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The Journal of the ACS Issue Groups

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Advance, the Journal of the Issue Groups of the American Constitution Society for Law and Policy (ACS), is published annually by ACS. Our mission is to promote the vitality of the U.S. Constitution and the fundamental values it expresses: individual rights and liberties, genuine equality, access to justice, democracy and the rule of law.

Each issue of *Advance* features a selection of Issue Briefs written for ACS by our network of scholars, advocates and practitioners in the preceding year on a variety of topics. ACS Issue Briefs—those included in *Advance* as well as others available at www.acslaw.org—are intended to offer substantive analysis of legal or policy issues in a form that is easily accessible to practitioners, policymakers and the general public. Some Issue Briefs tackle the high-profile issues of the day, while others take a longer view of the law, but all are intended to enliven and enrich debate in their respective areas. The Issue Briefs in *Advance* were published during the course of the year and thus may not reflect the most recent factual or legal developments. Publication dates are referenced in each article to provide the reader with context.

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Windsor, *Shelby County*, and the Demise of Originalism: A Personal Account*

Dawn Johnsen**

By the final day of the Supreme Court's 2012–2013 Term, when the Court issued decisions in challenges to two laws that discriminated against same-sex marriages,[1] a remarkable consensus anticipated essentially the outcomes announced. Court watchers expected that Justice-in-the-middle Anthony Kennedy would lead the Court cautiously toward protecting against sexual orientation discrimination and, in any event, would not set back the cause of marriage equality by upholding either law. Although a substantial and passionate minority of the American population continued to oppose the ability of gays and lesbians to marry, by June 26, 2013, the issue's eventual resolution seemed quite clear, and few believed that the Court would put itself on the "wrong side" of that history.[2]

A closely divided Court in *United States v. Windsor* met these expectations by declaring unconstitutional the section of the Defense of Marriage Act (DOMA) that limited marriage for federal law purposes to a man and woman.[3] A different five-Justice majority in *Hollingsworth v. Perry* declined to reach the constitutionality of similar discrimination in a state law, California's Proposition 8, by finding that the plaintiffs lacked standing.[4] The two decisions, in effect, ended more than one thousand forms of federal discrimination against married same-sex couples[5] and, by allowing the *Perry* district court ruling to stand, made California the thirteenth state, plus the District of Columbia, to permit same-sex couples to marry. Thirty percent of the U.S. population now lives in jurisdictions where women and men may marry or have their out-of-state marriages recognized regardless of sexual orientation and receive federal as well as state benefits associated with marriage.[6]

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* This Issue Brief was initially published in October 2013.

** Walter W. Foskett Professor of Law, Indiana University Maurer School of Law. I am deeply grateful for helpful suggestions from Jeannine Bell, John Hamilton, Bill Marshall and Jeff Powell, and also from my colleagues at Maurer School of Law, Daniel Conkle, Steve Sanders, Ryan Scott, and Deborah Widiss, all of whom will be publishing essays in a forthcoming issue of the *Indiana Law Journal* that arose out of a Spring 2013 ACS panel on *Windsor*. I also want to thank *Indiana Law Journal* editor-in-chief Richard Culbert and executive articles editor Chris Fyall for their outstanding work on the January 2014 *Windsor* symposium issue, which will include a version of this Issue Brief.

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

2 In 2013, for the first time a slight majority of Americans supported the legality of same-sex marriage. *In Gay Marriage Debate, Both Supports and Opponents See Legal Recognition as 'Inevitable'*, PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS (June 6 2013), http://www.people-press.org/2013/06/06/in-gay-marriage-debate-both-supporters-and-opponents-see-legal-recognition-as-inevitable/ [hereinafter PEW POLL]. *See also* Jeffrey M. Jones, *Same-Sex Marriage Support Solidifies Above 50% in U.S.*, GALLUP POLITICS (May 13, 2013), http://www.gallup.com/poll/162398/sex-marriage-support-solidifies-above.aspx [hereinafter GALLUP POLL] (finding 53% support and 45% opposition).

3 *Windsor*, 133 S. Ct. 2675.

4 *Perry*, 133 S. Ct. 2652.

5 *See* U. S. GEN. ACCOUNTING OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT (2004).

6 *States*, FREEDOM TO MARRY, http://www.freedomtomarry.org/states/.

The Court's invalidation of DOMA, and the very fact that the outcome was widely anticipated, marked an extraordinary evolution in constitutional law, as interpreted by the Court and as understood by the American people. *Windsor*'s discussion of the merits began by emphasizing the rapid and recent changes in how states and the public have approached the issue.[7] When Congress enacted DOMA in 1996, *every* state limited marriage to a man and a woman and many Americans had not seriously contemplated that it could be otherwise.

Justice Antonin Scalia alluded to that change, with the intent of discrediting its legitimate role in constitutional interpretation, during the March 2013 oral arguments when he pressed marriage equality advocate Theodore Olson to answer the question: "when did it become unconstitutional to exclude homosexual couples from marriage?"[8] This question foreshadowed the two principal grounds on which *Windsor* is constitutionally significant: first, for what it said about the substantive constitutional protections that apply to sexual orientation discrimination, and second, for the interpretive methodology the Court used to reach its conclusions. *Windsor*'s four opinions—one for the five-Justice majority and three for the four dissenting Justices—disagreed about precisely what the Court concluded, which may caution restraint in speculating about the case's future import.[9] This Issue Brief hazards the prediction that 2013 will be regarded as a critical year in the history of two distinct legal/political movements that first gained momentum in the 1980s: most obviously, strengthening the movement to combat sexual orientation discrimination and repression; and, more generally and less noted, weakening the movement to promote "originalism" in constitutional interpretation and American politics.

Paradoxically, in breaking new ground and interpreting the Fifth Amendment expansively to reflect the American people's changed understandings, the *Windsor* Court adhered to a traditional interpretive approach and implicitly rejected efforts, begun in earnest during the Reagan Administration, to substitute a form of originalism that would yield radically different interpretations across a great range of issues. Behind Justice Scalia's question at oral argument was a form of originalism, for which he has emerged as the best-known advocate, that seeks to interpret the Constitution with reference only to the text and the original meaning of the text defined at the most specific level of meaning at the time of the provision's adoption. In holding that DOMA violated "basic due process and equal protection principles," the Court instead relied heavily upon "the community's … evolving understanding of the meaning of equality."[10] *Windsor* thus reflects not only constitutional change in the direction of more expansive judicial protection of equal protection and due process, but also fidelity to a mainstream approach to interpreting the Constitution that considers a range of sources and methods and allows for the consideration of evolving social norms and constitutional understandings.

The exchange between Justice Scalia and Mr. Olson (who it is worth noting had served as a high-ranking official in the Reagan and George W. Bush administrations) conveys the essential difference in the competing approaches:

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[7] *See Windsor*, 133 S. Ct. at 2689.

[8] Transcript of Oral Argument at 38, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144).

[9] *See Windsor*, 133 S. Ct. at 2682 (Kennedy, J.), 2696 (Roberts, J., dissenting), 2697 (Scalia, J., dissenting), 2711 (Alito, J., dissenting).

[10] *Windsor*, 133 S. Ct. at 2693.

> Justice Scalia: [W]hen did it become unconstitutional to exclude homosexual couples from marriage? 1791? 1868, when the Fourteenth Amendment was adopted? …
>
> Mr. Olson: When—may I answer this in the form of a rhetorical question? When did it become unconstitutional to prohibit interracial marriages? When did it become unconstitutional to assign children to separate schools[?]
>
> Justice Scalia: It's an easy question, I think, for that one. At—at the time that the Equal Protection Clause was adopted….
>
> . . .
>
> Mr. Olson: There's no specific date in time. This is an evolutionary cycle.[11]

The Court, of course, had not yet ruled on the constitutionality of state discrimination and as of the writing of this Issue Brief, still has not. Indeed, it was so determined to avoid the issue in *Perry* that it may have reached the wrong conclusion on standing. In *Windsor*, the Court held DOMA unconstitutional on grounds tied to its particular facts: DOMA's "purpose and effect to disparage and to injure those whom the State, by it marriage laws, sought to protect in personhood and dignity."[12] Justice Scalia's *Windsor* dissent makes a strong case, however, that a holding that it is "unconstitutional to exclude homosexual couples from marriage" is just a matter of time, and perhaps not much time.[13]

In this Issue Brief, I accept Justice Scalia's invitation to focus on dates and consider how his question might best be answered with reference to relevant dates in the United States' constitutional history. This frame helps explain my expectation and my hope that the Court's decisions of 2013 will prove vital for the future of not only the substantive constitutional protections against marriage discrimination but also how the Court and "We the People" interpret the Constitution across a range of issues—and that those decisions will hasten the end of a narrow form of originalism that would be devastating to both "the liberty of the individual" and "the demands of organized society."[14] Beyond *Windsor*, I would point to the Court's decision issued a day earlier in *Shelby County* holding unconstitutional a core provision of the federal Voting Rights Act. Justice Scalia joined a bare five-Justice majority opinion despite its plain inconsistency with his professed originalist approach—to the detriment of racial equality and democracy.[15] Countless articles and books, of course, have been written about each of the vital dates and issues I briefly address. My observations will, by necessity, be selective and will include a few of a personal nature, based on my legal

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[11] Transcript of Oral Argument at 38–39, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144).

[12] *Windsor*, 133 S. Ct. at 2696.

[13] *Id*. at 2709–11 (Scalia, J., dissenting).

[14] Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting); *see also* Griswold v. Connecticut, 381 U.S. 479, 499 (1965) (Harlan, J., concurring).

[15] Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

work over the last quarter century as well as by virtue of simply having lived through a time of remarkable social and legal change.[16]

An important initial note about terminology: a political and legal movement during the 1980s adopted the label "originalism" in opposition to what it characterized as "activist," pro-rights, anti-federalism rulings of the Warren and the Burger Courts. How best to use the term today, however, is sharply and interestingly contested among those who endorse a more mainstream interpretive approach: some are content to cede the term while others seek to redefine it and talk in terms of "originalisms," plural, including to emphasize that they too care about original meaning. For example, Professor Jack Balkin has called for "living originalism,"[17] Justice Ruth Bader Ginsburg has asserted, "I count myself as an originalist too,"[18] and then-Supreme Court nominee Elena Kagan has declared, "we are all originalists."[19] Diversity exists, too, on the ideological right, seen, for example, in self-described originalist defenses of *Brown v. Board of Education*[20] and the Court's extension of constitutional protections against sex discrimination.[21] Justice Scalia has described himself as a "faint-hearted originalist"[22] and "an originalist and a textualist, not a nut,"[23] and he in fact at times has acknowledged the legitimacy of other interpretive sources such as precedent and the varying consequences of competing interpretations. Among the Justices, it is Justice Clarence Thomas who comes closest to principled adherence to a narrow form of originalism.[24]

Although I appreciate the desire among moderates and progressives not to cede the term, as well as the diversity of originalisms on the right, I feel it equally vital to recognize that, to the extent we are all originalists, we also all are living constitutionalists.[25] This Issue Brief principally addresses the popularly recognized 1980s form of originalism represented most prominently among the Justices by Justice Scalia, in

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[16] Before joining the faculty at Indiana University Maurer School of Law—Bloomington in 1998, I served as law clerk to Richard D. Cudahy on the U.S Court of Appeals for the Seventh Circuit (1986–87), staff counsel fellow at the ACLU Reproductive Freedom Project (1987–88), legal director of NARAL Pro-Choice America (1988–93), and deputy assistant attorney general (1993-96) and acting assistant attorney general (1997–98) for the Office of Legal Counsel at the U.S. Department of Justice.

[17] *Compare* JACK M. BALKIN, LIVING ORIGINALISM (2011), *with* DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010).

[18] Ariane de Vogue, *Justice Ginsburg Speaks About Gender Equality*, ABCNEWS (Nov. 18, 2011, 1:15 PM), http://abcnews.go.com/blogs/politics/2011/11/justice-ginsburg-speaks-about-gender-equality/.

[19] *Confirmation Hearing on the Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010) (statement of Elena Kagan).

[20] 347 U.S. 483 (1954).

[21] *See* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995); Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011).

[22] "I hasten to confess that in a crunch I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging." Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

[23] Nina Totenberg, *Justice Scalia, the Great Dissenter, Opens Up*, NPR (April 28, 2008, 7:32 AM), http://www.npr.org/templates/story/story.php?storyId=89986017.

[24] *See, e.g.*, McDonald v. Chicago, 130 S. Ct. 3020, 3050 (2010) (Justice Scalia "acquiesced" in "substantive due process" doctrine to invalidate state gun control measures). Many have noted the differences between Justice Scalia and Justice Thomas. *See, e.g.*, Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 7 (2006) ("This leaves Justice Thomas as the only justice who seems at all bound by originalist conclusions with which he may disagree.").

[25] *See* Dawn Johnsen, *Justice Brennan: Legacy of a Champion*, 111 MICH. L. REV. 1151, 1178–81 (2013) (reviewing SETH STERN & STEPHEN WERMEIL, JUSTICE BRENNAN: LIBERAL CHAMPION (2010)).

academia by Robert Bork, and in politics and government by President Reagan's Attorney General Edwin Meese.[26] That narrow and rigid originalism, which achieved its apex in 1986 with *Bowers v. Hardwick*'s upholding of a Georgia criminal ban on sodomy,[27] is utterly irreconcilable with *Windsor* and *Shelby County*. Those decisions, I believe, signal its demise.

I. 1791 AND 1868: ADOPTION OF THE FIFTH AND FOURTEENTH AMENDMENTS

A constitutional provision's meaning at the time of its adoption is an obvious and longstanding component of mainstream constitutional analysis. Justice Scalia's exchange with Mr. Olson, however, insists upon the year of adoption as a complete response, and the only legitimate one to his question. Hence his suggestion of the years of adoption of the Fifth and the Fourteenth Amendments: 1791 and 1868. Seeking thus to limit constitutional meaning to text and specific meaning at the time of ratification is the hallmark of the modern originalism movement. For an originalist, analysis of the constitutionality of DOMA or any discriminatory federal law is complicated by the fact that the Fifth Amendment, the source of relevant constraints on Congress, does not include an Equal Protection Clause (unlike the state-constraining Fourteenth Amendment). Both contain Due Process clauses.[28] Justice Scalia asked his question in *Perry* where the California law was at issue, so he appropriately referenced 1868 and "when the Equal Protection Clause was adopted" in response to Mr. Olson's rhetorical questions about racial segregation and bans on interracial marriage. For DOMA, however, the directly relevant text is the 1791 Due Process Clause.

It does not take a constitutional historian to appreciate that the specific original meanings of due process/liberty and equal protection in both 1791 and 1868 do not support constitutional protection against sexual orientation discrimination in marriage laws, state or federal. The *Windsor* Court flatly rejected Justice Scalia's originalism and went decidedly with Mr. Olson's "evolutionary" approach. Whether characterized as "living constitutionalism,"[29] "living originalism,"[30] or simply constitutional interpretation, the roots of *Windsor* in this respect can be traced to another early year, 1819, when the Court issued a decision widely viewed as foundational, *McCulloch v. Maryland*.[31] Chief Justice John Marshall there described the Constitution as "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."[32] The Court in *McCulloch* was interpreting the scope of congressional powers, but its reasoning for a flexible, evolving approach applies more generally:

> To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely,

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[26] *See infra* Part on 1986-87: *Bowers* and Bork.

[27] *See* 478 U.S. 186 (1986).

[28] "No person shall … be deprived of life, liberty, or property, without due process of law …." U.S. CONST. amend. V; "No state shall … 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." U.S. CONST. amend. XIV, § 1.

[29] *See* STRAUSS, *supra* note 17.

[30] *See* BALKIN, *supra* note 17.

[31] 17 U.S. (4 Wheat.) 316 (1819).

[32] *Id*. at 415 (emphasis omitted).

> the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.[33]

In another often-quoted passage, the Court further admonished, "[W]e must never forget, that it is a *constitution* we are expounding."[34] *McCulloch* remains a canonical decision, the foundation of the Court's interpretive approach, which Justice Breyer has characterized as including "traditional legal tools, such as text, history, tradition, precedent, and purposes and related consequences."[35]

II. 1954: *BROWN*

The central role Justice Anthony Kennedy would play on matters of sexual orientation discrimination became apparent at least a decade before *Windsor* when in 2003 he directed attention to the year 1954, and the Court's unanimous decision in *Brown v. Board of Education*,[36] as a critical point in evolving constitutional understandings.[37] Originalism's greatest challenge is the inability to square a court-ordered end to racial segregation of public schools with the specific meaning of the Fourteenth Amendment at its 1868 adoption, when Northern as well as Southern states maintained racially segregated schools and Congress itself segregated the schools in the District of Columbia.[38] Mr. Olson's rhetorical question—"When did it become unconstitutional to assign children to separate schools?"—evokes that the Framers clearly did not intend that the Fourteenth Amendment's Equal Protection Clause would desegregate the schools. That did not come until 1954 with *Brown*'s rejection of a narrow, rigid originalism: "[W]e cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when [*Plessy*] was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation."[39]

Particularly even more difficult on originalist grounds was *Brown*'s companion case *Bolling v. Sharpe*,[40] which held that the segregation of the District of Columbia schools was inconsistent with the "liberty" protected under the Due Process Clause of the Fifth Amendment—adopted in 1791, a time when enslaving African Americans was seen as consistent with this guarantee of "liberty." Acknowledging that the absence of

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[33] *Id*.

[34] *Id*. at 407 (emphasis in original).

[35] Stephen Breyer, Making Our Democracy Work: A Judge's View 74 (2010); *see also* H. Jefferson Powell, A Community Built on Words: The Constitution in History and Politics 205, 208 (2002) (Our nation's "shared constitutional first principles" include: "In constitutional argument it is legitimate to invoke text, constitutional structure, original meaning, original intent, judicial precedent and doctrine, political-branch practice and doctrine, settled expectations, the ethos of American constitutionalism, the traditions of our law and our people, and the consequences of differing interpretations of the Constitution.") (emphasis omitted); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885 (1985) (arguing the Framers did not intend their specific expectations to confine future generations).

[36] 347 U.S. 483 (1954).

[37] Lawrence v. Texas, 539 U.S. 558, 571–72 (2003) ("[W]e think that our laws and traditions in the past half century are of most relevance ….").

[38] *See* Richard Kluger, Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality 580–83 (2004).

[39] *Brown*, 347 U.S. at 492–93 (1954); *see also id*. at 489 (finding the evidence of intent "inconclusive").

[40] 347 U.S. 497 (1954).

an Equal Protection Clause made the issue "somewhat different," the Court disposed of the case in six short paragraphs.[41] The *Bolling* Court found that "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive."[42] The Court merged consideration of the two concepts as well as the standards of review that are familiar today, to the end that due process protects against at least some forms of discrimination that, when committed by states, are approached as a matter of equal protection. The Court cited what we today call strict scrutiny reserved for suspect classifications and fundamental liberties but then found that segregation was "not reasonably related to any proper governmental objective,"[43] the familiar standard of rational basis review. The Court offered little else on the precise effect the Fourteenth Amendment has on interpreting its predecessor amendment, except to note: "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."[44] *Bolling* would become a key precedent for *Windsor*'s treatment of the discrimination claim brought under the Fifth Amendment's Due Process Clause.[45]

III. 1965/1967: *GRISWOLD* AND *LOVING*

When Mr. Olson raised the closest precedent for marriage equality for gays and lesbians with his rhetorical response to Justice Scalia—"When did it become unconstitutional to prohibit interracial marriages?"—he well knew that the Court did not end state criminalization of interracial marriage until the startlingly late date of 1967, in *Loving v. Virginia*.[46] Even in the 1960s, the issue was a live one: counsel for the Lovings explained at oral argument that sixteen states banned interracial marriage, recently down from seventeen following Maryland's repeal and failed repeal efforts in Oklahoma and Missouri.[47] Of interest with regard to the issue of the timing of the Court's resolution of controversial constitutional questions, the *Loving* Court stressed it had never before addressed the issue,[48] even though it had dodged a challenge to that very Virginia statute a decade earlier when the Virginia Supreme Court upheld it.[49] Moreover, as the *Loving* Court noted, in 1883 it faced a closely related question and upheld Alabama's conviction and two-year sentence of an interracial couple for living together while unmarried.[50]

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[41] *Id*.

[42] *Id*. at 499.

[43] *Id*. at 499–500 ("Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective.").

[44] *Id*. at 500.

[45] *See* United States v. Windsor, 133 S. Ct. 2675, 2693 (2013). ("[DOMA] violates basic due process and equal protection principles applicable to the Federal Government. See U.S. CONST., Amdt. 5; *Bolling v. Sharpe*, 347 U.S. 497… (1954).").

[46] 388 U.S. 1 (1967).

[47] Transcript of Oral Argument, Loving v. Virginia, 288 U.S. 1 (1967) (No. 12-144).

[48] *See Loving*, 388 U.S. at 2. ("This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.").

[49] *See* Naim v. Naim, 197 Va. 80 (1955), *vacated*, 350 U.S. 891 (1955), *remanded to*, 197 Va. 734 (1956), *motion to recall denied*, 350 U.S. 985 (1956).

[50] *Loving*, 388 U.S. at 10 (citing Pace v. Alabama, 106 U.S. 583 (1883)). Alabama was the last state in the nation to have on its books a criminal ban on interracial marriage. *Alabama Considers Lifting Interracial Marriage Ban*, CNN.COM (Mar. 12, 1999, 1:32 PM), http://www.cnn.com/US/9903/12/interracial.marriage/.

The State of Virginia's defense centered on arguing that the statute punished whites and African Americans equally and thus did not discriminate on the basis of race, and, relatedly, that the Framers of the Fourteenth Amendment did not intend to prohibit such a use of race.[51] Mildred and Richard Loving both had been sentenced to a year in prison for marrying a person of a different race. The Court unanimously held that the ban plainly used race for the purpose of promoting "White Supremacy" in violation of equal protection of the laws.[52] The Court held further that the law deprived the Lovings of liberty in violation of due process by denying them "the freedom to marry," and cited for support *Skinner v. Oklahoma*, a 1942 case recognizing constitutional protection against forcible sterilization.[53]

Government prohibitions on same-sex marriage and sexual intimacy similarly are challenged today on both equal protection and liberty/due process grounds. But given the pervasive past discrimination against homosexuality and the unsettled status of even interracial marriage in the mid-1960s, there was no chance the Court would have recognized those parallels at that time and protected "the freedom to marry" someone of the same sex. Among the overwhelming historical evidence are statements to the effect that homosexuality is not constitutionally protected in various opinions in the 1965 case *Griswold v. Connecticut*, upholding the constitutional right of married couples to use contraception, and a 1961 dissent in *Poe v. Ullman* in which Justice Harlan dissented from the Court's dismissal of a challenge to the same Connecticut ban on contraception.[54] In all, five of the seven Justices in the *Griswold* majority joined opinions that distinguished the state's authority to ban homosexuality or illicit relationships.

Justice Harlan's *Griswold* concurrence has withstood the test of time and, together with his *Poe* dissent (which he incorporated by reference), describes still-current standards for interpreting the "liberty" protected substantively by the guarantee of due process.[55] Although Justice Harlan distinguished rights associated with homosexuality, his interpretive approach plainly left open the possibility that a future Court could reach a different conclusion. Citing *McCulloch*, he wrote of the importance of "approaching the text … not in a literalistic way, as if we had a tax statute before us, but

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[51] *See Loving*, 388 U.S. at 7–8.

[52] *Id*.

[53] *Id*. at 12 (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."). The Court also wrote of the two protections together. *Compare* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) ("[D]iscrimination may be so unjustifiable as to be violative of due process."), *with Loving*, 388 U.S. at 12 ("To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law.").

[54] *See* Griswold v. Connecticut, 381 U.S. 479, 499 (1965) (Goldberg, J., concurring) (Specifically referencing homosexuality, Justice Goldberg quoted Justice Harlan's *Poe* dissent, stating: "It is one thing when the State exerts its power either to forbid extra-marital sexuality … or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy."); *id*. at 505 (White, J., concurring) (stating that state policies against "promiscuous or illicit sexual relationships" are a "legitimate legislative goal"); Poe v. Ullman, 367 U.S. 497, 552 (1961) (Harlan, J., dissenting) ("The right of privacy most manifestly is not an absolute. Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced.").

[55] *See Griswold*, 381 U.S. at 500 (Harlan, J., concurring) (explaining his reasoning by reference to the "reasons stated at length in my dissenting opinion in *Poe v. Ullman*"); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 848–49 (1992) (citing Justice Harlan's dissent in *Poe* and subsequent concurrence in *Griswold*).

as the basic charter of our society, setting out in spare but meaningful terms the principles of government."[56] Constitutional interpretation must strike a balance between "the liberty of the individual" and "the demands of organized society" and have "regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing."[57] *Loving* and *Griswold* thus are vital to understanding the process by which discrimination against same-sex marriage has come to be understood as unconstitutional, in terms of the substantive protections of equal protection and liberty and the connections between the two, the appropriate interpretive methodology and role of original meaning, and the Court's practice of delaying resolution of controversial issues until it decides the time is right.

IV. 1973: *ROE* AND *FRONTIERO*

Justice Scalia is unquestionably correct that the Framers of the Fifth and Fourteenth Amendments did not specifically mean to protect women from sex discrimination or government control of their decisions about sexuality and childbearing.[58] In 1873, the pervasive unequal treatment of women included a Court decision upholding an Illinois law that excluded women from the practice of law, with Justice Bradley now infamously concurring to declare that "[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother."[59] As recently as 1961, the Court cited women's special role as mothers to uphold a state exclusion of women from mandatory jury service.[60]

In the early 1970s the Court began to protect women from laws that limited their opportunities to what the Framers in 1868 viewed as women's "natural" role. In 1973 Justice William Brennan's landmark plurality for four Justices in *Frontiero v. Richardson* made the case that sex discrimination should trigger heightened judicial scrutiny. Four additional Justices found the federal law, which gave men higher presumed benefits on the assumption they typically are heads of households, did not survive even mere rational basis review.[61] That same year, a seven-Justice majority held that the right to liberty substantively protected the right of women to be free from governmental interference with the decision whether to terminate a pregnancy, such that any significant governmental interference with abortion would be subject to strict scrutiny.[62]

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[56] *Poe*, 367 U.S. at 540 (Harlan, J., dissenting) (citing McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819)).

[57] *Id*. at 542.

[58] *See* Nina Totenberg, *Interviewing Scalia: Verbal Wrestling Match with a Master*, NPR (July 25, 2012, 6:23 PM), http://www.npr.org/blogs/itsallpolitics/2012/07/25/157384080/interviewing-scalia-verbal-wrestling-match-with-a-master.

[59] Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873). This is a useful point to remind of the diversities of originalism. It was in response to a law professor's originalist argument that women were not protected under the Equal Protection Clause that Justice Ginsburg, a chief advocate in the 1970s for constitutional protection against sex discrimination, declared: "I have a different originalist view. I count myself as an originalist too, but in a quite different way from the professor." de Vogue, *supra* note 18.

[60] Hoyt v. Florida, 368 U.S. 57, 62 (1961) ("[A] woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State … to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.").

[61] Frontiero v. Richardson, 411 U.S. 677, 691–92 (1973); *see also* Craig v. Boren, 429 U.S. 190, 197–98 (1976) (adopting intermediate scrutiny rather than strict scrutiny as the form of heightened scrutiny appropriate for sex discrimination).

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

These developments for women would prove critical for the equality and liberty of gays and lesbians, but the Court and the country certainly were not yet ready to make those connections at the time. In 1972 the Supreme Court dismissed, on what was supposed to be a mandatory appeal, a constitutional challenge to a Minnesota statute that limited marriage to heterosexual couples; Justice Scalia referenced the case in his rhetorical questioning of Mr. Olson, in suggesting as a possible date: "some time after *Baker*, where we said it didn't even raise a substantial Federal question?"[63] Nor was the Court close to ready to recognizing restrictions on women's reproductive liberty as a form of sex discrimination.[64] Later criticism of the *Roe* Court for being inadequately sensitive to that connection tends to lack adequate grounding in historical reality, just as does criticism that *Roe* set back reproductive rights by getting too far ahead of public opinion.[65] Indeed, throughout the 1970s, many equality advocates argued *against* the possible connections between discrimination on the basis of sex, on the one hand, and restrictions on abortion or homosexuality, on the other, due to the ongoing and ultimately unsuccessful efforts to ratify the Equal Rights Amendment. Until the time for ratification expired in 1982, *opponents* of the ERA argued that it would be used to the extreme ends of legalizing homosexuality and protecting access to abortion.[66] Even today, sex discrimination challenges to restrictions based on abortion or sexual orientation, although to my mind theoretically strong, generally have not prevailed. In my experience working in advocacy, the terms of legal and political advocacy are greatly affected by public opinion and, at this critical juncture (and undoubtedly through today), "women's rights" and "women's liberty" polled far worse than the popular "right to privacy" or the concept of leaving the abortion decision to women in consultation with physicians, husbands and clergy—as opposed to giving that private decision to politicians. Justices increasingly have noted the equality implications of abortion restrictions, but the Court still has not directly made the doctrinal connection to equal protection.[67] Most recently, in 2007, Justice Ginsburg's four-Justice dissent in *Gonzales v. Carhart* chastised the five-Justice majority for using reasoning in upholding abortion restrictions that "reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited."[68]

V. 1986–87: *BOWERS* AND BORK

Many readers will have personal markers from which to consider Justice Scalia's intriguing question and the social and constitutional change of the last quarter century. I graduated from law school in 1986, the year the Court held by a five to four vote in *Bowers v. Hardwick* that the Constitution did not protect against laws that made it a crime for consenting adults of the same sex to be physically intimate in the privacy

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[63] Transcript of Oral Argument at 38, Hollingsworth v. Perry, 133 S. Ct. 2652 (No. 12-144) (discussing Baker v. Nelson, 409 U.S. 810 (1972)).

[64] *See* Geduldig v. Aiello, 417 U.S. 484 (1974) (describing discrimination on the basis of pregnancy as not sex discrimination, but discrimination between pregnant and non-pregnant persons).

[65] *Roe*'s companion case, *Doe v. Bolton*, involved restrictions short of criminal bans and thus makes this even less plausible. 410 U.S. 179 (1973). *See* Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028 (2011).

[66] *See generally* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323 (2006).

[67] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747 (1986).

[68] 550 U.S. 124, 185 (2007) (Ginsburg, J., dissenting).

of their own homes.[69] A few months later, Justice Scalia joined the Court (with a confirmation vote of ninety-eight to zero) to succeed William Rehnquist, who was appointed Chief Justice. The next year brought the retirement of Justice Lewis Powell, a critical fifth vote in *Bowers* as well as in cases affirming *Roe v. Wade* and protecting against sex discrimination.[70] President Reagan nominated then-Court of Appeals for the D.C. Circuit Judge Robert Bork.

These events will be familiar to many. My attention was particularly keen because I was completing a one-year fellowship at the American Civil Liberties Union and most seriously considering two jobs: legal director of a reproductive rights organization at a time *Roe* seemed in jeopardy, and staff attorney at the ACLU's then-fledgling LGBT project when combatting criminal sodomy laws and employment and AIDS-related discrimination topped the agenda (and certainly not marriage equality). I vividly recall that, of the two, LGBT issues seemed far more controversial and difficult to foresee success; *Roe*, although in immediate jeopardy in the Court, enjoyed strong and consistent support among the American public. In the years since, the legal and political standing of the two sets of issues, which are closely aligned in many doctrinal and theoretical respects, have dramatically flipped in ways very few would have predicted.[71] My personal response to "when did it become unconstitutional to exclude homosexual couples from marriage" is that the evolution has been astounding since I was admitted to the bar, twenty-six years ago, and the events of 1986–1987, the year before my bar admission, were central to that progress.

The *Bowers* Court upheld the application to "consensual homosexual sodomy" (declining to address heterosexual sodomy) of a Georgia law that imposed criminal penalties of one to *twenty years* imprisonment for engaging in oral or anal sex.[72] Michael Hardwick was arrested for having consensual oral sex in his own bedroom with a man. In a remarkably short opinion that relied heavily on specific original meaning, the Court cited all of the sodomy bans on the books of all thirteen states when they ratified the Bill of Rights and the bans in place in all but five of the then-thirty seven states at the time of the Fourteenth Amendment's ratification.[73] The Court went beyond narrow originalism concerns and also noted that twenty-four states continued to ban private consensual sodomy in 1986.[74] Beyond that, the Court said little and was remarkably dismissive of what it called a "facetious" claim.[75] It declared that none of the liberties it previously had found within the fundamental right to privacy "bears any resemblance" to Hardwick's claim and that "[i]t is obvious to us" that a fundamental right of homosexuals to engage in consensual sodomy is neither "deeply rooted in this Nation's history and tradition" nor "implicit in the concept of ordered liberty."[76] Justice Powell, who later expressed regret for casting a

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[69] *See* 478 U.S. 186 (1986).

[70] *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982); *Thornburgh*, 476 U.S. 747.

[71] My decision was made easy when Nan Hunter, then director of the ACLU LGBT project, offered the excellent advice that I should take the legal director position—and did not offer me the other.

[72] *Bowers*, 478 U.S. 186 (1986).

[73] *Id*. at 192–93 & nn.5–7.

[74] *Id*. at 193–94.

[75] *Id*. at 194.

[76] *Id*. at 190, 192, 194.

critical fifth vote, authored a concurrence, signaling his ambivalence by suggesting the law might violate the Eight Amendment, an argument not presented to the Court.[77]

When in 1987 President Reagan nominated Judge Robert Bork to Justice Powell's seat, Bork was originalism's intellectual leader. He also had authored an opinion, which *Bowers* cited, that held against a claim of sexual orientation discrimination.[78] Attorney General Edwin Meese was originalism's chief public advocate. Even before President Reagan appointed Meese in 1985, his administration pursued substantial constitutional change in favor of an approach to federalism that would enhance state sovereignty and diminish congressional power and in opposition to the pro-rights "activism" of the Warren Court continued by the Burger Court under Justice William Brennan's leadership. Chief Justice Rehnquist was the Court's leader in this regard. Meese's principal contribution was to make Judge Bork's form of originalism the centerpiece of that agenda, even where it actually did not fit (as in affirmative action and congressional authority), through public advocacy, lengthy Department of Justice reports, government litigation, and judicial appointments.[79] To give just one example, a Department of Justice report directing government litigators to feature originalism selected *Bowers* as a model of originalism and listed as "inconsistent" with originalism and thus illegitimate (among many others): *Skinner v. Oklahoma*'s protection against forced sterilization, *Griswold v. Connecticut*'s protection of the right of a married couple to use contraception, *Loving v. Virginia*'s recognition of a right to marry, and *Roe v. Wade*'s protection of the right to decide whether to have an abortion.[80] The report described the protection of women from discrimination under heightened judicial scrutiny as "tenuous at best" and the recognition of any additional classes protected under equal protection analysis as illegitimate.[81]

The Reagan Administration relied heavily upon Judge Bork's writings.[82] The Senate refused to confirm Judge Bork, on a 58 to 42 vote, largely for the views expressed in those same writings. All of the issues discussed to this point in this chronology were the subject of intense questioning of Judge Bork in confirmation hearings that gripped the nation, paramount among them his views against *Griswold* and constitutional protection for a right of privacy.[83] President Reagan ultimately nominated, and the Senate confirmed, Anthony Kennedy to Justice Powell's seat, an event that would prove of great consequence for the direction of the Court. In 2008, long-time *New York Times* Supreme Court reporter Linda Greenhouse, in reflecting on a thirty-year illustrious career covering the Court, astutely captured the core difference between Robert Bork and Anthony Kennedy: "Judge Bork's constitutional vision,

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[77] *See id*. at 197 (Powell, J., concurring). *See also* Joan Biskupic & Fred Barbash, *Retired Justice Lewis Powell Dies at 90*, WASH. POST (Aug. 26, 1998), http://www.washingtonpost.com/wpsrv/national/longterm/supcourt/stories/powell082698.htm (quoting Justice Powell as saying that he "probably made a mistake in [*Bowers*].").

[78] Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984).

[79] For extensive discussion (with citations) of the leadership provided to the 1980s originalism movement by Judge Bork, Chief Justice Rehnquist, and Attorney General Meese, see Johnsen, *supra* note 25, at 1167–81; Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 385–406 (2003).

[80] OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION 78–83 (1988) [hereinafter GUIDELINES] (listing by issue examples of Supreme Court opinions the Reagan Administration believed were "consistent" with originalism and those that were wrongly decided).

[81] *Id*. at 78.

[82] *See, e.g.*, *id*. at 3.

[83] *See generally* MARK GITENSTEIN, MATTERS OF PRINCIPLE: AN INSIDER'S ACCOUNT OF AMERICA'S REJECTION OF ROBERT BORK'S NOMINATION TO THE SUPREME COURT (1992).

anchored in the past, was tested and found wanting, in contrast to the later declaration by Judge Anthony M. Kennedy, the successful nominee, that the Constitution's framers had 'made a covenant with the future.'"[84]

VI. 1992: *CASEY*

Noteworthy among the many consequential cases in which Robert Bork likely would have voted differently than Justice Kennedy is the 1992 decision *Planned Parenthood v. Casey*.[85] The events of this period remain vivid to me: at the time I served as the legal director of a reproductive rights organization that had just helped lead opposition to the nomination of Clarence Thomas to replace retiring Justice Thurgood Marshall, in part because it seemed virtually certain he would provide the fifth vote to overrule *Roe*.[86] In *Casey*, Justice Thomas voted as expected and joined Justice Scalia and Roe's two original dissenters, William Rehnquist and Byron White.[87] But Justice Kennedy's vote surprised all sides: he coauthored an extraordinary "joint" opinion with Justices Sandra Day O'Connor and David Souter that was joined by a total of five Justices in parts that reaffirmed "*Roe*'s essential holding."[88]

The five Justices in the *Casey* majority parted ways on some particulars vital to women's reproductive liberty,[89] but they found remarkable agreement on the issues directly relevant to Justice Scalia's question about the timing of protections related to sexual orientation. The *Casey* joint opinion quoted extensively from Justice Harlan's *Poe*/*Griswold* approach to fundamental rights—which the Court in *Bowers* had ignored entirely.[90] It reaffirmed application of that approach to the right to use contraception not only for married couples, but also, as the Court had subsequently held, for unmarried individuals and minors, stating "[w]e have no doubt as to the correctness of those decisions."[91] The Court also forcefully rejected Justice Scalia's narrow originalist approach as "inconsistent with our law."[92]

The *Casey* Court further emphasized the importance of constitutional change in its extended discussion of stare decisis. In discussing *Brown*'s overruling of *Plessy*, the Court emphasized the constitutional relevance of society's evolving *understanding* of facts: "Society's understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896."[93] The Court declared that "*Plessy* was wrong the day it was decided" but explained, in language *Windsor* would echo, why the Court could not appreciate that at the time: "[*Brown* is] comprehensible as the Court's response to facts that the

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[84] Linda Greenhouse, *2, 691 Decisions*, N.Y. TIMES, July 13, 2008, at WK1.

[85] 505 U.S. 833 (1992).

[86] *Cf.* Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (Justice Kennedy joined a four-Justice plurality that applied only rational basis review to uphold abortion restrictions). The nomination ended in Thomas's confirmation by a vote of 52 to 48, the narrowest margin in the Supreme Court's history.

[87] *Casey*, 505 U.S. at 944 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

[88] *Id*. at 843, 846.

[89] Chief Justice Rehnquist's dissent in fact charged that the joint opinion "retains the outer shell of *Roe v. Wade*, but beats a wholesale retreat from the substance of the case." *Id*. at 944 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (citation omitted).

[90] *Id*. at 847–50.

[91] *Id*. at 852.

[92] *Id*. at 847 ("It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.").

[93] *Id*. at 863.

country could understand, or had come to understand already, but which the Court of an earlier day, as its own declarations disclosed, had not been able to perceive."[94]

VII. 1996: DOMA AND *ROMER*

When Congress passed DOMA in 1996 by overwhelming margins and President Bill Clinton signed it into law, I was a deputy assistant attorney general in the U.S. Department of Justice's Office of Legal Counsel (OLC), which advises the President on constitutional and other legal (as opposed to policy) questions. I recall significant time spent during my five years at OLC on several legal issues related to sexual orientation, in part driven by President Clinton's strong opposition to sexual orientation discrimination, including the "Don't Ask, Don't Tell" policy, the Employment Non-Discrimination Act, legislation to protect against hate crimes committed because of the victim's sexual orientation, legislation that required the military to discharge HIV-positive individuals, and the provision of the Colorado Constitution at issue in *Romer v. Evans*.[95] These issues raised complex legal questions, but DOMA did not.

Then-head of OLC (and my direct boss) Walter Dellinger recently noted that the Department of Justice's statement at the time was "carefully worded to avoid opining that the Justice Department *itself* believed DOMA was constitutional"[96] and instead stated: "The Department of Justice believes that the Defense of Marriage Act would be sustained as constitutional if challenged in court …."[97] This statement clearly was an accurate assessment at the time. The Court would not overrule *Bowers v. Hardwick* for another six years, and if a state could send a gay couple to prison for up to twenty years for their relationship, the federal government certainly did not have to afford the benefits associated with marriage to the couple—particularly at a time no state allowed same-sex couples to marry. Even among those who thought DOMA terrible policy and *Bowers* wrongly decided, few could have imagined that in seventeen years the Court would strike it down or that most Americans would oppose it.[98] In 1996 Gallup for the first time polled the American public on the question of same-sex marriage: 27% favored legal recognition of same-sex marriages and 68% stated opposition.[99] That same year, the Court decided *Romer v. Evans* on narrow, fact-dependent, equal protection grounds that would prove important precedent for *Windsor*. The Court held that a Colorado constitutional provision that prohibited local governments from enacting measures to protect against sexual orientation discrimination failed even rational basis review.[100]

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[94] *Id*.

[95] 517 U.S. 620 (1996); *see The Clinton-Gore Administration: A Record of Progress for Gay and Lesbian Americans*, WELCOME TO THE WHITE HOUSE, http://clinton2.nara.gov/WH/Accomplishments/ac399.html (archival version of the Clinton Administration White House website).

[96] Walter Dellinger, *Supreme Court 2013: The Year in Review*, SLATE (June 23, 2013, 10:28 PM) (emphasis in original), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/doma_and_the_voting_rights_act_the_supreme_court_can_strike_down_one_and.html.

[97] *The Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. 2 (1996) (letter from Andrew Fois, Assistant Att'y Gen.).

[98] *See, e.g.*, Linda Greenhouse, *Current Conditions*, N.Y. TIMES (June 26, 2013, 6:57 PM), http://opinionator.blogs.nytimes.com/2013/06/26/current-conditions/?_r=0 ("When Congress enacted DOMA … it was hardly thinkable that the Supreme Court … would strike the statute down less than two decades later.").

[99] GALLUP POLL, *supra* note 2.

[100] The Colorado provision, enacted by statewide initiative, prohibited measures to protect "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." *Romer*, 517 U.S. at 624.

VIII. 2003: *LAWRENCE*

By 2003 public opinion had begun to change, with 33% supportive of recognition of same-sex marriage and 58% opposed,[101] and that year the LGBT movement achieved a tremendous victory with the Court's overruling of *Bowers*. Professor Jack Balkin posted the following hypothetical response to Justice Scalia's question, under the title "Supreme Court Arguments We'd Like to See":

> JUSTICE SCALIA: You—you've led me right into a question I was going to ask.... I'm curious, when -when did—when did it become unconstitutional to exclude homosexual couples from marriage? 1791? 1868, when the Fourteenth Amendment was adopted? ...
>
> MR. OLSON: Well, according to your dissent in *Lawrence v. Texas*, the Court decided that issue in 2003.[102]

Lawrence's five to four overruling of *Bowers* and invalidation of consensual sodomy prohibitions—with an additional vote from Justice O'Connor for the outcome, on more limited grounds—dramatically changed DOMA's prospects.[103] In striking down criminal prohibitions on consensual sodomy under a due process analysis, Justice Kennedy wrote eloquently about the harms such laws inflict to dignity, liberty, and equality. More generally, and of enormous consequence for marriage equality, the Court strongly rejected Justice Scalia's originalism as an appropriate methodology and relied heavily on the approach of the *Casey* joint opinion:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[104]

The Court, however, expressly reserved the issue of marriage, writing that the case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[105] Justice Scalia responded: "Do not believe it."[106] Accusing the Court of deception, he wrote, "[t]he Court today pretends ... that we need not fear judicial imposition of homosexual marriage ...."[107] Justice Scalia interpreted the Court's opinion as definitely (and wrongly) deciding

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[101] Gallup did not ask the question in 2003, but Pew obtained this result to a similar question. PEW POLL, *supra* note 2.

[102] Jack Balkin, *Supreme Court Arguments We'd Like to See*, BALKINIZATION (Mar. 26, 2013, 8:30 PM), http://balkin.blogspot.com/2013/03/supreme-court-arguments-wed-like-to-see.html.

[103] *See* Lawrence v. Texas, 539 U.S. 558 (2003).

[104] *Id*. at 578–79.

[105] *Id*. at 578.

[106] *Id*. at 604 (Scalia, J., dissenting).

[107] *Id*.

the issue: "This case 'does not involve' the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court."[108]

IX. 2013: *WINDSOR* AND *SHELBY COUNTY*

As of the writing of this Issue Brief in 2013, the Court still has not held that it is "unconstitutional to exclude homosexual couples from marriage." *Windsor* reached only the federal government's discrimination against marriages that states have chosen to recognize. The federal government's deviation from its traditional recognition of state marriages raised suspicions, confirmed by the Court, of a lack of legitimate purpose. In a dissent that strongly echoed his *Lawrence* dissent, Justice Scalia accused the Court of intentionally "fooling … readers" about the import of its decision.[109] He ridiculed the Court for "jaw-dropping" and "rootless and shifting"[110] reasoning, "legalistic argle-bargle"[111] that he speculated the Court had designed "to support its pretense" that it left "the second, state-law shoe to be dropped later,"[112] which he predicted "will of a certitude"[113] happen. An imagined response along Professor Balkin's lines thus now might add: "And, Justice Scalia, according to your *Windsor* dissent, the Court eliminated any remaining doubt in 2013."

To conclude this chronology, I consider 2013's significance both in strengthening the marriage equality movement (along the lines Justice Scalia predicts but deplores) and in diminishing the 1980s originalism movement (perhaps something Justice Scalia fears, which may help explain the bitter tone of his *Lawrence* and *Windsor* dissents). Regarding future marriage equality claims, the four dissenters are not all with Justice Scalia: all express strong views that DOMA is constitutional, but contrary to Justice Scalia (joined only by Justice Thomas in the merits discussion), Chief Justice Roberts and Justice Alito emphasized the limited nature of the Court's holding and the influence of federalism concerns that would not be present in a state law challenge.[114] Their analysis seems designed to encourage litigants and lower courts (and perhaps a future changed Court) to distinguish *Windsor*, while Justice Scalia's dissent surely will be cited in support of challenges to state discrimination.[115]

Chief Justice Roberts and Justice Alito are technically correct about the limited and restrained nature of *Windsor*'s holding, but Justice Scalia seems accurate in forecasting how the current Court will vote. A portion of his dissent cleverly quotes the Court's opinion at length, omitting words that limit the reasoning to the federal context.[116] He opines that the ease with which the passages are transposable is deliberate, intended to

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[108] *Id*. at 605.

[109] United States v. Windsor, 133 S. Ct. 2675, 2705 (2013) (Scalia, J., dissenting).

[110] *Id*. at 2698, 2705.

[111] *Id*. at 2709.

[112] *Id*. at 2705.

[113] *Id*. at 2710.

[114] *See id*. at 2696 (Roberts, J., dissenting), 2711 (Alito, J., dissenting).

[115] *See id*. at 2697 (Scalia, J., dissenting). Justice Scalia nonetheless encouraged lower courts to "take the Court at its word and distinguish away." *Id*. at 2709. The day of decision, Professor Laurence Tribe provided an insightful analysis of the contradictions and "troublesome cynicism" in Justice Scalia's dissent and the "delicate blend of principle and politics" behind the Supreme Court's decision. *See also* Larry Tribe, *DOMA, Prop 8, and Justice Scalia's Intemperate Dissent*, SCOTUSBLOG (June 26, 2013, 2:24 PM), http://www.scotusblog.com/2013/06/doma-prop-8-and-justice-scalias-intemperate-dissent/.

[116] *Windsor*, 133 S. Ct. at 2709–2710 (Scalia, J., dissenting).

facilitate that last step toward full marriage equality.[117] Justice Scalia further charged the Court with in effect calling DOMA's supporters "monsters," "enemies of the human race," "enem[ies] of human decency," and people with "hateful hearts."[118]

The Court does not come close to meriting such charges, nor is anything underhanded about ruling modestly about only the federal law at issue. A broader ruling that reached the appropriate standard of review for sexual orientation discrimination would have provided clearer direction, but the Court unsurprisingly instead applied the enhanced form of rational basis review from *Moreno*, *Cleburne*, and *Romer*, as well as the early sex discrimination cases, where the Court saw reason for suspicion and "careful consideration" including of the actual purpose behind the discrimination.[119] The *Windsor* majority took great care to explain the process of evolution in Americans' views on marriage, for example, describing "the beginnings of a new perspective, a new insight."[120] The point is not that DOMA's purpose reveals bad people who are enemies of human decency, but that people of good will and thoughtful consideration can evolve in their understandings of human dignity and equality—as we as a nation have in our understanding of why *Plessy* was wrong and why it was illegitimate (though understandable) for the government to privilege men based on a presumption they are the family breadwinners. Someone who once failed to recognize women's "pedestal" as a cage is no "monster" with a "hateful heart"—but today we do recognize the cage.[121]

Barring a change in the composition in the Court by the replacement of one of the five in the *Windsor* majority—and I would predict probably even then—the Court almost certainly will hold it "unconstitutional to exclude homosexual couples from marriage" and likely soon. Closely related, I predict that 2013 will accelerate the demise of the 1980s school of originalism. The *Windsor* majority adheres to and strengthens traditional interpretive methods that allow doctrinal evolution in response to social changes, as revealed in *Lawrence*, *Casey*, *Griswold*, *Loving*, and *Brown*. Indeed, those earlier cases may suggest that Scalia/Bork/Meese originalism was all but dead even before *Windsor*; the now-discredited 1986 *Bowers* opinion stands as its modern high-water mark.

Focusing on the decline of 1980s originalism as a legal doctrine, however, would miss its significance as a political movement and organizing device that continues today, especially within the Republican Party, as evidenced in judicial confirmation hearings and the Tea Party movement.[122] It is in combatting 1980s originalism as an organizing and rhetorical device used to delegitimize progressive constitutionalism that 2013 may prove particularly consequential. The ultimate achievement of

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[117] *Id*. at 2710.

[118] *Id*. at 2707–2711.

[119] The Court twice quoted *Romer*'s call for "careful consideration" of "discriminations of an unusual character." *Id*. at 2692–2693 (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)); *see also* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

[120] *Windsor*, 133 S. Ct. at 2689.

[121] For example, even as Justice Brennan wrote his landmark *Frontiero* plurality opinion, he initially refused to hire female law clerks and expressed the view he would not be able to serve on the Court if a woman ever were appointed. Frontiero v. Richardson, 411 U.S. 677, 684 (1973); STERN & WERMIEL, *supra* note 25, at 386–77.

[122] From the outset and increasingly over time, originalism has proven far more vital as political matter. *See* Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 554 (2006) ("Since the 1980s, originalism has primarily served as an ideology that inspires political mobilization and engagement.").

marriage equality throughout the nation now appears a matter of time, in large part because younger Americans are by far the most supportive. Indeed, 72% of Americans, and 59% of even those opposed to allowing same-sex marriage, describe an end to marriage discrimination as "inevitable."[123] And marriage equality as a constitutional matter is simply irreconcilable with any rigidly narrow form of originalism, perhaps even more inescapably than was the case with *Brown*, *Loving*, *Frontiero*, and *Griswold*, both as a methodological matter and, as important, in ways apparent to an American public that has lived through and increasingly embraces constitutional change at dramatic odds with the Framers' original expectations.[124] As more and more Americans see family, friends, and neighbors who are gay and lesbian have their marriages treated under the law with equal dignity, as Walter Dellinger has observed, "at work" will be "the enormous effect" of what Professor Charles Black, writing of race, described as the "normative power of the actual."[125]

The year 2013 may also prove significant in the demise of 1980s originalism because of a decision the Court issued the day before *Windsor* and *Perry*. At the same time Justice Kennedy led the Court to advance equality for gays and lesbians, he joined the *dissenting* Justices in *Windsor* to form a majority to invalidate a core provision of the federal Voting Rights Act, to the detriment of racial equality in political participation.[126] A thorough discussion of *Shelby County* is beyond the scope of this Issue Brief, but worthy of note, in addition to the strikingly different outcomes for race and sexual orientation, is the fact Justices Scalia and Thomas abandoned originalism and joined an opinion that focused on the changed conditions for racial minorities in the years since Congress first passed the Act.[127] The Court concluded that the improved political standing of racial minorities meant that Congress's intrusions on state sovereignty no longer were justified—notwithstanding that the section of the Fifteenth Amendment at issue by its plain and original meaning conferred on Congress the authority both to intrude upon state sovereignty to protect equality in voting and, equally fundamental, to make any necessary judgments about what current conditions require. Justice Ginsburg's dissent detailed the arguments from the constitutional text and original meaning, as well as other considerations that dictated judicial deference to Congress.[128] The majority did not directly dispute that rational basis review was the appropriate standard, but it in fact applied a heightened form of rational basis review and in the end inappropriately substituted its judgment for that of Congress.[129]

Shelby County, of course, is far from the first example of unprincipled reasoning from an originalist Justice, but it makes the top of my personal list, along with Justice Scalia's concurrence in *Adarand*, which similarly held unconstitutional a federal

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[123] Pew Poll, *supra* note 2.

[124] Professor Bill Marshall has powerfully demonstrated the utter failure of rigid originalism to explain several landmark cases. William P. Marshall, *Progressive Constitutionalism, Originalism, and the Significance of Landmark Decisions in Evaluating Constitutional Theory*, 72 Ohio St. L.J. 1251 (2011).

[125] Dellinger, *supra* note 96.

[126] *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

[127] *See id*.

[128] *Id*. at 2632 (Ginsburg, J., dissenting). One "success" of 1980s originalism may be the heightened attention of judges, scholars, and advocates to originalism, including in an effort to hold Justices Scalia and Thomas accountable.

[129] *See id*. (majority opinion).

provision designed to benefit racial minorities.[130] Although both opinions deviated from the originalism generally promoted by the Reagan/Meese agenda, they both fulfilled objectives endorsed in that agenda—specifically, the expansion of state sovereignty, the diminishing of congressional authority to enact legislation to protect the rights of racial minorities, and an end to affirmative action.[131]

X. CONCLUSION

I conclude this Essay with another chronology, this one of a personal nature. The day after the Court decided *Windsor*, my sister Jennifer Johnsen celebrated her fourth wedding anniversary, and she posted the following on her Facebook page to explain the legal trajectory of her relationship with my sister-in-law Dawn Guarriello:[132]

> We have more anniversaries than most couples, which I know is confusing! Here's the breakdown for those of you who asked:
>
> 9/6/86—started dating
>
> 8/10/96—commitment ceremony (we thought there was a good chance we'd never be able to get married)
>
> 6/27/09—state marriage (in CT because NY wouldn't perform them but recognized out-of-state same-sex marriages)
>
> 9/6/09—NY wedding with family and friends (we recycled our original anniversary)
>
> And now finally on 6/26/13 we have a legally fully recognized marriage[133]

As I read this post, I was struck of course by the injustice and personal cost, and also by the connections between the personal and the legal. Jennifer and Dawn have been together for twenty-seven years, since 1986, coincidentally the year the Court held in *Bowers* that they could constitutionally be *imprisoned* for their relationship. Ten years later, they despaired of ever being able to marry and held a small, necessarily unofficial commitment ceremony in my parents' backyard. That was 1996, the year Congress enacted DOMA. They married four years ago, in 2009, when their home state of New York refused to perform their marriage but would recognize an

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[130] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring); *see also* Fisher v. Univ. of Texas, 133 S. Ct. 2411 (2013). Linda Greenhouse thoughtfully and cogently analyzed the role "current conditions" played in the Court's decisions in *Shelby County*, *Fisher*, and *Windsor*. *See* Greenhouse, *supra* note 84.

[131] *See* Johnsen, *supra* note 79, at 389–92 (discussing GUIDELINES, *supra* note 80); *see also* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REDEFINING DISCRIMINATION: DISPARATE IMPACT AND THE INSTITUTIONALIZATION OF AFFIRMATIVE ACTION (1987).

[132] I thank Jennifer and Dawn for allowing me to share their story, and I dedicate this Essay to them and to the memory of my father, Donald Johnsen, whose willingness to work seemingly endless hours at second and third jobs enabled his four children to attain educational and life advantages he did not enjoy. His loving heart, open mind, and deep patriotism all helped drive his ever-evolving views on race, gender, and sexual orientation, shared in countless patient conversations exploring entrenched cultural prejudices and stereotypes. His personal journey and efforts, echoed in similar stories in so many American families, strengthen in me an enduring optimism for our country's continued progress toward our constitutional commitments to equality and justice.

[133] Facebook Post by Jennifer Johnsen, FACEBOOK (June 27, 2013) (on file with the author).

out-of-state marriage. In 2011, New York became the eighth state to end marriage discrimination. In 2013, the Court held DOMA unconstitutional and their relationship finally is afforded equal legal status.

As of 2013, seventy percent of Americans still live in states that will not allow individuals of the same sex to marry, including my state of Indiana, where the legislature has passed a proposed amendment to write that discrimination into the state constitution, as most states already have. Actions in 2014 will determine whether the proposed amendment goes to the public in a ballot question. "When did it become unconstitutional to exclude homosexuals from marriage?" The process toward "a more perfect union" continues.[134]

[134] "We the People of the United States, in Order to form a more perfect Union … do ordain and establish this Constitution for the United States of America." U.S. CONST. pmbl.

Environmental Law After *Sebelius*: Will the Court's New Spending Power Limits Affect Environmental State-Federal Partnerships?*

Erin Ryan**

I. INTRODUCTION

Last summer, after the Supreme Court ruled in the highly charged Affordable Care Act case, *National Federation of Independent Business vs. Sebelius*,[1] the political arena erupted in debate over the implications for the President's health reform initiative and the reach of federal law more generally. The Affordable Care Act (ACA) was designed to reduce costs and facilitate access to health insurance by requiring all individuals to participate in the insurance pool and expanding the Medicaid state-federal insurance partnership. Writing for a fractured plurality, Chief Justice Roberts upheld the Act's "individual mandate"—the famously controversial provision requiring individuals to buy health insurance or pay a fine—not under Congress's well-worn authority to regulate interstate commerce, but under its sleepier constitutional power to levy taxes.[2]

Analysts fixated on the decision's dueling Commerce Clause theories, but the arguably most important element involved neither the commerce power nor the tax power directly, but its flip side: Congress's authority to spend tax revenue to advance the general welfare. For even as one plurality allowed that the Act's expanded Medicaid program was itself constitutional, a different plurality held that plans to condition a state's continued receipt of Medicaid funds on assent to the new expansion would exceed federal authority under the Spending Clause.[3] Chief Justice Roberts concluded that Congress could not require participation in the Medicaid expansion by states that preferred the existing partnership, if rejecting the expansion would cause those states to lose critical federal funds they had come to rely on. That approach would amount to unconstitutional coercion, he reasoned, violating the principles of federalism and exceeding Congress's authority to negotiate with freely consenting states.

With that holding, *Sebelius* became the first Supreme Court decision ever to limit an act of Congress on spending power grounds, rounding out the "New Federalism" constraints on federal power under the Commerce Clause, Section Five of the

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1 132 S. Ct. 2566 (2012) (hereinafter, *Sebelius*).

2 *Id*. at 2598-2600.

3 *Id*. at 2606-07.

Fourteenth Amendment, and the Tenth and Eleventh Amendments first initiated by the Rehnquist Court in the 1990s.[4] *Sebelius* limits Congress's ability to bargain with the states, effectively holding that it may not condition a state's receipt of federal funds within an entrenched spending power partnership on that state's assent to an independent program—at least when the funds at stake are so substantial that the threat of losing them coercively undermines state consent, and when there is no independent source of federal authority for requiring state performance.[5] However, the decision gives little direction for evaluating when the amount of funding reaches the threshold of coercion, or even when changes to an existing program (like Medicaid) amount to a new and independent program (as Chief Justice Roberts characterized the Medicaid expansion).[6]

The decision thus leaves open important unanswered questions about the new spending power limits, which are likely to prompt litigation exploring them in challenges to other spending-power based programs of cooperative federalism.[7] Potential targets include partnerships built into the nation's major environmental laws, which often partner state and federal regulators to manage boundary-crossing resources—like air, water, and biodiversity—that can only be protected through coordinated multilevel governance.[8] As regulated entities renew their opposition to longstanding environmental laws and marshal opposition to new regulations, some may seek opportunities to challenge environmental state-federal partnerships under the new *Sebelius* doctrine. Indeed, attorneys for the state of Texas have already indicated intent to do so in ongoing litigation over new Clean Air Act requirements.[9]

This analysis reviews the potential impact of *Sebelius* on environmental programs of cooperative federalism, concluding that few, if any, are vulnerable to successful legal challenge. Part II reviews the role of the spending power in interjurisdictional governance, Part III explores the new *Sebelius* limit, and Part IV analyzes how the doctrine intersects with environmental law. With the possible exception of the Clean Air Act, which links states' preparation of implementation plans with receipt of certain federal highway funds, none of the major environmental laws premised on spending power bargains appear vulnerable. Part V concludes that although an environmental *Sebelius* challenge is unlikely to prevail, the new doctrine nevertheless shifts intergovernmental bargaining leverage toward the states, potentially altering the substance of cooperative federalism programs in important ways.

II. COOPERATIVE FEDERALISM AND THE SPENDING POWER

In the immediate wake of the *Sebelius* decision, legal analysts were most interested in the fact that the Chief Justice and the four conservative dissenters had rejected the government's view that the ACA was constitutionally authorized under Congress's

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[4] *See* ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN 1 & n.2 (2012) (discussing the Rehnquist Court's "New Federalism" revival and listing the standard canon of New Federalism cases).

[5] *Sebelius*, 132 S. Ct. at 2601-07.

[6] *See id*. at 2605-06 (differentiating the expansion as "a shift in kind, not merely degree").

[7] In programs of cooperative federalism, the federal and state governments take responsibility for interlocking elements of an overarching regulatory partnership. *See, e.g.,* RYAN, supra note 4, at 92.

[8] RYAN, supra note 4, at 145-80 (demonstrating intergovernmental interdependence in environmental law).

[9] *See* Lawrence Hurley, *Texas Wastes No Time in Citing Supreme Court Health Care Ruling in Clean Air Act Litigation*, E&E PUBLISHING, LLC (Aug. 1, 2012) http://eenews.net/public/Greenwire/2012/08/01/1 (reporting on the *Utility Air Regulatory Group v. EPA* case discussed *infra* at page 16).

commerce power.[10] Policy analysts were most concerned about the practical implications of the new commerce power jurisprudence for other programs of cooperative federalism. But even setting aside questions about its precedential value (given that the Chief's only supporters wrote in dissent[11]), the practical implications for existing governance are likely to be small, at least in the foreseeable future. After all, much of the debate over the individual mandate focused on how unprecedented it was: despite months of effort, nobody produced a satisfying example of a similar legislative tool used in previous health, environmental, or any other kind of federal law.

By contrast, the most immediately consequential portion of the ruling—and one with far more significance for most regulatory governance—is the part of the decision that focuses on the Spending Clause, limiting the federal spending power that authorizes Medicaid and so many other state-federal partnerships.[12] Congress regularly offers funding and other federal resources to persuade the states to engage in regulatory partnerships addressing matters of mixed state and federal interest. Interjurisdictional governance frequently takes place within spending power-based programs of cooperative federalism, ranging from social welfare programs and public education to national security and the interstate highway system.[13]

Sebelius, however, marks the first time the Court has ever invalidated a congressional act for exceeding its power under the Spending Clause, and it has important implications for the way state-federal regulatory partnerships work. Spending power partnerships reflect the complex way that the Constitution structures federal power, through both specific and open-ended delegations of authority. Specifically "enumerated" congressional powers include the authority to coin money, establish post offices, and declare war.[14] More open-ended grants of federal authority are conferred by the Commerce, Necessary and Proper, and Spending Clauses,[15] jointly accounting for vast areas of congressional lawmaking. Policymaking realms that are not expressly or implicitly covered by federal delegations are committed to state jurisdiction.[16]

The Spending Clause bridges realms of federal and state authority, authorizing Congress to spend money in pursuit of the public welfare in general. Congress can fund federal programs advancing specific federal responsibilities, such as post offices or naval training, and it can also fund state programs operating beyond Congress's specifically delegated powers, such as those addressing public education or domestic violence. Congress can fund state programs that it approves of directly, but it can also offer money conditionally—for example, to any state willing to adopt a rule or program that Congress would like to see implemented. In these examples, Congress is effectively offering the states a deal: "here is some money, but for use

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[10] *Sebelius*, 132 S. Ct. at 2591.

[11] Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds….'").

[12] U.S. CONST. art I, § 8.

[13] E.g., RYAN, *supra* note 4, at 265-72, 288-90.

[14] U.S. CONST. art I, § 8.

[15] *Id*.

[16] U.S. CONST. amend. X. There is considerable overlap between state and federal jurisdiction, jointly governed by federal restraint and federal supremacy (U.S. CONST. art. VI), but that's another story—and a previous ACS essay. Erin Ryan, *Health Care Reform and Federalism's Tug of War Within*, ACS BLOG, June 21, 2012, available at http://www.acslaw.org/acsblog/health-care-reform-and-federalism%E2%80%99s-tug-of-war-within (cross-posted with U. Penn's REGBLOG at https://www.law.upenn.edu/blogs/regblog/2012/06/21-ryan-federalism.html). See also RYAN, *supra* note 4.

only within this program that we think you should operate" (for example, health-insuring poor children[17]).

In this way, the spending power enables Congress to bargain with the states for access to policymaking arenas that are otherwise beyond its reach. Congress can't just compel the states to enact its preferred policies in realms that exceed its specifically enumerated powers.[18] Yet spending power partnerships are premised on negotiation rather than compulsion, because states remain free to accept or reject the federally proffered deal. In other words, if a state doesn't like the attached strings, it doesn't have to take the money. The *Sebelius* decision likens the spending power deal to a contract, valid when "the State voluntarily and knowingly accepts the terms."[19]

Members of the Court have sporadically worried about circumstances that might undermine the voluntariness of state consent, but usually in dicta and without much elaboration.[20] In 1987, in *South Dakota v. Dole*, the Court famously upheld the spending bargaining enterprise in a case challenging a federal law conditioning 5% of a state's federal highway funds if it did not adopt the national drinking age of 21 years of age.[21] In *Dole*, the Court held that spending power deals are constitutional so long as the conditions are unambiguous, reasonably related to the federal interest, promote the general welfare, and do not induce independent constitutional violations.[22] No law has ever run afoul of these broad limits, which have not since been revisited—until now.

III. THE NEW *SEBELIUS* SPENDING POWER LIMIT

A. THE *SEBELIUS* SPENDING POWER HOLDING

In challenging the ACA, twenty-six states argued that Congress had overstepped its bounds by effectively forcing them to accept a significant expansion of Medicaid, the state-administered but mostly federally-funded public health insurance program.[23] Before the ACA, Medicaid required that states offer health insurance to discrete categories of vulnerable people, including pregnant women, children, needy families, the blind, the elderly, and the disabled.[24] The ACA amendments required states to extend insurance to the general population of people under age 65 with incomes below 133% of the federal poverty line.[25] All states currently participate in the Medicaid partnership, but a longstanding provision specifies that the Secretary of Health and Human Services may withhold all Medicaid funds to any state failing to comply with any Medicaid requirement.[26] The plaintiff states feared losing that substantial source of funding—on average, about 10% of their annual budgets—if they rejected the ACA expansion.

The federal government maintained that Medicaid funds are a conditional gift that states are always free to take or refuse as best serves their interests. Congress had

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[17] State Children's Health Insurance Program (SCHIP), 42 U.S.C. 1397 et. seq. (2010).

[18] New York v. United States, 505 U.S. 144, 161 (1992) (holding that the Tenth Amendment forbids Congress from "commandeering" state participation as part of a federal regulatory program).

[19] *Sebelius*, 132 S. Ct. at 2602.

[20] *E.g.,* Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937) (worrying about "the point at which pressure turns into compulsion").

[21] 483 U.S. 203 (1987) (upholding the National Minimum Drinking Age Act).

[22] *Id*.

[23] *Sebelius*, 132 S. Ct. at 2601.

[24] *Id*.

[25] *Id*.

[26] *Id*. at 2607.

included a provision in the original authorizing legislation expressly stating that it could modify the program from one year to the next, and it has done so nearly fifty times since then.[27] But the plaintiffs argued that the ACA expansion was different, because the changes were more serious, and because they could not now disentangle from a critical social service program on which their citizens had come to rely. They argued that conditioning their continued access to these needed Medicaid funds on their assent to the new expansion would be unconstitutionally coercive, because they could not realistically refuse if it meant losing 10% of their annual budget. Any such consent would be effectively involuntary. With no ability to foresee this substantial change in the direction of Medicaid, they had become unfairly trapped in dependence on the existing program.

Holding for the plaintiffs on this point, a strained plurality of the Court stated a new rule limiting the scope of Congress's spending power in the context of an ongoing partnership of substantial means. Joined only by Justices Breyer and Kagan, Chief Justice Roberts began by upholding the presumption underlying spending power bargaining—that is, that it doesn't coerce the states, because they can always walk away from the table if they don't like the terms of the deal. As he explained, concerns about federal coercion are usually dispelled by relying on the states to "just say no" when they don't like the proposed federal terms, wryly observing that "[t]he States are separate and independent sovereigns. Sometimes they have to act like it."[28] The Medicaid expansion would therefore be constitutional in isolation, because states that did not want to participate in it could simply choose not to. No coercion, no constitutional problem.

But then the decision takes a key turn. There *would* be unconstitutional coercion, the Chief Justice explained, if Congress could penalize states opting out of the Medicaid expansion by cancelling their existing programs.[29] The Medicaid partnership has become so entrenched, he wrote, that punishing a state's decision to reject an unforeseeable change by denying funds for its existing program would leave that state no genuine opportunity to decline the new deal.

The spending deal upheld in *Dole* had also conditioned ongoing funds for one purpose (highway maintenance) on participation in an indirectly related program (the national drinking age), but Chief Justice Roberts distinguished them on grounds that Medicaid grants were so much larger in size. Plaintiffs may have willingly chosen to participate in the original Medicaid program, but they were now being "economically dragoon[ed]" into the expansion by the threatened loss of so large a percentage of their annual budgets.[30] In contrast to valid spending power programs that attract meaningful state consent by offering directly related federal funds, he concluded that the ACA—coupling an invitation to the new partnership with the threatened loss of funding for the old partnership—procured state consent by "a gun to the head."[31]

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[27] The Social Security Act, which includes Medicaid, includes a clause expressly reserving "[t]he right to alter, amend, or repeal any provision" of that statute. 42 U.S.C. § 1304; *Sebelius*, 132 S. Ct. at 2605 (discussing the provision), 2631 (Ginsburg, J., dissenting) (describing the 50 amendments made to Medicaid since 1965).

[28] *Sebelius*, 132 S. Ct. at 2603 (citations omitted).

[29] *Id*. at 2601-07. The Chief Justice's opinion was joined by Justices Breyer and Kagan. Dissenting Justices Scalia, Kennedy, Thomas, and Alito completed the plurality by agreeing that the Medicaid expansion should be invalidated for exceeding the spending power, but under a different rationale (tying coercion primarily to the size of the grant). *Id*. at 2666 (Scalia, J., et al., dissenting). Because the Chief Justice's rationale is narrower than that of the dissenting justices, his controls.

[30] *Id*. at 2604-05.

[31] *Id*. at 2604.

Critically, to make this analysis work, the Chief Justice had to construe Congress's new vision of Medicaid as really being *two separate programs*: (1) the pre-existing program, requiring health insurance for discrete categories of vulnerable people, and (2) the "independent" expansion, requiring insurance for the general low-income population.[32] While a joint dissent by conservative Justices Scalia, Kennedy, Thomas, and Alito, tied coercive abuse of the spending power to the size of the federal grant alone, the Chief Justice located coercion in the combined force of the size of the grant and the conditioning of that grant on assent to terms of an unrelated program.[33] His opinion thus differentiates between Congress (a) permissibly encouraging state policy choices by restricting even a large federal grant to a specified use and (b) impermissibly coercing the same policy choice by restricting receipt of a large grant for an *independent* use:

> We have upheld Congress's authority to condition the receipt of funds on the States' complying with restrictions on the use of those funds, because that is the means by which Congress ensures that the funds are spent according to its view of the "general Welfare." Conditions that do not here govern the use of the funds, however, cannot be justified on that basis. When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes.[34]

As for the ACA, coercion was evident because receipt of the large, existing Medicaid grant was made conditional on a state's assent to the independent expansion. The Medicaid expansion was an independent program, he reasoned, because no state could have foreseen that the original program it accepted would evolve from one to insure "the neediest among us" to "an element of a comprehensive national plan to provide universal health insurance coverage."[35]

The *Sebelius* analysis thus hinges on three moving parts. First, there must be an ongoing spending power partnership in which states have formed reasonable reliance interests—such that later congressional changes could constitute an unfair surprise to a state that voluntarily became entrenched under an acceptable set of rules but must now contend with an unacceptable set.[36] The plaintiff states argued that this had been their fate under Medicaid, which had seemed like a reasonable partnership in the beginning but became unreasonable after the ACA amendments. Second, the change must condition continued funds within the entrenched program on assent to terms that do not directly relate to how those original funds are to be used—for example, conditioning funds for existing Medicaid populations on coverage for new populations.[37] And finally, the funding at issue must be so large and the impact of

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[32] *Id*. at 2601 ("The current Medicaid program requires States to cover only certain discrete categories of needy individuals—pregnant women, children, needy families, the blind, the elderly, and the disabled.").

[33] *See* Samuel Bagenstos, *The Anti-Leveraging Principle and the Spending Clause after* NFIB, 101 Geo. L.J. 861 (2013).

[34] *Sebelius* 132 S. Ct. at 2603-04.

[35] *Id*. at 2606.

[36] *Id*. at 2575.

[37] *Id*. at 2603-04.

losing it so dire for a state that its capitulation to the new terms reflects coercion rather than voluntary agreement.[38]

Accordingly, and consistent with both new and old spending power jurisprudence, Congress could have lawfully conditioned funds to directly support the new Medicaid expansion on a state's agreement to implement those (and only those) programs. Even though the expansion is intended to become an ongoing partnership over time, at the moment of its creation, it would be a new program in which the states could not yet have formed reliance interests. And even though the funds at issue might be enormous, the conditions attached to those funds would govern the use of them directly and straightforwardly, without impacting the pre-existing Medicaid program. *Sebelius* affirms that Congress remains free to condition *directly* the disbursement of large federal grants as it wishes, subject only to the forgiving *Dole* limitations. The ACA was coercive, however, because it conditioned pre-existing funds on *independent* obligations. The Chief Justice held that Congress may not procure state acceptance of the Medicaid expansion by threatening to defund pre-existing operations of the original program.[39]

To remedy the defect, Chief Justice Roberts held that the provision entitling the Secretary to withhold all Medicaid funding for a failure to comply with any Medicaid requirement could not apply to states rejecting the ACA expansion.[40] The four conservative justices agreed with the result, if not the rationale, effectively requiring the federal government to allow dissenting states to opt out of the Medicaid expansion while remaining in the pre-existing Medicaid program.

Justice Ginsburg excoriated this logic in a dissent joined by Justice Sotomayor, arguing that there was only one program before the Court: Medicaid. For her, the expansion simply adds beneficiaries to what is otherwise the same partnership, same purpose, same means, and same administration: "a single program with a constant aim—to enable poor persons to receive basic health care when they need it."[41] She argued that neither the facts nor precedent supported the Chief's distinction between the pre-existing Medicaid program and the ACA expansion on the basis of whether the expansion was foreseeable at the outset of the state-federal partnership.[42] She criticized the Chief Justice for enforcing a new limitation on coercion without clarifying the point at which permissible persuasion gives way to undue coercion, and she pointed out the myriad ways this inquiry requires "political judgments that defy judicial calculation."[43]

B. INTERPRETING THE *SEBELIUS* DOCTRINE

The *Sebelius* decision leaves much uncertainty in its wake. It is indeed striking that such a landmark decision, establishing a wholly new constitutional limit, provides so little guidance about when that limit is exceeded. The Chief Justice would find coercion when both the size of a grant and its intersecting conditions make it "realistically impossible" for a state to refuse—but his opinion offered neither a threshold nor a limiting principle for evaluating coerciveness on either account. Punting on the most critical points of the analysis, he merely observed that previous justices had not

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[38] *Id.; see also* Bagenstos, *supra* note 33.

[39] *Id.* at 2606-07.

[40] *Id.* at 2607-08.

[41] *Id.* at 2630 (Ginsburg, J., dissenting).

[42] *Id.* at 2637-38.

[43] *Id.* at 2641.

attempted to "fix a line" between persuasion and coercion, and so neither would he.[44] Yet prior decisions upheld legislation under the spending power,[45] while *Sebelius* articulates a new constitutional limit, arguably creating responsibility to do more.

The *Sebelius* doctrine's first indicator for potential coercion is the large size of an ongoing federal grant, but the decision provides remarkably weak tools for identifying when this threshold is exceeded. The only guideposts for analysis are the decision's affirmation that the $614 million in highway funds at issue in *Dole* (less than half of 1% of the state's overall budget) were too small for the threat of loss to be coercive, coupled with its holding that threatened loss of $233 billion in Medicaid grants (on average, 10% of the state's budget) sufficed.[46] But Medicaid includes the largest of all federal grants to states, followed by those for public education and highways. The doctrine thus leaves the many federal grants in the zone between 0.05-10% of a state's budget on uncertain ground for the purposes of *Sebelius* scrutiny. The difficulty of establishing more precisely where persuasion gives way to coercion is surely one reason the Court has declined to do so previously, wisely reluctant to create an empty doctrinal vessel that can only exacerbate federalism-related uncertainty in lawmaking and litigation.

The *Sebelius* doctrine also requires that we distinguish conditional funds that directly sponsor the program in question from federal funds sponsoring one program that are conditioned on state participation in another program. While the former are presumptively permissible, the latter are potentially coercive under the new limit. Yet the decision provides no means at all for evaluating when programmatic amendments are within the permissible threshold of statutory evolution and when they amount to an independent program that warrants *Sebelius* scrutiny. The plurality acknowledged this problem in conceding that the ACA was enacted as an amendment to the same Medicaid statute that Congress and the states have jointly implemented for decades, but concluded that it need not defer to Congress's judgment about the boundaries between legislative programs.[47] Beyond noting that Congress can't just "surprise" states with "retroactive conditions,"[48] the decision provides no tools for distinguishing permissible modifications to an existing program from changes that create an independent program vulnerable to the new limit.

In the end, "I-know-it-when-I-see-it" reasoning won't do when assessing the labyrinthine political dimensions of intergovernmental bargaining under the spending power—but neither the Chief Justice nor the conservative dissenters provide more than that in their various assertions that such a limit must exist. The decision effectively leaves any major, ongoing spending power partnership improved by experience vulnerable to legal challenge under *Sebelius*, and purely at the discretion of the reviewing court. Yet as Justice Ginsburg warns, it is highly dubious for the Court to

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[44] *Id*. at 2606 ("The Court found it '[e]nough for present purposes that wherever the line may be, this statute is within it.' We have no need to fix a line either. It is enough for today that wherever that line may be, this statute is surely beyond it.").

[45] Steward Machine Co. v. Davis, 301 U.S. 548 (1937).

[46] *Sebelius,* 132 S. Ct. at 2664 (Scalia, J., et al., dissenting) (identifying the federal funds at issue in *Dole* and *Sebelius*).

[47] *Id*. at 2605 ("We cannot agree that existing Medicaid and the expansion dictated by the Affordable Care Act are all one program simply because 'Congress styled' them as such. If the expansion is not properly viewed as a modification of the existing Medicaid program, Congress's decision to so title it is irrelevant.").

[48] *Id*. at 2606 (noting that the spending power does not enable Congress to "surpris[e] participating States with post acceptance or 'retroactive' conditions").

assume institutional responsibility for determining the overall structure of complex regulatory programs—substituting its judgment for that of Congress in an enterprise in which legislative capacity supposedly apexes while judicial capacity hits its nadir.

Moreover, the rule threatens to be unworkable in implementation under legislative norms. No present Congress can bind future congressional choices, so every ongoing spending power deal is necessarily limited to its budgetary year as a matter of law. Programs are renewed on an annual basis, with amendments as needed to adjust for changing social circumstances. But after *Sebelius*, Congress can never modify a vulnerable partnership like Medicaid without potentially creating two tracks—one for states that like the change, and another for those that prefer the original (and with further modifications, three tracks, *ad infinitum*). The next time Congress decides to modify Medicaid—perhaps with insight gleaned from its experience with the ACA expansion—will it be required to manage three separate systems, to protect the choices of states that preferred the original Medicaid system, the ACA expansion, and now the new modification?

Perhaps the saving grace of the unworkable opinion is that its own vagueness could ultimately confine it to its facts—affecting future changes *only* to Medicaid, unique among cooperative federalism programs for both its enormous size and its uncertain footing in sources of federal authority beyond the spending power. After all, federal grants for state primary and secondary education are the next largest after Medicaid, and even in states with smaller than average Medicaid grants, Medicaid grants are at least twice the size of federal educational funding as a percentage of total state expenditures.[49]

Vulnerable provisions that condition federal educational funds on potentially "independent" conditions may also be upheld under independent sources of federal authority even if they prove infirm under the spending power limit. For example, civil rights laws like Title VI and IX, which prevent race and sex discrimination by recipients of federal funds, may find justification in direct congressional authority under Section V of the Fourteenth Amendment even if they were somehow held infirm under the spending power.[50]

Many of the nation's environmental spending power partnerships are also understood to be simultaneously grounded in another source of federal authority, usually the Commerce Clause. However, several Supreme Court cases following the New Federalism revival have challenged the commerce basis of some of those laws, threatening the reach of federal environmental law.[51] Indeed, the Chief Justice's commerce analysis of the ACA's individual mandate, if extended in future jurisprudence, could further undermine the commerce foundations of some environmental laws. For this reason, it is worth analyzing their spending power foundations in light of the new *Sebelius* doctrine, and how they would fare if challenged.

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[49] *Id*. at 2664-65 (joint dissent).

[50] *See* Emily Martin, *Title IX and the New Spending Clause*, AM. CONSTITUTION SOC'Y Issue Brief, (Dec. 4, 2012), available at http://www.acslaw.org/sites/default/files/Martin_-_Title_IX_and_the_New_Spending_Clause_1.pdf.

[51] *See* Rapanos v. United States, 126 S. Ct. 2208, 2252 (2006) and Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159, 173-74 (2001) (environmental federalism cases challenging the reach of the Clean Water Act over intrastate wetlands on both statutory and Commerce Clause grounds).

IV. ENVIRONMENTAL LAW AFTER *SEBELIUS*

This part considers the post-*Sebelius* vulnerability of the nation's major environmental laws that involve programs of cooperative federalism, including the Clean Air and Water Acts, the Coastal Zone Management Act, the Comprehensive Environmental Response, Compensation, and Liability Act, the Emergency Planning & Community Right-to-Know Act, the Endangered Species Act, the Resource Conservation and Recovery Act, the Safe Drinking Water Act, and the Surface Mining Control and Reclamation Act. The list is representative rather than exhaustive, but the conclusion is clear: with the possible exception of the Clean Air Act's cross-over conditioning of federal highway funds, none of the environmental spending partnerships trigger all three elements of the *Sebelius* limit. Yet as foreshadowed above, the most difficult part of the analysis is figuring out exactly how to test that limit.

Since the decision came down last summer, commentators have struggled to ascertain the impacts of *Sebelius* on existing spending power partnerships. A common theme in their evaluation is the lack of a coherent test for analyzing these programs. We have known since *Dole* that spending deals tying federal funds to wholly unrelated policy goals are constitutionally infirm, but after *Sebelius*, indirectly related conditions may also be vulnerable when the funds at issue are large enough to undermine genuine state consent. Future courts will have to divine when the size of federal grants between *Dole*'s permissible and *Sebelius*'s impermissible baselines trigger scrutiny.[52] But as a threshold matter, when is an indirectly related condition sufficiently remote to constitute an "independent" program?

Writing previously for the American Constitution Society, Emily Martin concludes that the Court articulated no clear test in *Sebelius*, and she accordingly analyzes the vulnerability of the Title IX federal education program by distinguishing it point by point from the vulnerable Medicaid program.[53] Writing for the Congressional Research Service, Kenneth Thomas observes that the test is unclear, but that the limit appears to hinge on whether the states had adequate notice of a change in conditional funding, the relatedness of the change to the conditioned funds, and the size of the funds.[54] Professor Sam Bagenstos identifies similar elements and makes sense of the *Sebelius* limit as an "anti-leveraging principle," best understood as prohibiting the use of the spending power to leverage a state's substantial reliance on one spending power program to coerce agreement to another.[55] He defends the anti-leveraging principle as justifiable in theory, but acknowledges that the decision fails to identify a workable threshold for the "independent program" element.[56]

However, all analyses converge on the three main elements in the *Sebelius* doctrine identified in Part III of this Issue Brief, and Professor Bagenstos convincingly shows that all of them must be met before the coercion limit is triggered: (1) the new offer must unfairly surprise the state by changing the terms of participation in an entrenched spending power partnership in which that state has established reasonable

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[52] Grants larger than the $233 billion at stake under pre-ACA Medicaid are likely to be scrutinized, while those smaller than the $614.7 million in highway funds at issue in *Dole* are not. *See supra* note 46 and accompanying text.

[53] Martin, *supra* note 50.

[54] KENNETH R. THOMAS, CONG. RESEARCH SERV., 7-5700, THE CONSTITUTIONALITY OF FEDERAL GRANT CONDITIONS AFTER NATIONAL FEDERATION OF INDEPENDENT BUSINESSES V. SEBELIUS (JULY 17, 2012).

[55] Bagenstos, *supra* note 33, at 866.

[56] *Id*. at 898-99, 905-06.

reliance interests; (2) the new offer must condition funds for the existing program on compliance with independent obligations that are not directly related to the disbursement of the funds within the original program (a "crossover condition"); and (3) the size of the grant at issue must be so large and forgoing it is so economically infeasible to the state that their consent to the new offer is effectively involuntary.[57]

Applying these criteria to the state-federal partnerships in the nation's environmental laws should provide comfort to advocates for federal environmental regulation and disappointment to opponents. Many federal environmental laws include ongoing spending power partnerships, but few appear vulnerable on any of the three criteria. Several authorize modest grants in one-time spending deals, but not in the kind of ongoing, multiple-iteration way that could create reasonable reliance interests on the part of a state. A few include annual renewals that could create unfair surprise if the terms were suddenly altered, but none involve grants on the scale of Medicaid, and only one—the Clean Air Act—includes a potentially vulnerable cross-over provision conditioning funds for one purpose on state assent to indirectly related terms.

Subjecting the major environmental cooperative federalism programs to a *Sebelius* analysis enables quick disposal of the majority of potential challenges. For example, the Emergency Planning & Community Right-to-Know Act (EPCRA) engages state and local partners in an ongoing regulatory partnership, but without use of the spending power and thus does not implicate *Sebelius*.[58] The Resource Conservation and Recovery Act (RCRA),[59] the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[60] the Endangered Species Act (ESA),[61] and the Surface Mining Control and Reclamation Act (SMCRA),[62] all involve spending partnerships, but the relevant federal funds are offered as one-time grants responding to specific

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[57] *Id*. at 870-71.

[58] EPCRA requires state and local planning for chemical emergencies (including State Emergency Response Commissions), notification of emergency releases of chemicals, and that communities can access local data about toxic and hazardous chemicals. Pub. L. No. 99–499,100 Stat. 1728 (1986) (codified as amended at 42 U.S.C. § 11004-11049, 11045).

[59] RCRA regulates hazardous substances through "cradle to grave" oversight, enabling states to choose whether to become authorized to implement the program within their boundaries or submit to federal regulation. Pub.L. No. 94–580, 90 Stat. 2795 (codified as part of the Solid Waste Disposal Act, 42 U.S.C. §§ 6901–6992). RCRA provided federal funds to assist the development of new state programs, but no grants involve recurring or ongoing grants.

[60] CERCLA imposes liability for the use, harboring, or transportation of hazardous substances that substantially endanger human health or the environment. Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. 9601-9675(1994)), as amended by Superfund Amendments and Reauthorization Act of 1986 (SARA). CERCLA authorizes discretionary § 104(k) "Superfund" grants to encourage state participation in cleanup efforts, and states and tribes are also eligible for § 128(a) Brownfield Grants to cope with less contaminated sites, but state grants are not recurring.

[61] The ESA provides for the conservation of endangered species of wildlife. Pub. L. no. 93–205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. § 1531). Section 6 authorizes small, non-recurring state grants through the Cooperative Endangered Species Conservation Fund, Habitat Conservation Planning Assistance Grants, and Habitat Conservation Plan Land Acquisition grants. U.S. Fish & Wildlife Service, Section 6 of the Endangered Species Act, http://www.fws.gov/midwest/endangered/grants/S6_grants.html#S6.

[62] SMCRA prevents water pollution, soil erosion, ecological destruction, and social and economic disruption as a result of surface mining, enabling states to implement their own programs or submit to federal regulation. Pub. L. No. 95–87, 91 Stat. 445 (1977). The law provides for discretionary grants to assist states in developing state programs, but grants cease when a state becomes fully certified to regulate, § 1295, and thus cannot create state expectations that would implicate *Sebelius*. Federal Assistance Manual, Regulatory Programs Overview, http://www.osmre.gov/guidance/fam/5-100.pdf; http://www.wpcamr.org/projects/smcra_reauth/TitleIV%20Basics.pdf.

tasks that cannot create state expectations triggering *Sebelius*'s first element. The Coastal Zone Management Act (CZMA) does include a program of recurring grants to states that implement coastal management plans, but not only are the grants small and directly conditioned, state participation is fully voluntary—with neither sanctions nor a federal alternative if a state opts out.[63]

Of all federal environmental laws, only three include recurring grant programs that meaningfully trigger the first element of *Sebelius* concern, and only one potentially triggers all three. The Clean Water Act involves an ongoing spending partnership with more force than the CZMA, but for grants that fall far shy of the benchmarks for coercive size. The Safe Drinking Water Act involves grants potentially large enough to warrant scrutiny for size, but the relevant grants are directly conditioned. Only the Clean Air Act potentially includes all three indicators, in an ongoing spending partnership of substantial means with cross-over terms linking a state's satisfaction of air quality requirements to its receipt of federal highway funds. The following analysis walks through application of the *Sebelius* doctrine to all three laws, demonstrating the independent operation of each element and concluding that all three laws should pass muster.

Clean Water Act. The Clean Water Act (CWA),[64] which regulates point source pollutants to the nation's waters,[65] authorizes recurring grants to states under the State Revolving Fund (SRF) to enable state distribution of low-interest loans for municipal water quality projects. Established in the Water Quality Act of 1987, the CWA SRF provides states with annual capitalization grants to fund municipal projects for wastewater treatment (§ 212), nonpoint source pollution control (§ 319), and watershed and estuary management (§ 320). Grants are awarded to states to develop conservation plans, implement management programs, and issue loans to local communities to construct treatment works.[66] Since 1987, cumulative assistance under the SRF has surpassed $65 billion. In the last decade, annual federal spending in the program has ranged from a high of $238.5 million in 2003 to a low of $164.5 million in 2012.[67]

States rely on this attractive source of funding, and the fact that grants are made on a recurring basis could trigger the reliance element of *Sebelius*. However, the SFR grants would easily survive scrutiny under the remaining elements. Even though administrative grants are ongoing, the funds at issue are still much smaller than the *Dole* $614 million standard of safety. More importantly, the federal conditions that attach to these funds are directly related to the use of the funds: states are entitled to these funds only for use in qualifying water quality projects. Because there is no condition

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[63] The CZMA is a voluntary program of cooperative federalism designed to protect coastal resources from interregional development pressure. 16 U.S.C. § 1451 et seq. The CZMA offers four different kinds of federal funding to encourage states to create voluntary coastal management plans: § 306 administrative grants, § 309 enhancement grants, § 6217 nonpoint pollution control grants, and § 315 estuarine research reserve grants. Administrative grants are the only recurrent kind, 16 U.S.C. 1455, but they are small and directly conditioned.

[64] Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. 1251 et seq.).

[65] A "point source" discharge, which enters a regulated watercourse through the end of a pipe, must be permitted under the National Pollutant Discharge Elimination System. 33 U.S.C. § 1342.

[66] Twenty-seven states leverage these funds by issuing bonds secured by SRF assets, increasing the value of the federal grants to finance more projects over time. *Id*.

[67] For a table listing total grants for each year since 1990, *see* Env't Prot. Agency, *Clean Water Act 319(h) Grant Funds History,* http://water.epa.gov/polwaste/nps/319hhistory.cfm, (last updated Oct. 9, 2012).

tying availability of these funds to a state's agreement to indirectly related conditions, the critical third element of a crossover condition is also missing.

Safe Drinking Water Act (SDWA). The SDWA ensures the quality of drinking water by authorizing the promulgation of federal standards and federal oversight of the state agencies, local governments, and water suppliers that implement these standards.[68] The SDWA authorizes the Drinking Water State Revolving Loan Fund (DWSRLF), an ongoing grant program similar to the CWA SRF that helps public water agencies finance the infrastructure projects needed to comply with federal drinking water regulations.[69] As under the CWA SRF, annual capitalization grants enable participating states to capitalize their own state loan funds, providing a long-term source of financing for the costs of maintaining drinking water infrastructure and quality.[70]

The DWSRLF provides long-term federal financing of state infrastructure through annual grants, and like the CWA SRF, likely triggers the *Sebelius* reliance element. But in contrast to CWA funds, federal DWSRLF funding has regularly exceeded the clear safety zone for coercive size established in *Dole*.[71] For example, total funds made available to the states in 2010 approached $1.4 billion[72]—still far short of Medicaid's coercive $233 billion, but in the gray zone between there and the $614 million held acceptable in *Dole*. The SDWA thus potentially triggers two of the three *Sebelius* indicators: the coercive size criteria, if a court were to interpret that limit conservatively, and the entrenched grant program creating reliance interests by a state. Yet absent more, the program would still survive scrutiny because it lacks the third indicator, a crossover condition. All funds are conditioned directly on their use within the program.

Clean Air Act (CAA). Among all environmental laws, only the Clean Air Act approaches the potentially combustible mix of all three *Sebelius* indicators. The Clean Air Act is designed to protect and improve air quality and the stratospheric ozone layer.[73] Under the CAA, states must prepare and maintain an adequate State Implementation Plan (SIP) for attaining federally designated air quality standards, and they must remain in attainment or risk the sanction of losing certain federal highway funds.[74] Federal highway funds are among the largest federal grants to states, and they represent an ongoing spending power partnership on which states had long relied before they were linked to the CAA. Because the CAA conditions the receipt of federal highway funds on a state's performance of CAA duties that are only indirectly related

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[68] Pub. L. No. 93-523, 42 U.S.C. § 300f.

[69] Pub. L. No. 104–182, 110 Stat. 1613 (1996).

[70] 42 U.S.C. § 300j-12 (1996).

[71] The original statute authorized appropriations through 2003, providing for $599,000,000 in 1994 and $1,000,000,000 for each of the fiscal years between 1995 and 2003. 42 U.S.C. § 300j-12(m); *see also* Procedures for Implementing Certain Provisions of EPA's Fiscal Year 2012 Appropriations Affecting the Clean Water and Drinking Water State Revolving Fund Programs, http://www.epa.gov/region8/water/Final_FY12_SRF_guidelines.pdf (last visited July 9, 2013). The statute includes other ongoing grant programs to states and tribes, including State Public Water System Supervision Grants and State Underground Water Source Protection Grants, but their size puts them well below the Dole threshold of concern. *See* Env't Prot. Agency, Grants – UIC, available at http://water.epa.gov/type/groundwater/uic/Grants.cfm (last updated Mar. 6, 2012).

[72] Env't Prot. Agency, Final State Allotment of Drinking Water State Revolving Fund Appropriation for Fiscal Year 2010, available at http://water.epa.gov/grants_funding/dwsrf/allotments/Final-State-Allotment-of-Drinking-Water-State-Revolving-Fund-Appropriation-for-Fiscal-Year-2010.cfm.

[73] Pub. L. No. 88-206, 77 Stat. 392 (1963) (codified as amended in 42 USC 7401 et seq. (1990)).

[74] 42 USC § 7509(b)(1).

to those highway funds, it comes closer than any other environmental law to the vulnerable crossover condition at the heart of the *Sebelius* doctrine.

CAA § 179 requires that federal highway funds be withheld to a state that has failed to prepare an adequate SIP or failed to implement requirements under an approved plan when that state includes "non-attainment areas."[75] Non-attainment areas are those that have not achieved the CAA's National Ambient Air Quality Standards, which define the level of air quality necessary to protect the public health and welfare.[76] The Environmental Protection Agency (EPA) maintains initial discretion about how and when to apply sanctions after notice and a grace period, but the Act mandates withholding of funds if noncompliance continues beyond 18-24 months.[77] EPA is then obligated to prevent disbursement of federal highway funds—but only those pertaining to the area in non-attainment, and even then, the penalty excludes funds used to reduce air pollution emissions, funds that are necessary for traffic safety,[78] and funds for certain specified transportation projects.[79] EPA also retains discretion to apply leniency for states that have made good-faith efforts to comply.[80]

An important detail mitigating SIP requirements and penalties is the availability of a federal alternative. A state may eliminate the responsibility to prepare a SIP by electing a Federal Implementation Plan (FIP) option, shifting planning and implementation responsibilities to EPA. If a SIP-state remains in noncompliance with its obligations beyond two years, then EPA is required to intervene with a FIP. The state is then alleviated of its obligation to prepare a SIP, and the potential for further sanctions under § 179 is negated. Nevertheless, most states prefer the autonomy of managing their own plans, and EPA has reportedly used its potential authority to withhold transportation funds as a threat to encourage full CAA compliance.[81]

In contrast to all other environmental laws, applying the three elements of the *Sebelius* doctrine—whether the size of the grant is coercive, whether the condition changes the terms of an entrenched spending partnership, and whether the proffered offer conditions existing funds on compliance with indirectly related conditions—suggests potential controversy over the CAA.

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[75] 42 USC § 7509, § 7509(b)(1) ("The Administrator may impose a prohibition, applicable to a non-attainment area, on the approval by the Secretary of Transportation of any projects or the awarding by the Secretary of any grants, under title 23…"). EPA may also apply discretionary sanctions after determining that a CAA requirement has been violated. 42 U.S.C. § 7410. *See also* EPA Regulations on Sanctions, 40 C.F.R. §§ 52.30-52.32; Federal Highway Administration (FHA), *Clean Air Act Sanctions*, U.S. Dept. of Transp., available at http://www.fhwa.dot.gov/environment/air_quality/highway_sanctions/#subject (last updated May 5, 2013).

[76] 42 U.S.C. §§ 7511(a) (ozone), 7512 (carbon monoxide), 7513 (particulates), and 7514 (nitrogen dioxide).

[77] 42 U.S.C. § 7509(a)(4) ("If the Administrator has selected one of such sanctions and the deficiency has not been corrected within 6 months thereafter, sanctions under both paragraph (1) and paragraph (2) of subsection (b) of this section shall apply until the Administrator determines that the State has come into compliance.").

[78] 42 U.S.C. § 7509(b)(1) (exempting "projects or grants for safety where the Secretary determines, based on accident or other appropriate data submitted by the State, that the principal purpose of the project is an improvement in safety to resolve a demonstrated safety problem and likely will result in a significant reduction in, or avoidance of, accidents").

[79] CAA § 179(b)(1)(B), 42 U.S.C. § 7509(b)(1)(B).

[80] 42 U.S.C. § 7509(a).

[81] *See* James E. McCarthy, Cong. Research Serv., RL 30131, Highway Fund Sanctions and Conformity Under the Clean Air Act (Oct. 15, 1999), available at http://cnie.org/NLE/CRSreports/transportation/trans-29.cfm.

Federal transportation funds constitute a substantial component of overall state spending, smaller only than Medicaid and combined federal spending on primary, secondary, and higher education. In 2010, states received around $62 billion in federal highway funds,[82] still short of Medicaid's monster grants but substantially larger than the funds at issue in *Dole*. However, nearly half that amount was designated for Highway Law Enforcement and Safety and Maintenance and Highway Services, two safety-related programs likely exempt from CAA withholding. The total would be further lowered as other exempted programs were subtracted from withholding, but may yet exceed *Dole*'s clear margin of safety. Notably, however, it is hard to apply real numbers in this guessing game, because while EPA frequently warns noncompliance areas about the potential of withholding, it has only actually withheld highway funds on one occasion.[83]

In addition to the large grants involved, the CAA condition could be vulnerable because it changes the terms of an entrenched transportation spending partnership in a way that could violate the expectations of states when they first entered into the partnership. The Department of Transportation has been administering federal highway funds to the states for over fifty years, since the Federal Aid-Highway Act was first passed in 1956.[84] It is unlikely that states could have foreseen at the time that the relationship would evolve to include air quality regulation.

Most importantly, and alone among environmental laws, the CAA conditions existing funds dedicated to one purpose (highways) on a state's compliance with a separate, indirectly related program (air quality management). The conditions are sufficiently related to satisfy the requirements of *Dole*, because the use of state highways will contribute substantially to that state's ambient air quality problems through automobile exhaust. However, not all of the pollutants compromising air quality are emitted by mobile sources using state highways; power plants, industrial and agricultural operations, and municipal and domestic uses also contribute. Conditioning highway funds authorized under a transportation statute on a state's compliance with air quality management obligations that go beyond transportation appears to present the very crossover fact pattern that the Chief Justice warned about in *Sebelius*. The condition is only indirectly related to the federal funds at peril, and those funds are authorized by a separate, pre-existing federal grant program under a separate statute in a different part of the U.S. Code.

Legal commentators have reached conflicting conclusions about potential *Sebelius* problems with the CAA sanctions. For example, Professor Jonathan Adler suggests that the highway fund penalty should be stricken, noting that highway funds are raised from gasoline taxes and are even "less directly related to air pollution control (particularly from stationary sources) than traditional Medicaid is to the Medicaid expansion."[85] David Baake concludes just as certainly that the sanctions are not unconstitutionally coercive, not only because the funds at issue are smaller than

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[82] David Baake, *Federalism in the Air: Is the Clean Air Act's "My Way or No Highway" Provision Constitutional After NFIB v. Sebelius?*, 37 HARV. ENVTL. L. REV. ONLINE 1, 8 (2012) (citing figures from the Federal Highway Administration and the National Association of State Budget Officers).

[83] In 1996, EPA applied sanctions for violations in East Helena, Montana. FHA, *Status of Sanction Clocks under the Clean Air Act*, http://www.fhwa.dot.gov/environment/air_quality/highway_sanctions/sanctionsclock.cfm (last updated Jan. 7, 2013); *See also* CONG. RESEARCH SERV., CLEAN AIR ACT ISSUES IN THE 106TH CONGRESS II (2000), available at http://chle.org/NLE/CRSreports/air/air-24a.cfm.

[84] Pub. L. No. 84-627 (1956).

[85] Jonathan H. Adler, *Could the Health Care Decision Hobble the Clean Air Act?* PERC Blog (July 23, 2012) available at http://perc.org/blog/could-health-care-decision-hobble-clean-air-act.

Medicaid's by a factor of seven, but because the penalty is so much more avoidable than the one at issue in the ACA.[86] Professor Bagenstos reserves judgment. He concedes that the provision is vulnerable under the reliance and crossover elements of the doctrine, but agrees that the CAA and ACA may be distinguishable in size and nuance.[87] He defends the connection between highway maintenance and air quality regulation, noting Congress's "desire that highway construction be carried out in a manner that does not contribute to air pollution,"[88] but emphasizes that the problem is not *Dole's* germaneness inquiry but *Sebelius's* crossover condition.[89] The CAA subjects highway funds to a condition that is not directly related to their use; after all, "preparing a SIP is not about building a highway."

One state has already noticed the potential for using *Sebelius* in litigation against the CAA's SIP requirements. On July 20, 2012, Texas state attorneys filed a notice of supplemental authority suggesting a *Sebelius* claim in *Utility Air Regulatory Group v. EPA*, a pending suit challenging EPA's new requirement that states update their SIPs with greenhouse gas regulations.[90] Under the new rule, states may not issue permits for the construction or improvement of projects that will emit large amounts of regulated pollutants until qualifying SIPs are approved. Frustrated by the consequences of an invalid SIP during this time, Texas argued that EPA should allow a buffer period of three years before invalidating its old SIP.[91] The July 2012 filing implied that Texas would be unconstitutionally coerced otherwise, but the issue was not raised during oral argument on May 7, 2013.[92] Though distinguishable from a pure highway fund challenge, the claim nevertheless demonstrates that states unhappy with CAA requirements are seeking opportunities to make use of the new *Sebelius* doctrine.

Critically, however, *Sebelius* claims targeting SIP and highway fund sanctions must contend with the fact that the CAA provides states with the option to avoid all SIP-related obligations and sanctions by opting out of the SIP program and invoking the federal FIP alternative.[93] After all, the premise of the *Sebelius* limit is that Congress should not be able to coerce the states, and enabling the states to opt out without losing the funds at issue is the antithesis of *Sebelius* coercion.

In this regard, the facts differ meaningfully from those at issue in *Sebelius*. States that opted out of their role in administering the Medicaid expansion stood to lose all

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[86] Baake, *supra* note 82.

[87] Bagenstos, *supra* note 33, at 917-20.

[88] *Id*. at 918 (quoting Missouri v. United States, 918 F. Supp. 1320, 1333 (E.D. Mo. 1996), vacated for lack of jurisdiction, 109 F.3d 440 (8th Cir. 1997)).

[89] *Id*. (noting that lower courts have consistently rejected germaneness claims and affirmed that the CAA furthers Congress's purpose because both mobile and stationary sources contribute to the overall problem of air pollution).

[90] Mark W. DeLaquil, *Petitioner State of Texas's Notice of Supplemental Authority,* Utility Air Regulatory Group v. EPA, No. 11-1037, Environment and Energy Publishing (Jul. 20, 2012), http://www.eenews.net/assets/2012/07/31/document_pm_03.pdf.

[91] Lawrence Hurley, *Texas Wastes No Time in Citing Supreme Court Health Care Ruling in Clean Air Act Litigation*, E&E PUBLISHING, LLC (Aug. 1, 2012) http://eenews.net/public/Greenwire/2012/08/01/1.

[92] D.C. Circuit Calendar, available at http://www.cadc.uscourts.gov/internet/sixtyday.nsf/fullcalendar?OpenView&term=2013&count=1000&date=2013-06-27; email from Professor Richard Lazarus, Harvard Law School, June 27, 2013 (discussing oral arguments).

[93] See, e.g., Richard Lazarus, *Texas Unconvincing in Clean Air Suit*, ENVIRONMENTAL FORUM (SEPT/OCT 2012) http://www.law.harvard.edu/faculty/rlazarus/docs/columns/LAZARUS_FORUM_2012_SEP-OCT.pdf; Damien Schiff, NFIB v. Sebelius, Coercion, and the Unconstitutional Conditions Doctrine, SCOTUS Blog (August 6, 2012), available at http://www.scotusreport.com/2012/08/06/nfib-v-sebelius-coercion-and-the-unconstitutional-conditions-doctrine/; Baake, *supra* note 82, at 6-7.

of their existing Medicaid funding, facing an all-or-nothing dilemma regarding participation in both federal programs. Their choices were to either accept the new expansion, or lose all federal funding under the existing program. By contrast, the CAA enables states to avoid SIP obligations without sacrificing the highway fund spending partnership by opting for EPA to directly regulate in-state polluters through a FIP. In that case, EPA becomes the author and implementer of plans to regulate pollution in the state, and sanctions against a state for noncompliance disappear.[94] If states prefer the regulatory control that a SIP offers over a FIP, that represents a freely bargained-for position that does not implicate the *Sebelius* coercion limit.

Even if the FIP alternative were not available to forestall the highway fund penalty, CAA sanctions are distinguishable from the troubled Medicaid penalty on several other grounds. Most important, federal funding plays a much smaller role in state transportation regulation than it does in state Medicaid implementation.[95] A reviewing court could easily conclude that the amounts at issue are so much less than those at issue in Medicaid that the sanctions are too small to meet the size-related coercion factor. Of course, the vagueness of the size constraint means that a court could also find it violated here, highlighting the wide zone of uncertainty that the Chief Justice left open between *Dole* and *Sebelius*.

But as noted, the CAA provides EPA with a variety of ways to forestall or lighten the penalty in comparison to the all-or-nothing approach of the ACA's Medicaid penalty. The vulnerable federal highway grants are much more narrowly tailored than those at issue in *Sebelius*, exempting essential highway funds devoted to road-safety and other protected projects. EPA also retains much greater discretion on when and how to apply them. Unless an entire state is out of compliance (which would be unprecedented), highway funds may be withheld proportionately, corresponding only to the portion of the state in non-attainment. The administrator also retains discretion not to apply the penalty if the state is making good-faith efforts to comply, an option unavailable to the agency in the ACA Medicaid Expansion.

Finally, to the extent *Sebelius* was decided to protect legitimate state expectations in spending power bargaining, the reliance interests at stake are much different in the CAA context. Participating states have consented to the CAA's crossover terms for decades, in contrast with the open rebellion that took place in the wake of the ACA's passage. If any state reliance interests were upset by unfair surprise when the sanctions first emerged, that upset has most likely been mooted by the subsequent state expectations that have been generated through years of experience under the existing program. Of course, if the program were later amended in some important and meaningful way, this defense could be weakened.

With all this in mind, a successful facial challenge seems very unlikely, because it is difficult to imagine the law proving coercive in every possible application.[96] The worst case scenario is that an individual state could succeed on a more limited, as-applied challenge if the federal alternative is somehow disregarded and none of EPA's ample

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[94] Section 179 is ambiguous on this point, but EPA has formalized this interpretation in the implementing regulations, 40 C.F.R. § 93.120, to which a reviewing court must defer. Chevron v. NRDC, 467 U.S. 837 (1984).

[95] *See supra* notes 45, 81, and accompanying text.

[96] In a *facial* challenge, the plaintiff argues that the law is unconstitutional "on its face," meaning that the law cannot be applied constitutionally in any circumstance. An *as-applied* challenge argues that the law functions unconstitutionally in a specified circumstance, even if it may be constitutionally applied in other circumstances. The latter is much easier to prove, but its individualized remedy is less satisfying because the overall law remains intact.

discretion is deployed in that state's favor.[97] Of course, the threat of a successful as-applied challenge may be enough to prompt EPA to enforce sanctions more mildly, which in turn could weaken the rigor with which states comply. In this way, *Sebelius* could impact the way the CAA functions, even if it doesn't undo the current terms of the statute. That said, given that the EPA has only enforced the sanctions one time in the history of the statute, even that kind of change would be modest.

If the CAA were challenged this way, it is worth noting how tempting it would be to argue that even if the sanction did somehow violate the new spending power limit, its terms are independently authorized under the Commerce Clause.[98] *Sebelius* doesn't alter Congress's settled commerce authority to regulate air pollution, but it is important to note that challenges to the highway fund sanctions focus on an independent issue. Even if Congress can regulate polluters directly under the Commerce Clause, there is a separate constitutional question about whether Congress can secure state participation in implementing the CAA. In cases like *Sweat v. Hull* (2001)[99] and *Missouri v. United States* (1996),[100] challengers argued that the threat of sanctions unconstitutionally coerced the states to participate in a federal regulatory program, in violation of the Tenth Amendment anti-commandeering doctrine.[101] Notably, these suits failed.

However, the *Sebelius* decision alters some of this precedent. These earlier decisions grounded the overall CAA in commerce authority but relied explicitly on the consent-theory of the spending power to immunize the highway sanctions against coercion claims. Thanks to the crossover characteristics of the sanctions, the spending power basis of these decisions has less force after *Sebelius*. Still, the change will ultimately prove a distinction without a difference. Even without the old spending power precedent, coercion claims should be easily refuted by the lack of coercion in fact, given the distinguishable nature of the CAA sanctions and the fact that states can opt out of the risk of sanctions entirely when EPA regulates directly from a FIP.

V. CONCLUSION: CHANGING THE DYNAMICS OF STATE-FEDERAL BARGAINING

After *Sebelius*, then, programs of cooperative federalism may exceed the spending power when (1) the new offer changes the terms of an entrenched partnership, (2) the new offer conditions existing funds on compliance with indirectly related terms, and (3) the size of the grant at issue is so large that the state could not forgo it without excessive economic harm. In environmental law, only the CAA potentially triggers all three elements, and it is distinguishable from the Medicaid example because states can avoid the penalty entirely by allowing EPA to regulate in-state polluters directly. The

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[97] *Cf.* Bagenstos, *supra* note 33, at 920 ("[I]f the Administrator were to shut off *all* federal highway funds to a state based on the state's failure to provide a sufficient response to *stationary* sources of pollution, her actions would raise serious questions under the Chief Justice's opinion.").

[98] For example, the Fourth Circuit upheld the CAA against a federalism challenge in *Virginia v. Browner* in 1996, 80 F.3d 869, 877 (4th Cir. 1996), cert. denied, 519 U.S. 1090 (1997) (holding that the Commerce Clause authorizes Congress to regulate "activities causing air or water pollution, or other environmental hazards that may have effects in more than one State."). At least one federal court has gone as far as to hold that air pollution is itself interstate commerce. United States v. Bishop Processing Co., 287 F. Supp. 624 (D.C. Md. 1968).

[99] 200 F. Supp. 2d 1162 (D. Ariz. 2001) (rejecting Tenth Amendment defense of state's unilateral decision to terminate pollution controls provided for in State Implementation Plan under Clean Air Act).

[100] 918 F. Supp. 1320 (E.D. Mo. 1996) (rejecting Tenth Amendment challenge to Clean Air Act requirements for State Implementation Plans).

[101] New York v. United States, 505 U.S. 144, 161 (1992).

size of the implicated funds are also much smaller than those held coercive in *Sebelius*, and the CAA provides substantial discretion to the agency to avoid the all-or-nothing coerciveness that the Court disparaged in *Sebelius*. The fact that the program has been in operation for so long also mitigates against the frustration of states' reliance interests that drove the plurality's analysis of the ACA Medicaid expansion.

The CAA thus has good chances in court, but of course, that is not the end of *Sebelius*'s impact. One thing we have learned from environmental federalism cases in the past is that the threat of litigation—even litigation that is unlikely to be successful—changes the way that the implementing agencies behave, especially when the Court's ruling leaves open considerable uncertainty. For example, after two cases challenging the reach of EPA's authority to regulate wetlands were decided in a way that clouded the scope of EPA's jurisdiction, the agency substantially pulled back from enforcement efforts in realms of regulatory uncertainty.[102] A major investigation in 2010 reported that nearly 1,500 major water pollution investigations had been dropped due to the difficulty of establishing jurisdiction after these decisions.[103]

As a result of *Sebelius*, the states will have more leverage when negotiating the future terms of spending power bargains and enforcement. This is "Negotiation 101": the better a state's chances in court, or the costlier it will be for the agency to determine the legal limit, the stronger the state's bargaining position becomes at the table. Congress will be more cautious in drafting laws that create spending power partnerships and agencies more hesitant in implementing them. States may continue the trend of negotiating for individualized waivers from more generally applicable laws, and EPA may be more receptive. Indeed, EPA may capitulate more easily in negotiating compliance under the CAA, and it will certainly be less likely to press for the kinds of penalties that could prompt a *Sebelius* challenge. Of course, EPA could also seek closure by isolating a test case and using it to establish clearer limits—but it is unlikely to do so before the current Court, which came so close in *Sebelius* to limiting the commerce authority on which so many environmental laws are premised.

At the same time, *Sebelius* could also harm the interests of states by prompting Congress to reduce or avoid state-federal partnerships in regulatory arenas where states might prefer them. Congress may lean toward smaller federal grants in cooperative programs of more limited duration, or toward programs that bypass the states entirely to avoid *Sebelius* impacts.[104] After all, the reason that all but a handful of states elect to design air quality implementation standards under the Clean Air Act and approve discharge permits under the Clean Water Act is that they prefer the resulting autonomy and engagement to direct federal regulation by EPA. While *Sebelius* thus legitimately focuses our attention on matters of fairness in state-federal bargaining, it's not yet clear who will benefit most from the change.

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[102] Rapanos v. United States, 126 S. Ct. 2208, 2252 (2006); Solid Waste Agency of N. Cook Cnty. v. United States Army Corps of Engineers, 531 U.S. 159, 173-74 (2001).

[103] Charles Duhigg & Janet Roberts, *Rulings Restrict Clean Water Act, Foiling EPA*, N.Y. TIMES, Feb. 28, 2010, at A1, http://www.nytimes.com/2010/03/01/us/01water.html?emc=eta.&_r=0.

[104] In an analysis of *Sebelius* effects on federal education grants, Professor Eloise Pasachoff similarly concludes that the decision is unlikely to impact them no matter how large they are, but that it is still likely to affect the future of federal education law by changing the architecture of state-federal partnerships. Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 Am. U. L. Rev. 577, 651-61 (2013).

Applying the Rationale of *Twombly* to Provide Safeguards for the Accused in Federal Criminal Cases*

Robert L. Weinberg**

In 2013, we marked the sixth anniversary of the Supreme Court's 7-2 decision in the now-famous *Bell Atlantic Corp. v. Twombly* case.[1] This private treble damages civil action—where the court dismissed as factually insufficient a civil complaint pleading a conspiracy to violate a federal criminal statute, the Sherman Antitrust Act[2]—produced an unexpected bonanza of pleading safeguards protecting defendants in future civil cases of all types, and resulted in numerous dismissals of complaints.[3]

But the basic pleading rule of *Twombly*—that allegations setting forth "a legal conclusion" cannot substitute for required "factual allegations"—a pleading rule, which should in principle be equally applicable to pleadings in federal criminal litigation, has not been applied by the courts to dismiss criminal indictments or informations for failure to make sufficient "factual allegations." This has been so, notwithstanding the reiteration and reinforcement of the *Twombly* rule by the even better known *Iqbal*[4] case, which explained that, in *Twombly*:

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[1] Bell Atl. Corp. v. Twombly, 550 U.S. 554 (2007).

[2] 15 U.S.C. § 1 (2006).

[3] For the most recent and comprehensive empirical study of the effects of the pleading standards set by *Twombly*, and the follow-on case of *Iqbal*, on the litigation of civil cases, see Jonah P. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of* Twombly *and* Iqbal *on Access to Discovery*, 121 YALE L.J. 2270 (2012). This article also references numerous prior articles and studies concerning the impact of *Twombly* and *Iqbal* on civil cases, including reports by the Administrative Office of the U.S. Courts. The Gelbach article concludes that *Twombly* and *Iqbal* have resulted in substantially increasing the grants of motions to dismiss civil complaints, and also in deterring the filing of civil complaints because plaintiffs' counsel feared a dismissal under the heightened pleading standards.

[4] Ashcroft v. Iqbal, 556 U.S. 662 (2009).

> The Court held the plaintiffs' complaint deficient under Rule 8. In doing so it first noted that the plaintiffs' assertion of an unlawful agreement was a 'legal conclusion' and, as such, was not entitled to the assumption of truth. *Had the Court simply credited the allegation of a conspiracy, the plaintiffs would have stated a claim for relief and been entitled to proceed perforce*.[5]

The *Iqbal* Court further explained:

> Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. *Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice*. (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, *we 'are not bound to accept as true a legal conclusion couched as a factual allegation*.')[6]

There have been vigorous responses to the challenges and obstacles which *Twombly*, and its follow-on case *Iqbal*, pose to the viability of complaints in civil actions that were instituted by civil rights groups and other public interest plaintiffs.[7] Civil procedure expert Professor Arthur Miller authored the authoritative and encyclopedic critique: *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*.[8] Miller's article explains that "*Twombly* and *Iqbal* have destabilized both the pleading and the motion-to-dismiss practices as they have been known for over sixty years."[9] However, Professor Miller's writings have eschewed any discussion of whether the *Twombly* and *Iqbal* pleading rule—that "conclusions of law" cannot substitute for required "factual allegations"—has application to challenging the sufficiency of indictments or informations pleaded by the government in federal criminal cases.

Moreover, Professor Miller's greatest misgiving about *Twombly* and *Iqbal* was that those cases allow a trial judge to dismiss a civil complaint because the judge deems the well-pleaded allegations of the civil complaint to lack "plausibility."[10] This concern,

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[5] *Id*. at 680 (citing *Twombly*, 550 U.S. at 555) (emphasis added).

[6] *Id*. at 663, 687 (citing *Twombly*, 550 U.S. at 555) (emphasis added and internal quotations omitted).

[7] *See* Joshua Civin & Debo P. Adegbile, *Restricting Access to Justice: The Impact of* Iqbal *and* Twombly *on Federal Civil Rights Litigation*, ACS Issue Brief (Sept. 2010), later published in 5 ADVANCE 18-36 (Fall 2011). *See also* Suzette M. Malveaux, *Salvaging Civil Rights Claims: How Plausibility Discovery Can Help Restore Federal Court Access After* Twombly *and* Iqbal, ACS Issue Brief (Nov. 2010). Issues posed by *Twombly* and *Iqbal* were also addressed at the 2010 ACS Annual Convention by a panel moderated by Professor Arthur Miller, held on June 18, 2010, in Washington, D.C.

[8] Arthur Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010).

[9] *Id*. at 2.

[10] Thus Professor Miller characterizes the pleading standard that has replaced traditional "notice pleading" as "plausibility pleading." The traditional standard was set forth in *Conley v. Gibson*, 355 U.S. 41 (1957), which was "retired" by the *Twombly* opinion. *See Twombly*, 550 U.S. at 563.

however, has no application to dismissal of federal criminal indictments because the trial judge has no authority to dismiss the indictment of a grand jury on that ground.[11]

It is therefore appropriate at this time to consider the consequences of applying to criminal prosecutions the *Twombly* principle, as it was reinforced and reiterated in *Iqbal*, that in ruling on a motion to dismiss the plaintiff's initial pleading as insufficient, the trial court is "*not bound to accept as true a legal conclusion couched as a factual allegation*."[12]

I. APPLICATION OF *TWOMBLY* TO FEDERAL INDICTMENTS

Just four months prior to the *Twombly* decision, in a leading case on the pleading standard for federal criminal indictments, the Supreme Court held in an 8-1 decision authored by Justice Stevens that, "an indictment *parroting the language of a federal criminal statute* is often sufficient …."[13] Because most federal indictments are "parroting the language of a federal criminal statute," and such statutory language "contains all the elements of the crime," such indictments will either be "parroting" statutory language which does state "a conclusion of law," or alleging a "legal conclusion couched as a factual allegation."

For example, consider the application of *Twombly* to a very common form of indictment, one that alleges that the defendants "conspired and agreed" to violate a cited federal criminal statute (such as a statute proscribing the selling of a controlled substance). A model indictment for conspiracy is set forth in Harry Subin's *The Practice of Federal Criminal Law*:[14]

> **COUNT ONE** (Narcotics Conspiracy: Importation)
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> 1. In or about and between May 2004 and January 2005, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant PAUL CHRISTOPHER, together with others, did knowingly and intentionally conspire to import into the United States from a place outside thereof five kilograms or more of a substance containing cocaine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 952(a). (Title 21,

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[11] *See* FED. R. CRIM. P. 12(b) (listing the possible grounds for motions to dismiss an indictment or information). The "plausibility" standard intended by the author of the *Twombly* decision, Justice Souter, was much more lenient to the pleader than the higher standard of "plausibility" later adopted by the 5-4 majority decision in *Iqbal*, in which Justice Souter dissented. Justice Souter's opinion in *Iqbal* indicated that an allegation could be ruled not plausible only where it was obviously in conflict with reality; or "sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel." *See Iqbal*, 556 U.S. at 687 (dissent of Souter, J., joined by Stevens, Ginsburg and, Breyer, JJ.).

[12] Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

[13] United States v. Resendiz-Ponce, 549 U.S. 102, 109 (2007) (emphasis added). The opinion in *Resendiz-Ponce* went on to note there are also "crimes that must be charged with greater specificity." As an example of such crimes, the opinion cited the Contempt of Congress statute, 2 U.S.C. § 192, and the Court's holding in *Russell v. United States*, 369 U.S. 749 (1961), that to be valid the indictment "must go beyond the words of" that statute. "Both to provide fair notice to defendants and *to assure that any conviction would arise out of the theory of guilt presented to the grand jury*, we held that indictments under § 192 must do more than restate the language of the statute." *Resendiz-Ponce*, 549 U.S. at 109 (emphasis added).

[14] HARRY I. SUBIN ET. AL., THE PRACTICE OF FEDERAL CRIMINAL LAW 272 (2006).

> United States Code, Sections 963, 960(a)(1) and 960(b)(1)(B(ii); Title 18, United States Code, Sections 3551 et seq.).
>
> **COUNT TWO** (Narcotics Conspiracy: Distribution and Possession with Intent to Distribute)
>
> 2. In or about and between May 2004 and January 2005, both dates being approximate and inclusive, within the Eastern District of New York, the defendants PAUL CHRISTOPHER and WILLIAM VAN NESS, together with others, did knowingly and intentionally conspire to distribute and possess with intent to distribute five kilograms or more of a substance containing cocaine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1). (Title 21, United States Code, Sections 84 and 841(b)(1)(A)(ii)(II); Title 18, United States Code, Sections 3551 et seq).[15]

This model form of conspiracy indictment would no longer be considered sufficient if the *Twombly* standard of pleading applied to indictments, since the allegation that the defendant did "conspire" is not supported by underlying factual allegations, but is merely a "conclusion of law."

In *Twombly*, the complaint charged that a number of telephone companies had "conspired" with each other and "agreed" with each other to engage in certain specified anti-competitive practices, such as refraining from entering into each other's markets. Such conduct would not violate the antitrust law if each company's decision to engage in it was reached independently, but would violate the Sherman Antitrust Act if this "parallel conduct" was entered into because the defendants had in fact "conspired" and "agreed" to do so. Under existing law, an indictment alleging that this "conspiracy" and "agreement" had brought about the anti-competitive practices would be held "sufficient" because it included statutory language containing all the essential elements of the charge and apprised the defendants of the charge they must be prepared to meet. Numerous Supreme Court cases have stated that the requirements of a sufficient indictment are that it "contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend."[16] For purposes of deciding a motion made by one of the defendants to dismiss the indictment for failure to charge that he committed an offense, the allegation that the defendants conspired and agreed together has been assumed by the court to be true.

In the *Twombly* civil case, the complaint of conspiracy to engage in the anti-competitive practices would likewise have withstood a motion to dismiss if the allegation that defendants "conspired" and "agreed" to perform the anti-competitive practices was assumed to be true for purposes of the motion to dismiss. But in *Twombly,* the Court held, by 7 to 2, that this allegation of "conspiracy" was alleging "a legal conclusion" (not a "factual allegation"), so that it would not be assumed to be true. Since the complaint did not allege specific facts that showed such an agreement had been entered into, *Twombly* held that dismissal of the complaint was required. As noted above, and in *Iqbal*, the opposite result would have followed "[h]ad the court simply credited the

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[15] *Id*.

[16] *See, e.g.*, Hamling v. United States, 418 U.S. 87, 117-18 (1974).

allegation of a conspiracy."[17] It should be unacceptable to uphold a challenged criminal indictment by assuming that an allegation that the defendant "conspired" is a true "allegation of fact," while under *Twombly* a civil complaint would be dismissed because an allegation of "conspiracy" is deemed to be merely "a legal conclusion."

An accused in a criminal case should be at least as entitled as a defendant in a civil case to be advised by the charging document of the factual basis for the charge filed against him. Indeed, Rule 7(c) of the Federal Rules of Criminal Procedure requires that the "essential facts" be alleged in an indictment, whereas Rule 8(a) of the Federal Rules of Civil Procedure does not by its terms require such specificity. Indeed, as Justice Stevens pointed out in his *Twombly* dissent, the framers of the Federal Rules of Civil Procedure expressly rejected the old civil code rule that the complaint must allege "the facts constituting the cause of action"[18]—whereas the new Federal Criminal Rules have required that an indictment plead "the essential facts constituting the offense."[19] Moreover, Rule 7(c) of the Criminal Rules, unlike Rule 8(a) of the Civil Rules, has a constitutional foundation in the Sixth Amendment, which guarantees the right of the accused "to be informed of the nature and cause of the accusation" against him.

II. HOW FAR DOES *TWOMBLY* GO IN CHANGING THE LAW ON SUFFICIENCY OF INDICTMENTS?

In *Resendiz-Ponce*,[20] the Supreme Court divided indictments into two categories: "[W]hile an indictment parroting the language of a federal criminal statute is often sufficient, there are crimes that must be charged with greater specificity."[21]

Application of the *Twombly* pleading rule that "conclusions of law" cannot substitute for the pleading of the underlying facts would at least move many indictments that are now "often" held sufficient under the precedent of *United States* v. *Debrow*,[22] into the second category, which covers "crimes which must be charged with greater specificity."[23] The paradigm for the second category, as *Resendiz-Ponce* noted, is *Russell* v. *United States*.[24]

But, going further, the *Debrow* case itself might be implicitly overruled by a decision applying to criminal cases the *Twombly* pleading rule that "conclusions of law" cannot substitute for "allegations of fact" in ruling on a motion to dismiss the initial pleading filed against the defendant. *Debrow* itself, on a close reading, really substituted a "conclusion of law" for an allegation as to the underlying facts in holding that the indictment therein was sufficient. In *Debrow*—which was the first to construe Rule 7(c) after adoption in 1946 of the new Federal Rules of Criminal Procedure—the Supreme Court reversed the lower court decisions and ruled that perjury indictments were sufficient even though they did not allege the specific facts as to the identity of the official who had administered the oath and the source of that official's

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[17] *See* Ashcroft v. Iqbal, 556 U.S. 662, 680 (2009) (discussing the *Twombly* conspiracy allegation).

[18] *See* Bell Atl. Corp. v. Twombly, 550 U.S. at 574-75 (Stevens, dissenting).

[19] FED. R. CRIM. P. 7(c).

[20] United States v. Resendiz-Ponce, 549 U.S. 102 (2007).

[21] *Id*. at 109.

[22] United States v. Debrow, 346 U.S. 374 (1953).

[23] *Id*.

[24] *Supra* note 13.

authority to do so.[25] The Federal District Court in Mississippi, and the majority opinion of the Fifth Circuit affirming the District Court's ruling, had dismissed a series of indictments for perjury allegedly committed before a U.S. Senate Subcommittee conducting a hearing in Mississippi. The Supreme Court held that "allegations as to those facts were supplied by the allegations in the indictments that the defendants had '*duly taken* an oath'. 'Duly taken' means an oath taken according to a law which authorizes such oath."[26]

The Supreme Court was thus using a conclusion of law—that the oath was "duly taken"—without requiring (as *Twombly* would) that the facts underlying that "conclusion of law" be pleaded in the charging document. The Court reasoned that the identity of the person who administered the oath "goes only to the proof of whether the defendants were duly sworn."[27] But the Court's acknowledgment that proof of such person's identity was required in order to prove two essential elements—that the oath was (1) authorized by a law of the United States and (2) taken before a competent tribunal, officer or person—shows that the Court was substituting the conclusion of law, "duly taken," for the underlying facts. Those facts, omitted from the indictment in *Debrow*, should be considered "essential facts" within the meaning of the requirement of Rule 7(c) that the indictment state "the essential facts constituting the offense charged." And the majority of the Fifth Circuit did hold that Rule 7(c) was violated by failure to allege those two "essential facts" in the indictment.[28]

Thus the Supreme Court's reasoning in *Twombly* should be held to implicitly overrule the Court's reasoning in the leading case of *United States* v. *Debrow*. The precedents following *Debrow*[29] should likewise be deemed overruled by *Twombly*. The reaffirmation of *Debrow* in *Resendiz-Ponce* should no longer be held binding.

III. POLICY CONSIDERATIONS

The policy considerations that would support applying *Twombly-Iqbal* pleading standards to safeguard the rights of the accused in criminal cases are no less compelling than the Supreme Court's rationale for according the protection of those heightened standards to defendants in civil cases.

The policy justification given for the Supreme Court's decisions in *Twombly* and *Iqbal*—which changed prior law so as to make it easier for defendants to terminate civil suits with a successful 12(b)(6) motion to dismiss the complaint as insufficient—was that a dismissal at this juncture of the case spares civil defendants from having to incur significant burdens of expense and time. In *Twombly*, for example, the dismissal saved the defendants the expense of having to engage in extensive discovery procedures, and the resulting risk that defendants may find it more economical to pay an

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[25] The perjury statute, 18 U.S.C. § 1621, provided that the oath had to be authorized by a law of the United States; therefore, as the Supreme Court noted, it would be necessary to prove the identity of the person who had administered the oath and that such person, by virtue of his official position, was authorized by statute to administer the oath.

[26] *Debrow*, 346 U.S. at 377 (emphasis added).

[27] *Id*.

[28] *See* United States v. Debrow, 203 F.2d 699 (5th Cir. 1952).

[29] *See, e.g.*, Hamling v. United States, 418 U.S. 87, 117-19 (1974) (holding that an indictment for publishing "obscene" material was sufficient even though it did not allege the facts establishing the legal conclusion that the material was "obscene").The *Hamling* opinion held the indictment was sufficient because it alleged the legal conclusion that the material was "obscene." *See id*. at 118 ("The word 'obscene,' as used in 18 U.S.C. § 1461, is not merely a generic descriptive term, but *a legal term of art*.") (emphasis added). *See also Resendiz-Ponce*, *supra* note 20, at 109 (citing *Hamling* with approval).

unwarranted monetary settlement than to incur the substantial expense of discovery proceedings. In *Iqbal*, the dismissal spared high public officials from having to spend their time defending themselves in the litigation and being distracted from the performance of their duties.

No less compelling are the justifications for raising pleading standards in order to protect the defendants in criminal cases. The burden spared a defendant by a successful motion to dismiss the case under Rule 12(b)(3)[30] is even more important to that defendant's welfare than is a dismissal under Rule 12(b)(6)[31] to a civil defendant, because the criminal defendant's liberty, rather than the civil litigant's time or money, is at stake. Thus the argument for applying the *Twombly* rationale to the heightened standards for pleading civil complaints—once *Twombly* had been held by *Iqbal* to cover "all civil cases"—should also be applied to raising the standards for pleading indictments in criminal felony prosecutions. The criminal defendant whose motion to dismiss is denied may well feel pressured into accepting a "settlement" in the form of a guilty plea to a less severe offense, to avoid the risk and strain of going to trial and receiving a heavier sentence if he loses. The concern in *Twombly*, that the civil defendant might be pressured into granting an impropitious monetary "settlement" in order to avoid the cost burdens of litigating its defense, seems less compelling than the concern one should have for a defendant facing loss of liberty if his motion to dismiss is erroneously denied and he feels coerced into "settling" his case for a "plea bargain" that will send him to jail. The Supreme Court recently noted that approximately ninety-seven percent of federal felony convictions are secured through guilty pleas, because the accused will be sentenced more harshly if he is convicted after rejecting a plea bargain.[32]

Moreover, the arguably unfair disadvantage that the *Twombly-Iqbal* rationale imposes on civil plaintiffs—because at the pleading stage they lack the knowledge of certain facts that those cases require the plaintiffs plead in order to avoid a dismissal[33]—is inapplicable to the federal government "plaintiff" in criminal cases. There, the "plaintiff" United States government has the resources needed for compelling disclosure of the facts necessary to plead an indictment with the requisite factual specificity. The government's resources are far more extensive than those ordinarily available to the drafters of civil complaints. The prosecutor who will draw up the indictment's allegations can readily employ government-controlled grand jury proceedings, and the grand jury's sweeping subpoena powers, to discover the specific facts which would have to be pleaded in an indictment under an *Iqbal-Twombly* standard of sufficiency. The government also has available the investigative assistance of the FBI and other law enforcement agencies. The government can therefore readily discharge the burden of more careful and detailed pleading of facts that would be required to plead an offense in an indictment under the heightened *Iqbal-Twombly* standard for pleading "factual allegations," not "legal conclusions."

Additionally, the accused has far greater need than the civil defendant to secure detailed factual allegations from the plaintiff's initial pleading. The civil defendant

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[30] Fed. R. Crim. P. 12(b)(3).

[31] Fed. R. Civ. P. 12(b)(6).

[32] Missouri v. Frye, 132 S. Ct. 1399 (2012).

[33] Before *Twombly* and *Iqbal*, it was more difficult for defendants to foreclose plaintiffs from proceeding with discovery by a motion to dismiss the complaint under Rule 12(b)(6), because the motion would be adjudicated under the "notice pleading" standard as construed in the landmark case of *Conley* v. *Gibson*. *See supra* note 3.

can readily flush out the plaintiff's allegations by taking his or her deposition, or submitting written interrogatories, or taking depositions of third parties—none of which basic discovery devices are available to the defendants in federal prosecutions or those in most states. And the civil defendant whose motion to dismiss for factual insufficiency is erroneously denied still has the opportunity to avoid the burdens of trial by securing a summary judgment in his favor if the plaintiff cannot show essential facts at that juncture. But the federal criminal defendant whose motion to dismiss is erroneously denied must then stand trial or plead guilty; there is no equivalent of a motion for summary judgment in federal criminal cases.[34]

IV. COURTS' USE OF *TWOMBLY* IN CRIMINAL PROCEEDINGS

The application of *Twombly* need not be limited to civil cases, as shown by the courts' application of the *Twombly* test to adjudicate motions to dismiss claims against the government brought by criminal defendants or third parties in certain types of criminal proceedings.

In opposing collateral attacks on criminal convictions made by defendants moving to vacate their sentences under 28 U.S.C. § 2255 for alleged constitutional violations, the government often seeks to have defendants' applications for relief dismissed for failure to state a claim. For example, in *United States v. Luck*, Judge Norman K. Moon applied the *Twombly* standard to each of the movant's constitutional claims under § 2255, holding that one of the claims was sufficient to survive the government's motion to dismiss that claim, and granting dismissal of the remaining claims as insufficient to satisfy *Twombly* requirements.[35]

Rule 12 of the *Rules Governing Section 2255 Proceedings for the United States District Courts* provides that "the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure … may be applied to a proceeding under these rules."[36] Additionally, *Advisory Committee Notes to Rule 12* recognize "the nature of a § 2255 motion [to vacate the defendant's sentence] *as a continuing part of the criminal proceeding* … as well as a remedy analogous to habeas corpus by state prisoners."[37] The *Advisory Committee Note to Rule 1* similarly states that "a motion under § 2255 is a *further step in the movant's criminal case* and not a separate civil action."[38] Thus *Luck* clearly illustrates the applicability of *Twombly* to pleadings in criminal cases. This supports the application of *Twombly* to pleading requirements for indictments and informations as well.

Twombly is also utilized by the courts in litigation brought under Rule 32.2(c)(1)(A) of the Federal Rules of Criminal Procedure,[39] which governs petitions filed by third parties asserting an interest in property to be forfeited to the government following a defendant's criminal conviction. Government motions to dismiss such petitions for "failure to state a claim" are subject to the *Twombly/Iqbal* test of sufficiency. For example, in *United States v. Egan*,[40] numerous third parties filed petitions claiming a portion of the property that had been seized by the government from the criminal case

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[34] The jurisdiction of Vermont, notably, allows criminal defendants both to take discovery depositions and to move for summary judgment.

[35] *See United States* v. *Luck*, 2009 WL 159859 (W.D. Va. 2009).

[36] Rules Governing Section 2255 Proceedings for the U.S. District Courts, Rule 12 (2010).

[37] Advisory Committee Notes to Rule 12 (emphasis added).

[38] Advisory Committee Note to Rule 1 (emphasis added).

[39] Fed. R. Crim. P. 32.2(c)(1)(A).

[40] *See* United States v. Egan, 2011 WL 3370392 (S.D.N.Y. 2011).

defendant, Mr. Egan. The government moved to dismiss these petitions for failure to state a claim. As the court's opinion notes, the government based its argument for dismissal of the petitions upon *Iqbal* and *Twombly*. But applying the standard of those cases, the court held each petition sufficient and denied the government's motion to dismiss each of the petitions. As the case caption (*United States v. Egan*) indicates, these petitions were part of the criminal proceedings, and were authorized by provisions of the Federal Rules of Criminal Procedure.

V. CONCLUSION

Over the past six years since the *Twombly* decision, most federal district judges will likely have had occasion to consider the application of *Twombly* and *Iqbal* to motions in civil cases filed on behalf of defendants invoking *Twombly* to support the dismissal of the plaintiffs' complaints. The familiarity of the federal bench with *Twombly* and *Iqbal* should therefore assist counsel for the accused in urging that courts entertain motions to apply *Twombly* and *Iqbal* to defense motions for dismissal of indictments and informations in federal criminal cases.

Just as *Twombly* "retired" the original *Conley* v. *Gibson* pleading standard that was applied for many years under the Federal Rules of Civil Procedure, so may *Twombly* also "retire" the *Debrow* pleading standard, applied for so many years under the Federal Rules of Criminal Procedure. Allegations that *Twombly* recognizes as mere conclusions of law when pleaded in a civil complaint are not transmogrified into allegations of "essential facts" when those same words (e.g., "conspiracy") are pleaded in a criminal indictment. Even if the higher pleading standard is not constitutionally required by the Fifth Amendment grand jury clause, the pleading of "the essential facts constituting the offense" is mandated by the terms of Rule 7(c) of the Federal Rules of Criminal Procedure,[41] and by *Twombly*.

[41] FED. R. CRIM. P. 7(c).

Is Our Dysfunctional Process for Filling Judicial Vacancies an Insoluble Problem?*

Russell Wheeler**

I. INTRODUCTION

The time and effort devoted to the Obama administration's first-term achievements may help explain why its judicial appointments record was a mixed bag. It got two Supreme Court justices confirmed and shifted somewhat the party-of-appointing-president make-up among active circuit judges, but the first term was also marked by fewer nominations, unexceptional confirmation rates, and more vacant judgeships.

A. THE CONTINUING BREAKDOWN OF THE PROCESS

Here are the basic nomination and confirmation facts of the first term:[1]

- President Barack Obama submitted 171 district nominations, compared to 177 by President George W. Bush and 196 by President William Clinton. Unlike Clinton and Bush, though, Obama made a large number of nominations (almost ten percent) after August of his fourth year, precluding confirmation in that year.
- The Senate confirmed 141 district nominees, for a confirmation rate of 82% —or 90% discounting the late-year nominations. The Senate confirmed 168 first term Bush nominees (97% of pre-September nominees) and 169 Clinton nominees (87%).
- The administration's confirmation record for circuit nominees was not out of line with those of the two previous administrations' first terms. The Senate confirmed 30 Obama circuit nominations (71% of his 42 nominees), versus 34 of Bush's (67% of 56 nominees) and 30 of Clinton's (77% of 39 submissions).
- Vacant district judgeships climbed from 43 when Obama took office to 63 in early January, and would have climbed higher but for an unprecedented 13 confirmations after the November 2012 elections. (District vacancies declined by nine and 31 in the first Clinton and Bush terms.) Circuit vacancies inched up by three, to 17; they increased by five in Clinton's first term and declined by nine under Bush.

Viewing these data—and the much longer wait times under Obama from district vacancy to nomination and to confirmation—many ask what can be done to "solve" the problematic federal judicial nomination and confirmation process? The process

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[1] Most of the nomination and confirmation data reported here and throughout the paper come or are updated from RUSSELL WHEELER, JUDICIAL NOMINATIONS AND CONFIRMATIONS IN OBAMA'S FIRST TERM (Brookings Institute Dec. 13, 2012), http://www.brookings.edu/research/papers/2012/12/13-judicial-nominations-wheeler.

may not be amenable to a "solution" if that means a return to the days of prompt and virtually controversy-free confirmations. It may be pointless to expect the White House once again (subject to ABA and Justice Department investigations) to delegate most district nominee selections to home-state senators or other in-state leaders of the president's party, who in turn will largely defer to the White House as to appellate vacancies in the state. Combined district and circuit confirmation rates in the ninety percent range are unlikely to return any time soon, nor are confirmations measured in days after nomination, rather than months. Equally unlikely to reappear are the Clinton first-term phenomena of a voice vote confirmation of every district nominee who made it to the Senate floor and of all but two circuit nominees. White House tussles with home state legislators of both parties appear to be the coming norm, and senators not of the president's party no longer accede routinely to White House nominees from their states or vote to confirm nominees routinely in return for the same deference that their predecessors knew those on the other side of the aisle would provide when the shoe was on the other foot.

B. SOME POSSIBLE SOLUTIONS

Technical and procedural adjustments to the process of filling federal judicial vacancies will not reverse the effects of the pervasive political polarization that has infected many other aspects of American politics. Even 70 years ago, though, Reinhold Niebuhr described democracy as "a method of finding proximate solutions for insoluble problems."[2] In the business of staffing the federal courts of the early twenty-first century, our best hope may be what Niebuhr called "indeterminate creative ventures."[3]

In this Issue Brief, I first provide a quick summary of today's less attractive work environment for federal judges, which heightens the need for an expeditious and effective nomination and confirmation process. Then I describe several proposals to increase the number of judicial nominations in Obama's second term and decrease the time between vacancy and nomination. They include revamping the executive branch nomination machinery, setting nomination deadlines, senators' use of vetting committees to screen potential nominees, making public the status of senatorial recommendations for judicial nominations, and reconsidering the current "blue slip" policy. Third, I look at two proposals to achieve more second term confirmations, more quickly: changes to the filibuster rules—even while recognizing the Senate's hoary traditions and commitment to protecting the minority's ability to call many of the legislative shots—and more persuasive messaging about the need for more expeditious confirmations. Fourth, I summarize very briefly three longer-term but still modest proposals for improving the district court nomination process: scaling back the Senate Judiciary Committee questionnaire, eliminating hearings, and rules changes to produce quicker Senate votes. They provide a glimpse of small steps that could improve the process.

Finally, given the near impossibility of achieving significant changes in the midst of the second term's confirmation battles, the administration might consider the tried-but-sometimes-true Washington institution of a task force—tripartite and bipartisan—to put on the table some modest changes that the next administration and the incoming 2017 Senate might consider and that aspirants for those positions might

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[2] Reinhold Niebuhr, The Children of the Light and the Children of the Darkness 118 (1944).

[3] *Id*. at 144.

debate in the 2016 elections. But for even slight improvements to have any chance of adoption, the Senate and the administration, Democrats and Republicans both, will have to conclude that it is in their self-interest—put aside the national interest—to change an increasingly dysfunctional process for filling judicial vacancies.

II. WHY IT MATTERS: THE HEALTH OF THE FEDERAL BENCH

Filling judicial vacancies is one part of a larger and more important task: sustaining or restoring a quality federal bench. Reasonable people will disagree on what defines a "quality federal bench," but most would acknowledge that by and large it provides what Rule One of the Federal Rules of Civil Procedure promises: "the just, speedy, and inexpensive determination of every action and proceeding." That requires judges who are professionally competent, able to deal with new forms and subjects of litigation, and able to manage a docket effectively as well as analyze competing legal claims. In addition, judges should be diverse enough demographically that the bench looks something like the population it serves, and judges should bring an array of professional backgrounds that provide perspectives they can apply to their work and that they can use when engaged with colleagues in collective problem solving. Their work should be intellectually and professionally challenging. The number of judgeships should keep some rough pace with the increased work. Judicial compensation, in all its forms, should be at least minimally adequate to the difficulty and importance of the work performed.

Today's judiciary is certainly more diverse, demographically, than it was twenty years ago. About three-fourths of President George H.W. Bush's appointees were white males (as were all of President Dwight Eisenhower's). Obama's appointees, enhancing trends in the Clinton and second Bush administrations, are 43 and 30% white male (district and circuit respectively) and include proportionately many more women, African Americans, Hispanics, and Asian Americans. There has also been a pronounced shift among district judges away from those who came to the bench from the private practice of law and a corresponding increase in those from the state and term-limited federal judiciaries. Those judges' judicial experience means they are in many ways well-equipped for the job, but they may lack the perspective of those recently in private practice. Two-thirds of Eisenhower's district appointees and almost half of H.W. Bush's came from private practice, a figure that dropped to less than 40% of Bush's and Obama's first-term district appointees. This long term trend has worried some observers, including Chief Justice William Rehnquist and Chief Justice John Roberts, Jr. Roberts has asserted that it "changes the nature of the federal judiciary when judges are no longer drawn primarily from among the best lawyers in the practicing bar."[4] Rehnquist and Roberts may have had in mind lawyers from top firms specializing in commercial law and related areas, but the practicing bar also includes lawyers specializing in such areas as criminal defense, civil rights, and environmental law. Those who may not worry about a decline in judges drawn from the corporate world may nevertheless worry about a dearth of judges drawn from other segments of the bar.

There are serious challenges in attracting a diverse and talented pool of federal judges. First, the federal judicial workload has changed significantly over the last

[4] Quoted in Russell Wheeler, *Changing Backgrounds of U.S. District Court Judges, Likely Causes and Possible Implications*, 93 JUDICATURE 140, 143 (2010).

twenty years.[5] Filings per district judgeship have increased from 392 in 1991 to 536 in 2011, and appellate filings have gone up even more, 197 per judge in 1991 to 308 last year. (Congress has created few district and no appellate judgeships since 1990.) So, caseloads have gone up over the past two decades, but authorized judgeships to handle them have basically stayed static (and the near ten percent vacancy rate doesn't help). Trials, which many judges relish, have declined per judge from 31 in 1991 to 21 last year. The proportion of drug and immigration criminal cases in the district courts has doubled, from six to 13% of the docket nationally, and is much higher in some districts. Although they have abated nationally in recent years, cases from the Board of Immigration Appeals, many with poor records, constitute about 12% of court of appeals filings (up from three percent in 2001) and are still a fourth of the caseload for the appellate courts in the Second and Ninth Circuits. These cases are, by and large, not what attract good would-be judges to the bench.

And, tiresome as it is to hear, federal judicial salaries have fallen well below the pace of inflation. A federal district judge today would need an annual salary of $211,459 to match the buying power, nationally, of 1991's $125,100 salary.[6] District judges in some parts of the country can live quite well on 2012's $174,000 salary, but its buying power is a different thing in high-cost markets. A continuing decline in buying power is a legitimate source of concern for judges and would-be judges in major metropolitan areas who are not independently wealthy and who are in, or are considering entering, what is supposed to be a life-time job with strict limits on outside earned income. Federal judges enjoy prestige and authority, as well as strong staff support and a well-funded physical and technological infrastructure, although staff furloughs and other cutbacks may be in the offing as part of government spending reductions.[7]

This snapshot is hardly a complete report card on the judiciary's health.[8] It's too early to say whether we are seeing what Andrew Cohen called "signposts on the road to third-world justice,"[9] but the figures are not encouraging. They are, moreover, consistent with the growing but hushed talk about the increasing numbers of lawyers who, unlike counterparts of some years ago, are disinterested in a federal judgeship and sometimes dismal numbers of applications for vacancies.

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[5] Caseload data comes from the ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR, 1991 and JUDICIAL BUSINESS OF THE UNITED STATES COURTS, FISCAL YEAR 2011 (2012), http://www.uscourts.gov/Statistics/JudicialBusiness.aspx#appTables, (principally tables B-3, C-2, C-7, and T-1).

[6] Based on the BUREAU OF LABOR STATISTICS CPI INFLATION CALCULATOR, http://www.bls.gov/data/inflation_calculator.htm (last visited Jan. 14, 2013).

[7] *See, e.g.*, *Court System Braces for Layoffs as Clock on Fiscal Crisis Ticks*, FOX NEWS (Dec. 10, 2012),http://www.foxnews.com/politics/2012/12/10/court-system-braces-for-layoffs-as-clock-on-fiscal-crisis-ticks; Daniel Wiessner, *Federal Courts Facing Fiscal Cliff Braced for Layoffs*, REUTERS (Dec. 13, 2012), http://newsandinsight.thomsonreuters.com/Legal/News/2012/12_December/Federal_courts_facing_fiscal_cliff_braced_for_layoffs/.

[8] A much more extensive discussion of how that health might be measured is F. COFFIN AND R. KATZMANN, TOWARD OPTIMAL JUDICIAL WORKWAYS, in WORKWAYS OF GOVERNANCE, MONITORING OUR GOVERNMENT'S HEALTH 121-143 (R. Davidson, ed., 2003).

[9] Andrew Cohen, *Federal Judges Are, in Fact, 'Job Creators'*, ATLANTIC, Mar. 18, 2012, *available at* http://www.theatlantic.com/politics/archive/2012/03/federal-judges-are-in-fact-job-creators/254670/.

III. WHAT'S AN ADMINISTRATION TO DO? MORE NOMINATIONS AND CONFIRMATIONS, SOONER

The administration can only do so much about these conditions. It can't stop prosecuting drug and immigration offenses or try to force parties to go to trial simply to accommodate judges' workload preferences. And although the Judicial Conference has had before Congress for several years an omnibus bill to add or make permanent nine circuit and 79 district judgeships, it's hard to imagine such legislation getting enacted even if the judiciary could identify spending cuts to offset the additional judgeships' costs under the "PAYGO" principle, which demands spending cuts that match any spending increases. Finally, amid all the talk of drastic reductions in federal spending, the administration can't argue for meaningful increases in federal judicial salaries, which are in the top percentiles of salaries nationally. Congress would go ballistic at any such proposal, partly because most legislators insist on linking their salaries to those of judges, and Congress is not going to give itself a pay hike as it debates debt reduction. Federal judges want to file a class action suit to extend to all of them the back pay that the Court of Appeals for the Federal Circuit recently awarded six judge and former judge plaintiffs. The court said that Congress's refusal to provide judges annual inflationary adjustments that a 1989 statute promised them violated the Constitution's judicial compensation clause.[10] On the merits, the judges probably have the best of it but not on the optics of judges' giving themselves a pay raise while the country teeters on multiple fiscal cliffs.[11] Corresponding congressional cutbacks in other judicial budget accounts are not unimaginable, weakening the federal judicial infrastructure.

What does all this have to do with the nomination and confirmation process? Two things: First, these changes enhance the need for a process that can find, nominate, and confirm diverse members of a shrinking pool of high quality potential district and circuit judges who want the jobs despite the deteriorating working conditions. Second, the changes that make the job less attractive than it was several years ago elevate the importance of a selection process that is not itself an impediment that discourages good people from considering federal judicial service. The immediate need is a more aggressive nomination effort by the administration and finding ways to persuade senators in the minority that their long-term interest does not lie in opposing or foot dragging on nominees simply because they can and because they want payback for what they see as their counterparts' obstructionism in earlier Senates.

A. MORE NOMINATIONS AND SOONER

President Ronald Reagan submitted more circuit and district nominees in his second term than in his first.[12] Clinton submitted more circuit nominees but fewer district nominees. Bush submitted fewer of both. Whatever the precedents, an aggressive

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[10] Beer v. United States, No. 2010-5012 (Fed. Cir. Oct 5, 2012), *available at* http://www.cafc.uscourts.gov/images/stories/opinions-orders/10-5012.pdf, *on remand from*, 131 S.Ct. 2865 (June 28, 2011), *petition for cert. filed sub nom*. United States v. Beer (U.S. Jan. 14, 2013), *available at* http://online.wsj.com/public/resources/documents/judges.pdf.

[11] *See, e.g.*, Brent Kendall, *Judges Rule for Judges on Pay*, WALL ST. J. L. BLOG (Oct. 6, 2012), http://blogs.wsj.com/law/2012/10/06/judges-rule-for-judges-on-pay/; Jesse Holland, *Federal Judges Go to Court over Pay*, WASH. POST (Dec. 17, 2012), http://www.washingtonpost.com/politics/federal-judges-go-to-court-over-pay/2012/12/16/d6482af6-47b2-11e2-b6f0-e851e741d196_print.html.

[12] DENNIS RUTKUS AND MITCHEL SOLLENBERG, CONG. RESEARCH SERV., RL31635, JUDICIAL NOMINATION STATISTICS: UNITED STATES DISTRICT AND CIRCUIT COURTS, 1977–2003 (2004), *available at* http://www.senate.gov/reference/resources/pdf/RL31635.pdf.

Obama second-term nomination strategy is important for two reasons. If the confirmation rate operates consistently, more nominations mean more confirmations. And more nominations can keep Senate Republicans from pointing to the slow pace of nominations to deflect complaints about the slow pace of confirmations.

More nominees are obviously crucial to reducing vacancies. Reducing the elapsed time between vacancy and nomination is important as well. In addition to depriving the courts of judge power, long pre-nomination hiatuses can discourage potential nominees, especially with the likelihood that the rumor mill will reveal that they are under consideration. The longer the wait, the greater is the potential embarrassment if the nomination goes to another person. And attorneys' practices can wither as potential clients wonder if and when their would-be lawyers will get caught up in the confirmation maelstrom.

Obama submitted district nominees, on average, 406 days after the date of the vacancy, versus 276 days for Bush and 370 for Clinton.[13] Various factors contribute to the elapsed time between vacancy and nomination, including external and internal investigations of prospective nominees. But some of it is due to the time it takes home state senators to submit prospective nominees to the White House—or to react to White House-proposed nominees (especially in the case of senators in the minority)—and to White House-senatorial bargaining to achieve agreement on a nominee. The ace card possessed by home state senators, Democratic and Republican, is "senatorial courtesy," embodied in the "blue slip"—the short message from the Senate Judiciary Committee chair seeking the home-state senators' views on the nominee and noting that the Committee will not process the nominee until the senators return the blue slips.[14] Although home-state senators cannot dictate the nominees, the threat of an unreturned blue slip gives them a powerful bargaining tool if they wish to use it. The entire Senate Republican caucus laid down a marker before Obama had submitted any nominations, telling the White House by a March 2009 letter that "if we are not consulted on, and approve of, a nominee from our states, the Republican Conference will be unable to support moving forward on that nominee…."[15] In fact, in Obama's first term, states with two Republican senators saw a smaller percentage of nominees to both district and circuit vacancies and longer average elapsed times from vacancy to nomination than did states with two Democratic senators or with split delegations.[16]

1. Reorganization and Deadlines?

The most effective second term step the administration could take would be to replicate the Bush administration's well-oiled judicial nominating machinery, ably documented by Sheldon Goldman and his colleagues.[17] Bush submitted 168 first term district nominees before September of the presidential election year, Obama 156. Bush submitted 56 first term circuit nominees, Obama 42. And Bush submitted them earlier. He sent the Senate 55% of his district nominees by the end of his second year in

[13] "Date of the vacancy" is the date the incumbent publicly announced she would leave active judicial service at some future date; if no such announcement, it is the date the vacancy came into being; if the vacancy was created during the previous administration, it is Inauguration day.

[14] The origin and operation of the blue slip phenomenon is discussed throughout SARAH BINDER AND FORREST MALTZMAN, ADVICE & DISSENT: THE STRUGGLE TO SHAPE THE FEDERAL JUDICIARY (2009).

[15] Manu Raju, *Republicans Warn Obama on Judges*, POLITICO (Mar. 2, 2009), http://www.politico.com/news/stories/0309/19526.html.

[16] *See supra* note 1.

[17] Sheldon Goldman, Sara Schiavoni, and Eliot Slotnick, *W. Bush's Judicial Legacy: Mission Accomplished*, 92 JUDICATURE 258 (2009).

office, and 93% by the end of his third year. Obama's comparable figures were 46% and 78%. Bush submitted 55% of his circuit nominees by the end of his first year in office; Obama submitted 29% of his. The effect of pushing back nominations into the second two years of Obama's first term was to shift the confirmation battles closer to the presidential election year with its slow-downs and stoppages, not to mention that the Senate Republicans were a larger minority. Although the flurry of lame-duck district confirmations mitigated the harm caused by back-loading nominations into the second two years, that back-loading still delayed getting vacancies filled.

The administration has telegraphed an aggressive second term effort, sending 15 district nominations to the Senate after August 2012. None were confirmed in 2012, but all have had their Justice Department investigations and have been rated by the American Bar Association's Standing Committee on the Federal Judiciary. That more aggressive effort continued on Day One of the new Congress with renominations of all 15, plus nine other 2012 and 2011 nominees.[18] It also renominated seven stalled circuit nominees, three of whom had been first submitted prior to 2012. Among the 31 were two district and one circuit nominee for whom one or both home-state senators had blocked Senate Judiciary Committee hearings, and a nominee to the District of Columbia circuit's court of appeals whose nomination Republican senators killed once before by a filibuster.

To get more nominees, more quickly, one observer has proposed creation of a single-issue office within the White House concerned only with judicial nominations, somewhat akin to the Council on Environmental Quality or the Office of National Drug Policy.[19] There is no doubt that selecting nominees and preparing them for confirmation battles is requiring greater amounts of personnel time in both the Justice Department and the White House,[20] but given congressional sniping about White House "czars" and the cost-cutting mantras pervading government, such an office would be a hard sell.

The idea of timetables has also resurfaced. Both Bush and Obama proposed timetables for up-or-down votes on judicial nominations, and Bush proposed timetables as well for making nominations and holding hearings.[21] Most senators, especially other-party senators, were not receptive to these proposals, and probably would be as unenthused in a second term about ceding some of their prerogatives. One major editorial page has made a looser call, urging senators to make nominee recommendations to the White House "within a reasonable period, like within 60 days of an opening," and calling for the White House and Justice Department "to verify and nominate candidates for confirmation within, say, 60 days of receiving names."[22] Absent any enforcement mechanism, though, it's hard to see how any such promises would stand up to the actual pressures of vetting and clearing potential nominees, and it's hard as well to see Senate or White House approval of any enforcement mechanisms. And what

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[18] Press Release, The White House, President Obama Re-nominates Thirty-Three to Federal Judgeships (Jan. 3, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/01/03/president-obama-re-nominates-thirty-three-federal-judgeships. In addition to the 31, Obama renominated two candidates for the Court of International Trade.

[19] David Fontana, *Judging Obama's Second Term*, HUFFINGTON POST, Nov. 14, 2012, http://www.huffingtonpost.com/david-fontana/obama-judicial-appointments-2nd-term_b_2131912.html.

[20] Michael Shenkman, *Decoupling District from Circuit Bench Nominations: A Proposal to Put Trial Bench Confirmations on Track*, 65 ARK. L. REV. 217, 263 (2012).

[21] *Id*. at 222-23.

[22] *Judges Needed for Federal Courts*, N. Y. TIMES, Dec. 12, 2012, http://www.nytimes.com/2012/12/13/opinion/judges-needed-for-federal-courts.html.

would such mechanisms look like—a rule that nominees who don't get a vote within 180 days go to the back of the line? That might spur some home-state senators to plead with colleagues to allow a vote, but if they were unsuccessful—and such home-state senator pleadings were often unsuccessful in the first term—the court would be stuck with an even longer vacancy.

2. Vetting Committees and Fast-Tracking?

At the outset of the Obama administration, senators (and in a few instances House members) in 20 states and the District of Columbia maintained, reactivated, or created committees to vet candidates for district judgeships and recommend prospective nominees that the senators could pass on to the White House. Those 21 jurisdictions (up from about seven during the Bush administration) accounted for two-thirds of Obama's district nominees. Legislators who use these committees praise them routinely when introducing committee-endorsed nominees. Committee supporters argued in 2009 that bipartisan committees would produce more qualified candidates; sitting judges and others with little political clout, for example, might apply to a committee more readily than to a senator or staffers. Supporters also thought that a committee's seal of approval would speed nominees through the nomination and confirmation processes. If the committees had that effect, the administration might consider encouraging more senators to create and use them.

These were reasonable and good faith assumptions, embraced by the American Bar Association in 2008.[23] I shared those assumptions when, five years ago, I proposed a fast-track for nominees recommended by bipartisan committees.[24] My Brookings colleague, Sarah Binder, an astute observer of congressional operations, has more recently suggested that the Senate might "consider new 'fast track' confirmation rules .... For judicial nominations, fast-track consideration might be given to candidates recommended by bipartisan commissions in their home states. If the White House nominates a candidate approved by such a commission, the Senate would fast-track the nominee to a confirmation vote."[25] A variation on the theme is for the president "informally [to] appoint his own nomination committees in each state" and if senators don't come up with nominees within some deadline, "presidentially nominated home state committees will step up to fill the void."[26]

Binder concedes that her proposal would likely not succeed. Her caution is well-taken, based on developments over the last several years. For one thing, the committees in place are all over the lot as to size, operations, transparency, and claims of bipartisanship.[27] A bipartisan committee might be three strong Democrats, three strong Republicans, and two committed independents, or seven Democrats and a centrist Republican. Whether to grant fast-track treatment would spawn satellite

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[23] *See* Report #118 *in* Summary of Recommendations, American Bar Association House of Delegates, 2008 Annual Meeting, *available at* http://www.abanet.org/leadership/2008/annual/docs/SummaryofRecommendations.doc. Full disclosure: I was closely involved in developing the report.

[24] Russell Wheeler, Prevent Federal Court Nomination Battles: De-Escalating the Conflict Over the Judiciary (Brookings Institute Nov. 2007), *available at* http://www.brookings.edu/research/papers/2007/11/20-judiciary-wheeler-opp08.

[25] Sarah Binder, *Three Reforms to Unstick the Senate*, CNN (Nov. 29, 2012), http://www.cnn.com/2012/11/29/opinion/binder0filibuster/index.html.

[26] *See e.g.*, David Fontana, *Judging Obama's Second Term*, *supra* note 19.

[27] See Russell Wheeler and Rebecca Love Kourlis, Options for Federal Judicial Screening Commissions (Brookings Institute, 2d ed. 2011), *available at* http://www.brookings.edu/~/media/research/files/reports/2011/9/13%20judicial%20screening/0913_judicial_screening.pdf.

controversies over whether the respective vetting committees were "bipartisan" and met whatever other criteria the Senate rules specified. Moreover, there is little reason to believe that senators who oppose a nominee would be likely to honor a fast confirmation track agreement simply because the nominee had a committee's blessing. It's hard to imagine Republican senators giving fast-track approval to Louis Butler because Wisconsin's long-standing committee endorsed him. Local party leaders kept him from a floor vote on the argument that he "lost a state-wide election, held by the people of Wisconsin, to continue serving on Wisconsin's Supreme Court."[28] (We're in trouble when losing a state supreme court election—especially one that the Associated Press called "one of the nastiest in [Wisconsin] state history"[29]—becomes a disqualification for federal judicial confirmation.) Edward Chen of California was endorsed by the committee that senators established in that state, but his confirmation was in limbo for several years (based on fairly flimsy objections). And in 2007, California Democrat Barbara Boxer refused to return the blue slip for a Bush nominee, former Republican Congressman James Rogan, who was approved by the bipartisan White House-senatorial vetting committee then in operation in California. Boxer, whom an aide said never promised to support nominees based simply on the committee's endorsement, claimed Rogan was "out of the mainstream," although many suspected his role in the Clinton impeachment was the reason for her opposition.[30] In any event, it's hard to see any fast-track arrangement that would have gotten Rogan confirmed.

Perhaps most importantly for this discussion, a comparison of times to nomination and to confirmation, and of nominees, in the jurisdictions where these committees were in place and those in other states in Obama's first term, suggests that early hopes for their positive impact, hopes that I shared, have not materialized overall.[31] Despite a major editorial page's recent call for senators "to put in place more effective steps for making timely recommendations (like setting up merit selection committees),"[32] during the first Obama term, the non-committee states produced proportionately more nominees (as a proportion of vacancies) and produced them faster. Nor did apparent committee endorsement necessarily speed confirmation. Average days to confirmation for committee state nominees were 230, versus 209 for other nominees. The confirmation *rate* for both sets of (pre-August 2012) nominees was the same, but ten percent of committee state nominees received ten or more negative confirmation votes, compared to six percent of other nominees.

There are limits to these quantitative comparisons, and I believe legislators should use committees if structured with due concern for bipartisanship and transparency. The committees well may produce unmeasurable benefits, but the comparisons above make it difficult to argue they would be a ticket to fast confirmations.

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[28] Diana Merrero, *Sensenbrenner Criticizes Butler Judicial Nomination*, Milwaukee Journal Sentinel, Oct. 1, 2009, http://www.jsonline.com/blogs/news/63146732.html.

[29] *Gableman Beats Supreme Court Justice Butler*, Milwaukee Journal Sentinel, Nov. 5, 2008, http://www.todaystmj4.com/news/local/45624362.html.

[30] David Savage, *Rogan May be Denied Seat on Federal Bench*, L.A. Times, Dec. 4, 2007, http://articles.latimes.com/2007/dec/04/nation/na-rogan4.

[31] *See supra* note 1.

[32] *Judges Needed for Federal Courts*, N.Y. Times, Dec. 12, 2012, http://www.nytimes.com/2012/12/13/opinion/judges-needed-for-federal-courts.html.

3. More Sunshine and a Reconsideration of the Judiciary Committee's Blue Slip Policy?

a. Publicizing the Status of Senatorial-White House Nominee Negotiations

The White House can be more aggressive in putting forth names and more aggressive with senators who don't cooperate. One practical proposal to that end comes from Michael Shenkman, who worked on nominations on the Senate Judiciary Committee staff and in the Justice Department Office of Legal Policy (and is now a Columbia Law School Lecturer and Fellow). He has proposed several fixes to the district judge nominating process, including the administration's "publishing the status of pre-nomination negotiations, although not the names of the nominees themselves."[33] Citing precedent for similar disclosures in the Bush administration, Shenkman argues that they can mobilize the local bar, media, and others who monitor the nomination process to pressure senators to get the process moving. Senators could call out what they regard as misleading information disseminated by the administration, bringing the dispute into the open for verification. All in all, "[l]ocal editorial pages across the country would be newly equipped to comment on who is holding up the filling of" district vacancies.[34]

The form of disclosure would resemble the Administrative Office of the U.S. Courts' on-line list of "Current Judicial Vacancies," which displays the vacancy and its date, the previous incumbent, the name of any formally submitted nominee, and the date of the nomination.[35] The administration web page would add to this information, for each vacancy without a nominee, the date on which the incumbent gave notice of the vacancy (or, we can presume, the date the vacancy was created in the absence of such notice), the date when the White House received senators' recommendations, and an administration statement on whether it is still considering the unnamed, potential candidates or whether the administration has requested new names.[36] We can presume that in situations in which the administration initially provides names to senators for comment, the list could identify the date the names were provided, the date of any senatorial response, and, again, whether the administration is still considering the candidates. The administration list, to repeat, would include no names except those of the previous incumbents and those of nominees formally submitted to the Senate.

Shenkman acknowledges that candidates submitted to the White House who are identified in senatorial press releases or by the rumor mill could be embarrassed if they do not get the nomination, but argues the "Administration's priority should be on the health of the overall process." Senators might not like the light such a list would shed on their dealings with the White House, but Shenkman responds, basically, "too bad," because the list would reduce senatorial ability to use long delays to frustrate timely nominations.

b. Loosening Up the Blue Slip Policy

This call for shedding more light on senatorial and White House pre-nomination negotiations raises as well the question of whether the Senate Judiciary Committee

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[33] Shenkman, *supra* note 20, at 299.

[34] *Id*. at 302.

[35] Administrative Office of the U.S. Courts, Current Judicial Vacancies, http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/CurrentJudicialVacancies.aspx (last visited Jan. 14, 2013).

[36] Shenkman, *supra* note 20, at 300.

policy honoring unreturned blue slips needs modification. There was some speculation at the outset of the Obama administration that Committee Chair Patrick Leahy of Vermont, as did some earlier chairs,[37] would loosen the blue slip policy, so as to deprive home-state senators, in particular senators in the minority, a veto over processing nominees.[38] That speculation has apparently proved groundless, driven, some say, by Leahy's respect for Senate tradition and concern that recalcitrant senators would find other ways to block nominations and use up floor time. The standstill over Nevada district court nominee Elissa Cadish, though, seems a passing strange indictment of adherence to a strict blue slip policy. Cadish, pushed by Majority Leader Harry Reid, could not get a hearing in 2012 because Republican Senator Dean Heller did not return the blue slip, apparently in deference to the National Rifle Association's objections to Cadish based on a questionnaire she answered as a state judge prior to the 2008 Supreme Court decision finding a Second Amendment-protected individual right to firearms possession.[39] Cadish was one of the 24 opening-day 2013 district renominations, although Heller's office announced it would continue to oppose her.[40] Reid has stood behind Cadish and says he hopes something can be worked out for her nomination to proceed. And, according to press reports, senators on about ten occasions have told the White House they support a nominee but then failed to return the blue slip after the formal nomination.[41]

B. MORE CONFIRMATIONS AND SOONER

The Senate has not been any more of a graveyard for Obama nominees than it was for Bush and Clinton nominees, but Obama district nominees have waited much longer to whistle past it. Lame duck Senate confirmations boosted Obama's district court confirmation rate (for pre-August recess nominees) to 90%, slightly higher than Clinton's first-term 87% but below Bush's of 97%. The relative paucity of district nominations, though, means Obama's first term could not match either of his predecessor's number of confirmations, whatever the rate. Obama's 30 circuit confirmations matched Clinton's and were only four less than Bush's, and his confirmation rate was between those of Clinton and Bush.

The bigger difference in the Senate's processing of Obama nominations is the time to confirmation for district judges. Clinton's first-term district judges were confirmed, on average, 93 days after they were nominated, Bush's in 155 days, a figure that soared to 223 for Obama. And while Clinton and Bush district appointees spent more time waiting for hearings than waiting for confirmation after the hearings, Obama appointees cooled their heels longer waiting for floor action. Clinton and Bush district appointees got floor votes in 30 and 54 days, respectively, after hearings. Obama

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[37] Robert Kuttner, *How Obama Dropped the Ball*, THE AMERICAN PROSPECT, Dec. 14, 2012, *available at* https://prospect.org/article/courts-how-obama-dropped-ball.

[38] *Uncertain Blue Slip Policy Could Affect Fourth Circuit*, BLOG OF THE LEGAL TIMES (Feb. 13, 2009), http://legaltimes.typepad.com/blt/2009/02/uncertain-blue-slip-policy-could-affect-4th-circuit.html.

[39] *See* Steve Tetreault, *Reid will Continue to Push Cadish for Federal Bench*, LAS VEGAS REVIEW-JOURNAL, Dec. 10, 2012, http://www.lvrj.com/news/reid-will-continue-to-push-cadish-for-federal-bench-182912081.html; Press Release, National Rifle Assoc., Senator Heller Steadfastly Opposes Nomination of Anti-Gun Judge (Apr. 27, 2012), *available at* http://www.nraila.org/news-issues/articles/2012/senator-heller-steadfastly-opposes-nomination-of-anti-gun-judge.aspx.

[40] *See Obama Re-nominated Nevada Judge Opposed by Heller over Gun Answer*, RENO GAZETTE-J., Jan. 4, 2013, http://www.rgj.com/viewart/20130103/NEWS19/301030058/Obama-re-nominates-Nevada-judge-opposed-by-Heller-over-gun-answer.

[41] Kuttner, *supra* note 37.

appointees waited an average of 142 days, largely because of the difficulty of securing unanimous consent to proceed to the confirmation votes, or, critics say, the Majority Leader's unwillingness to make the time available without White House support. (Despite the longer wait times, 72% of Obama's district appointees were confirmed by voice vote, unanimous consent, or on roll calls with no negative votes, and another 18% got 10 or fewer negative votes.)

Whatever the cause, this collective waiting period—81 days on average to get to the hearing, and 142 then to get to the floor—can work the same depressing effect on nominations as can the long delay from the vacancy to the nomination. For sitting judges, government lawyers, and law professors the problem is usually tolerable; they can continue their work while the Senate grinds on. But lawyers in private practice—from whatever segment of the profession—face a different dynamic because, more than during the pre-nomination phase, their practice is likely to suffer in an extended limbo as clients resist signing on with lawyers whose nominations are on the record and who may not be there for the duration of the case. The 50 district judges whom Obama appointed from private practice waited an average of 234 days, almost eight months, from nomination to confirmation. Moreover, while lawyers might accept, albeit reluctantly, having their practice in an eight month or longer hiatus if confirmation seems assured, they might well be less likely to do so if the chances are only four in five. That surely helps explain why the federal district bench is increasingly populated by former state judges and term-limited federal judges.

There have been some reports that the Obama administration believes—in general, not just as to judicial nominations—that Senate Republicans will be less likely to foot drag now that the president has won a second term, thus removing his defeat as an objective to foster by making him appear unable to produce results (such as reducing judicial vacancies). Republicans' consent to the 13 lame duck district confirmations may indicate a greater second-term willingness to process non-controversial nominations expeditiously, although those 13 waited longer for floor action, post-hearing, than did the other Obama district judges, 188 days on average versus 136. And, as several observers have noted, the administration's early first-term hopes that its willingness to compromise would produce more cooperation on the other side appears in retrospect as naive, providing little reason to expect different second-term results. And cynics, or realists, might argue that the splurge of late-term confirmations was aimed mainly at deflating pressure for a change in filibuster rules.

1. More Sunshine—Changing Filibuster Rules?

It is for the Senate, not the administration, to make any changes to the rules governing its procedures. That said, making it easier for the Senate to take up nominations (and other business) could ease the delay in moving from nomination to confirmation. As the 113th Congress got underway, what if any changes to the filibuster rules the Senate might adopt remained uncertain.[42]

As the 113th opened, the press reported that a group of Democratic senators claimed that they had close to a Senate majority to vote to change the rules substantially, eliminating motions to proceed to a nomination or bill (and thus filibuster threats on such motions) but not filibusters on the nominations and legislation themselves, and requiring "Mr. Smith Goes to Washington" filibustering on the Senate floor. A milder set of changes was in the works sponsored by a bipartisan group. Like

[42] *On Filibuster Reform, Advocates Claim Momentum*, HUFFINGTON POST (Jan. 4, 2013), http://www.huffingtonpost.com/2013/01/03/filibuster-reform-senate_n_2405008.html.

most every other aspect of judicial nominations, which are only one part of the filibuster controversy, charges and counter-charges abound as to which party has been the greater rules-abuser and over the legitimacy of changing the filibuster rules by majority vote on the opening day of the 113th Senate,[43] a "day" that can be expanded beyond its standard 24 hours. Despite the claims by proponents of change, it is hard to see senators unilaterally giving up the procedural advantages that permeate the Senate's unanimous consent mentality; Democrats as well as Republicans know that majority status is a fleeting commodity. Still, it is also hard to see how allowing senators to place anonymous holds on nominees, by threatening to deny unanimous consent for a motion to proceed, protects the rights of minorities as opposed to the interests of senators who operate best in the dark.

2. Exposing the Multi-Faceted Harm that Delay Causes

Much of the rhetoric about the need to fill vacancies cites litigants in civil rights cases who cannot get resolution because of overworked district and circuit judges. Early in the administration, eleven prominent law professors wrote the president to urge a faster pace of nominations and confirmations, because federal courts make "thousands of decisions each year on issues as wide-ranging as freedom from discrimination, due process, religious and expressive liberty, crime and punishment, the environment, immigration, workplace safety, privacy, and access to the political process."[44] Others emphasize the judicial threat they perceive to signature Obama legislative achievements if the courts of appeals are not well-stocked with Democratic appointees.[45] The White House itself has generally used a more muted approach, emphasizing the need for diversity, the need for "dispens[ing] justice with unwavering integrity and impartiality,"[46] complaining that "[t]oo many of our courtrooms stand empty,"[47] and "urg[ing] the Senate to consider and confirm … nominees without delay, so all Americans can have equal and timely access to justice."[48]

All these reasons for expeditious confirmations are well-taken, but the administration might stress a broader storyline. It's unlikely that storylines themselves will sway senators who are committed to keeping Obama's confirmation rates low and dragging out the process, but storylines may have some impact on editorial writers and other opinion-makers who in turn can have some effect on wavering senators who do not want to appear overly obstructionist. Andrew Cohen last March made a strong case that the real losers from federal court vacancies, especially in the district courts, are civil litigants, who have no constitutional right to a speedy trial. They are "corporations and small business owners, investors and merchants, employees and employers … [who] live with the financial uncertainty that pending

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[43] Alan Fram, *Dems, GOP Fight Brewing over Curbing Filibusters*, Assoc. Press (Nov. 11, 2012), *available at* http://bigstory.ap.org/article/dems-gop-fight-brewing-over-curbing-filibusters.

[44] Reprinted in Geoffrey Stone, *Obama's Judges*, Huffington Post (Mar. 2, 2010), *available at* http://www.huffingtonpost.com/geoffrey-r-stone/obamas-judges_b_483042.html.

[45] *See, e.g.*, Fontana, *Judging Obama's Second Term*, *supra* note 19.

[46] Press Release, The White House, President Obama Nominates Judge Timothy Black, Gloria Navarro for District Court Bench (Dec. 24, 2009), *available at* http://www.whitehouse.gov/the-press-office/president-obama-nominates-judge-timothy-black-gloria-navarro-district-court-bench.

[47] Press Release, The White House, President Obama Nominates Seven to the United States District Courts (Nov. 14, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/11/14/president-obama-nominates-seven-united-states-district-courts.

[48] Press Release, The White House (Jan. 3, 2013), *supra* note 18.

litigation brings," and some of whom could be, in his words, "job creators" with the resolution of that uncertainty.[49]

Of the nearly 368,000 cases filed in the most recent reporting year, almost 80% were civil, not criminal cases. Among those civil cases, one quarter were personal injury cases and another 15% involved contract and real property actions. Six percent involved labor laws, three percent were intellectual property cases, and another three percent involved consumer credit disputes. As to civil rights cases, five percent of the civil filings involved employment discrimination claims and six percent were classified as "other civil rights" (and 19% were prisoner petitions contesting convictions and protesting confinement conditions, few of which are meritorious by most any standard).[50]

A different take on messaging is one observer's call for "the administration to create nomination hearings that have more human drama and less legal theory," arguing that Second Circuit nominee Denny Chin might have sailed to confirmation much sooner had victims of Bernie Madoff, whom Chin as a district judge sentenced to a long prison term, been invited to "tell … their story." The hearings "would have been more likely to make the evening news or the cable news networks [and] gone viral," speeding his confirmation.[51] The five months that Chin waited from his hearing to his 98-0 confirmation vote served no useful purpose, but routinely parading sympathetic witnesses at confirmation hearings could likely lead to more delay as opponents of nominees searched for sympathetic litigants or others who might, in response, testify about how nominees' decisions disserved their interests.

IV. CONCLUSION: LOOKING AHEAD

A. CONSIDER TREATING DISTRICT COURTS DIFFERENTLY

Michael Shenkman, who suggested that the White House publicize the status of senators' district judge recommendations, has made three longer-term but still modest proposals that would create a different nomination and confirmation track for district judges than for circuit judges. In his words, "[b]eyond a high-profile compromise like the Gang of Fourteen agreement, it would be impossible to get a deal to de-escalate on circuit judges."[52] But, he points out, the job of district judge is different than that of circuit judge, and increased contentiousness over district nominees is largely a by-product of the escalated conflicts over circuit judges. In keeping with that observation, Shenkman would streamline the Judiciary Committee questionnaire that district nominees complete, eliminating, for example, the requirement to list all publications, which creates significant staff work and electronic searches to avoid a "gotcha" moment omission discovery later in the process. "[T]he only questions of consequence for a district judge are those describing cases decided as a judge and

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[49] Cohen, *supra* note 9.

[50] ADMINISTRATIVE OFFICE OF THE U.S. COURTS, *supra* note 5, Tables C-2 and D. (Case types cited totaled 82% of all civil cases.)

[51] David Fontana, *Judging the Senate*, HUFFINGTON POST (Nov. 26, 2012), http://www.huffingtonpost.com/david-fontana/judging-the-senate_b_2193627.html.

[52] Shenkman, *supra* note 20, at 298. The reference is to the temporary Senatorial truce during the Bush administration by which Democrats agreed to approve some controversial nominees while the Republican leadership agreed not to push the so-called "nuclear option" of simple majority rules changes to eliminate nomination filibusters. *See also* Michael Gerhardt and Richard Painter, *Extraordinary Circumstances: The Legacy of the Gang of 14 and Judicial Nominations Reform*, AMERICAN CONST. SOC. (Issue Brief, Nov. 2011), *available at* https://www.acslaw.org/sites/default/files/Gerhardt-Painter_-_Extraordinary_Circumstances.pdf.

cases handled as a lawyer," with relevant contact information. With that, "an able staffer can conduct reputation calls to determine a community consensus on how the nominee will perform on the bench."[53]

Shenkman also proposes eliminating Judiciary Committee hearings for district judges because they have become at times "a procedural obstacle to moving district nominations through to confirmation" due to scheduling difficulties, while adding little of value to the record.[54] A few years ago, my colleague Benjamin Wittes proposed eliminating nominee testimony at Supreme Court nomination hearings on somewhat the same grounds: "one struggles to identify a single instance when a Supreme Court nominee's testimony has proved genuinely revealing about his or her future career on the Court."[55] Although televised Supreme Court hearings with nominee testimony have become so engrained a part of our judicial politics that Wittes's proposal has little chance of adoption, one doubts that eliminating district nominee hearings would meet the same resistance.

Finally, Shenkman proposes Senate rules changes to facilitate a quick floor vote on district nominees. The majority leader, for example, "might be given the privilege, after a district judge nomination has laid over on the floor for one week, to call for an 'expedited' confirmation vote under a procedure requiring some higher threshold," such as a 60-plus minimum yes-vote requirement.[56]

B. THE VIRTUE OF KICKING THE PROVERBIAL CAN DOWN THE ROAD

The reason to describe these three proposals is not because they deserve immediate adoption, and certainly not because such adoption is feasible. They illustrate, however, what Niebuhr called "indeterminate creative ventures" that may have some promise of adoption rather than sweeping changes that do not. Still, it would be naive to expect the Senate to adopt Shenkman's three proposals—modest as they seem—or similar changes at the outset of the 113th Congress or during Senate sessions that continue the confirmation contentiousness of recent years. President Bush's October 2002 proposal for nomination-confirmation timetables went nowhere, in part because he offered it when mid-term elections were looming; Democrats saw it as an election year ploy to pressure them to confirm more of his nominees.

The Obama administration, however, might propose creation of a three-branch, truly bipartisan task force to develop a set of recommendations that could be implemented in 2017, when there will be a different set of players in the executive branch and some new faces in the Senate. Likelihood of adoption would depend on the proposals' relative modesty and candidates' willingness to endorse, or at least debate them, during the 2016 campaign. But a predicate to any serious debate and discussion is most actors' realizing that it is in their self-interest to mitigate the confirmation mess—to avoid the time demands it creates, the ill-will it engenders, and the partisanship it encourages, all the while discouraging those with the potential to be good federal judges to step forward to be considered despite the changing landscape within the courts.

Some, impatient with the slow pace of vacancy filling in the first Obama term, will roll their eyes at such a proposal as merely "kicking the can down the road," one of Washington's in-vogue phrases. But "down the road" may be a more serene place to consider and adopt modest changes than today's polarization-infested highways.

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[53] Shenkman, *supra* note 20, at 30.

[54] *Id*., at 273.

[55] Benjamin Wittes, Confirmation Wars 119 (2006).

[56] Shenkman, *supra* note 20, at 309.

What Process is Due? A Return to Core Constitutional Principles in Immigration*

Aarti Kohli**

INTRODUCTION

Sixty years ago, the Director of the Bureau of the Budget, Frederick J Lawton, sent a missive to then Secretary of State Dean Acheson about the pending 1952 McCarran and Walter Acts, large companion immigration bills that included a nationality-based quota system.[1] He wrote:

> These bills raise fundamental questions with respect to the treatment that should be accorded aliens who seek to enter this country and with respect to the position aliens should occupy in our society. In this connection, much has been made by the proponents of these bills of the fact that as a sovereign nation, the United States can admit as many or as few aliens as it chooses on whatever terms and conditions it deems desirable. The conclusion drawn from this is apparently that aliens have no rights. We do not believe that that conclusion is sound or that it provides an adequate basis upon which to construct immigration and naturalization policy.
>
> We do not believe that "aliens" differ in any fundamental respect from other human beings. We believe that the worth and dignity of all individuals, citizens or not, demand respect. And we believe that it is particularly incumbent upon the United States, as a democracy, to guarantee that that respect shall be paid. Our willingness to offer such a guarantee is the measure of the strength of our professed beliefs.

Despite Budget Director Lawton's protestations, the McCarran-Walter Act passed and the belief that "aliens" have very limited rights with respect to admission and removal is the basis for constructing immigration policy. The cumulative result of decades of legislating based on this principle is that Mr. Lawton's warnings have been realized; the United States has fallen far short of the ideal "that the worth and dignity of all individuals, citizens or not, demand respect."

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[1] Memorandum from Frederick J. Lawton, Director of the Bureau of the Budget, to Dean Acheson, Secretary of State (May 9, 1952), *in* I FOREIGN RELATIONS OF THE UNITED STATES, 1952-1954, 243 (John P. Glennon, ed. 1989), *available at* http://history.state.gov/historicaldocuments/frus1952-54v01p2/d24.

In fact, the United States has deported almost 4 million people since Congress passed the last major immigration law in 1996.[2] Many of these individuals were long-term permanent residents and a significant number left behind children, spouses and parents. As policymakers contemplate another comprehensive reform effort, we have an opportunity to correct our course and return to core democratic principles in our immigration policy, such as justice, liberty, and due process that attract immigrants to our shores in the first place.

Proponents of immigration reform have echoed Frederick Lawton's sentiments, arguing that it is untenable for a democracy tacitly to allow 11 million residents to remain in a second-class undocumented status where they are subject to deportation at any time and to require even lawful immigrants to satisfy byzantine rules and regulations to achieve and sometimes also to maintain their lawful status. If the reform effort is to be truly comprehensive, they argue, we must allow approximately 11 million undocumented residents in the U.S. today a path to earned citizenship, revamp ineffective and overly burdensome aspects of our legal immigration system and create viable avenues for future migrants.

Opponents to reform are reluctant to reward the undocumented, whom they perceive as 'law-breakers,' and some argue that we should limit lawful immigration as well. If past proposals are any guide, restrictionists will likely advocate for provisions that limit the rights of immigrants, targeting those who have even minor or very old criminal convictions or have violated civil immigration laws, with the twin goals of punishing and deterring future unauthorized immigration.

This Issue Brief focuses on a fundamental question: How should our democracy treat immigrants who have run afoul of the law? Part I provides a basic historical overview of constitutional rights afforded noncitizens who are facing criminal and civil prosecution; Part II examines the genesis of key provisions in current law that require mandatory deportation or that punish civil immigration violations; and the final section focuses on both broad principles and offers specific recommendations for reform.[3]

I. THE CONSTITUTIONAL RIGHTS OF NONCITIZENS

American legal history is replete with cases in which courts struggle to define what rights noncitizens have under the Constitution when seeking to come to the United States or to stay here. Proponents of a broad reading of noncitizens' rights have often come up against a judicially created limiting principle, the Plenary Power doctrine,

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[2] U.S. Dep't of Homeland Security, Yearbook of Immigration Statistics: 2011, Aliens Removed or Returned: Fiscal Years 1892 to 2011, Tbl. 39 (2012), *available at* http://www.dhs.gov/yearbook-immigration-statistics-2011-3. This figure only constitutes removals (formal deportations) rather than returns, which are often effectuated at the border or offered on a discretionary basis by immigration authorities.

[3] It is important to note that this Issue Brief was written before the recent unveiling of immigration reform principles by key senators and the president in January 2013. Both proposals provide a roadmap to citizenship and also contain restrictions for those with criminal convictions. In the Senate's proposal, those with serious criminal convictions would be subject to immediate deportation. Serious crimes are undefined. The President's plan emphasizes continued interior enforcement at federal and state prisons and jails. There is little mention of due process in either proposal. However, the legislative process has just begun and hopefully, the issues raised in this Brief will be aired in future immigration policy conversations. For more information about the pending proposals, see Press Release, The White House, Fixing our Broken Immigration System so Everyone Plays by the Rules (Jan. 29, 2013), http://www.whitehouse.gov/the-press-office/2013/01/29/fact-sheet-fixing-our-broken-immigration-system-so-everyone-plays-rules; Senator Chuck Schumer, et al., Bipartisan Framework for Comprehensive Immigration Reform (U.S. Senate, Jan. 28, 2013), *available at* http://www.nytimes.com/interactive/2013/01/23/us/politics/28immigration-principles-document.html.

which gives the political branches of government a wide berth in legislating and administering immigration laws. The rationale behind the principle, which was first raised in a case denying a challenge to the discriminatory Chinese Exclusion Act, is that Congress should have broad control over the rules that govern who is permitted to enter and remain and who must be removed, no matter how severe and unjust those rules are.[4] Over a century of jurisprudence reveals that the consequence of the Plenary Power doctrine is that the Supreme Court has allowed legislative and executive actions against noncitizens that would violate constitutional principles if applied to citizens.[5] This is not to say that noncitizens do not have any constitutional protections. The Fourteenth Amendment protects 'any person within the jurisdiction' of the U.S. and, along with the Fifth Amendment, has been held to apply to noncitizens in criminal proceedings. While noncitizens are entitled to due process protections such as a trial by jury, right to counsel and protections against unreasonable searches and seizures in criminal proceedings, civil deportation cases are another matter.

Immigration law operates on many theoretical pronouncements; a primary one is that deportation is not punishment. This principle stems from the holding in an 1893 Chinese Exclusion Act case, *Fong Yue Ting v. United States*, where the Supreme Court upheld the deportation of a laborer who failed to get a residency permit after living in the United States for fourteen years.[6] The Court held that deportation is not punishment for a crime, nor is it "banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment."[7] If deportation is not punishment, the Court concluded, then it is also not a deprivation of life, liberty, or property giving rise to procedural due process rights in immigration proceedings.

Consequently, the Court held that noncitizens challenging deportation are not entitled to a host of protections normally afforded those facing punishment in the criminal context, including a trial by jury, the suppression of evidence based on unlawful searches and seizures, and the right to challenge cruel and unusual punishment.[8] These holdings have generally been reaffirmed and expanded upon in the century of jurisprudence following *Fong Yue Ting*.[9] Courts have held that there is no right to bail while deportation proceedings are pending,[10] nor is there a Sixth Amendment right to counsel in deportation proceedings.[11] One of the few rights afforded immigrants is a right to an administrative hearing prior to deportation at which they have the right to call witnesses and the right to representation at no expense to the government, but

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[4] Chae Chan Ping v. United States, 130 U.S. 581, 603-610 (1889). *See* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power,* 1984 SUP. CT. REV. 255-307 (1984); Louis H. Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987).

[5] *Id*.

[6] 149 U.S. 698 (1893).

[7] *Fong Yue Ting*, 149 U.S. at 730.

[8] *Id*.

[9] Burr v. INS, 350 F.2d 87 (9th Cir. 1965) (holding that deportation does not constitute cruel and unusual punishment). *See also* Bassett v. INS, 581 F.2d 1385, 1387-1388 (10th Cir. 1978).

[10] United States ex rel. Carapa v. Curran, 297 F. 946 (2d Cir. 1924). *See also Demore v. Kim*, 538 U.S. 510 (2003).

[11] United States v. Campos-Ascencio, 822 F.2d 506, 509 (5th Cir. 1987).

even that is limited to those who have been formally admitted to the U.S.;[12] arriving immigrants can be subject to expedited removal without a hearing.[13]

The limitations on noncitizen rights are particularly severe when an immigrant—even a longtime permanent resident—is convicted of any number of crimes, some major and many minor. In a recent significant shift in constitutional law relating to immigrants, the Supreme Court acknowledged that deportation is an integral and important part of the penalty imposed on criminal defendants.[14] In *Padilla v. Kentucky,* the Court held that under the ambit of the Sixth Amendment, criminal defense counsel have a duty to inform their noncitizen clients regarding the immigration consequences of a plea. In this case, Jose Padilla, a Vietnam War veteran and a legal resident of the U.S. for forty years, pled guilty to transporting a large quantity of drugs after his criminal counsel incorrectly informed him that there would be no adverse immigration consequences as a result of the plea. Padilla was subsequently subject to mandatory deportation as a result of the criminal drug conviction.

Scholars have opined that the implicit recognition of deportation as a penalty in *Padilla* may well signal the willingness of the Court to extend due process protections in civil immigration proceedings. Whether the law is headed in that direction, the Court is acutely aware that presently little due process or judicial discretion awaits those who are placed in deportation proceedings. Writing for the *Padilla* majority, Justice Stevens noted that "the 'drastic measure' of deportation or removal… is now virtually inevitable for a vast number of noncitizens convicted of crimes."[15] Despite the Court's willingness to intervene in this case, the combined effect of the Plenary Power doctrine and the still prevailing legal interpretation of deportation as not constituting punishment for the purpose of extending rights has essentially left noncitizens at the mercy of Congress and the executive branches of government. Congress has legislated broadly punitive measures and the executive branch has enforced them vigorously.

II. THE EXPANDING LAW OF DEPORTATION

Since the last major legalization program, the Immigration Reform and Control Act of 1986 (IRCA), the idea of preventing 'criminal aliens' from entering or remaining in the U.S. increasingly has driven the discourse on immigration. Historically, noncitizens who committed offenses involving 'moral turpitude'[16] could be deported but, for better or for worse, the executive branch wielded a large amount of discretion in deportation decisions. Post-IRCA, Congress began a concerted effort with consecutive pieces of legislation to strip discretion from the executive and the judiciary in exclusion and deportation decisions.

A. AGGRAVATED FELONIES

In the Anti-Drug Abuse Act (ADAA) of 1988, a crime-control bill that was a hallmark of the War on Drugs, Congress instituted mandatory deportation for a new

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[12] Yamataya v. Fisher, 189 U.S. 86, 101 (1903). 8 U.S.C. § 1229a(b)(4)(A) (2006).

[13] Even those individuals who are physically within the U.S. can be considered "arriving" noncitizens. 8 U.S.C. § 1225(b)(1)(A)(i)(2006). *See also* American Immigration Lawyers Ass'n v. Reno, 18 F. Supp. 2d 38 (D.D.C. 1998).

[14] Padilla v. Kentucky, 130 S. Ct. 1473, 1480 (2010).

[15] *Padilla*, 130 S. Ct. at 1478.

[16] Derrick Moore, *"Crimes Involving Moral Turpitude": Why the Void-For-Vagueness Argument is Still Available and Meritorious*, 41 CORNELL INT'L L.J. 813, 822 (2008).

category of offenses called 'aggravated felonies.'[17] In the 1988 legislation, aggravated felonies were narrowly defined to include murder, arms trafficking and high-level drug trafficking.[18] Shortly thereafter, in the Immigration Act of 1990, family and immigrant visa numbers were increased, but Congress once again enhanced penalties for criminal convictions, expanded the definition of aggravated felonies, and limited due process for immigrants. One of the key procedures eliminated in the 1990 bill was the Judicial Recommendation Against Deportation (JRAD), which functioned as far more than a recommendation: immigration authorities were prevented from deporting an individual when a judge determined during the sentencing phase of a criminal case that the noncitizen should not be deported and issued a JRAD.[19] Ironically, the adjudicator most familiar with the criminal conduct who had already weighed the severity of the criminal behavior against equities in the criminal sentencing process was no longer able to prevent deportation.

Following on the heels of a Republican-led Congress' 1994 "Contract with America," restrictionists were intent on passing reforms aimed at punishing and thereby deterring illegal immigration. The Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA) of 1996, a massive piece of legislation, built upon previous efforts to limit due process for immigrants, broaden categories of deportable immigrants, streamline deportation processes by limiting and eliminating procedural protections and further limit discretion of the executive and judicial branches of the government in deportation proceedings. Mandatory deportation was no longer limited to murderers and drug kingpins; the definition of aggravated felonies expanded once again to include minor drug offenses, thefts, and crimes of violence.[20] In addition, mandatory detention was required for all those classified as aggravated felons with no opportunity to apply for bond (the equivalent of bail in immigration detention).

Another 1996 bill passed immediately before IIRIRA, the Anti-Terrorism and Effective Death Penalty Act (AEDPA), also added crimes such as gambling and bribery to the aggravated felony category.[21] As a result of the enactment of these laws, writing a bad check, jumping a subway turnstile, and pulling someone's hair (a battery in some states) have led to noncitizens being placed in deportation proceedings as aggravated felons after 1996.[22] Notably, the underlying criminal offenses do not have to be felonies and even individuals handed a suspended sentence are deportable. The provision mandating deportation of those convicted of aggravated felonies is applied retroactively, thus long forgotten offenses can come back to haunt noncitizens. And in

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[17] President Ronald Reagan, Remarks on Signing the Anti-Drug Abuse Act of 1988, Nov. 18, 1988, *available at* http://www.reagan.utexas.edu/archives/speeches/1988/111888c.htm.

[18] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 § 7342, 102 Stat. 4181, 4469 (1988).

[19] The JRAD procedure allowed a sentencing court to issue a declaration within 30 days of imposing judgment that the defendant should not be deported because of the crime at issue. The court was required to provide notice to the Attorney General and allow prosecuting attorneys and the immigration service an opportunity to weigh in. The decision was binding on the immigration service. 8 U.S.C. § 1251(b)(2) (repealed 1990). *See* Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131 (2002).

[20] Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208 § 321, 110 Stat. 3009-546 (1996).

[21] Crimes such as bribery and gambling rendered a noncitizen deportable. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) [hereinafter AEDPA]; 142 CONG. REC. H3617 (daily ed. Apr. 18, 1996).

[22] Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939-41 (2000).

AEDPA and IIRIRA, Congress sought to severely limit judicial review for immigrants convicted of crimes.[23]

B. BARS TO REENTRY

With the passage of the 1996 bills, all noncitizens, including long-term lawful permanent residents, with aggravated felony convictions are subject to mandatory detention and deportation.[24] Once deported, they have a lifetime ban on returning to the U.S. or as Justice Ginsburg put it, "[they] must never ever darken our doors again."[25] Undocumented immigrants and other noncitizens with aggravated felony convictions are also prohibited from ever adjusting to a lawful status.

Given this extremely harsh and permanent consequence, it is not surprising that many of those deported, undocumented immigrants and former lawful permanent residents alike, seek to re-enter the United States. Recent analysis of Secure Communities, an interior enforcement program that targets deportable noncitizens, reveals that approximately 40% of deportees report having a U.S. citizen spouse or child.[26] In California, the state with the largest share of the undocumented population, this figure is close to 60%. And these data undercount those with immediate family in the U.S. since they do not report on lawful permanent resident or other family members residing in the U.S.

Although the crimes of illegal entry and re-entry were created in 1917, it was not until 1996 that Congress instituted strict limits on re-entry after deportation that range from a five-year ban for those who are caught at the border to a lifetime ban for anyone deported because of an aggravated felony. In fact, illegal re-entry is itself a felony; [27] in 2011 it surpassed even unlawful entry, a misdemeanor, as the most common charge in federal criminal prosecutions.[28] The average sentence for those who had illegally re-entered the U.S. after deportation was 14 months in federal prison in 2011,[29] and illegal re-entry still remains the most charged crime in the United States today.[30] Some might argue that these are serious violent offenders seeking to re-enter to commit further crimes and placing them in federal prisons is necessary to protect communities. However, the government's own data on deportees indicates that the

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[23] Lenni Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1444-1448 (1997).

[24] AEDPA and IIRIRA together limited access to relief for immigrants convicted of crime. Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 107-115 (1998).

[25] Transcript of Oral Argument at 31, Carachuri-Rosendo v. Holder, 130 S. Ct. 2577 (2010).

[26] Aarti Kohli, Peter L. Markowitz, and Lisa Chavez, *Secure Communities by the Numbers: An Analysis of Demographics and Due Process*, CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY AND DIVERSITY (Research Report 2011), *available at* http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf.

[27] 8 U.S.C. § 1326 (2006).

[28] ILLEGAL REENTRY BECOMES TOP CRIMINAL CHARGE, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (2011), *available at* http://trac.syr.edu/immigration/reports/251/.

[29] *Id*. For a critical analysis of the prosecution program *see* Joanna Lydgate, *Assembly –Line Justice: A Review of Operation Streamline*, CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY AND DIVERSITY (Policy Brief, 2010).

[30] *See* Administrative Office of the U.S. Courts, *Federal Courts Hit Hard by Increased Law Enforcement on Border*, THE THIRD BRANCH (Jul. 2008), http://www.uscourts.gov/News/TheThirdBranch/08-07-01/Federal_Courts_Hit_Hard_by_Increased_Law_Enforcement_on_Border.aspx.

vast majority are either non-criminals or those who were convicted of non-violent misdemeanor offenses.[31]

Scholars have asserted that the sentences imposed upon those convicted of illegal re-entry violate the Eighth Amendment prohibition on cruel and unusual punishment because they often lack proportionality.[32] For those with past criminal convictions, it is common for the sentence for illegal re-entry to be higher than the original sentence for the underlying crime.[33] For example, in *Almendarez-Torres v. United States,* Mr. Almendarez-Torres received a sentence of seven years because he was encountered in the U.S. after being deported for a burglary offense for which he had been sentenced to one-year in jail.[34] The seven-year federal sentence was for illegal re-entry alone, not for any other criminal behavior. While certainly punitive, criminalizing illegal re-entry appears to have little deterrent effect, as evidenced by the continuing efforts of those who seek to re-enter in the face of possible incarceration.

C. THE ROOTS OF THE UNLAWFUL ENTRY PROBLEM

Learning from historical migration flows is important not only to gain a better understanding of illegal re-entry but also to fashion more workable policies in the future. The U.S. has a long history of first importing immigrant labor, and then crafting immigration policy to prevent disfavored groups, particularly racial minorities, from accessing citizenship. In 1790, the first immigration act granted citizenship only to a 'free white person.' A hundred years later, immigration laws specifically began excluding Asian immigrants from citizenship, among them Chinese, Japanese and Indian immigrants.[35]

Differential treatment based on race was not limited to citizenship and often coincided with American labor needs. Mexican labor was welcomed during the early 1900s expansion boom. After the Great Depression, when the economy contracted and they were no longer needed, Mexican and Asian migrants were disproportionately deported for being poor or for the crime of unlawful entry.[36] Even U.S. citizen children of Mexican parents were forcibly deported.[37] In the 1940's, farmers clamored for a pliable, seasonal workforce and the infamous Bracero temporary worker

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[31] U.S. Immigration and Customs Enforcement, Nationwide IDENT/IAFIS Interoperability Report 2008–2012 (2012), *available at* http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2012-to-date.pdf.

[32] Michael J. Wishnie, *Immigration Law and the Proportionality Requirement,* 2 U.C. Irvine L. Rev. 415 (2012).

[33] Doug Keller, *Why the Prior Conviction Sentencing Enhancements in Illegal Re-Entry Cases are Unjust and Unjustified (and Unreasonable Too)* 51 B.C. L. Rev. 719 (2010).

[34] 523 U.S. 224, 226–27 (1998).

[35] Chinese Exclusion Act, 22 Stat. 58 (1882); *see also* Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965*, 21 L. & Hist. Rev. 69, 73 (2003).

[36] Memorandum, G. C. Wilmoth to INS Commissioner General, Nov. 3, 1938; Memorandum, William Blocker to Secretary of State, Nov. 3, 1938; Memorandum, G. C. Wilmoth to INS Commissioner General, Nov. 29, 1938 (on file with U.S. Citizenship and Immigration Serv., file 55819/402C, box 75, accession 58A734).

[37] Frank D. Bean, Rodolfo Corona, Rodolfo Tuirán, and Karen Woodrow-Lafield, *The Quantification of Migration Between Mexico and the United States* 7 (Team Report to Mexico/United States Binational Study on Migration, 1997).

program was instituted; at its peak in the 1950's more than 400,000 farmworkers were imported from Mexico annually.[38]

Despite grower protests, the Bracero program was ended in 1964 and was soon followed by the Immigration Act of 1965. The 1965 bill was viewed as landmark, progressive legislation because it ended national origin quotas in immigration and opened doors to non-white immigrants, particularly those from Asia. Yet, as a result of the 1965 Act and subsequent legislation, Western Hemisphere (including Mexican) migration that had annually numbered in the hundreds of thousands prior to 1965 was artificially capped at 120,000 lawful (mostly family-based) visas per year for the entire region.[39] In 1976, the artificially low per-country cap of 20,000 visas was applied to Mexico.[40] With limited means of lawful migration, Mexican workers continued the well-established tradition that had developed since the beginning of the 20th century and intensified during the Bracero program of crossing the border to seek work. While some continued to come and go as seasonal migrants, many of these undocumented workers remained in the U.S. and were joined by El Salvadorans, Guatemalans and other Central Americans who were fleeing civil strife in their countries. The undocumented population grew and in the 1980s a debate emerged, not unlike the present one, over how to address the issue.

In 1986, after a long, hard-fought battle Congress passed the Immigration Reform and Control Act (IRCA), legalizing approximately 3 million people, allocating increased resources for border enforcement, and instituting employer sanctions, a regime of fining employers who knowingly hired unauthorized workers. Mexican-born immigrants constituted the bulk of those legalized (approximately 75%), followed by Central Americans and Asians.[41] Although legalized immigrants were able to petition (apply for a visa) for immediate family members after IRCA, workers without close family ties still had limited avenues for entering the U.S. lawfully, and low-income workers essentially had no avenue at all. Even lawful permanent residents who sponsored spouses, children and parents were subject to the cap of 20,000 visas per country that became quickly backlogged for Mexico, China and India.

Spouses, children and parents who were waiting for a backlogged family visa sometimes crossed the border unlawfully to join the sponsor before the visa was available. It was always difficult for people unlawfully present to obtain the visa that they were legally eligible for given their family relationships, and the 1996 Act made it more difficult by imposing penalties for a person's previous unlawful presence. In IIRIRA Congress instituted 3 and 10-year prohibitions (known as "bars") on re-entry for illegal presence. These prohibitions state that those who accumulated six months or more of unlawful presence after April 1, 1997 and then left the country, cannot return to the U.S. for 3 years; those who accumulated one year or more of unlawful presence after April 1, 1997 and then departed cannot return to the U.S. for 10 years. This provision is particularly cruel towards those who have a family visa petition pending but can only avail of that petition by leaving the country, thereby triggering the 3 and 10-year bars. Although there are waivers of the bars available, one has to

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[38] U.S. Gen. Accounting Office, The H-2A Program: Protections for U.S. Farmworkers 11 (1988), *available at* http://archive.gao.gov/ t2pbat16/137107.pdf.

[39] Doug Massey and Karen Pren, *Unintended Consequences of US Immigration Policy: Explaining the Post-1965 Surge from Latin America*, 38 Pop. & Dev. Rev. 1, 10 (Mar. 2012).

[40] *Id*. at 18.

[41] Kitty Calavita, *U.S. Immigration and Policy Responses: The Limits of Legislation,* in Controlling Immigration: A Global Perspective 68 (Wayne A. Cornelius, et al., eds. 2004).

prove extreme hardship to the U.S. citizen or permanent resident spouse or parent in order to circumvent the bar.[42]

D. LIMITED PATH TO LEGALIZE STATUS

It is clear that current law is inadequate to address the plight of undocumented residents who seek to earn a path to citizenship. On the affirmative side, immigration is limited to those who have permanently present immediate family, and then, only after a wait that takes years, at minimum, and at maximum can take decades. For those who are encountered by immigration authorities and placed in deportation proceedings, the path is even more difficult. One of the few options for undocumented immigrants in deportation proceedings is a mechanism known as cancellation of removal requiring evidence of 10 years of continuous residence and "exceptional and extremely unusual hardship" to U.S. citizen or Lawful Permanent Resident (LPR) immediate relatives.[43] As noted above, aggravated felons are ineligible for cancellation of removal, and there is an annual cap of 4000 grants of relief. Therefore 1% of the approximately 400,000 people who are currently processed through immigration courts every year can legalize their status through cancellation of removal.

E. UNINTENDED CONSEQUENCES OF IMMIGRATION CONTROL MEASURES

Even after Congress tried to crack down on unauthorized border crossers with severe penalties for unlawful entry and presence, the undocumented population almost doubled from 5.8 million in 1996 to the current estimate of 11 million undocumented residents. While there are numerous reasons why people migrate, scholars have shown that the main draw for undocumented migrants has been the availability of jobs.[44] In 1986, the new regime of employer sanctions was to be the magic bullet that would prevent employers from hiring undocumented workers. However, in the decades following IRCA, the government rarely prosecuted employers who were able to hide behind the intent requirement that they "knowingly" hired an unauthorized immigrant;[45] rather, employers wielded the ability to call immigration authorities as a weapon when workers demanded better labor conditions. Thus, employer sanctions failed to deter both employers and workers.

Employer sanctions are not the only immigration control measure with unintended results. An unintended consequence of the renewed effort to militarize and patrol the southern border after the tragic events of September 11, 2001, has been the reduced circularity of migration. Migrants who would cross the U.S. Mexico border to work seasonally in the past have decided to stay put in the U.S. to avoid an increasingly

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[42] The Obama Administration has initiated a provisional waiver process where an immediate relative of U.S. citizen spouses and parents can file the extreme hardship waiver and have it adjudicated prior to departing the country. This process will go into effect once a final rule has been published in the Federal Register. U.S. Citizenship and Immigration Services, Proposed Provisional Unlawful Presence Waivers (Jun. 6, 2012), http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=bc41875decf56310VgnVCM100000082ca60aRCRD&vgnextchannel=bc41875decf563110VgnVCM100000082ca60aRCRD.

[43] Prior to IIRIRA, a similar provision allowed residents with 7 years of continuous residency to apply for suspension of deportation.

[44] Jorge Durand, Nolan J. Malone, and Douglas S. Massey, Beyond Smoke and Mirrors: Mexican Immigration in an Era of Economic Integration (2003).

[45] Immigration Reform and Control Act of 1986, Pub.L. 99–603 § 101, 100 Stat. 3359 (1986).

expensive and dangerous crossing.[46] The number of unauthorized immigrants continued to rise after 2001 and peaked at 12 million in 2007,[47] well after increased border controls had been implemented, reinforcing the argument that migrants were staying put rather than returning home.

III. RECOMMENDATIONS FOR REFORM

Legislative changes in the past thirty years have been increasingly punitive towards any noncitizen who has violated our laws. These punitive policies have failed to deter undocumented immigration, not because they are not harsh (they are), but because they fail to understand demographic and economic realities. Unless future reform creates avenues for lawful circular migration, with strong worker protections, it is likely that we will again have to address the issue of unauthorized immigrant workers in the future.[48] Fixing broken federal laws will also preclude the need for state legislators and local law enforcement officials to justify racially motivated actions in the name of immigration enforcement. Until we address the problems with our current immigration regime, individuals such as Sheriff Joe Arpaio will continue to trample on the Fourth Amendment rights of Latinos, citizens and immigrants alike. Rather than continuing on the road of ever-escalating and expensive penalties, we should embrace the opportunity in immigration reform to restore due process in our laws. The recommendations below are by no means comprehensive; rather, they highlight key issues discussed in this Issue Brief.

A. IMPLEMENT A BALANCING TEST FOR DEPORTATION BASED ON CRIMINAL CONDUCT

Rather than using limited resources to place any noncitizen who has ever committed a crime in deportation proceedings, we should consider focusing immigration enforcement resources on those who have been convicted of serious, violent felonies. Regardless of the crime, mandatory detention and deportation are fundamentally contradictory to our justice system which aims to provide a full and fair hearing with a decision-maker who can exercise discretion. A mandatory deportation system can be easily replaced with a balancing test where an immigration judge takes into account the following factors in determining whether deportation is in order:

- the age the noncitizen immigrated and the length of residence;
- the nature and the severity of the offense;
- the impact on the noncitizen's family life, particularly the economic and emotional hardship on children, partners and parents;
- employment history;
- service in the armed forces;
- rehabilitative behavior by the noncitizen;

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[46] *See* Wayne A. Cornelius, et al., *Current Migration Trends from Mexico: What are the Impacts of the Economic Crisis and U.S. Enforcement Strategy?,* CENTER FOR COMPARATIVE IMMIGRATION STUDIES 26-27 (Jun. 2009), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/MigrationCornelius060809.pdf.

[47] Jeffrey Passel and D'Vera Cohn, *Unauthorized Immigrants: 11.1 Million in 2011*, PEW HISPANIC RESEARCH CENTER (Dec. 6, 2012), http://www.pewhispanic.org/2012/12/06/unauthorized-immigrants-11-1-million-in-2011/.

[48] Scholars and development experts have pointed to the benefits of voluntary circular migration for both receiving and sending countries. *See* Kathleen Newland, *Circular Migration and Human Development,* UNITED NATIONS DEVELOPMENT PROGRAMME 42 (Human Development Reports Research Paper 2009).

- the noncitizen's ties to the country of origin, including language ability; and
- the noncitizen's medical and psychological status.

A similar balancing test was applied in the past for immigrants who were seeking relief from deportation because of a criminal conviction and had resided in the United States for seven years.[49] Many of these common sense factors have also been implemented by the European Court of Human Rights in its balancing test for deportation and have been recommended by the Inter-American Commission of Human Rights.[50] Creating a more fair, balanced process for the future, however, will not resolve the problems of thousands of families who are currently separated from a loved one because of a previous deportation. We should create a similar balancing test that would allow prior deportees to demonstrate that they are not a threat to the U.S. and that they merit a chance at reunifying with family members in the U.S.

B. DECRIMINALIZE UNLAWFUL ENTRY AND RE-ENTRY

Social scientists have shown that the majority of unlawful border crossers enter the U.S. in search of work or family reunification. While certainly a violation of our immigration laws, should this conduct be equated with criminal behavior implying an intent to harm the public? As to whether there is public harm, economists have shown that immigration in the long-term "unambiguously improves employment, productivity, and income," with small negative impacts in the short-term during an economic downturn.[51] In addition, there has been no published evidence that federal prosecutions actually deter future unlawful entry or re-entry.

Policymakers should consider decriminalizing unlawful entry and re-entry to the extent it is the only conduct at issue. Like unlawful presence, unlawful entry should be a civil violation unless there is evidence that the individual is entering the U.S. to commit a serious offense. Decriminalizing unlawful entry would not prevent taking this conduct into consideration in criminal cases. If an individual re-enters and commits a felony, unlawful re-entry could still be considered in the sentencing phase.

Immigration authorities already have administrative authority to deport individuals for violating civil laws and, other than burdening the federal courts and prison system, it appears little is gained from federal criminal prosecution. In his recent year-end report on the state of the courts, Justice John Roberts pointed to the financial constraints the Judiciary is operating under;[52] two years ago, his year-end report noted that "[i]mmigration offenses accounted for much of the criminal caseload.…"[53] This conclusion is supported by the 2011 Sentencing Commission report stating that approximately 35% of the federal criminal caseload is primarily immigration illegal

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[49] Immigration and Nationality Act of 1965, Pub. L. 89-236 § 212(c), 79 Stat. 911 (1965); 8 U.S.C. § 1182(c) (1994) (repealed 1996). Anthony Distinti, *Gone But Not Forgotten: How Section 212(c) Relief Continues To Divide Courts Presiding over Indictments for Illegal Reentry*, 74 FORDHAM L. REV. 2809, 2819 (2006).

[50] DANIEL KANSTROOM, AFTERMATH. DEPORTATION LAW AND THE NEW AMERICAN DIASPORA 222-223 (2012).

[51] Giovanni Peri, *The Impact of Immigrants in Recession and Economic Expansion*, MIGRATION POLICY INST. 4 (2010), *available at* http://www.migrationpolicy.org/pubs/peri-june2010.pdf.

[52] CHIEF JUSTICE JOHN ROBERTS, 2012 YEAR-END REPORT ON THE FEDERAL JUDICIARY 9 (Dec. 2012) ("Because the Judiciary has already pursued cost-containment so aggressively, it will become increasingly difficult to economize further without reducing the quality of judicial services."), *available at* http://www.supremecourt.gov/publicinfo/year-end/2012year-endreport.pdf.

[53] CHIEF JUSTICE JOHN ROBERTS, 2010 YEAR-END REPORT ON THE FEDERAL JUDICIARY 11 (Dec. 2010), *available at* http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf.

re-entry cases.[54] If these cases were instead handled by the civil immigration system, it is likely the federal judicial system could redirect resources to cases where public safety is paramount, such as murder and gun trafficking.

C. REINSTATE JRAD

In the *Padilla* case, the majority highlighted the combination of eliminating the Judicial Recommendation Against Deportation in 1990 and the broadening of aggravated felonies in 1996 as legislative trends that "confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[55] If indeed, as *Padilla* recognizes, criminal convictions are inextricably linked to deportation, policymakers should bring back the JRAD procedure where a criminal sentencing judge can weigh that aspect of the penalty.[56] Under the *Padilla* standard, criminal defense counsel already have a duty to inform the noncitizen about possible immigration consequences; many may also follow Justice Stevens' advice to attempt to craft a plea that does not lead to deportation. However, in those cases where deportation is likely, the JRAD procedure would serve an important purpose: it would provide the noncitizen the assistance of counsel who is already familiar with the facts of the offense to argue for relief. The importance of access to counsel in criminal proceedings cannot be overstated because once the criminal process is complete, immigrants are placed in civil deportation proceedings where the government does not provide pro bono counsel to indigent defendants. Notably, in immigration proceedings nationwide only approximately 15% of detained individuals have counsel.[57] It is unlikely that consideration of a JRAD as part of the sentencing phase of the trial would substantially increase the workload of criminal courts, but it may have significant impact on alleviating the pressure on the civil deportation system, which processes approximately 400,000 people annually.

CONCLUSION

In an increasingly connected world where goods, information and money move freely, people are sure to follow. Therein lies both an opportunity and a challenge for the United States. The major lesson learned from past reforms is that harsh, punitive measures, both in criminal and civil immigration law have not deterred unlawful immigration nor have they made us safer; rather our current laws wreak havoc on families, particularly U.S.-born children who have been left fatherless or motherless. We are now presented with an opportunity to craft immigration laws that adhere to our values and offer a more balanced approach to crime and deportation. This is not to say that the government cannot or should not deport individuals who are deemed a threat; rather, that we work towards creating a full, fair and transparent process that reflects our democratic principles.

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[54] U.S. Sentencing Commission, 2011 Annual Report 5 (Dec. 2011), *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/ar11toc.htm.

[55] *Padilla*, 130 S. Ct. at 1480.

[56] Other scholars have suggested going further by combining the JRAD procedure with the deportation hearing for criminal noncitizens. *See* Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge,* 51 Emory L.J. 1131 (2002).

[57] *The US Immigration Court System: Workload and Due Process Challenges*, Center for Migration Studies (Feb. 2012), *available at* http://cmsny.org/2012/02/21/osuna-on-us-immigration-court-system/.

Homeland Security and the Post-9/11 Era*

P.J. Crowley**

Some time in 2014, in a formal ceremony in Kabul, Afghanistan, President Obama or his designated representative will declare an end to the war in Afghanistan, the longest in U.S. history. Through a relentless 13-year campaign employing a wide range of military, intelligence, law enforcement, diplomatic and economic tools, it may be safe to say at that moment that the United States has been able "to disrupt, dismantle and defeat al Qaeda in Pakistan and Afghanistan," the goal the President established when he entered office in 2009.[1] Subject to the negotiation of a new status of forces agreement, the United States will retain a small counterterrorism force in Afghanistan beyond 2014 to achieve the second part of the President's objective, to prevent Afghanistan or Pakistan from being used as a safe haven from which to launch attacks against the United States in the future.[2]

The ceremony will mark the end of the 9/11 era, where the United States deployed significant numbers of military forces to directly engage those directly responsible for those attacks, or associated with them. Although not certain, it is likely the United States will no longer be in a formal state of war. Jeh Johnson, the Department of Defense General Counsel, predicted in a recent speech that there would be a "tipping point" sometime in the near future where this challenge will no longer constitute an "armed conflict."[3]

But whatever it is called, the "war against al Qaeda"[4] or the struggle against a "syndicate of terrorism,"[5] the threat, while reduced, has not been eliminated. Violent political extremism has evolved dramatically over the past decade and continues to represent a direct threat to the U.S. homeland and its interests around the world. Going forward, the on-going struggle will be waged differently. There will be less emphasis on offense—the strategy of preventive war outlined by President Bush in

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1 The White House, Remarks by the President on a New Strategy for Afghanistan and Pakistan (Mar. 27, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-a-New-Strategy-for-Afghanistan-and-Pakistan.

2 Michael R. Gordon, *Time Slipping, U.S. Ponders Afghan Role After 2014*, N.Y. TIMES, Nov. 25, 2012, http://www.nytimes.com/2012/11/26/world/asia/us-planning-a-force-to-stay-in-afghanistan.html.

3 Jeh Charles Johnson, Speech at the Oxford Union, Oxford University: The Conflict Against al Qaeda and Its Affiliates: How Will It End? (Nov. 30, 2012) (transcript available at http://www.documentcloud.org/documents/526903-speech-to-oxford-union-final.html).

4 The White House, Remarks by the President on Strengthening Intelligence and Aviation Security (Jan. 7, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-strengthening-intelligence-and-aviation-security.

5 Secretary of State Hillary Clinton, Remarks on Meet the Press (Dec. 6, 2009) (transcript available at http://www.msnbc.msn.com/id/34280265/ns/meet_the_press/t/meet-press-transcript-dec/#.UMDqzoU-dEQ).

2002[6]—and greater emphasis on defense. Homeland security, law enforcement, diplomacy and the intelligence community will take on greater significance, with the military playing a support role. This will necessitate some significant strategic adjustments, particularly at a time of declining resources and the existence of other challenges, such as international criminal cartels, cyber espionage and the theft of intellectual property and more frequent super storms that impact American society every bit as much as terrorism. If so, how has homeland security evolved over the past four years? What are the capabilities required to meet these challenges going forward? What are the capabilities and resources required to effectively secure the country, its people, interests, borders and critical capabilities from a range of threats? And what are the right expectations about this post-9/11 era? These are complex and critical questions and answers raised in this Issue Brief.

I. THE CURRENT SECURITY LANDSCAPE

A. EVOLVING THREAT AND RISK

There has not been a major terrorist attack on the United States since 9/11. This is not for a lack of effort by al Qaeda and its sympathizers, with a string of attempts originating from both outside and inside the United States.

Major incidents over the past four years tend to reinforce an existing understanding of the threat. The aviation system remains a favorite target as we saw with a December 2009 attempt by Umar Farouk Abdulmutallab, the so-called "Underbomber," to bring down a commercial airliner over Detroit. There was also the interception in October 2010 of two packages, each containing explosives hidden in the ink cartridges of printers shipped from Yemen to the United States using both cargo and commercial aircraft. Both plots were linked to al Qaeda in the Arabian Peninsula (AQAP) and demonstrated active efforts to adjust tactics to security improvements instituted since 9/11.[7] Attacks also were focused against targets in major urban centers, particularly New York. Najibullah Zazi was arrested in September 2009 while plotting an attack on the New York City subway system.[8] Faisal Shahzad attempted to ignite a bomb in Times Square in May 2010, ostensibly in response to the ongoing American drone campaign in Pakistan.[9]

Other events were less grandiose and targets of opportunity. Army Major Nidal Hasan, an example of the emerging trend of "active shooters," is currently on trial for allegedly killing 13 people at Fort Hood, Texas, in November 2009 after receiving spiritual guidance from American-born cleric Anwar al-Awlaki.[10] There was also the September 2012 assault on a diplomatic outpost in Benghazi, Libya, by a group allegedly sympathetic to al Qaeda that resulted in the death of four Americans including U.S. Ambassador J. Christopher Stevens.[11] Given improvements in security

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[6] The White House, President Bush Delivers Graduation Speech at West Point (June 1, 2002), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020601-3.html.

[7] OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, DEP'T OF STATE, 2010 COUNTRY REPORTS ON TERRORISM, Chapter 1 (2011), *available at* http://www.state.gov/j/ct/rls/crt/2010/170253.htm [hereinafter 2010 COUNTRY REPORTS].

[8] OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, DEP'T OF STATE, 2009 COUNTRY REPORTS ON TERRORISM, Chapter 1 (2010), *available at* http://www.state.gov/j/ct/rls/crt/2009/140882.htm.

[9] 2010 COUNTRY REPORTS, *supra* note 7.

[10] Eric Schmitt & Eric Lipton, *Focus on Internet Imams as Al Qaeda Recruiters*, N.Y. TIMES, Dec. 31, 2009, http://www.nytimes.com/2010/01/01/us/01imam.html?ref=nidalmalikhasan.

[11] John McLaughlin, *The New Battlefield: 5 Ways Terrorism Has Changed Since 9/11*, FOREIGN POLICY (Nov. 13, 2012), http://www.foreignpolicy.com/articles/2012/11/13/the_new_battlefield.

at high-profile buildings or installations around the world, extremists may opt for more frequent attacks against smaller but more accessible targets in the future.

These and other episodes over the past four years reveal three significant factors that will shape the nature of the threat going forward.

First, given the relentless pressure on its sanctuary in Pakistan both before and after the raid that killed Osama bin Laden in 2011, much of al Qaeda's operational impetus has evolved away from the core to its affiliates in the Arabian Peninsula, Iraq, the Islamic Maghreb and Somalia.[12] Extremist groups in Nigeria and Mali, where a separatist movement now holds significant territory, are also a growing concern.[13] Al Qaeda is struggling for popular support. Its position within the Muslim world has been declining for several years. A significant majority of Muslims in several Islamic countries surveyed expressed negative views towards al Qaeda in polling done by the Pew Research Center.[14] They came to recognize that, despite pledges to strike at the "far enemy," the reality was that the vast majority of victims of al Qaeda's campaign were Muslims.[15]

These gains notwithstanding, the on-going Arab Awakening has provided a myriad of groups associated with or inspired by al Qaeda an opportunity to reassert their relevance. Al Qaeda was largely a spectator during the early stages of these historic and difficult transitions, but it has now become more assertive, taking advantage of the political vacuum that has followed the overthrow of autocratic regimes in Tunisia, Egypt, Libya and Yemen.

Additionally, Syria has seen a significant influx of Islamic fighters, many associated with al Qaeda in Iraq.[16] For example, the al Nusra Front is believed to be a front for al Qaeda in Iraq, and the United States recently designated the group as a foreign terrorist organization in an attempt to limit its future role in the country should the Bashar al-Assad regime fall.[17] While the United States has chosen not to send weapons to rebel groups in Syria, others have.[18] The influx of weapons could have spillover effects similar to what occurred in Libya in 2011. In addition, the loss of control of Syria's stockpile of chemical weapons and shoulder-fired anti-aircraft missiles would have potentially dire consequences across the region and beyond.

The Arab Awakening and the push for greater political, economic and social opportunity across the Middle East is itself a repudiation of the vision of a caliphate

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[12] John Brennan, Speech at the Woodrow Wilson International Center for Scholars: The Efficacy and Ethics of U.S. Counterterrorism Strategy (Apr. 30, 2012) (available at http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy).

[13] Office of the Coordinator for Counterterrorism, Dep't of State, 2011 Country Reports on Terrorism, Chapter 1 (2012), *available at* http://www.state.gov/j/ct/rls/crt/2011/195540.htm.

[14] Pew Research Ctr., *On Anniversary of bin Laden's Death, Little Backing of al Qaeda* (Apr. 30, 2012), http://www.pewglobal.org/2012/04/30/on-anniversary-of-bin-ladens-death-little-backing-of-al-qaeda.

[15] David Ignatius, *The bin Laden Plot to Kill President Obama*, Wash. Post, Mar. 16, 2012, http://articles.washingtonpost.com/2012-03-16/opinions/35446521_1_obama-and-petraeus-bin-laden-plot-osama.

[16] Tim Arango, Anne Barnard & Hwaida Saad, *Syrian Rebels Tied to Al Qaeda Play Key Role in War*, N.Y. Times, Dec. 9, 2012, at A1, http://www.nytimes.com/2012/12/09/world/middleeast/syrian-rebels-tied-to-al-qaeda-play-key-role-in-war.html.

[17] Michael R. Gordon & Anne Barnard, *U.S. Places Militant Syrian Rebel Group on List of Terrorist Organizations*, N.Y. Times, Dec. 11, 2012, at A8, http://www.nytimes.com/2012/12/11/world/middleeast/us-designates-syrian-al-nusra-front-as-terrorist-group.html.

[18] Karen DeYoung & Liz Sly, *Syrian Rebels Get Influx of Arms with Gulf Neighbors' Money, US Coordination*, Wash. Post, May 15, 2012, http://articles.washingtonpost.com/2012-05-15/world/35454790_1_baba-amr-neighborhood-syrian-rebels-homs.

promoted by bin Laden. These transitions towards civilian rule will be beneficial in the long run, but governments preoccupied with establishing legitimacy with empowered local populations may be less focused on international counterterrorism cooperation that has been significantly strengthened over the past decade.[19] Whereas bin Laden rejected politics in favor of jihad, this changed environment in the Middle East is likely to see the emergence of more hybrid movements like Hezbollah and Hamas, extremist organizations that will aggressively pursue political power and use violence to burnish their legitimacy and further their political goals.[20]

Finally, the resolution of Iran's nuclear ambitions in the coming years presents another potential complication. While the United States would prefer to resolve the thorny issue through diplomacy, it may be forced to employ military force. The United States' posture in the world has stabilized in recent years, but a military confrontation in the region is likely to generate unrest and a spike in anti-Americanism that extremist groups will undoubtedly try to exploit.[21] Further, should Iran perfect a weapons capability, it is possible that the region could see the emergence of a nuclear arms race, increasing the potential (although still low) that nuclear material could fall into the wrong hands.[22]

B. BEYOND TERRORISM: A WORLD OF COMPLEX CHALLENGES

Terrorism and the ramifications of state-based conflict are not the only concerns when analyzing the complex and unpredictable security environment. According to the 2010 Quadrennial Homeland Security Review, significant long-range issues involve criminal elements that seek to exploit global supply chains to traffic in illegal substances, weapons, money or other contraband; cyber attacks, intrusions, disruptions and the exploitation of information networks to gain access to government, business and personal information; migrant and refugee flows generated by political, social and economic instability; viruses that can traverse the world quickly, whether due to natural or man-made circumstances, and overwhelm available public health capabilities; and the consequences of climate change.[23]

1. Climate Change

Natural disasters seem to be increasing, not only in frequency, but also in the economic damage they inflict. Hurricane Sandy is just the latest example, generating an estimated $82 billion in damages just in the states of New York, New Jersey and Connecticut. The proposed $60 billion Federal reimbursement to pay for the damage exceeds by itself the entire budget of the Department of Homeland Security (DHS).[24]

Extreme weather patterns have become the "new normal." Twenty of the 30 most expensive catastrophes in history have occurred since 2001, with only one of

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[19] McLaughlin, *supra* note 11.

[20] Discussion via email with Ambassador Alberto M. Fernandez, Coordinator of the Center for Strategic Counterterrorism Communications, Department of State (Dec. 5, 2012).

[21] The Iran Project, Weighing Benefits and Costs of Military Action Against Iran 39 (2012), *available at* http://theiranproject.org/reports/.

[22] The White House, Remarks by the President to the UN General Assembly (Sep. 25, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-un-general-assembly.

[23] Dep't of Homeland Sec., Quadrennial Homeland Security Review 9 (2010), *available at* http://www.dhs.gov/quadrennial-homeland-security-review-qhsr [hereinafter Quadrennial Review].

[24] Raymond Hernandez & Peter Baker, *Obama Asking Congress for $60.4 Billion to Help States Recover from Storm*, N.Y. Times, Dec. 8, 2012, at A16, http://www.nytimes.com/2012/12/08/nyregion/obama-proposes-hurricane-recovery-bill.html.

them—9/11—being man-made. The rest were natural disasters, 13 of them in the United States.[25] Recent scientific studies suggest that, regardless of steps taken to reduce greenhouse gases, given the current warming trend, seas are almost certain to rise at least five feet in the coming decades. Roughly six million Americans today live on land less than five feet above sea level at high tide.[26] We already have witnessed the destruction a devastating storm like Hurricane Katrina can inflict on these low-lying areas when their existing defenses fail.

The Federal Emergency Management Agency (FEMA), a component of DHS, received widespread praise for its response to Hurricane Sandy, demonstrating the importance of advance planning and professional leadership.[27] DHS has to assume that the interrelated tasks of preparing for major natural disasters, responding effectively, helping communities recover and developing mitigation strategies and making critical systems and networks more resilient will tax existing capabilities more significantly in the years ahead. Climate change only will become a more important and critical issue with respect to this nation's security priorities.

2. Cybersecurity

Meanwhile, the 2009 Cyberspace Policy Review captured the essence of the challenge of defending computer networks that are vital to America, its economy and its security: "The digital infrastructure's architecture was driven more by considerations of interoperability and efficiency than of security. Consequently, a growing array of state and non-state actors is compromising, stealing, changing, or destroying information and could cause critical disruptions to U.S. systems."[28] As of this writing, the National Intelligence Council is preparing an intelligence estimate of the impact of cyber attacks, intrusions, disruptions and exploitations on government, business and personal information systems, and the theft of intellectual property on the U.S. national and economic security. The damage runs well into the billions of dollars and results in the loss of millions of jobs.[29] The release of this report could provide impetus for further action.

While the United States government is placing increased emphasis on cyber issues, there is still an internal struggle to actually define what cybersecurity means, set appropriate national standards, and clarify overlapping responsibilities.[30] Additionally, questions exist as to whether the government has the necessary capabilities to match its growing responsibilities in this field. Recently, for example, DHS

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[25] Erwann Michel-Kerjan & Howard Kunreuther, *Paying for Future Catastrophes*, N.Y. Times, Nov. 25, 2012, at SR-7, http://www.nytimes.com/2012/11/25/opinion/sunday/paying-for-future-catastrophes.html.

[26] Benjamin Strauss & Robert Kopp, *Rising Seas, Vanishing Coastlines*, N.Y. Times, Nov. 25, 2012, p. SR-6, available at http://www.nytimes.com/2012/11/25/opinion/sunday/rising-seas-vanishing-coastlines.html.

[27] Jennifer Steinhauer & Michael S. Schmidt, *Man Behind FEMA's Makeover Built Philosophy on Preparation*, N.Y. Times, Nov. 3, 2012, http://www.nytimes.com/2012/11/04/us/the-man-behind-femas-post-katrina-makeover.html.

[28] Cyberspace Policy Review: Assuring a Trusted and Resilient Information and Communications Infrastructure iii (2009), http://www.whitehouse.gov/assets/documents/Cyberspace_Policy_Review_final.pdf.

[29] Ken Dilanian, *U.S. Spy Agencies to Detail Cyber-attacks From Abroad*, L.A. Times, Dec. 6, 2012, http://articles.latimes.com/2012/dec/06/nation/la-na-cyber-intel-20121207.

[30] Ctr. for Strategic and Int'l Studies, Cybersecurity Two Years Later: A Report of the CSIS Commission on Cybersecurity for the 44th Presidency 3 (2011), *available at* http://csis.org/files/publication/110128_Lewis_CybersecurityTwoYearsLater_Web.pdf.

has increased its cyber force from 40 to 400.[31] In 2009, it established a new National Cybersecurity and Communications Integration Center. But more expertise and resources may still be needed.

Given the increased importance of networks to national security, there are difficult questions that need to be answered regarding how responsibility for securing these networks should be distributed among government, its contractors and the private sector.[32] When it comes to cybersecurity, there is a relatively thin line between offense and defense. Given the difficulty with attribution, determining which of the many daily assaults on U.S. government and private networks are the work of government hackers, hired guns, activists and individuals, calculations regarding how to respond, who is responsible and what actions are considered appropriate and proportionate are complex.

Many critical operations such as energy, chemical, water and electricity plants and transportation networks use computer control systems that are vulnerable to attack. For example, Saudi Arabia's national oil company, Aramco, experienced a cyber attack in August 2012 through a virus known as Shamoon. Had this attack been successful, it would have shut down the country's oil and gas production, which likely would have had a global economic impact.[33] Moreover, most of what is considered critical infrastructure is owned by the private sector. Hacker groups like Anonymous look at corporations in the same way al Qaeda views civilians—as fair game. A popular one-liner among security experts is that there are two kinds of corporations: those who have been attacked and those who will be.[34] But the concept of a "new terrain of warfare" doesn't sit well with executives used to worrying about market share.[35]

The government has struggled to articulate clear industrial sector standards in such a dynamic operating environment. There is no single "face" for the private sector to approach within government, since responsibility is shared across multiple agencies. DHS, given its day-to-day interactions with many segments of the U.S. and global economy, can be that go-to agency and should take the lead in fostering broader dialogue and improved information sharing between government and the private sector. But to be effective, DHS must bring greater capability and perspective to the table. DHS is improving, but its resources lag far behind those of the Department of Defense. However, cooperation between the two agencies is expanding.[36]

There is still a need to create the right set of incentives, including liability protection, to get the private sector to take the needed action to defend the ".com world" to the degree that is both possible and necessary. The Cybersecurity Act of 2012 that sought to promote better information sharing between government and the private

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[31] Ellen Nakashima, *Fierce Fight for Expert Workers*, WASH. POST, Nov. 13, 2012, at AA5, http://articles.washingtonpost.com/2012-11-13/world/35503584_1_cyber-threats-new-cyber-alan-paller.

[32] Ellen Nakashima, *Cyberwar Poses Dilemma for Defense Contractors*, WASH. POST, Nov. 23, 2012, at A1, http://articles.washingtonpost.com/2012-11-22/world/35510891_1_qatar-cyberattack-mcconnell.

[33] *See* Reuters, *Aramco Says Cyberattack Was Aimed at Production*, N.Y. TIMES, Dec. 10, 2012, at B2, *available at* http://www.nytimes.com/2012/12/10/business/global/saudi-aramco-says-hackers-took-aim-at-its-production.html.

[34] Somini Sengupta & Nicole Perlroth, *The Bright Side of Being Hacked*, N.Y. TIMES, Mar. 4, 2012, http://www.nytimes.com/2012/03/05/technology/the-bright-side-of-being-hacked.html .

[35] Leon Panetta, U.S. Sec'y of Defense, Remarks on Cybersecurity to the Business Executives for National Security, New York City (Oct. 11, 2012) (transcript available at http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5136).

[36] Jonathan Masters, *Confronting the Cyber Threat*, COUNCIL ON FOREIGN RELATIONS BACKGROUNDER (May 23, 2011), http://www.cfr.org/technology-and-foreign-policy/confronting-cyber-threat/p15577.

sector regarding intrusions and vulnerabilities was widely viewed as a step in the right direction. It would have established voluntary cybersecurity standards for operators of critical infrastructure, but stalled due to opposition to government-imposed requirements on businesses as well as privacy concerns. The Senate failed to muster the necessary 60 votes to bring the legislation to a vote.[37]

II. CHALLENGES FACING HOMELAND SECURITY

A. UNDERSTANDING THE HOMELAND SECURITY ENTERPRISE

Today, homeland security is conceptualized as an "enterprise."[38] While DHS, which started in 2003 as the merger of 22 separate agencies, plays a leading role, defending the country and its people, borders, critical infrastructure, networks and economy is a distributed whole of government challenges. It involves a national effort involving governments at all levels—Federal, state, local, tribal and territorial—as well as the private sector, communities and individuals.[39] While this enterprise is much more capable than when it began ten years ago, homeland security is very much a work in progress. In DHS's second decade, major priorities must be to continue to look for synergies within its many components, to build a more integrated culture, and to eliminate structural redundancies such as the overlapping regional structures that existed when DHS came into being.

One major accomplishment over the past four years involves agreement on the enduring missions of the homeland security enterprise. When the Obama administration came into office, there was still a residual debate about what DHS was expected to do. Some argued that combatting terrorism was but a first priority, but others insisted that it should be its sole mission.[40] Through its first Quadrennial Homeland Security Review, the Department's core missions reflect not just what the homeland security enterprise is trying to prevent, but also what it is trying to preserve. They include:

- Preventing Terrorism and Enhancing Security
- Securing and Managing Our Borders
- Enforcing and Administering Our Immigration Laws
- Safeguarding and Securing Cyberspace
- Ensuring Resilience to Disasters[41]

To its credit, DHS has embraced its multi-mission challenge. While these missions do involve different priorities, what binds them together is their relationship to American economic security. Bin Laden's stated objective was not to defeat the far enemy, but to inflict sufficient economic cost to force the United States to adapt its policies, particularly in the Middle East.[42] In defending borders and cyberspace,

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[37] Joseph I. Lieberman & Susan Collins, *At Dawn We Sleep*, N.Y. TIMES, Dec. 6, 2012, http://www.nytimes.com/2012/12/07/opinion/will-congress-act-to-protect-against-a-catastrophic-cyberattack.html.

[38] DEP'T OF HOMELAND SEC., IMPLEMENTING 9/11 COMMISSION RECOMMENDATIONS: PROGRESS REPORT 2011, at 11 (2011), *available at* http://www.dhs.gov/implementing-911-commission-recommendations.

[39] QUADRENNIAL REVIEW, *supra* note 23, at 12.

[40] SHAWN REESE, CONG. RES. SERV., DEFINING HOMELAND SECURITY: ANALYSIS AND CONGRESSIONAL CONSIDERATIONS 4 (Apr. 3, 2012), *available at* http://www.fas.org/sgp/crs/homesec/R42462.pdf.

[41] QUADRENNIAL REVIEW, *supra* note 23, at 19.

[42] Daveed Gartenstein-Ross, *Bin Laden's 'War of a Thousand Cuts' Will Live On*, THE ATLANTIC (May 3, 2011), http://www.theatlantic.com/international/archive/2011/05/bin-ladens-war-of-a-thousand-cuts-will-live-on/238228/.

determining who should and should not gain entry into the United States, and preventing man-made disasters while mitigating the impact of natural ones, government has to strike a balance: Keep America safe, without inhibiting commerce or compromising fundamental rights.

The challenge is how to provide security at a cost to the economy and society that is acceptable and sustainable. Improved risk-assessment tools have been developed that help, particularly improved processes and information-sharing that have strengthened the ability to verify the identity of an airline passenger, a cargo shipper or a visa applicant and differentiate them from someone with malign intent.

Where these two imperatives collide most significantly is at the nation's 450 airports through which almost two million passengers travel every day.[43] Initiatives like the Secure Flight pre-screening process enable the Transportation Security Administration (TSA) to better verify identities and to assess risk before passengers even arrive at the airport.[44] While the latest generation of video imaging scanners is viewed by many as overly intrusive, the sweet spot going forward is to significantly expand trusted traveler programs that expedite the flow of passengers who pose low risk through airport screening lines. TSA is testing multiple programs at present and should aggressively validate them and expand their use.[45] Trusted shipper and supply chains are also at the heart of cargo security.[46] Security improvements, including innovative technologies, are needed to be able to provide acceptable levels of security while reducing screening time and manpower. This will be important as budget pressures increase.

A significant asset to the homeland security enterprise is the breadth of its interaction with the private sector. Effective homeland security requires meaningful action within the private sector, not just government. But government has not yet found the most effective means to leverage this ongoing interaction into effective action.[47] The relationship still does not yet generate sufficient data that enables a clear understanding of what is happening within the private sector, the vulnerabilities that exist and how to yield effective action based on bottom up initiative rather than top down mandates.

B. SECURING GLOBAL AMERICA

Homeland security is a global challenge. DHS, working in conjunction with the Department of State and other agencies across the government, should continue to expand its presence overseas. Security requires international partners and global standards. A key factor in the decrease of the al Qaeda threat has been the increase in counterterrorism cooperation around the world. In addition, working within a number of international organizations as well as informal coalitions, security standards have steadily improved, from commercial air transportation and the verification of

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[43] Dep't of Homeland Sec., Bottom Up Review Report (2010), Annex B, *available at* http://www.dhs.gov/xlibrary/assets/bur_bottom_up_review.pdf.

[44] Transp. Sec. Admin., Secure Flight Program Fact Sheet, *available at* http://www.tsa.gov/stakeholders/secure-flight-program.

[45] Dep't of Homeland Sec., Department of Homeland Security Strategic Plan 2012-2016, at 36 (2012), *available at* http://www.dhs.gov/xlibrary/assets/dhs-strategic-plan-fy-2012-2016.pdf.

[46] Customs and Border Protection, C-TPAT Fact Sheet (2008), *available at* http://www.cbp.gov/xp/cgov/newsroom/fact_sheets/port_security/ctpat_sheet.xml.

[47] Darrell M. West, The Brookings Inst., A Vision for Homeland Security in the Year 2025, at 1 (2012), *available at* http://www.brookings.edu/~/media/Research/Files/Papers/2012/6/26%20security%20homeland%20west/26_homeland_security_west.pdf.

passenger identities to greater visibility over global supply chains and the scanning of freight containers that constitute the blood stream of global commerce. Homeland security-related issues, from the integrity of passports and other travel documents to the security of intellectual property, have become a more prominent aspect of the day-to-day engagement that the United States has with governments, corporations and people around the world.

As the United States reformed and expanded its homeland security enterprise in the aftermath of 9/11, it placed significant demands on other countries and also on multinational corporations. Looking from an American vantage point, the United States sought to "push out its borders" to ensure that, to the extent possible, people and goods would be screened not upon arrival in the United States, but prior to departure from another country.[48] To that end, the United States has worked closely with a range of international organizations, including the World Customs Organization, International Maritime Organization, International Civil Aviation Organization and others to achieve higher security standards for global transportation systems.[49] For example, the vast majority of shipping containers coming to the United States are screened, and if necessary, inspected prior to being placed on board ships bound for the United States.[50] Such steps have made transportation considerations more complex for both violent extremists and international criminal cartels.

Last year, DHS led a renewed negotiation with the European Union regarding passenger name recognition (PNR) records that are used to confirm the identities of individuals planning to travel to the United States and assess the risk travelers might pose prior to boarding an airplane or ship or crossing a border. DHS was able to overcome European privacy concerns about the potential misuse of personal data provided to the United States. An agreement was reached in late 2011 and ratified by the European Union in April 2012.[51]

At the same time, a major factor in sustaining United States global influence is open borders, successfully encouraging people around the world to visit, study, work and live here. Improved security has come at a high cost, with a significant number of international students choosing to study elsewhere and workers with critical high-end skills forced to wait for lengthy periods to obtain a visa. More effort is needed to establish the right balance. Regarding global supply chains, DHS has worked effectively to mesh the country's need for better security with the private sector's push for improved efficiency and reliability. Business success and security are not zero-sum, but bottom line pressures are going to continue to challenge this cooperation.

C. HEMISPHERIC SECURITY

Over the past decade, as the United States has focused its attention most significantly on the wars in Afghanistan and Iraq, different kinds of conflicts have been waged in this hemisphere that have challenged state sovereignty and effective governance in several countries, but most notably in Colombia and Mexico. The United

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[48] Lisa M. Seghetti, Jennifer E. Lake, & William H. Robinson, Cong. Res. Serv., Border and Transportation Security: Selected Programs and Policies, at CRS-5 (Mar. 29, 2005), *available at* http://www.fas.org/sgp/crs/homesec/RL32840.pdf.

[49] Discussion with David Heyman, Assistant Secretary for Policy, Department of Homeland Security.

[50] Customs and Border Protection, Container Security Initiative Fact Sheet (2011), *available at* http://www.cbp.gov/linkhandler/cgov/trade/cargo_security/csi/csi_factsheet_2011.ctt/csi_factsheet_2011.pdf.

[51] Press Release, Council of the European Union, Council Meeting on Justice and Home Affairs (Apr. 26, 2012), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/129870.pdf.

States has had significant involvement in these conflicts through programs like Plan Colombia[52] and the Merida Initiative.[53] Elsewhere, criminal cartels have corrupted and undermined weak governments in Guatemala and Honduras and they now potentially qualify as failed states.[54] While significant political attention has been devoted to building a fence along the U.S. border with Mexico, in reality, effective border security is a shared hemispheric challenge.

1. The Mexican Drug War

Mexico has recently inaugurated a new government and the United States must continue its close cooperation with the incoming Pena Nieto administration to enhance human security and the rule of law in Mexico. As the U.S. seeks to interdict the illegal flow of narcotics and people coming from the south, it must devote more attention to the parallel flow of weapons and money going to the south. The direct challenge posed by drug cartels to the sovereignty and authority of Mexico and neighboring states is the most significant security challenge the hemisphere confronts in the coming decade. This is not just Mexico's problem, nor just a Mexico problem. More needs to be done on both sides of the border.

The Merida Initiative (Merida), a security cooperation agreement between the United States, Mexico, and the countries of Central America, with the declared aim of combating the threats of drug trafficking, transnational organized crime, and money laundering, has been a successful platform that has transformed security and intelligence cooperation between the United States and Mexico since 9/11. While aimed at disrupting the ability of international cartels to operate, improving border security, as well as strengthening Mexico's justice system, government institutions and communities, the Merida Initiative has broadened U.S.-Mexican engagement on regional and global issues as progress has reshaped the nature of international drug smuggling. Today, more drugs are being smuggled via maritime routes and via other Central American countries into the United States, as well as to West Africa and Europe. Merida's scope needs to expand to reverse declines in governance across Central America.[55]

For its part, the United States has been looking at this challenge as an external threat, and it has not consistently addressed the contributing factors that exist internally. Beyond just the American drug demand, the flow of weapons and money south contribute significantly to the violence and corruption. Secretary of State Hillary Clinton has acknowledged our shared responsibility. The United States needs to more significantly address the flow of money and weapons flowing south into Mexico and other countries that contribute to violence, corruption and instability.[56] In a joint study soon to be published, an estimated 68 percent of the weapons seized in Mexico came from the United States.[57] One solution is for authorities to investigate and map cartel

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[52] Uri Friedman, *A Brief History of Plan Colombia*, Foreign Policy Mag., Oct. 28, 2011, http://www.foreignpolicy.com/articles/2011/10/27/plan_colombia_a_brief_history.

[53] Dep't of State, Fact Sheet: Expanding the U.S./Mexico Partnership (2012), *available at* http://www.state.gov/p/wha/rls/fs/2012/187119.htm.

[54] Elizabeth Dickinson, *Watch List: Four Countries in Big Trouble*, Foreign Policy (July/Aug. 2010), http://www.foreignpolicy.com/articles/2010/06/21/watch_list.

[55] Background Discussion with Senior Official of the Government of Mexico (Dec. 11, 2012).

[56] Department of State, Remarks by Hillary Rodham Clinton with Mexican Foreign Secretary Patricia Espinosa, Mar. 23, 2010, *available at* http://www.state.gov/secretary/rm/2010/03/138963.htm.

[57] Background Discussion, *supra* note 55.

interconnections and business associations that span the U.S.-Mexican border to better understand and interrupt the networks that enable illegal activity to flourish.

2. Immigration Reform

A confluence of factors both in Mexico and the United States offer a crucial opportunity to achieve comprehensive immigration reform over the next year. Both parties see benefits to advancing legislation given voting patterns from the 2012 election.[58] The Mexican economy is growing while the U.S. economy slowly recovers. Border enforcement has improved, while cartels force their way into the human trafficking business, creating increased danger for illegal border crossings. As a result, recent years have witnessed negative rates of immigration from Mexico into the United States, which may mitigate a key political obstacle to immigration reform.[59] In order to promote more effective border security and encourage legal immigration between the two countries, reform legislation needs to include provisions for a guest worker program that restores "circular mobility" and that enables workers to contribute to the U.S. economy and return home to Mexico, which the existing strategy on fencing and enforcement only interrupted.[60]

The lens through which the United States examines immigration needs to widen. The National Intelligence Council suggests that over the next 20 years, an unprecedented aging of populations will be a "megatrend" that impacts global security and stability.[61] With the retirement of the Baby Boomer generation, the United States will need to get younger. An effective immigration system that matches international skills with economic and entrepreneurial needs will be crucial to economic competitiveness.

A 21st century immigration policy will have to be enforced. DHS needs to improve its ability to track workers, students and visitors both arriving and departing the United States. It must include a nationwide employment verification system, but also a fair path to permanent status for those already in the United States, including a generous process to unite family members of citizens who wish to emigrate to the United States.

III. FORWARD-LOOKING STRATEGIES AND EXPECTATIONS

A. INTEGRATED STRATEGY AND RESOURCE ALLOCATION

The National Intelligence Council recently released its analysis of critical global trends that will or could shape the security environment over the next two decades. It speaks of a diffusion of power among states and greater individual empowerment; changing population demographics and increased global migration; increased demand for critical resources and economic volatility as various regions cope with differing effects of climate change; and the emergence of new technologies that can solve many problems but create new dangers as well.[62]

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[58] Lauren Fox, *Republicans on Capitol Hill Eye Immigration Reform to Win Back Latino Voters*, US NEWS & WORLD REPORT (Nov. 21, 2012), http://www.usnews.com/news/articles/2012/11/21/republicans-on-capitol-hill-eye-immigration-reform-to-win-back-latino-voters.

[59] Jeffrey Passel, D'Vera Cohn & Anna Gonzales Barerra, Pew Research Ctr., *Net Migration from Mexico Falls to Zero—and Perhaps Less* (May 3, 2012), http://www.pewhispanic.org/2012/04/23/net-migration-from-mexico-falls-to-zero-and-perhaps-less/.

[60] KATHLEEN NEWLAND, CIRCULAR MIGRATION AND HUMAN DEVELOPMENT, UNITED NATIONS DEVELOPMENT PROGRAM RESEARCH PAPER (2009), *available at* http://www.migrationpolicy.org/pubs/newland_HDRP_2009.pdf.

[61] NAT'L INTELLIGENCE COUNCIL, GLOBAL TRENDS 2030: ALTERNATIVE WORLDS, NOVEMBER 2012, at iv, *available at* http://globaltrends2030.files.wordpress.com/2012/11/global-trends-2030-november2012.pdf.

[62] *Id*. at ii.

Each of these trends adds complexity to the stated homeland security missions: confronting terrorism, protecting borders while promoting commerce, managing immigration, securing cyberspace and preparing for and recovering from disasters. While responsibility for these areas is shared, all of them require meaningful action by governments and in particular the Federal government.

Looking ahead, the requirements needed to meet these responsibilities are likely to rise, while available resources at all levels of government are very likely to level off or decline.[63] There is a risk that the on-going national debate over the economy and deficit reduction will overtake considerations of national security strategy across all of its dimensions, including homeland security. It remains to be seen whether in the face of budget pressures at all levels of government the homeland security enterprise will sustain capabilities and structures created in the aftermath of 9/11. Fewer intelligence analysts, fewer cops on the beat and less training will have an impact. At the same time, budget constraints can create a constructive dynamic and leverage innovations made at all levels of the enterprise. Going forward a number of prudent steps should be considered.

First, given the mounting pressure on budgets across the homeland security enterprise, there needs to be greater clarity regarding security-related budget and overhead decisions being made across the Federal government, at state and local levels and in the private sector. In other words, if homeland security is a shared responsibility, prudent strategic calculations are impossible without knowing if the resources will be available across the enterprise to actually do what is needed. Before homeland security suffers a thousands cuts, there must be an understanding of what each cut means to the overall health of the patient.

Second, homeland security needs a joint requirements process. In a time of resource constraint, agencies at all levels need to understand the tactical and strategic implications of individual funding decisions and make smart tradeoffs. What is the right mix of personnel and technology needed to fulfill the stated missions? For example, based on the security environment we will likely face over the next decade, do we need more Federal agents on the border or local cops on the street? If immigration reform passes, how will that impact the workload of Immigration and Customs Enforcement (ICE) as well as Citizenship and Immigration Services (CIS)? Given the prospect of more frequent and significant storms, what new capabilities are required within FEMA and the Coast Guard? If cartels are shifting transit routes from land to sea, what is the impact between Customs and Border Protection (CBP) and the Coast Guard? Can existing joint operations be expanded?

There are structural steps DHS can take as well that can reduce overhead. It inherited multiple regional headquarters from its legacy agencies. They should be consolidated into an integrated national homeland security command structure, building a stronger culture of jointness. Likewise, state and local fusion centers should be reformed and integrated.[64] In the next year, the Coast Guard will move into a new DHS leadership complex in Washington. Congress has slowed funding for the project, which is projected to consolidate all major DHS components on one campus. DHS should

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[63] Dep't of Homeland Sec., FY 2013 Budget in Brief (2012), *available at* http://www.dhs.gov/xlibrary/assets/mgmt/dhs-budget-in-brief-fy2013.pdf.

[64] Senate Homeland Sec. and Governmental Affairs Comm., Federal Support for and Involvement in State and Local Fusion Centers Majority and Minority Staff Report 106 (Oct. 3, 2012), *available at* http://www.hsgac.senate.gov/subcommittees/investigations/media/investigative-report-criticizes-counterterrorism-reporting-waste-at-state-and-local-intelligence-fusion-centers.

receive support from the administration and Congress to complete the project. DHS is taking useful steps in this direction with the establishment of a new office focused on strategic planning, analysis and risk and how to better invest in needed capabilities.[65]

Finally, there needs to be more long-range strategic planning and budgeting across all national security agencies to understand the shifting interplay among defense, diplomacy, homeland security, law enforcement, public health, the environment and intelligence. In a world of drones and bio-weapons, do we need fewer pilots and more public health specialists? With Arctic transit routes opening and the prospect of international disputes over resources, do we need more ships in the Navy or Coast Guard or both? When soldiers withdraw from global trouble spots, do we need more diplomats and development experts to stay behind? If so, as became tragically evident in Libya, the State Department may require a greater number of dedicated security personnel (as opposed to contractors) to secure them.

Rather than setting separate budget top-lines for the Departments of Defense, State, Homeland Security, Justice and other national security agencies, the executive branch should propose and Congress should approve an integrated top-line national security that would align resource decisions and operations.[66] Within the national security realm, the United States takes a whole of government approach to operations. It should plan and budget the same way.

B. BEYOND KINETICS

In its 2006 National Security Strategy, the Bush administration characterized the war on terror as "both a battle of arms and a battle of ideas."[67] The Obama administration likewise recognized both the right to use force unilaterally if necessary to defend the nation and its interests and the need to engage both governments and people to resolve common challenges, including the threat of terrorism.[68]

The Obama administration has aggressively pursued both dimensions of this struggle in pursuit of an end state where "the al Qaeda core is no longer relevant."[69] In addition to the raid that killed bin Laden, the Obama administration has greatly expanded the use of drones, more than 300 strikes since 2009, to decimate al Qaeda's leadership.[70] At the same time, it launched an innovative outreach to Muslim communities, including the creation of the Center for Strategic Counterterrorism Communication (CSCC) at the State Department, which engages in a vigorous debate within on-line chat rooms about extremism and distributes simple but effective video products in strategic languages using social media, including YouTube, that promote an alternative to political violence.[71]

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[65] Heyman, *supra* note 49.

[66] Ctr for Am.Progress, Rebalancing our National Security: The Benefits of Implementing a Unified Security Budget (2012), *available at* http://www.americanprogress.org/issues/security/report/2012/10/31/43074/rebalancing-our-national-security/.

[67] The White House, The National Security Strategy of the United States of America 9 (2006), *available at* http://georgewbush-whitehouse.archives.gov/nsc/nss/2006/.

[68] The White House, National Security Strategy (2010), *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

[69] Brennan, *supra* note 12.

[70] Scott Shane, *Election Spurred a Move to Codify U.S. Drone Policy*, N.Y. Times, Nov. 25, 2012, at A1, http://www.nytimes.com/2012/11/25/world/white-house-presses-for-drone-rule-book.html.

[71] Fernandez, *supra* note 20.

Notwithstanding the significant success of U.S. counterterrorism efforts over the past four years, a recent Pew poll revealed a clear lack of international support for the preferred weapon in the ongoing "war on terror," the use of drones.[72]

The administration has made a strong public case that the use of drones is legally defensible under both domestic and international law and strategically sound.[73] Drones have less impact on the broader civilian population than the deployments of a large number of conventional military forces. But the current approach is reaching what Pakistani Ambassador to the United States Sherry Rehman describes as a point of "diminishing returns." As she suggested at the 2012 Aspen Security Forum, the expanded use of drones in Pakistan "adds to the pool of recruits we're fighting against."[74]

The comments echo a well-known memo circulated in October 2003 in which former Secretary of Defense Donald Rumsfeld posed a question of whether on-going operations in Iraq were potentially creating more extremists than were being eliminated or dissuaded. Mr. Rumsfeld encouraged greater long-range planning that incorporated an improved cost-benefit analysis on current operations.[75]

Over the past four years, there is strong evidence that drones have advanced beyond a kind of silver bullet—employed only against high value targets where no other options exist—to a force protection weapon—used less against those who credibly represent a threat against the United States and more against those who threaten U.S. and the International Security Assistance Force (ISAF) forces on the battlefield in Afghanistan.[76] In other words, tactics have trumped strategy. While force protection is an essential element of any military campaign, it should not come at the expense of the long-range goal of a strategic partnership between Pakistan and the United States, considered a pillar of the existing strategy to defeat al Qaeda.[77]

Drone operations are a major impediment to a genuine alliance between Washington and Islamabad and continue to roil Pakistani public opinion. A recent Pew poll suggests that 74 percent of the Pakistani population considers the United States an "enemy."[78] A large number of Pakistanis view drone operations as a violation of the country's sovereignty. The Pakistani Parliament demanded in April 2012 that drone operations within Pakistan cease. But the United States has cleared its drone campaign with Pakistan's military, not its civilian government, a situation that undercuts the development of civilian democratic institutions within Pakistan, which remains another long-term strategic objective.[79]

The excessive secrecy surrounding drone operations, particularly in the context of Pakistan, is counterproductive. There is a significant nexus between Pakistan and terrorist threats to the United States, not just in the case of the 9/11 perpetrators, like bin

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[72] Pew Research Ctr., *Global Opinion of Obama Slips, International Policies Faulted* (June 13, 2012), http://www.pewglobal.org/2012/06/13/global-opinion-of-obama-slips-international-policies-faulted/.

[73] Jack Goldsmith, Power and Constraint 21 (2012).

[74] Eric Schmitt, *Tense Talk in Conference between U.S. and Pakistan*, N.Y. Times, July 27, 2012, http://www.nytimes.com/2012/07/28/world/asia/at-security-conference-tense-talk-between-us-and-pakistan.html.

[75] USA Today, *Rumsfeld's War-on-Terror Memo*, May 20, 2005, http://usatoday30.usatoday.com/news/washington/executive/rumsfeld-memo.htm.

[76] Shane, *supra* note 70.

[77] The White House, National Security Strategy 21 (2010), http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

[78] Pew Research Ctr., *Pakistani Public Opinion Ever More Critical of U.S.* (June 27, 2012), http://www.pewglobal.org/2012/06/27/pakistani-public-opinion-ever-more-critical-of-u-s/.

[79] David E. Sanger, Confront and Conceal: Obama's Secret Wars and Surprising Use of American Power 136-7 (2012).

Laden and Khaled Sheikh Mohammed, but also in more recent plots including Faisal Shahzad, Najibullah Zazi and David Headley.[80]

In contrast to Pakistan, in Yemen, the new government of President Abdu Rabbu Mansour Hadi has publicly acknowledged its direct involvement in the U.S. drone campaign, although there are indications the Yemeni government is misleading its people regarding the nature and responsibility of specific strikes.[81] President Hadi has likely taken this public stance to preempt al Qaeda in the Arabian Peninsula from exploiting the issue within Yemeni public opinion.[82]

Domestic and international public support has always been critical to success in traditional conflicts. Greater public engagement and transparency are necessary to keep the American people invested in the long-term struggle against violent political extremism.

In 2001, Congress passed an Authorization for the Use of Military Force (AUMF) in response to the attacks of September 11.[83] While a range of operations have been included under the umbrella of defeating core al Qaeda, the group directly responsible for 9/11, it also covered operations directed at its affiliates and sympathizers that have only loose connections but no direct link to 9/11. An indefinite extension of the existing AUMF advances the prospect that the United States will be engaged in a state of indefinite war, with significant powers permanently in the hands of the executive branch. Even President Obama, in remarks during the recently concluded campaign, expressed the need to ensure that his powers and those of his successors be appropriately checked.[84]

Before the end of 2014, the existing AUMF should be retired and new authorities put in place that defines the ongoing nature of the threat from al Qaeda and its offshoots that will continue beyond 2014, the strategy, and the authorities and resources required to defend the country, its allies and interests. It should also resolve conflicting existing authorities between the military (under Title 10) and intelligence community (under Title 50) that interfere with the ability to conduct joint operations. Much like the PATRIOT Act, it should require renewal periodically.

If we are a nation still at war, the American people need to be reengaged and understand the nature of the threat and what is still required to disrupt, dismantle and defeat it. The President should plan a major speech early in the next term that redefines the nature of the threat and how we plan to combat it.

IV. CONCLUDING THOUGHTS: POLITICAL RESILIENCE AND SUSTAINABLE EXPECTATIONS

In recent years, there has been increased emphasis within the homeland security enterprise on the concept of risk management as an important strategic tool. In the context of natural disasters, risk management can set appropriate expectations

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[80] Jayshree Bajoria & Jonathan Masters, *Pakistan's New Generation of Terrorists*, COUNCIL ON FOREIGN RELATIONS BACKGROUNDER (Sep. 26, 2012), http://www.cfr.org/pakistan/pakistans-new-generation-terrorists/p15422.

[81] Sudarsan Raghavan, *Yemen Tries to Cover Up Drone Hits*, WASH. POST, Dec. 25, 2012, at 1, http://www.washingtonpost.com/world/middle_east/when-us-drones-kill-civilians-yemens-government-tries-to-conceal-it/2012/12/24/bd4d7ac2-486d-11e2-8af9-9b50cb4605a7_story.html.

[82] Scott Shane, *Yemen's Leader Praises U.S. Drone Strikes*, N.Y. TIMES, Sep. 29, 2012, http://www.nytimes.com/2012/09/29/world/middleeast/yemens-leader-president-hadi-praises-us-drone-strikes.html.

[83] GOLDSMITH, *supra* note 73, at 5.

[84] Editorial, *Rules for Targeted Killing,* N.Y. TIMES, Nov. 30, 2012, at A26, http://www.nytimes.com/2012/11/30/opinion/rules-for-targeted-killing.html.

regarding preparedness against a range of threats. For example, the insurance industry bases its underwriting in specific localities on a range of storm frequency and severity such as the damage that an average annual hurricane would inflict rather than a one-in-a-generation storm. But the presumption is that, based on history, both the best- and worst-case scenarios will occur sooner or later.

This should be the approach the American people and their leaders take with regard to the threat of terrorism as well. DHS views resilience as an essential element of homeland security. What the United States requires going forward is political resilience as well. At some point in the future, it will be put to the test.

A dozen years after 9/11, we need a realistic assessment of the long-term threat and develop sustainable policies for the long-term. For example, what is the appropriate objective, to prevent all attacks? Can we do that without fundamentally changing the nature of the United States and incurring economic and social costs that are unacceptable? Alternatively, is terrorism a 10-year or 20-year event? If another attack is inevitable, what do we need to do to keep its economic and social costs below what we incurred in the aftermath of 9/11?

The United States is more capable and better prepared to defend the American homeland today than it was in 2001. But just as the United States and its allies have achieved common cause and significantly deepened international cooperation, extremists continue to adapt their tactics. Risk management assumes that by adapting to this constantly changing environment, strengthening security, improving defenses, and being better prepared, society can mitigate the impact of disasters that may strike at any time. But the risk cannot be totally eliminated. Every once in a while, the opposing team wins one.

"You have to live with that," cautions Senator Joseph Lieberman, the recently retired chairman of the Senate Homeland Security and Government Affairs Committee. "We've tried very hard to improve our homeland security without compromising personal liberty, and when you do that, at some point, somebody's going to break through."[85]

The United States should not live in fear, but it also cannot afford to become overly complacent. The best course is to expect the unexpected, learn from every disaster but respond effectively and respond as one.

The country cannot afford to experience a wrenching partisan political response every time there is a setback, whether at home or abroad. The most recent tragedy in Benghazi is a case in point. To be sure, mistakes and misjudgments were made. As the State Department Accountability Review Board determined, security at the temporary political compound was not adequate. Lessons learned should be vigorously pursued to improve security for diplomats in post-conflict societies in the future. Soldiers must leave their bases in order to take and hold territory on a distant battlefield. In doing so, they put themselves at considerable risk. So do diplomats, who cannot serve the national interest behind high-walled fortresses. Security can always be improved, but it can never be perfect.

The United States will remain a target for the foreseeable future and will experience periodic attacks. When that happens, there will be lessons learned that should be implemented to make us as safe as we can be. Thinking back to 9/11, the most important lesson we can apply going forward is not to overreact.

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[85] Ed O'Keefe, *Senate to Lose Its Star Contrarian: Lieberman*, WASH. POST, Dec. 6, 2012, at A5, http://www.washingtonpost.com/politics/joe-lieberman-has-few-regrets/2012/12/05/bbd27db4-3cb0-11e2-ae43-cf491b837f7b_story.html.

Are We Closer to Fulfilling *Gideon*'s Promise?: The Effects of the Supreme Court's "Right-to-Counsel Term"*

Christopher Durocher**

During the 2011-2012 Term, the United States Supreme Court handed down decisions in five cases that open the door to expanding and better protecting the availability of effective counsel in both the pre-trial and post-conviction stages of a criminal prosecution. These decisions recognized the realities of our 21st century criminal justice system and proved that the Court's last term deserved the sobriquet the "Right-to-Counsel Term."[1]

In the companion cases *Missouri v. Frye* and *Lafler v. Cooper*, the Supreme Court recognized that the Sixth Amendment right to counsel extends to the entire plea bargaining process, which is relatively unregulated. In *Frye*, the Court held that to ensure effective assistance of counsel, defense counsel has a duty to convey plea offers to clients. A defense attorney who, without consulting with her client, rejects a plea offer or allows a plea offer to lapse may violate her client's Sixth Amendment right to counsel. In *Lafler*, the Court found a defense attorney failed to provide effective assistance because he offered unreasonable legal advice that caused his client to reject a favorable plea offer and proceed to trial, at which he was convicted and sentenced to a term three and half times longer than what he would have served if he had accepted the plea.

The other three cases involved post-conviction counsel issues. In *Maples v. Thomas*, the Court recognized that a *habeas* petitioner should not be barred from federal review because he was unaware of and missed the procedural deadline after he was abandoned by his attorneys. The holding may have largely been a result of the unique facts, but it nonetheless protects hapless prisoners from the consequences of counsel abandonment. Dealing with a similar issue of procedural default in *Martinez v. Ryan*, the Court held that a petitioner's procedural default may be excused because of ineffective assistance of counsel or a lack of counsel in a first state *habeas* petition if the defendant was prohibited from raising those claims during his direct appeal. In *Martel v. Clair*, the Court held that the federal statute entitling capital *habeas* petitioners to appointed counsel allows a court to substitute counsel when it is in the interest of justice, giving federal courts discretion in deciding when substitute counsel is appropriate.

This Issue Brief examines the five "Right-to-Counsel Term" decisions the Court handed down during the 2011–2012 Term and some of the subsequent lower court

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[1] *See* Kent Scheidegger, *The Right-to-Counsel Term*, CRIME AND CONSEQUENCES (July 15, 2011, 1:44 PM), http://www.crimeandconsequences.com/crimblog/2011/07/the-right-to-counsel-term.html.

decisions applying those decisions. First, it provides an overview of the right to counsel during the plea bargaining stage and considers how the *Frye* and *Lafler* decisions may have altered the landscape. Next, it provides an overview of ineffective assistance of counsel and related claims in post-conviction proceedings and explores the implications of *Maples*, *Martinez*, and *Clair* in this context. The Issue Brief concludes by suggesting that the manner in which lower courts implement these decisions will reveal what the Right-to-Counsel Term's lasting impact will be.

I. RIGHT TO COUNSEL DURING PLEA BARGAINING

Prior to *Frye* and *Lafler*, it was well-grounded in Supreme Court precedent that an accused's Sixth Amendment right to effective assistance of counsel extended to all "critical stages" of a prosecution.[2] The Court's rationale behind the critical stage doctrine was the recognition that stages of a prosecution beyond the actual trial may be just as crucial to ensuring that the accused receives an adequate defense. It is well established for example, that an accused's Sixth Amendment right to counsel is undermined if he does not have access to counsel during custodial interrogations or other law enforcement questioning that occurs after an arrest or indictment.[3] Similarly, plea bargaining has been considered a "critical stage" since at least 1985.[4] As a result, even before *Frye* and *Lafler*, courts were considering ineffective assistance of counsel claims in the plea bargaining stage.

The difficulty that prompted the Court to grant certiorari in *Frye* and *Lafler* was the manner in which courts applied the test for ineffective assistance of counsel in the plea bargaining phase.[5] Under the Supreme Court's ruling in *Strickland v. Washington*, to establish ineffective assistance of counsel, the defendant must show (1) his counsel's performance fell below an objective standard of reasonableness ("deficient performance"); and (2) there is a reasonable probability that if his counsel performed adequately, the result of the proceeding would have been different ("prejudice").[6] Under the test, a defense attorney's deficient performance is not an automatic violation of his client's Sixth Amendment right to counsel. The client must show that the deficiency affected the outcome of the proceedings. The standard is difficult to meet given the Court's instruction that lower courts should be "highly deferential" to defense counsel and indulge a strong presumption that counsel's performance was within the wide range of reasonable professional assistance.[7]

In the Court's first consideration of ineffective assistance claims at the plea bargaining stage, *Hill v. Lockhart*, the Court held that the *Strickland* test applies to ineffective assistance of counsel claims in the plea bargaining context.[8] The defendant in *Hill* accepted a plea offer on his counsel's advice that he would be eligible for parole after serving one-third of his prison sentence, when in fact he would only be eligible for parole after serving one-half of his sentence. Applying *Strickland*, the Court held that in the plea bargain stage, as in the trial stage, the deficient performance prong requires an analysis of whether counsel's performance fell below an objective standard

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[2] Rothgery v. Gillespie County, 554 U.S. 191 (2008).

[3] *See* Massiah v. United States, 377 U.S. 201 (1964); Escobedo v. Illinois, 378 U.S. 478 (1964).

[4] Hill v. Lockhart, 474 U.S. 52 (1985).

[5] The Constitution Project's National Right to Counsel Committee has criticized this test because the burden it imposes on defendants is too difficult to meet.

[6] Strickland v. Washington, 466 U.S. 668 (1984).

[7] *Id*. at 689.

[8] 474 U.S. 52 (1985).

of reasonableness. The Court further held that under the prejudice prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. The Court ultimately rejected the defendant's ineffective assistance of counsel claim in *Hill* because the defendant failed to plead that he would have proceeded to trial but for his attorney's inadequate advice.

In 2010, the Supreme Court focused on the substance of *Strickland*'s deficient performance prong in the plea bargaining stage. In *Padilla v. Kentucky*, the defendant pled guilty to an offense on the advice of his counsel that a conviction pursuant to the guilty plea would have no immigration consequences.[9] The counsel's advice was incorrect, and the government subsequently commenced deportation proceedings against the defendant. After reaffirming that plea bargaining was a critical stage for purposes of the Sixth Amendment right to counsel, the Court held that the right to effective assistance of counsel requires competent advice about the deportation consequences of a guilty plea.[10] Through its decision in *Padilla*, the Court created an affirmative duty for defense counsel to inform their clients of the immigration consequences of a guilty plea.

Frye and *Lafler* may be viewed as a continuation of the Court's reasoning in *Hill* and *Padilla*. In *Frye*, the defendant never had the opportunity to accept the government's plea offer because his attorney failed to convey the offer to him before the offer lapsed. In *Lafler*, the defendant had the opportunity to accept a plea offer, but he chose to reject the offer based on his attorney's objectively unreasonable advice.

A. *MISSOURI V. FRYE*[11]

In *Frye*, the State of Missouri charged Galin Frye with driving with a revoked license. Frye had been convicted of the same offense (a misdemeanor) three times before, so Missouri law allowed the prosecutor to charge him with a felony carrying a maximum sentence of four years in prison. The prosecutor communicated to Frye's counsel (but not to Frye) two plea offers: (1) plead guilty to the felony and the prosecutor would recommend a 10-day jail sentence along with probation; or (2) plead guilty to the misdemeanor and the prosecutor would recommend a 90-day jail sentence. Frye's counsel never conveyed these offers to Frye and they expired. After being arrested again for the same offense before trial, Frye pled guilty to the felony charge without a plea agreement and was sentenced to three years in prison. He then obtained appellate counsel and brought an ineffective assistance of counsel claim on the basis that his trial counsel's failure to convey the plea offers to him was a violation of his Sixth Amendment right to counsel.

The Court first considered "whether the constitutional right to counsel extends to the negotiation and consideration of plea offers that lapse or are rejected[.]"[12] Distinguishing this case from *Hill* and *Padilla* was the fact that in *Frye* the defendant never accepted the plea because his attorney failed to convey the offer to him until after it had lapsed. The Court held that the right to effective assistance of counsel during plea negotiations extends to plea offers that lapse or are rejected. The Court reasoned that "[t]he reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities

[9] 130 S. Ct. 1473 (2010).

[10] *Id*.

[11] 132 S. Ct. 1399 (2012).

[12] *Id*. at 1404.

in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages."[13] The Court underscored this by adding that plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system."[14]

In analyzing *Strickland*'s deficient performance prong for lapsed plea offers, the Court held that "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."[15] Beyond this rule, the Court did not offer an explanation of what other behavior would constitute deficient attorney performance during plea negotiations. Since Frye ended up pleading guilty to a more serious charge with a longer sentence than the uncommunicated plea offer, Frye succeeded in establishing that his attorney's performance was deficient.

The second issue the Court tackled was what a defendant must show in order to establish prejudice resulting from counsel's failure to communicate a plea offer. In analyzing *Strickland*'s prejudice prong, the Court held that defendants alleging ineffective assistance of counsel from a lapsed or rejected plea offer must show (1) a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel; (2) a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it if they had the authority to exercise that discretion under state law; and (3) a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.[16] Frye was able to show that he would have accepted the earlier plea offer if his attorney had presented it to him and that the end result of the criminal process would have been more favorable because his prison time would have been less. However, the court remanded the case to determine whether Frye's arrest and charge for the same offense before trial would have likely caused the prosecution to withdraw its original plea offer.

B. *LAFLER V. COOPER*[17]

In *Lafler*, defendant Anthony Cooper pointed a gun at a female victim's head and fired, but missed. He then chased her as she fled and shot her in the buttock, hip, and abdomen, but she survived. The State of Michigan charged Cooper with four offenses, including assault with intent to murder. The prosecution offered to dismiss two of the charges and recommend a sentence of 51 to 85 months in prison if Cooper plead guilty to two of the charged offenses. Cooper initially expressed to the trial court his willingness to take the plea offer, but he ultimately rejected the offer and proceeded to trial based on his attorney's advice to reject the offer because the prosecution would be unable to show his intent to murder. The legal basis for his counsel's advice was that all three of Cooper's shots hit the victim below the waist, so the prosecution could not show that Cooper intended to kill the victim. Needless to say, this was objectively unreasonable advice. At trial, Cooper was convicted on all counts and received a mandatory minimum sentence of 185 to 360 months in prison. Cooper then brought an ineffective assistance of counsel claim arguing that his attorney's poor advice caused him to reject the plea bargain and proceed to trial.

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[13] *Id*. at 1407.

[14] *Id*. (emphasis in original).

[15] *Id*. at 1408.

[16] *Id*. at 1409-10.

[17] 132 S. Ct. 1376 (2012).

All parties conceded that the performance of Cooper's counsel was deficient under *Strickland*. The primary issue for the Court was "how to apply *Strickland*'s prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial."[18] The Court applied the same reasoning as in *Frye* to extend the right to effective counsel to advice concerning a rejected plea bargain. Rejecting the government's multifaceted argument that Cooper's fair trial remedied any errors during plea bargaining, the Court reiterated the facts that 97 percent of federal convictions and 94 percent of state convictions are the result of guilty pleas. Therefore, the court took the same reality-based approach as its companion case and found that "the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences."[19] Under the facts, the Court found that Cooper satisfied both parts of *Strickland*. All parties conceded Cooper's counsel's deficient performance; and Cooper demonstrated prejudice with his initial willingness to accept the plea offer before his counsel's unreasonable advice and the fact that under the plea offer he would have received a sentence at least three times shorter than the one he received at trial.

The Court then moved on to determining the appropriate remedy for when deficient attorney performance causes the defendant to reject the plea offer resulting in a trial and a more severe sentence. The Court offered two forms of remedy, both of which give the lower courts discretion to fashion an appropriate remedy. First, the court may simply conduct a resentencing hearing to give the defendant the sentence in the plea offer, the sentence imposed at trial, or something in between. Second, under certain circumstances, such as the defendant being convicted at trial of a charge carrying a mandatory minimum that would have been dropped as part of the plea agreement, the court may require the prosecution to reoffer the plea offer. "[T]he judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed."[20]

C. THE EFFECT OF *FRYE* AND *LAFLER*

In *Frye* and *Lafler*, the Supreme Court extended the right to effective assistance of counsel from the confines of *Hill* and *Padilla* to the entire plea bargaining process. Moreover, the Court correctly acknowledged that plea bargaining is now the defining feature of the criminal justice system and that criminal trials are becoming less often the avenues for obtaining convictions and achieving justice. Perhaps most notably, the Court explicitly rejected the argument that a fair trial cures earlier errors.

This rejection of the absolute curative properties of a criminal trial is critical in the face of a criminal justice system centered on a plea bargaining process that strongly favors the government. Very often, prosecutors have a multitude of statutes covering the same or substantially similar wrongful conduct. This allows prosecutors to charge individuals with multiple crimes, or multiple counts of the same crime, for the same conduct. This is known as "charge stacking." Charge stacking allows prosecutors to present defendants with a slew of charges that, taken together, carry overwhelming sentences with the goal of intimidating and frightening the defendant into accepting a plea bargain with a much shorter sentence, simply out of fear of a guilty verdict that

[18] *Id*. at 1384.

[19] *Id*. at 1388.

[20] *Id*. at 1389.

could carry a substantially longer sentence. The idea that a defendant would waive his or her right to a jury trial simply out of fear of receiving a longer sentence is often referred to as the "trial penalty." The leverage that charge stacking and trial penalties provide a prosecutor requires a counterbalancing force, which ideally is what effective defense counsel provides.

Extending the right to effective assistance of counsel to the plea negotiation phase is equally important because of the national crisis in indigent defense. About 80% of criminal defendants are represented by either public defenders or appointed counsel.[21] It is well-documented that indigent defense providers across the nation are overworked and have too few resources to adequately perform their duties.[22] These realities create an atmosphere ripe for inadequate legal representation, despite the best efforts of many indigent defense providers. Before *Frye* and *Lafler*, a court-appointed attorney's deficient performance might go without remedy if the defendant rejected a favorable plea offer or received unreasonable advice during plea negotiations. Now, courts have discretion in implementing a remedy to offset the defense counsel's inadequate performance.

The United States Court of Appeals for the Ninth Circuit recently remanded a case relying on the holdings in *Frye* and *Lafler*.[23] In *Miles v. Martel*, the defendant, Tyrone Miles, had two prior serious felony convictions that qualified as "strikes" under the California Three Strikes Law[24] when he was arrested for cashing fictitious checks—a third strike. Miles alleged that the prosecutor offered him a plea agreement in which he would serve six years in prison. Miles further alleged that his court-appointed attorney failed to properly look into his background and was, therefore, unaware that he had two strikes. Consequently, his attorney advised him to reject the offer. Miles later entered an open plea and was sentenced under the three strikes law to 25 years to life in prison. The Ninth Circuit held that Miles was entitled to an evidentiary hearing to determine whether his attorney provided unreasonable legal advice that resulted in him being sentenced to at least 19 more years in prison than he would have under the original plea offer.[25] This case demonstrates that if states fail to provide adequate representation to defendants, then *Frye* and *Lafler* offer courts an avenue for addressing such failures, at least on a case-by-case basis.

Regardless of the expansion of the right to effective assistance of counsel, defendants must still overcome the onerous *Strickland* test in order to successfully prove a constitutional violation during plea negotiations. While cases certainly exist of extremely deficient attorney performance to which *Frye* and *Lafler* are applicable,[26] most cases that have attempted to use the decisions have been unsuccessful. Some have

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[21] Thomas H. Cohen, *Who's Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes*, Bureau of Justice Statistics 14 (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1876474&download=yes.

[22] *See* The Constitution Project, Report of the Nat'l Right to Counsel Comm., Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel (2009), *available at* http://www.constitutionproject.org/pdf/139.pdf.

[23] Miles v. Martel, No. 10-15633, 2012 U.S. App. LEXIS 20346 (9th Cir. Sept. 28, 2012).

[24] Cal. Penal Code §§ 667(b)-(i) and 1170.12 (West 2012). The California 'three strikes law' significantly increases the sentencing range for a defendant's third offense.

[25] *Miles*, 2012 U.S. App. LEXIS 20346.

[26] *See, e.g.*, United States v. Wolfe, 2012 U.S. Dist. LEXIS 75369 (E.D. Tenn. May 31, 2012); United States v. Love, 2012 U.S. Dist. LEXIS 99332 (N.D. Ill. July 17, 2012).

encountered a problem of "counsel-said, client-said."[27] The clients argue that their counsel failed to explain to them the effect of a plea offer, or the strength of the prosecution's case, or even the existence of a plea offer and the defense counsel offers contradictory testimony. A few courts have granted an evidentiary hearing when the defendant offers some additional evidence,[28] but most courts have rejected the claims for the defendants' failure to overcome the burden of proving both prongs of the *Strickland* test.[29] Moreover, courts have made clear that to invoke *Frye* and *Lafler*, there must first be a government plea offer on the table; a mere discussion of a plea offer is insufficient to base a *Frye*/*Lafler* ineffective assistance of counsel claim.[30]

Despite the mixed results defendants have achieved by invoking *Frye* and *Lafler* in lower courts, the decisions may have a significant practical impact on the way in which plea bargaining is conducted. Plea bargaining traditionally has been informal, with the prosecutor and defense counsel meeting or talking on the phone to discuss the case. As the Court indicated in *Frye* and *Lafler*, courts and prosecutors may create rules that make these negotiations much more formal. To ensure that defense counsel conveys a plea offer to his or her clients, courts or prosecutor offices may require that all plea offers be on the record or in writing, or that the defendant be present at the time the prosecutor makes the plea offer.

There is also concern that the decisions could create a disincentive for defense counsel to reject otherwise unfavorable plea offers. Some defense attorneys may become overly cautious and recommend that their clients take the prosecution's first plea offer out of concern that a client convicted at trial will argue that their counsel was deficient in failing to advise them to take a plea offer. A corollary concern is that the decisions will deter aggressive defense positions that reject initial plea offers in order to obtain more favorable offers. With the decisions less than a year old, these concerns have not played out in lower court decisions so far.[31] In addressing these concerns, the Court was probably correct when it noted that "an erroneous strategic prediction about the outcome of a trial is not necessarily deficient performance."[32]

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[27] *See, e.g.*, Strain v. Perez, 2012 U.S. Dist. LEXIS 72850 (N.D.N.Y. May 24, 2012); Bonsu v. United States, 2012 U.S. Dist. LEXIS 47661 (D. Md. Apr. 4, 2012).

[28] *See, e.g.*, United States v. Bishop, 2012 U.S. App. LEXIS 16386, at *3-4 (5th Cir. Tex. Aug. 7, 2012); Ortega v. United States, 2012 U.S. Dist. LEXIS 88727 (S.D.N.Y. June 27, 2012); Williams v. Schneiderman, 2012 U.S. Dist. LEXIS 88521 (E.D.N.Y. June 26, 2012); Smith v. United States, 2012 U.S. Dist. LEXIS 128438 (D. Del. Sept. 7, 2012); United States v. Zamora, 2012 U.S. Dist. LEXIS 119781 (W.D. La. Aug. 20, 2012).

[29] *See, e.g.*, United States v. Moya, 676 F.3d 1211, 1214 (10th Cir. 2012); Bowens v. United States, 2012 U.S. Dist. LEXIS 112487 (S.D.N.Y. Aug. 10, 2012); United States v. Marks, 2012 U.S. Dist. LEXIS 130825 (W.D.N.Y. Sept. 12, 2012); Mitchum v. United States, 2012 U.S. Dist. LEXIS 139792 (D.S.C. Sept. 28, 2012); Salas v. United States, 2012 U.S. Dist. LEXIS 130725, 23-25 (E.D. Tenn. Sept. 13, 2012).

[30] *See, e.g.*, Ramos v. United States, 2012 U.S. Dist. LEXIS 44611 (D. Mass. Mar. 30, 2012); Williams v. United States, 2012 U.S. Dist. LEXIS 47065 (E.D.N.Y. Mar. 30, 2012); United States v. Thornton, 2012 U.S. Dist. LEXIS 42532 (W.D. Pa. Mar. 28, 2012); United States v. Habeeb Malik, 2012 U.S. Dist. LEXIS 66507 (E.D. Pa. May 11, 2012); Gilchrist v. United States, 2012 U.S. Dist. LEXIS 140278 (D. Md. Sept. 27, 2012).

[31] *See, e.g.*, Colotti v. United States, 2012 U.S. Dist. LEXIS 48084, 40-42 (S.D.N.Y. Apr. 4, 2012) (noting that defense counsel giving advice on whether sentencing exposure is greater under plea offer or trial is an "extremely challenging task" and should be given deference by judge); Mitchum v. United States, 2012 U.S. Dist. LEXIS 139792 (D.S.C. Sept. 28, 2012) (rejecting argument that defendant received ineffective assistance of counsel because attorney advised him to go to trial rather than negotiate plea agreement); Toto-Ngosso v. United States, 2012 U.S. Dist. LEXIS 109040 (D. Md. 2012) (finding no deficient performance for failing to dissuade the defendant of his belief that he could convince a jury that he was innocent and accordingly rejecting a plea offer).

[32] Lafler v. Cooper, 132 S. Ct. 1376, 1391 (2012).

Like previous questions of deficient performance under the *Strickland* test, courts applying *Frye* and *Lafler* have given strong deference to the reasonableness of counsel's conduct, even if their conduct turns out to be incorrect in hindsight. While *Frye* and *Lafler* are important decisions, the limitations of *Strickland* will prevent courts from remedying all but the most egregious failures of counsel.

II. INEFFECTIVE ASSISTANCE OF COUNSEL & RELATED CLAIMS IN POST-CONVICTION PROCEEDINGS

The three cases related to effective assistance of counsel in the post-conviction stage, *Maples*, *Martinez*, and *Clair*, asked the Court to consider whether the right to effective assistance of counsel ever extends to collateral proceedings. The Court has previously ruled that there is no constitutional right to counsel in post-conviction review, as the Supreme Court established in *Pennsylvania v. Finley*.[33] Consequently, there is no right to *effective* assistance of counsel at this stage.[34] Thus, a petitioner may not raise claims for ineffective assistance of counsel that occurred during the post-conviction stage as part of a post-conviction or *habeas* petition, regardless of whether counsel is retained by the petitioner or provided by a state or the federal government.

Though there is no constitutional right to post-conviction counsel, there are state and federal laws that provide for appointment of counsel in certain circumstances. States vary greatly in this regard. Most states provide counsel, at least nominally, for indigent capital defendants in post-conviction proceedings.[35] Under federal law, courts are given discretion to appoint counsel for indigent non-capital defendants when the interests of justice so require.[36] In 1988, Congress enacted a law that gives capital federal defendants and capital *habeas* petitioners counsel as a matter of right.[37] In addition, a provision of this law enables capital defendants to move to substitute counsel, which forms the central issue in *Clair*.

In order to meaningfully explain the Court's decisions, a brief overview of post-conviction proceedings is necessary. A defendant convicted of a state crime generally has three possible opportunities to have his conviction reviewed: a direct appeal in state court from the trial court to the state court of appeals, a post-conviction (or collateral) review in state court with the original trial court, and a petition for federal *habeas corpus*.[38] Every state provides for at least one statutory direct appeal as of right. After a defendant has exhausted his direct appeals, he may seek state post-conviction review. States typically impose procedural barriers before any claims may be considered on collateral review.[39] A claim of ineffective assistance of counsel is most often raised during post-conviction review because, assuming the same counsel is representing the defendant at trial and through direct appeal, the defendant's attorney is unlikely to argue that he was ineffective in representing his client. In fact, some states only allow defendants to raise claims of ineffective assistance of trial counsel in state collateral proceedings.

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[33] Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); *see also* Murray v. Giaratano, 492 U.S. 1, 3-4 (1989).

[34] *Compare* Evitts v. Lucey, 469 U.S. 387, 395-96 (1985) (right to counsel includes right to effective assistance of counsel) *with* Wainwright v. Torna, 455 U.S. 586, 587-88 (1982) (no right to counsel means no right to effective assistance of counsel).

[35] One notable exception is Alabama, which is pointed out in *Maples*.

[36] 18 U.S.C. § 3006A.

[37] 18 U.S.C. § 3599.

[38] The structure of the review process for federal offenses differs, but none of the cases were federal convictions.

[39] For example, in most states, the claim raised on collateral review must be new, must have been filed within a specified time period, and must have not been adjudicated in direct appeal.

If a defendant has made all possible direct appeals and collateral attacks in state court with no success,[40] he may still petition for federal review of his conviction by means of a writ of *habeas corpus*. In a petition for *habeas corpus*, the petitioner is limited to raising claims that federal law or his federal constitutional rights were violated. Under the current federal *habeas* regime, petitioners generally must (1) be in custody at the time the petition is filed, (2) timely file the petition, (3) have exhausted state remedies, and (4) not have their claim precluded by procedural default. Two of these requirements are relevant in *Maples* and *Martinez*: procedural default and the timely filing of the petition.

Procedural default occurs when the petitioner fails to follow state procedural rules for her claim. A federal court may not entertain a prisoner's *habeas* claims when (1) a state court has declined to address those claims because the prisoner failed to meet a state procedural requirement, and (2) the state judgment rests on independent and adequate state procedural grounds.[41] However, due to the rigidity of this requirement, the Supreme Court adopted a "cause and prejudice" standard in *Wainwright v. Sykes* to determine whether there is cause to excuse state procedural default.[42] The grounds for proper cause are in the Supreme Court's discretion, but the Court has generally remarked that the cause must be something external to the petitioner or something that cannot fairly be attributed to her that impeded her efforts to comply with the state procedural rule.[43] Further elaborating on the cause and prejudice test, the Supreme Court stated in *Coleman v. Thompson* that an attorney's errors or negligence ordinarily will not provide cause for procedural default because agency principles impute the attorney's negligence to the client.

The other relevant requirement for federal *habeas* review is the Antiterrorism and Effective Death Penalty Act's (AEDPA) one-year time limit for filing the petition.[44] Although there are various markers that begin the one-year deadline and several ways to extend the deadline, in the recent case of *Holland v. Florida*, the Court held that the one-year deadline for filing a federal *habeas* petition can be tolled for equitable reasons.[45] The Court had previously held that "a petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing."[46] Testing *Holland*, the Court found that, while mere garden variety claims of attorney negligence do not constitute an extraordinary circumstance, attorney misconduct that rises to the level of effective abandonment may be an extraordinary circumstance sufficient to justify equitable tolling.[47]

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[40] Some states provide a state writ of *habeas corpus* as well.

[41] Walker v. Martin, 131 S.Ct. 1120 (2011).

[42] Wainwright v. Sykes, 433 U.S. 72 (1977). Under the cause and prejudice standard, the petitioner must show that there was a cause for her failure to follow state procedural rules and that procedural default has prejudiced her case. The standard for prejudice is similar to the standard in the *Strickland* test for ineffective assistance of counsel, discussed *supra*. There must be a reasonable probability that the outcome would have been different.

[43] Coleman v. Thompson, 501 U.S. 722, 753-54 (1991).

[44] Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244(d).

[45] 130 S. Ct. 2549 (2010).

[46] *Id*. at 2562 (citation omitted).

[47] *See id*. (citing a case where an attorney's effective abandonment was grounds for tolling). On remand, the lower court found that the petitioner's attorney effectively abandoned him, which amounted to an extraordinary circumstance distinguishable from the situation of attorney negligence mentioned in *Coleman*. Holland v. Florida, 2010 U.S. Dist. LEXIS 144790 (S.D. Fla. Nov. 22, 2010).

A. *MAPLES V. THOMAS*[48]

After having his state capital conviction affirmed on direct appeal, Cory Maples sought state post-conviction review with the help of two attorneys at the New York office of Sullivan & Cromwell who served as his pro bono counsel.[49] Both attorneys were admitted *pro hac vice* to practice in Alabama courts under the engagement of a local Alabama attorney. With his new counsels' aid, Maples pursued a collateral attack on his conviction in state court, arguing that his underpaid and inexperienced trial counsel failed to afford him effective assistance of counsel. While his petition was pending, the two attorneys from Sullivan & Cromwell left the firm. They failed to inform Maples or the court of their inability to continue representing Maples. Subsequently, the court denied Maples' petition, which triggered procedural time limits for an appeal. The court's attempt to notify Maples' through his counsel failed, with the mailroom clerk at Sullivan & Cromwell returning the notification to the Alabama court. The court clerk took no further action to inform Maples, and the deadline for Maples to file an appeal of the court's order lapsed. Consequently, when Maples petitioned for federal *habeas* review, the federal court denied his petition on the grounds that he procedurally defaulted on his ineffective assistance of counsel claim.

The issue before the Supreme Court was whether Maples could show cause under the *Sykes* 'cause and prejudice' standard to excuse the state procedural default in his *habeas* petition. The Court first distinguished what happened to Maples from its holding in *Coleman*.[50] The reason for Maples missing the state procedural deadline was not simply his attorney's negligence. His attorneys abandoned him, severing the agency relationship that would cause the court to hold Maples responsible for the mistakes of his attorney-agents. Once an attorney abandons his client, the attorney's errors, including errors that result in the procedural default, are no longer attributable to the client and may represent cause under the *Sykes* test. The Court pointed out that it made a similar distinction in *Holland*. In *Holland*, the Court distinguished between garden variety negligence claims and unprofessional conduct that amounts to an attorney essentially abandoning his client. The Court in *Maples* made the same distinction but applied it in the context of the cause and prejudice standard rather than equitable tolling.

The Court reasoned that Maples should not be procedurally barred from raising his claim because his attorneys abandoned him without any notice. It was their abandonment that prevented Maples, despite his best efforts, from complying with the state procedural rules. Neither the fact that other lawyers from Sullivan & Cromwell later represented Maples nor the fact that Maples had local counsel in Alabama dissuaded the court from finding that Maples' attorneys abandoned him and that abandonment caused him to miss the state deadline. Therefore, Maples had excuse for procedural default. The Court remanded for the lower court's determination of prejudice under the *Sykes* test.

B. *MARTINEZ V. RYAN*[51]

Luis Martinez was convicted of two counts of sexual misconduct with a minor. Despite the victim recanting her accusation and numerous other problems with the

[48] 132 S. Ct. 912 (2012).

[49] Alabama does not provide counsel in state post-conviction proceedings for indigent capital defendants. It relies entirely on pro bono assistance like that provided by the attorneys from Sullivan & Cromwell.

[50] Coleman v. Thompson, 501 U.S. 722, 753-54 (1991).

[51] 132 S. Ct. 1309 (2012).

state's case against Martinez, his trial counsel failed to address or explain these problems to the jury. Such failures gave rise to a colorable ineffective assistance of counsel claim. Arizona requires claims of ineffective assistance of counsel at trial to be reserved for state collateral proceedings. After the court appointed Martinez new counsel for his direct appeals, his counsel alleged numerous grounds for his direct appeals. His counsel also filed a notice of post-conviction relief—the first and only time Martinez could raise an ineffective assistance of counsel claim—but she failed to raise any claims, including an ineffective counsel claim. Instead, she noted that she could find no colorable claims for post-conviction relief. The court gave Martinez an opportunity to raise claims for post-conviction relief *pro se*, but Martinez did not understand the opportunity, and the court eventually dismissed the petition for post-conviction relief. About a year and a half later, Martinez obtained new counsel and sought to file a second notice of post-conviction relief, alleging that his trial counsel was ineffective. However, the state court dismissed his petition for failing to raise the ineffective assistance of counsel claim in the previous state collateral proceeding, which constituted procedural default under Arizona law. Consequently, when Martinez sought federal *habeas* review alleging his ineffective assistance of counsel claim,[52] the court found that there was an adequate and independent state procedural ground to bar federal review and Martinez failed to show cause to excuse the procedural default. In particular, based on the reasoning of *Coleman*, the federal court found Martinez could show no cause because he was responsible under agency law for his attorney's actions, even if erroneous.

There were two questions presented to the Supreme Court in *Martinez*: (1) whether a prisoner has a right to effective counsel in collateral proceedings that provide the first occasion to raise a claim of ineffective assistance at trial ("initial-review collateral proceedings") and (2) whether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for excusing procedural default in a federal *habeas* proceeding.

The Court held that when state law prohibits a defendant from raising an ineffective assistance of trial counsel claim until the initial-review collateral proceeding, the defendant's lack of counsel or ineffective assistance of counsel in regard to that proceeding may give cause to excuse a procedural default. The Court intentionally sidestepped the underlying constitutional issue of a right to counsel post-conviction.[53] The holding would appear to be at odds with *Coleman*, but the Court explained that it was merely creating an "exception" or "qualification" to the rule in *Coleman*.[54] The Court stated that the initial-review collateral proceeding for Martinez's ineffective assistance of counsel claim was the equivalent of an appeal on direct review. Since the

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[52] Martinez's claim was essentially that his post-conviction counsel was ineffective in failing to allege that his trial counsel was ineffective at trial and that his post-conviction counsel's error was what caused him to procedurally default.

[53] As discussed *supra*, under *Coleman*, an attorney's errors may only constitute cause under the *Sykes* test when those errors amount to ineffective assistance of counsel. If Martinez had no constitutional right to counsel at his initial-review collateral proceedings, then he had no right to effective assistance of counsel at that stage of the proceedings and hence his attorneys' performance could not give rise to an ineffective assistance of counsel claim. Under this line of reasoning, Martinez's counsel's alleged error in failing to raise the claim would not constitute ineffective assistance. However, if Arizona allowed ineffective assistance of counsel claims on direct appeal as of right, Martinez's counsel's performance could have constituted ineffective assistance. This contrast leaves open the question whether a prisoner has a right to effective counsel in initial-review collateral proceedings, but the Court declined to answer this question.

[54] The rule from *Coleman*, discussed *supra*, is that an attorney's error in a post-conviction proceeding will not qualify as cause to excuse a procedural default.

Court already recognized in *Coleman* that an attorney's errors that amount to ineffective assistance may provide cause to excuse default, the same should be true for an initial-review collateral proceeding. This is despite the fact that the defendant is not constitutionally entitled to counsel at that proceeding. After noting the importance of the right to counsel, the Court stated that its exception to *Coleman* "acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim."[55]

In laying out what is required under the Court's departure from *Coleman*, the Court stated that petitioners must show that: (1) the state court did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial or that appointed counsel in the initial-review collateral proceeding was ineffective under *Strickland*; and (2) the "underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit."[56]

The Court found that Martinez's attorney in effect conceded that Martinez lacked any meritorious claims by filing a notice of post-conviction relief but failing to ever pursue any post-conviction claims, including his claim of ineffective assistance at trial. The Court remanded the case for the lower court to determine whether Martinez's counsel was ineffective and whether his claim of ineffective assistance of trial counsel is substantial.

C. *MARTEL V. CLAIR*[57]

Nearly two decades after his conviction for capital murder in California, and a decade after commencing federal *habeas* proceedings, Kenneth Clair moved to substitute his counsel who worked for the Federal Public Defender (FPD).[58] Clair claimed that his counsel was seeking only to overturn his death sentence, not to prove his innocence. After his motion, Clair relayed through his counsel that he changed his mind and the court took no action on his motion. Six weeks later, Clair filed another motion to substitute counsel, adding a claim to his earlier motion that his attorneys refused to test physical evidence from the crime scene that had never been fully tested. The court denied the motion without further inquiry and also denied Clair's *habeas* petition. With the FPD's agreement, Clair was appointed new counsel to appeal the denials of his *habeas* petition and motion for substitute counsel. After the district court rejected his request to vacate the denials, the Ninth Circuit vacated the district court's decision, holding that it was in the "interest of justice" that Clair be allowed to substitute counsel.

In granting Clair's motion, the Ninth Circuit noted that 18 U.S.C. § 3599 allows a defendant in a capital case to request new counsel, but fails to provide a standard for courts to apply in reviewing such a request.[59] In formulating a standard, the Ninth Circuit looked to 18 U.S.C. § 3006A, which entitled non-capital defendants to new counsel in federal post-conviction proceedings when "the interests of justice required that the request be granted."[60] The Supreme Court held that the "interests of justice"

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[55] *Martinez*, 132 S. Ct. at 1318.

[56] *Id*.

[57] 132 S. Ct. 1276 (2012).

[58] Under 18 U.S.C. § 3599(e), appointed counsel may be replaced upon motion of the defendant.

[59] Clair v. Ayers, 403 F. App'x 276, 278 (9th Cir. 2010).

[60] *Id*.

standard should apply to motions by capital *habeas* petitioners to substitute counsel. The Court explained that utilizing the interests of justice standard "comports with the myriad ways that § 3599 seeks to promote effective representation for persons threatened with capital punishment."[61]

Although the Supreme Court agreed with the Ninth Circuit's use of the "interests of justice" standard, it reversed the Ninth Circuit's finding that the lower court abused its discretion when it denied Clair's second motion for substitute counsel without inquiring into Clair's claims. The Court noted that Clair filed his second motion for substitute counsel right before the lower court was about to decide his 10-year-old *habeas* petition. In addition, the court had inquired into Clair's first motion for substitute counsel, but Clair later changed his mind about whether he wanted new counsel. Under these facts, the Court found that the lower court did not abuse its discretion in denying Clair's motion.

D. THE EFFECTS OF *MAPLES*, *MARTINEZ*, AND *CLAIR*

Though the Supreme Court refused to extend a constitutional right to effective assistance of counsel to the post-conviction stage, *Maples*, *Martinez*, *and Clair* each represent an incremental step towards establishing some protections in critical post-conviction proceedings. The Court's even limited recognition of the need for some accountability for counsel in a post-conviction setting is critical given both the crisis in indigent defense services across the nation and the near impossibility of navigating the complex, high stakes state post-conviction proceedings. The impact of errors in such proceedings on the ability to obtain federal *habeas corpus* review can be devastating.

In all three cases, counsel at trial was provided by the state, as is the case in an estimated 80% of criminal prosecutions. Despite this reliance on public defenders and appointed counsel, indigent defense services throughout the nation have always faced chronic underfunding. The economic and budget crises facing states over the past four years has only exacerbated this underfunding. In April, the chief public defender in one Pennsylvania county was forced to sue the county because deep budget cuts and hiring freezes were creating overwhelming caseloads for public defenders that were resulting in systemic constitutionally inadequate representation.[62] Earlier this year, in New Orleans, the chief public defender was forced to lay off a third of that office's staff and institute a two day per month furlough to address budget shortfalls.[63] In Washington, that state's supreme court felt compelled to adopt caseload limits in response to some public defenders handling over a thousand, and in some instances, over 2,100 cases annually.[64] The court felt the case limits were necessary to ensure defendants receive constitutionally adequate representation, even though cities are unsure how they will pay for these additional attorneys.[65] These are just a few of the examples of strain that indigent defense systems are feeling throughout the country.

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[61] *Clair*, 132 S. Ct. at 1285.

[62] Press Release, ACLU-PA, ACLU-PA Sues Luzerne County Alleging Gross Underfunding of Public Defender Deprives Defendants of Constitutional Rights (Apr. 10, 2012), *available at* http://www.aclupa.org/pressroom/aclupasuesluzernecountyall.htm.

[63] John Simerman, *Public Defender Layoffs Could Gum Up the Works at New Orleans Criminal Court*, TIMES-PICAYUNE, Feb. 2, 2012, http://www.nola.com/crime/index.ssf/2012/02/public_defender_layoffs_could.html.

[64] Gene Johnson, *Wash. Cities Grapple with New Public Defense Rules*, ASSOCIATED PRESS, June 25, 2012, http://seattletimes.com/html/localnews/2018528020_apwapublicdefense.html.

[65] *Id.*

When indigent defense providers do not have the time and resources to properly defend an indigent defendant, ineffective assistance of counsel claims in the post-conviction phase should serve as the bulwark against right to counsel violations. As a result, holding post-conviction counsel to a meaningful minimum standard of representation is only just. The lingering question after *Maples* will be where to draw the line between negligent representation and effective abandonment. It is clear that courts will continue to impute typical counsel errors and negligence to the prisoner under agency principles. The Court gave a thorough analysis of why Maples' attorneys' actions constituted effective abandonment, severing the agency relationship, and the importance of Maples' unawareness that the agency relationship had been severed. Prior precedent made clear that the egregiousness of the attorney's conduct should not affect the agency relationship.[66] The majority's analysis of effective abandonment in *Maples,* coupled with Justice Alito's concurrence in *Holland*, which the majority cited in *Maples*, will likely serve as the blueprint on how to distinguish attorney negligence from effective abandonment going forward.[67] Thus, to successfully argue that a procedural default attributable to counsel should be excused on equitable grounds, a petitioner will need to demonstrate that his counsel "is not operating as his agent in any meaningful sense of that word."[68]

In *Hinkley v. Lehigh*, a case decided shortly after *Maples*, a federal district court found that the petitioner established abandonment by his attorney after his attorney failed to file an appellate brief in his state post-conviction proceeding. The court also noted, however, that the abandonment did not result in the dismissal of the petitioner's appeal, and that the petitioner, in fact, pursued the appeal *pro se* before withdrawing it.[69] The court concluded that, "In these circumstances, counsel's abandonment… cannot be regarded as having occasioned the default and is therefore insufficient to establish cause for the default."[70] The fact that, unlike Maples, the petitioner in this case was well aware of his counsel's abandonment and attempted, at least first, to proceed with his appeal *pro se,* prevented the court from excusing the procedural bar.

Similarly, in *Ford v. Warren*, a federal district court found that counsel's failure to file a state post-conviction review petition, and his affirmative misrepresentation to petitioner that he had filed the petition, constituted abandonment under *Maples*.[71] Though the counsel still held himself out as representing the petitioner, his conduct was so egregious as to constitute abandonment. The court, unfortunately, still determined that the petitioner's *habeas* claim was procedurally barred. The court reasoned that the petitioner was entitled to equitable tolling during the period he was unaware of his counsel's misrepresentation.[72] Once he became aware that his counsel had failed to file his petition for post-conviction review, the equitable tolling ceased and the petitioner had one year to file his petition, the court reasoned.[73] The court determined

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[66] *See* Coleman v. Thompson, 501 U.S. 722, 754 (1991) ("[I]t is not the gravity of the attorney's error that matters, but that it constitutes a violation of petitioner's right to counsel, so that the error must be seen as an external factor.")

[67] *See, e.g.*, Moormann v. Schriro, 2012 U.S. Dist. LEXIS 24426, 10-11 (D. Ariz. Feb. 27, 2012) (distinguishing between attorney negligence and effective abandonment).

[68] Holland v. Florida, 130 S. Ct. 2549, 2568 (2010).

[69] Hinkley v. Lehigh, 2012 U.S. Dist. LEXIS 148299, at *24 (E.D. Pa., Oct. 15, 2012).

[70] *Id*.

[71] Ford v. Warren, 2012 U.S. Dist. Lexis 140295, at *22-23 (D.N.J., Sept. 25, 2012).

[72] *Id*. at *23.

[73] *Id*.

that the petition was filed three months beyond this constructive deadline, reflecting a lack of "diligence in pursuing his rights" and, therefore, denied relief.[74]

In *Martinez*, the Court declined to answer the constitutional issue left open in *Coleman*: whether a prisoner has a constitutional right to effective counsel in initial-review collateral proceedings. Martinez simply put an asterisk on the *Coleman* rule—it excluded initial-review collateral proceedings from the term 'post-conviction proceedings' in the *Coleman* rule that an attorney's negligence in post-conviction proceedings may not establish cause. The Court predicted that its decision should not put a significant strain on resources because it was not creating a constitutional right to counsel in initial-review collateral proceedings. States are free to choose whether to appoint counsel in these proceedings. However, if states do not appoint counsel or if counsel is ineffective under *Strickland*, then federal courts may review the case. As a consequence, affected states may either repeal their laws similar to the one in Arizona or else appoint counsel to all defendants in initial-review collateral proceedings for ineffective assistance of counsel claims.

The Court recently agreed to hear a Texas death penalty case that raises the issues of whether the *Martinez* decisions extends to other state post-conviction regimes beyond Arizona.[75] Carlos Trevino asserts that his state post-conviction counsel's failure to raise a claim of ineffective assistance of counsel during sentencing should not bar him from raising the claim in his federal *habeas* petition. The Fifth Circuit dismissed this claim without considering the impact of the *Martinez* decision.[76] The Court's decision in this case may determine whether *Martinez* has any effect beyond the specific regime in Arizona.

The *Martinez* opinion also emphasized that it does not "concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts."[77] Justice Scalia disagreed in his dissent, stating that the majority's reasoning will likely extend to claims other than ineffective assistance of counsel that states require defendants initially raise in collateral proceedings.[78] The majority appears to be correct so far in that circuit courts have limited *Martinez* to the narrow exception when states have a rule against raising ineffective assistance of counsel claims on direct appeal.[79]

One criticism of the *Martinez* decision is that it is unclear what constitutes a substantial claim under the Court's decision. Besides showing that the prisoner received no counsel or ineffective counsel at the initial-review collateral proceeding, the Court stated that the prisoner must show that the underlying ineffective assistance of counsel claim is substantial. The *Strickland* test is difficult enough to overcome, so it is unclear what effect courts will give the Supreme Court's instruction that the ineffective assistance of counsel claim must be substantial. Adding another rigorous burden

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[74] *Id*. at *24.

[75] Trevino v. Thaler, 2012 U.S. LEXIS 8391 (U.S. 2012).

[76] Trevino v. Thaler, 2011 U.S. App. LEXIS 22873, at *36-37 (5th Cir. 2011).

[77] Martinez v. Ryan, 132 S. Ct. 1309, 1320 (2012).

[78] *Id*. at 1321 (Scalia, J., dissenting) ("[N]o one really believes that the newly announced 'equitable' rule will remain limited to ineffective-assistance-of-trial-counsel cases.").

[79] *See, e.g.*, Ibarra v. Thaler, 687 F.3d 222 (5th Cir. 2012) (rejecting arguments to expand *Martinez*); Dansby v. Norris, 682 F.3d 711, 729 (8th Cir. 2012) ("*Martinez* does not apply here, because Arkansas does not bar a defendant from raising claims of ineffective assistance of trial counsel on direct appeal.").

to the *Strickland* test would diminish the chances of defendants successfully obtaining federal *habeas* review under the *Martinez* holding.

The Court's decision in *Clair* adopted the "interests of justice" standard for courts to use in determining whether a capital *habeas* petitioner is entitled to substitute counsel. Since the same standard was already in place for courts to use in determining whether to appoint counsel for non-capital *habeas* petitioners, courts should be fully capable of applying this existing standard to capital cases. Perhaps the more significant aspect of the decision was the Court's rejection of the more stringent standard that the state proposed. Courts liberally apply the interests of justice standard to appoint counsel in federal cases and *habeas* proceedings. By applying the same standard to motions to substitute counsel in capital cases, courts will better ensure that the representation is effective. For example, in situations where counsel refuses to pursue a certain claim or investigate aspects of the petitioners' cases, courts may substitute counsel to ensure that petitioners put forward all colorable claims.

Although the Court in *Clair* adopted a desirable standard for motions to substitute counsel, the appellate standard of review (abuse of discretion) for the application of the standard leaves lower courts with relatively unfettered discretion in deciding what is in the interests of justice. In *Clair*, the Supreme Court considered if the lower court abused its discretion in its application of the interests of justice test. The Supreme Court found no abuse of discretion despite the fact that the lower court rejected Clair's motion for substitute counsel without even reading Clair's letter. Although Clair's case had a 10-year history of *habeas* litigation and an extensive record, Clair still presented colorable claims in his motion for substitute counsel that the Court did not even consider. It is difficult to reconcile the lower court's complete lack of an inquiry into Clair's claims with an application of the interests of justice test. Therefore, the Court's decision reflects the reality that lower courts will have great discretion in deciding whether to substitute counsel.

III. CONCLUSION

The Supreme Court's decisions in the Right-to-Counsel Term cases acknowledge the extent to which our criminal justice system now operates well beyond the trial setting. To varying extents, the Court's decisions sought to adjust the parameters of the right to counsel in pre- and post-trial settings. In *Frye* and *Lafler*, the Court sent a strong message that the accused are entitled to objectively reasonable counsel during the plea negotiation process. In *Maples*, the Court held that a *habeas* petitioner will not be prevented from raising a colorable ineffective assistance of counsel claim for missing a filing deadline due to his counsel abandoning him without notice. In *Martinez*, the Court stopped short of extending a constitutional right to counsel for indigent defendants in initial-review collateral proceedings for ineffective assistance of counsel claims, but it provided protection against errors during those proceedings due to no counsel or ineffective counsel. Finally, in *Clair*, the Court adopted a standard that will allow federal courts to substitute counsel for a capital *habeas* petitioner as long as it is in the interests of justice. The extent to which lower courts aggressively apply these decisions, and the extent to which the Court supports these aggressive applications, will determine the true consequences of the Right-to-Counsel Term.

The Voting Rights Act Is In Jeopardy, But It Shouldn't Be: A Close Look at *Shelby County v. Holder*[*]

David H. Gans[**] and Elizabeth B. Wydra[***]

For the last 47 years, year in and year out, the Voting Rights Act (VRA) has stood as our nation's most effective civil rights law to realize the guarantees of the Fifteenth Amendment and prevent and deter state-sponsored racial discrimination in voting. Much of the Act's success is due to the preclearance requirement contained in Section 5 of the Voting Rights Act, which requires state and local jurisdictions with a history of racial discrimination in voting to get "preclearance" from the U.S. Department of Justice (DOJ) or a three-judge federal court in Washington, D.C., before changing their voting laws and regulations. Preclearance requires that covered jurisdictions demonstrate that proposed changes do not have a discriminatory purpose and will not have a discriminatory effect on racial minorities. Proving to be a critical tool to secure our Constitution's promise of a multi-racial democracy, the preclearance requirement was subsequently renewed in 1970, 1975, 1982, and 2006, and signed into law respectively by Presidents Richard Nixon, Gerald Ford, Ronald Reagan, and George W. Bush. Indeed, in the run up to the 2012 presidential election, we saw how vital preclearance remains as a tool for preventing racial discrimination in voting. Judges across the ideological spectrum applied the Act's preclearance requirement to prevent states, including Florida, Texas and South Carolina, from disenfranchising African-American and Latino voters and diluting their voting strength. Despite its success (or, perhaps because of it), every time the Act has been reauthorized, it has faced a constitutional challenge. This time has been no different.

This Term, in *Shelby County v. Holder*,[1] the Supreme Court will take up the constitutionality of the preclearance requirement for the sixth time since the Voting Rights Act was enacted in 1965. The Supreme Court has upheld the Act's preclearance provision four different times—in 1966, 1973, 1980, and 1999—recognizing that the Act falls squarely within congressional power to enforce the constitutional ban on racial discrimination in voting.[2] Shelby County, however, contends that the Act is now badly outdated and that the Act's renewal in 2006 exceeded the scope of Congress' power under the Constitution. In 2009, in *Northwest Austin Municipal Dist. No. 1 v. Holder*,[3] a precursor to *Shelby County*, the Supreme Court sidestepped

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[1] Shelby County v. Holder, 679 F.3d 848 (D.C. Cir. 2012), *cert granted*, No. 12-96.

[2] South Carolina v. Katzenbach, 383 U.S. 301 (1966); Georgia v. United States, 411 U.S. 526 (1973); City of Rome v. United States, 446 U.S. 156 (1980); Lopez v. Monterrey County, 525 U.S. 266 (1999).

[3] 557 U.S. 193 (2009).

a similar constitutional challenge. In an opinion by Chief Justice Roberts, the Court wrote that the Act's burdens must be justified by "current needs," but did not reach the question of the constitutionality of the Act's preclearance requirement.[4] Incorporating responses to the *Northwest Austin* opinion, the lower courts rejected Shelby County's challenge in a pair of thoughtful and thorough opinions. These opinions, written by judges across the ideological spectrum, have set the stage for a showdown in the Supreme Court. Unlike in *Northwest Austin*, there is no way to sidestep the constitutional question in *Shelby County*—Shelby County cannot "bail out" from the preclearance requirement because of recent voting rights violations.[5] The Justices will have to grapple with Shelby County's argument that this critical part of the Act is outdated and unnecessary, and hence beyond the power of Congress to protect the right to vote free from racial discrimination.

The Court should reject Shelby County's argument. In this Issue Brief, we show that the constitutionality of the preclearance requirement of the Voting Rights Act should not be in serious doubt. Part I demonstrates that the Voting Rights Act falls squarely within the constitutional powers granted to Congress in the Fifteenth Amendment, which specifically empowers Congress to enact "appropriate legislation" to "enforce" the text's prohibition on racial discrimination in voting. The text and history of the Reconstruction Amendments establish that "appropriate" enforcement legislation includes broad prophylactic regulation to protect the right to vote free from racial discrimination and ensure that the right to vote is meaningfully enjoyed by all citizens regardless of race. Part II examines the massive legislative record that Congress assembled in concluding that the preclearance requirement continues to be a necessary tool to enforce the Constitution's promise of a multi-racial democracy. Shelby County argues that preclearance is now an unnecessary, gratuitous burden, but Congress—which is charged with the responsibility of enforcing the Fourteenth and Fifteenth Amendments—concluded otherwise. Moreover, the simple reality is that the preclearance requirement is not a particularly significant burden for covered jurisdictions that do not seek to enact laws that deny or abridge the right of racial minorities to vote. Finally, Part III examines the vital role preclearance played in the run up to the 2012 election, demonstrating that, in state after state in the South, preclearance prevented state governments from enacting new discriminatory changes that would have denied African-American and Latino citizens an equal right to cast a ballot and diluted their voting strength. This recent history is proof positive that the Act is still very much needed to ensure compliance with the Fifteenth Amendment's promise of voting equality.

By any measure of constitutional fidelity, *Shelby County* should be an easy case for three reasons. First, the Constitution's text expressly gives to Congress the power to enact legislation to enforce the Constitution's prohibition against racial discrimination in voting, arming Congress with substantial power to ensure that our most precious fundamental right is enjoyed by all Americans regardless of race. Second, the Supreme Court already has affirmed the constitutionality of this very Act four times previously. Third, and finally, the record developed by Congress in 2006—as well as the actions of states in the course of the 2012 elections—manifestly shows that racial

[4] *Id*. at 203.

[5] The Voting Rights Act provides that a jurisdiction covered by the preclearance requirement may escape from preclearance obligations—"bail out"—by demonstrating a clean voting rights record for the last ten years. As Shelby County concedes, it cannot meet that standard. For further discussion of bailout, see text accompanying notes 81-84.

discrimination in voting is still a blot on our Constitution's promise of a multiracial democracy. The question, then, is whether Chief Justice Roberts and the Court's conservatives will recognize or stifle Congress' power to enforce the Constitution's guarantee of equality in the ballot booth, turning the Fifteenth Amendment on its head. Unfortunately, the conservatives on the Court have been willing to sacrifice fidelity to the Constitution in cases that have the potential to substantially advance the right's political agenda—cases such as *Bush v. Gore* and *Citizens United v. FEC*.[6] It would be tragic to see one of the most iconic civil rights statutes fall in a decision likely to be added to this ignominious group.

I. THE CONSTITUTION GIVES CONGRESS BROAD POWER TO PREVENT AND DETER RACIAL DISCRIMINATION IN VOTING

The U.S. Constitution's creation in 1787 was a hinge of modern democratic history, setting our country—and the world—on a path toward more inclusive and participatory government.[7] The Founding generation took important steps to increase the number of voters eligible to ratify the Constitution: many states waived voting restrictions (such as property requirements) and, even as slavery held sway in parts of the Union, African-Americans in some states voted for delegates to the Constitutional Convention.[8] Notwithstanding the expanded ratification pool during the 18th century, by the early 19th century people of color and women were almost entirely disenfranchised. Fortunately, after declaring that "We the People" would be the ones to establish and ordain the Constitution, the preamble also boldly states our intention to "create a more perfect union." The goal was not just to create something "more perfect" than what Americans had seen before—whether it be the tyranny of the British crown or the dysfunction of the Articles of Confederation—but to establish a Union that was itself perfectible across history. Article V, authorizing Amendments, made it clear that the 1787 Constitution was not an end, but a beginning. And perhaps nowhere is the arc of constitutional progress seen more plainly than in the story of suffrage.

Over the past two centuries, the United States has moved ever closer to its full promise of equal citizenship and inalienable rights. Using the Article V amendment process in the wake of the Civil War, "We the People" removed the stain of slavery from our Founding charter through the Thirteenth Amendment, guaranteed equal protection of the laws through the Fourteenth Amendment, and forbid disenfranchisement based on race in the Fifteenth Amendment. Over the next century, the Fifteenth Amendment was followed by a string of additional amendments that expanded the franchise, prohibiting both voting discrimination on account of sex and age and abolishing poll taxes in federal elections, and made our government more democratic, granting Americans the right to vote for U.S. Senator.[9] The enforcement powers granted to Congress in these amendments have made possible crucial civil-rights victories—notably the Voting Rights Act of 1965, which for the first time since Reconstruction provided the enforcement tools necessary to make the promise of the right to vote a reality for racial minorities. Written across the very face of our

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[6] 531 U.S. 98 (2000); 558 U.S. 310 (2010).

[7] Michael McConnell, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of Tradition?*, 25 Loy. L.A. L. Rev. 1159, 1173 (1992).

[8] *See* Akhil Reed Amar, America's Constitution: A Biography 7-8 (2005).

[9] *See* U.S. Const. amends. XVII, XIX, XXIV, XXVI.

Constitution is a story of hard-won progress toward what President Abraham Lincoln called "government of the people, by the people, and for the people."[10]

A. THE TEXT AND ORIGINAL MEANING OF THE FIFTEENTH AMENDMENT ESTABLISH BROAD CONGRESSIONAL POWER TO PROTECT VOTING RIGHTS FROM STATE-SPONSORED DISCRIMINATION

Proposed in 1869 and ratified in 1870, the Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[11] In language "as simple in command as it was comprehensive in reach," the Fifteenth Amendment "reaffirm[s] the equality of the races at the most basic level of the democratic process, the exercise of the voting franchise."[12] To make this guarantee a reality, the amendment then provides that "[t]he Congress shall have power to enforce this article by appropriate legislation."[13] As the Supreme Court recognized just five years after the Fifteenth Amendment's ratification, "the amendment has invested citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination of the elective franchise on account of race, color, or previous condition of servitude."[14] "Previous to this amendment, there was no constitutional guaranty against this discrimination: now there is."[15]

In writing into the Constitution the "fundamental principle" that state and federal governments "may not deny or abridge the right to vote on account of race,"[16] the Framers explained that the Fifteenth Amendment would be "the capstone in the great temple of American freedom"[17] that would "crown the great work" of emancipation and "make every citizen equal in rights and privileges."[18] Observing that "[t]he irresistible tendency of modern civilization is in the direction of the extension of the right of suffrage,"[19] the Framers emphasized that the right to vote was a fundamental right, indispensable to ensuring freedom for African-Americans. Indeed, without protection for the right to vote free from discrimination, the Constitution's promise of equality was "incomplete" and "radically defective."[20] "The ballot is as much the bulwark of liberty to the black man as it is to the white.... No class, no race is truly free until it is clothed with political power sufficient to make it the peer of its kindred class or race."[21]

The plain language of the Fifteenth Amendment vests Congress with "power to enforce" the constitutional right to vote free from racial discrimination "by appropriate legislation."[22] The language that the Framers used to define the scope of Congress' authority under the Thirteenth, Fourteenth, and Fifteenth Amendments reflects a

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[10] Abraham Lincoln, *Gettysburg Address* (Nov. 19, 1863).

[11] U.S. CONST. amend. XV, § 1.

[12] Rice v. Cayetano, 528 U.S. 495, 512 (2000).

[13] U.S. CONST. amend. XV, § 2.

[14] United States v. Reese, 92 U.S. 214, 218 (1875).

[15] *Id.*; *see also Rice,* 528 U.S. at 522 (explaining that the "Fifteenth Amendment has independent meaning and force").

[16] *Rice*, 528 U.S. at 512.

[17] CONG. GLOBE, 40th Cong., 3rd Sess. 724 (1869) (Rep. Ward).

[18] *Id*. at 672 (Sen. Wilson).

[19] *Id*. at 709 (Sen. Pomeroy).

[20] *Id*.

[21] *Id*. at 983 (Rep. Ross).

[22] U.S. CONST. amend. XV, § 2.

decision to give Congress wide discretion to enact whatever measures it deems "appropriate." In giving Congress the power to enact "appropriate legislation," the Framers granted Congress the sweeping authority of its Article I "necessary and proper" powers, as interpreted by the Supreme Court in *McCulloch v. Maryland*,[23] a seminal case well-known to the Framers of those Amendments.[24] In *McCulloch*, Chief Justice Marshall laid down the fundamental principle determining the scope of Congress' powers under the Necessary and Proper Clause: "Let the end be legitimate, let it be within the scope of the constitution, and *all means which are appropriate,* which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[25] Indeed, in *McCulloch*, Chief Justice Marshall used the word "appropriate" to describe the scope of congressional power no fewer than six times.[26] Thus, by giving Congress the power to enforce the constitutional prohibition on racial discrimination in voting by "appropriate legislation," the Framers "actually *embedded in the text*" the "language of *McCulloch*."[27]

The debates on the Fifteenth Amendment reflect the text's broad grant of power to Congress to secure the right to vote free from racial discrimination. During the debates, the Framers made clear that the Fifteenth Amendment's Enforcement Clause, like that of the Thirteenth and Fourteenth Amendments, gave Congress a broad "affirmative power" to secure the right to vote.[28] Without a broad enforcement power, the Framers feared that the constitutional guarantee would not be fully realized: "Who is to stand as the champion of the individual and enforce the guarantees of the Constitution in his behalf as against the so-called sovereignty of the States? Clearly, no power but that of the central government is or can be competent for their adjustment ...."[29]

Both supporters and opponents alike recognized that the Fifteenth Amendment's Enforcement Clause significantly altered the balance of power between the federal government and the states, giving Congress broad authority to secure the right to vote to African-Americans and to eradicate racial discrimination in state elections. Opponents of the Fifteenth Amendment were vehemently against conferring on Congress "all power over what our Constitution regards as the proper subject of State action exclusively."[30] As Senator Thomas Hendricks put it, "when the Constitution of the United States takes away from the State the control over the subject of suffrage it takes away from the State the control of her own laws upon a subject that the Constitution of the United States intended she should be sovereign upon."[31]

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[23] 17 U.S. (4 Wheat.) 316 (1819).

[24] *See* JOHN T. NOONAN, NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 28-31 (2002); Jack M. Balkin, *The Reconstruction Power,* 85 N.Y.U. L. REV. 1801, 1810-15 (2010*);* Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 HARV. J. L. & PUB. POL'Y 991, 1002-03 (2008); Evan Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers,* 53 STAN. L. REV. 1127, 1158-66 (2001); Akhil Reed Amar, *Intratextualism,* 112 HARV. L. REV. 747, 822-27 (1999); Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores,* 111 HARV. L. REV. 153, 178 n.153 (1997); Steven A. Engel, Note, *The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding,* 109 YALE L.J. 115, 131-34 (1999).

[25] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (emphasis added).

[26] *Id*. at 408, 410, 415, 421, 422, 423.

[27] Balkin, *supra* note 24, at 1815 (emphasis in original).

[28] CONG. GLOBE, 40th Cong., 3rd Sess. 727 (1869) (Rep. Bingham); *id*. at 1625 (Sen. Howard) ("Congress ... under the second clause of this amendment" has the power to "impart by direct congressional legislation to the colored man his right to vote. No one can dispute this.").

[29] *Id*. at 984 (Rep. Ross).

[30] CONG. GLOBE, 40th Cong., 3rd Sess. 697 (Rep. Burr).

[31] *Id*. at 989.

These concerns over state sovereignty were flatly rejected by the Framers of the Fifteenth Amendment, who explicitly conferred on Congress the power to secure the right to vote free from racial discrimination. During the debates on the Fifteenth Amendment, Senator George Edmunds explained that it was necessary to "withdraw from the States of this Union who have hitherto exercised … the entire power over the political question of the right of suffrage" because "in many of these States there are large classes of citizens who are practically ostracized from the Government …."[32] "The time has arrived," Senator Joseph Abbott declared, "when the power of the General Government should be felt within every foot of its territory…. [T]he time has come when it is the duty of the Government to assert its supremacy and protect life and property everywhere in the United States."[33] "[T]his Government was founded on the idea that all political power was vested in the people—not a third of a half or any fraction, but all the people."[34] In giving Congress the power to remedy voting discrimination by the states, the Fifteenth Amendment specifically limited state sovereignty.

In short, the Fifteenth Amendment radically altered the constitutional balance between the states and the federal government on the issue of racial discrimination in voting. It vested Congress with broad power to prevent and deter racial discrimination in voting and placed all citizens "under the shield of national protection."[35]

B. THE HISTORY OF THE FIFTEENTH AMENDMENT DEMONSTRATES THAT "APPROPRIATE" ENFORCEMENT LEGISLATION INCLUDES BROAD, PROPHYLACTIC REGULATION TO PROTECT THE RIGHT TO VOTE

The Framers of the Civil War Amendments, including the Fifteenth Amendment, chose broad, sweeping language conferring on Congress the power to enforce the new constitutional guarantees of liberty, equality, and the right to vote free from racial discrimination by all "appropriate legislation" because they were reluctant to leave the judiciary with sole responsibility for protecting against racial discrimination in voting and other constitutional violations. In the aftermath of the Supreme Court's decision in *Dred Scott v. Sandford*,[36] the Framers were determined to give Congress the lead role in securing the constitutional guarantees of the three Civil War Amendments. As Senator Oliver Morton explained, "the remedy for the violation" of the Fifteenth Amendment, like the remedies for violation of the other Civil War Amendments, "was expressly not left to the courts. The remedy was legislative, because … the amendment itself provided that it shall be enforced by legislation on the part of Congress."[37] Against this backdrop, it is no surprise that the congressional debates surrounding the amendments stressed the importance of a broad federal *legislative* power to protect constitutional rights—with corresponding deference from the courts to respect this new authority. While Congress did not use this power effectively to prevent disenfranchisement of racial minorities until civil rights advocates secured the passage of the Voting Rights Act of 1965, such enforcement power unquestionably lay in repose with Congress.

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[32] CONG. GLOBE, 40th Cong., 3rd Sess. 1626 (1869).

[33] *Id*. at 981.

[34] *Id*.

[35] CONG. GLOBE, 41st Cong., 2nd Sess. 3608 (1870) (Sen. Schurz).

[36] 60 U.S. (19 How.) 393 (1857).

[37] CONG. GLOBE, 42nd Cong., 2nd Sess. 525 (1872); *see also* McConnell, *supra* note 24, at 182 (explaining that the Enforcement Clauses of the Civil War Amendments were "born of the fear that the judiciary would frustrate Reconstruction by a narrow interpretation of congressional power.").

Congress's broad legislative power was particularly important to secure the right to vote free from racial discrimination. Because states extensively regulate elections, including by regulating voter qualifications and drawing district lines, states hostile to the Fifteenth Amendment could easily use their power over the election system to deny or abridge the right to vote free from discrimination, as they often did.[38] For that reason, the Framers of the Fifteenth Amendment specifically recognized that a broad legislative power to protect the right to vote against all forms of racial discrimination—both heavy-handed and subtle—was critical to "prevent[ing] any state from discriminating against a voter on account of his race ...."[39]

The Framers were well aware that Congress needed broad authority to enact prophylactic legislation to stamp out all forms of racial discrimination in voting. For example, during the debates on the Fifteenth Amendment, Representative William Pile observed that "[i]t is difficult by any language to provide against every imaginary wrong or evil which may arise in the administration of the law of suffrage in the several States," emphasizing that "[w]hat we desire to reach" is "to insure by constitutional enactment ... the right of suffrage" of citizens without regard to race.[40] In the months following ratification of the Fifteenth Amendment, Congress recognized the grim reality that many states would pursue novel methods of disenfranchising African-Americans on account of their race. Highlighting the importance of providing "proper machinery ... for enforcing the fifteenth amendment," Senator William Stewart explained that "it is impossible to enumerate over-specifically all the requirements that might be made as prerequisites for voting .... The states can invent just as many requirements [for voting] as you have fingers and toes. They could make one every day."[41] "There may be a hundred prerequisites invented by the States,"[42] "a hundred modes whereby [an African-American] can be deprived of his vote."[43]

Senator Stewart was prescient. The struggle for voting rights for African-Americans did not end with the ratification of the Fifteenth Amendment. Even with crystal clear constitutional protection of the right to vote, a number of states across the country—concentrated in the Southern states that made up the former Confederacy—flouted the command of the Fifteenth Amendment, with whites-only primaries, literacy tests, poll taxes, and registration restrictions that combined with segregation to suppress racial minorities' political participation.[44] The promise of the Fifteenth Amendment rang hollow throughout the South. It was not until civil rights champions fought long and hard to make Congress use its Fifteenth Amendment enforcement powers to pass the Voting Rights Act of 1965 that there was a successful response to nearly a century of minority disenfranchisement. The Voting Rights Act has subsequently been expanded by bipartisan majorities and remains one of the most iconic civil rights statutes on the books.

The history summarized above documents that the Framers of the Fifteenth Amendment wanted to and by their words did ensure that Congress had the authority

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[38] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 590-91 (1988) (discussing efforts to defy the Fifteenth Amendment through racial gerrymandering and adoption of discriminatory voting laws).

[39] CONG. GLOBE, 41st Cong., 2nd Sess. 3663 (1870) (Sen. Sherman).

[40] CONG. GLOBE, 40th Cong., 3rd Sess. 725 (1869).

[41] CONG. GLOBE, 41st Cong., 2nd Sess. 3658 (1870) .

[42] *Id*.

[43] *Id*. at 3657 (Sen. Stewart).

[44] *See* J. MORGAN KOUSSER, SHAPING OF SOUTHERN POLITICS (1974).

to stamp out and deter the full range of racial discrimination in voting, including by enacting prophylactic regulation. This history demonstrates why the preclearance requirement of the Voting Rights Act falls squarely within Congress' express power to protect the right to vote free from racial discrimination.

C. THE SUPREME COURT HAS UPHELD CONGRESS'S BROAD POWER TO PROTECT VOTING RIGHTS—AND THE VRA, IN PARTICULAR—MANY TIMES BEFORE

Consistent with the text and history of the Fifteenth Amendment, the Supreme Court has held numerous times that "Congress' authority under § 2 of the Fifteenth Amendment … [is] no less broad than its authority under the Necessary and Proper Clause."[45] In these cases, broad deference was applied to the means Congress adopted to enforce the constitutional right to vote free from racial discrimination. The preclearance requirement contained in Section 5 of the Voting Rights Act seeks to enforce the core purpose of the Fifteenth Amendment, and the nearly unanimous, bipartisan decision of Congress to re-authorize it falls squarely within Congress's broad power to enforce the Fifteenth Amendment.

In *South Carolina v. Katzenbach*,[46] the Supreme Court deferred to Congress's broad authority to protect voting rights in holding that the preclearance and coverage provisions of the Voting Rights Act—the same provisions Shelby County attacks—were "appropriate legislation" within Congress's Fifteenth Amendment enforcement power. "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition on racial discrimination in voting."[47] The *Katzenbach* Court analyzed the history of the Fifteenth Amendment, noting that "[b]y adding th[e] authorization [for congressional enforcement in Section 2], the Framers indicated that Congress was to be *chiefly responsible* for implementing the rights created.… Congress has full remedial powers to effectuate the constitutional prohibition on racial discrimination in voting."[48]

Based on this text and history, the Court rejected "South Carolina's argument that Congress may do no more than to forbid violations of the Fifteenth Amendment in general terms.… Congress is not circumscribed by any such artificial rules under § 2 of the Fifteenth Amendment."[49] Similarly, the Court rejected South Carolina's argument that Congress could not single out states with a history of voting discrimination for special prophylactic regulation under its express power to enforce the Fifteenth Amendment. "In acceptable legislative fashion, Congress chose to limit its attention to the geographic areas where immediate action seemed necessary. The doctrine of equality of states, invoked by South Carolina, does not bar this approach, for that

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[45] City of Rome v. United States, 446 U.S. 156, 174-75 (1980); *id*. at 177 ("[U]nder § 2 of the Fifteenth Amendment Congress may prohibit practices that … do not violate § 1 of the Amendment, so long as the prohibitions attacking racial discrimination in voting are 'appropriate' as that term is defined in *McCulloch*."); *cf*. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968) (explaining that the Enforcement Clause of the Thirteenth Amendment "clothed 'Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States'") (quoting *Civil Rights Cases*, 109 U.S. 3, 20 (1886)); James Everard's Breweries v. Day, 265 U.S. 545, 558-59 (1924) (applying *McCulloch* to analyze constitutionality of congressional action under the Enforcement Clause of the Eighteenth Amendment).

[46] 383 U.S. 301 (1966).

[47] *Id*. at 324.

[48] *Id*. at 325-26 (emphasis added).

[49] *Id*. at 326, 327.

doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared."[50] Since then, the Supreme Court has reaffirmed both the reasoning and result of *Katzenbach* on three separate occasions, rejecting challenges to the 1970, 1975, and 1982 renewals of the Act's preclearance requirement.[51]

To be sure, beginning with *City of Boerne v. Flores,* the Supreme Court in a long line of cases since the mid-1990s has limited the power of Congress to enforce the guarantees of the Civil War Amendments, crafting a "congruence and proportionality" test to assess the constitutionality of congressional efforts to enforce the Fourteenth Amendment.[52] Using this test, the Court struck a balance, reaffirming the power of Congress to enact prophylactic rules to protect established constitutional guarantees while striking down efforts to provide additional guarantees not properly rooted in the Constitution. In short, the Court ruled that Congress had to be enforcing actual constitutional guarantees—there must be a "congruence and proportionality" between the injury to be prevented or remedied and the means adopted to that end—but once it was, the Court recognized that Congress had wide latitude to act.[53] That balance allowed the Court to limit the reach of federal age and disability discrimination laws and, most recently, the Family and Medical Leave Act,[54] but it does not work in favor of Shelby County. The Court has said time and again that racial discrimination by the states, particularly when it concerns the fundamental right to vote, violates the Constitution.

The Court in *Boerne* was concerned that Congress might invent constitutional rights in the guise of enacting enforcement legislation. That concern does not have any force when it comes to the Fifteenth Amendment's focused and express prohibition on racial discrimination in voting. Both constitutional text and history, as well as the unbroken line of Supreme Court precedent, dictates that Congress has broad leeway to design remedies to protect against discrimination based on race—the most constitutionally suspect form of discrimination—in order to protect the right to vote, which has always been recognized as a fundamental right of the highest order, "preservative of all rights."[55] Even Justice Scalia, who has been a trenchant critic of most congressional enforcement legislation, has recognized that "[g]iving [Congress] … more expansive scope with regard to measures directed against racial discrimination by the

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[50] *Id*. at 328-29.

[51] Georgia v. United States, 411 U.S. 526, 535 (1973) (reaffirming that "the Act is a permissible exercise of congressional power under § 2 of the Fifteenth Amendment"); City of Rome v. United States, 446 U.S. 156, 183 (1980) (explaining that "we have reaffirmed our holdings in *South Carolina v. Katzenbach* that the Act is 'an appropriate means for carrying out Congress' constitutional responsibilities' and is 'consonant with all … provisions of the Constitution") (quoting South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966)); Lopez v. Monterrey County, 525 U.S. 266, 283 (1999) (reaffirming that "Congress has the constitutional authority to designate covered jurisdictions and to guard against changes that give rise to a discriminatory effect in those jurisdictions").

[52] *See* City of Boerne v. Flores, 521 U.S. 507 (1997); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 637 (1999); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000); Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); Coleman v. Maryland Court of Appeals, 132 S. Ct. 1327 (2012).

[53] *See, e.g.* Nevada Dep't of Human Resources v. Hibbs, 538 U.S. 721, 727-28 (2003) ("Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct."); Tennessee v. Lane, 541 U.S. 509, 520 (2004) (explaining that "Congress must have a wide berth in devising appropriate remedial and preventative measures for unconstitutional actions").

[54] *Kimel*, 528 U.S. 62; *Garrett*, 531 U.S. 356; *Coleman*, 132 S. Ct. 1327.

[55] Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

States accords to practices that are distinctly violative of the principal purpose of the [Civil War] Amendment[s] ...."[56] Not surprisingly, the Court's modern cases have repeatedly described the Voting Rights Act's preclearance requirement as the classic example of appropriate enforcement legislation.[57]

Boerne itself recognized that when Congress enforces recognized fundamental constitutional rights—such as the right to vote expressly enumerated in the Fifteenth Amendment—rather than, in the Court's view, inventing new ones, "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'"[58] As history shows, the Fifteenth Amendment was designed to radically alter constitutional principles of federalism, giving to Congress a broad sweeping power to ensure that the right to vote free from racial discrimination was actually enjoyed by all Americans. While "the Voting Rights Act, by its nature, intrudes on state sovereignty," "the Fifteenth Amendment permits this intrusion."[59]

Indeed, since the function of *Boerne*'s congruence and proportionality test is to distinguish "measures that remedy or prevent unconstitutional actions" and "measures that make a substantive change in the governing law,"[60] when Congress enforces an expressly enumerated constitutional right, such as the Fifteenth Amendment's prohibition on racial discrimination in voting, "Congress ought to have wide latitude in choosing among enforcement remedies."[61]As the Constitution's text reflects, "[t]he Fifteenth Amendment empowers Congress, not the Court, to determine ... what legislation is needed to enforce it."[62]

II. EXTENSIVE EVIDENCE OF CONTINUING VOTING DISCRIMINATION SUPPORTS CONGRESS' RE-AUTHORIZATION OF THE PRECLEARANCE REQUIREMENT

Examination of the legislative record assembled by Congress demonstrates that the 2006 renewal of the Voting Rights Act's preclearance requirement falls squarely within Congress' power to protect against racial discrimination in voting—the single purpose of the Fifteenth Amendment. Acting within its wide discretion to select appropriate means, Congress conducted an extensive inquiry into the current state of racial discrimination in voting and permissibly determined that prophylactic measures were "current[ly] need[ed]"[63] to protect against unconstitutional racial discrimination in the administration of elections concentrated in the covered jurisdictions. By an overwhelming margin—98-0 in the Senate and 390-33 in the House—bipartisan majorities agreed

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[56] *Lane*, 541 U.S. at 561 (Scalia, J., dissenting); *see also* Oregon v. Mitchell, 400 U.S. 112, 129 (1970) (opinion of Black, J.) ("[w]here Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intentions of the Framers of the Thirteenth, Fourteenth, and Fifteenth Amendments.").

[57] *See Boerne*, 521 U.S. at 526 (reaffirming *Katzenbach*'s recognition of "the necessity of using strong remedial and preventive measures to respond to the widespread and persisting deprivation of constitutional rights").

[58] *Id*. at 518 (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).

[59] Lopez v. Monterrey County, 525 U.S. 266, 284-85 (1999).

[60] *Boerne*, 521 U.S. at 519.

[61] Stephen G. Calabresi & Nicholas P. Stabile, *On Section 5 of the Fourteenth Amendment*, 11 U. PA. J. CONST. L. 1431, 1436 (2009).

[62] Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 205 (2009).

[63] *Id*. at 203.

that the preclearance provision of the historic Voting Rights Act continued to serve the critical purpose of preventing and deterring racial discrimination in voting. Under any standard—whether the *McCulloch* standard reflected in the text of Section 2 of the Fifteenth Amendment or *Boerne*'s more restrictive congruence and proportionality standard used in the Supreme Court's recent cases—the legislative record compiled by Congress establishes that the preclearance requirement is "appropriate legislation" enforcing the Constitution's prohibition on racial discrimination in voting.

Based on a record "over 15,000 pages in length," including "'statistics, findings by courts and the Justice Department, and first-hand accounts of discrimination,'"[64] Congress concluded that state-sponsored racial discrimination in voting continues to be concentrated in the jurisdictions long covered by the Voting Rights Act. Indeed, Congress found that many of the same state and local governments that had flouted the Fifteenth Amendment and had first occasioned the Voting Rights Act in 1965 continue to engage in racial discrimination in voting on a systematic basis. Thus, despite considerable progress towards the goal of a multiracial democracy demanded by the Fifteenth Amendment, Congress found that preclearance still served the vital goal of preventing government-sponsored racial discrimination in voting. In many cases, Congress found that just as minorities were close to exercising political power, state and local governments interposed discriminatory voting changes. As conservative jurist District Court Judge John Bates observed in rejecting Shelby County's challenge, given "the extensive evidence of recent voting discrimination reflected in th[e] virtually unprecedented legislative record … Section 5 remains a 'congruent and proportional remedy' to the 21st century problem of voting discrimination in the covered jurisdictions."[65]

The raw numbers show that preclearance has protected hundreds of thousands—if not millions—of citizens from voting discrimination. Between 1982-2006, more than 750 Section 5 objections by the Attorney General blocked the enforcement of approximately 2400 discriminatory voting changes; over 800 other proposed voting changes were withdrawn or modified when DOJ asked for more information to justify the voting changes, many in circumstances suggesting intentional discrimination was afoot.[66] These findings are just the tip of the iceberg. As both Congress and courts below found, Section 5's preclearance requirement both prevents voting discrimination and deters constitutional violations *ex ante*; accordingly, there are discriminatory "voting changes that have never gone forward as a result of Section 5."[67] Just a small sample of the evidence of continuing voting discrimination in the record powerfully makes the case for why huge bipartisan majorities concluded that the Voting Rights Act is still a necessary tool to eliminate the scourge of racial discrimination in voting:

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[64] Shelby County v. Holder, 811 F. Supp. 2d 424, 435 (D.D.C. 2011) (quoting S. Rep. No. 109-295 at 10 (2006)).

[65] *Id*. at 428.

[66] *See* Shelby County v. Holder, 679 F.3d 848, 866-68 (D.C. Cir. 2012). These are only two of the most relevant sets of data on which Congress relied. As the courts below explained, Congress also appropriately drew on: (1) registration and turnout rates; (2) minority officeholding; (3) successful litigation under the nationwide prohibition on discriminatory results in Section 2 of the Voting Rights Act; (4) dispatch of federal observers to covered jurisdictions; (5) judicial actions to enforce the preclearance requirement; (6) declaratory judgments for preclearance denied by the courts; and (7) racially polarized voting and vote dilution. *See Shelby County*, 679 F.3d at 862-73; 811 F. Supp. 2d at 466-70, 477-90.

[67] H.R. Rep. No. 109-478, at 24; *Shelby County*, 679 F.3d at 871-72; *Shelby County*, 811 F. Supp. 2d at 490-92.

Mississippi: In the early 1990s, state legislators opposed a redistricting plan that would have increased the number of majority-minority districts in which African-Americans would have the opportunity to elect representatives of their choice, privately disparaging the plan as the "nigger plan." Several years later, in 1995, Mississippi sought, without ever seeking pre-clearance, to institute a dual registration system requiring individuals to register separately for federal and state elections, a system nearly identical to the one the state had enacted in 1892 to flout the Fifteenth Amendment. Congress also found evidence of discrimination by political subdivisions in Mississippi. For example, in 2001, the all-white Board of Aldermen for the town of Kilmichael, Mississippi, made a sudden decision to cancel a general election three weeks before it was supposed to occur after the town had become majority African-American and "an unprecedented number" of African-Americans ran for office.[68]

Alabama: Congress, too, found continuing discrimination in Shelby County's home state. In the 1990s, Selma, Alabama—the site of the famous march on the Edmund Pettus bridge that helped lead to the initial passage of the Voting Rights Act—attempted to enact multiple redistricting plans that sought to dilute the voting strength of African-Americans after the 1990 Census showed that the African-American population of Selma had grown to 58%. On these occasions, DOJ objected to the discriminatory plans. Elsewhere in Alabama, Congress heard evidence of election officials "'closing the doors on African-American voters before the … voting hours were over,'" as well as evidence of white officers "using racial epithets to describe African-American voters in the presence of federal observers."[69]

Georgia: In the early 1980s, Georgia's discriminatory congressional redistricting was denied preclearance by a three-judge court based on the fact that the state's House Reapportionment Committee Chairman "told his colleagues on numerous occasions, 'I don't want to draw nigger districts.'"[70] Congress also found numerous more recent discriminatory acts. In 1992, Johnson County, Georgia sought to move a polling place from a county courthouse to an "all-white club with a history of refusing membership to black applicants," a change blocked by DOJ because of its purpose and effect of "discouraging black voters from turning out to vote."[71] In 1998, after Webster County, Georgia, had elected a majority-black school board for the first time, the County sought to reduce the African-American population in three out of five of the Board's single-member districts, a change DOJ found was

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[68] *See Shelby County*, 679 F.3d at 865-66; *Shelby County*, 811 F. Supp. 2d at 464, 473-74, 480-81.

[69] *See* 1 *Voting Rights Act: Section 5 of the Act—History, Scope & Purpose: Hearing before the Subcomm. on the Constitution, H. Comm. on the Judiciary,* 109th Cong. 391-92, 403 (Oct 25, 2005); *Shelby County*, 811 F. Supp. 2d at 464 (quoting 1 *Evidence of Continued Need* 182 (Nat'l Comm'n Report)).

[70] H.R. Rep. No. 109-478, at 67 (2006) (quoting Busbee v. Smith, 549 F. Supp. 494, 501 (D.D.C. 1982)).

[71] 1 *Voting Rights Act: Section 5 of the Act—History, Scope & Purpose: Hearing before the Subcomm. on the Constitution, H. Comm. on the Judiciary,* 109th Cong. 727 (Oct 25, 2005).

designed to "intentionally decreas[e] the opportunity of minority voters to participate in the political process."[72]

Texas: Congress also found systematic racial discrimination in jurisdictions that were covered beginning in 1975, when the Act's coverage formula was expanded. Congress heard evidence that, since 1975, *every* redistricting plan for the Texas House of Representatives has received a preclearance objection.[73] Congress also found numerous acts of racial discrimination in voting on the local level. For example, in 2004, in Waller County, Texas, election officials sought to "reduce early voting at polling places near a historically black college" and "prosecute students for 'illegal voting, after two black students announced their intent to run for office."[74] As a result of successful litigation to enforce the Act's preclearance provision, "five times as many … students were able to vote in the primary, in which the African-American student seeking election … won a narrow victory."[75]

These examples are just a small slice of the evidence that Congress drew on when it reauthorized the Voting Rights Act in 2006. Numerous other examples of discriminatory voting changes abound in Louisiana, South Carolina, Virginia and other covered jurisdictions.[76]

One of the most prominent charges made by opponents of the Voting Rights Act is that—notwithstanding this mountain of evidence of racial discrimination in voting persisting in covered jurisdictions—the Voting Rights Act is now out of date and unconstitutional because Congress did not update the Act's coverage provision. But, on close analysis, these arguments cannot withstand scrutiny. Congress had good reason to reauthorize the Act's geographic coverage provision, which has captured and still captures the jurisdictions with the worst record of adhering to the Constitution's promise of a multi-racial democracy. Shelby County and its supporters have made a number of policy arguments about why a new coverage formula should have been designed. But they are exactly that—policy arguments. The Constitution specifically entrusts to Congress the power to select the means to eliminate the scourge of racial discrimination in voting. The question whether to use or amend the coverage formula was one for Congress to decide, using the broad power specifically conferred in the Constitution.

The Act's geographic formula covers state and local governments that (1) maintained a voting "test or device" as of either November 1964, 1968, or 1972; and (2) at the same time had a low-registration or turnout rate below half the voting age population (1964 and 1968), or citizen voting age population (1972).[77] The Act's triggers were designed to capture those places where voting discrimination was most entrenched. Going all the way back to 1965, "Congress identified the jurisdictions it sought to cover—those for which it had 'evidence of actual voting discrimination'—and then

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[72] *Id*. at 830; *see also Shelby County*, 679 F.3d at 865.

[73] 2 *Voting Rights Act: Section 5 of the Act—History, Scope & Purpose: Hearing before the Subcomm. on the Constitution, H. Comm. on the Judiciary*, 109th Cong. 2177-80, 2319-23 (Oct 25, 2005).

[74] *Shelby County*, 679 F.3d at 865-66.

[75] *Shelby County*, 811 F. Supp. 2d at 480.

[76] *Id*. at 470, 474-76, 478-79, 482-84.

[77] 42 U.S.C. § 1973b(b).

worked backward, reverse-engineering a formula to cover those jurisdictions."[78] As the Court observed in *South Carolina v. Katzenbach*, "Congress began work with reliable evidence of actual voting discrimination" and the "formula eventually evolved to describe these areas ...."[79] As in 1965, in 2006, preclearance coverage was "not predicated on statistics alone," but rather "on recent and proven instances of discrimination in voting rights compiled in the ... record."[80] And, as the voluminous record compiled by Congress and detailed by the lower courts in *Shelby County* shows, the covered jurisdictions continue to be the worst offenders, consistently refusing to live up to the Constitution's promise of a multi-racial democracy.

As important, the coverage formula has never stood on its own. Even at the time of the 1965 Act, Congress recognized that the coverage formula had the potential to be both over- and under-inclusive. To address this problem, Congress designed two remedies: bailout, which permits covered jurisdictions to escape from preclearance obligations by demonstrating a clean voting record, and bail-in, which allows courts to extend preclearance to jurisdictions that have committed violations of the Fourteenth or Fifteenth Amendments.[81] In 2006, rather than try to create a wholly-new, untested coverage formula, Congress examined the state of voting discrimination both within and outside the covered jurisdictions and appropriately chose to continue to rely on bail-out and bail-in to address any conceivable problems in the scope of the Act's coverage formula. Doing so was well within the choice of means permitted Congress under its express power to enforce the Constitution's prohibition on racial discrimination in voting.

The history of bailout confirms that covered jurisdictions are not locked into the Act's coverage, but rather have a full and fair opportunity to be free of federal supervision, an opportunity which many jurisdictions have taken advantage of. At one time, towns or counties in the states of Colorado, Connecticut, Hawaii, Idaho, Maine, Massachusetts, New Mexico, and Wyoming were covered by the preclearance requirement; today, none of them are covered. Throughout the 1970s and 1980s, each bailed out.[82] In the 1982 renewal of Section 5, Congress liberalized the bailout provision, making it easier for covered jurisdictions to free themselves of the Act's preclearance regime. Since then, in *Northwest Austin*, the Supreme Court expanded eligibility for bail-out to a broader range of political subdivisions, allowing them to be able to demonstrate a clean voting record and bail out.[83] As a result, "[s]ince 2009, numerous local political subdivisions have sought and obtained a bailout .... [N]ot a single jurisdiction seeking a bailout has been turned down, and ... States and political subdivisions are pursuing bailouts with ease in greater numbers than ever before."[84]

Likewise, bail-in has been used to impose certain preclearance obligations on a number of jurisdictions who have engaged in a host of discriminatory voting practices. For example, in the last 25 years, federal courts bailed in Arkansas and New Mexico—two states in which there has been a lot of litigation to enforce the

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[78] *Shelby County*, 679 F.3d at 879 (quoting South Carolina v. Katzenbach, 383 U.S. 301, 329 (1966)).

[79] *Katzenbach*, 383 U.S. at 328, 329.

[80] 152 Cong. Rec. H5181-82 (daily ed. July 13, 2006).

[81] 42 U.S.C. § 1973a(c) (bail-in); 42 U.S.C. § 1973b(a) (bailout).

[82] *See* Dep't of Justice, Section 4 of the Voting Rights Act, Jurisdictions Currently Bailed Out, http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout_list (last visited Jan. 5, 2013).

[83] *Nw. Austin*, 557 U.S. at 206-11.

[84] Gerry Hebert, *The Shelby County, Alabama Case and Bailouts*, Campaign Legal Ctr. Blog (Nov. 15, 2012), http://www.clcblog.org/index.php?option=com_content&view=article&id=494:the-shelby-county-alabama-case-and-bailouts-.

nationwide provisions of the Voting Rights—as well as numerous local governments, including Los Angeles County, California, Bernalillo County, New Mexico, Buffalo County, South Dakota, Charles Mix County, South Dakota, and the City of Chattanooga, Tennessee.[85]

Finally, despite claims that the preclearance requirement imposes onerous burdens, the reality is that the preclearance requirement is not a particularly significant burden for covered jurisdictions that do not seek to enact laws that deny or abridge the right of racial minorities to vote. According to congressional testimony, most preclearance submissions take elections administrators "less than an hour to prepare and mail," and, with the exception of more complicated redistricting submissions, the costs are "insignificant."[86]

In sum, a review of the record before Congress in 2006 demonstrates that, despite considerable progress, the Voting Rights Act's preclearance regime is still necessary to prevent and deter racial discrimination in voting in state and local governments with longstanding, proven histories of racial discrimination in voting. The burdens created by the preclearance requirement are modest and fully justified by the need to ensure that states with a long history and contemporary record of voting discrimination live up to our Constitution's promise of a multi-racial democracy.

III. THE CONTINUING NEED FOR PRECLEARANCE: VOTER SUPPRESSION IN THE 2012 ELECTION

If the experience over the course of the 2012 election has proven anything, it's that the Voting Rights Act is still our nation's first and best defense against efforts to disenfranchise American voters. In the run-up to the 2012 election, the right to vote was under siege. Conservatives tried to change election rules to disenfranchise ordinary Americans, passing restrictive voter ID laws, shortening early voting hours, and making it more difficult to register to vote. These restrictions had the greatest impact on young, minority, elderly, and poor voters. They made a mockery of President Lincoln's description of our government being "of the people, by the people, and for the people," and they failed to honor the fact that the right to vote is perhaps our most fundamental constitutional right, a right "preservative of all rights."[87]

The happier, but lesser known, part of this story is how effective DOJ and public interest organizations were in going to court and using the Voting Rights Act to prevent the worst of these statutes from going into force. In the last few months before the election, there were a number of important lower court rulings that enforced the preclearance requirement and provided critical new evidence of precisely why preclearance is still a much needed tool to protect the right to vote free from racial discrimination. Without the VRA in place, African-American and Hispanic voters—in a number of states in the South and Southwest—might have been denied their constitutional right to cast a ballot on election day.

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[85] The history of bail-in is described in Travis Crum, Note, *The Voting Rights Act's Secret Weapon, Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 2010-15 (2010); *see also* Shelby County v. Holder, 679 F.3d 848, 881 (D.C. Cir. 2012).

[86] Testimony of Donald M. Wright, General Counsel of the N.C. State Bd. of Elections, Senate Jud. Comm., *Voting Rights Act: Policy Perspectives and Views From the Field* (June 21, 2006), *available at http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da116cea9&wit_id=e655f9e2809e5476862f735da116cea9-1-5*.

[87] Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

Voter suppression laws that were held back by Section 5 rulings this year included a strict Texas ID law, which a three-judge panel found was tantamount to reviving the poll tax. In *Texas v. Holder*,[88] the court unanimously blocked Texas' new voter identification statute, the most stringent in the nation, finding that the statute would inevitably disenfranchise low-income Texas citizens, who are disproportionately African-American and Hispanic. The court stressed that Texas had gone to great lengths to suppress the vote in poor and minority communities, strictly limiting the types of photo identifications available—a license to carry a concealed firearm is a valid ID under the law, but not a student or Medicare ID card—and making it costly to obtain a so-called "free" election ID for use at the polls.[89] For those without one of the five permitted photo identifications, the court found that the law was tantamount to a poll tax, "imposing an implicit fee for the privilege of casting a ballot."[90] The "very point" of the Voting Rights Act, the court explained, was to deny "states an end-run around the Fifteenth Amendment's prohibition on racial discrimination in voting."[91]

In *Florida v. United States*,[92] another three-judge panel unanimously held that Florida could not slash the period for early voting, explaining that "a dramatic reduction in the form of voting that is disproportionately used by African-Americans" was akin to "closing polling places in disproportionately African-American precincts."[93] Noting that Congress enacted the Voting Rights Act to enforce the Fifteenth Amendment and "provide robust and meaningful protections for minority voting rights,"[94] the court held that Florida could not suppress the vote through a significant reduction in the hours of early voting.

In *Texas v. United States*,[95] in a yet another unanimous ruling, another three-judge court held that Texas' new state legislative and congressional districts could not be squared with the Voting Rights Act, finding that new congressional, state senate and state house district lines had either the purpose or effect of diluting minority voting strength. Importantly, because the court's opinion, authored by George W. Bush appointee Judge Thomas Griffith, held that Texas had purposefully discriminated on account of race in both the congressional and state senate plans, Texas' districting was both a violation of the Voting Rights Act and the Constitution.

Equally important, laws that ultimately did "clear," like South Carolina's voter ID law, which was approved for use beginning in 2013 in *South Carolina v. United States*,[96] did so because Section 5 made lawmakers more careful to avoid problematic outcomes. As District Court Judge John Bates explained, "[w]ithout the review process under the Voting Rights Act, South Carolina's voter photo ID law certainly would have been restrictive. Several legislators have commented that they were seeking to structure a law that could be precleared."[97] "[T]he key ameliorative provisions were … shaped by the need for preclearance" that "the evolving interpretation of

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[88] 2012 WL 3743676 (D.D.C. Aug. 30, 2012).

[89] *Id*. at *26-29, 33.

[90] *Id*. at *28.

[91] *Id*. at *31.

[92] 2012 WL 3538298 (D.D.C. Aug. 16, 2012).

[93] *Id*. at *23.

[94] *Id*. at *13.

[95] 2012 WL 3671924 (D.D.C. Aug. 28, 2012), *jurisdictional statement filed,* no. 12-496 (dated Oct. 19, 2012).

[96] 2012 WL 4814094 (D.D.C. Oct. 10, 2012).

[97] *Id*. at *21 (Bates, J., concurring).

these key provisions … were driven by South Carolina officials' effort to satisfy the requirement of the Voting Rights Act."[98] "The Section 5 process here," Judge Bates explained, "demonstrates the continuing utility of Section 5 of the Voting Rights Act in deterring problematic, and hence encouraging non-discriminatory changes, in state and local voting laws."[99]

Conservative opponents of the Voting Rights Act argue that the preclearance requirement is outdated and unnecessary, but this past election—six years after huge bipartisan majorities renewed the Act—shows why, for the last 47 years, year in and year out, the Voting Rights Act has stood as our nation's most effective weapon to realize the guarantees of the Fifteenth Amendment and prevent and deter state-sponsored racial discrimination in voting. If the Supreme Court is faithful to the text and history of the Fifteenth Amendment, it should resoundingly affirm the constitutionality of the Voting Rights Act.

IV. CONCLUSION

Three years after *Northwest Austin*, the Supreme Court is once again confronted with questions about the constitutionality of Section 5 of the Voting Rights Act. The Act has been one of the most important and successful civil rights laws ever enacted, a law that continues to help our nation live up to our Constitution's promise of liberty, equality, and democracy. Shelby County has asked the Supreme Court to strike down this key provision of the Voting Rights Act in the name of federalism and state sovereignty, turning on its head the Fifteenth Amendment and the powers specifically granted to Congress in the Constitution. Will the Roberts Court honor the right to vote that is perhaps our most fundamental right, a right "preservative of all rights," and the express power of Congress to protect that right from state-sponsored racial discrimination? If the Supreme Court is faithful to the text of our Constitution, to the sweep of our constitutional history, and to the efforts of generations of men and women to redeem our Constitution's promise of "government of the people, by the people, and for the people," it will reaffirm the broad powers of Congress to eliminate the scourge of racial discrimination in voting and uphold the constitutionality of the Voting Rights Act.

[98] *Id*.

[99] *Id*. at *22 (Bates, J., concurring).

Revisiting Judicial Activism: The Right and Wrong Kinds*

Alan B. Morrison**

I. INTRODUCTION

In May 2010, I published a prior version of this Issue Brief in which I tried to articulate a theory of appropriate and inappropriate judicial activism. I stated as my theory that it is most appropriate for the Court to engage in judicial activism when there is some reason to believe that our system of representative government has not worked and that the protections that the Constitution is supposed to afford are lacking. Three full terms of the Supreme Court have concluded since then, and I believe that my approach still holds. In that time we have seen judicial activism from the left and the right on the political spectrum, some of which seems justified, and some not.

The principal addition to this Issue Brief is the application of my theory to cases decided in the past three years. That analysis cannot stand on its own, and so I have retained, and slightly modified, the Introduction and Part I, which sets forth examples of judicial activism in the Warren, Burger, and Rehnquist-Roberts Courts. The main changes are in Part II, where I have added discussions of (1) the Affordable Care Act case, (2) the ruling setting aside the statutory formula for determining which jurisdictions must obtain pre-clearance of changes in their election rules under the Voting Rights Act, and (3) the ruling striking down the Defense of Marriage Act (DOMA) and the non-decision on the validity of California's Proposition 8 precluding same-sex marriages. To accommodate those additions, I have trimmed some discussions and eliminated a few examples along the way. My Conclusion, with some minor tweaks, remains unchanged, and was recently confirmed by Justice Ruth Bader Ginsburg who called the Roberts Court "one of the most activist courts in history."[1]

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In his confirmation hearing, Chief Justice John Roberts proclaimed that his job was like that of an umpire, just calling balls and strikes. Similarly, Justice Sonia Sotomayor told the Senate that her vision of a Justice was a person simply applying the facts to the law. Anyone who has paid the slightest attention to the workings of the Supreme Court knows that there is much more to being a Justice than the kind of mechanical approach those nominees suggested. Court watchers and many others know that this minimalist approach is designed to demonstrate that, whoever else might be called a judicial activist, that label cannot be applied to them.

So what is a judicial activist? That is not an easy question to answer because, unlike terms such as Democrat or Republican or liberal (progressive), moderate, or conservative, no one proudly wears that mantle. Every judge proclaims that he or she is

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[1] Adam Liptak, *Court Is 'One of Most Activist,' Ginsburg Says, Vowing to Stay*, N.Y. TIMES, August 25, 2013, at A1.

just following the law, even when the law is embodied in phrases like "due process," "equal protection," or "probable cause" that are hardly self-defining. But as this Issue Brief shows, every Justice who has been on the bench since 1954, whether generally thought of as liberal, conservative, or some place in between, has engaged in judicial activism. The important question is which instances of activism can be justified under a theory of what the Supreme Court should be doing.

The activist label gained prominence during the era of Chief Justice Earl Warren, but in many respects the *Lochner* era,[2] when the Court struck down most legislative efforts to deal with economic inequities and oppression of those with no power, is at least in a league with the Warren Court. And today, there are those who contend that the current Court, beginning with many decisions from the era when William Rehnquist was Chief Justice and continuing with his successor Chief Justice Roberts, also deserves that title.

A cynic might say that a judicial activist is any judge who issues a decision in conflict with the views of the person applying the label. A more nuanced definition would call a decision an activist one when it overturns the considered judgment of legislative or executive branch officers, with the prototypical case being one in which the Court declares a duly enacted statute unconstitutional. However, since *Marbury v. Madison*,[3] the Supreme Court has exercised that very power, first as applied to federal laws and then to those of the states. However, unless one is prepared to overrule *Marbury,* some amount of judicial activism is not only inevitable, but necessary if the Constitution is to remain the supreme law of the land. In almost all of the cases discussed below, there are also respectable arguments that the Court reached a result that was incorrect under the prevailing law. But getting the wrong answer is not what is generally meant by a charge of judicial activism.

Most of the outcries over judicial activism relate to decisions on the merits of a case, but there are also significant cases of what I will call "procedural activism." For example, for years the states continued to apportion their legislatures and their congressional districts in ways that greatly favored rural voters over those who lived in the cities. Because any change had to come from a mal-apportioned legislature, nothing happened, and for many years the federal courts refused to become involved. Finally, in 1962, in *Baker v. Carr*,[4] the Court stepped in and subjected the process to constitutional scrutiny under the Equal Protection Clause. The activism there was not on the merits—the entire Court thought that these extreme gerrymanders were unconstitutional—but on whether the Court should remain on the sidelines.

A similar kind of procedural activism can be found in *Flast v. Cohen*,[5] in which the Court held that individual taxpayers had standing to challenge the use of federal funds that allegedly violated the Establishment Clause of the First Amendment. In doing so, *Flast* opened ever so slightly the taxpayer standing door that had been closed in *Frothingham v. Mellon*,[6] and that has subsequently remained closed except in the narrow set of cases covered by *Flast*. Then, on the other side of standing activism, the Court in *Raines v. Byrd*,[7] held unconstitutional the provision in the Line Item Veto Act that specifically conferred standing on Members of Congress to challenge

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[2] Lochner v. New York, 198 U.S. 45 (1905).

[3] 5 U.S. 137 (1803).

[4] 369 U.S. 186 (1962).

[5] 392 U.S. 83 (1968).

[6] 262 U.S. 447 (1923).

[7] 521 U.S. 811 (1997).

the constitutionality of that very law, which, they contended, would interfere with their legislative powers.

Most of the remainder of this Issue Brief focuses on cases in which the Court reached the merits, and it proceeds in two parts. In Part I, I describe a representative sample of the most prominent activist cases in each of three eras beginning in the second half of the 20th Century, but do not discuss whether they constitute examples of appropriate or inappropriate judicial activism. First, this Brief begins with the Warren Court, which was charged with being dominated by liberal judicial activists, largely because the results were supported by those who are considered political liberals. Next was the era of Chief Justice Warren Burger, where cases dealing with the death penalty and separation of powers raise judicial activism concerns. I call this the period of "mixed judicial activism" for two reasons: (1) the Justices in this period included holdovers from the Warren Court, as well as those who came to dominate the more conservative Court that followed it; and (2) some of the results pleased liberals, others were favored by conservatives, and others were seen as largely non-ideological. For the third era, I combine cases from when William Rehnquist and John Roberts served as Chief Justices, where the outcomes were generally favored by conservatives. I recognize that the time periods overlap and the labels are over-simplified, but in the end this division seemed a useful way to present the cases from which a theory of judicial activism could be analyzed.

To remove the suspense, and to allow the reader to assess my theory as this paper proceeds, here it is in a nutshell: it is most appropriate for the judiciary to be active and to overturn legislative decisions when there is some reason to believe that our system of representative government has not worked and that the protections that the Constitution is supposed to afford are lacking. The most common circumstance of appropriate intervention is to safeguard rights of a racial or other minority that were not adequately represented in the political process. The other important situation to which this theory applies arises when the structural protections afforded by the Constitution's specific guarantees of separation of powers or federalism have broken down because of an imbalance in legislative powers.

Whether this theory holds water can only be tested by examining controversial cases actually decided by the Court. That is the function of Part II, where I apply the theory to the major categories of cases discussed in Part I and make an assessment of whether the activism of the Court was justified in them.

This Issue Brief is admittedly not a full treatment of judicial activism, in part because the term has many potential meanings.[8] I have chosen to focus only on rulings that declare either a state or federal statute unconstitutional. I also do not discuss judicial activism in statutory interpretation and, with the exception of campaign finance cases, I generally steer clear of First Amendment cases based on freedom of speech, in part because that topic would require a separate Issue Brief and perhaps its own theory. Finally, I do not rate or rank Justices in terms of the degree to which they adhere to the theory propounded here. Rather, my larger point is that all Justices are activists from time to time, with greater or lesser justification in different cases. My hope for this Issue Brief is that it will cause the term judicial activism to be used less as a form of slander and that, when used, will be applied with greater nuance than has been true to date.

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[8] *See, e.g.,* William Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 COLO. L. REV. 1217 (2002).

II. JUDICIAL ACTIVISM—SOME REPRESENTATIVE CASES

A. THE WARREN ERA OF LIBERAL ACTIVISM

The five cases that combined to produce the unanimous opinion in *Brown v. Board of Education*[9] overturned state laws that specifically prohibited black and white children from attending school together. The laws were clear, their intent was unmistakable, and they were supported by a majority of citizens in their jurisdictions, yet the Court held that they violated the Equal Protection Clause of the Constitution. Although indisputably controversial at the time, no person who has been nominated for the Supreme Court since, including the late Robert Bork, has said that he or she would reverse *Brown*. And even the most vociferous of the anti-activists do not include *Brown* in their litany of judicial misdeeds.

Prior to *Brown*, the Court decided a number of cases in which it ruled that activities such as the Pledge of Allegiance[10] and prayer in a variety of forms regularly conducted in public schools,[11] violated the First Amendment rights of students who did not wish to participate in them and did not wish to be singled out for their non-participation. These rulings continued in the Warren Court in *Engel v. Vitale*[12] and *Abington Township v. Schempp,*[13] resulting in mounting criticism of the Court. Whether the activity at issue was the product of a law or just an official school policy made no difference to the Court, any more than did the fact that the vast majority of students and parents raised no objection to it.

As noted above, the Warren Court decided in *Baker v. Carr*[14] that claims of inequality in numerical representation in state legislatures and Congress were justiciable. Thereafter, in *Wesberry v. Sanders*,[15] the Court applied that ruling to congressional representation, finding the challenged districts to violate what came to be known as the principal of "one person, one vote,"[16] a result that was rather expected given the population-based approach for the House of Representatives prescribed in Article I, § 2, clause 3 of the Constitution. However, when the issue of the make-up of state legislatures came to the Court in *Reynolds v. Sims,*[17] the Court not only held that "one man, one vote" applied to the legislative body analogous to the U.S. House of Representatives, but also to the body most like the U.S. Senate. In doing so, the Court rejected all claims of allocation based on any principle other than population, although it did allow some limited flexibility for factors such as maintaining the integrity of political subdivisions.

The sexual privacy cases, beginning with the overturning of a ban on the use of contraceptives,[18] was followed by the Burger-era ruling in *Roe v. Wade,*[19] that dramatically limited the ability of the government to ban abortions. That led eventually to the

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[9] 347 U.S. 483 (1954).

[10] West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[11] Everson v. Bd. of Educ., 330 U.S. 1 (1947).

[12] 370 U.S. 421 (1962) (outlawing the widespread practice of beginning the school day with a non-denominational prayer).

[13] 374 U.S. 203 (1963) (prohibiting the reading of the Bible at the opening of the school day).

[14] 369 U.S. 186 (1962).

[15] 376 U.S. 1 (1964).

[16] *Id*. at 18.

[17] 377 U.S. 533 (1964).

[18] Griswold v. Connecticut, 381 U.S. 479 (1965).

[19] 410 U.S. 113 (1973); *see also* Doe v. Bolton, 410 U.S. 179 (1973).

2003 decision in *Lawrence v. Texas,*[20] striking down all anti-sodomy laws. These cases have proved troubling due in no small part to the fact that some scholars who support their substantive outcomes have nonetheless criticized the rulings because of what they perceive as the Court's inappropriateness in acting like a legislature in effectively creating a federal code of abortion, as well as objecting to some of the legal arguments used to support the decisions.

Another area where many members of the public became upset at what they saw as the activism of the Warren Court was with respect to the rights of persons accused of crimes. There were two different features of the Court's role that troubled its critics. First, the Court applied the Bill of Rights, which literally covers only conduct by the federal government, to actions by state and local officials, by arguing that these protections were extended to the states through the Due Process Clause of the Fourteenth Amendment, which expressly applies to the states. This doctrine, known as incorporation, had been initially utilized in the 1920s without great controversy to safeguard the guarantee of freedom of speech in the First Amendment.[21] However, the extension of virtually all of the protections available in the other amendments to those accused of crimes was seen as a major expansion by the Court. Second, the Court broadened the substantive protections afforded by the Fourth Amendment (the prohibition against unreasonable searches and seizures),[22] the Fifth Amendment (the ban on coerced confessions),[23] and the Sixth Amendment (guaranteeing the right to counsel),[24] and it enforced those protections by forbidding the states from introducing evidence that was obtained in violation of them, even when it resulted in freeing a probably guilty person.

B. THE BURGER ERA OF MIXED ACTIVISM

Supreme Court decisions involving the death penalty are often seen as an example of liberal judicial activism, because those that changed the law did so by limiting its availability as a punishment. The Warren Court did not issue any significant rulings on capital punishment, but four of its members were still on the Burger Court in 1972 when it temporarily halted the use of the death penalty in *Furman v. Georgia*.[25] Four years later, the Court held that subsequent changes in the manner in which it was applied satisfied the objections of at least a majority of the Court so that the states could constitutionally execute some, if not most, persons sentenced to death.[26] Thereafter, some limitations were imposed, the principal one being that a death sentence was not permitted except where the murder of another person was the basis of the penalty.[27] However, it was not until the Rehnquist era that the Court held that it was unconstitutional to execute persons who are mentally retarded[28] or who were under the age of 18 at the time that they committed the crime.[29]

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[20] 539 U.S. 558 (2003).

[21] Gitlow v. New York, 268 U.S. 652 (1925).

[22] Mapp v. Ohio, 367 U.S. 643 (1961).

[23] Miranda v. Arizona, 384 U.S. 436 (1966).

[24] Gideon v. Wainwright, 372 U.S. 335 (1963).

[25] 408 U.S. 238 (1972).

[26] Gregg v. Georgia, 428 U.S. 153 (1976).

[27] Coker v. Georgia, 433 U.S. 584 (1977); *see also* Kennedy v. Louisiana, 554 U.S. 407 (2008) (re-affirming *Coker* as applied to rape of an 8 year old girl).

[28] Atkins v. Virginia, 536 U.S. 304 (2002).

[29] Roper v. Simmons, 543 U.S. 551 (2005).

The Burger Court was also very active in the field of separation of powers as it struck down a significant number of statutes passed by Congress and in most cases signed by the President. In *Buckley v. Valeo,*[30] the Court held that the manner by which Congress directed the selection of members of the newly-created Federal Election Commission was inconsistent with the Appointments Clause. Thereafter, the Court ruled in *INS v. Chadha*,[31] that the legislative veto, which had been included in over 200 laws passed by Congress, was a violation of the constitutional doctrine of separation of powers because it gave Congress power to act in a manner not provided for in the Constitution, in that case to order an alien deported after immigration officials concluded that the law entitled him to remain in this country. And on his final day in office, Chief Justice Burger authored the opinion in *Bowsher v. Synar*,[32] holding that Congress violated principles of separation of powers when it assigned executive powers to the Comptroller General because he was subject to removal by Congress and not the President. These cases continued into the Rehnquist era. Thus, when Congress finally agreed to cede to the President the right to sign a bill into law, and then reject certain spending and tax provisions of which he disapproved, the Court held in *Clinton v. City of New York*[33] that the Line Item Veto Act was unconstitutional because the Constitution requires the President either to sign or veto an entire bill, and does not allow him to pick and choose among its provisions, even when authorized by Congress to do so.

C. THE REHNQUIST/ROBERTS ERA OF CONSERVATIVE ACTIVISM

Surely the most dramatic example of conservative judicial intervention during the time of Chief Justice Rehnquist was the decision that halted the recount in Florida and assured George W. Bush's election as President in 2000. In the case's three separate rulings, there are examples of both procedural and substantive activism. As to the former, the Court's initial (unanimous) decision, which was issued while the recount was still underway, told the Florida Supreme Court that the United States Constitution required that the Florida court rulings had to be based on existing state law and that the Court stood ready to enforce that requirement.[34] Next, after the Florida courts had issued another decision, the Court, this time by a vote of 5-4, ordered the recount stopped until the Court could hear the appeal by candidate Bush.[35] And third, after finding (7-2) that the recount procedures violated the Equal Protection Clause, the same 5-4 majority stopped the recount entirely.[36] In addition, three Justices would have found that the Florida Supreme Court had so far deviated from the existing dictates of that state's election laws in its order relating to the recount, that it had violated the constitutional provision that had been the focus of the first round in the Supreme Court.[37] Despite, or perhaps because of, its unique significance to the outcome of the 2000 election, none of the rulings in *Bush v. Gore* has been followed to justify constitutional rulings in election law or other equal protection cases.

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[30] 424 U.S. 1 (1976).

[31] 462 U.S. 919 (1983).

[32] 478 U.S. 714 (1986).

[33] 524 U.S. 417 (1998).

[34] Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70 (2000).

[35] Bush v. Gore, 531 U.S. 1046 (2000).

[36] Bush v. Gore, 531 U.S. 98 (2000).

[37] *Id*. at 111-122.

Notwithstanding *Bush v. Gore,* political conservatives today generally oppose an expanded role for the federal government, including the federal courts. Beginning in 1938 the Court began upholding New Deal legislation, instead of striking it down. Since then, Congress has increasingly relied on the Commerce Clause to sustain power in areas that once had been thought the exclusive province of the states. That trend continued unabated until 1995 when the Court in *United States v. Lopez*,[38] held that the federal law that made it a crime to have a gun in, or in close proximity to, a school exceeded Congress' power under the Commerce Clause. A similar fate befell the Violence Against Women Act in *United States v. Morrison*,[39] when the Court found that Congress had no authority to outlaw violent acts against women where there was no direct connection to interstate commerce. The Court seemed to back off somewhat from this approach when, in *Gonzales v. Raich*,[40] it upheld the power of Congress to use the Commerce Clause to extend the prohibition against the sale of marijuana to individuals who grow it for their personal use, in that case to relieve pain that responded only to marijuana.

The attack on Congress' reliance on the Commerce Clause continued in *Natl. Fed'n of Indep. Bus. v. Sebelius*,[41] in which five Justices concluded that the individual mandate in the Affordable Care Act could not be sustained under that constitutional provision because they concluded that Congress was attempting to regulate "inactivity"—the failure to obtain health insurance—whereas its power only extended to regulation of "activity." Nonetheless, the mandate was sustained as a proper exercise of the taxing power, with the Chief Justice writing the opinion that was joined by the four dissenting Justices on the Commerce Clause portion. I leave for Part II the issue of whether finding the Commerce Clause to be insufficient to sustain the mandate is an example of appropriate judicial activism, but the Chief Justice's insistence on opining on the Commerce Clause issue, when he also concluded that the mandate could be upheld on another basis, is at least a form of procedural activism by reaching out to pass on a question of constitutional law that did not affect the outcome of the case before the Court. It is too early to know for certain, but given the uniqueness of the mandate and the clear commercial aspects of most areas of congressional regulation, the impact of this ruling is likely to be rather modest, making it all the stranger that the Chief Justice joined it.

Other efforts by the Court to limit federal power based on other parts of the Constitution have had more lasting impacts. In one set of rulings, the Court expanded its interpretation of the Eleventh Amendment, which prohibits certain kinds of lawsuits against states in federal courts. In doing so, it overrode the power of Congress under the Commerce Clause and other parts of the Constitution to enact laws enabling private parties to sue states, including state universities and other state-created institutions that are not part of the state governance structure, for money damages for violating federal laws.[42] In one case, *Alden v. Maine*,[43] it found that an Eleventh Amendment-like immunity applied to cases based on federal law that were filed in state court, even though the Amendment speaks only of federal courts. In two other

[38] 514 U.S. 549 (1995).

[39] 529 U.S. 598 (2000).

[40] 545 U.S. 1 (2005).

[41] 132 S. Ct. 2566 (2012).

[42] Seminole Tribe v. Florida, 517 U.S. 44 (1996); Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1979).

[43] 527 U.S. 706 (1999).

significant cases, the Court reached similar results, using the Tenth Amendment to limit in one case, the power of Congress to require states to engage in certain conduct regarding the disposal of nuclear waste materials[44] and to control the sale of firearms in the other.[45] And when Congress tried to rely on its remedial authority under section 5 of the Fourteenth Amendment to apply the Violence Against Women Act against non-state defendants, the Court rejected that argument, narrowly construing that power and declaring the law unconstitutional.[46]

Two recent decisions of the Roberts Court overturned federal statutes based on constitutional infirmities in the manner in which Congress exercised its powers. The first involved another provision of the Affordable Care Act, in which Congress offered states the opportunity to expand the coverage of state Medicaid programs, with the federal government paying at least 90% of the added cost. If a state chose not to accept the offer, it would have lost all of its existing Medicaid funding, a condition that seven Justices found unacceptable for Congress to impose on the states.[47] Again, as with the mandate, a majority of the Court, in an opinion written by the Chief Justice, found the condition to be severable from the expansion, allowing the expansion to continue on an optional basis.

There was no saving the law in another major Roberts Court decision striking down a federal statute. In *Shelby County, Ala. v. Holder*,[48] the Court held that Congress had exceeded its powers in creating the formula determining which states and local jurisdictions have to obtain pre-clearance of changes in their elections laws and rules. The 5-4 majority opinion written by the Chief Justice overturned Congress' nearly-unanimous 2006 judgment re-enacting that formula because, the Court said, Congress had failed to take into account substantial changes in the ability of African-Americans and other minorities to exercise the right to vote in an effective manner. The majority was willing to second-guess Congress, despite the Fifteenth Amendment, which outlaws racial discrimination in voting and gives Congress the express power "to enforce this provision by appropriate legislation."

In the area of campaign finance reform, in which both Congress and the states have attempted to place limits on the influence of money in elections, the Court has placed major roadblocks in their way. This began in 1976 with *Buckley* where, in addition to its Appointments Clause ruling, the Court also struck down the limits on the amounts that candidates could spend of their own money to run for office, the caps on the total amount from all sources that a candidate could spend, and the limit that an individual could spend—independently of a candidate—to support or oppose a candidate for elected office.[49] Although *Buckley* upheld the government's right to limits on how much a individual may contribute to a candidate for office, the Court in subsequent cases has made it more difficult to sustain some lower limits based on a concern that restricting the size of contributions too far makes it too difficult for candidates to run for office, especially when they are opposing an incumbent.[50] On the other hand, the

[44] New York v. United States, 505 U.S. 144 (1992).

[45] Printz v. United States, 521 U.S. 898 (1997).

[46] United States v. Morrison, 529 U.S. 598 (2000); Kimmel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

[47] Natl. Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

[48] 133 S.Ct. 2612 (2013).

[49] Buckley v. Valeo, 424 U.S. 1 (1976).

[50] Randall v. Sorrell, 548 U.S. 230 (2006).

Court in *Caperton v. A. T. Massey Coal Co.*,[51] overturned a state supreme court ruling as a violation of due process, where a judge who successfully ran in an election for a seat on that court had been the beneficiary of more than $3 million in election-related support from the president of one of the parties, and then had cast the deciding vote in favor of that party.

The award for the most activist ruling in this area goes to the majority in *Citizens United* where the Court held that for-profit corporations have a First Amendment right to make independent expenditures to support or oppose a candidate for office. The decision overturned a law that had been in effect since 1947 that specifically forbad corporations and unions from using their treasuries to make independent expenditures in federal elections, as well as numerous state laws that applied to all kinds of elections, including those for state court judges.[52] Two years later, the Court effectively closed the door on public financing of elections as a means of softening the impact of *Citizens United*, by ruling that Arizona's law that provided additional funding to candidates who chose public financing if their opponent and his or her supporters significantly out-spent the candidate, violated the First Amendment.[53]

The Roberts Court also intervened to upset decisions made by state and local officials who were trying to deal with the difficult remedial problems that remained when the formal segregation that preceded *Brown* had ended. The efforts of the Seattle and Louisville public schools to assure a modest level of integration and equal opportunities for all students were found constitutionally infirm in *Parents Involved in Community Schools v. Seattle School Board No. 1*,[54] with at least four Justices prepared to hold that any race-conscious method of assigning students violated equal protection. Similar rulings were also made in other areas involving laws that set aside a certain percentage of government contract work for historically disadvantaged minorities[55] or gave a modest assist to minorities seeking admission to a state university.[56]

The most recent area where the Court reached an arguably activist result, which liberals decried and conservatives applauded, was in *District of Columbia v. Heller*.[57] There the Court struck down a law that banned the private possession of handguns, including in the home, on the ground that the statute violated an individual right to bear arms contained in the Second Amendment. And in *McDonald v. City of Chicago*,[58] the Court extended that ruling to apply to all state and local laws regulating the use of firearms.

Another example of "conservative judicial activism" can be found in the dissent of Chief Justice Roberts, joined by Justices Scalia and Alito in *Armour v. City of Indianapolis*.[59] The majority upheld the City's statutory scheme providing for more favorable treatment for small taxpayers who had not paid their assessments in full, whereas the dissent would have found the law to violate the equal protection rights of those mainly more wealthy taxpayers who had fully paid their assessments.

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[51] 556 U.S. 868 (2009).

[52] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

[53] Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011).

[54] 551 U.S. 701 (2007).

[55] Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

[56] Gratz v. Bollinger, 539 U.S. 244 (2003).

[57] 554 U.S. 570 (2008).

[58] 130 S. Ct. 3020 (2010).

[59] 132 S. Ct. 2073 (2012).

Even in the Roberts Court, the conservatives are not always able to prevent liberal judicial activism, most recently in *United States v. Windsor*.[60] There the 5-4 majority, led by Justice Kennedy, relying on both due process and equal protection rationales, set aside DOMA, which denied same-sex couples who were legally married under state law the rights (and obligations) that opposite-sex married couples had under more than 1100 federal laws.

III. A THEORY OF APPROPRIATE JUDICIAL ACTIVISM

No one who has given the matter any serious thought contends that the Court should never overturn decisions made by the political branches. Aside from having to reverse *Marbury* and more than 200 years of Supreme Court jurisprudence, most people are comfortable with the Court playing some role as a check on the other branches. The hard question is determining the circumstances in which that role is legitimate. The only determinate that is clearly wrong is whether one agrees with the outcome of the decision on the merits. That does not mean that if there is a clear violation of the Constitution, that fact may not properly play a part in the Court deciding to reach the merits. If there is such a clear violation, the Court is expected to step in and perform its checking function. But when the violation is less clear, we need guideposts to inform the Court as to when intervention is appropriate and, once a decision is made to decide an issue, what deference should be given to the legislature that wrote the law being challenged.

I begin with the proposition that the Constitution, including the Bill of Rights and the Civil War Amendments, was enacted to provide a baseline for the structural protections that would assure a working democracy and as a guard against intrusions on important liberties. The Framers were aware that temporary majorities might enact laws inconsistent with these basic protections, and the Constitution was set up as a bulwark against such actions. And, as established by *Marbury*, the Court is there to enforce the Constitution and preserve those basic rights.

Of course, virtually every time Congress acts, some person or interest is harmed in some way and in theory could make claims based on denials of due process or equal protection. But if the courts were to evaluate all such claims by re-balancing the interests that the legislature considered, they would become, in effect, super-legislatures, which is decidedly not the role that the Framers envisioned for them. The trick is to figure out when the general rule of deferring to the legislature should not apply, and the Court should actively seek to protect the right being asserted.

One part of the answer is found in famous footnote 4 in *Carolene Products,* where the Court embraced the notion of judicial activism (although not in those terms) to protect the rights of discrete and insular minorities.[61] Justice Brennan, in his opinion in *Kramer v. Union Free School District*,[62] made a similar point in advocating a heightened standard of review (which often is the technique used to effectuate judicial activism). In rejecting deference to the legislature, the *Kramer* Court observed that a relaxed standard is "based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no

[60] 133 S. Ct. 2675 (2013).

[61] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[62] 395 U.S. 621 (1969).

longer serve as the basis for presuming constitutionality."[63] Thus, when there is reason to believe that the normal functioning of government has broken down and the rights of the challengers were not protected, often because they were not adequately represented in the legislature for one reason or another, the case for judicial intervention is much stronger.

Those points are correct, but I would frame the issue more broadly than simply in terms of protecting the rights of minorities or others who are not full participants in the political process. I would also look to other structural impediments that might explain why the challenged law favors one outcome over another and/or why the current advantage is unlikely to change, absent court intervention. Moreover, these principles are not intended to provide a litmus test for appropriate interventions that can be mechanically applied to tell courts what they should and should not do, but are factors that the Court should consider in deciding whether the situation is an appropriate one for judicial activism. Whether these general propositions are useful and produce sensible results can only be assessed by applying them to the cases discussed above, a task to which I now turn.

Let us begin with *Brown*, which no one cites as an example of inappropriate judicial intervention, because it is undisputed that if the Court had not stepped in, the offending jurisdictions would not have abolished school segregation on their own. Even if all the blacks in those states had voted to elect legislators pledged to end segregation (which most of them could not do because of discriminatory voting laws), those votes coupled with the modest number of white voters who would have supported that change would never have come close to altering the law. Thus, it was the Court or no one, in an area of law where the Constitution included specific protections for racial minorities, albeit not ones speaking directly to school segregation.

Years later, the situation was reversed, and whites were asking the Court to step in to prevent what they called reverse discrimination by government entities that were favoring black applicants over them. These were not instances where black majorities were protecting members of their race the way that the South protected white school children before *Brown*. Rather, these cases mainly involved majority white-controlled entities that were trying to make up for decades or more of discrimination.[64] Whether such efforts were misguided or inartfully done, there was no basis to conclude that there were structural flaws in the process that led to the under-representation of the white majority. The only way in which it might have been argued that democracy was being undermined was that some, but not all, of these minority preferences were done outside the public view, by unelected and arguably unaccountable state officials, as evidenced by the fact that the details of these practices only became known after litigation had been brought. Thus, under one theory of democratic accountability, the Court might be suspicious of decisions advantaging one group at the expense of another, made in secret outside the legislative arena, although that was not the basis on which the Court stepped in to set aside those efforts at affirmative action. More importantly, however, the Seattle and Louisville school cases involved open processes, in which the entire communities were involved in decisions that evolved over time and attempted to be as responsive as possible to all affected parties. Given the hard choices that had to be made to balance all the relevant interests, it is difficult to conclude that the invocation of a principle of colorblindness that a majority of the Court there

[63] *Id*. at 628.

[64] Gratz v. Bollinger, 539 U.S. 244 (2003); Adarand Constructors, Inc., v. Pena, 515 U.S. 200 (1995).

found in the Equal Protection Clause was little more than a substitution of its judgment for that of the local officials and citizens.

As discussed above, a second area of judicial activism in the Warren Court era was protection of the rights of those accused of crimes. Many in that group were minorities, but neither the excesses on which the Court focused, nor the nature of its rulings, were so limited. On the other hand, while defendants in criminal cases are, like all citizens, represented by their elected officials, they are not part of an organized group (and surely have no lobbying presence) and, at least in the United States, candidates win elections by being tough on crime, not on protecting the rights of the accused. While it is legitimate to object to some of the specific rulings, there is a strong argument that unless the Court enforced the Bill of Rights for those charged with crimes, no other entity would do so. That is especially so where the death penalty was being used to punish those whose crimes were very serious, but not of the kind that differentiated them from others whose lives were spared for reasons unrelated to the specifics of their offense or criminal history.

Much the same analysis supports the Court's intervention in the school prayer cases. Indeed, the number of children or parents who objected, let alone actively opposed religious practices in public schools, was very small. If they had attempted to make their voices heard in the legislature (or school board), they would certainly have been defeated. Starting with the premise that the First Amendment's Establishment Clause was intended to protect against government intrusion of religion on the unwilling, those students seem like the kind of discrete minority that activism should protect.

The sexual privacy cases raise somewhat different considerations or, at the very least, are more complicated. The laws on contraceptives were based in part on the strongly held religious views of segments (sometimes majorities) in some, but not all states. The states that still had them were in an ever decreasing minority, and there was reason to believe that they were rarely if ever enforced. Moreover, there was no indication that legislative change was out of the question, although surely not without difficulty.

For the abortion laws, the legislative picture was less favorable. Most states had laws significantly restricting the availability of abortions, and while there had been some movement in some places, resistance was high, and in many cases unlikely to happen outside of court. Moreover, the women who needed abortions were often young and unsophisticated in influencing public policy, and almost invariably wanted to be out of the public eye, as shown by the fact that the lead plaintiffs in the cases that struck down the limits on abortion were Jane Roe and Mary Doe. Even doctors who were willing to perform abortions were not numerous, and organizations like Planned Parenthood had strong supporters, but not in great numbers. At least as to those laws that banned all abortions, with no or very limited exceptions (such as only to save the life of the mother), the case for intervention was a reasonable one. The actual decision was seen as problematic both by the limited textual basis in the Constitution for the ruling and by the scope of the decision that not only struck down the absolute bans, but, in effect, set up a regulatory regime to cover all abortions.[65]

[65] Recent scholarship has undermined previously made claims that positive change in abortion laws was well underway, and hence that Roe was unnecessary for that reason. *See* LINDA GREENHOUSE & REVA SIEGEL, BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING (2010).

The same-sex sodomy case, *Lawrence v. Texas*,[66] involved a set of circumstances different from the other sexual privacy cases in terms of the justifications for judicial activism. By 2006, just 13 states still had sodomy laws, with only four applying them only to same-sex conduct.[67] But it seemed unlikely that those states that retained those laws would change them. Moreover, gays and lesbians have always been the kind of minority that the Constitution has sought to protect, and in this case, Texas had chosen to enforce its criminal law against two consenting males. Coupled with the fact that, as dissenting Justice Clarence Thomas put it, despite his view that the law was constitutional, he would have voted against it because it was "uncommonly silly,"[68] the Court's judicial activism in setting aside the conviction seems justified.

The separation of powers cases involve different considerations because there is no one, either as a class or otherwise, that is likely to be a pre-determined loser in most separation of powers battles. To be sure, in *Chadha* the only people who could be harmed by the legislative veto were immigrants who were seeking an exception from deportation, and in the line item veto case, those who were harmed were those whose funding was denied by the President. But the legislative veto operated broadly across the government, and it was only by chance (and because Mr. Chadha had standing to contest it) that the victim of the veto that went to the Court was a member of a discrete minority. Similarly, the City of New York, which was the plaintiff in the case that set aside the line item veto, does not fall into the *Carolene Products* category, nor would the vast majority of others whose funding might have been subjected to a line item veto, particularly since they had enough clout to persuade Congress to insert the line item that was the subject of a presidential veto.

The Appointments Clause problem in *Buckley* and the legislative veto exercised in *Chadha* were objectionable because they increased the power of Congress generally (and not just those in the majority) at the expense of the Executive. Congress was able to gain that advantage because those provisions were relatively minor parts of much larger laws that the President could not easily veto because of those objectionable features alone. Moreover, if those devices were upheld, Congress would have had every incentive to include similar provisions in most other laws granting executive power, at essentially no cost in its bargaining with the President or with others in Congress, since every member could be seen to benefit personally from their inclusion. Thus, the ability of those mechanisms to alter other structural protections that secure liberty and protect other values in the Constitution arguably made it essential for the Court to step in.

A similar analysis can explain the willingness of the Court in *Marbury* to find the law at issue there unconstitutional, although the Court did not explain its intervention in this way. Congress had assigned the Court original jurisdiction over a category of cases that was not provided for in the Constitution. That law was not an example of legislative self-aggrandizement since it was undisputed that Congress could have assigned those cases to other federal courts. Although the burden on the Court was hardly significant, if the Court declined to say that Congress had exceeded its power, there would be nothing to prevent Congress from assigning other cases, or for that matter, non-judicial duties to the Court that were inconsistent with its limited role provided by the Framers. Furthermore, if the Court did not take a stand, no other part of the Government would be likely to do so.

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[66] 539 U.S. 558 (2003).

[67] *Id*. at 573.

[68] *Id*. at 605.

Caperton is another case where necessity was an appropriate basis for judicial intervention. More than 30 states conduct elections for judges, including for their highest court. Many of those races involve substantial amounts of money spent by persons with a direct interest in the outcome of cases before the court, as was true in *Caperton* where a $50 million judgment hung in the balance. The judges who ran for office and sat on such cases could easily have issued rules precluding their participation in cases where a party had provided substantial financial support for their election. They had not done so, nor were they likely to change their practices because additional restrictions would directly affect their ability to retain their elected offices. Moreover, considerations of separation of powers at the state level are thought to limit the ability of some state legislatures to pass detailed rules regulating the conduct of judges. Thus, if the Supreme Court had not invoked due process to disqualify the affected judge, the practice of sitting on cases involving significant campaign contributors would have continued. This was also a case in which none of the Justices defended the practice; the only issue was whether the Court should have intervened in light of the admitted line-drawing difficulties that would arise in future cases.

The line item veto presented a different situation for judicial intervention because the veto power was one that the President wanted and was finally able to persuade Congress to give to him, not as part of other legislation in a tradeoff, but in an independent statute that Congress could have voted down with no collateral costs. Thus, the line item veto is not a case of one branch aggrandizing itself over the objection of the other, but of an inter-branch agreement to alter the power structure. Nonetheless, a six person majority in *Clinton v. City of New York*—comprised of liberals and conservatives, as well as strict constructionists and pragmatists—struck down the line item veto.[69] The Presentment Clause requires the President to sign or veto a bill as a whole, and not pick and choose among its parts. Thus, the result in *City of New York* may be justifiable because the majority saw the law as a clear attempt to do indirectly that which everyone agreed could not be done directly. And, if the Court did not step in, there was no one else to stop an arrangement that had the potential to alter the constitutional checks and balances in a significant way.

From an activism perspective, the portion of *Reynolds* that extended one man, one vote to the more populous state legislative body was only a small step from the justiciability decision in *Baker*, as applied on the merits to congressional districts in *Wesberry*. But extending that to both houses of all state legislatures was surely an act of insisting that the Court was the truer judge of democracy than were the authors of the numerous state constitutions and statutes that contained rather different principles for allocating seats in one of their legislative bodies. Nor can *Reynolds* be justified under the lock-in theory that persuaded the Court in *Baker* because the law governing the composition of the upper house in Colorado had been recently approved by a state-wide referendum.

Turning to conservative judicial activism under the Commerce Clause, it is the structural analysis that makes some of those interventions justified. Once the Court blessed the expanded powers of Congress under the Commerce Clause, the natural inclination, for which there is no obvious counter-balance, was for Congress to

[69] 524 U.S. 517 (1998) (Chief Justice Rehnquist and Justices Stevens, Kennedy, Souter, Thomas, & Ginsburg voted to overturn the law; Justices O'Connor, Scalia, & Breyer would have upheld it). A similar split between Justices generally labeled as liberals and conservatives was found in *Texas v. Johnson*, 491 U.S. 397 (1989), where Justice Scalia invoked the First Amendment to strike down the statute making flag-burning a crime, and Justice Stevens voted to uphold it.

assume the job of solving all of the nation's problems, using an expansive reading of the Commerce Clause to do so. Thus, if guns in the schools were a problem, or there was increased violence against women, Congress could feel good about stepping in and providing federal solutions. Even though the national government was supposed to be limited in its powers, the states, either on their own or through their two senators, were unlikely to object so long as the federal role supplemented state law and did not take away any state powers. Assuming that the reach of the Commerce Clause is broad, but not without some boundaries, the Court was probably justified to step in in those cases, especially where the government was unable to point to another example in which the commerce power would not be exceeded if the theory advanced by the government to support the law banning guns in schools or making violence against women a violation of federal law were upheld.

The Commerce Clause ruling on the Affordable Care Act raises different issues relating to the roles of Congress and the Court. Congress did not simply supplement state authority in the health care field, but overrode it by requiring virtually everyone to buy (obtain) health insurance or pay a penalty (tax) if they did not. But unlike cases in which states were indifferent to federal laws supplementing state laws, the states here, as well as their very vocal and in many cases powerful citizens and corporations, were fully able to assert their objections, but were out-voted in Congress. Thus, the majority could justifiably be accused of judicial activism in bailing out the states on a Commerce Clause argument that they were unable to persuade Congress to accept. Moreover, this is a situation in which no state acting alone could solve the problem of uninsured individuals who would inevitably need medical services and in which everyone agreed that Congress could have adopted a Medicare-for-all plan that would have been *more* invasive of the rights of states than the plan that was enacted.

One other factor should have, but did not, give the Court pause before finding that Congress had exceeded its Commerce Clause power. There was no doubt that Congress could have used the same powers that it exercised to create Medicare to achieve the same mandates, but neither it nor the President had the will to proceed in that manner. Moreover, no state had the power to enact such a comprehensive solution to our health care problems. But if limits on the Commerce Clause are intended to restrict federal power, it is a little odd, if not disingenuous, to object on federalism grounds to a law that Congress plainly could have enacted using another of its constitutional tools in Article I, Section 8, especially when that alternative would be more intrusive of the rights of states and individuals than the law that was actually passed.

The interventions under the Eleventh Amendment and Section 5 of the Fourteenth Amendment, however, are unjustified because the entities that they are protecting—the states—not only have the incentives to protect themselves, but have the ability to do so directly and through their senators. Indeed, if the issue were truly one of states' rights, or the overreaching of Congress, the states were perfectly capable of presenting a unified front on that matter of principle, even when they have significant differences on matters of substance. In a battle, for example, between states' rights and patient rights, there would seem to be no reason to believe that a fairer resolution would occur in the judicial branch than in Congress because of some structural or other imbalance. Similarly, if the states cannot persuade either house of Congress or the President that it is bad policy to apply age discrimination laws to them and to make them pay money damages when those laws are violated, the states should not be able to call on the Court to rescue them.

In the campaign finance area, the Court's conservative activism seems justified in some cases, but decidedly not in others. On the one hand, the decision to overturn

spending ceilings by candidates is justifiable, if not compelled, by the concern that those limits may have been enacted by incumbent legislators more concerned with protecting their jobs from challengers than in achieving other goals that supposedly justify those laws. As long as the Court continues to uphold statutory limits on the amounts that individuals may contribute to candidates, political committees, and parties, the Court's intervention on spending limits will not destroy the anti-corruption check that Congress sought to achieve with contribution limits. Furthermore, as a practical matter, contribution limits create a supply-side cap on what can be spent because of the real world limits on how much can be raised. The fact that these rulings have been joined by both liberals and conservatives relieves some unease about what is surely a form of second-guessing the political branches.

On the other hand, the decision in *Citizens United* that eliminated all restrictions on for-profit corporations making independent expenditures in all elections cannot be justified under any theory of necessity. Surely, for-profit corporations are not the kind of minority that is frozen out of the political process, nor have they been asking, without success, for Congress and the legislatures of the 26 states that had similar laws to change them so that they could participate more fully in elections. The law at issue in *Citizens United* still allowed corporations to form, administer, and pay for many of the operating expenses of their own political committees that can solicit from corporate officers and stockholders. Moreover, there are no structural impediments to change that stood in the way of amending the law—other than a clear disagreement by a majority of both Houses of Congress that our electoral processes needed more money from business corporations. Thus, on a scale of 1 to 10 in unjustified judicial activism, *Citizens United* is probably a 9, if not higher, and that is without considering the many ways that the Court could have avoided deciding this issue in that case and left it for another day when it was squarely presented and had been fully addressed in the lower courts.

Many of those who support the decision in *Citizens United* criticize the Court for its ruling in *Kelo v. City of New London*.[70] The City there decided to develop property in an effort to revitalize the downtown area and thereby reduce unemployment and augment tax revenues. To carry out its plan, it exercised its statutory powers of eminent domain over 11 houses whose owners declined to accept the City's offer to purchase, not because the price was inadequate, but because they did not want to move. When the City went to court, the homeowners resisted on the ground that the use to which their land was to be put was not a "public purpose" for which a taking was proper under the Constitution. The Supreme Court disagreed (5-4), and the immediate public reaction was by and large in favor of the homeowners and against the City, especially among those who call themselves conservatives.

If the definition of a judicial activist is a judge who overturns the judgments of duly elected officials, then *Kelo* is a clearly *not* a case of judicial activism because the majority allowed the decisions made by elected officials to stand. Moreover, the decision to permit the use of eminent domain for these general purposes, as well as its specific use in this case, was controlled by applicable state law, and this use was specifically approved by state and local officials. As the majority opinion made clear, the taking was proper only because the state had specifically authorized it for this very purpose: if Connecticut citizens and lawmakers think this is unwise, said the majority, they can change it tomorrow. Furthermore, there is no indication that this is a

[70] 545 U.S. 469 (2005).

situation in which a majority was taking advantage of a minority, particularly because the City was required to pay fair value for all the property that was condemned. Indeed, if the Court had gone the other way, *that* would have been an example of extreme judicial activism.

To some, the Court's decision in *Heller* that the Second Amendment creates an individual right to bear arms, unrelated to any connection with a militia, and that the law in question violated that right is a prime example of judicial activism. On the main issue, I disagree. Surely, the Court had to decide the meaning of the Second Amendment when the plaintiff had applied for a gun permit and was denied it based solely on a law that the plaintiff alleged was unconstitutional, relying on specific language in the Constitution that was directed at government control over firearms. The Court can be faulted for having misinterpreted the Second Amendment, but that is a dispute on the merits, and no one should be called a judicial activist over a difference of opinion alone.

However, the second part of *Heller* is in a different category. The issue there was whether the District's laws interfered with the right to bear arms, as the majority had defined it. Although the court of appeals and the parties did discuss that question, the main focus in the case had been the basic interpretive question about the Second Amendment. The District Court had dismissed the complaint without reaching the second question, and there was no evidence offered on the actual operation of the laws, including two provisions that seemed to impose further use restrictions on anyone who possessed any firearm. Nonetheless, the majority simply declared that this law went too far and declined to give any weight to the fact that the ban applied in an urban setting, where handguns and crime were a serious problem, and that the elected representatives had concluded that the ban was essential for public safety. Neither the plaintiffs nor their supporters, such as the National Rifle Association and other pro-gun groups, claimed that they were powerless, although they sought to portray themselves, probably correctly, as part of a small minority of District of Columbia residents who opposed the law. Moreover, given the power of Congress to impose virtually any condition on the District, including the ability to override any law that the District passed, the Court should have at least paused and asked why plaintiffs had not gone to Congress asking it to soften the law, before coming to Court and asking the judiciary to second-guess the judgment of the elected officials in the District. The bottom line for those conservatives who generally decry judicial activism is that they should have been quite troubled by the lack of deference that the Court showed to the elected officials who had enacted the law set aside in *Heller*, and yet only a few expressed opposition, almost certainly because the majority of self-described anti-activists liked the result that the Court reached there.

Finally, the decision in *Windsor* is an example of "liberal judicial activism," but was it appropriate?[71] The plaintiffs and the United States argued that gays and lesbians were the kind of disfavored minority that should be accorded special protections when challenging laws that disfavored them. The majority did not go that far, but the same history of discrimination that would support heightened scrutiny, as well as the very high hurdle that would have had to be overcome to repeal DOMA, coupled with

[71] I leave aside the issue of whether there was Article III standing to appeal where the defendant agreed with the plaintiff that the law was unconstitutional, and three dissenters argued that the Court improperly reached out to decide the merits. Although I believe that the majority was correct on that score, if there was "activism," it was of a different kind than I have addressed here because there was no legislative judgment on the issue of standing, and the House, as a participant, urged the Court to reach the merits.

the minimal federal interest in treating same-sex married couples less favorably others, justified the Court in striking down this law. The fact that a number of states had eliminated the differing treatment of same and opposite-sex marriages and that Congress had repealed Don't Ask Don't Tell suggested that gays and lesbians were much less disfavored than once was true. Indeed, those changes may have been partially responsible for the Court's unwillingness to reach the merits of California's Proposition 8 that made marriage unavailable to same-sex couples, where that ruling would be likely to affect every state and not just California. But on balance, the Court's modest activism on DOMA seems appropriate, as does it decision to put off to another day the validity of state laws barring same-sex marriages.

IV. CONCLUSION

There are some who say that judicial activism, like beauty, is in the eye of the beholder. I disagree. I also disagree with those who imply that any decision with which they disagree is an example of judicial activism, or that a Court is acting improperly in any case in which it overturns a judgment of elected officials. The Constitution is an important protection, but it should not be employed to answer every disagreement about the advisability of a law. This Issue Brief attempts to establish some principles for when judicial activism is and is not appropriate. For those who disagree, I await their responses, hopefully with examples from both ends of the political spectrum.

The Behavior of Supreme Court Justices When Their Behavior Counts the Most*

Geoffrey R. Stone**

In *The Behavior of Federal Judges*, Lee Epstein, William Landes and Richard Posner offer an illuminating analysis of judicial decision making. In light of my own interest in constitutional law, I was particularly intrigued by Table 3.2, which ranks the justices who have served on the Supreme Court since 1937 in terms of the percentage of "conservative" votes they cast in several different types of cases. The column in Table 3.2 that is most interesting to me is the one dealing with cases involving what the authors term "adjusted civil liberties," which focuses on decisions most likely to reflect ideological differences among the justices in the domain of constitutional law.

That Table made me especially curious about the behavior of the justices who have served on the Court in recent years—specifically, about the behavior of the thirteen justices who have served on the Court since 2000. According to conventional wisdom, five of these justices (Alito, Rehnquist, Roberts, Scalia and Thomas) are generally thought to be very conservative; two (Kennedy and O'Connor) are generally thought to be moderately conservative, and six (Breyer, Ginsburg, Kagan, Sotomayor, Souter and Stevens) are generally thought to be moderately liberal.

Table 3.2 bears out this conventional wisdom. The very conservative justices cast an average of 83.3 percent of their votes in "adjusted civil liberties" cases for what Epstein, Landes and Posner deem the "conservative" position, the two moderately conservative justices cast an average of 69.9 percent of their votes in support of the "conservative" position, and the moderately liberal justices cast an average of only 26.7 percent of their votes for the "conservative" position. (The "moderately liberal" justices are not "very liberal" because there is a significant group of justices, including Black, Brennan, Douglas, Fortas, Goldberg, Marshall, Murphy and Warren, who have more "liberal" scores in Table 3.2 than any of the more recent "liberal" justices.)

In thinking about these data, I grew especially curious about two questions. First, to what extent might these figures—which reveal considerable polarization within the Court—actually *understate* the degree of polarization in the *most important* constitutional cases? Second, what does any of this tell us about the distinction between judicial activism and judicial restraint, which is often seen as central to the difference between "liberal" and "conservative" judicial approaches to constitutional interpretation?

I. THE MOST "IMPORTANT" CASES

I asked several of my professional colleagues, (without telling them why I was asking) to identify what they thought to be the most important constitutional decisions

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since 2000. I then culled from their lists the twenty decisions that received the most "votes." These twenty decisions range across a broad spectrum of constitutional issues, including the 2000 presidential election, gun control, voter disenfranchisement, affirmative action, search and seizure, abortion, habeas corpus, due process for persons suspected of terrorism, takings of private property, the death penalty, campaign finance regulations, the freedom of religion, the rights of gays and lesbians, and the Commerce Clause.

The twenty cases are, in chronological order:

- *United States v. Morrison*, invalidating the federal Violence Against Women Act;[1]
- *Bush v. Gore,* invalidating the actions of Florida in the 2000 presidential election;[2]
- *Zelman v. Simmons-Harris,* upholding school vouchers for students attending parochial schools;[3]
- *Lockyer v. Andrade*, upholding denial of habeas corpus for a challenge to a "three strikes" law;[4]
- *Grutter v. Bollinger*, upholding an affirmative action program in higher education;[5]
- *Lawrence v. Texas*, invalidating a law prohibiting same-sex sodomy;[6]
- *Hamdi v. Rumsfeld*, invalidating a law denying U.S. citizens the right to challenge their detention as alleged enemy combatants;[7]
- *Roper v. Simmons*, invalidating a law authorizing the death penalty for crimes committed by minors;[8]
- *McCreary County v. American Civil Liberties Union*, invalidating the display of the Ten Commandments in a county courthouse;[9]
- *Kelo v. City of New London*, upholding a redevelopment plan that affected property rights;[10]

1 529 U.S. 598 (2000).
2 531 U.S. 98 (2000).
3 536 U.S. 639 (2002).
4 538 U.S. 63 (2003).
5 539 U.S. 306 (2003).
6 539 U.S. 558 (2003).
7 542 U.S. 507 (2004).
8 543 U.S. 551 (2005).
9 545 U.S. 844 (2005).
10 545 U.S. 469 (2005).

- *Hamdan v. Rumsfeld*, invalidating the military commissions set up for Guantanamo detainees;[11]

- *Gonzales v. Carhart*, upholding a law prohibiting "partial-birth abortion;"[12]

- *Parents Involved in Community Schools v. Seattle School District No.1*, invalidating the use of race to create greater integration in public schools;[13]

- *Crawford v. Marion County Election Board*, upholding a law requiring voters to provide photo IDs in order to vote;[14]

- *Boumediene v. Bush*, invalidating a law denying habeas corpus to Guantanamo detainees;[15]

- *District of Columbia v. Heller*, invalidating a law regulating guns;[16]

- *Citizens United v. Federal Election Commission*, invalidating a law limiting the amount corporations could spend in political campaigns;[17]

- *National Federation of Independent Business v. Sebelius*, upholding the Affordable Care Act of 2010;[18]

- *Shelby County v. Holder*, invalidating a provision of the Voting Rights Act of 1965;[19] and

- *United States v. Windsor*, invalidating the federal Defense of Marriage Act.[20]

To determine whether each of these cases was decided in a "liberal" or a "conservative" manner, I undertook another informal survey. Without disclosing what I was up to, I gave several of my non-lawyer acquaintances a list of the laws at issue in each of these twenty cases and asked them whether they thought a conservative *legislator* would be inclined to support or oppose each of the challenged laws. As it turned out, their judgments were quite uniform.

I then compared their assessments of how a conservative legislator would vote on each of these laws with the actual votes of the justices on the *constitutionality* of those same laws. I counted as a "conservative" vote one that either upheld a law that a conservative legislator would support or that invalidated a law that a conservative legislator would oppose. I counted as a "liberal" vote one that either upheld a law that

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[11] 548 U.S. 557 (2006).
[12] 550 U.S. 124 (2007).
[13] 551 U.S. 701 (2007).
[14] 553 U.S. 181 (2008).
[15] 553 U.S. 723 (2008).
[16] 554 U.S. 570 (2008).
[17] 558 U.S. 310 (2010).
[18] 567 U.S. --- (2012).
[19] 570 U.S. --- (2013).
[20] 570 U.S. --- (2013).

a conservative legislator would oppose or invalidated a law that a conservative legislator would support.

The results were striking. The six moderately liberal justices voted for the "liberal" policy position 97.5 percent of the time (seventy-eight of eighty votes—Justice Stevens jumped ship in *Hamdi* and *Crawford*). The five very conservative justices voted the conservative line 98.5 percent of the time (sixty-seven of sixty-eight votes—Chief Justice Roberts broke ranks in *Sebelius*). Thus, in the twenty most important constitutional cases decided since 2000, these eleven justices cast 145 of 148 votes in a manner that tracked the presumed policy preferences of conservative and liberal legislators. Put simply, they voted in what seems to have been an ideologically result-oriented manner 98 percent of the time.

What, though, of the all-important "swing" justices—Sandra Day O'Connor and Anthony Kennedy? Predictably, given their characterization as "moderately conservative," they cast twenty of their thirty-one votes in line with the presumed policy preferences of conservative legislators and joined the very conservative justices 64.5 percent of the time. (O'Connor voted with the moderate liberals in *Grutter*, *Lawrence, Hamdi*, and *McCreary*; Kennedy voted with the moderate liberals in *Lawrence, Kelo, Hamdi, Hamdan, Boumediene*, *Roper and Windsor*). Kennedy voted with the very conservative justices in thirteen of the twenty cases, or 65 percent of the time; O'Connor voted with the very conservative justices in seven of eleven cases, or 64 percent of the time.

When all the dust settled, then, from 2000 to 2013 both the very conservative justices and the moderately liberal justices were in the majority in ten of the twenty cases. Because the two swing justices were relatively conservative, however, the ten liberal victories tended to be more narrowly crafted decisions that were often more important for their *rejection* of the positions put forth by the very conservative justices than for their embrace of more liberal visions of constitutional law.

II. DECIDING THE MOST IMPORTANT CASES

What are we to make of all this? Based on this informal study, it seems clear that the justices are much more likely to embrace what appear to be ideologically-determined results in the more important constitutional cases than in more routine ones. Extrapolating from the data in Table 3.2, it seems that, on average, the very conservative justices and the moderately liberal justices agree in constitutional cases approximately 32 percent of the time. But in the *most important* constitutional cases, the very conservative justices and the moderately liberal justices agree less than 3 percent of the time.

This suggests two closely-related and fairly obvious observations: First, the justices are much more polarized along ideological lines in the most important constitutional cases. Second, the justices appear to vote in a much more result-oriented manner in the most important constitutional cases.

Why are these patterns so much more pronounced in the Court's most important decisions? One possibility is that the most "important" cases are thought to be most important, not because the stakes are especially high, but because they pose novel issues that are not governed by any clear precedents. Certainly, in such cases we might reasonably expect the justices to be more likely to fall back on their own personal predilections, values and preferences. That, in turn, might produce a much higher than usual degree of result-orientated decision making and ideological polarization.

This seems a plausible factor in at least some of the twenty cases. In *Bush v. Gore* and *Hamdan v. Rumsfeld*, for example, there were no clearly governing precedents to constrain the justices. But this was not the situation in many of the other cases. In *Citizens United* and *Gonzales v. Carhart*, for example, there were clear governing precedents, but that failed to constrain at least some of the justices' seeming determination to reach their preferred outcomes.

Another and more convincing explanation for the voting pattern in these twenty cases is that the same factors that led my panel of experts to identify these decisions as especially important also led the justices themselves to care deeply—perhaps too deeply—about reaching the "right" result. It goes without saying, of course, that judges should want to reach the "right" result. But if the results they reach seem explicable primarily in terms of their own policy preferences, rather than in terms of some consistent and principled theory of constitutional adjudication, then there is clearly reason for concern.

Put simply, the extraordinarily high correlation between the votes cast by the justices in these cases and their presumed policy preferences as individuals seems to raise serious questions about their willingness or ability to "apply the law" in a principled, fair-minded, and objective manner, especially when they care deeply about reaching particular outcomes that conform with their own policy preferences.

III. PRINCIPLED EXPLANATIONS?

But this may be too cynical. Perhaps the voting pattern in these cases can be explained in terms of a principled theory of constitutional interpretation—a theory that just happens to produce outcomes that comport with the justices' own presumed policy preferences. Of course, given the dramatically different results reached in these cases by the very conservative justices, on the one hand, and the moderately liberal justices, on the other, there must be at least *two* quite distinct theories of constitutional interpretation, employed by these two quite distinct sets of justices, to justify and explain their votes in a principled manner. Do such theories exist?

A. JUDICIAL ACTIVISM V. JUDICIAL RESTRAINT

This brings me to the second issue I want to address, which concerns the distinction between judicial activism and judicial restraint. Because none of these twenty cases presented an "easy" question, as demonstrated by the sharp divisions within the Court, it seems clear that in each case a reasonable argument could be made for the constitutionality of the challenged law. That being so, it seems sensible to conclude that every decision that invalidated the challenged law in these cases can be characterized as an example of "judicial activism." This is, of course, an imperfect definition, but it seems a reasonable use of the concept for this particular set of cases.

The first thing worth noting is that the Court invalidated the challenged law in fourteen of the twenty cases, or 70 percent. The Court in these cases was therefore quite aggressive, rather than deferential, in its analysis of these issues. This is not surprising, because, on average, decisions are more likely to be thought "important" when the Court holds a law unconstitutional than when it upholds a law. Thus, the relatively high degree of judicial activism in these cases may be more the product of the label "important" than of the more general disposition of the justices. On the other hand, we shouldn't make too much of this point, because almost all these cases were understood to be important even before the Court decided them. In most

instances, it was the issue, rather than the result, that made these cases at least presumptively "important."

Perhaps more interesting is the behavior of the three different groups of justices. The traditional understanding—that liberals are judicial activists and conservatives are committed to judicial restraint—would lead one to expect that the moderately liberal justices in these cases would have been the most activist, the moderately conservative justices would have been in the middle, and the very conservative justices would have been the most restrained.

Not so. In these twenty decisions, the moderately liberal justices cast 53 percent of their votes to invalidate the challenged law, the very conservative justices cast 53 percent of their votes to invalidate the challenged law, and the moderately conservative justices cast 76 percent of their votes to invalidate the challenged law. Thus, the very conservative justices were every bit as activist as the moderately liberal justices. Moreover, if one combines the very conservative justices and the moderately conservative justices, it turns out that the conservative justices as a group were appreciably *more* likely to take activist positions in these cases than the more liberal justices (60 percent to 53 percent). Thus, at least in the Court's most important recent constitutional decisions, the traditional understanding of how liberal and conservative justices behave is clearly belied.

Is there any *principled* theory of constitutional interpretation that might explain why these justices were activist in some cases, but not in others? What, if anything, can we discern from their voting patterns about their respective approaches to constitutional interpretation? As we have seen, the very conservative justices and the moderately liberal justices voted in direct opposition to one another more than 97 percent of the time. Although they were equally activist, they were activist on diametrically opposed issues.

The moderately liberal justices were activist in voting to strike down laws that restricted the rights of gays and lesbians (*Lawrence*, *Windsor*), restricted the rights of women (*Gonzales*), restricted the rights of religious minorities (*McCreary County*, *Zelman*), restricted the rights of persons accused of crime or terrorism (*Boumediene*, *Hamdan*, *Hamdi*, *Lockyer, Roper*), and restricted the right to vote (*Crawford*).

The very conservative justices were activist in voting to strike down the Voting Rights Act (*Shelby County*), the Violence Against Women Act (*Morrison*), the Affordable Care Act (*Sebelius*), laws restricting the right of individuals to own guns (*Heller*), laws restricting the right of corporations to spend unlimited amounts in the political process (*Citizens United*), laws restricting the rights of property owners (*Kelo*), laws promoting affirmative action and integration for African Americans (*Grutter*, *Parents Involved*), and laws that might have led to the election of Al Gore as president in 2000 (*Bush v. Gore*).

Is there any principled theory of constitutional interpretation that explains the justices' highly *selective* use of judicial activism in these cases?

B. OUR MODERATELY LIBERAL JUSTICES

Let me begin with the six moderately liberal justices—Breyer, Ginsburg, Kagan, Sotomayor, Souter and Stevens. Their votes in these cases reflect almost perfectly the theory of judicial review enunciated by Chief Justice Harlan Fiske Stone in 1938 in the Supreme Court's famous footnote 4 in *United States v. Carolene Products Co*.[21]

[21] 304 U.S. 144 (1938).

While burying the doctrine of economic substantive due process,[22] Chief Justice Stone at the same time suggested that "there may be narrower scope for operation of the presumption of constitutionality when legislation … restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" or when it discriminates "against discrete and insular minorities" in circumstances in which it is reasonable to infer that prejudice, intolerance or indifference might seriously have curtailed "the operation of those political processes ordinarily to be relied upon to protect minorities."[23]

This conception of *selective* judicial activism is deeply rooted in the original understanding of the essential purpose of judicial review in our system of constitutional governance. The Framers of our Constitution wrestled with the problem of how to cabin the dangers of overbearing and intolerant majorities. For example, those who initially opposed a bill of rights argued that a list of rights would serve little, if any, practical purpose, for in a self-governing society the majority could simply disregard whatever rights might be "guaranteed" in the Constitution. In the face of strenuous objections from the Anti-Federalists during the ratification debates, however, it became necessary to reconsider the issue.

On December 20, 1787, Thomas Jefferson wrote James Madison from Paris that, after reviewing the proposed Constitution, he regretted "the omission of a bill of rights."[24] In response, Madison expressed doubt that a bill of rights would "provide any check on the passions and interests of the popular majorities." He maintained that "experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State" that already had a bill of rights. In such circumstances, he asked, "What use … can a bill of rights serve in popular Governments?"[25]

Jefferson replied, "Your thoughts on the subject of the Declaration of rights" fail to address one consideration "which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent … merits great confidence for their learning and integrity."[26] This exchange apparently carried some weight with Madison.

On June 8, 1789, Madison proposed a bill of rights to the House of Representatives. At the outset, he reminded his colleagues that "the greatest danger" to liberty was found "in the body of the people, operating by the majority against the minority."[27] Echoing Jefferson's letter, he stated the position for judicial review, contending that if these rights are "incorporated into the constitution, independent tribunals of justice will consider themselves … the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be

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[22] *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905).

[23] 304 U.S. at 152 n.4.

[24] Thomas Jefferson to James Madison (Dec. 20, 1787), *in* JACK N. RAKOVE, DECLARING RIGHTS: A BRIEF HISTORY WITH DOCUMENTS at 154, 156 (Bedford 1997).

[25] James Madison to Thomas Jefferson (Oct. 17, 1788), *in* RAKOVE, DECLARING RIGHTS, *supra* note 24, at 160-162.

[26] Thomas Jefferson to James Madison (Mar. 15, 1789), *in* RAKOVE, DECLARING RIGHTS, *supra* note 24, at 165.

[27] James Madison, Speech to the House of Representatives (June 8, 1789), *in* 12 THE PAPERS OF JAMES MADISON 204 (Charles F. Hobson, Robert A. Rutland, William M. E. Rachal, eds., 1979).

naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights."[28]

This reliance on judges, whose lifetime tenure would hopefully insulate them from the need to curry favor with the governing majority, was central to the Framers' understanding. Alexander Hamilton, for example, strongly endorsed judicial review as "obvious and uncontroversial." The "independence of the judges," he reasoned, is "requisite to guard the constitution and the rights of individuals from the effects of those ill humours which … sometimes disseminate among the people themselves." Judges, he insisted, have a duty to resist invasions of constitutional rights even if they are "instigated by the major voice of the community."[29]

It was this "originalist" conception of judicial review that informed the Warren Court's selective judicial activism. As a rule, the Warren Court gave a great deal of deference to the elected branches of government—except when such deference would effectively abdicate the responsibility the Framers had imposed upon the judiciary to serve as an essential check against the inherent dangers of democratic majoritarianism. They therefore invoked activist judicial review primarily in two situations: (1) when the governing majority systematically disregarded the interests of a historically underrepresented group (such as blacks, ethnic minorities, political dissidents, religious dissenters, and persons accused of crime), and (2) when there was a risk that a governing majority was using its authority to stifle its critics, entrench the political status quo, and/or perpetuate its own political power.

Consider, for example, *Brown v. Board of Education*,[30] which prohibited racial segregation in public schools, *Loving v. Virginia*,[31] which invalidated laws forbidding interracial marriage, *Engel v. Vitale*,[32] which prohibited school prayer, *Goldberg v. Kelly*,[33] which guaranteed a hearing before an individual's welfare benefits could be terminated, *Reynolds v. Sims*,[34] which guaranteed "one person, one vote," *Miranda v. Arizona*,[35] which gave effect to the prohibition of compelled self-incrimination, *Gideon v. Wainwright*,[36] which guaranteed all persons accused of crime the right to effective assistance of counsel, *New York Times v. Sullivan*,[37] which limited the ability of public officials to use libel actions to silence their critics, and *Elfbrandt v. Russell*,[38] which protected the First Amendment rights of members of the Communist Party. Each of these decisions clearly reflected the central purpose of judicial review—to guard against the distinctive dangers of majoritarian abuse.

By definition, anti-majoritarian decisions generally do not sit well with the majority. It is therefore hardly surprising that this jurisprudence excited biting criticism, especially in the political arena, where candidates curry favor with the very same majority whose "unconstitutional" political preferences are being thwarted. By the late 1960s, Richard Nixon was able to make the Court's "judicial activism" a significant

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[28] James Madison, Speech to the House of Representatives (June 8, 1789), *in* RAKOVE, DECLARING RIGHTS *supra* note 24, at 170, 179.

[29] THE FEDERALIST NO. 78 (Alexander Hamilton).

[30] 347 U.S. 483 (1954).

[31] 388 U.S. 1 (1967).

[32] 370 U.S. 421 (1962).

[33] 397 U.S. 254 (1970).

[34] 377 U.S. 533 (1964).

[35] 384 U.S. 436 (1966).

[36] 372 U.S. 335 (1963).

[37] 376 U.S. 254 (1964).

[38] 384 U.S. 11 (1966).

issue in national politics. During his nomination acceptance speech in 1968, for example, he insisted that the Court had "gone too far" and that "we must act to restore" a proper "balance."[39] Nixon decried the activism of the Warren Court and pledged to appoint "strict constructionists" rather than "judicial activists" to the Court. In the discourse of the time, a strict constructionist was a judge committed to judicial restraint. In a few short years, Nixon appointed Warren Burger, Harry Blackmun, Lewis Powell, and William Rehnquist. Although these justices varied over time in their adherence to "strict constructionism," their presence soon transformed the Court, leaving the vision of the Warren Court in its wake.

But it is that vision of constitutional law that has continued to shape and inform the behavior of the moderately liberal justices on the modern Supreme Court and that explains—in a principled manner—their selective invocation of judicial activism. A review of the votes of the moderately liberal justices in the twenty most important constitutional decisions since 2000 reveals that they continue to adhere to this approach. Indeed, in one additional "experiment," I described to several non-lawyers the criteria for special concern under footnote 4, gave them a list of the laws at issue in the twenty cases, and asked them to identify those that best fit the footnote 4 criteria. Their judgments matched almost perfectly the cases in which the moderately liberal justices engaged in judicial activism. Thus, in my view, the approach reflected in the voting patterns of Justices Stevens, Souter, Ginsburg, Breyer, Sotomayor and Kagan in these twenty cases seems well grounded in the footnote 4 theory and thus in the original concerns of the Framers of the Constitution and in their distinctive understanding of the special responsibility of courts in our constitutional system.

C. OUR VERY CONSERVATIVE JUSTICES

What, though, of our very conservative justices? Does any principled theory of constitutional interpretation explain their selective judicial activism? A review of their votes leaves one in a bit of a quandary. Over the years, conservatives have articulated two quite different theories of constitutional interpretation—judicial restraint and originalism. Neither explains in any way the votes of the very conservative justices.

In Richard Nixon's day, a "conservative" justice was a justice committed to judicial restraint. Judicial restraint is, of course, critical to the legitimacy of constitutional law. In general, judges must defer to the reasonable judgments of the elected branches of government. But although judicial restraint in *appropriate* circumstances is essential, its sweeping, reflexive invocation would abdicate a fundamental responsibility that the Framers themselves entrusted to the judiciary and would therefore undermine a critical element of the American constitutional system.

In any event, the voting behavior of the very conservative justices cannot be explained by any commitment to the principle of judicial restraint. To the contrary, as we have seen, the very conservative justices were every bit as activist as the moderately liberal justices in these cases and nothing in their approach to constitutional interpretation in these decisions can reasonably be characterized as restrained or deferential. Thus, whatever the merits of judicial restraint as a general approach to constitutional interpretation, it does not in any way explain the voting pattern of the Rehnquist-Roberts-Scalia-Thomas-Alito faction of the Court.

The second theory of constitutional interpretation often associated with conservative thinkers is originalism. First popularized in the early 1980s, originalism, as

[39] Richard M. Nixon, Presidential Nomination Acceptance Speech (Aug. 8, 1968).

promoted by Robert Bork, Antonin Scalia and Clarence Thomas, presumes that courts should exercise restraint unless the "original meaning" of the text mandates a more activist approach.[40] Under this theory, for example, it is appropriate for courts to invoke the Equal Protection Clause to invalidate laws that deny African Americans the right to serve on juries, but not to invalidate laws that deny women that same right, because that was not the "original meaning" of the Equal Protection Clause.

For at least two reasons, originalism is problematic as a theory of constitutional interpretation. First, because those who enacted the broad foundational provisions of our Constitution often did not have any precise and agreed-upon understanding of the *specific* meaning of such phrases as "the freedom of speech," "due process of law," "regulate Commerce … among the several States," or "equal protection of the laws," it is often difficult if not impossible to know with any degree of confidence what they did or did not think about concrete constitutional issues. Originalist inquiries are therefore often much less helpful—and much less constraining—than their proponents suggest.

The second difficulty with originalism is even more problematic, for it reveals the approach to be internally incoherent. Originalism asserts that those who crafted and ratified our Constitution intended the meaning and effect of their handiwork to be limited to the specific understandings of their time. But this view erroneously attributes to the Framers a narrow-mindedness and short-sightedness that belies their true spirit.

The Framers were men of the Enlightenment who were steeped in a common-law tradition that presumed that just as reason, observation, and experience permit us to gain greater insight over time into questions of biology, physics, economics, and human nature, so too would they enable us to learn more over time about the content and meaning of the principles they enshrined in the Constitution. The notion that any particular moment's understanding of the meaning of the Constitution's broad and open-ended provisions should be locked into place and taken as constitutionally definitive would have seemed completely wrong-headed to the Framers, who held a much bolder and more confident understanding of their own achievements and aspirations.

In any event, and whatever the merits of originalism in the abstract, it does not in any way explain the voting behavior of the very conservative justices in these cases. In some of these decisions, such as *Lawrence* and *Windsor*, a strict originalist could quite credibly argue that the Framers did not affirmatively intend the Constitution they enacted to render unconstitutional laws against sodomy or laws limiting marriage to a man and a woman. In such cases, the votes of the very conservative justices were certainly consistent with an originalist conception of constitutional interpretation.

But in many other cases, the votes of the very conservative justices cannot fairly be explained by, or even reconciled with, any meaningful theory of originalism. These would include, for example, their votes to hold unconstitutional laws restricting the amounts that corporations can spend in the electoral process (*Citizens United*), laws authorizing affirmative action in higher education (*Grutter*), laws regulating guns (*Heller*), laws protecting the right of African-Americans to vote (*Shelby County*), laws promoting racial integration in public schools (*Parents Involved*), laws affecting property rights in the context of economic redevelopment plans (*Kelo*), and the laws of the State of Florida in the 2000 presidential election (*Bush v. Gore*). My point is not that

[40] *See, e.g.*, Steven G. Calabresi and Antonin Scalia, Originalism: A Quarter-Century of Debate (2007); Robert W. Bennett and Lawrence B. Solum, Constitutional Originalism: A Debate (2011).

one could not justify the votes of the very conservative justices in these cases on some other ground, but that those votes clearly cannot be defended or explained in terms of any fair-minded application of originalism.

What, then, explains the voting pattern of Justices Rehnquist, Roberts, Scalia, Kennedy, Thomas, and Alito in these cases? In my view, their votes cannot be explained by any consistent theory of constitutional interpretation. Rather, to paraphrase Justice Frankfurter's critique of the Court's activism in the *Lochner* era, the selective judicial activism of the very conservative justices in these decisions seems to be born out of "their prejudices and their respective pasts and self-conscious desires."[41]

Their votes in these cases, in short, were determined first-and-foremost by their own personal policy preferences. No other plausible theory explains the otherwise striking pattern of their decisions. That is distressing, to say the least. They are, I am certain, unaware of this. They no doubt believe that they decide each case as it comes to them, like umpires calling balls and strikes. But given the strikingly ideological pattern of their votes in these cases, and the absence of any plausible theory to explain them, this is simply not credible.

IV. CONCLUSION

Finally, what about the moderately conservative justices? In 95 percent of these decisions, at least one of the moderately conservative justices was in the majority (the sole exception was *Sebelius*). Justice Kennedy was in the majority in 85 percent of the decisions and Justice O'Connor was in the majority in 80 percent of the cases in which she participated. By contrast, Justices Scalia and Thomas, on the conservative side, and Justices Ginsburg and Breyer, on the liberal side, all were in the majority in exactly 50 percent of the cases, even though they disagreed 100 percent of the time. Clearly, then, in terms of the Court's most important decisions since 2000, this has been the Kennedy/O'Connor Court. In the end, they called the shots.

Although Justices Kennedy and O'Connor clearly inclined in a conservative direction, they were far from knee-jerk in their voting. In several important decisions, including *Lawrence, Windsor, Grutter, Hamdan* and *McCreary*, one or both of them parted company with their more conservative colleagues. What led Justices Kennedy and O'Connor to vote as they did in these twenty cases is unclear. Unlike the moderately liberal justices, there is no overarching theory that explains why Kennedy and O'Connor were more activist in some cases and more restrained in others. It might be, of course, that their votes were driven by nothing more than their own moderately conservative policy preferences, but one gets more of a sense from their opinions that they were also grappling seriously with the conventional legal sources that are "supposed" to guide judicial decision making.

In the end, though, the most striking thing about my journey into these twenty decisions was the remarkable voting record of the very conservative justices. That, in my view, speaks volumes. In any event, as I hope I have demonstrated, by generating the data presented in *The Behavior of Federal Judges,* Lee Epstein, William Landes and Richard Posner have not only enlightened us with the answers they offer, but they have also raised new and wonderfully intriguing questions about what makes judges tick.

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[41] Melvin I. Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 Duke L. J. 71, 105 (1988).