. The nation's capital, she added, was "too small to be a state but too large to be an asylum for the mentally deranged."

Those remarks further inflamed her opponents, so she withdrew from the advisory panel before she was sworn in.

She focused on her private law practice in Colorado, specializing in child advocacy law. Her son, Neil Gorsuch, said that as a young district attorney, she had pursued "deadbeat dads" long before that cause was popular, and she returned to those kinds of issues in her later work. She was still working at the time of her death.

Her marriage to Robert Burford also ended in divorce.

Survivors include three children from her first marriage, Neil Gorsuch of Washington and Stephanie Gorsuch and J.J. Gorsuch of Denver; her mother, Dorothy O'Grady McGill of Denver; a brother; and five sisters.

Anne M. Gorsuch Burford cut environmental regulations and resigned in a fight with Congress.

---- Index References ----

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NewsRoom

1. *FORMER REAGAN EPA DIRECTOR ANNE BURFORD DIES*

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News

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FORMER REAGAN EPA DIRECTOR ANNE BURFORD DIES

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Body

WASHINGTON -- Anne Gorsuch Burford, the Environmental Protection Agency director who resigned under fire in 1983 during a scandal over mismanagement of a $1.6 billion program to clean up hazardous waste dumps, died of cancer July 18 in Colorado. She was 62.

Her 22-month tenure was one of the most controversial of the early Reagan administration. A firm believer that the federal government, and specifically the EPA, was too big, too wasteful and too restrictive of business, Burford cut her agency's budget by 22 percent. She boasted that she reduced the thickness of the book of clean-water regulations from six inches to a half-inch.

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-- Washington Post

Jerry Goldsmith

COMPOSER, LOS ANGELES

Academy Award-winning composer Jerry Goldsmith, who created the memorable music for scores of classic movies and television shows ranging from "Star Trek" and "Planet of the Apes" to "The Man from U.N.C.L.E." and "Dr. Kildare," has died. He was 75.

Goldsmith died Wednesday at his Beverly Hills home after a long battle with cancer, said Lois Carruth, his personal assistant.

A classically trained composer and conductor who began musical studies at age 6, Goldsmith's award-dappled Hollywood career -- he was nominated for 18 Academy Awards, won one, and took home five Emmys -- spanned nearly half a century.

He crafted an astonishing number of TV and movie scores that have become classics in their own right. From the clarions of "Patton" to the syrupy theme for TV's "The Waltons," Goldsmith seemed virtually synonymous with soundtracks.

He took on action hits such as "Total Recall," which he considered one of his best scores, as well as the "Star Trek" movies and more lightweight fare, like his most recent movie theme, for last year's "Looney Tunes: Back in Action." His hundreds of works included scores for "The Blue Max," "L.A. Confidential," "Basic Instinct" and "Chinatown."

Goldsmith's output also spilled into television, with the themes for shows including "Dr. Kildare," "Barnaby Jones" and "Star Trek: The Next Generation." He wrote a fanfare that is used in Academy Awards telecasts.

He won his Oscar for best original score in 1976 for "The Omen." He was nominated for nine Golden Globe awards, though he never won one.

Born Feb. 10, 1929, in Los Angeles, Goldsmith studied with famed pianist Jacob Gimpel and pianist, composer and film musician Mario Castelnuovo-Tedesco. He fell in love with movie composing when he saw the 1945 Ingrid Bergman movie "Spellbound," Carruth said, and while attending USC took classes with Miklos Rozsa, who wrote the Oscar-winning score for that film.

In 1950, he got a job as a clerk typist at CBS and eventually got assignments for live radio shows, writing as much as one score a week. He later turned to television.

In the late 1950s he began composing for movies. His career took off in the 1960s with such major films as "Lonely Are the Brave" and "The Blue Max." He earned his first Academy Award nomination for his work on 1962's "Freud."

Goldsmith was known for his versatility and his experimentation. He added electronics to the woodwinds and brasses of his scores. For 1968's "Planet of the Apes," he got a blaring effect by having his musicians blow horns without mouthpieces. With a puckish sense of humor, he reportedly wore an ape mask while conducting the score.

"He experimented a lot, and that's what made him so popular with his fans," Carruth said.

Some of his motion picture scores were adapted for ballets. Goldsmith also composed orchestral pieces and taught occasional music classes at local universities.

He is survived by his wife, Carol; children Aaron, Joel, Carrie, Ellen Edson and Jennifer Grossman; six grandchildren; and a great-grandchild.

-- Associated Press

Classification

Language: ENGLISH

Subject: DEATHS & OBITUARIES (90%); US ENVIRONMENTAL LAW (90%); CONSERVATION (90%); AIR QUALITY REGULATION (90%); ENVIRONMENTAL DEPARTMENTS (90%); POLITICAL PARTIES (89%); US FEDERAL GOVERNMENT (89%); GOVERNMENT BUDGETS (89%); ENVIRONMENTAL LAW (89%); PUBLIC FINANCE (89%); US PRESIDENTS (89%); ENVIRONMENT & NATURAL RESOURCES (89%); LAWYERS (89%); PESTICIDES (89%); RESIGNATIONS (89%); LAW SCHOOLS (86%); US REPUBLICAN PARTY (79%); NATURAL RESOURCES (78%); TOXIC & HAZARDOUS SUBSTANCES (78%); SUPERFUND (78%); POLLUTION & ENVIRONMENTAL IMPACTS (78%); US STATE GOVERNMENT (78%); APPOINTMENTS (78%); HAZARDOUS WASTE (77%); CONSERVATISM (76%); LEGISLATIVE BODIES (76%); ENERGY & UTILITY LAW (75%); SCHOOL BUDGETS (75%); US DEMOCRATIC PARTY (74%); ENVIRONMENTAL CLEANUP (73%); APPROVALS (73%); WATER QUALITY REGULATION (73%); ENVIRONMENTALISM (73%); SCANDALS (73%); CANCER (72%); JUSTICE DEPARTMENTS (71%); GRADUATE & PROFESSIONAL SCHOOLS (69%); PRIVILEGED COMMUNICATIONS (68%); LAW ENFORCEMENT (68%); EMPLOYEE TERMINATION (52%); Obituary

Company: XIAMEN ANNE CORP LTD (90%); XIAMEN ANNE CORP LTD (90%); BELL TELEPHONE CO OF PENNSYLVANIA (53%)

Organization: US ENVIRONMENTAL PROTECTION AGENCY (84%); US ENVIRONMENTAL PROTECTION AGENCY (84%); UNIVERSITY OF COLORADO (82%); UNIVERSITY OF COLORADO (82%)

Ticker: 002235 (SZSE) (90%)

Industry: BUDGETS (90%); GOVERNMENT BUDGETS (89%); LAWYERS (89%); PESTICIDES (89%); LAW SCHOOLS (86%); LANDFILLS (78%); TOXIC & HAZARDOUS SUBSTANCES (78%); SUPERFUND (78%); HAZARDOUS WASTE (77%); BUDGET CUTS (75%); ENERGY & UTILITY LAW (75%); SCHOOL BUDGETS (75%); ENVIRONMENTAL CLEANUP (73%); TELECOMMUNICATIONS SERVICES (70%); GRADUATE & PROFESSIONAL SCHOOLS (69%); HAZARDOUS WASTE TREATMENT & DISPOSAL (57%)

Person: RONALD REAGAN (89%)

FORMER REAGAN EPA DIRECTOR ANNE BURFORD DIES

Geographic: CASPER, WY, USA (69%); COLORADO, USA (95%); WYOMING, USA (79%); INDIA (79%); UNITED STATES (79%)

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JUDGE NEIL M. GORSUCH
SENATE JUDICIARY COMMITTEE
QUESTIONNAIRE

SUPPLEMENTAL APPENDIX 13(b)

Cases in which Judge Gorsuch authored opinions

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United States v. Henry, --- F.3d ----, 2017 WL 462051 (10th Cir. 2017)
United States v. Marshall, --- Fed.Appx. ----, 2017 WL 83356 (10th Cir. 2017)
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Hammond v. Stamps.com, Inc., 844 F.3d 909 (10th Cir. 2016)
United States v. Rivera, --- Fed.Appx. ----, 2016 WL 7176603 (10th Cir. 2016)
United States v. Mendoza-Haro, --- Fed.Appx. ----, 2016 WL 7047980 (10th Cir. 2016)
Smith v. Farris, --- Fed.Appx. ----, 2016 WL 7047984 (10th Cir. 2016)
White v. Deere & Company, --- Fed.Appx. ----, 2016 WL 6958133 (10th Cir. 2016)
Hopper v. Fenton, --- Fed.Appx. ----, 2016 WL 6958137 (10th Cir. 2016)
United States v. Tarango, --- Fed.Appx. ----, 2016 WL 6892144 (10th Cir. 2016)
Lancaster v. Sprint/United Management Co., --- Fed.Appx. ----, 2016 WL 6892152 (10th Cir. 2016)
Garman v. Garaychochea, --- Fed.Appx. ----, 2016 WL 6871871 (10th Cir. 2016)
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Moore v. McCollum, --- Fed.Appx. ----, 2016 WL 6246825 (10th Cir. 2016)
United States v. Henry, 839 F.3d 1271 (10th Cir. 2016)
Alvarez v. Grosso, --- Fed.Appx. ----, 2016 WL 6087648 (10th Cir. 2016)
Hodge v. State of Utah, --- Fed.Appx. ----, 2016 WL 6078554 (10th Cir. 2016)
United States v. Espinoza, --- Fed.Appx. ----, 2016 WL 6082632 (10th Cir. 2016)
Parker v. Dowling, --- Fed.Appx. ----, 2016 WL 5799312 (10th Cir. 2016)
United States v. Tolliver, --- Fed.Appx. ----, 2016 WL 4973823 (10th Cir. 2016)
McNeill v. United States, 836 F.3d 1282 (10th Cir. 2016)
Ute Indian Tribe of the Uintah v. Myton, 835 F.3d 1255 (10th Cir. 2016)
Watson v. Missouri, --- Fed.Appx. ----, 2016 WL 4487601 (10th Cir. 2016)
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Winkel v. Heimgartner, --- Fed.Appx. ----, 2016 WL 4436090 (10th Cir. 2016)
Glaser v. Raemisch, --- Fed.Appx. ----, 2016 WL 4413284 (10th Cir. 2016)
United States v. Gronski, --- Fed.Appx. ----, 2016 WL 4372265 (10th Cir. 2016)
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Lexington Insurance Company v. Precision Drilling Company, L.P., 830 F.3d 1219 (10th Cir. 2016)
United States v. Reed, 654 Fed.Appx. 935 (10th Cir. 2016)
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United States v. Johnson, --- Fed.Appx. ----, 2016 WL 3581981 (10th Cir. 2016)
United States v. Mitchell, 653 Fed.Appx. 651 (10th Cir. 2016)
United States v. Sing, 653 Fed.Appx. 646 (10th Cir. 2016)

Lawton v. Patton, --- Fed.Appx. ----, 2016 WL 3410268 (10th Cir. 2016)
United States v. Marshall, 652 Fed.Appx. 719 (10th Cir. 2016)
El Encanto, Inc. v. Hatch Chile Company, Inc., 825 F.3d 1161 (10th Cir. 2016)
Galbreath v. Patton, 654 Fed.Appx. 378 (10th Cir. 2016)
Sellers v. Cline, 651 Fed.Appx. 804 (10th Cir. 2016)
United Planners Financial Services of America, L.P. v. Sac and Fox Nation, 654 Fed.Appx. 376 (10th Cir. 2016)
Tong v. New Mexico, 651 Fed.Appx. 798 (10th Cir. 2016)
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Caring Hearts Personal Home Services, Inc. v. Burwell, 824 F.3d 968 (10th Cir. 2016)
United States v. Gomez–Olivas, 650 Fed.Appx. 631 (10th Cir. 2016)
Craine v. National Science Foundation, 647 Fed.Appx. 871 (10th Cir. 2016)
Freres v. Xyngular, 647 Fed.Appx. 861 (10th Cir. 2016)
U.S. v. Wallace, 647 Fed.Appx. 842 (10th Cir. 2016)
U.S. v. Arthurs, 647 Fed.Appx. 846 (10th Cir. 2016)
Harvey v. Segura, 646 Fed.Appx. 650 (10th Cir. 2016)
Broughton v. Merit Systems Protection Bd., 639 Fed.Appx. 574 (10th Cir. 2016)
U.S. v. Lancaster, 646 Fed.Appx. 589 (10th Cir. 2016)
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Jordan v. Allbaugh, 639 Fed.Appx. 569 (10th Cir. 2016)
Johnson v. Oklahoma Department of Transp., 645 Fed.Appx. 765 (10th Cir. 2016)
Walton v. Powell, 821 F.3d 1204 (10th Cir. 2016)
Kontgis v. Salt Lake City Corp., 645 Fed.Appx. 750 (10th Cir. 2016)
Garrett v. Branson Commerce Park Community Improvement Dist., 645 Fed.Appx. 710 (10th Cir. 2016)
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U.S. v. Reed, 644 Fed.Appx. 847 (10th Cir. 2016)
In re Estate of Bleck ex rel. Churchill, 643 Fed.Appx. 754 (10th Cir. 2016)
Vreeland v. Zupan, 644 Fed.Appx. 812 (10th Cir. 2016)
du Merac v. Colorado School of Mines, 643 Fed.Appx. 709 (10th Cir. 2016)
Gordon v. Farris, 644 Fed.Appx. 804 (10th Cir. 2016)
Robinson v. Estrada, 637 Fed.Appx. 531 (10th Cir. 2016)
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U.S. v. Stout, 637 Fed.Appx. 528 (10th Cir. 2016)
U.S. v. Hinson, 637 Fed.Appx. 526 (10th Cir. 2016)
Lopez v. Roark, 637 Fed.Appx. 520 (10th Cir. 2016)
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Aslan v. Colvin, 637 Fed.Appx. 509 (10th Cir. 2016)
Wahpekeche v. Colvin, 640 Fed.Appx. 781 (10th Cir. 2016)
U.S. v. Brooks, 634 Fed.Appx. 669 (10th Cir. 2016)
U.S. v. Anderson, 634 Fed.Appx. 666 (10th Cir. 2016)
Gambrill v. Unified Government of Wyandotte County/Kansas City, Kan., 636 Fed.Appx. 981 (10th Cir. 2016)
U.S. v. Yazzie, 633 Fed.Appx. 703 (10th Cir. 2016)
Jordanoff v. Lester, 628 Fed.Appx. 624 (10th Cir. 2016)
U.S. v. Rubio-Ayala, 628 Fed.Appx. 622 (10th Cir. 2016)
Espinoza v. Arkansas Valley Adventures, LLC, 809 F.3d 1150 (10th Cir. 2016)
Feinberg v. C.I.R., 808 F.3d 813 (10th Cir. 2015)
Ramos-Hernandez v. Lynch, 624 Fed.Appx. 677 (10th Cir. 2015)
Robinette v. Fender, 624 Fed.Appx. 664 (10th Cir. 2015)
Fogg v. Colvin, 622 Fed.Appx. 767 (10th Cir. 2015)
McClaflin v. Burd, 622 Fed.Appx. 769 (10th Cir. 2015)
Jemaneh v. University of Wyoming, 622 Fed.Appx. 765 (10th Cir. 2015)
U.S. v. Falcon-Sanchez, 622 Fed.Appx. 766 (10th Cir. 2015)
U.S. v. Makkar, 810 F.3d 1139 (10th Cir. 2015)
U.S. v. Davis, 622 Fed.Appx. 758 (10th Cir. 2015)
Duran v. Marathon Asset Management, LP, 621 Fed.Appx. 553 (10th Cir. 2015)
U.S. v. Avalos-Chavez, 621 Fed.Appx. 552 (10th Cir. 2015)
U.S. v. Camargo-Chavez, 630 Fed.Appx. 835 (10th Cir. 2015)
De Niz Robles v. Lynch, 803 F.3d 1165 (10th Cir. 2015)
In re Expert South Tulsa, LLC, 619 Fed.Appx. 779 (10th Cir. 2015)
Chapman v. Lampert, 616 Fed.Appx. 889 (10th Cir. 2015)
Adams v. Colvin, 616 Fed.Appx. 393 (10th Cir. 2015)
Rader v. C.I.R., 616 Fed.Appx. 391 (10th Cir. 2015)
Muathe v. Fifth Third Bank, 627 Fed.Appx. 732 (10th Cir. 2015)
Perez-Carrera v. Stancil, 616 Fed.Appx. 371 (10th Cir. 2015)
Barrera-Estrada v. U.S., 616 Fed.Appx. 371 (10th Cir. 2015)
U.S. v. Spring, 614 Fed.Appx. 386 (10th Cir. 2015)
A.F. ex rel Christine B. v. Espanola Public Schools, 801 F.3d 1245 (10th Cir. 2015)
Eizember v. Trammell, 803 F.3d 1129 (10th Cir. 2015)
U.S. v. Handy, 614 Fed.Appx. 379 (10th Cir. 2015)
U.S. v. McAlpine, 613 Fed.Appx. 766 (10th Cir. 2015)
Stauffer v. Blair, 613 Fed.Appx. 760 (10th Cir. 2015)
Patriot Mfg., LLC v. Hartwig, Inc., 613 Fed.Appx. 753 (10th Cir. 2015)
U.S. v. Butler, 611 Fed.Appx. 517 (10th Cir. 2015)
General Steel Domestic Sales, LLC v. Chumley, 627 Fed.Appx. 682 (10th Cir. 2015)
Carlson v. Pryor, 611 Fed.Appx. 514 (10th Cir. 2015)

Serna v. Commandant, USDB-Leavenworth, 608 Fed.Appx. 713 (10th Cir. 2015)
U.S. v. Mendez, 618 Fed.Appx. 930 (10th Cir. 2015)
U.S. v. MacKay, 610 Fed.Appx. 797 (10th Cir. 2015)
Energy and Environment Legal Institute v. Epel, 793 F.3d 1169 (10th Cir. 2015)
In re Renewable Energy Development Corp., 792 F.3d 1274 (10th Cir. 2015)
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U.S. v. Jenkins, 608 Fed.Appx. 710 (10th Cir. 2015)
U.S. v. Fishman, 608 Fed.Appx. 711 (10th Cir. 2015)
Cook v. Rockwell Intern. Corp., 790 F.3d 1088 (10th Cir. 2015)
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Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah, 790 F.3d 1000 (10th Cir. 2015)
Browder v. City of Albuquerque, 787 F.3d 1076 (10th Cir. 2015)
CCPS Transp., LLC v. Sloan, 611 Fed.Appx. 931 (10th Cir. 2015)
Backcountry Hunters and Anglers v. U.S. Forest Service, 612 Fed.Appx. 934 (10th Cir. 2015)
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Caplinger v. Medtronic, Inc., 784 F.3d 1335 (10th Cir. 2015)
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U.S. v. Rogers, 599 Fed.Appx. 850 (10th Cir. 2015)
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Franco v. Board of County Comm'rs for the County of Roosevelt, 609 Fed.Appx. 957 (10th Cir. 2015)
U.S. v. Herrera, 782 F.3d 571 (10th Cir. 2015)
ACAP Financial, Inc. v. U.S. S.E.C., 783 F.3d 763 (10th Cir. 2015)
Alejandre-Gallegos v. Holder, 598 Fed.Appx. 604 (10th Cir. 2015)
Vigil v. Morgan, 598 Fed.Appx. 594 (10th Cir. 2015)
David v. Sirius Computer Solutions, Inc., 779 F.3d 1209 (10th Cir. 2015)
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Pippin v. Elbert County, Colorado, 604 Fed.Appx. 636 (10th Cir. 2015)
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Banks v. American Baptist Churches, 594 Fed.Appx. 544 (10th Cir. 2015)
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Lee v. Maye, 589 Fed.Appx. 416 (10th Cir. 2015)
U.S. v. Denson, 775 F.3d 1214 (10th Cir. 2014)
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Brown v. Metropolitan Tulsa Transit Authority, 588 Fed.Appx. 849 (10th Cir. 2014)
U.S. v. Truby, 588 Fed.Appx. 847 (10th Cir. 2014)
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Bruton v. U.S., 587 Fed.Appx. 504 (10th Cir. 2014)
Green v. Patton, 587 Fed.Appx. 503 (10th Cir. 2014)
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U.S. v. Smith, 756 F.3d 1179 (10th Cir. 2014)
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U.S. v. Zaler, 537 Fed.Appx. 808 (10th Cir. 2013)
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U.S. v. Woods, 351 Fed.Appx. 259 (10th Cir. 2009)
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U.S. v. Luster, 346 Fed.Appx. 353 (10th Cir. 2009)

Four Corners Nephrology Associates, P.C. v. Mercy Medical Center of Durango, 582 F.3d 1216 (10th Cir. 2009)
Harrison v. Warden of Fremont Correctional Facility, 345 Fed.Appx. 361 (10th Cir. 2009)
U.S. v. Satterfield, 344 Fed.Appx. 487 (10th Cir. 2009)
Wackerly v. Workman, 580 F.3d 1171 (10th Cir. 2009)
U.S. v. Lovern, 590 F.3d 1095 (10th Cir. 2009)
Garcia v. Hatch, 343 Fed.Appx. 316 (10th Cir. 2009)
U.S. v. Rabadan-Rivas, 342 Fed.Appx. 412 (10th Cir. 2009)
Matthews v. Workman, 577 F.3d 1175 (10th Cir. 2009)
Rashaw-Bey v. U.S., 341 Fed.Appx. 449 (10th Cir. 2009)
Barnum v. Hilfiger, 340 Fed.Appx. 508 (10th Cir. 2009)
U.S. v. Wittig, 575 F.3d 1085 (10th Cir. 2009)
Jenner v. Zavaras, 339 Fed.Appx. 879 (10th Cir. 2009)
U.S. v. Hutchinson, 573 F.3d 1011 (10th Cir. 2009)
Evans-Carmichael v. U.S., 343 Fed.Appx. 294 (10th Cir. 2009)
Lipari v. U.S. Bancorp NA, 345 Fed.Appx. 315 (10th Cir. 2009)
U.S. v. Osuna, 341 Fed.Appx. 356 (10th Cir. 2009)
U.S. v. Dolan, 571 F.3d 1022 (10th Cir. 2009)
U.S. v. Swenson, 335 Fed.Appx. 751 (10th Cir. 2009)
Allen v. Briggs, 331 Fed.Appx. 603 (10th Cir. 2009)
U.S. v. Ramirez, 326 Fed.Appx. 484 (10th Cir. 2009)
Perez-Hernandez v. Holder, 332 Fed.Appx. 458 (10th Cir. 2009)
Wade Pediatrics v. Department of Health and Human Services, 567 F.3d 1202 (10th Cir. 2009)
U.S. v. Matteson, 327 Fed.Appx. 791 (10th Cir. 2009)
In re Martel, 328 Fed.Appx. 584 (10th Cir. 2009)
U.S. v. Sands, 329 Fed.Appx. 794 (10th Cir. 2009)
In re C and M Properties, L.L.C., 563 F.3d 1156 (10th Cir. 2009)
U.S. v. Uscanga-Mora, 562 F.3d 1289 (10th Cir. 2009)
U.S. v. Windrix, 322 Fed.Appx. 629 (10th Cir. 2009)
U.S. v. Rayas, 322 Fed.Appx. 618 (10th Cir. 2009)
Simmons v. Zavaras, 325 Fed.Appx. 652 (10th Cir. 2009)
U.S. v. Bacon, 322 Fed.Appx. 591 (10th Cir. 2009)
Hostetler v. Green, 323 Fed.Appx. 653 (10th Cir. 2009)
Kornfeld v. Kornfeld, 321 Fed.Appx. 745 (10th Cir. 2009)
U.S. v. Hernandez-Lopez, 320 Fed.Appx. 832 (10th Cir. 2009)
Whittenburg v. Werner Enterprises Inc., 561 F.3d 1122 (10th Cir. 2009)
U.S. v. Page, 317 Fed.Appx. 806 (10th Cir. 2009)
Bynum v. Howard, 317 Fed.Appx. 788 (10th Cir. 2009)

Rudd v. Werholtz, 318 Fed.Appx. 625 (10th Cir. 2009)
MarkWest Hydrocarbon, Inc. v. Liberty Mut. Ins. Co., 558 F.3d 1184 (10th Cir. 2009)
U.S. v. Jones, 315 Fed.Appx. 714 (10th Cir. 2009)
In re Tollefsen, 315 Fed.Appx. 683 (10th Cir. 2009)
U.S. v. DeWilliams, 315 Fed.Appx. 81 (10th Cir. 2009)
Energy West Mining Co v. Oliver, 555 F.3d 1211 (10th Cir. 2009)
Hailey v. Ray, 312 Fed.Appx. 113 (10th Cir. 2009)
U.S. v. Phillips, 311 Fed.Appx. 137 (10th Cir. 2009)
U.S. v. Foreman, 2009 WL 294354 (10th Cir. 2009)
Jackson v. Brummett, 311 Fed.Appx. 114 (10th Cir. 2009)
U.S. v. Walker, 307 Fed.Appx. 230 (10th Cir. 2009)
Montez v. Owens, 307 Fed.Appx. 160 (10th Cir. 2009)
U.S. v. Muldrow, 306 Fed.Appx. 427 (10th Cir. 2009)
Vallez v. Hartley, 305 Fed.Appx. 505 (10th Cir. 2008)
U.S. v. Barajas-Garcia, 303 Fed.Appx. 677 (10th Cir. 2008)
Russo v. Ballard Medical Products, 550 F.3d 1004 (10th Cir. 2008)
U.S. v. Gerhartz, 303 Fed.Appx. 601 (10th Cir. 2008)
Raifsnider v. Colorado, 299 Fed.Appx. 825 (10th Cir. 2008)
Wickham v. Friel, 299 Fed.Appx. 813 (10th Cir. 2008)
Byington v. Astrue, 299 Fed.Appx. 782 (10th Cir. 2008)
Aquila, Inc. v. C.W. Mining, 545 F.3d 1258 (10th Cir. 2008)
Green v. Sirmons, 299 Fed.Appx. 763 (10th Cir. 2008)
U.S. v. Harper, 545 F.3d 1230 (10th Cir. 2008)
U.S. v. Poole, 545 F.3d 916 (10th Cir. 2008)
Lowber v. City of New Cordell, 298 Fed.Appx. 760 (10th Cir. 2008)
Warren v. Gartman, 297 Fed.Appx. 767 (10th Cir. 2008)
Stanko v. Davis, 297 Fed.Appx. 746 (10th Cir. 2008)
Houston v. Colorado, 296 Fed.Appx. 699 (10th Cir. 2008)
Flores v. Geo Security, 296 Fed.Appx. 628 (10th Cir. 2008)
Green v. Sirmons, 295 Fed.Appx. 270 (10th Cir. 2008)
U.S. v. Sears, 294 Fed.Appx. 383 (10th Cir. 2008)
Kearl v. Rausser, 293 Fed.Appx. 592 (10th Cir. 2008)
U.S. v. Quintana-Navarette, 317 Fed.Appx. 742 (10th Cir. 2008)
Herlik v. U.S., 291 Fed.Appx. 208 (10th Cir. 2008)
Thompson R2-J School Dist. v. Luke P., ex rel. Jeff P., 540 F.3d 1143 (10th Cir. 2008)
Shook v. Board of County Commissioners of County of El Paso, 543 F.3d 597 (10th Cir. 2008)
Uecker v. Romero, 290 Fed.Appx. 154 (10th Cir. 2008)
Queen v. McIntire, 290 Fed.Appx. 162 (10th Cir. 2008)
Zapata v. Brandenburg, 291 Fed.Appx. 150 (10th Cir. 2008)

U.S. v. Farr, 536 F.3d 1174 (10th Cir. 2008)
Cook v. Medical Savings Ins. Co., 287 Fed.Appx. 657 (10th Cir. 2008)
Big Sky Network Canada, Ltd. v. Sichuan Provincial Government, 533 F.3d 1183 (10th Cir. 2008)
Lindsey v. Estep, 287 Fed.Appx. 644 (10th Cir. 2008)
Orr v. City of Albuquerque, 531 F.3d 1210 (10th Cir. 2008)
Surefoot LC v. Sure Foot Corp., 531 F.3d 1236 (10th Cir. 2008)
U.S. v. Sandoval-De Lao, 283 Fed.Appx. 621 (10th Cir. 2008)
U.S. v. Harper, 282 Fed.Appx. 727 (10th Cir. 2008)
Johnson v. Federal Bureau of Prisons, 281 Fed.Appx. 851 (10th Cir. 2008)
U.S. v. Marquez-Ramirez, 281 Fed.Appx. 847 (10th Cir. 2008)
Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc., 528 F.3d 1258 (10th Cir. 2008)
U.S. v. Montes, 280 Fed.Appx. 784 (10th Cir. 2008)
Brown v. Dinwiddie, 280 Fed.Appx. 713 (10th Cir. 2008)
Leyba v. Hartley, 280 Fed.Appx. 690 (10th Cir. 2008)
Ardese v. DCT, Inc., 280 Fed.Appx. 691 (10th Cir. 2008)
Strickland v. Murphy, 279 Fed.Appx. 673 (10th Cir. 2008)
U.S. v. Hasan, 526 F.3d 653 (10th Cir. 2008)
Regan-Touhy v. Walgreen Co., 526 F.3d 641 (10th Cir. 2008)
Travis v. Park City Police Dept., 277 Fed.Appx. 829 (10th Cir. 2008)
U.S. v. Espinoza, 277 Fed.Appx. 789 (10th Cir. 2008)
U.S. v. Powell, 277 Fed.Appx. 782 (10th Cir. 2008)
U.S. v. Olivares-Campos, 276 Fed.Appx. 816 (10th Cir. 2008)
Sayles v. Astrue, 275 Fed.Appx. 790 (10th Cir. 2008)
In re Taumoepeau, 523 F.3d 1213 (10th Cir. 2008)
Sydnes v. U.S., 523 F.3d 1179 (10th Cir. 2008)
Hinds v. Sprint/United Management Co., 523 F.3d 1187 (10th Cir. 2008)
U.S. v. Martinez, 273 Fed.Appx. 744 (10th Cir. 2008)
Pino v. U.S., 273 Fed.Appx. 732 (10th Cir. 2008)
Garcia v. Board of Educ. of Albuquerque Public Schools, 520 F.3d 1116 (10th Cir. 2008)
U.S. v. Hernandez-Hernandez, 519 F.3d 1236 (10th Cir. 2008)
U.S. v. Gonzalez-Carballo, 266 Fed.Appx. 799 (10th Cir. 2008)
U.S. v. Lopez, 518 F.3d 790 (10th Cir. 2008)
U.S. v. Martinez, 518 F.3d 763 (10th Cir. 2008)
U.S. v. Jolivet, 267 Fed.Appx. 736 (10th Cir. 2008)
U.S. v. Cervantes, 267 Fed.Appx. 741 (10th Cir. 2008)
U.S. v. Azubuike, 267 Fed.Appx. 731 (10th Cir. 2008)
In re Haberman, 516 F.3d 1207 (10th Cir. 2008)
U.S. v. Todd, 515 F.3d 1128 (10th Cir. 2008)
U.S. v. Taylor, 514 F.3d 1092 (10th Cir. 2008)

Dudnikov v. Chalk & Vermilion Fine Arts, Inc., 514 F.3d 1063 (10th Cir. 2008)
Foldenaur v. Franklin, 261 Fed.Appx. 93 (10th Cir. 2008)
Wilkins v. Packerware Corp., 260 Fed.Appx. 98 (10th Cir. 2008)
Custard v. Lappin, 260 Fed.Appx. 73 (10th Cir. 2008)
U.S. v. Rakes, 510 F.3d 1280 (10th Cir. 2007)
Alexander v. Lucas, 259 Fed.Appx. 145 (10th Cir. 2007)
U.S. v. Gay, 509 F.3d 1334 (10th Cir. 2007)
U.S. v. Gay, 265 Fed.Appx. 688 (10th Cir. 2007)
U.S. v. McComb, 519 F.3d 1049 (10th Cir. 2007)
Davis v. Warden, Federal Transfer Center, Oklahoma City, 259 Fed.Appx. 92 (10th Cir. 2007)
Niedens v. Continental Cas. Co., 258 Fed.Appx. 216 (10th Cir. 2007)
U.S. v. Trejo-Alvarez, 2007 WL 4269053 (10th Cir. 2007)
U.S. v. Buckaloo, 257 Fed.Appx. 88 (10th Cir. 2007)
Biehl v. Salina Police Dept., 256 Fed.Appx. 212 (10th Cir. 2007)
U.S. v. Golden, 255 Fed.Appx. 319 (10th Cir. 2007)
Garcia v. Archuleta, 253 Fed.Appx. 802 (10th Cir. 2007)
U.S. v. Hernandez-Solis, 253 Fed.Appx. 767 (10th Cir. 2007)
Simmons v. Uintah Health Care Special Dist., 506 F.3d 1281 (10th Cir. 2007)
Pino v. U.S., 507 F.3d 1233 (10th Cir. 2007)
U.S. v. Gonzales, 252 Fed.Appx. 900 (10th Cir. 2007)
U.S. v. Lopez-Gamez, 251 Fed.Appx. 590 (10th Cir. 2007)
Biehl v. Stoss, 2007 WL 2993557 (10th Cir. 2007)
U.S. v. Swenson, 250 Fed.Appx. 838 (10th Cir. 2007)
U.S. v. Sanchez-Marioni, 250 Fed.Appx. 840 (10th Cir. 2007)
Friedman v. Anderson, 249 Fed.Appx. 712 (10th Cir. 2007)
U.S. v. Tucson, 248 Fed.Appx. 959 (10th Cir. 2007)
Friedman v. Kennard, 248 Fed.Appx. 918 (10th Cir. 2007)
Paige v. Oklahoma Dept. of Corrections, 248 Fed.Appx. 35 (10th Cir. 2007)
U.S. v. Guerrero-Cota, 247 Fed.Appx. 136 (10th Cir. 2007)
Meadows v. Oklahoma City Mun. Court, 247 Fed.Appx. 116 (10th Cir. 2007)
Price v. Reid, 246 Fed.Appx. 566 (10th Cir. 2007)
Heller v. Quovadx, Inc., 245 Fed.Appx. 839 (10th Cir. 2007)
Penncro Associates, Inc. v. Sprint Spectrum, L.P., 499 F.3d 1151 (10th Cir. 2007)
Jiayang Hua v. University of Utah, 242 Fed.Appx. 603 (10th Cir. 2007)
Van Deelen v. Johnson, 497 F.3d 1151 (10th Cir. 2007)
Montes v. Vail Clinic, Inc., 497 F.3d 1160 (10th Cir. 2007)
U.S. ex rel. Boothe v. Sun Healthcare Group, Inc., 496 F.3d 1169 (10th Cir. 2007)
Williams v. W.D. Sports, N.M., Inc., 497 F.3d 1079 (10th Cir. 2007)
Arnold v. Curtis, 243 Fed.Appx. 408 (10th Cir. 2007)

U.S. v. Cortez-Galaviz, 495 F.3d 1203 (10th Cir. 2007)
U.S. v. Diesel, 238 Fed.Appx. 398 (10th Cir. 2007)
Copart, Inc. v. Administrative Review Bd., U.S. Dept. of Labor, 495 F.3d 1197 (10th Cir. 2007)
Helm v. Colorado, 244 Fed.Appx. 856 (10th Cir. 2007)
Keck v. Zenon, 240 Fed.Appx. 815 (10th Cir. 2007)
Embrey v. U.S., 240 Fed.Appx. 791 (10th Cir. 2007)
U.S. v. Jackson, 493 F.3d 1179 (10th Cir. 2007)
Nasious v. Two Unknown B.I.C.E. Agents, at Arapahoe County Justice Center, 492 F.3d 1158 (10th Cir. 2007)
In re Bello, 237 Fed.Appx. 363 (10th Cir. 2007)
U.S. v. Smith, 238 Fed.Appx. 356 (10th Cir. 2007)
U.S. v. Gonzalez, 238 Fed.Appx. 350 (10th Cir. 2007)
Magar v. Parker, 490 F.3d 816 (10th Cir. 2007)
Coulthrust v. Wells, 236 Fed.Appx. 420 (10th Cir. 2007)
White v. Hesse, 225 Fed.Appx. 769 (10th Cir. 2007)
Leske v. Brill, 236 Fed.Appx. 391 (10th Cir. 2007)
Warren v. Tastove, 240 Fed.Appx. 771 (10th Cir. 2007)
U.S. v. Castro, 225 Fed.Appx. 755 (10th Cir. 2007)
Hough v. Alderden, 236 Fed.Appx. 350 (10th Cir. 2007)
Miller v. Astrue, 224 Fed.Appx. 859 (10th Cir. 2007)
Energy West Mining Co. v. Johnson, 233 Fed.Appx. 860 (10th Cir. 2007)
Yates v. Arkin, 242 Fed.Appx. 478 (10th Cir. 2007)
Johnson v. Christopher, 233 Fed.Appx. 852 (10th Cir. 2007)
Folsom v. Franklin, 234 Fed.Appx. 856 (10th Cir. 2007)
U.S. v. Cardenas-Alatorre, 485 F.3d 1111 (10th Cir. 2007)
In re Smith, 2007 WL 4953041 (10th Cir. 2007)
Watson v. U.S., 485 F.3d 1100 (10th Cir. 2007)
Thomas v. Bruce, 233 Fed.Appx. 815 (10th Cir. 2007)
Omar-Muhammad v. Williams, 484 F.3d 1262 (10th Cir. 2007)
Bergersen v. Shelter Mut. Ins. Co., 229 Fed.Appx. 750 (10th Cir. 2007)
Andrews v. Heaton, 483 F.3d 1070 (10th Cir. 2007)
U.S. v. Pelayo-Torres, 221 Fed.Appx. 801 (10th Cir. 2007)
Graham v. Attorney General of Kansas, 231 Fed.Appx. 790 (10th Cir. 2007)
Berry v. Ray, 229 Fed.Appx. 697 (10th Cir. 2007)
Brown v. McKune, 227 Fed.Appx. 755 (10th Cir. 2007)
Briggs v. Astrue, 221 Fed.Appx. 767 (10th Cir. 2007)
U.S. v. Le, 228 Fed.Appx. 827 (10th Cir. 2007)
Nez v. BHP Navajo Coal Co., 227 Fed.Appx. 731 (10th Cir. 2007)
U.S. v. Mullane, 226 Fed.Appx. 810 (10th Cir. 2007)

Bernat v. Allphin, 220 Fed.Appx. 891 (10th Cir. 2007)
Martinez v. Carr, 479 F.3d 1292 (10th Cir. 2007)
U.S. v. Vaca-Perez, 221 Fed.Appx. 737 (10th Cir. 2007)
Bolton v. Roberts, 219 Fed.Appx. 761 (10th Cir. 2007)
U.S. v. Duran, 219 Fed.Appx. 762 (10th Cir. 2007)
Hill v. Kemp, 478 F.3d 1236 (10th Cir. 2007)
Officer v. Sedgwick County, Kansas, 226 Fed.Appx. 783 (10th Cir. 2007)
U.S. v. Ruiz-Terrazas, 477 F.3d 1196 (10th Cir. 2007)
U.S. v. Torres-Laranega, 476 F.3d 1148 (10th Cir. 2007)
U.S. v. Earle, 216 Fed.Appx. 824 (10th Cir. 2007)
Bank of Oklahoma, N.A. v. Monumental Life Ins. Co., 230 Fed.Appx. 788 (10th Cir. 2007)
U.S. v. Acosta-Quinones, 213 Fed.Appx. 749 (10th Cir. 2007)
Casey v. West Las Vegas Independent School Dist., 473 F.3d 1323 (10th Cir. 2007)
U.S. v. Shaffer, 472 F.3d 1219 (10th Cir. 2007)
U.S. v. Diaz, 213 Fed.Appx. 647 (10th Cir. 2007)
U.S. v. Mendivil, 208 Fed.Appx. 647 (10th Cir. 2006)
U.S. v. Urias-Bojorquez, 205 Fed.Appx. 706 (10th Cir. 2006)
Young v. Dillon Companies, Inc., 468 F.3d 1243 (10th Cir. 2006)
U.S. v. Gutierrez-Palma, 201 Fed.Appx. 576 (10th Cir. 2006)

Concurrences (including opinions concurring in part and dissenting in part).
Cortez v. McCauley, 478 F.3d 1108 (10th Cir. 2007)
Zamora v. Elite Logistics, Inc., 478 F.3d 1160 (10th Cir. 2007)
Pace v. Swerdlow, 519 F.3d 1067 (10th Cir. 2008)
U.S. v. Manning, 526 F.3d 611 (10th Cir. 2008)
U.S. v. Huckins, 529 F.3d 1312 (10th Cir. 2008)
Hanson v. Wyatt, 552 F.3d 1148 (10th Cir. 2008)
U.S. v. Hinckley, 550 F.3d 926 (10th Cir. 2008)
Strickland v. UPS, 555 F.3d 1224 (10th Cir. 2009)
U.S. ex rel. Belt Con Const. v. Metric Const., 314 Fed. Appx. 151 (10th Cir. 2009)
Barber v. Colorado Dept. of Revenue, 562 F.3d 1222 (10th Cir. 2009)
Chelsea Family Pharmacy v. Medco Health Solutions, 567 F.3d 1191 (10th Cir. 2009).
Milne v. USA Cycling, 575 F.3d 1120 (10th Cir. 2009)
Fisher v. City of Las Cruces, 584 F.3d 888 (10th Cir. 2009)
U.S. v. Raymond, 369 Fed. Appx. 958 (10th Cir. 2010)
Abdulhaseeb v. Calbone, 600 F.3d 1301 (10th Cir. 2010)
Forest Guardians v. U.S. Fish and Wildlife Service, 611 F.3d 692 (10th Cir. 2010)
Mink v. Knox, 613 F.3d 995 (10th Cir. 2010)
Flitton v. Primary Residential Mortgage, 614 F.3d 1173 (10th Cir. 2010)

Wilderness Society v. Kane Cty., 632 F.3d 1162 (10th Cir. 2011)
Wyodak Resources Development Corp. v. U.S., 637 F.3d 1127 (10th Cir. 2011)
Columbian Financial Corp. v. BancInsure, Inc., 650 F.3d 1372 (10th Cir. 2011)
U.S. v. Games-Perez, 667 F.3d 1136 (10th Cir. 2012)
U.S. v. Canas, 462 Fed. Appx. 836 (10th Cir. 2012)
U.S. v. Benard, 680 F.3d 1206 (10th Cir. 2012)
Somerlott v. Cherokee Nation Distributor, Inc., 686 F.3d 1144 (10th Cir. 2012)
Hooks v. Workman, 689 F.3d 1148 (10th Cir. 2012)
U.S. v. Mendiola, 696 F.3d 1033 (10th Cir. 2012)
Jefferson Cty. School District R-1 v. Elizabeth E., 702 F.3d 1227 (10th Cir. 2012)
Wilson v. Trammell, 706 F.3d 1286 (10th Cir. 2013)
Hobby Lobby v. Sebelius, 723 F.3d 1114 (10th Cir. 2013)
Riddle v. Hickenlooper, 742 F.3d 922 (10th Cir. 2014)
U.S. v. Law, 572 Fed. Appx. 644 (10th Cir. 2014)
Williams v. Trammell, 782 F.3d 1184 (10th Cir. 2015)
Browder v. City of Albuquerque, 787 F.3d 1076 (10th Cir. 2015)
U.S. v. Alisuretove, 788 F.3d 1247 (10th Cir. 2015)
U.S. v. Krueger, 809 F.3d 1109 (10th Cir. 2015)
Direct Marketing Ass'n v. Brohl, 814 F.3d 1129 (10th Cir. 2016)
Cordova v. City of Albuquerque, 816 F.3d 645 (10th Cir. 2016)
Webb v. Thompson, 643 Fed. Appx. 718 (10th Cir. 2016)
Gutierrez-Brizuela v. Lynch, 834 F.3d 1142 (10th Cir. 2016)

Dissents (including dissents to the denial of rehearing en banc).
WWC Holding Co. v. Sopkin, 488 F.3d 1262 (10th Cir. 2007)
U.S. v. Cos, 498 F.3d 1115 (10th Cir. 2007)
Abilene Retail #30, Inc. v. Bd. of Comm'rs of Dickison Cty., 508 F.3d 958 (10th Cir. 2007)
U.S. v. Ford, 550 F.3d 975 (10th Cir. 2008)
Salmon v. Astrue, 309 Fed. Appx. 113 (9th Cir. 2009)
Blausey v. U.S. Trustee, 552 F.3d 1124 (9th Cir. 2009)
Williams v. Jones, 571 F.3d 1086 (10th Cir. 2009)
Green v. Haskell Cty. Bd. of Comm'rs, 574 F.3d 1235 (10th Cir. 2009)
Wilson v. Workman, 577 F.3d 1284 (10th Cir. 2009)
Williams v. Jones, 583 F.3d 1254 (10th Cir. 2009)
American Atheists v. Davenport, 637 F.3d 1095 (10th Cir. 2010)
Compass Environmental, Inc. v. OSHA Comm'n, 663 F.3d 1164 (10th Cir. 2011)
U.S. v. Rosales-Garcia, 667 F.3d 1348 (10th Cir. 2012)
U.S. v. Games-Perez, 695 F.3d 1104 (10th Cir. 2012)
U.S. v. Nicholson, 721 F.3d 1236 (10th Cir. 2013)

U.S. v. Dutton, 509 Fed. Appx. 815 (10th Cir. 2013)
New Mexico Off-Highway Vehicle Alliance v. U.S. Forest Service, 540 Fed. Appx. 877 (10th Cir. 2013)
Kerr v. Hickenlooper, 759 F.3d 1186 (10th Cir. 2014)
U.S. v. Nichols, 784 F.3d 666 (10th Cir. 2015)
U.S. v. Spaulding, 802 F.3d 1110 (10th Cir. 2015)
NLRB v. Community Health Servs., 812 F.3d 768 (10th Cir. 2016)
U.S. v. Carloss, 818 F.3d 988 (10th Cir. 2016)
A.M. v. Holmes, 830 F.3d 1123 (10th Cir. 2016)
Transam Trucking, Inc. v. Admin. Review Bd., 833 F.3d 1206 (10th Cir. 2016)
Planned Parenthood Ass'n of Utah v. Herbert, 839 F.3d 1301 (10th Cir. 2016)
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JUDGE NEIL M. GORSUCH
SENATE JUDICIARY COMMITTEE
QUESTIONNAIRE

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Cases in which Judge Gorsuch was a panel member but did not author an opinion

Asarco v. Noranda Mining, Inc., 844 F.3d 1201 (10th Cir. 2017)
Cvancara v. Reams, --- Fed.Appx. ---, 2017 WL 280701 (10th Cir. 2017)
United States v. Dowell, --- Fed.Appx. ----, 2017 WL 280704 (10th Cir. 2017)
Sweat v. City of Las Cruces, --- Fed.Appx. ----, 2017 WL 280705 (10th Cir. 2017)
United States v. Bates, --- Fed.Appx. ----, 2017 WL 104454 (10th Cir. 2017)
Tompkins v. Lifeway Christian Resources of the Southern Baptist Convention, --- Fed.Appx. ----, 2016 WL 7383963 (10th Cir. 2016)
Whitney v. MacGregor, --- Fed.Appx. ----, 2016 WL 5957310 (10th Cir. 2016)
United States v. Smith, --- Fed.Appx. ----, 2016 WL 6609499 (10th Cir. 2016)
United States v. Hurtado, --- Fed.Appx. ----, 2016 WL 3410270 (10th Cir. 2016)
Long v. Wells Fargo Bank, --- Fed.Appx. ----, 2016 WL 6803706 (10th Cir. 2016)
Wilson v. Rokusek, --- Fed.Appx. ----, 2016 WL 6610206 (10th Cir. 2016)
United States v. Warren, 650 Fed.Appx. 614 (10th Cir. 2016)
United States v. Hall, --- Fed. Appx. ---, 2016 WL 3437496 (10th Cir. 2016)
Lunnon v. Commissioner of Internal Revenue, 652 Fed.Appx. 623 (10th Cir. 2016)
Pease v. Raemisch, --- Fed. Appx. ---, 2016 WL 406312 (10th Cir. 2016)
Wilkins v. Chrisman, --- Fed.Appx. ---, 2016 WL 6832910 (10th Cir. 2016)
Ray v. Colvin, 657 Fed.Appx. 733 (10th Cir. 2016)
United States v. Camacho, 654 Fed.Appx. 927 (10th Cir. 2016)
United States v. Vasquez-Garcia, --- Fed.Appx. ---, 2016 WL 5799280 (10th Cir. 2016)
United States v. Johnson, 652 Fed.Appx. 619 (10th Cir. 2016)
United States v. Maxton, --- Fed.Appx. ---, 2016 WL 7406309 (10th Cir. 2016)
United States v. Brinson, --- Fed.Appx. ---, 2016 WL 3409882 (10th Cir. 2016)
United States v. Taylor, --- Fed.Appx. ---, 2016 WL 7033905 (10th Cir. 2016)
Palzer v. Cox Oklahoma Telecom, LLC, --- Fed.Appx. ---, 2016 WL 6818839 (10th Cir. 2016)
Castillo v. Jones-Cooper, 660 Fed.Appx. 614 (10th Cir. 2016)
Bloom v. Pompa, 654 Fed.Appx. 930 (10th Cir. 2016)
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U.S. v. Powell, 295 Fed.Appx. 920 (10th Cir. 2008)
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Alvarez-Flores v. Jones, 293 Fed.Appx. 617 (10th Cir. 2008)
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U.S. v. Johnson, 291 Fed.Appx. 920 (10th Cir. 2008)
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U.S. v. Lester, 285 Fed.Appx. 542 (10th Cir. 2008)
Carolina Cas. Ins. Co. v. Yeates, 533 F.3d 1202 (10th Cir. 2008)
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U.S. v. Pena, 279 Fed.Appx. 702 (10th Cir. 2008)
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Patton v. West, 276 Fed.Appx. 756 (10th Cir. 2008)
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U.S. v. Rainwater, 274 Fed.Appx. 629 (10th Cir. 2008)
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American Cas. Co. of Reading PA v. Health Care Indem., Inc., 520 F.3d 1131 (10th Cir. 2008)
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U.S. v. Norwood, 259 Fed.Appx. 157 (10th Cir. 2007)
U.S. v. Rogers, 259 Fed.Appx. 149 (10th Cir. 2007)
U.S. v. Revels, 510 F.3d 1269 (10th Cir. 2007)
Rodriguez v. Editor in Chief, Legal Times, 2007 WL 5239004 (D.C. Cir. 2007)
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Aid for Women v. Foulston, --- Fed.Appx. ----, 2007 WL 6787808 (10th Cir. 2007)
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U.S. v. Rhoads, 222 Fed.Appx. 700 (10th Cir. 2007)
Zampedri v. Utah, 219 Fed.Appx. 803 (10th Cir. 2007)
U.S. v. Williams, 219 Fed.Appx. 778 (10th Cir. 2007)
OCI Wyoming, L.P. v. PacifiCorp, 479 F.3d 1199 (10th Cir. 2007)
U.S. v. Long, 218 Fed.Appx. 808 (10th Cir. 2007)
Citizens for Peace in Space v. City of Colorado Springs, 477 F.3d 1212 (10th Cir. 2007)
Loftis v. Higgins, 218 Fed.Appx. 771 (10th Cir. 2007)
U.S. v. Dighera, 217 Fed.Appx. 826 (10th Cir. 2007)
How v. City of Baxter Springs, Kansas, 217 Fed.Appx. 787 (10th Cir. 2007)

Pimentel & Sons Guitar Makers, Inc. v. Pimentel, 477 F.3d 1151 (10th Cir. 2007)
Hollingshead v. Blue Cross and Blue Shield of Oklahoma, 216 Fed.Appx. 797 (10th Cir. 2007)
U.S. v. De La Torre-Rodriguez, 216 Fed.Appx. 774 (10th Cir. 2007)
NLRB v. King Soopers, Inc., 476 F.3d 843 (10th Cir. 2007)
Pursley v. Estep, 216 Fed.Appx. 733 (10th Cir. 2007)
U.S. v. Garrison, 214 Fed.Appx. 769 (10th Cir. 2007)
U.S. v. Morales-Ramirez, 214 Fed.Appx. 767 (10th Cir. 2007)
U.S. v. Castellon, 213 Fed.Appx. 732 (10th Cir. 2007)
U.S. v. Atencio, 476 F.3d 1099 (10th Cir. 2007)
U.S. v. Saunders, 209 Fed.Appx. 778 (10th Cir. 2006)
U.S. v. Grace, 209 Fed.Appx. 767 (10th Cir. 2006)
U.S. v. Ladue, 208 Fed.Appx. 680 (10th Cir. 2006)
U.S. v. Franco-Guillen, 196 Fed.Appx. 716 (10th Cir. 2006)
Zamora v. Elite Logistics, Inc., 194 Fed.Appx. 496 (10th Cir. 2006)
U.S. v. Montero-Montero, 220 Fed.Appx. 759 (10th Cir. 2006)

Cases not found on Westlaw

FILED
United States Court of Appeals
Tenth Circuit

September 18, 2008

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ARTHUR D'AMARIO, III,

Petitioner - Appellant,

v.

BLAKE DAVIS,

Respondent - Appellee.

No. 08-1191
(D.C. No. 1:07-CV-02257-ZLW)

ORDER

Before **KELLY**, **BRISCOE**, and **GORSUCH**, Circuit Judges.

The petitioner appeals the dismissal by the United States District Court for the District of Colorado of his petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2241. Because the petitioner has not demonstrated "a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal," *Caravalho v. Pugh*, 177 F.3d 1177, 1179 (10th Cir. 1999), we deny the petitioner leave to proceed on appeal without prepayment of fees.

In his petition, the petitioner challenged a criminal judgment entered by the United States District Court for the District of Rhode Island following his conviction for being a felon in possession of a firearm. He also alleged that the execution of his

sentence is illegal and unconstitutional because he is being denied credit for time served in state custody.

The district court dismissed the petition. The court concluded that the challenges to the legality of the conviction and sentence must be brought pursuant to 28 U.S.C. § 2255, and that § 2255 provides the petitioner with an adequate and effective remedy. The court also determined that the challenge to the execution of the sentence was the subject of a prior § 2241 petition, in which the claim was decided on the merits, and, therefore, the claim was barred because it was successive and abusive.

The court also denied leave to proceed on appeal *in forma pauperis*, determining that the appeal was not being taken in good faith and because the petitioner did not show the existence of a reasoned nonfrivolous argument on the law and facts in support of the issues raised on appeal. *See* 28 U.S.C. § 1915(a)(3).

Normally, "'[a] petition under 28 U.S.C. § 2241 attacks the execution of a sentence rather than its validity and must be filed in the district where the prisoner is confined. A [section 2255 motion] attacks the legality of detention, and must be filed in the district that imposed the sentence.'" *Haugh v. Booker*, 210 F.3d 1147, 1149 (10th Cir.2000) (quoting *Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir.1996)). Section 2241 "is not an additional, alternative, or supplemental remedy to 28 U.S.C. § 2255." *Bradshaw*, 86 F.3d at 166. Only if the petitioner shows that § 2255 is "inadequate or ineffective" to challenge the validity of a judgment or sentence may a prisoner petition for such a remedy under 28 U.S.C. § 2241. *Id.*

"Failure to obtain relief under § 2255 does not establish that the remedy so provided is either inadequate or ineffective." *Id*. (quotation omitted).

The petitioner has not established the inadequacy or ineffectiveness of 28 U.S.C. § 2255.

In addition, the court correctly concluded that the § 2241 claim was successive. *See* 28 U.S.C. § 2241(a); *McCleskey v. Zant*, 499 U.S. 467, 483-85 (1991); *George v. Perrill*, 62 F.3d 333, 334-35 (10th Cir. 1995). Although the petitioner represents that the previously filed § 2241 petition was dismissed without prejudice for failure to exhaust administrative remedies, this is not entirely correct. The first § 2241 petition was dismissed without prejudice, but a subsequent petition was denied on the merits. *See D'Amario v. Zenk*, 131 Fed. Appx. 381 (3d Cir. 2005) (unpublished). *See also discussion in United States v. D'Amario*, 350 F.3d 348, 352-53 (3d Cir. 2003). Accordingly the district court did not err in dismissing the § 2241 claim.

Permission to proceed on appeal *in forma pauperis* is **DENIED** and this appeal is **DISMISSED**.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

Ellen Rich Reiter

Ellen Rich Reiter
Deputy Clerk/Jurisdictional Attorney

FILED
United States Court of Appeals
Tenth Circuit

June 30, 2010

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SOJOURN CARE, INC.,d/b/a Sojourn Care of Tulsa, a Delaware corporation, Plaintiff-Appellant/Cross-Appellee, v. KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, Defendant-Appellee/Cross-Appellant.	Nos. 09-5031, 09-5066 (D.C. No. 4:07-CV-00375-GFK-PJC) (N.D. Okla.)

ORDER[*]

Before **HARTZ**, **GORSUCH**, and **HOLMES**, Circuit Judges.

These appeals are dismissed for lack of appellate jurisdiction. Sojourn Care Inc.'s complaint contains a single cause of action. It contends that a regulation used to calculate certain reimbursements to hospice providers such as itself (42 C.F.R. § 418.309) is contrary to Title XVIII of the Social Security Act (42 U.S.C. § 1395f(i)). So far, the district court has awarded Sojourn a

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[*] This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

declaratory judgment but deferred decision on certain other forms of relief requested by Sojourn until after a remand to the Provider Reimbursement Review Board (PRRB), for additional proceedings, can be completed. In these circumstances we lack a final judgment that might afford us appellate jurisdiction under 28 U.S.C. § 1291. *See Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 743-44 (1976). Neither, in these circumstances, is there a proper basis for the government's cross-appeal. The government, like Sojourn, will have an avenue for obtaining judicial review of any adverse decision by the district court when the case reaches a final judgment. *See Bender v. Clark*, 744 F.2d 1424, 1428 (10th Cir. 1984).

If we lack appellate jurisdiction to hear Sojourn's appeal under § 1291, Sojourn contends we should still issue a writ of mandamus. *See* 28 U.S.C. § 1651(a). But a writ of mandamus is a "drastic remedy" that may be "invoked only in extraordinary situations." *Barclaysamerican Corp. v. Kane*, 746 F.2d 653, 654 (10th Cir. 1984) (quotation marks omitted). This is not such a case. Sojourn can obtain meaningful review of the district court's rulings in the normal course, when proceedings finish. *See In re: Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1187 (10th Cir. 2009) ("[T]he party seeking issuance of the writ must have no other adequate means to attain the relief he desires" (quotation marks omitted)). And whether or not the district court is in error, a question we do not decide, its decision is not clearly and indisputably wrong, as it must be to warrant the

issuance of a writ. *See id.* (writ of mandamus may issue only when right to it is "clear and indisputable" (internal quotation marks omitted)).[**]

These appeals are **DISMISSED**.

Entered for the Court,



ELISABETH A. SHUMAKER, Clerk

[**] Sojourn has not sought to invoke our jurisdiction under 28 U.S.C. § 1292(a)(1), and it is our general practice to avoid passing on possible arguments in support of our jurisdiction that the parties themselves haven't raised and had the opportunity to join issue on. *Cf. Kaw Nation ex rel. McCauley v. Lujan*, 378 F.3d 1139, 1142 (10th Cir. 2004) ("[W]e need not consider a new argument in support of jurisdiction" not raised in a party's opening brief). We see no reason to depart from that practice in this case.

FILED
United States Court of Appeals
Tenth Circuit

June 8, 2012

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

OLOYEA D. WALLIN,

Plaintiff-Appellant,

v.

RODNEY ACHEN; MASCARENAS; BELL; T. STENZEL; R. BASTIDOS; DAVE ALLEN; JAMES ABBOT, Warden of CTCF; MASSEY; HENRY WILLIAMS; TOOMEY; BENEVIDEZ; FAZZINO; MARY ANN ALDRICH; TOFOYA; CARLAND; JANTZ; LOPEZ-MARTINEZ; LOPEZ, JOHN and JANE Doe of CDOC; ARISTEDES ZAVARAS, Executive Director of CDOC,

Defendants-Appellees.

No. 11-1201
(D.C. No. 1:10-CV-01317-LTB)
(D. Colo.)

ORDER

Before **TYMKOVICH**, **BALDOCK**, and **GORSUCH**, Circuit Judges.

Plaintiff-appellant Oloyea D. Wallin, a state prisoner, seeks to appeal the district court's orders dismissing his civil rights action, denying his motion for reconsideration, and denying his motion to amend the complaint. He has not paid the filing fee for this appeal, but seeks to proceed in forma pauperis (IFP) under 28 U.S.C. § 1915.

On April 16, 2012, we entered an order directing appellant to either pay the full amount of the filing fee forthwith or show cause why this appeal should not be dismissed because he had "struck out" under the Prison Litigation Reform Act ("PLRA"), *id.* § 1915(g), prior to filing this appeal on May 3, 2011. We granted his motion for an extension of time, allowing him until June 4 to respond and stating that no further extensions would be granted. Mr. Wallin failed to file a response by June 4, so we now proceed to rule on his IFP motion.

Under PLRA, prisoners initiating civil actions and appeals must pay the full amount of the filing fee, but they may pay the fee in monthly installments if they are granted leave to proceed IFP. *See id.* § 1915(b). PLRA further provides, however, that

> [i]n no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

Id. § 1915(g).

Prior to filing the present appeal, appellant, while incarcerated or detained, had filed at least three civil actions or appeals that were dismissed as frivolous, malicious, or for failure to state a claim upon which relief may be granted. In *Wallin v. Arapahoe County Detention Facility*, 244 F. App'x 214, 221 (10th Cir. 2007), we considered three of appellant's appeals, holding that appeals

No. 06-1376 and No. 06-1416 were frivolous and declaring two strikes under § 1915(g). The Supreme Court allowed appellant an extension of time until February 21, 2008, in which to file a petition for writ of certiorari from our decision, but the Supreme Court's website indicates that appellant did not file one. Thus, the two strikes we assessed in *Wallin v. Arapahoe County Detention Facility* ripened to be counted against appellant's civil filings on February 21, 2008, when his time to file a petition for writ of certiorari expired. *See Hafed v. Fed. Bureau of Prisons*, 635 F.3d 1172, 1175 (10th Cir. 2011).

In addition, in the district court case underlying appeal No. 06-1376, the district court dismissed appellant's complaint without prejudice because his claims were premature under *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). *See Wallin v. McCabe*, No. 06-cv-01322, slip op. at 3 (D. Colo. July 20, 2006). We noted in *Smith v. Veterans Administration*, 636 F.3d 1306, 1312 (10th Cir. 2011), that "[o]ur precedent holds that the dismissal of a civil rights suit for damages based on prematurity under *Heck* is for failure to state a claim." Moreover, "[i]t is irrelevant under § 1915(g) whether the district court affirmatively stated in the order of dismissal that it was assessing a strike." *Id.* at 1313. "In fact, because a district court's order of dismissal cannot count as a strike in this circuit until the prisoner 'has exhausted or waived his appeals[,]' *Jennings*[*v. Natrona Cnty. Det. Ctr. Med. Facility*], 175 F.3d [775,] 780 [(10th Cir. 1999)], it will be more usual that a district court's order of dismissal

will not state that it is a strike." *Id.* As a result, the dismissal in *Wallin v. McCabe* is a strike under § 1915(g), and it ripened to be counted against appellant's civil filings on February 21, 2008, when the extension of time allowed by the Supreme Court for appellant's petition for writ of certiorari in appeal No. 06-1376 expired.

Thus, appellant accumulated three strikes and "struck out" on February 21, 2008. As a result, the prepayment requirement imposed by § 1915(g) applies to this appeal, which appellant filed in this court on May 3, 2011. But he has neither paid the filing fee nor shown why he is not required to pay. We decline to consider his untimely response to our show cause order.

Appellant's motion for leave to proceed IFP is denied. The appeal is DISMISSED.

Entered for the Court



ELISABETH A. SHUMAKER, Clerk

JUDGE NEIL M. GORSUCH

SENATE JUDICIARY COMMITTEE
QUESTIONNAIRE

SUPPLEMENTAL APPENDIX 13(f)

Cases in Which Certiorari Was Requested or Granted

CERT. GRANTED

Pauly v. White, 817 F.3d 715 (10th Cir. 2016) (denying rehearing en banc) (Gorsuch, J., dissenting from denial of rehearing en banc), cert. granted, judgment vacated, 2017 WL 69170 (Jan. 9, 2017).

United States v. Nichols, 784 F.3d 666 (10th Cir. 2015) (denying rehearing en banc) (Gorsuch, J., dissenting from denial of rehearing en banc), cert. granted, 136 S. Ct. 445 (Nov. 6, 2015), rev'd, 136 S. Ct. 1113 (2016).

Warner v. Gross, 776 F.3d 721 (10th Cir. 2015), cert. granted, 135 S. Ct. 1173 (Jan. 23, 2015), aff'd, 136 S. Ct. 2726 (2015).

Direct Marketing Ass'n v. Brohl, 735 F.3d 904 (10th Cir. 2013), cert. granted, 134 S. Ct. 2901 (July 1, 2014), rev'd 135 S. Ct. 1124 (2015).

United States v. Loughrin, 710 F.3d 1111 (10th Cir. 2013), cert. granted, 134 S. Ct. 822 (Dec. 13, 2013), aff'd, 134 S. Ct. 2384 (2014).

Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013), cert. granted, 134 S. Ct. 678 (Nov. 26, 2013), aff'd, 134 S. 2751 (2014).

Tarrant Regional Water Dist. v. Herrmann, 656 F.3d 1222 (10th Cir. 2011), cert. granted, 133 S. Ct. 831 (Jan. 4, 2013), aff'd, 133 S. Ct. 2120 (2013).

United States v. Dolan, 571 F.3d 1022 (10th Cir. 2009), cert. granted, 558 U.S. 1104 (Jan. 8, 2010), aff'd, 560 U.S. 605 (2010).

Summum v. Pleasant Grove City, 499 F.3d 1170 (10th Cir. 2007), cert. granted, 552 U.S. 1294 (Mar. 31, 2008), rev'd 555 U.S. 460 (2009).

United States v. Gonzales, 252 F. App'x 900 (10th Cir. 2007), cert. granted, judgment vacated, and remanded sub nom. Sanchez v. United States, 552 U.S. 1278 (2008).

United States v. Trotter, 483 F.3d 694 (10th Cir. 2007), cert. granted, judgment vacated, 552 U.S. 1090 (2008).

CERT. DOCKETED

A.M. v. Holmes, 830 F.3d 1123 (10th Cir. 2016), petition for cert. filed, (U.S. Feb. 8, 2017) (No. 16-984).

Ute Indian Tribe of the Uintah v. Myton, 835 F.3d 1255 (10th Cir. 2016), petition for cert. filed, (U.S. Jan. 10, 2017) (No. 16-868).

United States v. Pinkerton, — F. App'x —, 2016 WL 5853318 (10th Cir. 2016), petition for cert. filed, (U.S. Jan. 10, 2017) (No. 16-7491).

Edens v. The Netherlands Ins. Co., 834 F.3d 1116 (10th Cir. 2016), petition for cert. filed, (U.S. Dec 20, 2016) (No. 16-7255).

Hamilton v. Bird, 650 Fed.Appx. 585 (10th Cir. 2016), cert. docketed (Nos. 16-7537, -7538, -7539) (Jan. 12, 2017).

Smith v. Glanz, — F. App'x —, 2016 WL 5799435 (10th Cir. 2016), petition for cert. filed, (U.S. Dec. 16, 2017) (No. 16-7456).

Stovall v. Chaptelain, — F. App'x —, 2016 WL 4973840 (10th Cir. 2016), petition for cert. filed, (U.S. Dec. 13, 2016) (No. 16-7378).

United States v. Verdin-Garcia, 824 F.3d 1218 (10th Cir. 2016), petition for cert. filed, (U.S. Nov. 4, 2016) (No. 16-6786).

Peoples v. Falk, 613 F. App'x 752 (10th Cir. 2015), petition for cert. filed, (U.S. Nov. 12, 2015) (No. 15-6912).

CERT. DENIED

Melander v. Wyoming, 661 F. App'x 521, 2016 WL 4720052 (10th Cir. 2016), cert. denied, 2017 WL 160496 (Jan. 17, 2017).

United States v. Freeburg, 655 F. App'x 649 (10th Cir. 2016), cert. denied, 2017 WL 276259 (Jan. 23, 2017).

Ellis v. Lemons, — F. App'x —, 2016 WL 3606937 (10th Cir. 2016), cert. denied, 137 S. Ct. 482 (Nov. 14, 2016).

United States v. Sing, 653 F. App'x 646 (10th Cir. 2016), cert. denied, 137 S. Ct. 484 (Nov. 14, 2016).

United States v. Mitchell, 653 F. App'x 651, cert. denied, 2017 WL 69338 (Jan. 9, 2017).

Requena v. Roberts, 650 F. App'x 939 (10th Cir. 2016), cert. denied, 137 S. Ct. 329 (Oct. 11, 2016).

United States v. Warren, 650 F. App'x 614 (10th Cir. 2016), cert. denied, 2017 WL 69330 (Jan. 9, 2017)

United States v. Wolf, 650 F. App'x 556 (10th Cir. 2016), cert. denied, 137 S. Ct. 237 (Oct. 3, 2016).

United States v. Arthurs, 647 F. App'x 846 (10th Cir. 2016), cert. denied, 137 S. Ct. 254 (Oct. 3, 2016).

United States v. Wallace, 647 F. App'x 842 (10th Cir. 2016), cert. denied, 137 S. Ct. 254 (Oct. 3, 2016).

United States v. Villanueva, 821 F.3d 1226 (10th Cir. 2016), cert. denied, 137 S. Ct. 250 (Oct. 3, 2016).

United States v. Taylor, 639 F. App'x 571 (10th Cir. 2016), cert. denied, 137 S. Ct. 397 (Oct. 31, 2016).

Garrett v. Branson Commerce Park Community Improvement Dist., 645 F. App'x 710 (10th Cir. 2016), cert. denied, 137 S. Ct. 334 (Oct. 17, 2016).

Gilyard v. Chrisman, 644 F. App'x 863 (10th Cir. 2016), cert. denied, 2016 WL 5874463 (Dec. 5, 2016).

Tuffa v. Flight Services & Systems, Inc., 644 F. App'x 853 (10th Cir. 2016), cert. denied, 137 S. Ct. 166 (Oct. 3, 2016).

United States v. Peterman, 644 F. App'x 829 (10th Cir. 2016), cert. denied, 2016 WL 3633065 (Dec. 12, 2016).

Webb v. Scott, 643 F. App'x 711 (10th Cir. 2016), cert. denied, 137 S. Ct. 159 (Oct. 3, 2016).

United States v. Carloss, 818 F.3d 988 (10th Cir. 2016), cert. denied, 137 S. Ct. 231 (Oct. 3, 2016).

United States v. Hinson, 637 F. App'x 526 (10th Cir. 2016), cert. denied, 137 S. Ct. 401 (Oct. 31, 2016).

Lopez v. Roark, 637 F. App'x 520 (10th Cir. 2016), cert. denied, 137 S. Ct. 280 (Oct. 3, 2016).

United States v. Reymundo-Lima, 643 F. App'x 668 (10th Cir. 2016), cert. denied, 137 S. Ct. 203 (Oct. 3, 2016).

Direct Marketing Ass'n v. Brohl, 814 F.3d 1129 (10th Cir. 2016), cert. denied, 137 S. Ct. 591 (Dec. 12, 2016).

United States v. Yazzie, 633 F. App'x 703 (10th Cir. 2016), cert. denied, 136 S. Ct. 2029 (May 16, 2016).

United States v. Mullins, 632 F. App'x 499 (10th Cir. 2015), cert. denied, 136 S. Ct. 1700 (Apr. 18, 2016).

United States v. McKye, 638 F. App'x 680 (10th Cir. 2015), cert. denied, 136 S. Ct. 2522 (June 27, 2016).

Benton v. Addison, 624 F. App'x 667 (10th Cir. 2015), cert. denied, 136 S. Ct. 1678 (Apr. 18, 2016).

Jemaneh v. University of Wyoming, 622 F. App'x 765 (10th Cir. 2015), cert. denied, 136 S. Ct. 2419 (June 6, 2016).

United States v. Wilson, 631 F. App'x 623 (10th Cir. 2015), cert. denied, 136 S. Ct. 2532 (June 27, 2016).

United States v. Wilson, 503 F. App'x 598 (10th Cir. 2012), cert. denied, 134 S. Ct. 335 (Oct. 7, 2013).

United States v. Delgado, 620 F. App'x 673 (10th Cir. 2015), cert. denied, 136 S. Ct. 1393 (Mar. 7, 2016).

United States v. Melot, 616 F. App'x 398 (10th Cir. 2015), cert. denied, 136 S. Ct. 1501 (Mar. 28, 2016).

Barrera-Estrada v. United States, 616 F. App'x 371 (10th Cir. 2015), cert. denied, 136 S. Ct. 1396 (Mar. 7, 2016).

United States v. Ordaz, 627 F. App'x 689 (10th Cir. 2015), cert. denied, 136 S. Ct. 1684 (Apr. 18, 2016).

Eizember v. Trammell, 803 F.3d 1129 (10th Cir. 2015), cert. denied, 136 S. Ct. 2468 (June 13, 2016).

United States v. McCary, 614 F. App'x 383 (10th Cir. 2015), cert. denied, 136 S. Ct. 2496 (June 20, 2016).

Brooks v. Raemisch, 613 F. App'x 773 (10th Cir. 2015), cert. denied, 136 S. Ct. 845 (Jan. 11, 2016).

United States v. Spaulding, 802 F.3d 1110 (10th Cir. 2015), cert. denied, 136 S. Ct. 1206 (Feb. 29, 2016).

United States v. Rhone, 613 F. App'x 763 (10th Cir. 2015), cert. denied, 136 S. Ct. 1220 (Feb. 29, 2016).

Cannon v. Trammell, 796 F.3d 1256 (10th Cir. 2015), cert. denied, 136 S. Ct. 2517 (June 27, 2016).

Serna v. Commandant, USDB-Leavenworth, 608 F. App'x 713 (10th Cir. 2015), cert. denied, 136 S. Ct. 918 (Jan. 19, 2016).

Energy and Environment Legal Institute v. Epel, 793 F.3d 1169 (10th Cir. 2015), 136 S. Ct. 595 (Dec. 7, 2015).

Owens v. Trammell, 792 F.3d 1234 (10th Cir. 2015), cert. denied, 136 S. Ct. 1180 (Feb. 29, 2016).

United States v. Fishman, 608 F. App'x 711 (10th Cir. 2015), cert. denied, 136 S. Ct. 858 (Jan. 11, 2016).

United States v. Beckstrom, 618 F. App'x. 361 (10th Cir. 2015), cert. denied, 136 S. Ct. 846 (Jan. 11, 2016).

Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah, 790 F.3d 1000 (10th Cir. 2015), cert. denied, 136 S. Ct. 1451 (Mar. 21, 2016).

United States v. Manning, 635 F. App'x 404 (10th Cir. 2015), cert. denied, 136 S. Ct. 1220 (Feb. 29, 2016).

United States v. Alisuretove, 788 F.3d 1247 (10th Cir. 2015), cert. denied, 136 S. Ct. 370 (Oct. 19, 2015).

Green v. Addison, 613 F. App'x 704 (10th Cir. 2015), cert. denied, 136 S. Ct. 543 (Nov. 30, 2015).

Brown v. Marriott Hotel, 602 F. App'x 726 (10th Cir. 2015), cert. denied, 136 S. Ct. 403 (Nov. 2, 2015).

Caplinger v. Medtronic, Inc., 784 F.3d 1335 (10th Cir. 2015), cert. denied, 136 S. Ct. 796 (Jan. 11, 2016).

United States v. Rogers, 599 F. App'x 850 (10th Cir. 2015), cert. denied, 136 S. Ct. 214 (Oct. 5, 2015).

Williams v. Trammell, 782 F.3d 1184 (10th Cir. 2015), cert. denied, 136 S. Ct. 806 (Jan. 11, 2016).

United States v. Trachanas, 605 F. App'x 751 (10th Cir. 2015), cert. denied, 136 S. Ct. 278 (Oct. 5, 2015).

Matthews v. Bonner, 605 F. App'x 741 (10th Cir. 2015), cert. denied, 136 S. Ct. 368 (Oct. 19, 2015)

White v. Roberts, 605 F. App'x 731 (10th Cir. 2015), cert. denied, 136 S. Ct. 107 (Oct. 5, 2015)

United States v. Zaler, 601 F. App'x 677 (10th Cir. 2015), cert. denied, 136 S. Ct. 91 (Oct. 5, 2015)

Sampson v. Patton, 598 F. App'x 573 (10th Cir. 2015), cert. denied, 136 S. Ct. 63 (Oct. 5, 2015)

Barnes v. United States, 776 F.3d 1134 (10th Cir. 2015), cert. denied, 136 S. Ct. 1155 (Feb. 29, 2016)

Ragsdell v. Regional Housing Alliance of La Plata County, 603 F. App'x 653 (10th Cir. 2015), cert. denied, 136 S. Ct. 59 (Oct. 5, 2015)

United States v. Vann, 776 F.3d 746 (10th Cir. 2015), cert. denied, 136 S. Ct. 434 (Nov. 2, 2015)

Lee v. Maye, 589 F. App'x 416 (Mem) (10th Cir. 2015), cert. denied, 135 S. Ct. 1717 (Mar. 30, 2015)

Brainerd v. Schlumberger Technology Corp., 589 F. App'x 406 (Mem), cert. denied, 136 S. Ct. 505 (Nov. 15, 2015)

United States v. Denson, 775 F.3d 1214 (10th Cir. 2014), cert. denied, 135 S. Ct. 2064 (May 4, 2015).

Myers v. Knight Protective Service, Inc., 774 F.3d 1246 (10th Cir. 2014), cert. denied, 135 S. Ct. 2061 (May 4, 2015).

United States v. Storey, 595 F. App'x 822 (10th Cir. 2014), cert. denied, 135 S. Ct. 1539 (Mar. 9, 2015).

Lee v. Benuelos, 595 F. App'x 743 (10th Cir. 2014), cert. denied, 135 S. Ct. 1747 (Apr. 6, 2015).

Mattox v. McKune, 588 F. App'x 833 (Mem) (10th Cir. 2014), cert. denied, 135 S. Ct. 2872 (June 22, 2015).

Lee v. Maye, 581 F. App'x 721 (Mem) (10th Cir. 2014), cert. denied, 135 S. Ct. 977 (Jan. 12, 2015).

Morgan v. Addison, 574 F. App'x 852 (Mem) (10th Cir. 2014), cert. denied, 135 S. Ct. 1496 (Mar. 2, 2015).

Marshall v. Rudek, 575 F. App'x 831 (10th Cir. 2014), cert. denied, 135 S. Ct. 1423 (Feb. 23, 2015).

Harrell v. Wilson, 577 F. App'x 839 (10th Cir. 2014), cert. denied, 135 S. Ct. 1184 (Jan. 26, 2015).

Entek GRB, LLC v. Stull Ranches, LLC, 763 F.3d 1252 (10th Cir. 2014), cert. denied, 135 S. Ct. 1895 (Apr. 27, 2015).

United Food and Commercial Workers Union Local 880 Pension Fund v. Chesapeake Energy Corp., 762 F.3d 1158 (10th Cir. 2014), amended, 774 F.3d 1229 (Aug. 8, 2014), cert. denied, 136 S. Ct. 35 (Oct. 5, 2015).

United States v. Hendrix, 571 F. App'x 661 (10th Cir. 2014), cert. denied, 135 S. Ct. 1002 (Jan. 12, 2015).

Goings v. Sumner County Dist. Attorney's Office, 571 F. App'x 634 (10th Cir. 2014), cert. denied, 135 S. Ct. 1175 (Jan. 26, 2015).

Cleveland v. Havanek, 569 F. App'x 636 (10th Cir. 2014), cert. denied, 135 S. Ct. 408 (Oct. 20, 2014).

Felders ex rel. Smedley v. Malcom, 755 F.3d 870 (10th Cir. 2014), cert. denied, 135 S. Ct. 975 (Jan. 12, 2015).

United States v. Burch, 569 F. App'x 548 (Mem) (10th Cir. 2014), cert. denied, 135 S. Ct. 423 (Oct. 20, 2014).

Tillotson v. McCoy, 568 F. App'x 564 (10th Cir. 2014), cert. denied, 135 S. Ct. 332 (Oct. 6, 2014).

United States v. Quinn, 566 F. App'x 659 (10th Cir. 2014), cert. denied, 135 S. Ct. 378 (Oct. 14, 2014).

United States v. Mosley, 561 F. App'x 707 (10th Cir. 2014), cert. denied, 135 S. Ct. 204 (Oct. 6, 2014).

Clark v. Oakley. 560 F. App'x 804 (10th Cir. 2014), cert. denied, 135 S. Ct. 379 (Oct. 14, 2014).

United States v. Webb, 559 F. App'x 704 (10th Cir. 2014), cert. denied, 135 S. Ct. 312 (Oct. 6, 2014).

United States v. Arrowgarp, 558 F. App'x 824 (10th Cir. 2014), cert. denied, 135 S. Ct. 100 (Oct. 6, 2014).

Miller v. Janecka, 558 F. App'x 800 (10th Cir. 2014), cert. denied, 135 S. Ct. 202 (Oct. 6, 2014).

United States v. Perryman, 558 F. App'x 795 (10th Cir. 2014), cert. denied, 134 S. Ct. 2716 (June 2, 2014).

In re Gordon, 743 F.3d 720 (10th Cir. 2014), cert. denied, 135 S. Ct. 2309 (May 18, 2015).

Lee v. Bigelow, 555 F. App'x 806 (10th Cir. 2014), cert. denied, 134 S. Ct. 2313 (May 19, 2014).

United States v. Serrato, 742 F.3d 461 (10th Cir. 2014), cert. denied, 134 S. Ct. 2739 (June 9, 2014).

United States v. Tisdale, 553 F. App'x 836 (10th Cir. 2014), cert. denied, 134 S. Ct. 2688 (May 27, 2014).

Baca v. Rodriguez, 554 F. App'x 676 (10th Cir. 2014), cert. denied, 134 S. Ct. 2688 (May 27, 2014).

Wild Horse Observers Ass'n, Inc. v. Jewell, 550 F. App'x 638 (10th Cir. 2013), cert. denied, 135 S. Ct. 78 (Oct. 6, 2014).

United States v. Begay, 550 F. App'x 604 (10th Cir. 2013), cert. denied, 134 S. Ct. 2321 (May 19, 2014).

In re Staker, 550 F. App'x 580 (10th Cir. 2013), cert. denied, 134 S. Ct. 2300 (May 19, 2014).

Hagos v. Werholtz, 548 F. App'x 540 (Mem) (10th Cir. 2013), cert. denied, 135 S. Ct. 340 (Oct. 6, 2014).

United States v. Eccleston, 545 F. App'x 774 (10th Cir. 2013), cert. denied, 134 S. Ct. 1774 (Mar. 31, 2014).

Roberts v. International Business Machines Corp., 733 F.3d 1306 (10th Cir. 2013), cert. denied, 134 S. Ct. 2867 (June 23, 2014).

United States v. Calvin, 543 F. App'x 807 (10th Cir. 2013), cert. denied, 134 S. Ct. 2688 (May 27, 2014).

Lacey v. Homeowners of America Ins. Co., 546 F. App'x 755 (10th Cir. 2013), cert. denied, 134 S. Ct. 1553 (Mar. 24, 2014).

Tijerina v. Patterson, 543 F. App'x 771 (10th Cir. 2013), cert. denied, 134 S. Ct. 2674 (May 27, 2014).

United States v. Davis, 599 F. App'x 815 (10th Cir. 2013), cert. denied, 134 S. Ct. 1565 (Mar. 24, 2014).

United States v. Turrentine, 542 F. App'x 714 (10th Cir. 2013), cert. denied, 134 S. Ct. 1356 (Feb. 24, 2014).

Ferguson v. Shinseki, 543 F. App'x 750 (10th Cir. 2013), cert. denied, 135 S. Ct. 335 (Oct. 6, 2014).

United States v. Goodwin, 541 F. App'x 851 (10th Cir. 2013), cert. denied, 135 S. Ct. 254 (Oct. 6, 2014).

Novell, Inc. v. Microsoft Corp., 731 F.3d 1064 (10th Cir. 2013), cert. denied, 134 S. Ct. 1947 (Apr. 28, 2014).

United States v. Washington, 536 F. App'x 810 (10th Cir. 2013), cert. denied, 134 S. Ct. 1328 (Feb. 24, 2014).

United States v. Cardoza-Sarabia, 531 F. App'x 932 (Mem) (10th Cir. 2013), cert. denied, 134 S. Ct. 1041 (Jan. 27, 2014).

Tiedemann v. Bigelow, 539 F. App'x 860 (10th Cir. 2013), cert. denied, 135 S. Ct. 158 (Oct. 6, 2014).

Keeler v. Aramark, 536 F. App'x 771 (10th Cir. 2013), cert. denied, 134 S. Ct. 1289 (Feb. 24, 2014).

Genova v. Banner Health, 734 F.3d 1095 (10th Cir. 2013), cert. denied, 134 S. Ct. 1359 (Feb. 24, 2014).

United States v. Card, 534 F. App'x 765 (10th Cir. 2013), cert. denied, 134 S. Ct. 1044 (Jan. 27, 2014).

Decker v. Roberts, 530 F. App'x 844 (Mem) (10th Cir. 2013), cert. denied, 134 S. Ct. 1036 (Jan. 27, 2014).

Grant v. Trammell, 727 F.3d 1006 (10th Cir. 2013), cert. denied, 134 S. Ct. 2731 (June 9, 2014).

United States v. Olivas-Castaneda, 530 F. App'x 791 (10th Cir. 2013), cert. denied, 134 S. Ct. 1327 (Feb. 24, 2014).

Banks v. Doe, 523 F. App'x 503 (Mem) (10th Cir. 2013), cert. denied, 134 S. Ct. 698 (Dec. 2, 2013).

United States v. Jones, 530 F. App'x 747 (10th Cir. 2013), cert. denied, 134 S. Ct. 548 (Nov. 4, 2013).

Glossip v. Trammell, 530 F. App'x 708 (10th Cir. 2013), cert. denied, 134 S. Ct. 2142 (May 5, 2014).

Jensen v. Solvay Chemicals, Inc., 721 F.3d 1180 (10th Cir. 2013), cert. denied, 134 S. Ct. 1280 (Feb. 24, 2014).

United States v. Lopez, 517 F. App'x 625 (Mem) (10th Cir. 2013), cert. denied, 134 S. Ct. 548 (Nov. 4, 2013).

United States v. Renteria, 720 F.3d 1245 (10th Cir. 2013), cert. denied, 134 S. Ct. 969 (Mem) (Jan. 13, 2014).

U.S. v. Dyke, 718 F.3d 1282 (10th Cir. 2013), cert. denied, 134 S. Ct. 365 (Oct. 7, 2013).

United States v. Dunbar, 718 F.3d 1268 (10th Cir. 2013), cert. denied, 134 S. Ct. 808 (Dec. 9, 2013).

United States v. Angilau, 717 F.3d 781 (10th Cir. 2013), cert. denied, 134 S. Ct. 805 (Dec. 9, 2013).

Jenner v. Faulk, 516 F. App'x 691 (Mem) (10th Cir. 2013), cert. denied, 134 S. Ct. 799 (Dec. 9, 2013).

Goosby v. Trammell, 515 F. App'x 776 (10th Cir. 2013), cert. denied, 134 S. Ct. 1316 (Feb. 24, 2014).

United States v. Bell, 526 F. App'x 880 (10th Cir. 2013), cert. denied, 134 S. Ct. 265 (Oct. 7, 2013).

United States v. Baker, 713 F.3d 558 (10th Cir. 2013), 134 S. Ct. 784 (Dec. 9, 2013).

United States v. Ramos-Carrillo, 511 F. App'x 739 (10th Cir. 2013), cert. denied, 134 S. Ct. 254 (Oct. 7, 2013).

Wilson v. City of Lafayette, 510 F. App'x 775 (10th Cir. 2013), cert. denied, 134 S. Ct. 164 (Oct. 7, 2013).

Wilson v. Trammell, 706 F.3d 1286 (10th Cir. 2013), cert. denied, 134 S. Ct. 224 (Oct. 7, 2013).

Seely v. Jones, 509 F. App'x 806 (10th Cir. 2013), cert. denied, 134 S. Ct. 133 (Oct. 7, 2013).

United States v. Lipsey, 509 F. App'x 714 (10th Cir. 2013), cert. denied, 134 S. Ct. 2287, U.S., May 19, 2014

United States v. Shobe, 508 F. App'x 845 (10th Cir. 2013), cert. denied, 133 S. Ct. 1614, U.S., Mar. 18, 2013

Santana v. Muscogee (Creek) Nation, ex rel. River Spirit Casino, 508 F. App'x 821 (10th Cir. 2013), cert. denied, 133 S. Ct. 2038, U.S., Apr. 29, 2013

Cosby v. Astrue, 507 F. App'x 819 (10th Cir. 2013), cert. denied, 134 S. Ct. 188, U.S., Oct. 7, 2013

Lott v. Trammell, 705 F.3d 1167 (10th Cir. 2013), cert. denied, 134 S. Ct. 176, U.S., Oct. 7, 2013

Rueb v. Zavaras, 532 F. App'x 831 (10th Cir. 2013), cert. denied, 134 S. Ct. 226, U.S., Oct. 7, 2013

Lynch v. Barrett, 703 F.3d 1153 (10th Cir. 2013), cert. denied, 133 S. Ct. 2352, U.S., May 13, 2013

Wallin v. Achen, No. 11-1201 (10th Cir. July 30, 2013), cert. denied, 113 S. Ct. 2737 (May 28, 2013).

Jefferson Cnty. Sch. Dist. R-1, v. Elizabeth E. by and through Roxanne B., 702 F.3d 1227 (10th Cir. 2013), cert. denied, 133 S. Ct. 2857, U.S., June 24, 2013

Gammons v. City of Denver, 505 F. App'x 785 (10th Cir. 2012), cert. denied, 134 S. Ct. 74, U.S., Oct. 7, 2013

Swain v. Seaman, 505 F. App'x 773 (10th Cir. 2012), cert. denied, 134 S. Ct. 90, U.S., Oct. 7, 2013

United States v. Neal, 505 F. App'x 755 (10th Cir. 2012), cert. denied, 133 S. Ct. 1852, U.S., Apr. 15, 2013

United States v. Wilson, 503 F. App'x 598 (10th Cir. 2012), cert. denied, 134 S. Ct. 335, U.S., Oct. 7, 2013

Hopper v. Wyant, 502 F. App'x 790 (10th Cir. 2012), cert. denied, 133 S. Ct. 2771, U.S., June 3, 2013

United States v. Morales-Ramirez, 502 F. App'x 784 (10th Cir. 2012), cert. denied, 134 S. Ct. 171, U.S., Oct. 7, 2013

Johnson v. Jones, 502 F. App'x 807 (10th Cir. 2012), cert. denied, 133 S. Ct. 203, U.S., Apr. 22, 2013

United States v. Hood, 501 F. App'x 812 (10th Cir. 2012), cert. denied, 134 S. Ct. 277, U.S., Oct. 7, 2013

Valenzuela v. Silversmith, 699 F.3d 1199 (10th Cir. 2012), cert. denied, 134 S. Ct. 58, U.S., Oct. 7, 2013

Lorentzen v. Omer, 486 F. App'x 749 (10th Cir. 2012), cert. denied, 134 S. Ct. 82, U.S., Dec. 9, 2013

United States v. Martinez, 485 F. App'x 334 (10th Cir. 2012), cert. denied, 134 S. Ct. 278, U.S., Oct. 7, 2013

Habyarimana v. Kagame, 696 F.3d 1029 (10th Cir. 2012), cert. denied, 133 S. Ct. 167, U.S., Mar. 18, 2013

United States v. Gieswein, 495 F. App'x 944 (10th Cir. 2012), cert. denied, 133 S. Ct. 958, U.S., Jan. 14, 2013

Hassan v. Colorado, 495 F. App'x 947 (10th Cir. 2012), cert. denied, 133 S. Ct. 2769, U.S., June 3, 2013

United States v. Rendon-Martinez, 497 F. App'x 848 (10th Cir. 2012), cert. denied, 133 S. Ct. 1295, U.S., Feb. 19, 2013

Krider v. Conover, 497 F. App'x 818 (10th Cir. 2012), cert. denied, 133 S. Ct. 1469, U.S., Feb. 25, 2013

Elwell v. Okla. ex rel. Bd. of Regents of the University of Oklahoma, 693 F.3d 1303 (10th Cir. 2012), cert. denied, 133 S. Ct. 1255, U.S., Feb. 19, 2013

DeRosa v. Workman, 696 F.3d 1302 (10th Cir. 2012) (denying rehearing en banc), cert. denied, 133 S. Ct. 1645, U.S., Mar. 25, 2013

Banks v. Workman, 692 F.3d 1133 (10th Cir. 2012), cert. denied, 133 S. Ct. 2397, U.S., May 20, 2013

United States v. De Vaughn, 694 F.3d 1141 (10th Cir. 2012), cert. denied, 133 S. Ct. 2383 (May 13, 2013).

United States v. Shippley, 690 F.3d 1192 (10th Cir. 2012), cert. denied, 133 S. Ct. 901 (Jan. 7, 2013).

Palecek v. Jones, 473 F. App'x 866 (10th Cir. 2012), cert. denied, 133 S. Ct. 949 (Jan. 14, 2013).

United States v. Gehringer, 474 F. App'x 751 (10th Cir. 2012), cert. denied, 133 S. Ct. 1486 (Feb. 25, 2013).

United States v. Hasan, 686 F.3d 1159 (10th Cir. 2012), cert. denied, 133 S. Ct. 797 (Dec. 10, 2012).

Young v. Addison, 490 F. App'x 960 (10th Cir. 2012), cert. denied, 133 S. Ct. 1262 (Feb. 19, 2013).

Bedard v. National Cas. Ins. Co., 481 F. App'x 445 (10th Cir. 2012), cert. denied, 133 S. Ct. 1737 (Apr. 1, 2013).

United States v. Crosby, 468 F. App'x 913 (10th Cir. 2012), cert. denied, 133 S. Ct. 314 (Oct. 1, 2012).

United States v. Burgdorf, 466 F. App'x 761 (10th Cir. 2012), cert. denied, 133 S. Ct. 561 (Oct. 29, 2012).

Buckland v. Buckland, 486 F. App'x 704 (10th Cir. 2012), cert. denied, 133 S. Ct. 861 (Jan. 7, 2013).

Chiles v. Oklahoma Dept. of Corrections, 467 F. App'x 801 (10th Cir. 2012), cert. denied, 133 S. Ct. 845 (Jan. 7, 2013).

Burke v. Rudek, 483 F. App'x 516 (10th Cir. 2012), cert. denied, 133 S. Ct. 613 (Nov. 13, 2012).

United States v. Cartwright, 678 F.3d 907 (10th Cir. 2012), cert. denied, 133 S. Ct. 452 (Oct. 9, 2012).

United States v. Coleman, 483 F. App'x 419 (10th Cir. 2012), cert. denied, 133 S. Ct. 360 (Oct. 1, 2012).

Tindall v. Freightquote.com, Inc., 466 F. App'x 752 (10th Cir. 2012), cert. denied, 133 S. Ct. 379 (Oct. 1, 2012).

United States v. Burnell, 480 F. App'x 501 (10th Cir. 2012), cert. denied, 133 S. Ct. 375 (Oct. 1, 2012).

Romero v. Goodrich, 480 F. App'x 489 (10th Cir. 2012), cert. denied, 133 S. Ct. 1315 (Feb. 19, 2013).

Robledo v. Jones, 464 F. App'x 773 (10th Cir. 2012), cert. denied, 133 S. Ct. 342 (Oct. 1, 2012).

Warrener v. Medina, 475 F. App'x 290 (10th Cir. 2012), cert. denied, 133 S. Ct. 212 (Oct. 1, 2012).

Allen v. Zavaras, 474 F. App'x 741 (10th Cir. 2012), cert. denied, 133 S. Ct. 656 (Nov. 26, 2012).

United States v. Collins, 461 F. App'x 807 (10th Cir. 2012), cert. denied, 133 S. Ct. 302 (Oct. 1, 2012).

United States v. Antone, 461 F. App'x 815 (10th Cir. 2012), cert. denied, 133 S. Ct. 392 (Oct. 1, 2012).

United States v. Torres-Laranega, 473 F. App'x 839 (10th Cir. 2012), cert. denied, 132 S. Ct. 2786 (June 18, 2012).

United States v. Maytubby, 472 F. App'x 877 (10th Cir. 2012), cert. denied, 133 S. Ct. 367 (Oct. 1, 2012).

McCormick v. Schmidt, 469 F. App'x 661 (10th Cir. 2012), cert. denied, 133 S. Ct. 578 (Nov. 5, 2012).

Allen v. Clements, 467 F. App'x 784 (10th Cir. 2012), cert. denied, 133 S. Ct. 656 (Nov. 26, 2012).

United States v. Moser, 466 F. App'x 713 (10th Cir. 2012), cert. denied, 133 S. Ct. 299 (Oct. 1, 2012).

George v. U.S., 672 F.3d 942 (10th Cir. 2012), cert. denied, 133 S. Ct. 432 (Oct. 9, 2012).

United States v. Rodriguez-Garcia, 459 F. App'x 754 (10th Cir. 2012), cert. denied, 133 S. Ct. 181 (Oct. 1, 2012).

United States v. Sturm, 672 F.3d 891 (10th Cir. 2012), cert. denied, 133 S. Ct. 300 (Oct. 1, 2012).

United States v. Canas, 462 F. App'x 836 (10th Cir. 2012), cert. denied, 133 S. Ct. 251 (Oct. 1, 2012).

United States v. Lewis, 459 F. App'x 742 (10th Cir. 2012), cert. denied, 133 S. Ct. 647 (Nov. 26, 2012).

United States v. Coulter, 461 F. App'x 763 (10th Cir. 2012), cert. denied, 132 S. Ct. 2787 (June 18, 2012).

White v. Medina, 464 F. App'x 715 (10th Cir. 2012), cert. denied, 133 S. Ct. 124 (Oct. 1, 2012).

Loggins v. Hannigan, 461 F. App'x 712 (10th Cir. 2012), cert. denied, 133 S. Ct. 42 (June 25, 2012).

Romero v. Lander, 461 F. App'x 661 (10th Cir. 2012), cert. denied, 133 S. Ct. 212 (Oct. 1, 2012).

United States v. Braden, 458 F. App'x 751 (10th Cir. 2012), cert. denied, 132 S. Ct. 1950 (Apr. 16, 2012).

United States v. Freerksen, 457 F. App'x 765 (10th Cir. 2012), cert. denied, 132 S. Ct. 2728 (June 4, 2012).

United States v. Freerksen, 457 F. App'x 769 (10th Cir. 2012), cert. denied, 132 S. Ct. 2788 (June 18, 2012).

United States v. Games-Perez, 667 F.3d 1136 (10th Cir. 2012), cert. denied, 134 S. Ct. 54 (Oct. 7, 2013).

Rhodes v. Judiscak, 676 F.3d 931 (10th Cir. 2012), cert. denied, 133 S. Ct. 29 (June 25, 2012).

Tucker v. Murphy, 456 F. App'x 756 (10th Cir. 2012), cert. denied, 132 S. Ct. 2111 (Apr. 30, 2012).

Whitmore v. Hill, 456 F. App'x 726 (10th Cir. 2012), cert. denied, 133 S. Ct. 220 (Oct. 1, 2012).

Whitmore v. Hill, 456 F. App'x 735 (10th Cir. 2012), cert. denied, 133 S. Ct. 269 (Oct. 1, 2012).

United States v. Carel, 668 F.3d 1211 (10th Cir. 2011), cert. denied, 132 S. Ct. 2122 (Apr. 30, 2012).

Kerns v. Bader, 663 F.3d 1173 (10th Cir. 2011), cert. denied, 133 S. Ct. 645 (Nov. 26, 2012).

United States v. Koufos, 666 F.3d 1243 (10th Cir. 2011), cert. denied, 132 S. Ct. 2787 (June 18, 2012).

United States v. Moser, 453 F. App'x 762 (10th Cir. 2011), cert. denied, 132 S. Ct. 2448 (May 21, 2012).

United States v. Cruz-Arellanes, 442 F. App'x 408 (10th Cir. 2011), cert. denied, 132 S. Ct. 1769 (Mar. 19, 2012).

Kartiganer v. Newman, 450 F. App'x 713 (10th Cir. 2011), cert. denied, 132 S. Ct. 2405 (May 14, 2012).

United States v. Arriola-Perez, 449 F. App'x 762 (10th Cir. 2011), cert. denied, 132 S. Ct. 2757 (June 11, 2012).

Stine v. Davis, 442 F. App'x 405 (10th Cir. 2011), cert. denied, 132 S. Ct. 1581 (Feb. 21, 2012).

Almond v. Unified School Dist. No. 501, 665 F.3d 1174 (10th Cir. 2011), cert. denied, 133 S. Ct. 317 (Oct. 1, 2012).

United States v. Holly, 444 F. App'x 309 (10th Cir. 2011), cert. denied, 133 S. Ct. 247 (Oct. 1, 2012).

Miller v. Trammell, 439 F. App'x 766 (10th Cir. 2011), cert. denied, 132 S. Ct. 1798 (Mar. 26, 2012).

Thompson v. Milyard, 444 F. App'x 249 (10th Cir. 2011), cert. denied, 132 S. Ct. 1593 (Feb. 21, 2012).

United States v. Kutz, 439 F. App'x 751 (10th Cir. 2011), cert. denied, 132 S. Ct. 1612 (Feb. 21, 2012).

Williams v. Sibbett, 442 F. App'x 385 (10th Cir. 2011), cert. denied, 132 S. Ct. 1643 (Feb. 27, 2012).

United States v. Leyva, 442 F. App'x 376 (10th Cir. 2011), cert. denied, 132 S. Ct. 1768 (Mar. 19, 2012).

United States v. Tukes, 442 F. App'x 373 (10th Cir. 2011), cert. denied, 132 S. Ct. 1599 (Feb. 21, 2012).

United States v. Meeks, 439 F. App'x 736 (10th Cir. 2011), cert. denied, 132 S. Ct. 1874 (Apr. 2, 2012).

Teton Millwork Sales v. Schlossberg, No. 10-8073, 2011 WL 4489643, cert. denied, 132 S. Ct. 1637 (Feb. 27, 2012).

City of Hugo v. Nichols (Two Cases), 656 F.3d 1251 (10th Cir. 2011), cert. denied, 132 S. Ct. 1744 (Mar. 19, 2012).

Felix v. City and County of Denver, 450 F. App'x 702 (10th Cir. 2011), cert. denied, 132 S. Ct. 1724 (Mar. 5, 2012).

Norouzian v. University of Kansas Hosp. Authority, 438 F. App'x 677 (10th Cir. 2011), cert. denied, 132 S. Ct. 1653 (Feb. 27, 2012).

United States v. Robinson, 437 F. App'x 733 (10th Cir. 2011), cert. denied, 132 S. Ct. 1065 (Jan. 9, 2012).

United States v. Acosta-Gallardo, 656 F.3d 1109 (10th Cir. 2011), cert. denied, 132 S. Ct. 540 (Oct. 31, 2011).

Vann v. Wieneke, 433 F. App'x 679 (10th Cir. 2011), cert. denied, 132 S. Ct. 1736 (Mar. 5, 2012).

Fulton v. Chester, 436 F. App'x 857 (10th Cir. 2011), cert. denied, 132 S. Ct. 1646 (Feb. 27, 2012).

Hyberg v. Milyard, 436 F. App'x 843 (10th Cir. 2011), cert. denied, 132 S. Ct. 1868 (Apr. 2, 2012).

Charlotte v. Hansen, 433 F. App'x 660 (10th Cir. 2011), cert. denied, 132 S. Ct. 1147 (Jan. 23, 2012).

Craft v. Jones, 435 F. App'x 789 (10th Cir. 2011), cert. denied, 132 S. Ct. 1859 (Apr. 2, 2012).

United States v. Kitchell, 653 F.3d 1206 (10th Cir. 2011), cert. denied, 132 S. Ct. 435 (Oct. 11, 2011).

Kay Elec. Co-op. v. City of Newkirk, Okla., 647 F.3d 1039 (10th Cir. 2011), cert. denied, 132 S. Ct. 1107 (Jan. 17, 2012).

United States v. Castellanos-Barba, 648 F.3d 1130 (10th Cir. 2011), cert. denied, 132 S. Ct. 1740 (Mar. 19, 2012).

Rhodes v. Judiscak, 676 F.3d 391 (10th Cir. 2012), cert. denied, 133 S. Ct. 29 (June 25, 2012).

Merrifield v. Board of County Com'rs for County of Santa Fe, 654 F.3d 1073 (10th Cir. 2011), cert. denied, 132 S. Ct. 1991 (Apr. 23, 2012).

United States v. Vazquez, 430 F. App'x 741 (10th Cir. 2011), cert. denied, 132 S. Ct. 1062 (Jan. 9, 2012).

Abrams v. Williams, 430 F. App'x 685 (10th Cir. 2011), cert. denied, 132 S. Ct. 581 (Nov. 14, 2011).

Tyler v. Arellano, 427 F. App'x 681 (10th Cir. 2011), cert. denied, 132 S. Ct. 1115 (Jan. 17, 2012).

United States v. Jackson, 429 F. App'x 757 (10th Cir. 2011), cert. denied, 132 S. Ct. 600 (Nov. 14, 2011).

In re Dawes, 652 F.3d 1236 (10th Cir. 2011), cert. denied, 132 S. Ct. 2429 (May 21, 2012).

Ellis v. Parker, 426 F. App'x 683 (10th Cir. 2011), cert. denied, 132 S. Ct. 1011 (Jan. 9, 2012).

Pavlov v. Smelzer, 427 F. App'x 636 (10th Cir. 2011), cert. denied, 132 S. Ct. 327 (Oct. 3, 2011).

Gutierrez v. King, 426 F. App'x 671 (10th Cir. 2011), cert. denied, 132 S. Ct. 1030 (Jan. 9, 2012).

Raley v. Hyundai Motor Co., Ltd., 642 F.3d 1271 (10th Cir. 2011), cert. denied, 132 S. Ct. 779 (Nov. 28, 2011).

Knox v. Workman, 425 F. App'x 781 (10th Cir. 2011), cert. denied, 132 S. Ct. 269 (Oct. 3, 2011).

United States v. Hillman, 642 F.3d 929 (10th Cir. 2011), cert. denied, 132 S. Ct. 359 (Oct. 3, 2011).

United States v. Crabbe, 424 F. App'x 782 (10th Cir. 2011), cert. denied, 132 S. Ct. 1539 (Feb. 21, 2012).

United States v. Chon, 434 F. App'x 730 (10th Cir. 2011), cert. denied, 132 S. Ct. 470 (Oct. 17, 2011).

Selsor v. Workman, 644 F.3d 984 (10th Cir. 2011), cert. denied, 132 S. Ct. 1558 (Feb. 21, 2012).

Francis v. Standifird, 422 F. App'x 729 (10th Cir. 2011), cert. denied, 132 S. Ct. 1920 (Apr. 16, 2012).

United States v. Ludwig, 641 F.3d 1243 (10th Cir. 2011), cert. denied, 132 S. Ct. 306 (Oct. 3, 2011).

Hansen v. Harper Excavating, Inc., 641 F.3d 1216 (10th Cir. 2011), cert. denied, 132 S. Ct. 574 (Nov. 14, 2011).

Kavel v. Marshall, 418 F. App'x 687 (10th Cir. 2011), cert. denied, 565 U.S. 869 (Oct. 3, 2011).

United States v. Caraway, 417 F. App'x 828 (10th Cir. 2011), cert. denied, 132 S. Ct. 565 (Nov. 7, 2011).

Smith v. Veterans Admin., 636 F.3d 1306 (10th Cir. 2011), cert. denied, 132 S. Ct. 381 (Oct. 3, 2011).

Prost v. Anderson, 636 F.3d 578 (10th Cir. 2011), cert. denied, 132 S. Ct. 1001 (Jan. 9, 2012).

United States v. Santistevan, 412 F. App'x 142 (10th Cir. 2011), cert. denied, 563 U.S. 952 (Apr. 18, 2011).

Swierzbinski v. Holder, 408 F. App'x 188 (10th Cir. 2011), cert. denied, 563 U.S. 1039 (June 6, 2011).

United States v. Yeley-Davis, 632 F.3d 673 (10th Cir. 2011), cert. denied, 563 U.S. 969 (Apr. 25, 2011).

Teniente v. Wyoming Atty. Gen., 412 F. App'x 96 (10th Cir. 2011), cert. denied, 563 U.S. 1025 (May 31, 2011).

Trujillo v. Hartley, 406 F. App'x 280 (10th Cir. 2010), cert. denied, 132 S. Ct. 173 (Oct. 3, 2011).

American Atheists, Inc. v. Davenport, 637 F.3d 1095 (10th Cir. 2010), cert. denied, 132 S. Ct. 12 (Oct. 31, 2011).

Pavatt v. Jones, 627 F.3d 1336 (10th Cir. 2010), cert. denied, 562 U.S. 1171 (Jan. 10, 2011).

United States v. Hernandez, 444 F. App'x 230 (10th Cir. 2010), cert. denied, 563 U.S. 949 (Apr. 18, 2011).

Doe v. Shurtleff, 628 F.3d 1217 (10th Cir. 2010), cert. denied, 562 U.S. 1272 (Mar. 7, 2011).

United States v. Espinoza, 403 F. App'x 315 (10th Cir. 2010), cert. denied, 562 U.S. 1300 (Mar. 21, 2011).

Clark v. Wilson, 625 F.3d 686 (10th Cir. 2010), cert. denied, 563 U.S. 979 (May 2, 2011).

Taylor v. Ortiz, 410 F. App'x 76 (10th Cir. 2010), cert. denied, 563 U.S. 962 (Apr. 25, 2011).

United States v. Wampler, 624 F.3d 1330 (10th Cir. 2010), cert. denied, 564 U.S. 1021 (June 20, 2011).

United States v. Lee, 401 F. App'x 336 (10th Cir. 2010), cert. denied, 563 U.S. 990 (May 16, 2011).

United States v. Riggs, 400 F. App'x 408 (10th Cir. 2010), cert. denied, 563 U.S. 957 (Apr. 18, 2011).

United States v. Zeigler, 400 F. App'x 328 (10th Cir. 2010), cert. denied, 562 U.S. 1247 (Feb. 22, 2011).

Stanton v. Wyoming Atty. Gen., 401 F. App'x 313 (10th Cir. 2010), cert. denied, 563 U.S. 910 (Mar. 28, 2011).

Been v. O.K. Industries, Inc., 398 F. App'x 382 (10th Cir. 2010), cert. denied, 563 U.S. 975 (May 2, 2011).

Saleh v. Davis, 398 F. App'x 331 (10th Cir. 2010), cert. denied, 562 U.S. 1158 (Jan. 10, 2011).

Dumas v. U.S. Parole Com'n, 397 F. App'x 492 (10th Cir. 2010), cert. denied, 562 U.S. 1279 (Mar. 7, 2011).

Anderson v. Cline, 397 F. App'x 463 (10th Cir. 2010), cert. denied, 562 U.S. 1227 (Feb. 22, 2011).

Higgins v. Addison, 395 F. App'x 516 (10th Cir. 2010), cert. denied, 562 U.S. 1234 (Feb. 22, 2011).

Ly v. McKune, 394 F. App'x 502 (10th Cir. 2010), cert. denied, 563 U.S. 978 (May 2, 2011).

Jackson v. Jackson, 392 F. App'x 664 (10th Cir. 2010), cert. denied, 562 U.S. 1202 (Jan. 24, 2011).

Norman v. Social Sec. Admin., 392 F. App'x 661 (10th Cir. 2010), cert. denied, 562 U.S. 1226 (Feb. 22, 2011).

Brooks v. Gaenzle, 614 F.3d 1213 (10th Cir. 2010), cert. denied, 562 U.S. 1200 (Jan. 24, 2011).

United States v. Carrillo, 389 F. App'x 861 (10th Cir. 2010), cert. denied, 562 U.S. 1245 (Feb. 22, 2011).

United States v. Cooper, 389 F. App'x 842 (10th Cir. 2010), cert. denied, 562 U.S. 1193 (Jan. 18, 2011).

United States v. Mullins, 613 F.3d 1273 (10th Cir. 2010), cert. denied, 562 U.S. 1035 (Nov. 8, 2010).

Dunn v. Parker, 389 F. App'x 787 (10th Cir. 2010), cert. denied, 562 U.S. 1204 (Jan. 24, 2011).

United States v. Gehringer, 385 F. App'x 830 (10th Cir. 2010), cert. denied, 562 U.S. 1051 (Nov. 15, 2010).

Dean v. Computer Sciences Corp., 384 F. App'x 831 (10th Cir. 2010), cert. denied, 562 U.S. 1270 (Mar. 7, 2011).

United States v. Quaintance, 608 F.3d 717 (10th Cir. 2010), cert. denied, 562 U.S. 1019 (Nov. 1, 2010).

Harmon v. Keith, 383 F. App'x 770 (10th Cir. 2010), cert. denied, 562 U.S. 1113 (Dec. 13, 2010).

Sines v. Wilner, 609 F.3d 1070 (10th Cir. 2010), cert. denied, 562 U.S. 1182 (Jan. 18, 2011).

Gardner v. Garner, 383 F. App'x 722 (10th Cir. 2010), cert. denied, 560 U.S. 981 (June 17, 2010).

DuHall v. Lennar Family of Builders, 382 F. App'x 751 (10th Cir. 2010), cert. denied, 562 U.S. 1010 (Nov. 1, 2010).

United States v. Lopez, 382 F. App'x 680 (10th Cir. 2010), cert. denied, 562 U.S. 1238 (Feb. 22, 2011).

Sojourn Care, Inc. v. Sebelius, No. 10-670 (10th Cir. 2010), cert. denied, 562 U.S. 1194 (Jan. 18, 2011).

United States v. Adame-Orozco, 607 F.3d 647 (10th Cir. 2010), cert. denied, 562 U.S. 944 (Oct. 4, 2010).

Portley-El v. Brill, 380 F. App'x 744 (10th Cir. 2010), cert. denied, 562 U.S. 1115 (Dec. 13, 2010).

Yellowbear v. Atty. Gen. of Wyoming, 380 F. App'x 740 (10th Cir. 2010), cert. denied, 562 U.S. 1228 (Feb. 22, 2011).

United States v. Trotter, 379 F. App'x 735 (10th Cir. 2010), cert. denied, 562 U.S. 991 (Oct. 18, 2010).

United States v. Campbell, 603 F.3d 1218 (10th Cir. 2010), cert. denied, 562 U.S. 939 (Oct. 4, 2010).

United States v. Lujan, 603 F.3d 850 (10th Cir. 2010), cert. denied, 562 U.S. 1303 (Mar. 21, 2011).

United States v. Chancellor, 376 F. App'x 826 (10th Cir. 2010), cert. denied, 562 U.S. 865 (Oct. 4, 2010).

Abdulhaseeb v. Calbone, 600 F.3d 1301 (10th Cir. 2010), cert. denied, 562 U.S. 967 (Oct. 12, 2010).

United States v. De La Torre, 599 F.3d 1198 (10th Cir. 2010), cert. denied, 562 U.S. 898 (Oct. 4, 2010).

United States v. Crockett, 370 F. App'x 900 (10th Cir. 2010), cert. denied, 562 U.S. 883 (Oct. 4, 2010).

Ellis v. Brown, 374 F. App'x 776 (10th Cir. 2010), cert. denied, 562 U.S. 882 (Oct. 4, 2010).

United States v. Wise, 597 F.3d 1141 (10th Cir. 2010), cert. denied, 564 U.S. 1021 (June 20, 2011).

Brotherhood of Maintenance of Way Employes Div. v. Burlington Northern Santa Fe Ry. Co., 596 F.3d 1217 (10th Cir. 2010), cert. denied, 562 U.S. 836 (Oct. 4, 2010).

Williams v. Zavaras, No. 09-1518, 2010 WL 653320 (10th Cir. 2010), cert. denied, 562 U.S. 987 (Oct. 18, 2010).

United States v. Corber, 596 F.3d 763 (10th Cir. 2010), cert. denied, 562 U.S. 1134 (Jan. 10, 2011).

In re Matney, 365 F. App'x 126 (10th Cir. 2010), cert. denied, 562 U.S. 981 (Oct. 18, 2010).

Dauwe v. Miller, 364 F. App'x 435 (10th Cir. 2010), cert. denied, 562 U.S. 845 (Oct. 4, 2010).

United States v. Olivas-Porras, 363 F. App'x 637 (10th Cir. 2010), cert. denied, 559 U.S. 1020 (Mar. 22, 2010).

United States v. Tucker, 363 F. App'x 643 (10th Cir. 2010), cert. denied, 562 U.S. 866 (Oct. 4, 2010).

United States v. Valle, 359 F. App'x 77 (10th Cir. 2010), cert. denied, 559 U.S. 1020 (Mar. 22, 2010).

United States v. Chatman, 359 F. App'x 62 (10th Cir. 2010), cert. denied, 560 U.S. 915 (May 17, 2010).

United States v. Villa, 589 F.3d 1334 (10th Cir. 2009), cert. denied, 562 U.S. 1060 (Nov. 29, 2010).

United States v. Frost, 355 F. App'x 230 (10th Cir. 2009), cert. denied, 562 U.S. 898 (Oct. 4, 2010).

United States v. Neidlinger, 354 F. App'x 357 (10th Cir. 2009), cert. denied, 559 U.S. 1055 (Apr. 5, 2010).

Ysais v. Children Youth And Family Dept., 353 F. App'x 159 (10th Cir. 2009), cert. denied, 560 U.S. 956 (June 7, 2010).

United States v. Martin, 353 F. App'x 140 (10th Cir. 2009), cert. denied, 558 U.S. 1130 (Jan. 11, 2010).

United States v. Phillips, 583 F.3d 1261 (10th Cir. 2009), cert. denied, 558 U.S. 1100 (Dec. 14, 2009).

Hammon v. Miller, 350 F. App'x 222 (10th Cir. 2009), cert. denied, 560 U.S. 928 (May 24, 2010).

United States v. Velazquez, 349 F. App'x 339 (10th Cir. 2009), cert. denied, 559 U.S. 1020 (Mar. 22, 2010).

United States v. Archuleta, 348 F. App'x 380 (10th Cir. 2009), cert. denied, 559 U.S. 960 (Feb. 22, 2010).

United States v. Villa, 348 F. App'x 376 (10th Cir. 2009), cert. denied, 559 U.S. 959 (Feb. 22, 2010).

Martinez-Arellano v. U.S., 345 F. App'x 379 (10th Cir. 2009), cert. denied, 559 U.S. 996 (Mar. 8, 2010).

Straley v. Utah Bd. of Pardons, 582 F.3d 1208 (10th Cir. 2009), cert. denied, 559 U.S. 991 (Mar. 8, 2010).

Harrison v. Warden of Fremont Correctional Facility, 345 F. App'x 361 (10th Cir. 2009), cert. denied, 560 U.S. 931 (May 24, 2010).

Wackerly v. Workman, 580 F.3d 1171 (10th Cir. 2009), cert. denied, 560 U.S. 955 (June 7, 2010).

Lewis v. Burger King, 344 F. App'x 470 (10th Cir. 2009), cert. denied, 558 U.S. 1125 (Jan. 11, 2010).

United States v. Lopez, 343 F. App'x 314 (10th Cir. 2009), cert. denied, 558 U.S. 1132 (Jan. 11, 2010).

Akers v. Crow, 343 F. App'x 319 (10th Cir. 2009), cert. denied, 560 U.S. 915 (May 17, 2010).

United States v. Soto-Munoz, 343 F. App'x 303 (10th Cir. 2009), cert. denied, 559 U.S. 1101 (Apr. 26, 2010).

Matthews v. Workman, 577 F.3d 1175 (10th Cir. 2009), cert. denied, 559 U.S. 1014 (Mar. 22, 2010).

United States v. Charles, 576 F.3d 1060 (10th Cir. 2009), cert. denied, 558 U.S. 1097 (Dec. 14, 2009).

Jenner v. Zavaras, 339 F. App'x 879 (10th Cir. 2009), cert. denied, 558 U.S. 1152 (Jan. 19, 2010).

United States v. Hutchinson, 573 F.3d 1011 (10th Cir. 2009), cert. denied, 564 U.S. 1045 (June 27, 2011).

Williams v. Jones, 571 F.3d 1086 (10th Cir. 2009), cert. denied, 560 U.S. 952 (June 7, 2010).

United States v. Garton, 336 F. App'x 804 (10th Cir. 2009), cert. denied, 562 U.S. 1078 (Nov. 29, 2010).

Miller v. Glanz, 331 F. App'x 608 (10th Cir. 2009), cert. denied, 559 U.S. 1108 (May 3, 2010).

Gardner v. Galetka, 568 F.3d 862 (10th Cir. 2009), cert. denied, 559 U.S. 993 (Mar. 8, 2010).

Staten v. Parker, 334 F. App'x 166 (10th Cir. 2009), cert. denied, 558 U.S. 1027 (Nov. 16, 2009).

United States v. Moya-Breton, 329 F. App'x 839 (10th Cir. 2009), cert. denied, 558 U.S. 908 (Oct. 5, 2009).

United States v. Nichols, 329 F. App'x 186 (10th Cir. 2009), cert. denied, 558 U.S. 924 (Oct. 5, 2009).

United States v. Brown, 333 F. App'x 345 (10th Cir. 2009), cert. denied, 558 U.S. 925 (Oct. 5, 2009).

United States v. Dawson, 327 F. App'x 782 (10th Cir. 2009), cert. denied, 558 U.S. 920 (Oct. 5, 2009).

In re Smith, 329 F. App'x 805 (10th Cir. 2009), cert. denied, 558 U.S. 1024 (Nov. 16, 2009).

United States v. Uscanga-Mora, 562 F.3d 1289 (10th Cir. 2009), cert. denied, 558 U.S. 911 (Oct. 5, 2009).

United States v. Windrix, 322 F. App'x 629 (10th Cir. 2009), cert. denied, 558 U.S. 929 (Oct. 5, 2009).

United States v. Robinson, 323 F. App'x 676 (10th Cir. 2009), cert. denied, 558 U.S. 907 (Oct. 5, 2009).

United States v. Ailsworth, 325 F. App'x 658 (10th Cir. 2009), cert. denied, 558 U.S. 907 (Oct. 5, 2009).

Lemery v. Beckner, 323 F. App'x 644 (10th Cir. 2009), cert. denied, 558 U.S. 947 (Oct. 13, 2009).

United States v. Jones, 320 F. App'x 827 (10th Cir. 2009), cert. denied, 558 U.S. 890 (Oct. 5, 2009).

Heinemann v. Murphy, 326 F. App'x 455 (10th Cir. 2009), cert. denied, 558 U.S. 894 (Oct. 5, 2009).

Thomas v. Parker, 318 F. App'x 626 (10th Cir. 2009), cert. denied, 558 U.S. 899 (Oct. 5, 2009).

United States v. Island, 316 F. App'x 804 (10th Cir. 2009), cert. denied, 558 U.S. 868 (Oct. 5, 2009).

Rudd v. Werholtz, 318 F. App'x 625 (10th Cir. 2009), cert. denied, 557 U.S. 909 (June 15, 2009).

Allstate Ins. Co. v. Covalt, 321 F. App'x 717 (10th Cir. 2009), cert. denied, 558 U.S. 879 (Oct. 5, 2009).

Scott v. Parker, 317 F. App'x 758 (10th Cir. 2009), cert. denied, 558 U.S. 903 (Oct. 5, 2009).

United States v. Finney, 316 F. App'x 752 (10th Cir. 2009), cert. denied, 558 U.S. 860 (Oct. 5, 2009).

United States v. LeBeau, No. 08-5078, 2009 WL 405844, cert. denied, 557 U.S. 915 (June 15, 2009).

United States v. Coleman, No. 08-5113, 2009 WL 405845, cert. denied, 558 U.S. 840 (Oct. 5, 2009).

United States v. Stevahn, 313 F. App'x 138 (10th Cir. 2009), cert. denied, 557 U.S. 927 (June 22, 2009).

Meier v. United States, 310 F. App'x 976 (9th Cir. 2009), cert. denied, 558 U.S. 1011, (Nov. 09, 2009).

United States v. Eskridge, 309 F. App'x 282 (10th Cir. 2009), cert. denied, 557 U.S. 927 (June 22, 2009).

United States v. Laliberte, 308 F. App'x 295 (10th Cir. 2009), cert. denied, 556 U.S. 1160 (Mar. 30, 2009).

United States v. Walker, 307 F. App'x 230 (10th Cir. 2009), cert. denied, 558 U.S. 1001 (Nov. 2, 2009).

United States v. Muldrow, 306 F. App'x 427 (10th Cir. 2009), cert. denied, 556 U.S. 1175 (Apr. 6, 2009).

United States v. Cook, 550 F.3d 1292 (10th Cir. 2008), cert. denied, 557 U.S. 915 (June 15, 2009).

United States v. Ford, 550 F.3d 975 (10th Cir. 2008), cert. denied, 558 U.S. 849 (Oct. 5, 2009).

Vigil v. Jones, 302 F. App'x 801 (10th Cir. 2008), cert. denied, 557 U.S. 926 (June 22, 2009).

United States v. Hinckley, 550 F.3d 926 (10th Cir. 2008), cert. denied, 556 U.S. 1240 (May 18, 2009).

Mukes v. Warden of Joseph Harp Correctional Center, 301 F. App'x 760 (10th Cir. 2008), cert. denied, 556 U.S. 1190 (Apr. 20, 2009).

Flynn v. Kansas, 299 F. App'x 809 (10th Cir. 2008), cert. denied, 556 U.S. 1248 (May 18, 2009).

United States v. Grist, 299 F. App'x 770 (10th Cir. 2008), cert. denied, 556 U.S. 1113 (Mar. 9, 2009).

Warren v. Gartman, 297 F. App'x 767 (10th Cir. 2008), cert. denied, 555 U.S. 1120 (Jan. 12, 2009).

Griffin v. Kelly, 297 F. App'x 760 (10th Cir. 2008), cert. denied, 556 U.S. 1169 (Apr. 6, 2009).

Stephens v. Miller, 297 F. App'x 719 (10th Cir. 2008), cert. denied, 556 U.S. 1241 (May 18, 2009).

Boyle v. McKune, 544 F.3d 1132 (10th Cir. 2008), cert. denied, 556 U.S. 1136 (Mar. 23, 2009).

In re S.E.C., 296 F. App'x 637 (10th Cir. 2008), cert. denied, 555 U.S. 1181 (Feb. 23, 2009).

United States v. Powell, 295 F. App'x 920 (10th Cir. 2008), cert. denied, 555 U.S. 1117 (Jan. 12, 2009).

Bronakowski v. Boulder Valley School Dist., 294 F. App'x 408 (10th Cir. 2008), cert. denied, 555 U.S. 1193 (Feb. 23, 2009).

In re Raiser, 293 F. App'x 619 (10th Cir. 2008), cert. denied, 556 U.S. 1272 (June 1, 2009).

United States v. Quintana-Navarette, 317 F. App'x 742 (10th Cir. 2008), cert. denied, 556 U.S. 1197 (Apr. 20, 2009).

United States v. Stover, 292 F. App'x 755 (10th Cir. 2008), cert. denied, 558 U.S. 913 (Oct. 5, 2009).

Long v. Peterson, 291 F. App'x 209 (10th Cir. 2008), cert. denied, 555 U.S. 1181 (Feb. 23, 2009).

Thompson R2-J School Dist. v. Luke P., ex rel. Jeff P., 540 F.3d 1143 (10th Cir. 2008), cert. denied, 555 U.S. 1173 (Feb. 23, 2009).

Uecker v. Romero, 290 F. App'x 154 (10th Cir. 2008), cert. denied, 556 U.S. 1194 (Apr. 20, 2009).

United States v. Shaw, 292 F. App'x 728 (10th Cir. 2008), cert. denied, 556 U.S. 1159 (Mar. 30, 2009).

United States v. Torres-Romero, 537 F.3d 1155 (10th Cir. 2008), cert. denied, 556 U.S. 1228 (May 4, 2009).

United States v. Goodlett, 287 F. App'x 699 (10th Cir. 2008), cert. denied, 555 U.S. 1061 (Dec. 1, 2008).

Lindsey v. Estep, 287 F. App'x 644 (10th Cir. 2008), cert. denied, 555 U.S. 1017 (Nov. 10, 2008).

Rodriguez v. Editor in Chief, 285 F. App'x 756 (D.C. Cir. 2008), cert. denied, 555 U.S. 1062 (Dec. 01, 2008).

United States v. Pullen, 285 F. App'x 535 (10th Cir. 2008), cert. denied, 555 U.S. 1145 (Jan. 21, 2009).

Brown v. Sherrod, 284 F. App'x 542 (10th Cir. 2008), cert. denied, 555 U.S. 1107 (Jan. 12, 2009).

Gales v. Cline, 283 F. App'x 656 (10th Cir. 2008), cert. denied, 555 U.S. 918 (Oct. 6, 2008).

United States v. Haley, 529 F.3d 1308 (10th Cir. 2008), cert. denied, 555 U.S. 957 (Oct. 14, 2008).

United States v. Marquez-Ramirez, 281 F. App'x 847 (10th Cir. 2008), cert. denied, 555 U.S. 934 (Oct. 6, 2008).

Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc., 528 F.3d 1258 (10th Cir. 2008), cert. denied, 555 U.S. 934 (Oct. 6, 2008).

Brown v. Dinwiddie, 280 F. App'x 713 (10th Cir. 2008), cert. denied, 555 U.S. 1051 (Dec. 1, 2008).

Leyba v. Hartley, 280 F. App'x 690 (10th Cir. 2008), cert. denied, 555 U.S. 927 (Oct. 6, 2008).

Williams v. Weathersbee, 280 F. App'x 684 (10th Cir. 2008), cert. denied, 555 U.S. 889 (Oct. 6, 2008).

United States v. Pena, 279 F. App'x 702 (10th Cir. 2008), cert. denied, 555 U.S. 927 (Oct. 6, 2008).

Xiangyuan Sue Zhu v. St. Francis Health Center, 278 F. App'x 825 (10th Cir. 2008), cert. denied, 555 U.S. 940 (Oct. 14, 2008).

Vesom v. Atchison Hosp. Ass'n, 279 F. App'x 624 (10th Cir. 2008), cert. denied, 555 U.S. 970 (Oct. 20, 2008).

Travis v. Park City Police Dept., 277 F. App'x 829 (10th Cir. 2008), cert. denied, 555 U.S. 1114 (Jan. 12, 2009).

Long v. Roberts, 277 F. App'x 801 (10th Cir. 2008), cert. denied, 555 U.S. 905 (Oct. 6, 2008).

United States v. Tinajero-Porras, 275 F. App'x 794 (10th Cir. 2008), cert. denied, 555 U.S. 918 (Oct. 6, 2008).

United States v. Bejar, 274 F. App'x 616 (10th Cir. 2008), cert. denied, 555 U.S. 910 (Oct. 6, 2008).

United States v. Griebel, 312 F. App'x 93 (10th Cir. 2008), cert. denied, 555 U.S. 866 (Oct. 6, 2008).

United States v. Gordon, 272 F. App'x 674 (10th Cir. 2008), cert. denied, 555 U.S. 894 (Oct. 6, 2008).

United States v. Eccleston, 521 F.3d 1249 (10th Cir. 2008), cert. denied, 555 U.S. 958 (Oct. 14, 2008).

Ellis v. Province, 316 F. App'x 705 (10th Cir. 2008), cert. denied, 555 U.S. 841 (Oct. 6, 2008).

Harmon v. Booher, 271 F. App'x 704 (10th Cir. 2008), cert. denied, 555 U.S. 891 (Oct. 6, 2008).

Steward v. Workman, 270 F. App'x 736 (10th Cir. 2008), cert. denied, 555 U.S. 878 (Oct. 6, 2008).

United States v. Hernandez-Hernandez, 519 F.3d 1236 (10th Cir. 2008), cert. denied, 555 U.S. 868 (Oct. 6, 2008).

Diaz v. Inch, 268 F. App'x 802 (10th Cir. 2008), cert. denied, 555 U.S. 854 (Oct. 6, 2008).

United States v. Gurrola-Rodriguez, 268 F. App'x 732 (10th Cir. 2008), cert. denied, 555 U.S. 861 (Oct. 6, 2008).

United States v. Collins, 267 F. App'x 744 (10th Cir. 2008), cert. denied, 553 U.S. 1046 (May 12, 2008).

Gonzales v. Tafoya, 515 F.3d 1097 (10th Cir. 2008), cert. denied, 555 U.S. 890 (Oct. 6, 2008).

Dehning v. Child Development Services of Fremont County, 261 F. App'x 75 (10th Cir. 2008), cert. denied, 555 U.S. 822 (Oct. 6, 2008).

United States v. Montague, 260 F. App'x 60 (10th Cir. 2008), cert. denied, 555 U.S. 859 (Oct. 6, 2008).

United States v. Spry, 260 F. App'x 52 (10th Cir. 2008), cert. denied, 553 U.S. 1086 (June 2, 2008).

United States v. Love, 260 F. App'x 134 (10th Cir. 2008), cert. denied, 553 U.S. 1026 (Apr. 28, 2008).

Howard v. Campbell, 305 F. App'x 442 (9th Cir. 2008), cert. denied, 556 U.S. 1213 (Apr. 27, 2009).

Ikbal v. United States, 304 F. App'x 604 (9th Cir. 2008), cert. denied, 558 U.S. 849 (Oct. 5, 2009).

United States v. Hernandez-Caudillo, 304 F. App'x 543 (9th Cir. 2008), cert. denied, 556 U.S. 1265 (May 26, 2009).

United States v. Pena-Perete, 260 F. App'x 22 (10th Cir. 2007), cert. denied, 553 U.S. 1042 (May 12, 2008).

United States v. Norwood, 259 F. App'x 157 (10th Cir. 2007), cert. denied, 555 U.S. 934 (Oct. 6, 2008).

Alexander v. Lucas, 259 F. App'x 145 (10th Cir. 2007), cert. denied, 552 U.S. 1249 (Mar. 3, 2008).

United States v. McComb, 519 F.3d 1049 (10th Cir. 2007), cert. denied, 552 U.S. 1329 (Apr. 14, 2008).

Jewell v. Life Ins. Co. of North America, 508 F.3d 1303 (10th Cir. 2007), cert. denied, 553 U.S. 1079 (June 2, 2008).

United States v. Copening, 506 F.3d 1241 (10th Cir. 2007), cert. denied, 554 U.S. 905 (June 16, 2008).

United States v. Cortez, 252 F. App'x 887 (10th Cir. 2007), cert. denied, 552 U.S. 1274 (Mar. 17, 2008).

United States v. Lopez, 252 F. App'x 908 (10th Cir. 2007), cert. denied, 552 U.S. 1223 (Feb. 19, 2008).

Abilene Retail #30, Inc. v. Board of Com'rs of Dickinson County, Kan., 508 F.3d 958 (Mem) (10th Cir. 2007), cert. denied, 552 U.S. 1296 (Mar. 31, 2008).

United States v. Romero-Hernandez, 505 F.3d 1082 (10th Cir. 2007), cert. denied, 553 U.S. 1067 (May 27, 2008).

Queen v. Nalley, 250 F. App'x 895 (10th Cir. 2007), cert. denied, 553 U.S. 1009 (Apr. 21, 2008).

United States v. Moran, 503 F.3d 113574 (10th Cir. 2007), cert. denied, 553 U.S. 1035 (May 12, 2008).

United States v. Kelly, 247 F. App'x 978 (10th Cir. 2007), cert. denied, 552 U.S. 1157 (Jan. 14, 2008).

United States v. Andrus, 499 F.3d 1162 (Mem) (10th Cir. 2007), cert. denied, 552 U.S. 1297 (Mar. 31, 2008).

United States v. Weeden, 243 F. App'x 405 (10th Cir. 2007), cert. denied, 552 U.S. 936 (Oct. 1, 2007).

United States v. Cortez-Galaviz, 495 F.3d 1203 (10th Cir. 2007), cert. denied, 552 U.S. 1123 (Jan. 7, 2008).

United States v. Lopez, 230 F. App'x 853 (10th Cir. 2007), cert. denied, 552 U.S. 1042 (Nov. 26, 2007).

Barocio v. Ward, 243 F. App'x 398 (10th Cir. 2007), cert. denied, 552 U.S. 1112 (Jan. 7, 2008).

United States v. Smith, 238 F. App'x 356 (10th Cir. 2007), cert. denied, 552 U.S. 1053 (Nov. 26, 2007).

United States v. Gonzalez, 238 F. App'x 350 (10th Cir. 2007), cert. denied, 522 U.S. 1018 (Nov. 5, 2007).

Wilder v. Turner, 490 F.3d 810 (10th Cir. 2007), cert. denied, 552 U.S. 1181 (Feb. 19, 2008).

White v. Ockey, 241 F. App'x 462 (10th Cir. 2007), cert. denied, 552 U.S. 1025 (Nov. 13, 2007).

Leske v. Brill, 236 F. App'x 391 (10th Cir. 2007), cert. denied, 552 U.S. 1153 (Jan. 14, 2008).

United States v. Cleaver, 236 F. App'x 359 (10th Cir. 2007), cert. denied, 552 U.S. 1003 (Oct. 29, 2007).

Folsom v. Franklin, 234 F. App'x 856 (10th Cir. 2007), cert. denied, 552 U.S. 1110 (Jan. 7, 2008).

United States v. Lugo-Balderas, 224 F. App'x 817 (10th Cir. 2007), cert. denied, 552 U.S. 924 (Oct. 1, 2007).

United States v. Cardenas-Alatorre, 485 F.3d 1111 (10th Cir. 2007), cert. denied, 552 U.S. 966 (Oct. 9, 2007).

United States v. Andrus, 483 F.3d 711 (10th Cir. 2007), cert. denied, 552 U.S. 1297 (Mar. 31, 2008).

Jacobs v. Looney , 233 F. App'x 790 (10th Cir. 2007), cert. denied, 552 U.S. 850 (Oct. 1, 2007).

Velarde v. Reid, No. 06-1545, 2007 WL 1128871 (10th Cir. Apr. 17, 2007), cert. denied, 552 U.S. 912 (Oct. 1, 2007).

Graham v. Attorney General of Kansas, 231 F. App'x 790 (10th Cir. 2007), cert. denied, 552 U.S. 884 (Oct. 1, 2007).

Brown v. McKune, 227 F. App'x 755 (10th Cir. 2007), cert. denied, 552 U.S. 913 (Oct. 1, 2007).

United States v. Borrego, 227 F. App'x 729 (10th Cir. 2007), cert. denied, 552 U.S. 929 (Oct. 1, 2007).

United States v. Engles, 481 F.3d 1243 (10th Cir. 2007), cert. denied, 552 U.S. 929 (Oct. 1, 2007).

United States v. Crabb, 221 F. App'x 722 (10th Cir. 2007), cert. denied, 552 U.S. 885 (Oct. 1, 2007).

Bolton v. Roberts, 219 F. App'x 761 (10th Cir. 2007), cert. denied, 552 U.S. 877 (Oct. 1, 2007).

Hill v. Kemp, 478 F.3d 1236 (10th Cir. 2007), cert. denied, 552 U.S. 1096 (Jan. 7, 2008).

United States v. Ruiz-Terrazas, 477 F.3d 1196 (10th Cir. 2007), cert. denied, 552 U.S. 850 (Oct. 1, 2007).

United States v. Torres-Laranega, 476 F.3d 1148 (10th Cir. 2007), cert. denied, 552 U.S. 872 (Oct. 1, 2007).

Pursley v. Estep, 216 F. App'x 733 (10th Cir. 2007), cert. denied, 552 U.S. 842 (Oct. 1, 2007).

United States v. Morales-Ramirez, 214 F. App'x 767 (10th Cir. 2007), cert. denied, 550 U.S. 980 (May 29, 2007).

United States v. Saunders, 209 F. App'x 778 (10th Cir. 2006), cert. denied, 550 U.S. 913 (Apr. 23, 2007).

United States v. Urias-Bojorquez, 205 F. App'x 706 (10th Cir. 2006), cert. denied, 549 U.S. 1300 (Mar. 19, 2007).

CERT. DISMISSED

Cook v. Rockwell Intern. Corp., 790 F.3d 1088 (10th Cir. 2015), cert. dismissed sub. nom. Cook v. Dow Chemical Company, 136 S. Ct. 2055 (May 19, 2016).

Muathe v. Fifth Third Bank, 627 F. App'x 732 (10th Cir. 2015), cert. dismissed, No. 15-7645 (May 11, 2016).

Farris v. Frazier, 599 F. App'x 851 (10th Cir. 2015), cert. dismissed, 136 S. Ct. 833 (Jan. 11, 2016).

Gregory v. Denham, 581 F. App'x 728 (Mem) (10th Cir. 2014), cert. dismissed, 136 S. Ct. 140 (Oct. 5, 2015).

Fogle v. Infante, 595 F. App'x 807 (10th Cir. 2014), cert. dismissed, 136 S. Ct. 58 (Oct. 5, 2015).

Robinson v. Kastner, 577 F. App'x 896 (Mem) (10th Cir. 2014), cert. dismissed, 135 S. Ct. 1016 (Jan. 12, 2015).

Park v. TD Ameritrade Trust Co., 481 F. App'x 449 (10th Cir. 2012), cert. denied, No 12-8419 (May 22, 2013).

Marian v. Socorro Elec. Co-op. (SEC) of New Mexico, 466 F. App'x 756 (10th Cir. 2012), cert. dismissed, 133 S. Ct. 661 (Nov. 26, 2012).

Griffin v. Gash, 317 F. App'x 782 (10th Cir. 2009), cert. dismissed, 556 U.S. 1280 (June 8, 2009).

United States v. DeWilliams, 315 F. App'x 81 (10th Cir. 2009), cert. dismissed, 557 U.S. 931 (June 29, 2009).

Griffin v. Astrue, 300 F. App'x 615 (10th Cir. 2009), cert. dismissed, 556 U.S. 1233 (May 18, 2009).

D'Amario v. Davis, No. 08-7677 (10th Cir. 2008), cert. dismissed, No. 08-7677 (Jan. 21, 2009).

United States v. Manning, 526 F.3d 611 (10th Cir. 2008), cert. dismissed, 555 U.S. 1091 (Dec. 19, 2008).

Cases not found on Westlaw

FILED
United States Court of Appeals
Tenth Circuit

September 18, 2008

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ARTHUR D'AMARIO, III,

Petitioner - Appellant,

v.

BLAKE DAVIS,

Respondent - Appellee.

No. 08-1191
(D.C. No. 1:07-CV-02257-ZLW)

ORDER

Before **KELLY**, **BRISCOE**, and **GORSUCH**, Circuit Judges.

The petitioner appeals the dismissal by the United States District Court for the District of Colorado of his petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2241. Because the petitioner has not demonstrated "a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal," *Caravalho v. Pugh*, 177 F.3d 1177, 1179 (10th Cir. 1999), we deny the petitioner leave to proceed on appeal without prepayment of fees.

In his petition, the petitioner challenged a criminal judgment entered by the United States District Court for the District of Rhode Island following his conviction for being a felon in possession of a firearm. He also alleged that the execution of his

sentence is illegal and unconstitutional because he is being denied credit for time served in state custody.

The district court dismissed the petition. The court concluded that the challenges to the legality of the conviction and sentence must be brought pursuant to 28 U.S.C. § 2255, and that § 2255 provides the petitioner with an adequate and effective remedy. The court also determined that the challenge to the execution of the sentence was the subject of a prior § 2241 petition, in which the claim was decided on the merits, and, therefore, the claim was barred because it was successive and abusive.

The court also denied leave to proceed on appeal *in forma pauperis*, determining that the appeal was not being taken in good faith and because the petitioner did not show the existence of a reasoned nonfrivolous argument on the law and facts in support of the issues raised on appeal. *See* 28 U.S.C. § 1915(a)(3).

Normally, "'[a] petition under 28 U.S.C. § 2241 attacks the execution of a sentence rather than its validity and must be filed in the district where the prisoner is confined. A [section 2255 motion] attacks the legality of detention, and must be filed in the district that imposed the sentence.'" *Haugh v. Booker*, 210 F.3d 1147, 1149 (10th Cir.2000) (quoting *Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir.1996)). Section 2241 "is not an additional, alternative, or supplemental remedy to 28 U.S.C. § 2255." *Bradshaw*, 86 F.3d at 166. Only if the petitioner shows that § 2255 is "inadequate or ineffective" to challenge the validity of a judgment or sentence may a prisoner petition for such a remedy under 28 U.S.C. § 2241. *Id.*

"Failure to obtain relief under § 2255 does not establish that the remedy so provided is either inadequate or ineffective." *Id*. (quotation omitted).

The petitioner has not established the inadequacy or ineffectiveness of 28 U.S.C. § 2255.

In addition, the court correctly concluded that the § 2241 claim was successive. *See* 28 U.S.C. § 2241(a); *McCleskey v. Zant*, 499 U.S. 467, 483-85 (1991); *George v. Perrill*, 62 F.3d 333, 334-35 (10th Cir. 1995). Although the petitioner represents that the previously filed § 2241 petition was dismissed without prejudice for failure to exhaust administrative remedies, this is not entirely correct. The first § 2241 petition was dismissed without prejudice, but a subsequent petition was denied on the merits. *See D'Amario v. Zenk*, 131 Fed. Appx. 381 (3d Cir. 2005) (unpublished). *See also discussion in United States v. D'Amario*, 350 F.3d 348, 352-53 (3d Cir. 2003). Accordingly the district court did not err in dismissing the § 2241 claim.

Permission to proceed on appeal *in forma pauperis* is **DENIED** and this appeal is **DISMISSED**.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

Ellen Rich Reiter

Ellen Rich Reiter
Deputy Clerk/Jurisdictional Attorney

FILED
United States Court of Appeals
Tenth Circuit

June 30, 2010

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SOJOURN CARE, INC.,d/b/a Sojourn Care of Tulsa, a Delaware corporation, Plaintiff-Appellant/Cross-Appellee, v. KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, Defendant-Appellee/Cross-Appellant.	Nos. 09-5031, 09-5066 (D.C. No. 4:07-CV-00375-GFK-PJC) (N.D. Okla.)

ORDER[*]

Before **HARTZ**, **GORSUCH**, and **HOLMES**, Circuit Judges.

These appeals are dismissed for lack of appellate jurisdiction. Sojourn Care Inc.'s complaint contains a single cause of action. It contends that a regulation used to calculate certain reimbursements to hospice providers such as itself (42 C.F.R. § 418.309) is contrary to Title XVIII of the Social Security Act (42 U.S.C. § 1395f(i)). So far, the district court has awarded Sojourn a

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[*] This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

declaratory judgment but deferred decision on certain other forms of relief requested by Sojourn until after a remand to the Provider Reimbursement Review Board (PRRB), for additional proceedings, can be completed. In these circumstances we lack a final judgment that might afford us appellate jurisdiction under 28 U.S.C. § 1291. *See Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 743-44 (1976). Neither, in these circumstances, is there a proper basis for the government's cross-appeal. The government, like Sojourn, will have an avenue for obtaining judicial review of any adverse decision by the district court when the case reaches a final judgment. *See Bender v. Clark*, 744 F.2d 1424, 1428 (10th Cir. 1984).

If we lack appellate jurisdiction to hear Sojourn's appeal under § 1291, Sojourn contends we should still issue a writ of mandamus. *See* 28 U.S.C. § 1651(a). But a writ of mandamus is a "drastic remedy" that may be "invoked only in extraordinary situations." *Barclaysamerican Corp. v. Kane*, 746 F.2d 653, 654 (10th Cir. 1984) (quotation marks omitted). This is not such a case. Sojourn can obtain meaningful review of the district court's rulings in the normal course, when proceedings finish. *See In re: Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1187 (10th Cir. 2009) ("[T]he party seeking issuance of the writ must have no other adequate means to attain the relief he desires" (quotation marks omitted)). And whether or not the district court is in error, a question we do not decide, its decision is not clearly and indisputably wrong, as it must be to warrant the

issuance of a writ. *See id.* (writ of mandamus may issue only when right to it is "clear and indisputable" (internal quotation marks omitted)).[**]

These appeals are **DISMISSED**.

Entered for the Court,



ELISABETH A. SHUMAKER, Clerk

[**] Sojourn has not sought to invoke our jurisdiction under 28 U.S.C. § 1292(a)(1), and it is our general practice to avoid passing on possible arguments in support of our jurisdiction that the parties themselves haven't raised and had the opportunity to join issue on. *Cf. Kaw Nation ex rel. McCauley v. Lujan*, 378 F.3d 1139, 1142 (10th Cir. 2004) ("[W]e need not consider a new argument in support of jurisdiction" not raised in a party's opening brief). We see no reason to depart from that practice in this case.

FILED
United States Court of Appeals
Tenth Circuit

June 8, 2012

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

OLOYEA D. WALLIN,

Plaintiff-Appellant,

v.

RODNEY ACHEN; MASCARENAS; BELL; T. STENZEL; R. BASTIDOS; DAVE ALLEN; JAMES ABBOT, Warden of CTCF; MASSEY; HENRY WILLIAMS; TOOMEY; BENEVIDEZ; FAZZINO; MARY ANN ALDRICH; TOFOYA; CARLAND; JANTZ; LOPEZ-MARTINEZ; LOPEZ, JOHN and JANE Doe of CDOC; ARISTEDES ZAVARAS, Executive Director of CDOC,

Defendants-Appellees.

No. 11-1201
(D.C. No. 1:10-CV-01317-LTB)
(D. Colo.)

ORDER

Before **TYMKOVICH**, **BALDOCK**, and **GORSUCH**, Circuit Judges.

Plaintiff-appellant Oloyea D. Wallin, a state prisoner, seeks to appeal the district court's orders dismissing his civil rights action, denying his motion for reconsideration, and denying his motion to amend the complaint. He has not paid the filing fee for this appeal, but seeks to proceed in forma pauperis (IFP) under 28 U.S.C. § 1915.

On April 16, 2012, we entered an order directing appellant to either pay the full amount of the filing fee forthwith or show cause why this appeal should not be dismissed because he had "struck out" under the Prison Litigation Reform Act ("PLRA"), *id.* § 1915(g), prior to filing this appeal on May 3, 2011. We granted his motion for an extension of time, allowing him until June 4 to respond and stating that no further extensions would be granted. Mr. Wallin failed to file a response by June 4, so we now proceed to rule on his IFP motion.

Under PLRA, prisoners initiating civil actions and appeals must pay the full amount of the filing fee, but they may pay the fee in monthly installments if they are granted leave to proceed IFP. *See id.* § 1915(b). PLRA further provides, however, that

> [i]n no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

Id. § 1915(g).

Prior to filing the present appeal, appellant, while incarcerated or detained, had filed at least three civil actions or appeals that were dismissed as frivolous, malicious, or for failure to state a claim upon which relief may be granted. In *Wallin v. Arapahoe County Detention Facility*, 244 F. App'x 214, 221 (10th Cir. 2007), we considered three of appellant's appeals, holding that appeals

No. 06-1376 and No. 06-1416 were frivolous and declaring two strikes under § 1915(g). The Supreme Court allowed appellant an extension of time until February 21, 2008, in which to file a petition for writ of certiorari from our decision, but the Supreme Court's website indicates that appellant did not file one. Thus, the two strikes we assessed in *Wallin v. Arapahoe County Detention Facility* ripened to be counted against appellant's civil filings on February 21, 2008, when his time to file a petition for writ of certiorari expired. *See Hafed v. Fed. Bureau of Prisons*, 635 F.3d 1172, 1175 (10th Cir. 2011).

In addition, in the district court case underlying appeal No. 06-1376, the district court dismissed appellant's complaint without prejudice because his claims were premature under *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). *See Wallin v. McCabe*, No. 06-cv-01322, slip op. at 3 (D. Colo. July 20, 2006). We noted in *Smith v. Veterans Administration*, 636 F.3d 1306, 1312 (10th Cir. 2011), that "[o]ur precedent holds that the dismissal of a civil rights suit for damages based on prematurity under *Heck* is for failure to state a claim." Moreover, "[i]t is irrelevant under § 1915(g) whether the district court affirmatively stated in the order of dismissal that it was assessing a strike." *Id.* at 1313. "In fact, because a district court's order of dismissal cannot count as a strike in this circuit until the prisoner 'has exhausted or waived his appeals[,]' *Jennings*[*v. Natrona Cnty. Det. Ctr. Med. Facility*], 175 F.3d [775,] 780 [(10th Cir. 1999)], it will be more usual that a district court's order of dismissal

will not state that it is a strike." *Id.* As a result, the dismissal in *Wallin v. McCabe* is a strike under § 1915(g), and it ripened to be counted against appellant's civil filings on February 21, 2008, when the extension of time allowed by the Supreme Court for appellant's petition for writ of certiorari in appeal No. 06-1376 expired.

Thus, appellant accumulated three strikes and "struck out" on February 21, 2008. As a result, the prepayment requirement imposed by § 1915(g) applies to this appeal, which appellant filed in this court on May 3, 2011. But he has neither paid the filing fee nor shown why he is not required to pay. We decline to consider his untimely response to our show cause order.

Appellant's motion for leave to proceed IFP is denied. The appeal is DISMISSED.

Entered for the Court



ELISABETH A. SHUMAKER, Clerk