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Latino Inter-Ethnic Employment Discrimination and the “Diversity” Defense

Tanya Katerí Hernández*

For the great enemy of truth is very often not the lie—deliberate, contrived and dishonest—but the myth, persistent, persuasive and unrealistic.¹

With the growing racial and ethnic diversity of the U.S. population and workforce,² scholars have begun to address the ways in which coalition building across groups not only will continue to be necessary but also will become even more complex.³ Recent scholarship has focused on analyz-

* Professor of Law & Justice Frederick Hall Scholar, Rutgers University School of Law-Newark. A heartfelt thanks to all the following colleagues who read earlier versions of this Article: Richard Banks, Taunya Lovell Banks, Dorothy Brown, Devon Carbado, Anani Dzidzienyo, Angelo Falcon, Carlos Gonzalez, Mitu Gulati, Cheryl Harris, Alan Hyde, Jerry Kang, Emma Coleman Jordan, Kevin Johnson, Beverly Moran, Rachel F. Moran, Suzanne Oboler, James Pope, Miriam Jimenez Roman, Terry Smith, John Valery White, and Adrien Wing. I was also greatly benefited by being able to present this research as a work-in-progress at Fordham Law School, George Washington Law School, Pennsylvania State University Law School, University of Minnesota Law School, Stanford Law School, University of Western Cape Rulci/Lat Crit Colloquium, and the Latin American Studies Association 2006 Annual Congress. I also thank my research assistants Toan Tran and Mark Jaffe for truly superb research work. Most importantly, I dedicate this Article to my mother, Norma Cecilia Rolón, for her courage as a truth teller about racial bias and discrimination wherever she sees it. Any shortcomings are my own.

¹ President John F. Kennedy, Commencement Address at Yale University (June 11, 1962), available at <http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/JFK/003POF03Yale06111962.htm>.

² See Mitra Toosi, *A Century of Change: The Labor Force, 1950–2050*, MONTHLY LAB. REV., May 2002, at 15, 15–16, available at <http://www.bls.gov/opub/mlr/2002/05/art2full.pdf> (reporting U.S. Department of Labor projections that almost half of the workforce of 2050 will be non-White and non-Anglo, with 24% Latino, 14% African American, and 11% Asian or Pacific Islander).

³ See, e.g., Taunya Lovell Banks, *Both Edges of the Margin: Blacks and Asians in Mississippi Masala, Barriers to Coalition Building*, 5 ASIAN L.J. 7 (1998); Kevin R. Johnson, *The Struggle for Civil Rights: The Need for, and Impediments to, Political Coalitions Among and Within Minority Groups*, 63 LA. L. REV. 759 (2003); Rogelio A. Lasso, *Some Potential Casualties of Moving Beyond the Black/White Paradigm To Build Racial Coalitions*, 12 WASH. & LEE J. C.R. & SOC. JUST. 81 (2005); Robyn K. Mallett, Stacey Sinclair & Jeffrey R. Huntsinger, *What Intergroup Relations Research Can Tell Us About Coalition Building*, 12 WASH. & LEE J. C.R. & SOC. JUST. 5 (2005); George A. Martinez, *African-Americans, Latinos, and the Construction of Race: Toward an Epistemic Coalition*, 19 UCLA CHICANO-LATINO L. REV. 213 (1998); Mary Romero, *Afterword: Historicizing and Symbolizing a Racial Ethnic Identity: Lessons for Coalition Building with a Social Justice Agenda*, 33 U.C. DAVIS L. REV. 1599 (2000); Victor C. Romero, *Rethinking Minority Coalition Building: Valuing Self-Sacrifice, Stewardship, and Anti-Subordination*, 50 VILL. L. REV. 823 (2005); Susan Taing, *Lost in the Shuffle: The Failure of the Pan-Asian Coalition*

ing how best to promote effective coalition building.⁴ Thus far, scholars have not examined what that growing racial and ethnic diversity will mean in the context of individual racial and ethnic discrimination claims. What will antidiscrimination litigation look like when all the parties involved are non-White⁵ but nonetheless plaintiffs allege that a racial hierarchy exists and they are not necessarily interested in the group-politics agenda of coalition building?⁶ This Article focuses on the implications of increased diversity for the operation of employment discrimination law.

For instance, in a pro se petition alleging employment discrimination,⁷ Mr. Olumuyiwa, a Nigerian security guard, asserted that he and African American security guards were hired at a lower wage (\$7.00 per hour) than Latino and Yugoslavian employees (\$14.00 per hour) and received fewer hours than did other guards at the discretion of the Hispanic supervisor, who said he did not like the plaintiff because he was Nigerian. The supervisor also made overtly discriminatory remarks, such as “Why is your black-ass sleeping here?! I am going to deduct two hours pay from your black-ass paycheck!” and “We Hispanics run this office!” Because the rest of the management personnel were also Latino, the plaintiff felt that they condoned the supervisor’s poor conduct. In that context, a plaintiff like Mr. Olumuyiwa is likely to be most concerned with having any harms he has experienced at the hands of a workplace racial hierarchy addressed before considering the importance of political coalitions with the ethnic

To Advance the Interests of Southeast Asian Americans, 16 LA RAZA L.J. 23 (2005); Reynaldo A. Valencia, *What If You Were First and No One Cared: The Appointment of Alberto Gonzales and Coalition Building Between Latinos and Communities of Color*, 12 WASH. & LEE J. C.R. & SOC. JUST. 21 (2005); Adrienne Katherine Wing, *Civil Rights in the Post 9/11 World: Critical Race Praxis, Coalition Building, and the War on Terrorism*, 63 LA. L. REV. 717 (2003); Note, *The Ties That Bind: Coalitions and Governance Under Section 2 Of The Voting Rights Act*, 117 HARV. L. REV. 2621 (2004).

⁴ See, e.g., Kevin R. Johnson, *African American and Latina/o Cooperation in Challenging Racial Profiling*, in NEITHER ENEMIES NOR FRIENDS: LATINOS, BLACKS, AND AFRO-LATINOS 247, 258 (Anani Dzidzienyo & Suzanne Oboler eds., 2005) [hereinafter NEITHER ENEMIES NOR FRIENDS] (“Because African Americans and Latinas/os suffer common harms from racial profiling in law enforcement, they would seem natural allies in seeking to eliminate the practice. However, cooperation between the African American and Latina/o communities in the United States faces formidable barriers.”).

⁵ Whiteness is treated in this Article as a social construct with which a society bestows favored status and class privilege upon the individuals referred to as White in varying contexts. See David Roediger, *Whiteness and Ethnicity in the History of “White Ethnics” in the United States*, in TOWARDS THE ABOLITION OF WHITENESS: ESSAYS ON RACE, POLITICS, AND WORKING CLASS HISTORY 181, 181–98 (David Roediger ed., 1994) (describing whiteness as a context-based category whose assignment is influenced by class and citizenship). Because whiteness is not considered a biological fact in this analysis, the Article’s discussion of inter-ethnic discrimination also includes cases in which non-Anglo immigrants with fair skin are treated as non-White because they are viewed with less favor than White-Anglo citizens.

⁶ José E. Cruz, *Interminority Relations in Legislative Settings: The Case of African Americans and Latinos*, in NEITHER ENEMIES NOR FRIENDS, *supra* note 4, at 229, 230 (describing instances of disinterest in the formation of coalitions).

⁷ *Olumuyiwa v. Harvard Prot. Corp.*, 1999 WL 529553 (E.D.N.Y. July 21, 1999).

group members who are comparatively advantaged by that hierarchy. Unfortunately, neither the literature about coalition building nor the employment discrimination jurisprudence is presently capable of addressing the problems of inter-ethnic discrimination plaintiffs whose claims are not as extreme in their manifestation of overt Latino anti-Black sentiment.⁸

As this Article will explicate, non-White racial hierarchies appear opaque to decisionmakers and other legal actors, who find it difficult to recognize the indicators of discrimination. Agents of discrimination are perceived as uniformly White-Anglos⁹ and all incidents are envisioned as having a White-versus-non-White dynamic.¹⁰ For instance, the Equal Em-

⁸ *Id.* at *6 (granting plaintiff's motion to amend complaint).

⁹ The term "White-Anglo" is used in this Article to distinguish those viewed as White in the United States from the many Latinos who also appear Caucasian. In analyzing the interplay of race and ethnicity in employment discrimination cases, it is important to be specific about the background of the parties. For that same reason the term "African American" is used to distinguish those viewed as Black in the United States from the many Latinos who are also of African descent living in the United States. It is useful to be ethnically specific in referring to populations of African descent in order to provide a more nuanced account of Latino racism that does not conflate identifiable Afro-Latinos with Latinos of more prominent European ancestry.

¹⁰ There is a growing body of literature that discusses the various ways in which the legal system manifests a view of racism as solely involving African Americans and White-Anglos. The focus of that literature has been upon illustrating how the Black/White binary obfuscates the operation of White racism against many other racial groups. This Article instead focuses upon how the binary obfuscates the racial attitudes of racial group members themselves. See, e.g., Juan Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 10 CAL. L. REV. 1213, 1257 (1997) (discussing how the Black/White binary focus upon White racism against Blacks does not fully explain White racism against other racial groups); see also Christopher David Ruiz Cameron, *How the García Cousins Lost Their Accents: Understanding The Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 10 LA RAZA L.J. 261, 261, 268 (1998) (defining "racial dualism" as "the tendency of courts to view civil rights discourse in terms of Blacks and Whites to the exclusion of Browns and other people of color" which thereby "makes Latinos and their problems in the workplace invisible"); Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1267 (1993) ("To focus on the black-white racial paradigm is to misunderstand the complicated racial situation in the United States."); Adrienne D. Davis, *Identity Notes Part One: Playing in the Light*, 45 AM. U. L. REV. 695, 696 (1996) ("An historical assessment of the relationship of other groups of color to a black/white paradigm reveals the paradigm as not only un-descriptive and inaccurate, but debilitating for legal analysis, as well as civil rights oriented organizing."); Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 775 & n.169 (1994) ("Race-crits' understanding of 'race' and 'racism' might also benefit from looking beyond the struggle between black and white. African American theorists have, until now, dominated CRT, and African American experiences have been taken as a paradigm for the experiences of all people of color."); Elizabeth Martinez, *Beyond Black/White: The Racisms of Our Time*, 20 SOC. JUST. 22 (1993); Rachel F. Moran, *Foreword: Demography and Distrust: The Latino Challenge to Civil Rights and Immigration Policy in the 1990s and Beyond*, 8 LA RAZA L.J. 1, 4 (1995); Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 957-59 (1995); William R. Tamayo, *When the "Coloreds" Are Neither Black nor Citizens: The United States Civil Rights Movement and Global Migration*, 2 ASIAN L.J. 1, 7-9 (1995); Frank Wu, *Neither Black nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 225, 248 (1995) ("The time has come to consider groups that are neither black nor white in the ju-

ployment Opportunity Commission (“EEOC”) fails to collect any data about the race of those individuals who are agents of discrimination and racial harassment in the workplace. While this is presumably because the EEOC targets discrimination by employers, not individuals, the absence of racial data about the employers’ representatives implicitly furthers the narrative that racism in the United States is solely a White/non-White problem. One EEOC attorney has even stated that there has been a “reluctance to bring cases against other minorities.”¹¹ This reluctance exists even though the EEOC is beginning to see more cases in which different racial/ethnic groups are set against each other in the allocation of job opportunities.¹² Indeed, employers generally demonstrate a preference for particular racial or ethnic groups in the labor market beyond a mere economic preference for low-wage immigrant workers.¹³ For instance, among immigrant workers, employers prefer those with lighter skin tone.¹⁴

risprudence of race . . . Race is conceptualized as breaking down into two all-encompassing and mutually exclusive categories, black and white.”); Richard Delgado, *Rodrigo’s Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181, 1196 (1997) (book review).

¹¹ Miriam Jordan, *Blacks vs. Latinos at Work: More African Americans Claim They Are Passed Over for Hispanics in Hiring*, WALL ST. J., Jan. 24, 2006, at B1 (quoting EEOC regional attorney Anna Park).

¹² See, e.g., EEOC v. Clougherty Packing Co., No. 2:04-cv-08051-GAF-PLA (C.D. Cal. Oct. 19, 2005), available at <http://www.morelaw.com/verdicts> (settling discrimination claim for \$110,000 where Black applicants alleged they were denied employment so that pork packing employer could hire Latino applicants instead); EEOC v. Raytheon Technical Servs., No. CV 02-00735 (D. Haw. Nov. 5, 2004), available at <http://www.eeoc.gov/litigation/settlements/index.html> (settling discrimination claim for \$165,000 where Black paint contractor allegedly was denied employment in favor of Asian/Pacific Islander paint contractors); EEOC v. Pac. Micr. Corp. No. 02-0015 (D. N. Mar. I. Mar. 3 2004), available at <http://www.eeoc.gov/litigation/settlements/index.html> (settling discrimination claim for \$400,000 where more than forty employees of Filipino origin had been replaced by employees from countries other than the Philippines); see also Jordan, *supra* note 11, at B1 (describing \$180,000 EEOC settlement with Zenith National Insurance Corp., based upon the allegation that ten Black applicants were denied a position in the mailroom in favor of a Latino applicant with no mailroom experience); W. Matt Meyer, *Here Is a Twist—Firm Is Fined for Hiring Too Many Hispanics and Not Enough Black and White Workers, Pictsweet To Amend for Prejudicial Hiring*, HISP. VISTA, July 14, 2003, at 1 (describing a settlement agreement between United Foods Inc. and the U.S. Department of Labor’s Office of Federal Contract Compliance Programs for discrimination in systematically excluding African American and White job applicants in favor of hiring Latinos). The preference for Latino workers over African Americans may also contribute to the disparate unemployment rates that each group suffers. The Bureau of Labor Statistics indicates that the unemployment rate among African Americans is rising twice as fast as that of Whites. In contrast, overall Latino unemployment is in line with that of the nation as a whole and Latinos have fared better with an expansion in manufacturing jobs. Louis Uchitelle, *Blacks Lose Better Jobs Faster as Middle-Class Work Drops*, N.Y. TIMES, July 12, 2003, at A1.

¹³ PHILIP MOSS & CHRIS TILLY, *STORIES EMPLOYERS TELL: RACE, SKILL, AND HIRING IN AMERICA* 116–17 (2001). The authors report racial distinctions made by employers regarding the desirability of different racial/ethnic group employees in the Russell Sage Foundation Multi-City Study of Urban Inequality, as demonstrated by respondents identifying Latinos six times more frequently than African Americans as preferred workers. This attitude is reflected in one respondent’s statement that “Spanish people are more willing to work. They are willing to work longer hours. I think the ones that I’ve known are very dedicated

Similarly, despite the fact that a significant level of overtly anti-Black Latino gang violence occurs in the state of California; Chicago, Illinois; and most recently in Perth Amboy, New Jersey,¹⁵ the FBI's statistical collection of hate-crime incidents fails to provide a mechanism for assessing the number of Latino offenders. Instead, the FBI tabulates suspected offenders as White, Black, American Indian/Alaskan Native, Asian/Pacific Islander, Multi-Racial, and Unknown.¹⁶ Thus, the existence of Latino hate crime perpetrators is statistically invisible despite news reports of its occurrence.¹⁷ In turn, the notion that hate crime is solely a White/non-White phenomenon is maintained.¹⁸

to their jobs." See also John J. Betancur, *Framing the Discussion of African American-Latino Relations: A Review and Analysis*, in NEITHER ENEMIES NOR FRIENDS, *supra* note 4, at 159, 160 (summarizing the literature detailing employer preferences for one racial group over another with a racial ordering of segmented employment roles by status and wage).

¹⁴ Joni Hersch, *Profiling the New Immigrant Worker: The Effects of Skin Color and Height* (Vanderbilt Law & Econ., Research Paper No. 07-02, 2007), available at <http://ssrn.com/abstract=927038> (noting that a 2003 study of 8600 recent immigrants found that light-skinned immigrants in the United States make more money on average than those with darker complexions, even when controlling for race and nationality).

¹⁵ See, e.g., Jeffrey Gettleman, *Effort To Re-Integrate Jail Sparks New Disturbance*, L.A. TIMES, May 10, 2000, at B4 (reporting three days of rioting after Latino inmates, acting on orders from the Mexican Mafia prison gang, began attacking African American inmates, prompting prison officials to segregate the inmates by race, after which the Latino inmates refused to be re-integrated with African American inmates); Suzanne C. Russell, *Perth Amboy Gang Tensions Worry Parents*, HOME NEWS TRIB., Apr. 7, 2004 (reporting harassment of African American athletes by a Dominican gang of students known as the "D Block").

¹⁶ See FBI, UNIFORM CRIME REPORTS OF HATE CRIME (1995), <http://www.fbi.gov/ucr/hatecm.htm>.

¹⁷ See, e.g., Nicholas Confessore & Kareem Fahim, *Racial Slur Preceded Slashing of 3 in Manhattan, Police Say*, N.Y. TIMES, Mar. 5, 2006, at Metro 37 (reporting attack on three Asian men by three Hispanic men wielding a box cutter and yelling a derogatory term for Chinese people); Robert Siegel & Melissa Block, *All Things Considered: California Prisons on Alert After Weekend Violence* (National Public Radio broadcast Feb. 6, 2006) (reporting two weekend race riots between Latino and African American inmates, which culminated in prison officials segregating the inmates by race and Latino inmates sending prison officials a letter that stated, "No disrespect . . . but if blacks come in the dorms we will fight."); News Brief, Center for the Study of Hate and Extremism, *Los Angeles Hate Crime Leads to Hijacked Bus*, May 3, 2001, available at http://hatemonitor.csusb.edu/NewsHeadlines/may01_news_briefs.html#LA%20Hate%20Crime (reporting shooting of African American by Latino who stated he did not like African American men associating with Latina women); see also JAMES E. JOHNSON & BILL LANN LEE, U.S. DEP'T OF TREASURY ET AL., NATIONAL CHURCH ARSON TASK FORCE (1998), available at http://www.usdoj.gov/crt/church_arson/arson98.html (reporting arrest of Hispanic suspect for burning an African American house of worship). In addition, some municipal arrest records reflect the existence of Latino hate crime perpetrators. See Brian Levin, *A Dream Deferred*, 20 J. INTER-GROUP REL. 3, 22 (1993) (indicating that 42% of those arrested for racial hate crimes in Los Angeles in 1992 were Latino, and 9% of those arrested for racial hate crimes in Boston in 1991 were Latino).

¹⁸ See Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 970 (1995) (describing the ways in which the relative lack of positive public identity and legitimacy of Latinos creates an image of racial conflict as existing solely between African Americans and White-Anglos).

As Eric Yamamoto notes, the traditional civil rights approach focuses on conflicts with Whites and not with other communities of color.¹⁹ He also observes that the focus on White-Anglos underappreciates the extent to which inter-ethnic conflicts can quickly escalate into intergroup controversies because of the deep and often unacknowledged racial grievances.²⁰ Yamamoto recommends that in order to build more effective coalitions, civil rights attorneys should envision racial justice practice as something more than the enforcement of civil rights laws. They should instead deploy interracial justice inquiries in the venue of grassroots organizing in order to acknowledge how racial groups harm one another. Yamamoto's work, however, does not examine the focus of this Article: the development of a conceptual framework for effectively presenting and understanding inter-ethnic discrimination claims with the goal of disrupting the judiciary's singular focus on White/non-White discrimination.

This Article treats "inter-ethnic discrimination" as discrimination among non-White racial and ethnic groups. The concept is defined broadly to include discrimination among members of different ethnic subgroups, such as discrimination by Puerto Ricans against Dominicans or by White Latinos against Afro-Latinos. Inter-ethnic discrimination is viewed expansively in order to depict the many ways non-White ethnic groups and subgroups are complicit in maintaining racial hierarchy in the workplace. Thus, the classic disparate treatment employment discrimination cases, in which White employers exclude or differentially treat particular racial/ethnic groups, are not part of this examination of inter-ethnic discrimination.²¹ Furthermore, the dearth of reported cases involving systemic disparate treatment and disparate impact in the inter-ethnic context precludes the

¹⁹ ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT & RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* 38 (1999).

²⁰ See Julie A. Su & Eric K. Yamamoto, *Critical Coalitions: Theory and Praxis*, in *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* 379, 386 (Francisco Valdes et al. eds., 2002).

²¹ See *supra* note 12 (detailing cases in which the EEOC has successfully settled allegations of White employers awarding job opportunities to one racial/ethnic group at the expense of another). While the EEOC often is able to settle classic disparate treatment cases involving White employers, plaintiffs have met with judicial resistance when they allege disparate treatment by White employers who rely on word-of-mouth hiring methods that disproportionately exclude African Americans while overwhelmingly including other racial/ethnic groups. *But see* *EEOC v. Chi. Miniature Lamp Works*, 947 F.2d 292, 298-99 (7th Cir. 1991) (observing that exclusionary word-of-mouth hiring methods can support a finding of discrimination when an employer is actively involved in soliciting employees for word-of-mouth applicant recommendations). The Seventh Circuit later upheld a judgment of discrimination by a Polish employer who used word-of-mouth recruitment practices that benefited Polish and Latino employees while completely excluding African American applicants. *EEOC v. O&G Spring & Wire Forms Specialty Co.*, 38 F.3d 872 (7th Cir. 1994). This result accords with the general understanding that word-of-mouth recruitment policies creating a predominantly White workforce or job category can establish a discrimination violation. See, e.g., *Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007 (2d Cir. 1980); *Barnett v. W. T. Grant Co.*, 518 F.2d 543 (4th Cir. 1975).

specific examination of those forms of discrimination in this Article's analysis of inter-ethnic discrimination.²²

The majority of inter-ethnic employment discrimination claims appear to be those in which Latinos are involved in turn as victims and as agents of individual disparate treatment in the workplace.²³ Latinos and individual disparate treatment cases are thus the focus of this exploration of inter-ethnic discrimination.²⁴ This focus is warranted by demographic projections that one in four job seekers by the year 2020 will be the child of a Latino immigrant and that Latino workers will increase their representation in the workforce from the current rate of 12% to 25% by the year 2050.²⁵ Latino-owned businesses have also increased 232% between 1987 and 1997.²⁶ In 1997 alone, Latino-owned businesses employed 1,492,773 people.²⁷ Furthermore, as the fastest-growing²⁸ ethnic/racial minority²⁹ in the United States, Latinos have been celebrated in the public discourse as a multiracial people incapable of racial discrimination.³⁰ Examining La-

²² In one noteworthy systemic disparate treatment inter-ethnic discrimination case, the Seventh Circuit held that the passive use of word-of-mouth recruitment by the Korean owner of a janitorial and cleaning services company could not in and of itself give rise to an inference of intentional discrimination in the absence of evidence that the owner was biased in favor of Koreans or prejudiced against any group underrepresented in its work force. *EEOC v. Consol. Serv. Sys.*, 989 F.2d 233 (7th Cir. 1993). Although this case has been assailed for underestimating the discriminatory effects of intra-ethnic group preferences in the workplace, it should be noted that unlike the disposition of the emerging individual disparate treatment inter-ethnic cases analyzed in this Article, *Consolidated Service* does not foreclose the possibility that racial discriminatory intent might exist simply because the company owner is Korean. Indeed, the court took pains to note that the assessment of the case would have been different if evidence of racial animus had been presented or if the owner had been actively engaged in deploying the word-of-mouth hiring method rather than passively benefiting from his employees' self-initiated use of the method. *Id.* at 236.

²³ See *infra* note 125 and accompanying text (detailing the inter-ethnic employment discrimination cases in LexisNexis and Westlaw).

²⁴ See *infra* notes 125–131 and accompanying text (describing the nature of an individual disparate treatment case and its importance to the emerging inter-ethnic discrimination cases).

²⁵ *Employment: Second-Generation Latinos To Exert Major Workforce Influence*, *Pew Report Says*, Daily Lab. Rep. (BNA) No. 199, at A-7 (Oct. 15, 2003); see also RAKESH KOCHHAR, PEW HISPANIC CTR., *LATINO LABOR REPORT 2006: STRONG GAINS IN EMPLOYMENT* (2006), available at <http://pewhispanic.org/files/reports/70.pdf>.

²⁶ U.S. SMALL BUS. ADMIN., *MINORITIES IN BUSINESS 1* (1999), available at <http://www.sba.gov/advo/stats/min.pdf>.

²⁷ *Id.* at 23.

²⁸ U.S. CENSUS BUREAU, *THE HISPANIC POPULATION IN THE UNITED STATES: MARCH 2002*, at 20-545 (2003), available at <http://www.census.gov/prod/2003pubs/p20-545.pdf> (reporting that the nation's Hispanic population grew much faster than the population as a whole, increasing from 35.3 million in 2000 to 38.8 million in 2002, and constituted 12.5% of the 2000 census population, excluding the 3.8 million residents of Puerto Rico). The Latino population is projected to constitute one-quarter of the U.S. population by 2050. Dick Kirschsten, *Hispanics: Beyond the Myths*, NAT'L J., Aug. 14, 1999, at 2350, 2351.

²⁹ See Ian F. Haney Lopez, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143 (1997) (describing how Latinos can be positioned to be both an ethnic group and a racial group).

³⁰ See Silvio Torres-Saillant, *Inventing the Race: Latinos and the Ethnoracial Pentagon*, 1 LATINO STUD. J. 123 (2003) (describing how Latinos take pride in being enlightened about race relations because they are a "racially mixed" people); Silvio Torres-Saillant,

tino bias may tell us much about the ability of legal actors to recognize and articulate the harm of inter-ethnic discrimination in a legal system steeped in an understanding of discrimination as solely a White/non-White phenomenon.

In the emerging body of inter-ethnic discrimination cases, Latinos figure prominently in allegations of employment discrimination in ways that contradict the image in public discourse of a multiracial people who do not racially discriminate. In these cases, judges seem unable to appreciate Latino manifestations of bias for two reasons. First, judges appear to be unfamiliar with Latin American racial ideology and how Latinos in the United States express racial bias. Second, they impute to diverse workplaces a shield against discriminatory treatment claims. This is best exemplified by one judge's explicit claim that "[d]iversity in an employer's staff undercuts an inference of discriminatory intent."³¹ Such a presumption both contravenes established employment discrimination doctrine and impairs a thorough inquiry into inter-ethnic employment discrimination claims. Indeed, it effectively operates as a defense to discrimination in individual disparate treatment cases when an accusation of inter-ethnic discrimination is at issue.

This Article uses the term "diversity defense" to describe the way in which legal actors view a racially "diverse" workplace as the equivalent of a racially harmonious workplace, thereby failing to recognize incidents of discrimination and the relevant caselaw. Viewing all people of color as the same and overlooking the particular histories of racial animus within and across different ethnic groups can cause a perceived equivalence of workplace diversity and racial harmony. The lack of judicial knowledge about non-White racial hierarchies generally, and Latino ethnic/racial differences and attitudes specifically, facilitates the inclination to construct a diversity defense. Then, in a circular fashion, the diversity defense hinders judicial awareness of Latino heterogeneity and inter-ethnic strife. In response, this Article proposes a "Multiracial Racism Litigation Approach" ("MRLA") to enable decisionmakers to identify and address discrimination in inter-ethnic contexts.

Part I of this Article will present the social science literature illuminating the complexity of racial attitudes among Latinos, which judges gen-

Epilogue: Problematic Paradigms: Racial Diversity and Corporate Identity in the Latino Community, in LATINOS: REMAKING AMERICA 435 (M.M. Suarez-Orozco & M.M. Paez eds., 2002) [hereinafter Torres-Saillant, *Problematic Paradigms*] (discussing the dangers of "current assertions of a harmonious panethnic Latino identity"); see also JOHN FRANCIS BURKE, MESTIZO DEMOCRACY: THE POLITICS OF CROSSING BORDERS (2002) (arguing that the Latino "mestizaje" mixed race experience offers an ideal model for fostering unity); Lynette Clemetson, *Hispanic Population Is Rising Swiftly, Census Bureau Says*, N.Y. TIMES, June 19, 2003, at A22 ("[Latinos] just don't see the world divided into such stark boxes, and that has to be a real engine for change." (quoting Roberto Suro, Director of the Pew Hispanic Institute)).

³¹ *Arrocha v. CUNY*, 2004 WL 594981 (E.D.N.Y. Feb. 9, 2004).

erally do not appreciate. Part II will analyze the emerging Latino inter-ethnic employment discrimination cases. These cases demonstrate that judicial inability to recognize racial discrimination when it occurs in an inter-ethnic context leads judges to deploy an inappropriate diversity defense to discrimination claims. Part III therefore proposes that legal actors address the particular litigation needs of inter-ethnic claims through a multiracial racism lens. The proposed MRLA focuses on how an ethnic/racial group is advantaged or disadvantaged depending on the context. As such, it is better able to elucidate and address the harms of inter-ethnic employment discrimination, without imputing magical powers to the existence of workplace diversity.

I. LATINO RACIAL ATTITUDES

Before presenting the emerging Latino inter-ethnic discrimination cases, it is important to explore the social science data about Latino racial attitudes that judges have overlooked. With a foundation in the social science literature, one can more clearly appreciate the missteps of the cases.

A. *The Origins of Latino Racism*

The manifestation of Latino racism in the United States is the result of a complex interaction of Latin American/Caribbean racial attitudes and self-esteem-boosting responses to being racialized as Latinos in the United States. Most relevant for this analysis of inter-ethnic employment discrimination is the interplay of Latino anti-Black racial attitudes.³² They are most relevant because the emerging inter-ethnic Latino cases discussed herein involve workplace settings in which Latinos are identified as agents of anti-Black bias and discrimination against African Americans and Afro-Latinos. Presented with these cases, judges are often unable to recognize

³² Latino anti-Asian bias is an under-studied area that warrants empirical research. Just a few scholars have begun to address the issue of Asian ethnicity in Latin America. See JEFFREY LESSER, *NEGOTIATING NATIONAL IDENTITY: IMMIGRANTS, MINORITIES AND THE STRUGGLE FOR ETHNICITY IN BRAZIL* (1999); Evelyn Hu Dehart, *Chinese Coolie Labour in Cuba in the Nineteenth Century: Free Labour or Neo-Slavery?*, in *THE WAGES OF SLAVERY* 67, 68–70 (Michelle Twaddle ed., 1993); Mieko Nishida, *Japanese Brazilian Women and Their Ambiguous Identities: Gender, Ethnicity and Class in Sao Paulo* (Latin Am. Stud. Ctr., Univ. of Md., College Park, Working Paper No. 5, 2000). In contrast, prejudice against those of indigenous ancestry in Latin America is well documented in social science literature. See, e.g., *STRUGGLES FOR SOCIAL RIGHTS IN LATIN AMERICA* (Susan Eva Eckstein & Timothy P. Wickham-Crowley eds., 2002) (detailing the indigenous peoples' struggle against discrimination in Latin America). However, neither anti-Asian nor anti-indigenous bias has been implicated in the emerging Latino inter-ethnic employment discrimination cases reported thus far.

the details of Latino anti-Black racial discrimination, despite their willingness to entertain claims of anti-Latino bias made by African Americans.³³

It is useful to first summarize Latin American and Caribbean perspectives about Afro-Latinos, that is, their own Afro-descendants, before discussing how those perspectives inform Latino attitudes toward African Americans in the United States. The presentation of Latin American race ideology is not at all meant to suggest that all Latinos are racist or harbor these racialized perspectives. Admittedly, group-focused discussions always run the risk of suggesting an essentialized view of a group.³⁴ This data about Latino racial perspectives is provided to demonstrate the nature of Latino racial stereotypes of which legal actors in the United States may otherwise be ignorant and which they must understand in order to recognize the discriminatory conduct of Latinos who act upon such stereotypes.³⁵ It is not intended to insinuate that all Latinos think a particular way.

Racism, in particular anti-Black racism, is a pervasive and historically entrenched fact of life in Latin America and the Caribbean. Over 90% of the approximately ten million enslaved Africans brought to the Americas were taken to Latin America and the Caribbean, whereas only 4.6% were brought to the United States.³⁶ As such, the historical legacy of slavery is pervasive in Latin America and the Caribbean. In Latin America and the Caribbean, as in the United States, lighter skin and European features increase one's chances for socioeconomic advancement, while darker skin and African or indigenous features severely limit such opportunity and social

³³ It may well be that the apparent judicial predisposition to consider the culpability of Black defendants in anti-Latino bias employment claims is part and parcel of the general proclivity for more readily accepting the possible culpability of Black defendants in contrast to other racial groups. See, e.g., Floyd Weatherspoon, *Ending Racial Profiling of African-Americans in the Selective Enforcement of Laws: In Search of Viable Remedies*, 65 U. PITT. L. REV. 721 (2004). Therefore, while inter-ethnic cases of anti-Latino bias do exist, they have not thus far led to judicial confusion in the inquiry into discrimination and are therefore not the subject of this Article. See, e.g., *Limes-Miller v. City of Chicago*, 773 F. Supp. 1130 (N.D. Ill. 1991) (dismissing claim of Latina plaintiff who failed to show that her employer's stated reason for layoffs was a pretext for national-origin discrimination in an inter-ethnic workplace in which plaintiff failed to prove that Blacks were promoted at higher rates than others).

³⁴ An essentialized approach to understanding groups is marked by the notion that human identity categories are fixed and exist trans-historically and transculturally. See Cheshire Calhoun, *Denaturalizing and Desexualizing Lesbian and Gay Identity*, 79 VA. L. REV. 1859, 1863 (1993).

³⁵ See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (concluding that an employer's expressions of stereotypical views about a protected group such as women could be admitted as evidence that an adverse employment decision was impermissibly motivated); see also Leti Volpp, *(Mis)identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57, 95 (1994) (proposing the use of essentialized notions of culture in criminal law cases for the limited purpose of explaining an individual's state of mind and cultural influences).

³⁶ Miriam Jimenez Román, *Un Hombre (Negro) del Pueblo: José Celso Barbosa and the Puerto Rican "Race" Toward Whiteness*, 8 CENTRO 8, 12 (1996).

mobility.³⁷ The poorest socioeconomic class is populated primarily by Afro-Latinos, while the most privileged class is populated primarily by Whites; an elastic intermediary socioeconomic standing exists for some light-skinned (mixed-race) “Mulattos” and “Mestizos.”³⁸ For instance, until the Cuban revolution in 1959, certain occupations used explicit color preferences to hire Mulattos to the complete exclusion of dark-skinned Afro-Cubans, based on the premise that Mulattos were superior to dark-skinned Afro-Cubans, though not of the same status as Whites.³⁹

White supremacy is deeply ingrained and continues into the present. For example, in research conducted in Puerto Rico during the 1997–1998 academic year, the overwhelming majority of the 187 college students interviewed described “Puerto Ricans who are ‘dumb’ as having ‘dark skin.’”⁴⁰ Conversely, the same students correlated light skin color with a description of “Puerto Ricans who are physically strong.” Such negative perspectives about African ancestry are not limited to college students. In 1988, when the presiding governor of Puerto Rico publicly stated, “The contribution of the black race to Puerto Rican culture is irrelevant, it is mere rhetoric,” it was in keeping with what social scientists describe as the standard paradox in Puerto Rico: Puerto Ricans take great pride in the claim of being the whitest people of the Caribbean islands, while simultaneously asserting they are not racist. The pride of being a presumably White population is a direct reaction to the Puerto Rican understanding that “black people are perceived to be culturally unrefined and lack ambition.”⁴¹ The Puerto Rican example is emblematic of the racial attitudes throughout the Caribbean and Latin America.⁴²

As in the United States, the disparagement of Black identity is not limited to Mulattos, Mestizos and Whites, but also extends to darker-skinned Afro-Latinos who can harbor internalized racist norms. The internalization manifests itself in a widespread concern among Afro-Latinos with the degree of pigmentation, width of nose, thickness of lips, and nature of one’s hair—with straight, European hair denominated literally as “good” hair.

³⁷ Tanya Katerí Hernández, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, a United States—Latin America Comparison*, 87 CORNELL L. REV. 1093, 1121–22 (2002) [hereinafter Hernández, *Multiracial Matrix*].

³⁸ *Id.* at 1121–25.

³⁹ Tanya K. Hernández, *An Exploration of the Efficacy of Class-Based Approaches to Racial Justice: The Cuban Context*, 22 U.C. DAVIS L. REV. 1135 (2000).

⁴⁰ Ronald E. Hall, *A Descriptive Analysis of Skin Color Bias in Puerto Rico: Ecological Applications to Practice*, 27 J. SOC’Y. & SOC. WELFARE 171, 177–78 (2000).

⁴¹ Arlene Torres, *La Gran Familia Puertorriqueña “Ej Prieta De Beldá” (The Great Puerto Rican Family is Really Really Black)*, in BLACKNESS IN LATIN AMERICA AND THE CARIBBEAN: SOCIAL DYNAMICS AND CULTURAL TRANSFORMATION, VOL. II, EASTERN SOUTH AMERICA AND THE CARIBBEAN 285, 297 (Arlene Torres & Norman E. Whitten, Jr. eds., 1998).

⁴² Ariel E. Dulitzky, *A Region in Denial: Racial Discrimination and Racism in Latin America*, in NEITHER ENEMIES NOR FRIENDS, *supra* note 4, at 41–42 (describing the anti-Black racism that exists throughout Latin America).

This concern with European skin and features also influences Afro-Latinos' assessments of preferred marriage partners. Marrying someone lighter is called "adelantando la raza" (improving the race) under the theory of "blanqueamiento" (whitening), which prizes the mixture of races precisely to help diminish the existence of Afro-Latinos. Even in the midst of Latin American nationalistic emphasis on having individuals identify solely by their country of origin rather than by racial ancestry, discursive distinctions are made about the diminished value of Blacks and blackness. Indeed, it is even common within Latin America and the Caribbean to rank order the prestige of countries based on a color spectrum in which each country is racially identified.⁴³ In this way "nationality is a proxy for race" that embodies White supremacy.⁴⁴ As a result, countries with a large percentage of Whites are valued while those with a large percentage of Blacks are discounted as "less cultured."⁴⁵ The attribution of a racial identity to countries, with nationality serving as a proxy for race, also permits a schizophrenic ability to cast racial aspersions about a person's background without ever openly discussing race. These proxies for race are deeply ingrained in Latin American/Caribbean culture.⁴⁶

It should not be surprising, then, that migrants from Latin America and the Caribbean travel to the United States with their culture of anti-Black racism well intact.⁴⁷ In turn, this facet of Latino culture is transmitted to some degree to younger generations.⁴⁸ For instance, in one ethnographic

⁴³ Telephone Interview with Ana Y. Ramos Zayas, Professor of Latino & Hispanic Caribbean Studies, Rutgers Univ. (Mar. 1, 2007); see also Francisco Valdes, *Race, Ethnicity, and Hispanismo in a Triangular Perspective: The "Essential Latino/a" and LatCrit Theory*, 48 UCLA L. REV. 305, 326 (2000) (describing the racialization of Latin America and "the supremacy of whiteness and Eurocentricity in Latina/o racial and ethnic hierarchies — both in Latin American societies and in Latina/o communities throughout the United States"). One scholar refers to racial identification of countries as "primacism." See Benjamin G. Davis, *International Commercial Online and Offline Dispute Resolution: Addressing Primacism and Universalism*, 4 J. AM. ARB. 79, 81 (2005) ("The word primacism is my manner of describing the situation where race, culture, and nationality are intertwined in such a manner that while one speaks in terms of nationality, in fact, one is describing race (or some other primary group).").

⁴⁴ Davis, *supra* note 43, at 81.

⁴⁵ Hernández, *Multiracial Matrix*, *supra* note 37, at 1160 ("[T]he examination of the Latin American context has shown how existing racial disparities and hierarchy are explained as the result of the 'bad culture' that racial minorities manifest."); see also Paulo de Carvalho-Neto, *Folklore of the Black Struggle in Latin America*, 5 LATIN AM. PERSP. 53, 58–62, 71 (1978) (detailing the ways in which Latin American folklore publicly depicts Blacks in Latin America as ill-mannered and stupid). "To the prejudiced white man, the black man has no artistic or literary education." *Id.* at 62.

⁴⁶ Telephone Interview with Ana Y. Ramos Zayas, *supra* note 43.

⁴⁷ Paula D. McClain et al., *Racial Distancing in a Southern City: Latino Immigrants' Views of Black Americans*, 68 J. POL. 571 (2006) (documenting how Latino immigrants bring negative attitudes towards Blacks with them from their countries of origin rather than develop them in the United States after immigrating); Torres-Saillant, *Problematic Paradigms*, *supra* note 30, at 435–55.

⁴⁸ See Valdes, *supra* note 43, at 307 (observing the "internal reproduction of white supremacy within and among Latinas/os").

study of Dominican racial identity within the United States, all of the Dominican preoccupations with skin color and European phenotype honed in the Dominican Republic were readily apparent among the Dominican Diaspora in the United States.⁴⁹ Furthermore, interviews of Dominican clients at a hair salon in Washington Heights, New York, demonstrated the pervasive Latin American/Caribbean racialized denigration of curly African hair as “bad” and straight European hair as “good,” along with the distaste for dark skin.⁵⁰

The inability to perceive Latino racism in the United States stems from an acceptance in U.S. public discourse of the Latin American myth that racism does not exist in Latin America⁵¹ and that racism is thus not part of the Latino migrant legacy across generations.⁵² In turn, Latinos and the scholars who describe their racial attitudes tend to accept the notion that any anti-Black sentiment expressed by Latinos in the United States is a consequence of learning the cultural norms of the United States and its racial paradigm.⁵³ However, a growing social science literature discredits the premise that Latino racism is a set of behaviors and attitudes only learned on the United States mainland.⁵⁴

B. The Extent of Latino Social Distance from African Americans

The sociological concept of “social distance” measures the social unease that an ethnic or racial group has in interactions with another ethnic or racial group.⁵⁵ Social science studies of Latino racial attitudes often indicate a preference for maintaining social distance from African Americans. And while the social distance level is largest for recent Latin American immigrants, more established communities of Latinos in the United States are also characterized by their social distance from African Americans. For instance, in a 2002 survey of 600 Latinos (two-thirds of whom were Mexican, the remainder Salvadoran and Colombian) and 600 African Americans in Houston, Texas, the African Americans had more positive views of Lati-

⁴⁹ See Ginetta E. B. Candelario, *Situating Ambiguity: Dominican Identity Formations* 339 (2000) (unpublished Ph.D. dissertation, City University of New York) (on file with author).

⁵⁰ *Id.* at 360–81.

⁵¹ Dulitzky, *supra* note 42, at 39.

⁵² See *supra* text accompanying note 30.

⁵³ See, e.g., TATCHO MINDIOLA, JR. ET AL., *BLACK-BROWN RELATIONS AND STEREOTYPES* 20–29, 37–38 (2002).

⁵⁴ See Valdes, *supra* note 43, at 328 (“Latina/o tendencies to valorize whiteness are not simply a matter of acculturation, or even reacculturation, to the Anglocentric white supremacist rule imposed by the United States.”); see also Tanya Katerí Hernández, *To Be Brown in Brazil: Education and Segregation Latin American Style*, 29 N.Y.U. REV. L. & SOC. CHANGE 683 (2005) (describing the literature documenting the existence of residential and educational racial segregation in Latin America).

⁵⁵ GEORGE YANCEY, *WHO IS WHITE? LATINOS, ASIANS, AND THE NEW BLACK/NONBLACK DIVIDE* 65 (2003).

nos than vice versa.⁵⁶ While a slim majority of U.S.-born Latinos did use positive identifiers when describing African Americans, only a minority of foreign-born Latinos did so. One typical foreign-born Latino respondent stated “I just don’t trust them The men, especially, all use drugs and they all carry guns”⁵⁷ It is thus not surprising that this same study found that, although Latino immigrants live in residential neighborhoods with African Americans in the same proportion as U.S.-born Latinos, 46% of Latino immigrants report almost no interaction with African Americans whatsoever.⁵⁸ Similarly, the Los Angeles Survey of Urban Inequality found that recent and intermediate-term Latino immigrants held the most negative stereotypes of African Americans.⁵⁹

Furthermore, the social distance of Latinos from African Americans is consistently reflected in Latino responses to other survey questions.⁶⁰ In a 2003 survey of five hundred residents of Durham, North Carolina (equally divided among Latinos, African Americans, and White-Anglos), researchers found that Latinos’ negative stereotypes of African Americans exceed those held by White-Anglos.⁶¹ A 2000 study of residential segregation found that Latinos reject African Americans as neighbors more readily than members of other racial groups do.⁶² In addition, the 1999–2000 Lilly Survey of American Attitudes and Friendships indicated that African Americans were the least desirable marriage partners for Latinos, whereas African Americans are more accepting of intermarriage with Latinos.⁶³

Similarly, in a 1993 study of intergroup relations, Latinos overwhelmingly responded that they had most in common with Whites and least in

⁵⁶ MINDIOLA, JR., *supra* note 53, at 35.

⁵⁷ *Id.* at 35.

⁵⁸ *Id.* at 44–45.

⁵⁹ CAMILLE ZUBRINSKY CHARLES, WON’T YOU BE MY NEIGHBOR? RACE, CLASS, AND RESIDENCE IN LOS ANGELES 161 (2006) (describing the results from the 1992–1994 Los Angeles Survey of Urban Inequality).

⁶⁰ *Id.* at 46.

⁶¹ See McClain, *supra* note 47 (observing that a majority of Latino immigrants in the study—58.9%—said that few or almost no African Americans are hardworking, 57% said few if any African Americans could be trusted, and nearly one-third said few if any African Americans are easy to get along with; for White-Anglos, 9.3% said few African Americans work hard, 9.6% said African Americans could not be trusted, and 8.4% said African Americans were difficult to get along with).

⁶² Camille Zubrinsky Charles, *Neighborhood Racial-Composition Preferences: Evidence from a Multiethnic Metropolis*, 47 SOC. PROBS. 379 (2000).

⁶³ YANCEY, *supra* note 55, at 70–71 (describing the study of group-based racial attitudes but not delineating which ethnic groups made up the composite of “Latinos” in the study respondents); see also Roger Lindo, *Miembros de las Diversas Razas Prefieren a los Suyos: Así lo Afirma una Investigación de la Universidad de California de Los Angeles*, LA OPINION, Nov. 20, 1992, at 1C (describing UCLA study indicating Latino social distance from African Americans); Cynthia Orosco, *Aprender a Convivir: Negros e Hispanos*, LA OPINION, Apr. 14, 2001, at 9A (describing a study by Hispanic Link regarding Latino relations with African Americans in North Carolina, South Carolina, Arkansas, Alabama, and Tennessee).

common with African Americans.⁶⁴ In contrast, African Americans responded that they felt they had more in common with Latinos and least in common with Whites and Asian Americans. It is somewhat ironic that African Americans, who are publicly depicted as being averse to coalition building with Latinos, provide survey responses that are actually more in accord with all the socioeconomic data that demonstrates the commonality of African American and Latino communities.⁶⁵ Meanwhile, Latinos in contradistinction provide survey responses that fly in the face of all the socioeconomic data demonstrating African American and Latino parallels.⁶⁶

Although some commentators might equate the Latino preference for White-Anglos over African Americans with the competition they perceive from African Americans in the labor market, a 1996 sociological study of racial group competition indicates otherwise.⁶⁷ In the study of 477 Latinos from the 1992 Los Angeles County Social Survey, Bobo and Hutchings found that prejudice contributes to perceptions of group threat and economic competition. They also found that the greater the social distance Latinos prefer to maintain from African Americans, the more likely they are to see African Americans as competitors.⁶⁸ In other words, the anti-Black animosity facilitates the perception of African Americans as an economic threat. Yet despite media reports to the contrary, the Bobo and Hutchings study indicated a lower rate of African American perception of economic competition from Latinos, as compared with the rate of Latino perception of economic threat from African Americans.⁶⁹ Similarly, Latinos attribute disorder to predominantly African American neighborhoods much more readily than do other racial/ethnic groups. A study published in 2004

⁶⁴ NAT'L CONFERENCE FOR CMTY. AND JUSTICE, *TAKING AMERICA'S PULSE: THE FULL REPORT OF THE NATIONAL CONFERENCE SURVEY ON INTER-GROUP RELATIONS* 10 (1994).

⁶⁵ See Tanya Katerí Hernández, "Too Black to be Latino/a:" *Blackness and Blacks as Foreigners in Latino Studies*, 1 *LATINO STUD.* 152, 154 (2003) ("Current discussions about the demographic explosion of Latinos/as and their desire to assume greater political clout has focused upon the presumed obstructionism and discontent of Anglo-Blacks who must 'relinquish' their power to accommodate Latinos/as."); see also Alex Prud'homme, *Race Relations Browns vs. Blacks*, *TIME*, July 29, 1991, at 14–16 (identifying the source of Black-Latino hostilities as African Americans' beliefs that "Latinos are benefiting from civil rights victories won by blacks with little help from Hispanics," "fear that Hispanic immigrants, who are often willing to work less than the legal minimum wage, are supplanting them in even the lowliest positions," and resistance to "any attempts to increase Latino employment" and being "unwilling to treat [Latinos] as equals in the fight for equal rights"). A recent book about Black-Latino hostilities has been criticized for being one-sided in its blame of African Americans: "The villains invariably turn out to be African-Americans, who are threatened by demographic changes and shut Latinos out of political office, while refusing to acknowledge that anyone's suffering could ever be as great as theirs." Ed Morales, *Brown Like Me?*, *NATION*, Mar. 8, 2004, at 24.

⁶⁶ BILL PIATT, *BLACK AND BROWN IN AMERICA: THE CASE FOR COOPERATION* 52–57 (1997) (detailing the socioeconomic factors that align Latino and African American interests).

⁶⁷ Lawrence Bobo & Vincent L. Hutchings, *Perceptions of Racial Group Competition: Extending Blumer's Theory of Group Position to a Multiracial Social Context*, 61 *AM. SOC. REV.* 951 (1996).

⁶⁸ *Id.* at 963.

⁶⁹ *Id.* at 964.

demonstrated that neighborhood racial context in Chicago shapes perceptions of disorder more powerfully than actual observations of disorder.⁷⁰

The Latino affinity for White-Anglos over African Americans is part and parcel of the Latino identification with whiteness. Indeed, in contrast to the many reports of a Latino preference for mixed-race census racial categories, there is a strong Latino preference for the White racial category and some Latino groups like Cubans disproportionately select the White racial category.⁷¹ Moreover, the Latino National Political Survey, a study of Latino racial preferences across generations in the United States from 1989 to 1990, found that a substantial majority of Latino respondents chose to self-identify as White.⁷² It is important to note that the Latino National Political Survey study was able to examine the preference for whiteness divorced from any ancillary effects that variation in census racial category structures can include.⁷³ The study indicated that the White racial category is particularly preferred by recent immigrants of all skin color shades.⁷⁴ And when later generations do move away from the White racial category, they do so in favor of collective national ethnic labels like “Latino” or “Hispanic.”⁷⁵ Furthermore, the Latino imagination consistently identifies a White face as the quintessential Latino.⁷⁶ Even for those Latinos who do acknowledge their African ancestry, there is a cultural pressure to emphasize their Latino ethnicity publicly as a mechanism for distancing themselves from

⁷⁰ Robert J. Sampson & Stephen W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of “Broken Windows,”* 67 SOC. PSYCH. Q. 319, 332–33, 336 (2004) (summarizing findings of study of five hundred block groups in Chicago).

⁷¹ William Darity, Jr., Darrick Hamilton & Jason Dietrich, *Passing on Blackness: Latinos, Race and Earnings in the USA*, 9 APPLIED ECON. LETTERS 847 (2002).

⁷² William Darity, Jr. & Tanya Golash Boza, *Choosing Race: Evidence from the Latino National Political Survey* 4–5 (2004), available at <http://paa2004.princeton.edu/download.asp?submissionid=41644> (discussing findings from study of Mexican American, Cuban, and Puerto Rican respondents in the United States); see also William A. Darity, Jr. et al., *Bleach in the Rainbow: Latino Ethnicity and Preference for Whiteness*, 13 TRANSFORMING ANTHROPOLOGY 103 (2005).

⁷³ A Hispanic-origin ethnicity category was not added to the list of racial categories on the census until 1980. See Transfer of Responsibility for Certain Statistical Standards from OMB to Dep’t of Commerce, Directives for the Conduct of Federal Statistical Activities, Directive 15, 43 Fed. Reg. 19,260, 19,269 (May 4, 1978). This permitted Latinos to self-identify both as of Hispanic origin and as belonging to a racial category (Black, White, Asian, Indian, or Other). With the 1980 census Latino respondents could self-select their racial and ethnic designation rather than have one designated by a census enumerator. Prior to the 1980 census, enumerators were instructed to observe and then classify Hispanics who “were definitely not Negro” as White. See Sharon M. Lee, *Racial Classifications in the U.S. Census: 1890–1990*, 16 ETHNIC & RACIAL STUD. 75, 78 (1993). Mexicans were exempted from this White versus Negro visual inspection when “Mexican” was briefly included as its own racial category on the 1930 census. *Id.* From 1940 to 1970, Mexicans were officially included in the White category. *Id.*; see also CLARA E. RODRIGUEZ, CHANGING RACE: LATINOS, THE CENSUS, AND THE HISTORY OF ETHNICITY IN THE UNITED STATES (2000).

⁷⁴ Darity & Boza, *supra* note 72, at 13.

⁷⁵ *Id.*

⁷⁶ Denise DiFulco, *Can You Tell a Mexican from a Puerto Rican?*, LATINA, Aug. 2003, at 86, 86.

public association with the denigrated societal class of African Americans.⁷⁷ This truism is highlighted by the popular refrain “the darker the skin, the louder the Spanish.”⁷⁸

While commentators in the United States are seemingly oblivious to the pre-existing anti-Black racism of Latinos, journalists from abroad have observed a number of disturbing examples. For instance, a 2001 British Broadcasting Company news item entitled “Hate in Action” noted that Latino gangs in Los Angeles have a clear mission of anti-Black ethnic cleansing in their neighborhoods and that Latinos are increasingly perpetrators of anti-Black hate crimes in the United States.⁷⁹ In fact, four Latino gang members were recently convicted in Los Angeles for engaging in a six-year conspiracy to assault and murder African Americans in the city’s Highland Park neighborhood.⁸⁰ During the trial, federal prosecutors demonstrated that African American residents were terrorized in an effort to force them out of a neighborhood perceived as Latino.⁸¹ Notably, the victims of the violence were not themselves members of gangs. One African American resident was murdered as he looked for a parking space.⁸² As a consequence of the incendiary facts, the trial garnered some media attention and is thus an exception to the general public silence about Latino expressions of anti-Black bias in the United States.⁸³

The one area in which Latino anti-Black racism has begun to be discussed in the United States is with respect to the apparent racial caste system of Spanish-language television that presents Latinos as almost exclusively White.⁸⁴ In fact, because of the scarce but derogatory images of Afro-Latinos in the media, activists have been lobbying the Puerto Rican Legal Defense and Education Fund to consider a lawsuit against the two major Spanish-language networks to challenge their depiction of Afro-

⁷⁷ PATRICIA R. PESSAR, *A VISA FOR A DREAM: DOMINICANS IN THE UNITED STATES* 44 (1995).

⁷⁸ DAVID HOWARD, *COLORING THE NATION: RACE AND ETHNICITY IN THE DOMINICAN REPUBLIC* 114–15 (2001).

⁷⁹ Pilar Marrero, *El Odio en Acción*, BBCMUNDO.COM, Aug. 29, 2001, http://news.bbc.co.uk/hi/spanish/specials/newsid_1513000/1513820.stm.

⁸⁰ Press Release, U.S. Dep’t of Justice, *Gang Members Convicted of Federal Hate Crimes for Murders and Assaults of African-Americans* (Aug. 1, 2006), available at http://www.usdoj.gov/opa/pr/2006/August/06_crt_481.html.

⁸¹ See John Spano, *Blacks Were Targeted, Witness Insists: A Highland Park Gang Member Testifies in a Civil Rights Conspiracy Trial That a 1999 Murder Was Part of a Racial Cleansing Campaign*, L.A. TIMES, July 6, 2006, at B4.

⁸² See Andrew Murr, *A Gang War with a Twist: Gangbangers in L.A. on Trial for Deadly Hate Crimes*, NEWSWEEK, July 17, 2006, at 29.

⁸³ See Tanya K. Hernández, Op-Ed., *Roots of Latino/Black Anger: Longtime Prejudices, Not Economic Rivalry, Fuel Tensions*, L.A. TIMES, Jan. 7, 2007, at M1 (discussing the growing pattern of Latino gangs targeting peaceful, non-gang-affiliated Black residents in Los Angeles, culminating in the murder of fourteen-year-old Cheryl Green on December 15, 2006).

⁸⁴ Michael A. Fletcher, *The Blond, Blue-Eyed Face of Spanish TV*, WASH. POST, Aug. 3, 2000, at A01.

Latinos.⁸⁵ Some Latino activists see a direct parallel between the whiteness of Spanish-language television and Latino politics. One such activist states:

Latino leaders and organizations do not want to acknowledge that racism exists among our people, so they have ignored the issue by subscribing to a national origin strategy. This strategy identifies Latinos as a group comprising different nationalities, thereby creating the false impression that Latinos live in a color-blind society.⁸⁶

Many concrete examples demonstrate that Latinos are not colorblind. To begin with, Afro-Latinos in the United States experience color discrimination at the hands of other Latinos. In fact, the 2002 National Survey of Latinos indicated that Latinos with more pronounced African ancestry, such as Dominicans, more readily cite color discrimination as an explanation for the bias they experience from other Latinos.⁸⁷ Furthermore, despite variations across regions and ethnic groups, the commonality of social distance in relations with African Americans remains constant. What follows is a preliminary review of the social science literature that demonstrates the consistency of anti-Black sentiment in Latino communities across the United States.

C. Racial Attitudes Among Latinos Across Ethnic Groups and Regions

Of all the Latino ethnic subgroups, Mexican Americans have the largest demographic presence within the United States.⁸⁸ The development of Mexican American racial identity in the United States has been subject to a variety of influences. Prior to the Chicano movement, Mexican American leaders claimed that Mexicans were Caucasian and therefore deserving of the same social status as White-Anglos.⁸⁹ “The Mexican American generation saw

⁸⁵ Carlos Flores, *Race Discrimination Within the Latino Community*, *DIÁLOGO*, Winter/Spring 2001, at 30–31, available at http://condor.depaul.edu/~dialogo/back_issues/issue_5/race_discrimination.htm.

⁸⁶ *Id.*

⁸⁷ PEW HISPANIC CTR. & THE KAISER FAMILY FOUND., NATIONAL SURVEY OF LATINOS 74 (2002), available at <http://pewhispanic.org/files/reports/15.pdf>.

⁸⁸ The 2000 census reported that of the 35.3 million Latinos in the United States, 58% were of Mexican or Mexican American origin. See Press Release, U.S. Census Bureau, *Census 2000 Paints Statistical Portrait of the Nation's Hispanic Population* (May 10, 2001), available at <http://www.census.gov/Press-Release/www/2001/cb01-81.html>. This large demographic presence represents not only contemporary immigration flows from Mexico, but also the generations of Mexican Americans who trace their roots to the incorporation of Mexican lands into the United States after the 1848 Treaty of Guadalupe Hidalgo, which ended the Mexican American War. See RICHARD GRISWOLD DEL CASTILLO, *THE TREATY OF GUADALUPE HIDALGO: A LEGACY OF CONFLICT* (1990); THE MEXICAN WAR: A CRISIS FOR AMERICAN DEMOCRACY (Archie P. McDonald ed., 1969).

⁸⁹ Ruben Salazar, the *Los Angeles Times* journalist who most faithfully reported the developments of the Chicano movement, observed that “many [Mexican Americans] still

themselves as a White group,” writes Professor Ian Haney Lopez. “This self-conception both drew upon and led to prejudice against African Americans, which in turn hindered direct relations between those two groups.”⁹⁰ Only after widespread police brutality and judicial mistreatment of Mexicans in the wake of the Black civil rights movement did a Chicano movement that stressed a non-White Chicano identity emerge.⁹¹ Yet this non-White identity focused upon Chicanos’ indigenous ancestry and completely submerging their African ancestry.⁹²

Even with their construction of a non-White racial identification, Chicanos in California and the Southwest in the 1960s and 1970s expressed feelings of cultural superiority with respect to African Americans that adversely affected intergroup interactions.⁹³ At the time, one Chicano college student summed up this sentiment when he wrote:

We’re not like the Negroes. They want to be white men because they have no history to be proud of. My ancestors come from one of the most civilized nations in the world.⁹⁴

Such sentiments in turn fed Chicano resentment about the allocation of government funds in Los Angeles after the 1965 Watts urban uprising, and the allocation of government funds to service agencies catering to what were described to be as “less needy” African Americans.⁹⁵ Such perspectives have not greatly changed in the new millennium. In Los Angeles, where a predominant number of Latinos are Chicano, it has been observed:

Many Latinos fail to understand the complexity and severity of the black experience. They frequently bash blacks for their poverty and goad them to pull themselves up like other immigrants

cling to the idea that Mexican Americans are Caucasians, thus white, thus ‘one of the boys.’” Ruben Salazar, *Chicanos Would Find Identity Before Coalition With Blacks*, L.A. TIMES, Feb. 27, 1979, reprinted in BORDER CORRESPONDENT: SELECTED WRITINGS, 1955–1970, at 239, 241 (Mario T. Garcia ed., 1995). In addition, Salazar observed that “several of the more conservative Mexican-American leaders strongly oppose any ‘mixing’ of Mexican-American and Negro grievances.” Ruben Salazar, *Negro Drive Worries Mexican-Americans*, L.A. TIMES, July 14, 1963, reprinted in BORDER CORRESPONDENT: SELECTED WRITINGS, 1955–1970, at 113, 113 (Mario T. Garcia ed., 1995).

⁹⁰ Ian Haney Lopez, *Protest, Repression, and Race: Legal Violence and the Chicano Movement*, 150 U. PA. L. REV. 205, 216 (2001).

⁹¹ *Id.*

⁹² Tanya Katerí Hernández, *Afro-Mexicans and the Chicano Movement: The Unknown Story*, 92 CAL. L. REV. 1537 (2004) (reviewing IAN F. HANEY LÓPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* (2003)).

⁹³ FRED BARBARO, *Ethnic Resentment, in BLACK/BROWN/WHITE RELATIONS: RACE RELATIONS IN THE 1970S* 77, 89–91 (Charles V. Willie ed., 1977).

⁹⁴ *Id.* at 91.

⁹⁵ *Id.* at 90.

have done. Worse, some even repeat the same vicious anti-black epithets used by racist whites.⁹⁶

For instance, in the 2000 *New York Times* series entitled “How Race is Lived in America,” an investigation into the North Carolina pork industry revealed a rigidly planned hierarchy in job tasks assigned by race that usually had White-Anglos employed as supervisors over both African Americans and Latinos.⁹⁷ Yet rather than focusing on the injustice of all-White management ranks, Mexican worker Mrs. Fernandez is quoted as saying, “Blacks don’t want to work. They’re lazy.”⁹⁸ Her husband is quoted as saying, “I hate the Blacks.”⁹⁹ Even Mexican Americans with greater exposure to the U.S. history of racism express cultural superiority over African Americans. One prominent Mexican American business executive and commentator in Los Angeles, Fernando Oaxaca, accounts for the difference in Latino and African American economic conditions with the explanation, “[W]e have a work ethic.”¹⁰⁰

Even younger generations are not immune to anti-Black sentiment. In recent years the Los Angeles town of Inglewood has experienced violence almost every time Black History Month is celebrated.¹⁰¹ The source of the violence is Latino teens’ resentment at the month-long celebration of Black culture. In February 1999, the principal of Inglewood High School cancelled the Black History Month celebration in order to avoid the violence.¹⁰²

Los Angeles Latinos have even proposed having block association meetings that exclude the African American residents of the block, prompting one African American resident to state, “[I]t seems like the Latinos don’t even want to try to forge neighborhood unity.”¹⁰³ This social distance is paralleled even in church congregations in which Latino and African American parishioners who share the same church attend separate services, serve on separate parish councils, and never meet.¹⁰⁴ It is interesting to note that even when African American congregations in other areas of the United States have actively made it part of their ministry to reach out to their Latino neighbors, the social distance of Latinos remains.¹⁰⁵ Eth-

⁹⁶ Earl Ofari Hutchinson, *Urban Tension: Latinos’ New Clout Threatening to Blacks*, L.A. DAILY NEWS, Jan. 26, 2003, at V3.

⁹⁷ Charlie LeDuff, *At a Slaughterhouse, Some Things Never Die: Who Kills, Who Cuts, Who Bosses Can Depend on Race*, N.Y. TIMES, June 16, 2000, at A1.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Gary Lee & Robert Suro, *Latino-Black Rivalry Grows: Los Angeles Reflects Tensions Between Minorities*, WASH. POST, Oct. 13, 1993, at A01.

¹⁰¹ Martin Kasindorf & Maria Puente, *Hispanics and Blacks Find Their Futures Entangled*, USA TODAY, Sept. 10, 1999, at 21A.

¹⁰² *Id.*

¹⁰³ Lee & Suro, *supra* note 100, at A01.

¹⁰⁴ *Id.*

¹⁰⁵ Francis W. Guidry, *Reaching The People Across the Street: An African American Church Reaches Out To Its Hispanic Neighbors* (1997) (unpublished Ph.D. Dissertation,

nographic studies of Mexican Americans in Chicago and the southern states uncover the same disdain for African Americans and attributions of blackness in Latino subgroups.¹⁰⁶ For example, one Latino student at a Chicago high school said: “It’s crazy. But a lot of the Hispanic kids here just don’t want to be friends with the blacks.”¹⁰⁷

The general racial relations of Cubans with African Americans in Florida are not much better. In fact, Miami, Florida (a city in which Cubans and other Latinos predominate and hold political power), has the distinction of being the only city that was the locus of four separate race riots in the 1980s.¹⁰⁸ The immediate causes of all four riots were police shootings of African Americans.¹⁰⁹ Although police brutality against African Americans is endemic throughout the United States, Miami is a city with many Latino police officers and, more alarmingly, a Latino population seemingly indifferent to anti-Black police brutality. For instance, when a Colombian immigrant police officer was found guilty of manslaughter for killing an African American motorcyclist, the Latino community came out in protest.¹¹⁰ Furthermore, Latinos publicly denounced the urban uprisings that marked each affront to the humanity of African Americans as the work of the “criminal element.”¹¹¹ Indeed, sociologists in Miami have noted that the Latino discourse about African Americans evinces the association of African Americans with crime and “an invidious comparison between Hispanic economic advancement—attributed to hard work, family values, and self-reliance—and black dependency on welfare and other social programs.”¹¹²

In contrast, studies of Puerto Rican relations with African Americans in the northeastern United States have traditionally noted the smaller degree of social distance that exists between the groups.¹¹³ However, even

Drew University Theological School) (on file with author).

¹⁰⁶ See NICHOLAS DE GENOVA & ANA Y. RAMOS-ZAYAS, *LATINO CROSSINGS: MEXICANS, PUERTO RICANS, AND THE POLITICS OF RACE AND CITIZENSHIP* 187–89 (2003) (discussing ethnographic study of Latino racial attitudes in Chicago); McClain et al., *supra* note 47 (discussing study of Latino immigrant views of Blacks in the U.S. South); see also Rachel L. Swarns, *Bridging a Racial Rift That Isn’t Black and White*, N.Y. TIMES, Oct. 3, 2006, at A1 (describing derogatory racial attitudes of Mexican workers in the U.S. South toward African Americans).

¹⁰⁷ Jacquelyn Heard, *Racial Strife Runs Deep at High School: Black and Hispanic Staff, Students Clash at Farragut*, CHI. TRIB., Nov. 17, 1992, at C.

¹⁰⁸ Marvin Dunn & Alex Stepick III, *Blacks in Miami*, in *MIAMI NOW! IMMIGRATION, ETHNICITY, AND SOCIAL CHANGE* 41 (Guillermo J. Grenier & Alex Stepick III eds., 1992).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 45.

¹¹¹ John F. Stack & Christopher L. Warren, *The Reform Tradition and Ethnic Politics: Metropolitan Miami Confronts the 1990s*, in *MIAMI NOW! IMMIGRATION, ETHNICITY, AND SOCIAL CHANGE* 174 (Guillermo J. Grenier & Alex Stepick III eds., 1992).

¹¹² Guillermo J. Grenier & Max Castro, *Blacks and Cubans in Miami: The Negative Consequences of the Cuban Enclave on Ethnic Relations*, in *GOVERNING AMERICAN CITIES: INTERETHNIC COALITIONS, COMPETITION, AND CONFLICT*, 137, 151 (Michael Jones-Correa ed., 2001).

¹¹³ See Nelson Peery, *Witnessing History: An Octogenarian Reflects on Fifty Years of*

the Puerto Rican subgroup expresses anti-Black racism. Angela Jorge noted early on that Latinos such as Puerto Ricans are taught within their family circles to dislike African Americans.¹¹⁴ One observer of the civil rights coalitions of Puerto Ricans and African Americans even stated that the coalition “was more of a strategic device than a factual description of the true nature of the relationship between the groups. Puerto Rican participation in civil rights organizations and on picket lines was lower than for whites.”¹¹⁵ Another commentator noted that Puerto Ricans, because of the anti-Black prejudice they harbored, were not eager to be identified with African Americans.¹¹⁶ In fact, the residential segregation between the two groups is high.¹¹⁷ Even though Puerto Rican youth organizations in the 1960s and 1970s modeled themselves after the Black Panthers, the groups never had much contact with Black Power organizations.¹¹⁸

In fact, although relations between Puerto Ricans and African Americans in New York City are typically depicted as unusually harmonious, electoral politics studies have shown the two groups at odds with one another.¹¹⁹ Similarly, in Chicago, racial tensions between Puerto Ricans and African Americans have arisen over the competition for housing rehabilitation, in which Puerto Ricans have depicted African Americans as presumed gang members, criminals, and generally the cause of the tightening housing market.¹²⁰

The concern with a racialized competition between Latinos and African Americans does not dissipate when one examines Dominicans, who are frequently viewed as Black themselves.¹²¹ Despite often sharing the more visible facial imprint of African ancestry, Dominicans and African Americans have a high level of residential segregation,¹²² and Dominicans resent

African American-Latino Relations, in NEITHER ENEMIES NOR FRIENDS, *supra* note 4, at 305, 306–08.

¹¹⁴ Angela Jorge, *The Black Puerto Rican Woman in Contemporary American Society*, in THE PUERTO RICAN WOMAN 134, 139 (Edna Acosta-Belén ed., 1979).

¹¹⁵ BARBARO, *supra* note 93, at 83.

¹¹⁶ José E. Cruz, *Interminority Relations in Urban Settings: Lessons from the Black-Puerto Rican Experience*, in BLACK AND MULTIRACIAL POLITICS IN AMERICA 84, 90 (Yvette M. Alex-Assensoh & Lawrence J. Hanks eds., 2000).

¹¹⁷ *Id.* at 91.

¹¹⁸ *Id.* at 92; see also MIGUEL “MICKEY” MELENDEZ, WE TOOK THE STREETS: FIGHTING FOR LATINO RIGHTS WITH THE YOUNG LORDS (2003).

¹¹⁹ Angelo Falcón, *Black and Latino Politics in New York City: Race and Ethnicity in a Changing Urban Context*, in LATINOS AND THE POLITICAL SYSTEM 171 (F. Chris García ed., 1988); Silvio Torres-Saillant, *Racism in the Americas and the Latino Scholar*, in NEITHER ENEMIES NOR FRIENDS, *supra* note 4, at 281, 299.

¹²⁰ See ANA Y. RAMOS-ZAYAS, NATIONAL PERFORMANCES: THE POLITICS OF CLASS, RACE, AND SPACE IN PUERTO RICAN CHICAGO 228–30 (2003).

¹²¹ Jose Itzigsohn et al., *Immigrant Incorporation and Racial Identity: Racial Self-Identification Among Dominican Immigrants*, 28 ETHNIC & RACIAL STUD. 50, 69 (2005) (describing high levels of Black external racialization of Dominicans in New York and their high level of Black self-identification).

¹²² Lance Freeman, *A Note on the Influence of African Heritage on Segregation: The Case of Dominicans*, 35 URB. AFF. 137, 141 (1999).

job competition from African Americans.¹²³ Recent reports of high-school violence show Dominican youth and African American youth involved in violent clashes as well.¹²⁴ Yet despite the troublesome incidents demonstrating discord between Latinos and African Americans and the complexity of Latino racial attitudes, the emerging Latino inter-ethnic employment discrimination cases often treat Latinos as incapable of racial or ethnic discrimination.

II. THE EMERGING LATINO INTER-ETHNIC DISCRIMINATION CASES

The majority of the emerging cases of Latino inter-ethnic discrimination are disparate treatment claims filed pursuant to Title VII of the Civil Rights Act of 1964.¹²⁵ This accords with the majority of employment dis-

¹²³ Jose Itzigsohn & Carlos Dore-Cabral, *Competing Identities? Race, Ethnicity and Panethnicity Among Dominicans in the United States*, 15 Soc. F. 225, 240 (2000).

¹²⁴ See Russell, *supra* note 15 (reporting the harassment of African American athletes by a Dominican gang of students known as the "D Block" in Perth Amboy, N.J.).

¹²⁵ 42 U.S.C. § 2000e (2000). A list of the relevant cases presently available in Lexis Nexis and Westlaw follows. *Ajayi v. Aramark Bus. Servs.*, 336 F.3d 520 (7th Cir. 2003) (African American plaintiff alleging that Hispanic supervisor treated Hispanic employees better and gave her more onerous responsibilities); *Osei-Buckle v. Laidlaw Transit, Inc.*, No. CV-96-00753-DDP, 1998 WL 552126, at *1 (9th Cir. Aug. 27, 1998) (African American plaintiff alleging Hispanic supervisor discriminated against her and expressed preference for Hispanic employees in allocating work assignments); *Patino v. Rucker*, No. 96-7531, 1997 WL 416949, at *1 (2d Cir. July 25, 1997) (Puerto Rican porter for Columbia University alleging that he was discharged by his Hispanic supervisor and replaced with another Latino porter, in violation of Title VII of the Civil Rights Act); *Arrocha v. City Univ. of N.Y.*, No. CV021868, 2004 WL 594981, at *1 (E.D.N.Y. Feb. 9, 2004) (Afro-Panamanian college instructor alleging illegal termination in preference for non-Black Hispanic employees); *Isaac v. School Bd. of Miami-Dade County*, No. 00-0890-CIV, 2002 WL 31086118, at *1 (S.D. Fla. Sept. 3, 2002) (African American plaintiff alleging discrimination by Hispanic supervisor); *Allen v. Bake-Line Prods., Inc.*, No. 98 C 1119, 2001 WL 1249054, at *1 (N.D. Ill. Oct. 17, 2001) (analyzing allegation by fifteen African American plaintiffs that Hispanic management preferred Hispanic employees and failed to promote African American employees to position of supervisor as an individual disparate treatment case because the statistical data presented by plaintiff was insufficient to mount a systemic case); *Rai v. Dynagear, Inc.*, No.98 C 6053, 2000 WL 875401, at *1 (N.D. Ill. June 26, 2000) (Southeast Asian Indian plaintiff alleging discriminatory termination by Hispanic supervisor and other Hispanic managers who preferred to work with Mexicans and not Indians); *Olumuyiwa v. Harvard Prot. Corp.*, No. 98-CV-5110, 1999 WL 529553, at *1 (E.D.N.Y. July 21, 1999) (Nigerian plaintiff alleging that Hispanic and Yugoslavian employees were hired at a higher wage and received greater number of work hours than Black employees); *Rodriguez v. Torres*, 60 F. Supp. 2d 334 (D.N.J. 1999) (Hispanic plaintiff alleging that Hispanic supervisor denied him a promotion and subjected him to a hostile work environment because of his involvement in Hispanic community activism); *Russell v. Am. Eagle Airlines*, 46 F. Supp. 2d 1330 (S.D. Fla. 1999) (African American aircraft mechanic alleging that employees and supervisors who were either White or Hispanic racially harassed him); *Thompson v. Chicago School Reform Bd. of Trustees*, No. 97 C 1172, 1999 WL 258488, at *1 (N.D. Ill. Apr. 13, 1999) (African American plaintiff alleging discriminatory termination and replacement by Hispanic candidate along with preferential treatment for Hispanic employees); *Harper v. Hunter Coll.*, No. 95 CIV. 10388, 1999 WL 147698, at *1 (S.D.N.Y. Mar. 15, 1999) (West Indian assistant principal custodial supervisor alleging that his Hispanic immediate supervisor and Black American director of housekeeping subjected him to harassment, retaliation, and termination); *Sprott v. Franco*, No. 94 Civ. 3818, 1998 WL 472061, at *1 (S.D.N.Y.

crimination claims that are filed by individual plaintiffs asserting disparate treatment rather than class claims of systemic disparate treatment or disparate impact.¹²⁶ Accordingly, this Article's examination of Latino inter-ethnic employment discrimination focuses on individual disparate treatment claims.

Aug. 7, 1998) (African American who worked as Deputy Director of New York City Housing Authority Office of Equal Opportunity alleged that her Hispanic supervisor harassed her and denied her salary increases because of her race in violation of 42 U.S.C. § 1981); *Vincent v. Wells Fargo Guard Servs., Inc. of Fla.*, 3 F. Supp. 2d 1405 (S.D. Fla. 1998) (Black, Haitian-born security guard alleged that Black and Haitian guards were assigned undesirable posts while Whites and Hispanics were given desirable posts with rest rooms); *Webb v. R&B Holding Co.*, 992 F. Supp. 1382 (S.D. Fla. 1998) (African American title clerk alleging discrimination in a predominantly Caucasian-Hispanic car dealership); *Bernard v. N.Y. City Health & Hosps. Corp.*, No. 93 CIV.8593, 1996 WL 457284 (S.D.N.Y. Aug. 14, 1996) (pro se application by a self-described dark-skinned Black woman born in Trinidad, West Indies alleging that she had been terminated from her position as Administrative Assistant because of her race, color, and national origin, all in violation of Title VII, because of negative interactions with her Puerto Rican manager and other Latina co-workers); *Mathura v. Council for Human Servs. Home Care Servs., Inc.*, No. 95CIV.4191, 1996 WL 157496 (S.D.N.Y. Apr. 2, 1996) (Black Belizean plaintiff alleging that Hispanic supervisor harassed and verbally abused him and treated him differently from the Hispanic employees); *Roberts v. CBS Broadcasting Inc.*, No. BC 227280, 2003 WL 1194102, at *1 (Cal. Ct. App. Mar. 17, 2003) (African American camera technician alleging Hispanic supervisor relegated him to temporary job positions and routinely passed him over in favor of non-African Americans with less seniority, experience or expertise who were often preselected when openings were not posted).

The number of emerging cases has thus far been modest, in large measure because of the racially segmented nature of the employment market, which relegates different racial and ethnic groups to different employment sectors and job positions. See HERBERT HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE, WORK, AND THE LAW* 182–83, 254 (Univ. Wis. Press 1985) (1977) (providing statistical data regarding the racial segmentation of the labor market); DEIRDRE A. ROYSTER, *RACE AND THE INVISIBLE HAND: HOW WHITE NETWORKS EXCLUDE BLACK MEN FROM BLUE-COLLAR JOBS* 29–33 (2003) (explaining the dynamic of labor market racial segmentation and how the operation of ethnic networks facilitates racial hierarchy); Elizabeth Higginbotham, *Employment for Professional Black Women in the Twentieth Century*, in *INGREDIENTS FOR WOMEN'S EMPLOYMENT POLICY* 73–91 (Christine Bose & Glenna Spitze eds., 1987) (detailing how even when Blacks enter into traditionally segregated professions, they are relegated to racially segregated positions). It is the longstanding existence of racial segmentation that in turn can fuel racial hostilities when different racial and ethnic groups interact in the workplace. See, e.g., Roberto Lovato, *The Latinization of New Orleans*, *NEW AM. MEDIA*, Oct. 18, 2005, http://news.newamericamedia.org/news/view_article.html?article_id=fa92e2c88a63985418da75582292b5c7 (describing the influx of Latino workers as a “radical Latinization that is transforming [New Orleans and] other urban landscapes in the country” and that has “strained race relations by lowering wages and fostering competition between groups”).

¹²⁶ See THOMAS R. HAGGARD, *UNDERSTANDING EMPLOYMENT DISCRIMINATION* 83 (2001) (describing the different stages of proof in a class-based systemic disparate treatment case alleging that an employer's hiring or promotion practice results in the hiring or promotion of fewer members of a protected group in relation to the number of qualified group members in the local labor pool); GEORGE RUTHERGLEN, *EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE* 70–87 (2001) (describing the doctrinal features of an adverse impact case in which a business policy or practice affects a plaintiff's protected group as a class differently than it affects members of other groups); John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination*, 43 *STAN. L. REV.* 983, 1019–21 (1991) (detailing the numerical patterns in kinds of cases filed).

A. Doctrinal Contours of Disparate Treatment

In an individual disparate treatment case, an employer may not, with a rule, policy, or decision, treat an employee differently than she treats other employees on account of race or ethnicity.¹²⁷ The plaintiff must prove that the employer purposefully treated her differently compared to similarly situated individuals from other racial or ethnic groups. Yet absent direct evidence of discriminatory motive¹²⁸ (for example, outright statements of animus closely timed with an adverse employment decision), a plaintiff can rely upon circumstantial evidence. This is done with an elaborate burden-shifting process.¹²⁹

¹²⁷ See RUTHERGLEN, *supra* note 126, at 30–54 (describing the features of an individual disparate treatment case, which can also be based upon color, national origin, gender, or religion).

¹²⁸ In a situation where the employer is alleged to have both discriminatory and nondiscriminatory motives for the employment decision, known as a mixed-motive case, a plaintiff who can establish that discrimination played a “motivating factor” in the employer’s decision is entitled to judgment. Thereafter the defendant is allowed to prove that she would have made the same decision absent the discriminatory motive, and if the defendant is successful the plaintiff is not entitled to any compensatory relief on her claim; she can still collect attorney’s fees for prevailing on the merits, and can possibly obtain injunctive relief. See *Desert Palace v. Costa*, 539 U.S. 90 (2003).

¹²⁹ See, e.g., *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973). A plaintiff can establish a prima facie inference of discrimination by showing that she is a member of a protected group (race, sex, etc.) and was rejected after applying for a job or promotion for which he or she was qualified, and that after rejecting the plaintiff the employer continued to seek applications from persons of plaintiff’s qualifications. The employer can rebut the prima facie showing of discrimination by proffering a nondiscriminatory reason for the employment decision. Thereafter the burden shifts back to the plaintiff to present either further evidence of discriminatory intent or evidence that the defendant’s proffered nondiscriminatory justification was actually a pretext for discrimination. The elements of the prima facie case may be modified to suit varying factual patterns beyond the hiring and promotion context. But it is not sufficient for a plaintiff merely to show that the employer’s proffer of a nondiscriminatory reason was “unbelievable.” See *Reeves v. Sanderson Plumbing*, 530 U.S. 133 (2000); see also *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). Scholars have observed that over time, courts have transformed the burden-shifting process into one that is more burdensome on plaintiffs than originally intended by *McDonnell Douglas*. See, e.g., Symposium, *Employment Discrimination and the Problems of Proof*, 61 LA. L. REV. 487 (2001). It is also unclear whether the Supreme Court decision in *Desert Palace* has altered the *McDonnell Douglas* prima facie standard. See MARION G. CRAIN ET AL., WORKLAW: CASES AND MATERIALS 560 (2005) (“Although, on its face, the Supreme Court’s unanimous decision in *Desert Palace* was uncontroversial, it has sparked a lively debate in the lower courts (so far principally confined to district courts) regarding whether the case has altered the *McDonnell Douglas* proof structure.”); see also *id.* at 560 (“Traditionally, the mixed-motives structure was seen as an alternative proof structure But now that the Supreme Court has held that circumstantial evidence can be used to prove a mixed-motive case, there is a question whether the two structures have effectively been merged, given that circumstantial evidence is the means to prove pretext.”); Sheila A. Skojec, *Effect of Mixed or Dual Motives in Actions Under Title VII*, 83 A.L.R. FED. 268 (listing cases that apply *Desert Palace* differently). But see *Ash v. Tyson Foods*, 546 U.S. 454 (2006) (*per curiam*) (chastising the Eleventh Circuit for its inappropriate test once pretext is shown and thereby suggesting that the *McDonnell Douglas* prima facie test remains separate from the *Price Waterhouse* mixed-motive test).

In the absence of evidence of overt discriminatory treatment, the plaintiff may offer statistical data about the composition of the workforce in comparison to the number of racial minorities in the relevant labor market to allow the court to infer discrimination.¹³⁰ Ironically, this ability to infer discrimination from racial disparity in the workplace can lead factfinders in inter-ethnic discrimination cases to conclude that diverse workplaces are free of discrimination. The juridical belief in the inherent salutary powers of a diverse workplace exists despite established Supreme Court precedent to the contrary. In fact, the Supreme Court has rejected the notion that a workplace with a large number of employees from a plaintiff's protected group is de facto free of bias against the plaintiff.¹³¹ However, the emerging inter-ethnic discrimination cases suggest that judges are doctrinal amnesiacs when caught up in the romanticization of diversity.

B. *The Diversity Defense and Its Obfuscation*

The diversity defense describes the way in which legal actors immediately view a racially "diverse" workplace as the equivalent of a racially harmonious workplace.¹³² These legal actors view people of color as the same, overlooking the particular histories and present incidence of racial animus within and across different ethnic groups.¹³³ The judicial fashion-

¹³⁰ See *McDonnell Douglas*, 411 U.S. at 804–05 (noting that statistical evidence showing an employer's general policy or practice is relevant to whether an individual employment decision was discriminatory).

¹³¹ See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam) (vacating summary judgment in a sex discrimination case in which the district court erroneously concluded that an over-representation of women in the workplace obviated the existence of bias against women by an employer that refused to accept job applications from women with preschool-age children).

¹³² It should be noted that more than a decade ago Juan Perea presciently suggested that employers would be able to defend themselves against a claim of national-origin discrimination by the presentation of workplace statistics indicating a large percentage of racial minorities. See Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 864–65 (1994) (describing the potential for an employer's "minority percentage points defense" to national origin discrimination claims). Yet the two cases available to Perea at that time did not explicitly deploy racial minority percentages data as the justification for denying relief to the plaintiffs, as is done in the Latino inter-ethnic discrimination cases discussed herein. See *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 93 (1973) (finding no evidence of national-origin discrimination when there was no disparity in Latino hiring and the only direct evidence was employer's neutrally applied policy against hiring undocumented workers); *Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980) (concluding that in the absence of both direct evidence of national origin discrimination and an indirect suggestion of discrimination from a workplace statistical imbalance in the hiring of Latinos, the neutral application of a workplace English-only rule was not national-origin discrimination).

¹³³ The colorblind approach of the diversity defense is not exclusive to judges of any particular race. Cf. Martin Kilson, *Anatomy of Black Conservatism*, 59 TRANSITION 4, 7 (1993) (describing the articulation of colorblind discourse amongst Black intellectuals). The one exception to the judicial use of the diversity defense that appears in the emerging inter-ethnic discrimination cases is in the context of White plaintiffs filing reverse-discrimination allegations in diverse non-White workplace settings. This is the only context where the

ing of a diversity defense to claims of employment discrimination appears to reflect the public romanticization of diversity as a panacea for racial conflict.¹³⁴ Diversity as a concept was first introduced into the legal discourse as a justification for race-conscious remedies to racial inequality, such as affirmative action.¹³⁵ Since that time, it has taken on a force of its own in the public imagination¹³⁶ through the operation of what sociologist Lauren Edelman aptly terms “diversity rhetoric.”¹³⁷ Research corroborates the public support for diversity and indicates that diverse workplaces help to facilitate creative problem solving, attract larger client bases, and effectively operate within a global marketplace.¹³⁸

diverse workplace does not mislead judges into automatically presuming the existence of a bias-free workplace. *See* *Bass v. Bd. of County Comm'rs*, 256 F.3d 1095 (11th Cir. 2001) (reversing summary judgment order for defendant where White plaintiff alleged discrimination in layoff decision from racially diverse workplace); *EEOC v. David Gomez & Assocs., Inc.*, 1997 WL 136285 (N.D. Ill. Mar. 17, 1997) (denying summary judgment where White plaintiff alleged discrimination because he was not referred for employment by agency that chose to refer Latino and African American candidates instead).

¹³⁴ *See* Tanya Kateri Hernández, “Multiracial” Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence, 57 MD. L. REV. 97, 102 (1998) (observing the growing societal belief that racial diversity will deconstruct and transcend race and racism); *see also* Paulette M. Caldwell, *The Content of Our Characterizations*, 5 MICH. J. RACE & L. 53, 106 (1999) (discussing the growing scholarship that equates increasing racial diversity with the reconstruction of racism and the Black-White paradigm of race).

¹³⁵ *See* *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978) (Powell, J., concurring); *see also* *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding the use of racial preferences to enroll a critical mass of underrepresented students of color legally permissible to serve the compelling interests of achieving a diverse and robust exchange of ideas and developing leaders from various racial communities).

¹³⁶ *See* Lana Bortolot, *Group Dynamics: Companies Embrace Diversity, Teach Employees Respect*, AM NEW YORK, Mar. 6, 2006, at 33, available at <http://www.amNY.com/careers> (“Remember when ‘synergy’ was the buzzword a few years ago? Well, get ready for a new one. Diversity is what’s hot now.”); Myron Curry, *Diversity: No Longer Just Black and White*, BLACK EOE J., Spring 2005, at 46, 46 (“Most CEO’s and executives alike have come to discover that diversity is what often makes for better business.”); Chris Woodyard, *Multilingual Staff Can Drive up Auto Sales; Ethnic Communities Show Buying Power*, USA TODAY, Feb. 22, 2005, at B1 (reporting that businesses all over the country are realizing that being multicultural has profit benefits); *see also* Peter H. Schuck, *The Perceived Values of Diversity, Then and Now*, 22 CARDOZO L. REV. 1915, 1937–38 (2001) (“Nor is diversity merely a widespread ideal among social and educational elites; it is now an explicit public policy goal emphatically endorsed by both major parties and opposed by none . . .”). *But see* Orlando Patterson, *On the Provenance of Diversity*, 23 YALE L. & POL’Y REV. 51, 61 (2005) (“What is true of the private sector has been true of society and the economy at large. The focus has shifted from addressing the very special problems of African Americans to the promotion of a feel-good, but largely empty, goal of ethnic diversity.”).

¹³⁷ Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589 (2001) (discussing employers’ “diversity rhetoric” and expansion of the legal concept of diversity to nonlegal dimensions).

¹³⁸ *See* DIVERSITY IN WORK TEAMS: RESEARCH PARADIGMS FOR A CHANGING WORKPLACE (Susan E. Jackson & Marian N. Ruderman eds., 1995); *see also* CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY (2003) (discussing the importance of workplace bonds to enhancing inter-group relations); Steven A. Ramirez, *Diversity and the Boardroom*, 6 STAN. J.L. BUS. & FIN. 85 (2000) (summarizing literature demonstrating the business benefits of a diverse workforce); David B. Wilkins, *From “Separate is Inherently Unequal” to “Diversity is Good for Business”: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117

However, the mere presence of coworkers from various backgrounds in a single workplace does not magically foster racial harmony. Indeed, the research regarding diverse work teams indicates that employers need to cultivate particular conditions in order to generate effective work teams of diverse backgrounds.¹³⁹ Otherwise, racial conflict and poor social relations can continue to exist even within that diverse setting.¹⁴⁰ In fact, many of the emerging Latino inter-ethnic cases describe what appear to be racially hostile environments, even though the cases are not litigated as racial harassment cases. Unfortunately, court opinions reflect a fanciful notion of diversity that is not supported by scientific research or legal doctrine.

The diversity defense is most explicitly and comprehensively articulated in the 2004 case *Arrocha v. CUNY*,¹⁴¹ which serves as the paradigmatic example of the analytical problems surfacing in the emerging inter-ethnic discrimination cases. This Article focuses on *Arrocha* to present the doctrinal problems of the diversity defense. In *Arrocha*, a self-identified Afro-Panamanian tutor of Spanish sued City University of New York (CUNY) for failure to renew his appointment as an adjunct instructor, claiming a violation of Title VII's prohibition against race and national-origin discrimination. The plaintiff alleged that the Latino heads of the Medgar Evers College Spanish department discriminated against "Black Hispanics," and that there was "a disturbing culture of favoritism that favor[ed] the appointments of white Cubans, Spaniards and white Hispanics from South America."¹⁴² Yet the court dismissed his race and national-origin discrimination claims because the judge did not understand how a color hierarchy informs the ways in which Latinos subject other Latinos to racism and national-origin bias.¹⁴³ Indeed, the national-origin claim was

HARV. L. REV. 1548, 1556 (2004).

¹³⁹ See Robin J. Ely & David A. Thomas, *Cultural Diversity at Work: The Effects of Diversity Perspectives on Work Group Processes and Outcomes*, 46 ADMIN. SCI. Q. 229 (2001) (concluding that diverse work teams function better with an "integration-and-learning" approach than with other approaches).

¹⁴⁰ See Shari Caudron, *Diversity Ignites Effective Work Teams*, BLACK EOE J., Spring 2005, at 40 (stating that resegregation can occur when racial bias is ignored as an issue in the workplace). Legal scholar Cynthia Estlund also notes that the potential for conflict is heightened in low-wage settings and contingent employment sectors where employees' motivation to overcome differences is undermined by their tenuous connection to the workplace and employer suppression of communication among workers. ESTLUND, *supra* note 138, at 45, 56.

¹⁴¹ 2004 WL 594981 (E.D.N.Y. Feb. 9, 2004).

¹⁴² *Id.* at *7.

¹⁴³ Ironically, the judge *sua sponte* converted the claim into a color-discrimination claim and allowed it to survive the summary judgment motion. This is an unsatisfactory characterization of Latino inter-ethnic discrimination claims because not all Latino plaintiffs who experience discrimination have dark skin or prominent African features as markers of their social treatment. For those Latino plaintiffs whose African ancestry is not readily discernible, it is important to examine a workplace environment for the deployment of racial stereotypes tied to national origin status that are an aspect of Latino racial discourse. Indeed, judges typically view Latino color-discrimination claims as viable when a Latino plaintiff alleges color discrimination at the hands of a White-Anglo employer or supervisor. See Tanya

dismissed on summary judgment because five of the eight adjunct instructors who were reappointed were natives of other South or Central American countries such as Argentina, Peru, and Mexico, as well as the Dominican Republic. The judge stated in the opinion, “*Diversity* in an employer’s staff undercuts an inference of discriminatory intent.”¹⁴⁴

This is a completely erroneous assessment of the social science doctrine of statistical inference and its evidentiary justification as it has been incorporated into employment discrimination jurisprudence.¹⁴⁵ Population statistics have been traditionally considered relevant to Title VII cases involving gross underrepresentations of racial minorities because our racial history demonstrates that in the absence of any other explanation it is more likely than not that racial discrimination accounts for the gross underrepresentation.¹⁴⁶ Yet the initial Supreme Court authorization in *McDonnell Douglas Corp. v. Green* to use workforce statistics in individual disparate treatment cases was only an authorization insofar as such statistics “may be helpful to a determination of whether petitioner’s refusal to hire respondent in this case conformed to a general pattern of discrimination.”¹⁴⁷ There was no suggestion that workforce statistics could have a conclusive exculpatory use in such cases. Inverting the traditional use of population statistics

Katerí Hernández, *Latinos at Work: When Color Discrimination Means More Than Color*, in *HIERARCHIES OF COLOR: TRANSNATIONAL PERSPECTIVES ON THE SOCIAL AND CULTURAL SIGNIFICANCE OF SKIN COLOR* (Evelyn Nakano Glenn ed., forthcoming 2007). Unfortunately for the plaintiff in *Arrocha*, the jury trial on the color-discrimination issue returned a verdict in favor of the defendant. Telephone Interview with James A. Brown, Esq., Attorney for Mr. Arrocha (Feb. 28, 2006). Such a result was inevitable once the judge handicapped the jury’s assessment of the issues by entering summary judgment on the racial and national origin discrimination claims and thus presented the color claim in isolation from its connections to race and national-origin discrimination.

¹⁴⁴ *Arrocha*, 2004 WL 594981, at *7 (emphasis added).

¹⁴⁵ See *Castaneda v. Partida*, 430 U.S. 482, 496–97 (1977) (explaining the precise methods of measuring statistical significance of racial disparities). While statistical significance suggests that two or more variables are correlated, its absence yields no definite conclusions about the relationship between the variables. See generally DAVID C. BALDUS & JAMES W.L. COLE, *STATISTICAL PROOF OF DISCRIMINATION* (1980); JOSEPH L. GASTWIRTH, *STATISTICAL REASONING IN LAW AND PUBLIC POLICY* (1988); RAMONA L. PAETZOLD & STEVEN L. WILBORN, *THE STATISTICS OF DISCRIMINATION* (1994). In the absence of statistical significance, it is difficult to conclude from a comparison between workforce composition numbers and those of the relevant labor market that some social construct other than pure chance accounts for the workforce numbers. But that absence does not foreclose the possibility that factors other than pure chance actually did influence the workforce composition numbers, and more importantly that the individual plaintiff might have received discriminatory treatment. See KENT SPRIGGS, *REPRESENTING PLAINTIFFS IN TITLE VII ACTIONS*, 14–28 (2d ed. supp. 2005) (“Courts have sometimes erroneously stated that a statistical calculation yielding less than a finding of a statistically significant level of improbability is affirmative evidence of the absence of discrimination. This is completely illogical and an abuse of statistics for several reasons.”).

¹⁴⁶ *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977) (“Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of *purposeful discrimination*” (emphasis added)).

¹⁴⁷ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973).

by treating a racially diverse workforce as the equivalent of a bias-free workplace also contravenes an early Supreme Court approach to proving Title VII employment discrimination when the plaintiff's protected class is proportionately represented in the workplace.¹⁴⁸

What follows is a detailed account of established employment discrimination doctrine that is completely overlooked in the emerging inter-ethnic discrimination cases. The doctrinal details are presented to underscore the extent to which diversity rhetoric subverts the judicial application of existing relevant doctrine.

C. The Traditional Role of Workforce Composition Data in Employment Discrimination Cases

In 1971, in *Phillips v. Martin Marietta Corp.*,¹⁴⁹ the Supreme Court was presented with a gender discrimination case in which summary judgment had been granted in favor of an employer that did not accept job applications from women with pre-school-age children despite employing men with pre-school-age children. The district court had based its award of summary judgment upon the premise that no question of bias could exist in a workplace in which 75 to 80% of those hired were women from an application pool in which 70 to 75% were women.¹⁵⁰ In vacating the summary judgment due to a conflict with Title VII's mandate, the Supreme Court, in a per curiam opinion, unanimously rejected the equation of significant numbers of women in the workplace with the simplistic conclusion that no bias against women existed.¹⁵¹ In other words, the Supreme Court was fully aware that gender discrimination can exist even where a large number of women are employed in a given workplace. This is because Title VII creates an individual right not to be unfairly treated because of protected group status. It is immaterial to a proof of discrimination against that individual whether other members of the protected group have been hired. It is true that an inference of discrimination can be based upon a statistically significant disproportionate absence of protected group members from a

¹⁴⁸ The diversity defense's esteem for the probative value of workforce composition statistics in discrimination cases stands in marked contrast to courts' usual disinclination to rely upon workforce statistics to decide individual disparate treatment cases. *See, e.g.*, *Bogren v. Minnesota*, 236 F.3d 399, 406 (8th Cir. 2000) ("Second, we conclude the generic type of employment statistics presented by Bogren are not probative of the reason for her termination."); *Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343, 349 (7th Cir. 1997) ("[S]tatistics are improper vehicles to prove discrimination in disparate treatment (as opposed to disparate impact) cases."); *Martin v. Citibank, N.A.*, 762 F.2d 212, 218 (2d Cir. 1985) ("We have previously held that such statistical proof alone cannot ordinarily establish a prima facie case of disparate treatment under Title VII or § 1981."); *Davis v. Ashcroft*, 355 F. Supp. 2d 330 (D.D.C. 2005) (holding that plaintiff's workforce statistics were insufficient to show employer's articulated reason for denying promotion was a pretext for discrimination).

¹⁴⁹ *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

¹⁵⁰ *Id.* at 543.

¹⁵¹ *Id.* at 544.

workplace because it often reflects unstated bias, unless some other factor such as the unavailability of qualified group members can be shown to exist.¹⁵² But Title VII does not impose the symmetrical abstraction of insisting that a proportionate representation of protected class members precludes a finding of discrimination.

The *Marietta* analysis was applied to racial discrimination in 1978, albeit without citation to *Marietta* itself. In *Furnco Construction Corp. v. Waters*¹⁵³ the Supreme Court stated that a “racially balanced work force cannot immunize an employer from liability for specific acts of discrimination.”¹⁵⁴ This is because Title VII is designed to address the individual’s experience of discrimination. The Court noted in *Furnco*, “It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant’s race are already proportionately represented in the work force.”¹⁵⁵ Nor is *Furnco* an outdated articulation of discrimination jurisprudence, given the Court’s reliance upon this particular premise in the 2000 case of *Reeves v. Sanderson Plumbing Products Inc.*¹⁵⁶ To be sure, *Furnco* does note that a court may consider the racial mix of the workforce in making a determination about the existence of discriminatory motive because the composition of the workforce “is not wholly irrelevant on the issue of intent.”¹⁵⁷ However, that is far from treating workforce composition data as conclusively demonstrating the absence of discriminatory intent. Such an equivalence is prohibited by *Furnco*.¹⁵⁸

¹⁵² See *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977).

¹⁵³ 438 U.S. 567 (1978).

¹⁵⁴ *Id.* at 579.

¹⁵⁵ *Id.* Contrast the diversity defense use of aggregate workforce statistics with the entrenched treatment of individual disparate treatment claims as unique to the plaintiff so that the aggregate treatment of a class action certification is rarely possible. See, e.g., *Abron v. Black & Decker, Inc.*, 654 F.2d 951, 955 (4th Cir. 1981) (concluding that plaintiff’s claim was “a solitary one that could not support a class certification”); see also Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 787–88 (2005) (describing judicial hostility toward class action certification in disparate treatment cases).

¹⁵⁶ 530 U.S. 133, 153 (2000) (“[T]he other evidence on which the court relied—that Caldwell and Oswald were also cited for poor recordkeeping, and that respondent employed many managers over age 50—although relevant, is certainly not dispositive.” (citing *Furnco*, 438 U.S. at 580)).

¹⁵⁷ *Furnco*, 438 U.S. at 580.

¹⁵⁸ *Id.*; see also *Connecticut v. Teal*, 457 U.S. 440, 453–54 (1982) (holding that for disparate impact claims it is immaterial that “bottom-line” hiring results were racially balanced and concluding that this balance does not preclude a Title VII violation for application of a facially discriminatory policy to an individual plaintiff). The doctrinal focus on discrimination against an individual, as opposed to the diversity of the workplace, is also reflected in the prohibition against the use of race norming. Race norming is any adjustment of test scores to diminish the disproportionate impact on racial minorities. Section 106 of the Civil Rights Act of 1991 prohibits it. 42 U.S.C. § 2000e-2(1) (2000). Although race norming could be used to ensure a racially integrated workforce, it is prohibited by law because Title VII focuses on discrimination, not diversity.

Arrocha disregards *Furnco* and other Supreme Court precedent rejecting the premise that a racially balanced workforce conclusively demonstrates the absence of discriminatory intent. The only juridical support cited in *Arrocha* for the premise that “diversity . . . undercuts an inference of discriminatory intent”¹⁵⁹ is a reference to *Chambers v. TRM Copy Center Corp.*¹⁶⁰ *Chambers* is another inter-ethnic employment discrimination case in which the appellate court opinion discussed in passing how a court might assess the ethnic makeup of a workforce.

In *Chambers*, a “black person of dark skin and Jamaican national origin” alleged employment discrimination based on race and national origin when he received a letter of reprimand from his African American supervisor.¹⁶¹ The appellate court recognized that an inference of no discrimination might be appropriate where the ethnic makeup of the workforce was particularly varied¹⁶² and there was no direct proof of discriminatory animus, as is sometimes provided by racially invidious remarks by supervisors and coworkers. Yet the court was also careful to note that the diverse workforce composition would not be dispositive in all contexts. “[I]f, for example, the company had sought to downsize its operation and chose to do so by firing only one or more of its minority employees,” evidence of a racially balanced workforce would not be salient.¹⁶³ In fact, the appellate court in *Chambers* ultimately vacated the defendant’s summary judgment victory. The court remanded for trial because the plaintiff’s discharge, absent concrete reasons, occurred in circumstances that permitted a rational factfinder to infer invidious discrimination regardless of the workforce’s racial composition.¹⁶⁴

In short, while *Chambers* inaccurately assesses the ability of a racially balanced workforce to support an inference of no discriminatory animus, its overarching import is the need to examine all factors in context before coming to any conclusions. In fact, *Chambers* has been relied upon by the Southern District of New York for the proposition that “a diverse workforce in itself does not preclude the finding of an inference of discrimination.”¹⁶⁵ Yet the Eastern District of New York, which decided *Arrocha*, continues to use *Chambers* as support for the premise that diversity undercuts an inference of discrimination in a manner that equates diversity with the absence of discrimination.¹⁶⁶ This equivalence is struck despite

¹⁵⁹ *Arrocha v. CUNY*, 2004 WL 594981, at *7 (E.D.N.Y. Feb. 9, 2004).

¹⁶⁰ *Chambers v. TRM Copy Ctr. Corp.*, 43 F.3d 29, 38 (2d Cir. 1994).

¹⁶¹ *Id.* at 32.

¹⁶² The twelve-person workforce comprised “5 Caucasian, 4 African-American or dark-skinned West Indians (including the plaintiff and the Service Center Manager), 2 Asians, and 1 Hispanic.” *Id.* at 33.

¹⁶³ *Id.* at 38.

¹⁶⁴ *Id.* at 40.

¹⁶⁵ *Thompson v. Am. Eagle Airlines*, No. 99 Civ. 4529 (JGK), 2000 U.S. Dist. LEXIS 14932, at *16 (S.D.N.Y. Oct. 4, 2000).

¹⁶⁶ *See Subramanian v. Prudential Sec.*, No. CV-01-6500(SJF)(RLM), 2003 U.S. Dist.

its contravention of social science, its conflict with Supreme Court precedent, and the implicit rejection of the premise by an earlier Second Circuit decision.¹⁶⁷

What then might account for the maverick judicial use of bald dialectical reasoning and little else¹⁶⁸ to assert that diversity necessarily indicates the absence of discrimination? Perhaps the diversity defense judges have taken their cue from the dicta in Justice Scalia's majority opinion in *St. Mary's Honor Center v. Hicks*,¹⁶⁹ an example of the rhetorical power of the diversity defense to dismiss a suggestion of discrimination.

D. The New Push for Doctrinal Symmetry in the Treatment of Workforce Composition Data

In *Hicks*, the Supreme Court held that once an employer produces evidence of a nondiscriminatory reason for the adverse employment action, it is immaterial whether the trier of fact is persuaded of the veracity of the proffered nondiscriminatory reason. The mere production of the nondiscriminatory reason is sufficient to rebut the presumption of intentional discrimination from the plaintiff's prima facie case. This is because the ultimate burden of persuasion remains with the plaintiff at all times. In response to the dissent's abhorrence of accepting at face value the proffer of any specious nondiscriminatory reason by an employer, Justice Scalia provides the following hypothetical for consideration:

Assume that 40% of a business' workforce are members of a particular minority group, a group which comprises only 10% of the relevant labor market. An applicant, who is a member of that group, applies for an opening for which he is minimally qualified, but is rejected by a hiring officer of that *same minority group*,

LEXIS 23231, at *7, *23 (E.D.N.Y. Nov. 20, 2003) (asserting that given diversity in defendant's workforce, where an Asian plaintiff from India worked with Korean, African American, Hispanic, and White-Anglo coworkers, the plaintiff's burden of proof was heightened).

¹⁶⁷ *Waisome v. Port Auth. of N.Y. & N.J.*, 948 F.2d 1370, 1379 (2d Cir. 1991) (concluding that the absence of statistical significance can simply reflect the use of a small sample size and cannot be equated with the absence of a correlation between race and employment decisions).

¹⁶⁸ While courts do have broad discretion in their ability to take judicial notice of legislative facts that relate to the interpretation of applicable law, this discretion does not authorize courts to ignore relevant legal precedents. See the FED. R. EVID. 201(a) advisory committee note suggesting that courts should be free to initiate independent research for legislative facts and take judicial notice of them. But because the Federal Rules of Evidence do not supply guidance as to how legislative facts should be incorporated into a case (in contrast to the guidance set forth in FED. R. EVID. 201(a) for incorporating adjudicative facts), with legislative facts a judge has a dangerous freedom to create new law inappropriately. See Peggy C. Davis, "There Is a Book Out . . .": *An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539, 1541, 1598 (1987) (proposing a tradition of care standard for regulating judicial use of legislative facts).

¹⁶⁹ *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

and the search to fill the opening continues. . . . Under the dissent's interpretation of our law . . . [t]he disproportionate minority makeup of the company's workforce and the fact that its hiring officer was of the same minority group as the plaintiff will be irrelevant, because the plaintiff's case can be proved indirectly by showing that the employer's proffered explanation is unworthy of credence [I]t is a mockery of justice to say that if the jury believes the reason they set forth is probably *not* the "true" one, all the utterly compelling evidence that discrimination was *not* the reason will then be excluded from the jury's consideration.¹⁷⁰

While the hypothetical is pure dicta, it is most interesting to note that both the majority and the dissent refer to the hypothetical construction of a disproportionate minority makeup of the workforce and the presence of a racial minority hiring officer as indicating the absence of discrimination. This is evidenced by Scalia's reference to the hypothetical as "utterly compelling evidence that discrimination was *not* the reason,"¹⁷¹ and the dissent's characterization that the hypothetical employer could easily prove a "nondiscriminatory reason it almost certainly must have had, given the facts assumed."¹⁷²

In short, despite the lack of precedent or statistics doctrinal, both the Court's opinion and the dissent are caught up in their own intuitive notion that a diverse workforce is a barometer for nondiscrimination and that racial minorities cannot harbor racial bias themselves. The majority opinion and the dissent can be characterized as based upon intuition to the extent established Title VII doctrine has not similarly applied a symmetrical approach to proof of discrimination and nondiscrimination. For instance, the use of anecdotal evidence is treated differently when presented for purposes of proving discrimination than when presented to prove nondiscrimination.¹⁷³ Anecdotal evidence can be considered strong evidence of intentional discrimination.¹⁷⁴ In contrast, anecdotal evidence of nondiscrimination carries little evidentiary weight.¹⁷⁵ The justification for the asymmetrical approach to anecdotal evidence is the same one that supports the use of a *prima facie* inference of discrimination in disparate treatment cases—namely, the understanding that discriminatory intent is often concealed—and necessitates the admission of circumstantial evidence and

¹⁷⁰ *Id.* at 513–14 & n.5 (internal quotations and citation omitted).

¹⁷¹ *Id.* at 514.

¹⁷² *Id.* at 539 n.12 (Souter, J., dissenting).

¹⁷³ See PAETZOLD & WILLBORN, *supra* note 145, § 3.01 n.2 ("[C]ourts tend to rely on anecdotal evidence only when it cuts in favor of the plaintiff . . .").

¹⁷⁴ See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 342–43 n.24 (1977).

¹⁷⁵ *Id.* Anecdotal evidence of nondiscrimination may include employer statements that it does not discriminate. PAETZOLD & WILLBORN, *supra* note 145, § 3.01 n.2.

the use of inferences to enforce the mandate against discrimination. This is not the case for disputing an allegation of discrimination. It is a straightforward matter for an employer to present evidence of actual bases for employment decisions. There is no need for inferences from statistical data or anecdotal evidence, nor would such evidence be probative given the very strong possibility that discriminatory motive can coexist with such statistical data and anecdotal evidence. In contrast, this nation's history of racial inequality has shown that in the absence of a concrete explanation, the inference of discrimination is an accurate indicator for the actual existence of discrimination.¹⁷⁶ Scalia's hypothetical in *Hicks* reveals the extent to which a disregard for the contemporary significance of the nation's history of racism can undermine the justifications for the asymmetrical use of inference and other evidentiary tools.¹⁷⁷ Moreover, it demonstrates how the Court is unacquainted with, or perhaps disinterested in, the manifestation of discrimination within diverse settings and amongst racial minorities themselves, and is thus just as subject to the obfuscation of diversity rhetoric as lower courts. In fact, the general jurisprudential movement of narrowing the applicability of antidiscrimination law provides a hospitable setting for the growth of the diversity defense.¹⁷⁸ Indeed, the narrow vision suggested by the *Hicks* hypothetical is in direct contrast to Supreme Court precedent.

In *Castaneda v. Partida*,¹⁷⁹ the Court stated that "it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group."¹⁸⁰ *Castaneda* is also particularly relevant given its rejection of the governing majority defense to discrimination that resonates with the equally specious diversity defense. The governing majority theory asserts that a prima facie case of discrimination can be rebutted with the proof that racial minorities were

¹⁷⁶ See *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (describing the *McDonnell Douglas* use of inference for finding discrimination as a "sensible, orderly way to evaluate the evidence in light of *common experience* as it bears on the critical question of discrimination") (emphasis added).

¹⁷⁷ Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 283 (1997) (explaining how the original structures for proving discrimination "functioned properly only when the courts applying them were willing to see discrimination as a viable explanation for social and political conditions" connected to a history that "suggested that discrimination was the most likely explanation"); see also Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 1031 (1999) ("To base Supreme Court precedent on a hypothetical that bears little resemblance to reality is strikingly ill advised."); John Valery White, *The Irrational Turn in Employment Discrimination Law: Slouching Toward a Unified Approach to Civil Rights Law*, 53 MERCER L. REV. 709, 747 (2002) ("Scalia's hypothetical is telling. Apart from having absolutely nothing to do with the case he is deciding, Scalia's hypothetical reveals he believes that most discrimination cases do not involve discrimination at all.").

¹⁷⁸ See AWAKENING FROM THE DREAM: CIVIL RIGHTS UNDER SIEGE AND THE NEW STRUGGLE FOR EQUAL JUSTICE (Denise C. Morgan et al. eds., 2006).

¹⁷⁹ *Castaneda v. Partida*, 430 U.S. 482 (1977).

¹⁸⁰ *Id.* at 499.

the governing majority of decisionmakers involved. In *Castaneda*, the Supreme Court rejected out of hand the notion that a prima facie case of discriminatory intent based on the exclusion of Mexican Americans from the grand jury could be rebutted with proof that three of the five jury commissioners were Mexican American.¹⁸¹

Yet despite the clearly articulated precedents of *Castaneda*¹⁸² and *Furnco*, which disentangle notions of diversity from proof of nondiscrimination, the *Hicks* opinion presents a hypothetical that recharacterizes diversity as the equivalent of nondiscrimination. As one employment discrimination scholar notes about the case, “[t]o base Supreme Court precedent on a hypothetical that bears little resemblance to reality is strikingly ill advised.”¹⁸³ Moreover, by requiring plaintiffs to provide actual proof of discriminatory intent even after showing that a defendant’s rebuttal was not credible, *Hicks* gives judges vast discretion to create their own definitions of what constitutes discrimination,¹⁸⁴ undermining the adjudicatory force of the prima facie proof established by *McConnell Douglas v. Green*. As civil rights scholar John Valery White astutely observes:

Because *Hicks* and *Reeves* now require plaintiffs to produce evidence of discriminatory intent, judges must specifically decide

¹⁸¹ *Id.* at 500.

¹⁸² Over the years, *Castaneda* has been relied upon as viable precedent regarding the inapplicability of a governing majority defense to discrimination. See *Castaneda v. Pickard*, 648 F.2d 989, 1004 (5th Cir. 1981); *Ausler v. Ark. Dep’t of Educ.*, 245 F. Supp. 2d 1024, 1031 (E.D. Ark. 2003); *Eccleston v. Sec’y of the Navy*, 700 F. Supp. 67, 69 (D.D.C. 1988). In addition, social scientists have continued to document the persistence of intraracial prejudice, which refutes the skepticism about its existence expressed by Justice Powell’s dissenting opinion in *Castaneda*, 430 U.S. at 518 (Powell, J., dissenting) (“There is for me a sense of unreality when Justices here in Washington decide solely on the basis of inferences from statistics that the Mexican-Americans who control the levers of power in this remote border county are manipulating them to discriminate ‘against themselves.’”). See WILLIAM E. CROSS, JR., *SHADES OF BLACK: DIVERSITY IN AFRICAN-AMERICAN IDENTITY* (1991) (exploring the relationship between racial identity attitudes and internalized racism in African Americans); Aaron C. Cargile, *Attitudes Toward Chinese-Accented Speech: An Investigation in Two Contexts*, 16 J. LANGUAGE & SOC. PSYCHOL. 434 (1997) (describing negative attitudes of Asian Americans toward Mandarin-Chinese-accented English within a college classroom); Marta I. Cruz-Janzen, *Lives on the Crossfire: The Struggle of Multiethnic and Multiracial Latinos for Identity in a Dichotomous and Racialized World*, 9 RACE, GENDER & CLASS 47 (2002) (discussing Latinos’ internalization of bias against dark-skinned Latinos).

¹⁸³ Bisom-Rapp, *supra* note 177, at 1031.

¹⁸⁴ White, *supra* note 177, at 759 (“Through a minor adjustment in proof structures, *Hicks* has unleashed district courts to answer these questions on their own, through judges’ imposition of their own definition of race, discrimination, and appropriate workplace behavior.”); see also Henry L. Chambers, Jr., *Getting it Right: Uncertainty and Error in the New Disparate Treatment Paradigm*, 60 ALB. L. REV. 1, 43–44 (1996) (describing the post-*Hicks* prima facie case assessment as “the fact-finder’s perceived prevalence of intentional discrimination in society”); Sheila R. Foster, *Causation in Antidiscrimination Law: Beyond Intent Versus Impact*, 41 HOUS. L. REV. 1469, 1525 (2005) (“Instead, the Court has unleashed the factfinder into a world of causal inquiry that is subject to the very biases, stereotypes, and misconceptions that underlie the discrimination of which the plaintiff complains.”).

what acts constitute race acts and which do not. With neither guidance from above, nor coherent categories with which to work, judges after *Hicks* are empowered to answer these questions according to their own theories of life.¹⁸⁵

Indeed, after *Hicks*, district court judges are certainly assessing summary judgment motions through the lenses of their own particular understanding of discrimination.¹⁸⁶ Unfortunately, that understanding seems to be increasingly influenced by public discourse that presents racial diversity as the equivalent of racial harmony.¹⁸⁷ The *Arrocha* case discussed in Section II.B above is an example of a judge who concocts a diversity defense to discrimination based on his own perspectives of what constitutes discrimination.¹⁸⁸

E. Diversity and the Presumed Interchangeability of Latinos

The diversity defense in the *Arrocha* case is problematic in its incoherent understanding of employment discrimination law's application of statistical analysis and of Supreme Court precedents related to the issue. Furthermore, in dismissing the national origin claim because the Afro-Panamanian plaintiff's employer reappointed natives from other South and Central American countries instead of him, the *Arrocha* court treats all Latinos as interchangeable and incapable of national-origin discrimination against other Latinos.¹⁸⁹ The mistaken treatment of the panethnic identifier of Latino/Hispanic as precluding discrimination between various Latinos is also present in other Latino inter-ethnic employment discrimination cases.¹⁹⁰ This,

¹⁸⁵ White, *supra* note 177, at 727.

¹⁸⁶ *Id.* at 716 ("In general *Hicks* was blamed for initiating a considerably more suspicious view of Title VII claims and unleashing federal judges to reject claims on summary judgment when the facts were unpersuasive to the judge.").

¹⁸⁷ See *supra* notes 134–137 and accompanying text.

¹⁸⁸ *Arrocha v. CUNY*, 2004 WL 594981 (E.D.N.Y. Feb. 9, 2004).

¹⁸⁹ The presumed interchangeability of Latinos in employment discrimination cases resembles the judicial treatment of color-bias claims brought by African Americans. Specifically, courts have difficulty identifying the manifestation of discrimination within African American communities when assessing color-based discrimination claims brought by persons of African ancestry. This is because judges presume that all persons of African ancestry are viewed as the same regardless of skin color or ethnicity. The presumed sameness of African ancestry obscures the analysis of colorism claims. See Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1731 (2000) (discussing the influence of the rule of hypo-descent on the judicial application of color-discrimination doctrine to persons of African ancestry); see also Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1544 (2000) (noting that it can be difficult for a court "to believe that a person who hires Blacks will engage in discrimination against other Blacks, or that a person who is Black would discriminate against another Black person").

¹⁹⁰ See, e.g., *Patino v. Rucker*, 1997 U.S. App. LEXIS 29691 (2d Cir. July 25, 1997). In this case a Puerto Rican porter for Columbia University alleged that he was discharged by his Hispanic supervisor and replaced with another Latino porter, in violation of Title VII of

of course, directly contravenes the Supreme Court mandate in *Castaneda* not to presume that intra-ethnic and intraracial discrimination cannot exist.¹⁹¹ Treating Latinos as interchangeable also denies them protection against national origin discrimination when the employer's agents are Latinos as well. The Supreme Court's own definition of national origin as referring "to the country where a person was born, or, more broadly, the country from which his or her ancestors came,"¹⁹² conflicts with the way the diversity defense lumps all Latinos into one undifferentiated group.¹⁹³ Certainly, where a White-Anglo employer is alleged to have discriminated against a Latino, the binary White-Anglo-versus-Latino context may justify the simple reference to the plaintiff as a "Latino" or "Hispanic" with standing to bring a national-origin claim.¹⁹⁴ However, where a Latino plaintiff from a

the Civil Rights Act. In granting the defendant's motion for summary judgment, the judge noted that the plaintiff failed to respond to the defendant's persuasive "evidence" that the plaintiff had previously replaced a Hispanic employee, that the accused supervisor was Hispanic, and that 90% of the employees in the department were Hispanic. Informing the diversity defense in *Patino* is the view of the Hispanic category as a racial unifier that prevents group members from being biased against one another. The notion that Latinos are a racially mixed people may also be informing the court's assessment.

¹⁹¹ *Castaneda v. Partida*, 430 U.S. 482, 499 (1977) ("[I]t would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group.").

¹⁹² *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973); *see id.* at 89 ("The only direct definition given the phrase 'national origin' is the following remark made on the floor of the House of Representatives by Congressman Roosevelt, Chairman of the House Subcommittee which reported the bill: 'It means the country from which you or your forebears came.'"); *see also Storey v. Burns Int'l Sec. Servs.*, 390 F.3d 760, 766 (3d Cir. 2004) (Scirica, C.J., concurring) (noting that a plaintiff with a national-origin claim must "trace ancestry to a nation outside of the United States" and thus a "Confederate Southern-American" is not a valid national-origin class under Title VII). *But see Earnhardt v. Commonwealth of Puerto Rico*, 744 F.2d 1, 2-3 (1st Cir. 1984) (holding that in Puerto Rico a plaintiff born in the continental United States can assert a national-origin discrimination claim). For an in-depth critique of the current limitations of the legal definition for national origin, *see Perea, supra* note 132, at 857 (proposing that Congress legislate an expansive definition of "national origin" that includes discrimination based upon ethnic traits such as alienage status and language preference).

¹⁹³ *See Gloria Sandrino-Glasser, Los Confundidos: De-Conflating Latinos/as' Race and Ethnicity*, 19 CHICANO-LATINO L. REV. 69, 73 (1998) (detailing the ways Latinos are inappropriately depicted as a homogeneous group). Symbolic homogenization is not restricted to Latinos. *See Aaron Celious & Daphna Oyserman, Race From the Inside: An Emerging Heterogeneous Race Model*, 57 J. SOC. ISSUES 149, 150-53 (2001) (describing how African Americans are often presented as a homogeneous group despite the ways social, economic, gender, and physical traits vary the racial experiences of different African Americans).

¹⁹⁴ It is probably for this very purpose that while the EEOC does not define national origin, it chooses to define national origin discrimination "broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group." 29 C.F.R. § 1606.1 (2007) (emphasis added). Accordingly, at least one district court has permitted Latino plaintiffs to bring national-origin discrimination allegations based upon their "Spanish-speaking characteristic" alone where a White-Anglo defendant may have had no actual knowledge of the plaintiff's exact place of origin, but instituted policies that disparately impacted and discriminated based upon the foreignness of the plaintiffs. *See Alemendares v. Palmer*, 2002 U.S. Dist. LEXIS 23258, at *31 (N.D. Ohio Dec. 2, 2002) ("Because plaintiffs have linguistic

particular country is alleging national-origin discrimination at the hands of a Latino from another country of origin, it would be nonsensical to ignore the distinctions in country of origin. Similarly, it would defy logic to presume that an employer's preference for one Latino over another should insulate the employer from an inquiry about discriminatory intent. Such an interpretation of antidiscrimination jurisprudence would, like the emerging diversity defense to discrimination, be yet another misplaced application of symmetry to the doctrine.¹⁹⁵

Supreme Court precedent should temper any district court inclination to presume symmetrically that because the replacement of a discharged racially excluded employee with a White employee gives rise to a prima facie case of discrimination,¹⁹⁶ the replacement of a discharged racially excluded employee with another racially excluded employee is, in turn, proof of nondiscriminatory intent on the part of the employer. In *O'Connor v. Consolidated Coin Caterers Corp.*, the Supreme Court explicitly held in the context of age discrimination that it is immaterial that a statutorily protected class member was replaced by someone who is also a protected class member.¹⁹⁷ Because *O'Connor* entailed a development of the *McDonnell Douglas* prima facie standard for discrimination,¹⁹⁸ its discussion of protected class member replacements in the age discrimination context is analytically applicable to race discrimination cases.¹⁹⁹

Unfortunately, the treatment of Latinos of varying racial and ethnic backgrounds as a homogeneous group also adversely influences the analysis

characteristics of a particular national origin group—as required in the EEOC's definition of 'national origin discrimination'—they have sufficiently pled a claim of national origin discrimination. Plaintiffs' Spanish-speaking characteristics reflect their national origin.").

¹⁹⁵ See *supra* notes 173–181 and accompanying text.

¹⁹⁶ A number of jurisdictions have concluded that proof that a protected class member has been unfavorably treated relative to someone not in the protected class can be an element of a prima facie case of racial discrimination. See, e.g., *Leadbetter v. Gilley*, 385 F.3d 683, 690 (6th Cir. 2004) (requiring reverse-discrimination plaintiffs to prove that other employees of similar qualifications who were not members of the protected class were more favorably treated in order to set forth a prima facie case of discrimination); *Sledge v. Goodyear Dunlop Tires N. Am., Ltd.*, 275 F.3d 1014, 1015 (11th Cir. 2001) (per curiam) (noting that part of establishing a prima facie case of discrimination is showing that employer either filled plaintiff's position with a person not of the same racial minority or left the position open); *Cones v. Shalala*, 199 F.3d 512, 516 (D.C. Cir. 2000) (requiring as an element of a prima facie case of discrimination proof either that someone not of the plaintiffs' protected class filled the position or that the position remained vacant).

¹⁹⁷ 517 U.S. 308, 312 (1996) ("The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age.").

¹⁹⁸ *Id.* at 312 ("Because it lacks probative value, the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the *McDonnell Douglas* prima facie case.").

¹⁹⁹ See *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 158 (7th Cir. 1996) (per curiam) (applying *O'Connor* to a Title VII racial discrimination case). "Laws against discrimination protect persons, not classes, the Court remarked, an observation with equal force in a case under the Civil Rights Act of 1964." *Id.*; see also *Pivrotto v. Innovative Sys.*, 191 F.3d 344, 355 (3d Cir. 1999) (applying *O'Connor* to a Title VII gender discrimination case).

of the nature of Latino inter-ethnic discrimination that cannot be addressed by *O'Connor* alone. For instance, the interchangeability of Latinos' perspectives in *Arrocha* completely fails to appreciate the ways in which internal Latino national origin bias is rooted in a racialized hierarchy of Latin American countries, where countries perceived as European are viewed as more advanced than those more significantly populated with people of indigenous descent or those of African descent.²⁰⁰ In the list of countries the judge thought equivalent, Latin American racial constructs would rank Argentina as a highly valued White country, followed by Peru and Mexico with their indigenous populations, followed by the Dominican Republic and the plaintiff's own country of origin, Panama, because they are populated by more people of African descent. For Latinos influenced by Latin American racial paradigms where each country has a racial identification, a diverse workforce of Latinos is not the immediate equivalent of a bias-free context. Nor is a color preference divorced from a racialized ideology within the Latino context.²⁰¹ Diversity means something more nuanced to people of color, who do not view all ethnic groups as the same simply because they are non-White. The public discourse about diversity as a panacea for racial discrimination overlooks the complexity of actual diversity.

Part of the difficulty that judges have in disentangling notions of diversity from discrimination may stem from overlooking the operation of what Devon Carbado and Mitu Gulati term "working identity."²⁰² Carbado and Gulati assert that judges utilize such a narrow conception of what race is that they often disregard the extent to which racial and ethnic discrimination manifests itself not simply by a plaintiff's membership in a protected class, but also by an employer's stereotyped expectations about "racial conduct."²⁰³ To be precise, Carbado and Gulati theorize that discrimination in a diverse setting can occur when the least racially assimilated employee

²⁰⁰ See *supra* notes 43–44 and accompanying text.

²⁰¹ See DE GENOVA & RAMOS-ZAYAS, *supra* note 106, at 214 (describing how "intra-Latino divisions seem always to be entrenched in the hegemonic denigration of African Americans" and blackness).

²⁰² Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 702 (2001) ("Understanding the relationship between discrimination and performance, we argue, is crucial to developing a plausible and coherent theory of discrimination."); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000); accord Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134 (2004) (arguing that Title VII has been misinterpreted to exclude those cases in which employees are disparately treated based upon racially specific grooming choices that are integral to racial identity).

²⁰³ Carbado & Gulati, *Working Identity*, *supra* note 202, at 1262; see also Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2013 (1995) (describing the ways in which Whites' lack of consciousness of having a race disconnects them from recognizing the full spectrum of their racialized decisionmaking when assessing the conduct of employees who do not conform to expectations of racial assimilation within predominantly White workplaces).

or prospective employee is targeted for disparate treatment.²⁰⁴ One example that Carbado and Gulati provide is of a law school faculty inclined to exclude any female Asian American teaching candidate whose conduct does not challenge the stereotype of “Asian-American females as lacking authority and being quiet and submissive.”²⁰⁵ If the law school faculty were instead to hire another Asian American female candidate whose racial performance was more visibly commanding and vocal, it would not vitiate the disparate treatment that the faculty accorded the first candidate based on their unconscious stereotypes. “To make this concrete, if ten black employees are up for promotion, and nine are promoted, a court should still not negate the possibility that the tenth was denied a promotion because of his race: The other nine employees may have been engaged in racially palatable identity performances.”²⁰⁶ Judicial willingness to inquire into the possibility of discrimination in an individual instance of racial exclusion within an otherwise “diverse” workplace setting will depend upon jurists’ attention to what racial differences an employer finds acceptable and unacceptable, and the ways in which that calculus itself is discrimination.²⁰⁷ Cer-

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An employer that has a record of promoting black employees is likely to persuade a court that insufficient evidence of racial animus exists. The court assumes that because the employer thinks that some blacks are “good,” the reason the employer thought the plaintiff was “bad” had nothing to do with the plaintiff’s race. The court is likely to conclude that the reason for the termination was simply the employer’s dislike of the individual, which does not produce an actionable discrimination case.

Carbado & Gulati, *Working Identity*, *supra* note 202, at 1298.

²⁰⁵ *Id.* at 1272.

²⁰⁶ *Id.* at 1298.

²⁰⁷ One example of a judge who demonstrates an understanding of the implications of a racial performance in working identity can be found in *Davis v. Boykin Mgmt. Co.*, 1994 WL 714517, at *4 (W.D.N.Y. Dec. 21, 1994):

[A]n employer might tolerate outspokenness in his white employees but find objectionable a comparable lack of reserve by a black employee because of a feeling that blacks should “know their place.” If his solution is to fire the outspoken black in favor of a more docile or reserved black employee, his action obviously still is discriminatory even though the position was not filled by a “non-protected class member.”

One scholar has raised concerns about using employment discrimination doctrine to address issues of racial assimilation. RICHARD THOMPSON FORD, *RACIAL CULTURE: A CRITIQUE* 189 (2005) (concluding that an assimilation focus in employment discrimination doctrine “invites confusion as to the underlying purpose and practical application of disparate impact doctrine and ultimately ill serves the broader social goals of reducing underrepresentation and segregation in the workplace”). Yet a singular doctrinal focus on proportional representation in the workplace that ignores questions of racial assimilation could ultimately undermine the goal of eradicating racially biased decisionmaking. That is why Kenji Yoshino proposes that employer demands to “act White” be addressed by requiring employers to offer a rational reason for coercing conformity. Yoshino in fact states that “covering demands are the modern form of subordination.” KENJI YOSHINO, *COVERING: THE HID-*

tainly, the EEOC's recent settlement agreements in cases in which employers have categorically preferred one non-White racial group over another non-White racial group attests to the fact that employer stereotypes about preferred racial conduct do exist.²⁰⁸ It is thus not unlikely that employer racial conduct preferences also inform those diverse work settings in which an individual from one racial/ethnic group is disparately treated from an individual from another racial/ethnic group, such as in *Arrocha*.

Unfortunately, the misconstrued application of diversity discourse is not limited to the isolated case of intra-racial bias among Latino subgroup members, as in *Arrocha*. Although *Arrocha* serves as the paradigmatic example of all the deficiencies of the diversity defense, the deficiencies also manifest themselves in varying ways in other reported Latino inter-ethnic employment discrimination cases in which the alleged bias is instead amongst Latinos and other people of color (most often African Americans). For example, in *Sprott v. Franco*,²⁰⁹ an African American woman who worked as deputy director of the New York City Housing Authority's Office of Equal Opportunity alleged that her Hispanic supervisor harassed her and denied her salary increases because of her race. In dismissing the plaintiff's claim upon defendant's request for summary judgment, the judge noted that the facts failed to raise an inference of discrimination because "the new Director is an Hispanic woman There are now two deputy directors—one African-American and one Caucasian The remaining staff is comprised of [sic] twenty-four Hispanics, twenty-three African Americans, nine Caucasians, and one person categorized as 'other.'"²¹⁰ Thus, the judge accorded a diverse workplace and the supervisor's Hispanic status great power to circumvent racism, without questioning what diversity actually means in the new demographic social order. While some judges mistakenly assert that the existence of a diverse workplace may undercut a claim about discriminatory hiring practices, it certainly has no relevance to a claim about an individual plaintiff's racial harassment and pay raise disputes. Yet this court conflates those two contexts in ways that seem to presume that Latino coworkers and diverse workplaces cannot be bearers of racism.

In *Bernard v. New York City Health and Hospitals Corp.*,²¹¹ the diversity defense is raised again by a district court judge, albeit more subtly. In a pro se application the plaintiff, a self-described dark-skinned Black woman born in Trinidad, alleged that she had been terminated from her posi-

DEN ASSAULT ON OUR CIVIL RIGHTS 177 (2006). "If civil rights law fails to protect these groups against coerced conformity, it will have stopped short of its end." *Id.* at 178.

²⁰⁸ See *supra* note 12 and accompanying text.

²⁰⁹ *Sprott v. Franco*, 1998 WL 472061 (S.D.N.Y. Aug. 7, 1998) (Section 1981 employment discrimination claim).

²¹⁰ *Id.* at *6.

²¹¹ *Bernard v. N.Y. City Health & Hosps. Corp.*, 1996 WL 457284 (S.D.N.Y. Aug. 14, 1996).

tion as an administrative assistant because of her race, color, and national origin. In dismissing her case upon motion for summary judgment by the defendant employer, the court took pains to note that the plaintiff's former work environment had been an "ethnically diverse office" staffed predominantly by Hispanic and African American women.²¹² Although the plaintiff alleged several instances of negative interactions with her Puerto Rican manager and other Latina co-workers, the court was persuaded to resolve the dispute on summary judgment. The court based its decision on the fact that the associate personnel director, who never previously had any contact with the plaintiff, independently concluded that the plaintiff should be terminated after reviewing all the records and hearing statements at a disciplinary meeting. Why is this personnel director's opinion so significant to the court? The court opinion noted that at the disciplinary meeting "Ms. Gloria Simmons . . . the Associate Personnel Director, presided in her capacity as Labor Relations Officer Simmons *who is black*, had no contact with Bernard prior to the meeting."²¹³ As Ms. Simmons was never identified as a party to the discrimination, there is no legally relevant reason for identifying her racial affiliation. Instead, the racial identification is situated in the opinion as a mechanism for attesting to the absence of any discrimination in the workplace. In other words, if a Black woman found there was no discrimination then there could not have been any discrimination. Her racial minority status raises her credibility and is part of the rhetorical understanding that diverse workplaces are somehow impervious to racism.

The influence of diversity-as-antidote-to-discrimination discourse has also surfaced in a defendant's proffer of proof of nondiscriminatory intent. For instance, in *EEOC v. Rodriguez*,²¹⁴ the EEOC filed a pattern and practice discrimination case based upon an automobile dealership's failure and refusal to hire African Americans as salespersons. The automobile dealership was owned by a man of Spanish and Italian ancestry. The EEOC amassed a significant amount of evidence about the owner's stated policy of not hiring African Americans as salespersons²¹⁵ and his promotion of a racially hostile environment.²¹⁶ Yet despite the wealth of evidence demon-

²¹² *Id.* at *2.

²¹³ *Id.* at *3 (emphasis added).

²¹⁴ 66 Fair Empl. Prac. Cas. (BNA) 1649 (E.D. Cal. Nov. 16, 1994).

²¹⁵ *Id.* The evidence included testimony regarding racist commentary at the workplace, such as "I don't care how good that nigger is, he will never work here." There was also testimony that other dark-skinned ethnic group members would only be hired upon demonstrating they were not African American. For instance, an East Indian applicant whose skin color was unfavorably contrasted against a dark-colored desk as a test for acceptable skin color was told that the managers might still be able to hire him because he was Indian and not African American. Similarly, a dark-skinned Mexican employee salesperson was saved from being fired by a manager who thought he was Black when another manager explained, "It's ok, he's not black, he's Mexican."

²¹⁶ *Id.* Sales meetings often contained verbal references to "niggers." Other racially disparaging terms included "nigger," "sand nigger," "we-bes," "I-be," "large lips," "fucking

strating the employer's discriminatory practices, the defendant claimed he could not be "prejudiced" against African Americans because he had been the subject of discrimination himself. He asserted that his own ethnic heritage as a Spaniard exposed him to racism and thereby inoculated him against being racist. While the defense ultimately failed amidst the significant evidence of discrimination, the defendant's decision to assert his own ethnic diversity as a defense highlights the potential for continued misapplication of diversity discourse in employment discrimination litigation.

F. Diversity and the "Cultural Misunderstanding" Dismissal of Discrimination

If many judges in these emerging cases do not view inter-ethnic discrimination as actual discrimination, what do they believe the cases describe? Two workplace narratives seem to suggest that decisionmakers may instead read inter-ethnic discrimination claims as instances of mere cultural misunderstanding. A July 2004 report from a human resources director provides a helpful illustration:

I was called in because a small work team in a laboratory was not meeting deadlines on an important project. On the surface it looked like a time management issue to their supervisor when in fact, two Hispanic employees on the team had issues that were culturally rooted—one being Puerto Rican and the other being Dominican. Their issues were getting in the way of the team's progress. While unfortunate and inaccurate, people who were working with and supervising these employees never thought something diversity-related was going on. It never came up on their radar screens because they saw both employees as "Hispanic."²¹⁷

This workplace case study illustrates two separate aspects of the opacity of inter-ethnic disputes for decisionmakers. First, the supervisor simply identifies a mere personality conflict between two Latino employees because of the presumption that all Latinos are part of a monolithic group. Then, the human resources director, who is African American and asserts knowledge about the existence of intra-racial bias within racial groups, is better able to appreciate that two Latinos from different ethnic subgroups can harbor group-based bias against one another. Yet even this human resources director presumes that the conflict is simply "culturally rooted" rather than informed by Latino racial ideology about the "inherent racial differences" between Puerto Ricans and Dominicans. Thus, even when a

niggers," "hey buckwheat," and "hey boy."

²¹⁷ E-mail from Manager of Learning & Organizational Dev., to author (July 29, 2004) (on file with author).

workplace identifies inter-ethnic conflicts, it is not necessarily equipped to appreciate that “culture” is not divorced from racism.

Cultural misunderstanding was also the explanatory factor in entering summary judgment against a plaintiff in *Webb v. R&B Holding Co.*²¹⁸ In *Webb*, an African American title clerk in a predominantly White-Hispanic car dealership was often referred to as “la negra” (the black girl) and reprimanded for being “rude.”²¹⁹ In her complaint, the plaintiff noted that other employees were not disciplined for rude behavior. In granting the defendant’s motion for summary judgment, the judge chastised the plaintiff for filing the discrimination claim with the following reprimand:

Over the years, work environments have come to reflect our increasingly multi-cultural world. With the coming together of numerous diverse ethnicities and cultures in the common workplace, there are bound to be not only many instances of cultural harmony but also some occasions of *cultural friction* While this Court sincerely hopes that all employees of all cultures will choose to exercise common respect and courtesy, it cannot allow Title VII to be used as a sword by which one culture may achieve supremacy in the workplace over another”—by filing a Title VII claim!²²⁰

The judicial assumption seems to be that when Latino workplace disputes arise they are cultural misunderstandings and not rooted in racism. This judicial assumption conflicts with the growing body of social science research discussed in Section I of this Article, illustrating the racial stereotypes that can exist within Latino communities. What is needed is a mechanism for incorporating the realities of racial complexity demonstrated in the social science research into antidiscrimination jurisprudence. This Article proffers a Multiracial Racism Litigation Approach as one possible mechanism for more effectively analyzing inter-ethnic employment discrimination cases.

III. THE MRLA PROPOSAL: THE MULTIRACIAL RACISM LITIGATION APPROACH

How can we add nuance to the jurisprudence of antidiscrimination to make the new demography less opaque to factfinders and assist the judiciary and others in identifying the new markers of racial discrimination?²²¹

²¹⁸ *Webb v. R&B Holding Co.*, 992 F. Supp. 1382 (S.D. Fla. 1998).

²¹⁹ The stereotyped characterization of Black women as rude has a long history. See Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539.

²²⁰ *Webb*, 992 F. Supp. at 1389 (emphasis added).

²²¹ The jurisprudential problem with Latino inter-ethnic discrimination cases identified in this Article is also subject to all the pre-existing concerns that many scholars have described regarding the growing limitations on proving employment discrimination cases. See,

The first step will need to be a mechanism for developing a fuller record of inter-ethnic racial animus across groups. For judges who do not understand racial discrimination unless a White-Anglo person is present as an instigator or victim, pleadings will need to be more detailed, expert witnesses will need to be brought in, and depositions will need to be more expansive. In addition, judicial training sessions will need to be targeted for curriculum reform to address inter-ethnic discrimination specifically. But this cannot be done without judicial willingness to consider empirical data about the broader phenomenon of inter-ethnic bias and its contravention of the diversity defense.

A. *The MRLA Method*

One method for facilitating the judicial admission of inter-ethnic specific empirical data to defuse the application of the diversity defense is the development of a “Multiracial Racism Litigation Approach” (“MRLA”). The MRLA is the mechanism for justifying the admission of data about the details of a specific ethnic/racial group’s racial attitudes that judges might otherwise view as irrelevant to the judicial proceedings. In turn, the MRLA can help judges to move beyond the veil of a diverse workplace and summary conclusions of nonactionable “cultural misunderstanding.” This will then reinforce for judges the applicability of firmly established employment discrimination doctrines to the context of inter-ethnic discrimination.

The term “multiracial” in Multiracial Racism Litigation Approach both describes the multiracial/multi-ethnic context of the cases and the ways in which multiracial contexts can be imbued with racism even as they are stereotyped as transcending race.²²² Therefore, this Article will use the term

e.g., E. Christi Cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 CONN. L. REV. 441 (1998) (“Lower courts’ reluctance to apply the Supreme Court’s formation of the prima facie case suggests a discomfort with the explicit recognition of historical disadvantage that the prima facie presumption entails.”); Samuel L. Gaertner et al., *Aversive Racism: Bias Without Intention*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES 377, 393 (Laura Beth Nielsen & Robert L. Nelson eds., 2005) (concluding that Title VII needs to be reformed to address “ingroup favoritism” as a form of discrimination); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

²²² See Hernández, *Multiracial Matrix*, *supra* note 37, at 1098 (describing the ways in which racially diverse contexts are publicly depicted as resolving racial problems by transcending race). This Article uses the term “multiracial” more expansively than do mixed-race persons using it to denote racial identity. Yet the term does encompass the broader societal notions about the presumed racial enlightenment of mixed-race persons and diverse racial demography. While the term “multiracial/multi-ethnic” is more descriptive, it is also more cumbersome and less apt to capture the racialization that occurs in the manifestation of animus across groups characterized as ethnic. See MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES FROM THE 1960s TO THE 1980s* (1986) (theorizing how the treatment of various ethnic groups in the United States is more

“multiracial racism lens” to describe a conceptual focus on whether a defendant’s conduct is an assertion of racial privilege in a multiracial/multi-ethnic diverse workplace setting. In a nutshell, the MRLA suggests that inter-ethnic employment discrimination plaintiffs contextualize the discrimination they allege by: (1) explicitly foregrounding the narrative with the premise of inter-ethnic hierarchy and bias; (2) focusing the inquiry on whether there were racially advantaged and disadvantaged employees among the diverse non-White workers; (3) providing the social science data about the specific racial attitudes; and (4) demonstrating the applicability of established employment discrimination doctrine to diverse workplaces.

The MRLA is not a whole new theory about the origins of discrimination.²²³ Instead, it is a tool for recognizing our current understandings of discrimination when it occurs in a multiracial or an inter-ethnic context. Just as eyeglasses assist a person to see more clearly images that already exist, the multiracial racism lens clarifies the discrimination that can manifest in diverse workplaces. It does so by focusing the pre-existing Title VII proof structure on the question of who is functionally privileged and subjugated in a given context and time.²²⁴ It provides needed context for the application of the Title VII proof structures without altering them. Plaintiffs will attempt to carry their traditional burden of demonstrating how the alleged facts amount to discrimination, but will do so by focusing on cultural and historical context.²²⁵ Defendants will still have the same opportunity for rebuttal by proffering a nondiscriminatory reason for the

accurately characterized as a series of “racial projects”).

²²³ See, e.g., FOUNDATIONS OF EMPLOYMENT DISCRIMINATION LAW 126–78 (John J. Donohue III ed., 2d ed. 2003) (delineating various theories of racial prejudice and discriminatory conduct).

²²⁴ The understanding of racial privilege and disadvantage as fluid and thereby shifting given a particular context and timeframe is embodied in Eric Yamamoto’s concept of simultaneity. Eric K. Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice*, 3 ASIAN PAC. AM. L.J. 33, 38 (1995). Yamamoto uses simultaneity to describe how racially subordinated groups “contribute to and are responsible for the construction of their own identities and sometimes oppressive inter-group relations.” *Id.* In other words, a racialized group can simultaneously be subordinated and a subordinator of others. Similarly, Neil Gotanda’s articulation of racial hierarchy incorporates the helpful perspective of “racial stratification” which includes the model of a “hierarchical structure between minorities,” instead of a model that exclusively “emphasizes the subordinate position of all racial and ethnic minorities.” Neil Gotanda, *Multiculturalism and Racial Stratification*, in MAPPING MULTICULTURALISM 238, 240 (Avery F. Gordon & Christopher Newfield eds., 1996) (emphasis omitted).

²²⁵ While the MRLA recommends that litigators provide a more extensive narrative in their pleadings to include data about inter-ethnic racial animus in order to counteract the diversity defense, the MRLA does not abrogate Federal Rule of Civil Procedure 8(a)(2). Because the MRLA is a suggested framework for litigation, it does not interfere with that Rule’s simple mandate for a “short and plain statement of the claim showing that the pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2). Indeed, the Supreme Court has explicitly rejected a heightened pleading requirement for employment discrimination cases because it would conflict with this Rule. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002).

challenged employment decision, in addition to providing expert witnesses of their own regarding the relevant cultural and historical context presented by the plaintiff. As such, the MRLA is flexible enough to be applied to inter-ethnic discrimination cases that do not involve Latino defendants.²²⁶ Indeed, it was *Ali v. National Bank of Pakistan*, a case not involving Latinos, in which a federal judge took this approach and came closest to demanding that plaintiffs utilize what this Article characterizes as the MRLA.²²⁷

In *Ali*, a self-described light-skinned Pakistani citizen from the province of Punjab employed at the National Bank of Pakistan's New York branch alleged that the Bank discriminated against him in favor of darker-skinned Pakistani citizens from the province of Sind.²²⁸ In dismissing the plaintiff's claim, the court noted that although light-skinned employees predominated in the lower-paid job positions, it was problematic that no "evidence by way of expert testimony or treatise was presented with respect to color differences among the various provinces of Pakistan, or discrimination based on color."²²⁹ The court was disturbed by the lack of a fuller record because it was unclear whether a light-skinned Pakistani who "is darker in complexion than those commonly termed white in the United States"²³⁰ warranted "protected class status" under the *McDonnell Douglas*²³¹ prima facie evidentiary standard. The court stated:

Suffice it to note that the presumption of a protected class status on the basis of color is bound up with an entire national racial history. It may well be that there are indigenous discriminatory practices around the world having nothing to do with the American experience. However, there is no basis on this record for the recognition of skin color as a presumptive discriminatory criterion (rooted, one would suppose, in the intermingling of distinctive national or racial groups) in employment in Pakistan, or among Pakistanis in New York, under the *McDonnell Douglas* guidelines.²³²

In short, the judge is asserting that when Title VII cases are brought that implicate racial meanings beyond the U.S. setting, a fuller record about

²²⁶ While Latino inter-ethnic claims are the focus of this Article, the MRLA, justifying the admission of empirical data, should be just as helpful in explicating the context of non-White-Anglo/African American allegations of discrimination. See, e.g., VIJAY PRASHAD, *THE KARMA OF BROWN FOLK* (2000) (discussing the racial attitudes of Indians and their anti-Black racism as well). See also GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (1954) (describing the ubiquitous and historically pervasive construction of "in-groups" and "out-groups").

²²⁷ *Ali v. Nat'l Bank of Pak.*, 508 F. Supp. 611 (S.D.N.Y. 1981).

²²⁸ *Id.* at 613–14.

²²⁹ *Id.* at 612.

²³⁰ *Id.*

²³¹ *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

²³² *Ali*, 508 F. Supp. at 613–14.

those meanings should be set forth in order for the existing legal doctrine to be applied effectively.

B. *The MRLA Benefits*

When specifically applied to the context of Latino inter-ethnic discrimination with its empirical data regarding Latino anti-Black sentiment and the idealization of whiteness, the MRLA enables an inquiry into the manifestations of racial privilege with a focus on how a defendant's conduct positions him or her as an agent of White supremacy, while not being viewed as racially White himself or herself. This is because the MRLA incorporates the understanding that systems and norms of White supremacy do not disappear simply because the census count of racial Whites has diminished.²³³ Indeed, the seduction of "performing whiteness" by subjugating others continues to exist.²³⁴ This is because "intergroup conflict

²³³ See STEPHANIE M. WILDMAN, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 30 (1996) (describing the need for employment discrimination doctrine to acknowledge the importance of context in appreciating how "each of us lives at the juncture of privilege in some areas and subordination in others"); López, *supra* note 29, at 93 (1998) (describing the process of racialization as subject to the varying contingencies of time, place, and identity); see also John Valery White, *The Turner Thesis, Black Migration, and the (Misapplied) Immigrant Explanation of Black Inequality*, 5 NEV. L.J. 6, 24, 24–29 (2004) (describing the way in which the racial diversity of Northern California in the 1940s, with its mixed population of Mexicans, Chinese, Japanese, and Filipino residents, still maintained a system of White privilege that thoroughly segregated African Americans from most employment opportunities despite the absence of an official Jim Crow system).

²³⁴ "Performing whiteness" in its most narrow interpretation is when individuals assert their claim to a White racial identity by evidencing "whiteness in their character, religious practices and beliefs, class orientation, language, ability to intermarry, and a host of other traits that [have] nothing to do with intrinsic racial grouping." John Tehranian, Note, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817, 821 (2000) (applying Judith Butler's work on gender and the performance of identity to the analysis of judicial evaluations of immigrant petitions for naturalization). But performing whiteness can also refer more generally to the ways in which people of color engage in interracial distancing and attempt to "occupy both the marginalized and the privileged ends of the Black/White paradigm." Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283, 1311 (2002). In this way, "discrimination becomes a strategic tool manipulated" by one racial or ethnic group against another. Louis Herns Marcelin, *Identity, Power, and Socioracial Hierarchies Among Haitian Immigrants in Florida*, in NEITHER ENEMIES NOR FRIENDS, *supra* note 4, at 209, 223. In addition to self-conscious attempts by individuals to assert a White identity or an elevated social status built on White privilege, there is also the societal dynamic of particular ethnic groups being offered certain facets of White privilege in order to lessen their interest in forming alliances with other racially subordinated groups. See LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 227 (2002) ("By offering this option of whiteness over time to selected nonblack nonwhites, the racial binary of black and white is preserved and race in the United States is made more manageable for those seeking to hold onto zero-sum power."). This can take the form of actually incorporating new ethnic groups into the category of whiteness as was done with the Irish over time. See NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (1995). It can also take the form of treating particular groups as "honorary whites" in a particular place and time. See Mark Sawyer, *Racial Politics in Multiethnic America: Black and Latina/o Identities*

can [often] be best understood as the product of internalized white supremacy,"²³⁵ and the search for group-based status production.²³⁶ Accordingly, the MRLA seeks to infuse the analysis of inter-ethnic discrimination claims with the fundamental understanding that acts of racial discrimination preserve racial privilege for whoever is situated as racially valued in any given context, and that such bias also furthers systemic White privilege more generally, regardless of whether a self-identified White-Anglo person is directly involved.²³⁷

For example, legal scholars who analyzed the 1992 Los Angeles riots have noted the way in which both Koreans and African Americans were in turn positioned as functionally White-privileged in nativist constructs of the racial conflict in the public discourse.²³⁸ Korean Americans were described as immigrant foreigners in opposition to African Americans with "White" U.S. citizenship, a description that alternated with the description of Korean Americans as pursuing the American entrepreneurial dream as Whites in opposition to African Americans as a socially problematic Black underclass.²³⁹ The MRLA can recognize the White privilege of non-White groups in varying contexts.²⁴⁰ Rather than introducing further complexity into employment discrimination cases, the MRLA builds upon the knowledge judges already have about the operation of White privilege and provides a language for describing its manifestation in non-White contexts.²⁴¹ In addition, the vast literature regarding the legacies of colonial-

and Coalitions, in *NEITHER ENEMIES NOR FRIENDS*, *supra* note 4, at 265, 272 ("Hollywood portrayals of [Puerto Rican actress Jennifer Lopez] emphasize the attempt to portray Latinas/os as 'potential whites.'"); Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 226 & 249 (1995) (using the concepts of "honorary whites" and "constructive blacks" to describe the public discourse about affirmative action and the attempt to dissuade Asian Americans of their common interests with African Americans). Some scholars assert that Latinos are particularly predisposed to being "seduced into thinking [they] are White." Enid Trucio-Haynes, *Why "Race Matters": Latcrit Theory and Latina/o Racial Identity*, 12 LA RAZA L.J. 1, 1 (2001).

²³⁵ Chris K. Iijima, *The Era of We-Construction: Reclaiming the Politics of Asian Pacific American Identity and Reflections on the Critique of the Black/White Paradigm*, 29 COLUM. HUM. RTS. L. REV. 47, 75 (1997).

²³⁶ Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1044 (1995) (theorizing that individuals are driven in part by their competition for esteem and that racist behavior is a process by which one racial group seeks to produce esteem for itself by lowering the status of another group).

²³⁷ See WILDMAN, *supra* note 233, at 33 (emphasizing the need for employment discrimination doctrine to include issues of privilege in its traditional examination of subordination).

²³⁸ See, e.g., Janine Young Kim, Note, *Are Asians Black?: The Asian-American Civil Rights Agenda and the Contemporary Significance of the Black/White Paradigm*, 108 YALE L.J. 2385, 2398 (1999).

²³⁹ *Id.*

²⁴⁰ See Clark Freshman, *Whatever Happened to Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between "Different" Minorities*, 85 CORNELL L. REV. 313, 406 (2000) ("[W]e need to know the definition of the ingroup in a given context . . .").

²⁴¹ Scholars have observed that trial judges in antidiscrimination cases are disinclined

ism and postcolonial racial stratification in multiracial societies around the world gives further context to the premise of racial privilege in multi-racial/multi-ethnic societies.²⁴² Another advantage of the MRLA is that it can identify who is functionally privileged in a given context, without losing sight of the continuing privilege of self-identified White-Anglos.²⁴³ Thus, it does not make the mistake of recasting White-Anglos “as just another [racial] group competing with many others.”²⁴⁴ In this way, the focus on inter-ethnic disparate treatment claims need not undermine the need to continue enforcing discrimination claims against White-Anglo defendants. Similarly, the MRLA is not meant to subvert the enforcement of disparate impact claims, nor should it diminish an employer’s desire to foster a diverse workplace.²⁴⁵

While the multiracial racism lens is an analytical approach that litigators will need to persuade judges to consider, it is not one that requires the enactment of new laws or other legislative reform.²⁴⁶ Rather, it is a con-

to consider the complexity of racial identity categories. See Suzanne B. Goldberg, *On Making Anti-Essentialist and Social Constructionist Arguments in Court*, 81 OR. L. REV. 629, 644 (2002). The advantage of the MRLA is that it builds upon pre-existing judicial knowledge about White racial privilege. It seeks to elucidate the dynamics of inter-ethnic discrimination by grounding its analysis in the operation of racial privilege rather than the particularities of how a party to the case racially identifies.

²⁴² See, e.g., COLONIAL DISCOURSE AND POST-COLONIAL THEORY: A READER (Patrick Williams & Laura Chrisman eds., 1994).

²⁴³ Cf. WILDMAN, *supra* note 233, at 36 (“Privileging of whiteness in the workplace can occur even when all participants are African American.”).

²⁴⁴ Alexandra Natapoff, Note, *Trouble in Paradise: Equal Protection and the Dilemma of Interminority Group Conflict*, 47 STAN. L. REV. 1059, 1062 (1995) (concluding that the Supreme Court’s current equal protection doctrine exploits the changing racial demography of the United States to transform Whites rhetorically into a victim group like any other).

²⁴⁵ Because this first wave of Latino inter-ethnic employment discrimination cases have all been litigated as individual disparate treatment claims, this Article focuses upon the judicial misunderstandings that arise in that context. More empirical data is needed before an assessment can be made as to whether diverse workplaces also alter the judicial application of traditional disparate impact doctrine. Nonetheless, it is quite possible that the MRLA may have some utility for plaintiffs attempting to prove that an employer’s proffered justification for the employment practice in question is a pretext for discrimination. For instance, in *EEOC v. Consolidated Services*, 989 F.2d 233 (7th Cir. 1993), the court noted the persuasiveness of the employer’s expert witness in explaining the cultural factors that would encourage a Korean-owned business to hire mostly Korean workers to the exclusion of African American workers. If the plaintiff EEOC had deployed the MRLA, it too could have proffered expert testimony about the pre-existing racial attitudes of Koreans informing the alleged employment practice of word-of-mouth recruitment. In short, for those inter-ethnic discrimination plaintiffs able to aggregate the statistical evidence to show a disparate impact upon their racial or ethnic subgroup from a particular employment practice, the MRLA may further support the plaintiff’s case rather than undermine it. Similarly, the MRLA does not undermine diversity in the workplace or dispute the overarching value of diversity in the workplace. See *supra* notes 138–139 and accompanying text.

²⁴⁶ In fact, the request for a judicial inquiry into who is functionally advantaged and disadvantaged in a specific racial hierarchy resonates with the post-Civil War judicial assessments of who was functionally White or Black for purposes of Jim Crow segregation enforcement. See, e.g., *Gong Lum v. Rice*, 275 U.S. 78 (1927) (concluding that a child of Chinese descent was functionally “colored” and thus not qualified to enroll in Whites-only public schools); see also IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUC-*

ceptual framework that plaintiffs can use to displace the judicial inclination towards the diversity defense and its disregard for established legal doctrine. For instance, if the paradigmatic case of *Arrocha v. CUNY*,²⁴⁷ discussed in Part II of this Article, had been crafted by the plaintiff using the proposed MRLA, the court would not have summarily dismissed the plaintiff's claims of race and national-origin discrimination, because the plaintiff would have been better able to dispel the judicial enchantment with diversity rhetoric by: (1) explicitly foregrounding his narrative with the premise of inter-ethnic hierarchy and bias; (2) focusing the inquiry on whether there were racially advantaged and disadvantaged employees among the diverse non-White workers; (3) providing the social science data about Latino racial attitudes; and (4) demonstrating the applicability of established employment discrimination doctrine to diverse workplaces. In *Arrocha*, the plaintiff's statement that there was a "disturbing culture of favoritism that favor[ed] the appointments of white Cubans, Spaniards, and white Hispanics from South America" was insufficient to invoke the long legacy of racial hierarchy in Latin America.²⁴⁸ For a judge focused on an understanding of discrimination as solely a U.S. White/non-White phenomenon, the *Arrocha* plaintiff needed to present explicit documentation of racial privilege and bias in non-White contexts. Using the insights of the multiracial racism lens, the plaintiff would have been more likely to persuade the judge to consider the empirical data about Latino racial attitudes and their manifestation. The plaintiff's submission of expert testimony regarding the long legacy of anti-Black bias against Afro-Latinos within Latin America would have dispelled the judicial inclination to view Latinos as homogeneous and interchangeable. In turn, the disruption of the judicial presumption of Latino homogeneity would have eliminated the rationalization that "[d]iversity in an employer's staff undercuts an inference of discriminatory intent."²⁴⁹ Further, established employment discrimination doctrine would not have been overlooked. Similarly, in other Latino inter-ethnic discrimination cases in which the plaintiffs are African American, the presentation of empirical information about Latino anti-Black bias would be useful in dismantling fanciful notions about the inherent harmony of a diverse workplace. Furthermore, the scholarly literature explaining how systemic White privilege encourages non-White racial/ethnic group members to harbor bias against other non-Whites would also be useful.²⁵⁰

TION OF WHITENESS (Richard Delgado & Jean Stefancic eds., 1996). Although official Jim Crow segregation has been abolished, racial hierarchies continue as does the need to address the differential employment status of those racially privileged and racially disadvantaged.

²⁴⁷ *Arrocha v. CUNY*, 2004 WL 594981 (E.D.N.Y. Feb. 9, 2004).

²⁴⁸ *Id.* at *7.

²⁴⁹ *Id.*

²⁵⁰ See *supra* note 234; see also FRANTZ FANON, *BLACK SKIN, WHITE MASKS* 10–30 (Charles Lam Markmann trans., Grove Press 1967) (describing how subordinated group

The MRLA is a concept influenced by Charles Lawrence's articulation of a "cultural meaning test." In a 1987 *Stanford Law Review* article, he proposed the overt judicial examination of context as a method for recognizing racial meanings and motivations.²⁵¹ Lawrence proposed the cultural meaning test as a mechanism for helping judges address the harm of unconscious racism in the equal protection context. Lawrence suggested that judges look to the cultural meaning of an allegedly discriminatory governmental act as a method for identifying unconscious racism that should be addressed and subjected to strict scrutiny. This could be done by considering evidence regarding the historical and social context in which a governmental decision was made.

Because Lawrence's analysis focused on the racial subordination of African Americans, his articulation of the cultural meaning test relies upon the usefulness of considering whether a significant portion of the population views a particular action as being of racial import.²⁵² In contrast, the MRLA concerns itself with the racial and ethnic discrimination of which much of the population in the United States may very well be ignorant. Accordingly, the MRLA instead encourages the search for cultural meaning that is outside of the U.S. Jim Crow racial history but serves as its functional equivalent for understanding racial subordination in the inter-ethnic context.

While no court has ever directly referenced the Charles Lawrence cultural meaning test,²⁵³ "much of what judges do entails this kind of inter-

members can internalize the biases of the privileged class and thereby adopt disdain for other subordinated group members). In contrast, when the EEOC files class actions alleging that an employer has privileged a particular racial/ethnic group in order to exclude another racial/ethnic group in its employment decisions, it may instead find the scholarly literature regarding the strategic positioning of "middleman minorities" more useful for informing a judge. *See, e.g.,* HUBERT BLALOCK, JR., TOWARD A THEORY OF MINORITY-GROUP RELATIONS 79-84 (1967); Edna Bonacich, *A Theory of Middleman Minorities*, 38 AM. SOC. REV. 583, 584 (1973). This separate body of literature may be more useful because it focuses upon a White privileged-class interest in favoring one racial/ethnic group over another. In contrast, the internalized racism literature focuses upon the racialized attitudes of non-White racial/ethnic group members and is thus more applicable to establishing a framework for understanding employment discrimination cases in which non-Whites are the identified agents of discrimination in a workplace dominated by non-Whites.

²⁵¹ Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 355-81 (1987) (using cognitive theory to develop a cultural meaning test for addressing the social harms of unconscious racism).

²⁵² *Id.* at 356.

²⁵³ Courts thus far have only cited Lawrence's article for its discussion of unconscious racism rather than to apply the proposed cultural meaning test. *See, e.g.,* McCleskey v. Kemp, 481 U.S. 279, 332-33 (1987); Crum v. Alabama, 198 F.3d 1305, 1321 (11th Cir. 1999); Thomas v. Eastman Kodak Co., 183 F.3d 38, 61 (1st Cir. 1999); Gonzalez-Rivera v. INS, 22 F.3d 1441, 1450 (9th Cir. 1994); United States v. Bishop, 959 F.2d 820, 827-28 (9th Cir. 1992); Brown v. Bd. of Educ., 892 F.2d 851, 863 (10th Cir. 1989); Chin v. Runnels, 343 F. Supp. 2d 891, 906 (N.D. Cal. 2004); Thomas v. Troy City Bd. of Educ., 302 F. Supp. 2d 1303, 1309 (M.D. Ala. 2004); Dobbs-Weinstein v. Vanderbilt Univ., 1 F. Supp. 2d 783, 801 (M.D. Tenn. 1998); United States v. Burroughs, 897 F. Supp. 205, 208 (E.D. Pa. 1995); United States v. Clary, 846 F. Supp. 768, 778-79 (E.D. Mo. 1994); Harris v. Int'l

pretation: It requires the same skills they employ when they decide a case by characterizing or interpreting a line of precedent in the way that seems most true to them.”²⁵⁴ Moreover, at least one Supreme Court case implicitly supports the search for cultural meaning in the manner proposed by the MRLA. In *St. Francis College v. Al-Khazraji*, the Court was presented with the question of whether a person of Arabian ancestry born in Iraq has standing to seek protection from racial discrimination under the Section 1981 mandate against racial discrimination in the making of private and public contracts.²⁵⁵ The Court refused to decide the case on the fact that under current racial classifications Arabs are Caucasians and thus precluded from raising a Section 1981 claim that they are not treated like “white citizens.”²⁵⁶ Instead, the Court held that:

Based on the history of § 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory.²⁵⁷

In effect, the Court looked beyond the attempts at formalizing what constitutes a racial group for coverage under discrimination law, and instead sought to have the law address the reality of racial discrimination in our more racially and ethnically diverse society. It did this by recognizing that those often viewed racially as Caucasian, as was the *St. Francis College* plaintiff, can also be treated as non-White depending upon the context.²⁵⁸ The MRLA proposed here would extend that analysis to recognizing how those often viewed as racially non-White can still exert White privilege in various contexts.

Paper Co., 765 F. Supp. 1509, 1515–16 (D. Me. 1991); *Knop v. Johnson*, 667 F. Supp. 467, 503 (W.D. Mich. 1987); *Alaska Inter-Tribal Council v. State*, 110 P.3d 947, 963 (Alaska 2005); *State by Beaulieu v. City of Mounds View*, 518 N.W.2d 567, 575 (Minn. 1994).

²⁵⁴ Lawrence, *supra* note 251, at 362. “If the jurisprudential task is to give sense to broad propositions of law—deriving that sense from an ongoing judicial interpretation of culturally created moral norms—then application of the proposed cultural meaning test is clearly within the courts’ competence.” *Id.* at 386.

²⁵⁵ *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604 (1987).

²⁵⁶ Section 1981 prohibits racial discrimination that denies individuals the same rights “as [are] enjoyed by white citizens.” 42 U.S.C. § 1981 (2000).

²⁵⁷ 481 U.S. at 613.

²⁵⁸ *St. Francis College* has been relied on to recognize that Jews, Iranians, and Italians can be protected from racial discrimination under Section 1981 even though they are today racially classified as Caucasian. See *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987) (recognizing Jews as protected under Section 1981); *Amini v. Oberlin Coll.*, 259 F.3d 493 (6th Cir. 2001) (recognizing Iranians as protected under Section 1981); *Bisciglia v. Kenosha Unified Sch. Dist. No. 1*, 45 F.3d 223 (7th Cir. 1995) (recognizing Italians as protected under Section 1981).

In order to be able to examine an employment context for racial discrimination in a richer demographic workforce, the MRLA will entail an engagement with the particularities of how various racial and ethnic groups have historically treated and continue to stereotype one another. For instance, in the context of Latino inter-ethnic discrimination claims, plaintiffs' lawyers would have available to them a vast literature on Latino Studies²⁵⁹ and Ethnic Studies²⁶⁰ with which to understand and present such claims. Such literature would be especially useful in the context of Latino inter-ethnic discrimination claims as a mechanism to remedy the ill-informed characterizations of Latino racial attitudes that currently pervade the public discourse and unconsciously influence judges and other legal decisionmakers.²⁶¹ Legal scholars Laurens Walker and John Monahan describe this process as the admission of empirical information to construct a frame of reference for deciding factual issues.²⁶² While this is a form of judicial notice that involves neither legislative facts nor adjudicative facts as contemplated in Federal Rule of Evidence 201, "a growing number of courts have held that the use of social frameworks to correct beliefs that are erroneous does indeed 'assist the trier of fact.'"²⁶³ This is because the Federal Rules of Evidence do not bar this third use of social science in law,²⁶⁴ thereby allowing a court to admit empirical information "to keep it responsive to its changing environment."²⁶⁵

Judges customarily admit empirical information through the use of expert witnesses for the purpose of assisting a trier of fact to understand the evidence.²⁶⁶ For instance, judges have accepted the presentation of expert testimony on the deployment of racial stereotypes in the workplace in order to disabuse factfinders of what they believe is "common sense."²⁶⁷ In *Walker v. State*, a law professor provided expert testimony on behalf of an Afri-

²⁵⁹ See Pedro A. Cabán, *Moving from the Margins to Where? Three Decades of Latino/a Studies*, 1 *LATINO STUD.* 5 (2003) (describing the evolution of Latino Studies).

²⁶⁰ See generally INTRODUCTION TO ETHNIC STUDIES: A READER (Phillip Q. Yang ed., 1999).

²⁶¹ See Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and New Theory of Racial Discrimination*, 109 *YALE L.J.* 1717, 1723–25 (2000) (articulating a theory of "institutional racism" to explain how judges can unconsciously follow elaborate social scripts that manifest prejudice and racism without a conscious intent to discriminate); see also LU-IN WANG, *DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE* 135–37 (2006) (describing how discrimination in the legal system can occur by default, due to legal actors' unconscious biases and resort to automatic racial stereotypes).

²⁶² Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 *VA. L. REV.* 559, 570 (1987) (defining social framework as "the use of general conclusions from social science research in determining factual issues in a specific case").

²⁶³ *Id.* at 580.

²⁶⁴ *Id.* at 582.

²⁶⁵ E.F. Roberts, *Preliminary Notes Toward a Study of Judicial Notice*, 52 *CORNELL L.Q.* 210, 210 (1967).

²⁶⁶ Walker & Monahan, *supra* note 262, at 583.

²⁶⁷ SPRIGGS, *supra* note 145, § 17.03[3][g].

can American state trooper alleging discriminatory discharge.²⁶⁸ The testimony was based on research in the literature of racial stereotyping that permitted the expert witness to conclude that it was extremely likely that the plaintiff was the victim of race-based performance evaluations. Expert testimony will be especially useful in delineating how Latinos and other populations of color racialize one another.²⁶⁹ Such information would be presented for the sole purpose of creating a social framework to construct a frame of reference for deciding the factual issues, and not as a vehicle for imparting a general group bias to an individual defendant on the legal question of discriminatory intent.²⁷⁰ In this way, the MRLA will call on expert witnesses to act in their traditional role of educating the decision-maker about their areas of expertise.²⁷¹ One federal district court has already been very explicit about the need for such expert testimony and literature.²⁷² As discussed earlier in this section, *Ali v. National Bank of Pakistan* represents what is sure to become a growing dynamic of cases presenting judges with inter-ethnic discrimination claims that they are unable to assess and evaluate without in-depth assistance from the plaintiff.²⁷³ It is at least encouraging that the judge in *Ali* expressed a willingness to receive expert testimony and documentation about systems of racialization with which he was not familiar. It is in such spaces of willingness that the multiracial racism lens concept may gain traction in the same manner that some judges have implicitly and explicitly applied Critical Race Theory in their analysis of social issues.²⁷⁴ Once the judiciary is made more aware of the existence of inter-ethnic discrimination expertise, judges may become more disposed to exercising their discretion to appoint expert witnesses themselves.²⁷⁵ In addition to using expert witnesses, empirical re-

²⁶⁸ No. EV 87-12-C (S.D. Ind. Jan. 21, 1987).

²⁶⁹ See WANG *supra* note 261, at 136–37 (explaining that one way to counteract a factfinder’s unconscious biases is to present more normative clarity about the role of race in the case).

²⁷⁰ See FED. R. EVID. 702 (authorizing the use of expert witnesses with specialized knowledge to “assist the trier of fact to understand the evidence”); see also JOHN WILLIAM STRONG, MCCORMICK ON EVIDENCE § 12 at 50 (1992) (“[T]he Federal Rules of Evidence do not permit opinion on law except questions of foreign law”); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE: PRACTICE UNDER THE RULES § 7.7 at 905 (2d ed. 1999) (“[When] parties offer expert testimony on the content of law during the ordinary course of trial, it is properly rejected.”).

²⁷¹ MUELLER & KIRKPATRICK, *supra* note 270, § 7.6 at 902 (“Often the best thing an expert can do is to provide standards or criteria, estimates of feasibility or likelihood, or descriptions of *social frameworks* that juries can then constructively use in resolving more particular issues relating to such things as due care, intent or purpose, and who likely did what and why.”) (emphasis added).

²⁷² See *Ali v. Nat’l Bank of Pak.*, 508 F. Supp. 611 (S.D.N.Y. 1981).

²⁷³ See *supra* notes 228–232 and accompanying text.

²⁷⁴ See RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 109–19 (2001) (describing some cases in which judges have either explicitly or implicitly used Critical Race Theory in their opinions).

²⁷⁵ See FED. R. EVID. 706 (“[T]he court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed . . . and

search can be presented in briefs, and later in the proposal for jury instructions.²⁷⁶ Over time a set of pattern jury instructions could be developed to standardize the use of a set of social science findings.²⁷⁷ This will in turn become useful for those plaintiffs financially unable to obtain expert witnesses of their own. Given the longstanding use of statistical empirical data in employment discrimination cases to provide context for an allegation of discrimination, judges should be amenable to the presentation of other forms of empirical data as well.

With respect to Latino inter-ethnic discrimination claims, plaintiffs will need not only to develop the record with regard to Latino racial biases, but also to countermand the misleading public discourse that currently exists about Latinos and race.²⁷⁸ Specifically, much of the public discourse about Latinos and racism has focused on the depiction of a problematic relationship between Latinos and African Americans and has presented Latinos as racial innocents incapable of racial discrimination.²⁷⁹ Given the fact that the vast majority of reported Latino inter-ethnic claims to date involve claims of anti-Black bias, it is especially important to have a more complete picture of Latino racial attitudes as described in Part I of this Article. The value of the MRLA, with its attention to racial hierarchy and privilege in diverse workplace settings, is that it validates the need to submit empirical information to expand the judicial understanding of how employment discrimination is manifested amidst workplace diversity.

Because of the long legacy of White/non-White racism in the United States, discussion of race has rightly focused on the White/non-White paradigm of U.S. race relations and its effects on civil rights enforcement. But the changing demographics of the United States mean that we need to expand the judicial analysis of racism to include considerations of how groups of color can be complicit and even active agents in discrimination

may appoint expert witnesses of its own selection . . .”).

²⁷⁶ Walker & Monahan, *supra* note 262, at 588. The model for inserting empirical information into legal memoranda is the “Brandeis brief.” See BLACK’S LAW DICTIONARY 98 (5th ed. 1983) (“Form of appellate brief in which economic and social surveys and studies are included along with legal principles and citations and which takes its name from Louis D. Brandeis, former Associate Justice of Supreme Court, who used such briefs while practicing law.”).

²⁷⁷ See Walker & Monahan, *supra* note 262, at 597–98.

²⁷⁸ See Sawyer, *supra* note 234, at 270 (discussing how the public emphasis placed on “Latinas/os as representative of a new mixed-race America is meant to distance Latinas/os from Blacks and to redefine race in U.S. society as a concept not so very different from the Latin American myth of racial democracy, which effectively denies racism by emphasizing miscegenation”).

²⁷⁹ See, e.g., NICOLÁS C. VACA, THE PRESUMED ALLIANCE: THE UNSPOKEN CONFLICT BETWEEN LATINOS AND BLACKS AND WHAT IT MEANS FOR AMERICA (2004) (presenting race relations between African Americans and Latinos as unharmonious because of the resentment African Americans are presumed to have for Latinos). *But see* Sawyer, *supra* note 234, at 270 (describing how authors like Vaca “overemphasize differences between Latinas/os and African American and ignore political and ideological convergences . . . [and also] overemphasize conflict in the service of an assimilationist political agenda”).

against other groups of color. Accordingly, the national dialogue about race needs to examine each ethnic group's racial attitudes in order to have a complete picture of race relations in today's United States, and of the growing dynamic of inter-ethnic civil rights claims. The failure to address the interplay of diversity discourse and inter-ethnic discrimination claims will undermine the social importance of equality in the workplace.²⁸⁰ Allowing diversity discourse to proceed unchecked in employment discrimination cases will leave open the very concrete possibility that employers will begin to construct their workplaces as "diverse" to ward off lawsuits, while simultaneously maintaining a racial hierarchy.²⁸¹ The MRLA proposed here is but one possible method for more effectively navigating the realities of racism in a multiracial world. The concept seeks to focus judges on the applicability of established employment discrimination doctrine to the context of inter-ethnic discrimination. Such an endeavor is imperative if inter-ethnic discrimination allegations are to receive the full inquiry that they deserve.

²⁸⁰ Richard Delgado, *The Current Landscape of Race: Old Targets, New Opportunities*, 104 MICH. L. REV. 1269, 1272 (2006) ("The black-white binary paradigm of race thus requires expansion to deal with our increasingly multicultural, multiracial society—and even, sometimes, to do justice to the black cause.").

²⁸¹ See Carl G. Cooper, *Diversity: Denied, Deferred or Preferred*, 107 W. VA. L. REV. 685, 687 (2005) ("[A] diverse workforce cuts down on litigation. It is very difficult when you have all groups, all racial groups and all kinds of individuals, sexual orientation, disability, age, all employed by the same employer to mount a successful discrimination lawsuit.").

[A]n anecdotal example is the statement of a Filipino American who, in a recent interview, said that she and other Asian Americans are promoted to and kept at low management positions so that they can do the face-to-face firing of African Americans and Latino employees, thereby immunizing their employers from Title VII suits; after all, how can one racial minority illegally discriminate against another?

Pluralism: A Principle for Children's Rights

*Holning Lau**

Some day, maybe, there will exist a well-informed, well-considered and yet fervent public conviction that the most deadly of all possible sins is the mutilation of a child's spirit.

—Erik H. Erikson¹

There has been a proliferation of scholarship on the harms caused by pressures to assimilate²—for example, pressures on Muslims not to wear their traditional garb, pressures on businesswomen to downplay their motherhood, and pressures on same-sex couples not to display affection publicly. Legal scholars have argued that assimilation demands strike a blow to a person's sense of identity,³ imposing unjustified psychological burdens.⁴ Kenji Yoshino has gone so far as to suggest a new civil rights move-

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¹ ERIK H. ERIKSON, *YOUNG MAN LUTHER: A STUDY IN PSYCHOANALYSIS AND HISTORY* 70 (1958).

² See Nathan Glazer, *Is Assimilation Dead?*, 530 ANNALS AM. ACAD. POL. & SOC. SCI. 122, 123 (1993) (describing the growing consensus among scholars that "assimilation . . . is somewhat disreputable, opposed to the reality of both individual and group difference and to the claims that such differences should be recognized and celebrated").

³ Drawing from psychological literature, I define identity as the sense of self that individuals develop by committing to values and goals associated with particular social categories. Identity must be *developed*. Thus, for example, an individual of Chinese American ancestry does not develop a Chinese American identity unless she adopts values and goals associated with the Chinese American community. Others may label her as Chinese American based on her genes, but she does not possess a Chinese American identity in the psychological sense if she feels no allegiance to Chinese American values and goals.

⁴ See, e.g., Martha Nussbaum, *A New Type of Discrimination: The Prohibition Era*, NEW REPUBLIC, Mar. 20, 2006, at 22:

[A demand] for assimilation to majority norms . . . is profoundly unfair, burdening minorities in ways that majorities are not burdened. Moreover, the demand is fraught with psychological danger. How can a person really have equality when she has to push some of her most deeply rooted commitments under the rug, treating them as something shameful and socially inappropriate?

ment that focuses on protecting a person's right not to assimilate and to live a life that is centered on an "uncovered," authentic identity.⁵

The existing legal scholarship on identity and assimilation focuses on adults. In this Article, I bring the discussion full circle, back to where the concept of identity first arose—the context of childhood. The concept of identity was not commonly used until the 1950s, when psychologist Erik H. Erikson introduced the terms "identity" and "identity crisis" in his works on children.⁶

Consider Kenji Yoshino's works on assimilation, in which he argues that it is troubling when an employer requires her gay (adult) employees to hide their same-sex relationships, demanding that employees assimilate to a heterosexual norm.⁷ What happens when we shift the focus from the office to the schoolhouse? Is it equally, less, or more troubling when a public high school punishes students who openly display same-sex affection and threatens to out those students to their parents?⁸ This Article contends that cases involving children are more troubling than cases involving adults and that the law should account for that fact. The developmental state of childhood renders children particularly vulnerable to the harmful effects of assimilation demands.

Throughout this Article, I focus on the harmful effects of demands to assimilate and not on assimilation itself, which may be uncoerced. For examples of legal scholarship on these demands, see Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2562–65 (1994) (discussing costs associated with gender-based assimilation); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1279–93 (2000) (discussing costs associated with race-based assimilation) [hereinafter Carbado & Gulati, *Working Identity*].

⁵ KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 27, 184–96 (2006). Borrowing from sociologist Erving Goffman, Yoshino uses the term "covering" to refer to the "ton[ing] down" of particular identity traits to fit into the mainstream. *Id.* at ix.

⁶ See ERIK H. ERIKSON, *CHILDHOOD AND SOCIETY* (1950); ERIK H. ERIKSON, *IDENTITY AND THE LIFE CYCLE* (W. W. Norton & Co. 1980) (1959) [hereinafter ERIKSON, *LIFE CYCLE*]; ERIK H. ERIKSON, *IDENTITY, YOUTH, AND CRISIS* (1968) [hereinafter ERIKSON, *YOUTH AND CRISIS*]; ERIK H. ERIKSON, *YOUTH: CHANGE AND CHALLENGE* (1963); see also Glazer, *supra* note 2, at 124–25 (acknowledging that the concept of identity was introduced by Erikson through his works on children); Ruben G. Rumbaut, *The Crucible Within: Ethnic Identity, Self-Esteem, and Segmented Assimilation Among Children of Immigrants*, 28 INT'L MIGRATION REV. 748, 753 (1994) (same).

⁷ See YOSHINO, *supra* note 5, at 69–70 (criticizing the federal government's "Don't Ask, Don't Tell" policy for requiring gay service members to hide their sexual orientation); *id.* at 93–101 (criticizing *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997), in which the court upheld the government's withdrawal of an employment offer from a lesbian because she flaunted her same-sex relationship).

⁸ This question is inspired by the pending case of *C.N. v. Wolf*, in which a high school disciplined a lesbian student for being affectionate with her girlfriend and outed the student to her parents, even though the school allegedly never punished opposite-sex couples for similar conduct. 410 F. Supp. 2d 894 (C.D. Cal. 2005) (granting in part and denying in part defendants' motion to dismiss); see also Seema Mehta, *Lesbian Student Files Discrimination Lawsuit*, L.A. TIMES, Sept. 8, 2005, at B3.

Public policies often require children to conform to majoritarian community standards.⁹ Of course, requiring children to conform may sometimes be desirable and not harmful. Children need to learn and adopt some basic social norms in order to grow into well-functioning members of society.¹⁰ Socialization of children can be as innocuous as requiring schoolchildren to raise their hands before speaking and to wait patiently in line in the cafeteria. However, socialization processes become harmful when they require children to suppress their identities.¹¹ For example, forbidding girls to wear headscarves in school psychologically burdens many Muslim schoolgirls, for whom headscarves are an identity trait.¹²

The remainder of this Article contains three arguments: a normative policy argument in Parts I and II, a descriptive legal argument in Part III, and a prescriptive legal argument in Part IV. In Part I, I argue that children are harmed when they are pressured to suppress traits of minority social groups in order to fit into the mainstream.¹³ Allegiance to a minority group informs an individual's identity.¹⁴ Accordingly, suppression of mi-

⁹ See Kenneth L. Karst, *Law, Cultural Conflict, and the Socialization of Children*, 91 CAL. L. REV. 967 (2003); Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487, 490 (1973).

¹⁰ See Nussbaum, *supra* note 4, at 26.

¹¹ As discussed *infra* in Part I, the suppression of identity generates particular psychological burdens.

¹² In 2004, France banned the wearing of "ostentatious" religious symbols, including headscarves, in public schools. See Law No. 2004-22 of Mar. 15, 2004, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Mar. 17, 2004, p. 5190. For commentary on the law's psychological impact on Muslim girls, see Adrien Katherine Wing & Monica Nigh Smith, *Critical Race Feminism Lifts the Veil?: Muslim Women, France, and the Headscarf Ban*, 39 U.C. DAVIS L. REV. 743, 777–83 (2006).

Recall that the term "identity" refers to the sense of self that individuals develop by committing to values and goals associated with particular social categories. Accordingly, I use the term "identity trait" as a shorthand (that is not part of psychology jargon) to refer to traits that have special value or represent particular goals to people within an identity group. Headscarves may seem like ordinary pieces of clothing to many people; however, they are an identity trait for Muslims who place special value on headscarves.

¹³ In this Article, I focus on minority social groups based on race, ethnicity, religion, political opinion, disability, sexual orientation, and gender identity. Traditionally, prejudice has been based on these statuses, rendering them particularly relevant to a person's self-awareness. Although trait suppression manifests differently across these statuses, a common denominator is that coerced suppression of these statuses burdens children psychologically.

For a discussion addressing the question of slippery slopes, see *infra* text accompanying notes 137–141. For example, can shy students constitute a minority social group and, therefore, oppose all public speaking assignments? I answer in the negative and explain that such slippery-slope concerns are unwarranted.

¹⁴

[O]rdinary discourse differentiates people according to social groups such as women and men, age groups, racial and ethnic groups, religious groups, and so on. Social groups of this sort are not simply collections of people, for they are more fundamentally intertwined with the identities of the people described as belonging to them.

nority traits undermines that identity, exacting a psychological toll. The law should endeavor to prevent such psychological burdens.¹⁵

That goal can be realized through pluralism, the making of space for difference.¹⁶ Thus, in Part II, I propose a two-pronged pluralism principle for children's rights jurisprudence.¹⁷ The first prong dictates that, while socialization of children is generally acceptable, the state must avoid socialization policies that undermine a child's ability to develop and express her identity (which I refer to as "identity interests"). However, according to the second prong, the state can restrict a child's exercise of identity interests if protecting that exercise would cause cognizable harms to the child or to others.¹⁸

Self, 27 PERSONALITY & SOC. PSYCHOL. BULL. 585, 585–86 (2001) (surveying psychological literature that acknowledges that "the self is construed in relation to one's group memberships").

Group status is particularly relevant to individuals' sense of self when the group is an oppressed minority group. See *Harper v. Poway Unified Sch. Dist.*, 445 F.3d. 1166, 1183 n.28 (9th Cir. 2006):

There is, of course, a difference between a historically oppressed minority group that has been the victim of serious prejudice and discrimination and a group that has always enjoyed a preferred social, economic and political status. Growing up as a member of a minority group often carries with it psychological and emotional burdens not incurred by members of the majority.

See also Margaret E. Montoya, *Máscaras, Trenzas, y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Stories*, 15 CHICANO-LATINO L. REV. 1, 13–15 (1994) (arguing that the suppression of minority traits is a particularly harmful form of conformity); Russell K. Robinson, *Uncovering Covering*, 101 Nw. U. L. REV. (forthcoming 2007) (on file with author) (same).

¹⁵ I do not suggest that the law should prevent all psychological burdens on children. For example, even though a child may experience stress from having a favorite television show canceled, I do not argue that the law should intervene. Accepting respected commentators' existing arguments that the law should prevent the particular psychological harms of assimilation demands, this Article simply contends that those commentators' main points are especially pressing for children; the Article does not make broad arguments about general psychological burdens.

¹⁶ Although commentators often write about specific forms of pluralism (e.g., political pluralism, cultural pluralism, religious pluralism), I use the term pluralism to refer to the making of space for difference within identity categories generally.

¹⁷ The pluralism principle builds on Emily Buss's developmentalist approach to children's rights, which asserts that in deciding what autonomy rights to extend to children, the government should consider the developmental benefits and harms of such extensions. See Emily Buss, *Allocating Developmental Control Among Parent, Child, and the State*, 2004 U. CHI. LEGAL F. 27, 35 [hereinafter Buss, *Allocating Developmental Control*].

¹⁸ In Part II.B, *infra*, I define cognizable harms to include only a narrow range of consequences. Indeed, harms cognizable under the pluralism principle are not synonymous with harms in common parlance.

This prong is partly inspired by John Stuart Mill's time-honored harm principle. See JOHN STUART MILL, *ON LIBERTY AND OTHER ESSAYS* (John Gray ed., 1998). The pluralism principle clearly differs from Mill's harm principle because Mill explicitly excluded children from his principle's coverage. See *id.* at 14. Also, whereas Mill only was concerned with harms to others, the pluralism principle is concerned with children's harms to themselves as well. See JOEL FEINBERG, *HARM TO SELF: THE MORAL LIMITS OF THE CRIMINAL LAW* 69, 325–33 (1984).

In Part III, I show that the pluralism principle is already emerging in jurisprudence on children's constitutional rights, even though courts and commentators have never clearly articulated the principle.¹⁹ Critics charge that the Supreme Court's children's rights jurisprudence lacks coherence.²⁰ However, the Court's decisions are not inconsistent when viewed in light of the pluralism principle. The principle helps to explain why the Court has recognized children's rights in some instances and refused to do so in others. Explicitly acknowledging the pluralism principle would reconcile the seemingly inconsistent decisions while at the same time realizing the policy goal of protecting children's identity interests.

In Part IV, I present a case study on issues concerning gay and lesbian youth to illustrate how the pluralism principle should influence developing law.²¹ Questions regarding gay and lesbian youth have elicited much attention. Lower courts have provided inconsistent answers to these questions due to divergent interpretations of the Supreme Court's jurisprudence on children's rights. That divergence stems from a failure to see and implement the pluralism principle.

Do gay and lesbian youth have a right to display romantic affection at school and to organize gay pride events at school?²² Can a public school protect gay and lesbian youth from hate speech without violating the Constitution?²³ Do gay and lesbian youth have a right to privacy that includes a

¹⁹ Note that my current project focuses on children's constitutional rights. Thus, it only addresses children's claims against the state. It does not address children's claims against their parents, nor does it cover parents' claims against the state. I do address, however, how parental interests might influence children's claims against the state. See *infra* Part II.C.2.i.

²⁰ See MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 12 (2005) ("[T]he children's rights movement has been a confused and often ridiculed one Nearly forty years after the movement began, it has made very little progress developing a cogent conceptual position."); NANCY E. WALKER, CHILDREN'S RIGHTS IN THE UNITED STATES 10 (1999) ("[C]ourts have answered [the question of children's rights] in inconsistent ways. Certain pronouncements make the rights of children explicit, but other U.S. Supreme Court opinions reflect a paternalistic view."); Martha Minow, *What Ever Happened to Children's Rights?*, 80 MINN. L. REV. 267-77 (1995) ("The Court's ambivalence swings between two starkly contrasting alternatives. One would extend adult rights to children; the other would treat children in important ways as subject to different authorities.") [hereinafter Minow, *Children's Rights*]; Rodham, *supra* note 9, at 487 ("The phrase 'children's rights' is a slogan in search of definition."); Lee E. Teitelbaum, *Children's Rights and the Problem of Equal Respect*, 27 HOFSTRA L. REV. 799, 799 (1999) ("Few areas present more difficult problems than does the definition of the rights of children.").

²¹ Sexual orientation issues make for an illustrative case study because gays and lesbians are subject to a uniquely wide variety of assimilation demands. See Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002).

²² Lower courts have issued disparate interpretations of the Supreme Court's case law on student expression. One court has held that bringing a same-sex partner to a high school prom is protected speech. See *Fricke v. Lynch*, 491 F. Supp. 381 (D.R.I. 1980). Other courts maintain that school officials have broad discretion to censor student expression. See, e.g., *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 471 (6th Cir. 2000) (holding that school officials may prohibit a student from wearing a T-shirt with "illustrations of [the musician] Marilyn Manson largely unadorned by text" because Manson "promotes disruptive and demoralizing values").

²³ *Compare Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1171 (9th Cir. 2006)

right not to be outed by school officials?²⁴ The pluralism principle offers a normatively desirable, unified approach to these questions.

In the Conclusion, I take a cursory look at how the pluralism principle should influence laws affecting children who identify with other minority groups, such as religious and ethnic groups.²⁵ In doing so, I invite discussion on how the law should remedy assimilation-based wounds suffered by children.

I. ASSIMILATION DEMANDS AND THEIR EFFECTS ON CHILDREN

How do the harms of coerced assimilation specifically affect children? Assimilation demands are disproportionately harmful to children because children lack the emotional maturity that helps adults cope with psychological burdens.²⁶ Older children are often the most vulnerable to assimilation harms. Not only do adolescents²⁷ generally have less coping capacity than adults, but they are also at the stage of development in which people are most preoccupied with identity issues.²⁸ Combining those two factors, adolescents not only are less capable of weathering the storms of assimilation demands, but also are situated in a storm zone.

In this Part, I first present existing legal scholarship on assimilation's harms. Then, I relate that scholarship to social science literature on children's coping capacity and identity development.

(holding that a public school did not violate the First Amendment by prohibiting a student from wearing a T-shirt that condemned homosexuality), *with* *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965 (S.D. Ohio 2005) (reaching the opposite conclusion in a case with nearly identical facts), *and* *Hansen v. Ann Arbor Pub. Sch.*, 293 F. Supp. 2d 780 (E.D. Mich. 2003) (holding that a public school violated the First and Fourteenth Amendments by refusing to allow individuals who would condemn homosexuality from participating in a panel discussion). Some courts have held that schools' antiharassment policies violate the First Amendment. *See, e.g.,* *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001); *Pyle v. S. Hadley Sch. Comm.*, 861 F. Supp. 157 (D. Mass. 1993).

²⁴ A student is asserting this controversial privacy claim in the pending case of *C.N. v. Wolf*. *See* Mehta, *supra* note 8.

²⁵ These groups are not mutually exclusive, of course.

²⁶ *See infra* Part I.B.1.

²⁷ I use the term "adolescents" to refer to a subset of "children," as opposed to an entirely distinct category, because the law has traditionally done so. For example, in *Bellotti v. Baird*, the Court addressed the rights of pregnant teenagers, yet referred to those teenagers' rights as "children's rights." *See, e.g.,* 443 U.S. 622, 634 (1979). Similarly, the international human rights community treats adolescents as a subset of children. *See* United Nations Convention on the Rights of the Child, art. 1, Nov. 20, 1989, 28 I.L.M. 1448 ("For the purpose of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.") *But see* Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 549 (2000) (arguing for recognition of adolescence as a distinct legal category).

²⁸ *See infra* notes 75, 78–83 and accompanying text.

A. Assimilation's Flaws

1. History

Assimilation has long played a prominent role in American society. In the context of immigration, the "melting pot" ideal went largely unchallenged until recently.²⁹ According to this romantic metaphor, Americans of diverse ancestral backgrounds would "melt" into a unified blend of American identity.³⁰

Progressives of the early twentieth century believed that the unified blend of American identity would constantly change over time, absorbing new characteristics from immigrants as they melted into the blend.³¹ As discussed below, however, assimilation has not lived up to this metaphor. The demands of assimilation usually require immigrants and other minority groups to abandon, rather than contribute, traits that they value to melt into the existing American mainstream. Indeed, the term "assimilation" now generally refers to the process by which minority groups abandon, hide, or downplay their identity traits in an attempt to fit into the mainstream.³²

Even if minorities do contribute some of their characteristics to a unified American identity,³³ the melting pot ideal is nonetheless troubling because blending identities still requires people to abandon, hide, or downplay some, though perhaps not all, of the identity traits that they value.³⁴ Accordingly, many commentators have discarded the melting pot imagery, embracing other metaphors such as salad bowls and mosaics, in which individual ingredients of the salad or individual pieces of the mosaic re-

²⁹ The term "melting pot" derives from the play *The Melting-Pot* by Israel Zangwill, first performed in 1908. See ISRAEL ZANGWILL, *THE MELTING-POT* (1909). Kenji Yoshino asserts that criticisms against the melting pot grew out of the civil rights movement of the 1960s. See YOSHINO, *supra* note 5, at xi. Camille Gear Rich believes that it was not until the 1990s that most Americans abandoned the melting pot ideal. See Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1234 (2004). Even today, however, some political figures, such as Pat Buchanan, openly idealize the melting pot despite the criticism against it. See, e.g., PATRICK J. BUCHANAN, *STATE OF EMERGENCY: THE THIRD WORLD INVASION AND CONQUEST OF AMERICA* (2006).

³⁰ For background on the melting pot, see Peter H. Schuck, *The Perceived Values of Diversity, Then and Now*, 22 CARDOZO L. REV. 1915, 1927–28 (2001).

³¹ *Id.*

³² THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) defines assimilation as "[t]he process whereby a minority group gradually adopts the customs and attitudes of the prevailing culture." Kenji Yoshino describes three forms of assimilation: conversion (i.e., abandoning traits), passing (i.e., hiding traits), and covering (i.e., downplaying traits). See YOSHINO, *supra* note 5, at 17–18.

³³ Mainstreaming of minority culture does occur to some degree. Cf. HOWARD WILNANT, *RACIAL CONDITIONS* 26 (2002) (discussing the influence that blacks have had on mainstream American music).

³⁴ In Part I.A.3, *infra*, I recognize that pressuring people to relinquish personal traits they value is not troubling under exceptional circumstances, for example, when exercising a behavioral trait harms others.

tain their original characteristics while contributing to the overall flavor or picture.³⁵

2. *Harmful Effects*

Legal commentators have identified both macro and micro levels of harm associated with assimilation demands. At the macro level, pressures to assimilate are harmful because they reinforce social dynamics that subordinate traditionally disadvantaged groups. For example, the pressure on racial and ethnic minorities to “act white” reinforces white supremacy.³⁶ When an employer bans traditionally black hairstyles from the workplace, she is demanding conformity with a white standard of beauty, which mainstream society assumes to be superior.³⁷ By maintaining her grooming code, the employer reinforces that notion of white superiority.³⁸

Similarly, pressures on Muslim women to remove their veils, and on Jewish men to remove their yarmulkes, reinforce notions of Christian supremacy.³⁹ The pressure on businesswomen to hide their childcare responsibilities reinforces patriarchy.⁴⁰ And the pressure on gays and lesbians to downplay their romantic relationships in public reinforces heterosexism.⁴¹ In these ways, pressures to assimilate reinforce oppressive social norms.

At the micro level, assimilation demands take their toll on individuals by imposing psychological costs. According to psychologists, a healthy identity requires congruence between one’s inner sense of self and one’s outward representations of that self.⁴² Assimilation demands can undermine that congruence, creating a psychological burden.⁴³

³⁵ See John Rhee, *Theories of Citizenship and Their Role in the Bilingual Education Debate*, 33 COLUM. J.L. & SOC. PROBS. 33, 37 n.20 (1999); Rich, *supra* note 29, at 1234.

³⁶ See YOSHINO, *supra* note 5, at 132–36.

³⁷ See *Rogers v. American Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981) (upholding an employer’s restriction on braided hairstyles against a Title VII challenge, even though an employee argued that her hairstyle was an expression of black identity). According to Paulette M. Caldwell:

[B]lack women who are permitted to break through the barrier of racial exclusion into “visible” jobs involving public contact are likely to be those who possess physical characteristics close to those of women of the dominant racial group Rather than focusing on the black woman herself, the impetus to exclude is transferred to the black woman’s hair.

Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 391 (1991).

³⁸ See Caldwell, *supra* note 37, at 391.

³⁹ See YOSHINO, *supra* note 5, at 169–70.

⁴⁰ See *id.* at 142–66, 177.

⁴¹ See *id.* at 93–101.

⁴² See *infra* notes 84–86 and accompanying text.

⁴³ See *infra* notes 84–86 and accompanying text. While an individual subjected to assimilation demands bears a psychological burden, she might also “export” some of that burden to her family. See Zachary Kramer, *After Work: Family Harms in Employment Discrimination Law*, 95 CAL. L. REV. (forthcoming 2007).

Consider, for example, that some employers pressure their black employees to suppress traits that the employees value as racial traits.⁴⁴ Lakisha,⁴⁵ who once regularly wore cornrows and kente scarves, may submit to that pressure and adopt the name Mary, straighten her hair with synthetic chemicals, and abandon her kente scarves.⁴⁶ In doing so, Lakisha, now Mary, dons a mask. Lakisha's expressed self, her mask, is no longer congruent with her inner sense of self; this incongruity inflicts a psychological wound. Employers' assimilation demands suggest to Lakisha that black identity is inferior and unworthy of respect.⁴⁷ For Lakisha, who identifies with black culture despite her mask, that suggestion of inferiority demeans her inner sense of self and can produce self-hatred.⁴⁸

Under statutory employment law, employers may not refuse to hire Lakisha simply because she is of African descent, but they generally may refuse to hire her for openly expressing black identity.⁴⁹ Lakisha is left with a harrowing decision: sacrifice financial livelihood or assimilate and betray her sense of self.⁵⁰ Excoriating this tradeoff between dignity and financial health, commentators have argued for statutory reform,⁵¹ rein-

⁴⁴ See Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701 (2001) [hereinafter Carbado & Gulati, *Fifth Black Woman*]; Carbado & Gulati, *Working Identity*, *supra* note 4, at 1279–93.

⁴⁵ Economists Marianne Bertrand and Sendhil Mullainathan found that having a name associated with African American culture, such as “Lakisha” or “Jamal,” significantly reduces one’s likelihood of receiving a job interview. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* (Nat’l Bureau of Econ. Research, Working Paper No. 9873, 2003), available at <http://www.nber.org/papers/w9873>.

⁴⁶ Some parts of this example are borrowed from Carbado and Gulati’s “fifth black woman” hypothetical. See Carbado & Gulati, *Fifth Black Woman*, *supra* note 44, at 710–21.

⁴⁷ See *supra* notes 36–38 and accompanying text (discussing assimilation demands that derive from white supremacy).

⁴⁸ See Carbado & Gulati, *Working Identity*, *supra* note 4, at 1277 (describing assimilation processes as “self-negating” and “self-denying”); Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370, 2408 (1994) (“To be forced to suppress one’s cultural identity . . . is insulting and demeaning.”); Montoya, *supra* note 14, at 13 (“[Wearing] masks of acculturation can be experienced as self-hate.”).

⁴⁹ See Rich, *supra* note 29, at 1137 (“[I]t has long been established that Title VII does not prohibit discrimination based on ‘voluntary’ or ‘performed’ aspects of racial or ethnic identity.”).

⁵⁰ Even by betraying her sense of self, Lakisha suffers an economic burden. Commentators have noted that repackaging oneself requires time, effort, and significant cash expenditures. See Carbado & Gulati, *Working Identity*, *supra* note 4, at 1279 & n.43.

⁵¹ See, e.g., Juan F. Perea, *Ethnicity and Prejudice: Reevaluating “National Origin” Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 809 (1994) (proposing an expansion of Title VII to protect expressions of ethnicity).

terpretation of existing statutes,⁵² and extralegal remedies such as greater public discourse on assimilation's harms.⁵³

3. *Circumscribing the Criticism*

Before proceeding to a discussion of assimilation in childhood contexts, I should clarify that criticism of pressures to conform is not absolute. The criticism should be circumscribed for three main reasons. First, not all socialization demands produce psychological harms. For example, there is innocuous social pressure to conform to unwritten codes of politeness—to say “thank you,” to hold the door for others, and to offer one’s bus seat to the elderly. Generally speaking, one would be hard-pressed to argue that such conformity compromises anyone’s identity.⁵⁴ Moreover, pressure to conform is less offensive when it manifests in the form of encouragement. The pressure is most harmful when it is a coercive demand. For example, it is one thing for the state to encourage patriotism with a recitation of the Pledge of Allegiance in schools; it is quite another thing to coerce patriotism by suspending students who refuse to participate in the salute.⁵⁵

Second, even when assimilation demands undermine individuals’ identity, those demands may be justified. For example, a man may identify with a particular ethnic group that traditionally condones wife battering. Assimilating to social norms against domestic violence may contradict that man’s identity; however, the state can justify requiring that man to conform to social norms against domestic violence because wife beating creates both physical and psychological harms to others.⁵⁶ In proposing a legal solution to assimilation demands on children, I am cognizant that, when social conformity prevents legitimate harms, assimilation demands should be allowed. I define those legitimate harms in detail below, in Part II.B.

⁵² See, e.g., Caldwell, *supra* note 37, at 385–90 (arguing for an interpretation of Title VII that protects expressions of racial identity); Rich, *supra* note 29, at 1202–12 (arguing for an interpretation of Title VII that protects performances of racial and ethnic identities through behavioral traits).

⁵³ See, e.g., YOSHINO, *supra* note 5, at 178 (proposing that parties who make assimilation demands and parties who are burdened by demands should have “reason-forcing conversations” to discuss whether the demands are justifiable).

⁵⁴ One could certainly argue that one is impolite and that impoliteness informs one’s sense of self. However, self-concept is not synonymous with identity. Identity is the part of one’s self-concept that is developed by committing to particular values and goals associated with social categories. Suppression of one’s identity generates unique harms. See *infra* note 95 and accompanying text.

⁵⁵ See *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding mandatory participation in the Pledge of Allegiance in schools unconstitutional). For a discussion of *Barnette*, see *infra* notes 182–187 and accompanying text.

⁵⁶ Cf. Nancy S. Kim, *Blameworthiness, Intent, and Cultural Dissonance: The Unequal Treatment of Cultural Defense Defendants*, 17 U. FLA. J.L. & PUB. POL’Y 199 (2006) (noting that cultural defenses to violent crimes are largely unsuccessful).

Third, I believe that assimilation demands are sometimes less troubling when individuals are able to avoid the demands by exiting the situation. For example, a church's demands on its congregation and a political party's demands on its members are less troubling so long as members can exit the group with ease.⁵⁷ Children, however, usually lack the ability to avoid assimilation demands by exiting. Two major sources of assimilation demands on children are their parents and the state. Children rely on their parents and the state for support, and thus these sources are difficult for children to avoid. In this Article, I focus on crafting a legal response to assimilation demands from the state. Although parents' assimilation demands on children can also cause psychological wounds, the unique challenges to crafting a legal response to parents' assimilation demands warrant discussion in a separate article.⁵⁸

B. The Case of Children

The assimilation harms identified by legal scholars are magnified when assimilation is demanded from children, especially adolescents. Children are more vulnerable to these harms because their capacity to deal with stressors is less than that of adults. Adolescents are particularly vulnerable because they are at a stage of development during which individuals are most preoccupied with the psychological task of identity formation.⁵⁹ Thus, adolescents struggle with more identity-related stress than adults, while also lacking the full range of mechanisms that adults have for coping with stress.

1. Children's Coping Capacity

Psychologists use the term "coping" to refer to individuals' "constantly changing cognitive and behavioral efforts to manage specific external and/or internal demands that are appraised as taxing or exceeding the

⁵⁷ In previous writing, I have supported the idea that, under some limited circumstances, groups should have the right to demand conformity among their members, even if conformity contravenes public policy goals. See Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 CAL. L. REV. 1271, 1319 (2006); see also *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (holding that the Boy Scouts of America can require its members to adopt heterosexual norms because the organization's freedom of expressive association trumps an antidiscrimination law proscribing sexual orientation discrimination).

⁵⁸ American law has traditionally shielded the "private sphere" of the family from government intervention, save for exceptional circumstances. A discussion regarding the regulation of parents' assimilation demands requires a lengthy consideration of the pros and cons of this protection. For background and related criticisms, see Martha Albertson Fineman, *What Place for Family Privacy?*, 67 GEO. WASH. L. REV. 1207 (1999); Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENT. 319 (1993).

⁵⁹ See *infra* notes 75, 78–83 and accompanying text.

resources of the person.”⁶⁰ In other words, coping refers to people’s efforts to deal with stress.⁶¹ When coping is effective, individuals are described as having developed “resilience.”⁶² The stressors that trigger coping range from daily hassles to catastrophic natural disasters.⁶³ Stress, when not effectively mitigated, can undermine both psychological and physical well-being.⁶⁴

The capacity to cope develops during the course of one’s life and, therefore, adults are generally equipped with the greatest capacity.⁶⁵ Although researchers disagree on how to categorize particular coping techniques, there is general agreement that coping techniques emerge throughout one’s life.⁶⁶ Infants and young children tend to deal with stress through purely involuntary means, such as crying.⁶⁷ As children develop their coping capacity, they usually develop passive techniques first, finding ways to avoid stress, for example, by withdrawing from stressful social interactions.⁶⁸ With time, children develop more active forms of coping, such as thinking about problems, trying to find solutions, and engaging in simple emotion-stabilizing exercises.⁶⁹ During adolescence, individuals broaden their range of coping techniques and learn to employ those techniques more effectively.⁷⁰ By adulthood, individuals usually employ an extensive range of both problem-solving and emotion-stabilizing techniques.⁷¹

For the purposes of this Article, it is useful to note that two factors—a strong sense of self and a supportive social network—contribute to one’s coping capacity. A strong sense of self empowers individuals to confront

⁶⁰ RICHARD S. LAZARUS & SUSAN FOLKMAN, *STRESS, APPRAISAL, AND COPING* 141 (1984); see also Bruce E. Compas, et al., *Coping with Stress During Childhood and Adolescence: Problems, Progress, and Potential in Theory and Research*, 127 *PSYCHOL. BULL.* 87, 88 (2001) (describing Lazarus and Folkman’s definition as the “most widely cited” in research on children’s coping).

⁶¹ Some psychologists distinguish voluntary efforts from involuntary efforts, such as crying, and exclude involuntary efforts from their definition of coping. See Compas et al., *supra* note 60, at 91.

⁶² *Id.* at 89.

⁶³ Dianna T. Kenny, *Psychological Foundations of Stress and Coping: A Developmental Perspective*, in *STRESS AND HEALTH: RESEARCH AND CLINICAL APPLICATIONS* 88–89 (Dianna T. Kenny et al. eds., 2000).

⁶⁴ *Id.*

⁶⁵ See Compas et al., *supra* note 60, at 91 (“Coping and other stress responses can be expected to follow a predictable developmental course.”); Kenny, *supra* note 63, at 82 (“Changes in the ability to cope are linked to major maturational changes throughout the lifespan.”); Christopher J. Recklitis & Gil G. Noam, *Clinical and Developmental Perspectives on Adolescent Coping*, 30 *CHILD PSYCHOL. & HUM. DEV.* 87, 97 (1999) (studying adolescent psychiatric patients and confirming “the developmental nature of coping behaviors”).

⁶⁶ See Compas et al., *supra* note 60, at 91.

⁶⁷ *Id.* at 90.

⁶⁸ *Id.* at 91.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See LAZARUS & FOLKMAN, *supra* note 60 (describing in detail typologies of coping techniques).

stressful situations and reflect on those situations with greater clarity.⁷² Supportive social networks provide people with interpersonal emotional support.⁷³ As discussed below, children who face assimilation pressures often have weakened senses of self; for example, immigrant youth are more likely than nonimmigrant youth to suffer identity confusion.⁷⁴ Moreover, children who face assimilation pressures may need to overcome certain hurdles before they seek interpersonal support; for example, gay and lesbian youth must be comfortable enough to identify openly before they can seek emotional support in coping with sexual orientation-related stress. Thus, the very nature of assimilation demands makes coping with them particularly difficult.

2. Children's Identity Development

It is generally accepted that adolescence is the phase of human development in which people are most preoccupied with identity struggles.⁷⁵ Most literature on identity development derives from the work of Erik Erikson. Although scholars have expanded upon Erikson's work, his basic concepts provide the foundation for understanding identity development.⁷⁶ Recognizing the legitimacy of his work, the Supreme Court has already cited him in three opinions.⁷⁷

According to Erikson, people face particular psychosocial challenges at various stages of life;⁷⁸ resolution of these challenges is required for one's health and growth.⁷⁹ The primary psychosocial challenge of adolescence is to establish a well-developed identity.⁸⁰ This is not to say that identity development is confined to adolescence. People confront questions of identity from early childhood to late adulthood.⁸¹ However, it is during ado-

⁷² See Jeannie S. Kidwell et al., *Adolescent Identity Exploration: A Test of Erikson's Theory of Transitional Crisis*, 30 *ADOLESCENCE* 785, 789 (1995); Recklitis & Noam, *supra* note 65, at 93–96.

⁷³ See Kenny, *supra* note 63, at 82; Recklitis & Noam, *supra* note 65, at 97.

⁷⁴ See *infra* Part I.B.2. Some minority youth might experience identity confusion because of their minority status even in the absence of demands to assimilate. In these situations, assimilation demands might exacerbate any preexisting identity confusion.

⁷⁵ See Elizabeth Douvan, *Erik Erikson: Critical Times, Critical Theory*, 28 *CHILD PSYCHOL. & HUM. DEV.* 15, 18 (1997).

⁷⁶ See generally *id.*

⁷⁷ See *Roper v. Simmons*, 543 U.S. 551, 570 (2005) (citing *ERIKSON, YOUTH AND CRISIS*, *supra* note 6, in a juvenile death penalty case); *Thompson v. Oklahoma*, 487 U.S. 815, 835 n.43 (1988) (citing *ERIK H. ERIKSON, CHILDHOOD AND SOCIETY* 261–63 (1985) and *ERIKSON, YOUTH AND CRISIS*, *supra* note 6, at 128–35 in a juvenile death penalty case); *United States v. Vuitch*, 402 U.S. 62, 78 n.1 (1971) (Douglas, J., dissenting) (citing Erik H. Erikson, *quoted in GROUP FOR THE ADVANCEMENT OF SOCIETY, COMM. ON PSYCHIATRY & LAW, THE RIGHT TO ABORTION: A PSYCHIATRIC VIEW* 219 (1969), in an abortion case).

⁷⁸ Erikson referred to these challenges as “normative crises,” i.e., “normal phase[s] of increased conflict.” *ERIKSON, LIFE CYCLE*, *supra* note 6, at 125.

⁷⁹ *Id.* at 51–57.

⁸⁰ *Id.* at 94–100; *ERIKSON, YOUTH AND CRISIS*, *supra* note 6, at 128–34.

⁸¹ See *ERIKSON, YOUTH AND CRISIS*, *supra* note 6, at 91–96.

lescence that people are most preoccupied with the question, “Who am I?”⁸² Failure to resolve that question jeopardizes psychological health, resulting in symptoms ranging from reduced productivity to depression to difficulty engaging in intimate relationships.⁸³

A well-developed identity, as defined by Erikson, is “the accrued confidence that one’s ability to maintain inner sameness and continuity . . . is matched by the sameness and continuity of one’s meaning for others.”⁸⁴ That is to say, an individual’s identity is well developed when: (1) she has achieved a coherent sense of self—that is, an inner sameness—such that her thoughts and actions are not random but guided by specific principles and values; (2) that sense of self is continuous through time; and (3) the way she represents herself to others is consistent with that coherent and continuous sense of self.⁸⁵ The third requirement of a well-developed identity is particularly important for this Article because individuals who face assimilation pressures often develop an unhealthy incongruence between their internal sense of self and their external representations of self.⁸⁶

Building on Erikson’s works, James Marcia identified four statuses in the process of identity formation: identity diffusion, identity foreclosure, moratorium, and identity achievement.⁸⁷ Diffusion is the least-developed status. When an individual is in a state of identity diffusion, she has neither explored nor committed to any values or goals to shape her notions of self.⁸⁸ In the state of foreclosure, an individual has committed to specific values and goals but has committed based on little or no exploration of alternatives. Often, adolescents in the state of foreclosure have simply adopted their parents’ goals and values without exploring alternatives.⁸⁹

⁸² See *id.* at 91.

⁸³ See ERIKSON, LIFE CYCLE, *supra* note 6, at 131–46.

⁸⁴ *Id.* at 94.

⁸⁵ See *id.* at 127; see also Jenny Makros & Marita P. McCabe, *Relationships Between Identity and Self-Representations During Adolescence*, 30 J. YOUTH & ADOLESCENCE 623, 625 (2001) (“According to Erikson, the more developed one’s sense of identity is, the more congruency (or less discrepancy) there should be among one’s various self beliefs.”); Serena J. Patterson et al., *The Inner Space and Beyond: Women and Identity*, in ADOLESCENT IDENTITY FORMATION 9 (Gerald R. Adams et al. eds., 1992) (summarizing Erikson’s definition of identity).

⁸⁶ See ERIKSON, LIFE CYCLE, *supra* note 6, at 120. Following Erikson, E. Tory Higgins elaborated on the psychological harms of incongruence between an individual’s inner sense of self and her outward representations of self; Higgins also provided empirical evidence to support his theory. See E. Tory Higgins, *Self-Discrepancy: A Theory Relating Self and Affect*, 94 PSYCHOL. REV. 319 (1987).

⁸⁷ See James E. Marcia, *Development and Validation of Ego Identity Status*, 3 J. PERSONALITY & SOC. PSYCHOL. 551 (1966); James E. Marcia, *Identity in Adolescence*, in HANDBOOK OF ADOLESCENT PSYCHOLOGY 159 (Joseph Adelson ed., 1980); see also Makros & McCabe, *supra* note 85, at 624–25 (describing Marcia’s operationalization of Erikson’s theory as “the most widely respected and researched” and noting that more than three hundred studies have incorporated Marcia’s four statuses); Patterson et al., *supra* note 85, at 10–12 (summarizing the previous works of Marcia, one of the authors of the piece).

⁸⁸ Patterson et al., *supra* note 85, at 9.

⁸⁹ *Id.*

Marcia considers foreclosed identities to be underdeveloped, noting that people often abandon foreclosed identities to explore alternatives.⁹⁰ Moratorium refers to the state of development in which people actively explore their identity without committing to any goals or values.⁹¹ In the state of identity achievement, which follows moratorium, individuals establish a strong identity by committing to a set of life goals and values.⁹² Although those goals and values may still evolve over time, they are relatively stable.⁹³

Identity is not synonymous with self-concept, although the two are often conflated in common parlance. In the tradition of Erikson and Marcia, identity is specifically the part of one's self-concept that is developed⁹⁴ by exploring and committing to particular values and goals associated with social categories such as religion, political ideology, gender, sexual orientation, race, ethnicity, and so on.⁹⁵ Thus, a person may be aware that she is afraid of heights. Being afraid of heights is part of her self-concept, but it is not a part of her identity because she did not develop an awareness of those fears by adopting particular values and goals. Society constructs the social categories that are salient to people's identities.⁹⁶ Categories like race and sexual orientation, for example, are particularly salient because history and social dynamics make people particularly aware of the allegiances they adopt with regard to those categories.

Note that, even though people may be born with a particular racial phenotype or a predisposition for same-sex attraction,⁹⁷ developing a sense of identity related to those biological traits is still a process—one that involves learning about, relating to, and committing to, socially constructed meanings associated with the biological status. For example, people who report feeling attraction to members of the same sex, and people who report having engaged in same-sex sexual behavior, do not always report a gay, lesbian, or bisexual identity.⁹⁸

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See Marcia, *Identity in Adolescence*, *supra* note 87, at 159–60.

⁹⁵ Erikson's and Marcia's research focused on particular social categories: gender, religion, political ideology, and occupational choice. See Marcia, *Development and Validation*, *supra* note 87 (summarizing Erikson's and Marcia's work). Subsequent researchers extended Erikson's and Marcia's theories to other social categories. See Vivienne Cass, *Homosexual Identity: A Concept in Need of Definition*, 9 J. HOMOSEXUALITY 105, 111 (1984).

⁹⁶ See Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women's Human Rights*, 52 EMORY L.J. 71, 102–04 (2003).

⁹⁷ Whether an individual's sexual orientation is a product of nature or nurture is still unclear to scientists; however, mounting evidence suggests that sexual orientation can be related to genetics. See Brian Mustanski et al., *Genomewide Scan of Male Homosexuality*, 116 HUM. GENETICS 272 (2005).

⁹⁸ See EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY* 287–301 (1994) (providing empirical data on the percentages of individuals who experience

Because the case study in Part IV of this Article focuses on the rights of gay and lesbian youth, it is worth spending a moment to consider specifically the development of sexual orientation as a component of one's identity. Developing specific components of one's identity—such as one's sexual orientation—comports with Erikson's and Marcia's theories.⁹⁹ Put differently, a key developmental challenge for youth is to achieve a sense of sexual identity that is coherent and continuous while also consistent with external representations.¹⁰⁰ That challenge is easier for straight youth than for gay and lesbian youth. Societal pressures have made heterosexuality the default sexual identity. Thus, youth with an inclination to opposite-sex intimacy can arrive at a stable heterosexual identity without much exploration of their sexual goals and values.¹⁰¹ For youth with an inclination toward same-sex intimacy, however, achieving a stable sexual identity requires transgressing the heterosexual default by exploring values such as gay pride and aspirations for same-sex relationships. Because society generally discourages the exploration and adoption of such values and goals, gay and lesbian youth face hurdles in forming a strong identity. Weak identities among gay and lesbian youth contribute to the increased likelihood of poor psychological health, manifesting in both mental and physical symptoms.¹⁰² Youth belonging to other stigmatized minority groups also face difficult challenges.¹⁰³

Erikson acknowledged this phenomenon when he observed that “the increasing demand for standardization, uniformity, and conformity” threatens adolescents' identity formation.¹⁰⁴ Indeed, assimilation demands compel adolescents to commit outwardly to particular goals and values, without exploration, even when those goals and values conflict with the adolescents' inner sense of self. In that regard, assimilation pressures hinder the formation of minority youth identity, burdening them with considerable stress.

homosexual attraction, who have engaged in homosexual behavior, and who self-identify as homosexual or bisexual).

⁹⁹ See Mary Jane Rotheram-Borus & Kris A. Langabeer, *Developmental Trajectories of Gay, Lesbian, and Bisexual Youth*, in *LESBIAN, GAY, AND BISEXUAL IDENTITIES AND YOUTH* 97, 99–101 (Anthony R. D'Augelli & Charlotte J. Patterson eds., 2001) (concluding that development of sexual identity and ethnic identity conform to Erikson's and Marcia's theories).

¹⁰⁰ See *supra* notes 84–87 and accompanying text.

¹⁰¹ See Rotheram-Borus & Langabeer, *supra* note 99, at 101.

¹⁰² See Michael Radkowsky & Lawrence Siegel, *The Gay Adolescent: Stressors, Adaptations, and Psychosocial Interventions*, 17 *CLINICAL PSYCHOL. REV.* 191, 191 (1997) (“Social stigmatization hinders the ability of gay adolescents to achieve the tasks of adolescence. Because their sexual identity is denigrated by society, these youth have difficulty forming a positive identity.”).

¹⁰³ See, e.g., Margaret Beale Spencer et al., *Ethnicity, Ethnic Identity, and Competence Formation: Adolescent Transition and Cultural Transformation*, 60 *J. NEGRO EDUC.* 366, 380 (1991) (discussing the psychological health of ethnic and racial minority youth).

¹⁰⁴ See ERIKSON, *LIFE CYCLE*, *supra* note 6, at 120.

3. *Compounded Effects of Assimilation*

At the very least, assimilation demands impose harms on individuals who belong to minority groups. The preceding sections suggest that the harms of assimilation are compounded when assimilation demands are imposed on children specifically. In light of these compounded harms, requiring children to suppress minority group traits in order to fit into a mainstream is particularly troubling. The following three Parts detail how that normative claim can and should shape the law.

Before proceeding to legal arguments, however, it is worth noting that assimilation's compounded harms on children are not simply theoretical. Empirical evidence suggests that the compounded harms are alarmingly real. The evidence takes two forms. First, data show that minority youth contending with assimilation demands are more likely than other children to have poor psychological and physical health.¹⁰⁵ Second, survey results show that greater identity achievement among minority youth corresponds to better psychological and physical health.¹⁰⁶

Consider gay and lesbian youth as an example. As discussed in Part IV, gay and lesbian youth are currently subject to striking assimilation demands. The majority of gay and lesbian youth cope with their increased stress and emerge from adolescence as healthy—and often remarkably resilient—adults.¹⁰⁷ Nevertheless, research shows that, compared to youth generally, a disproportionate number of gay and lesbian youth suffer from poor psychological and physical health.¹⁰⁸ Poor psychological health can lead to dire consequences. Survey-based studies since 1990 have consistently shown that thirty to forty percent of gay and lesbian youth attempt suicide.¹⁰⁹ That rate far exceeds the estimated three to fifteen percent attempt rate among all adolescents.¹¹⁰ Gay and lesbian youth are also more likely to attempt suicide than gay and lesbian adults.¹¹¹ Although skeptics criticized the methodology used in early studies for relying on conven-

¹⁰⁵ See *infra* notes 107–113, 119 and accompanying text.

¹⁰⁶ See *infra* notes 118–119 and accompanying text.

¹⁰⁷ See RITCH C. SAVIN-WILLIAMS, *GAY AND LESBIAN YOUTH: EXPRESSIONS OF IDENTITY* 182–85 (1990) (“[T]he results of the current study presented lesbian and gay adolescents as essentially psychologically and socially healthy individuals.”).

¹⁰⁸ See James Lock & Hans Steiner, *Gay, Lesbian, and Bisexual Youth Risks for Emotional, Physical, and Social Problems: Results from a Community-Based Survey*, 38 J. AM. ACAD. CHILD & ADOL. PSYCHOL. 297 (1999).

¹⁰⁹ See J. Stephen McDaniel et al., *The Relationship Between Sexual Orientation and Risk for Suicide: Research Findings and Future Directions for Research and Prevention*, 31 SUICIDE & LIFE-THREATENING BEHAV. 84, 87–96 (2001).

¹¹⁰ See *id.* at 87 (citing Patrick J. Meehan, *Attempted Suicide Among Young Adults: Progress Toward a Meaningful Estimate of Prevalence*, 149 AM. J. PSYCHOL. 41 (1992)).

¹¹¹ See Heidi S. Kulkin et al., *Suicide Among Gay and Lesbian Adolescents and Young Adults: A Review of the Literature*, 40 J. HOMOSEXUALITY 1, 2 (2000) (“Most suicide attempts by gays or lesbians take place during their youth.”); McDaniel et al., *supra* note 109, at 88 (summarizing two studies of gay and lesbian adults who had attempted suicide, which showed that most attempts were made before age twenty-five).

ience samples,¹¹² four recent studies based on statewide school-population samples confirm the figures from the earlier studies.¹¹³

Meanwhile, survey-based studies reveal what ought to be self-evident: high self-esteem among gay and lesbian youth is directly related to their degree of comfort with homosexuality.¹¹⁴ One study directly asked high school students: “Are you comfortable with your sexual orientation?”¹¹⁵ The study found that students who were comfortable with their sexual orientation had higher measures of both mental and physical health.¹¹⁶ Straight students who were comfortable with their sexual orientation were the healthiest; gay students who were uncomfortable were the least healthy.¹¹⁷ Studies also show that self-esteem is directly related to disclosure of sexual identity, which is a sign of identity achievement.¹¹⁸ This research suggests that the high suicide rate among gay and lesbian youth can be reduced by protecting them from assimilation demands, which breed self-

¹¹² Early studies recruited subjects from places such as gay and lesbian support groups, which could have biased the studies’ findings. See McDaniel et al., *supra* note 109, at 87–90 (discussing the early studies’ methodologies); see also Amy Lovell, Comment, “*Other Students Always Used to Say, ‘Look at the Dykes’*”: *Protecting Students from Peer Sexual Orientation Harassment*, 86 CAL. L. REV. 617, 624–25 (1998) (discussing the early studies’ methodological flaws).

¹¹³ Four studies, published between 1998 and 1999, reported the following suicide attempt rates among gay and lesbian students: first study, 35% (high school students); second study, 35% (high school students); third study, 27.5% (high school students); and fourth study, 28%/21% (male/female, junior high and high school students). See McDaniel et al., *supra* note 109, at 91–95 (summarizing findings from statewide school-based studies).

One should note that these newer studies still have minor methodological shortcomings. For example, school-based surveys do not account for school dropouts, who may be more likely to have attempted suicide. See *id.* at 95. Also, these studies vary in their definitions of suicide attempts and sexual orientation (some surveys asked students to identify their sexual orientation; others asked students whether they had ever experienced same-sex sexual contact). See *id.* Finally, three of the studies do not capture how attempt rates may vary by sex. See *id.* at 94.

¹¹⁴ See Margaret Rosario et al., *The Coming-Out Process and Its Adaptational and Health-Related Associations Among Gay, Lesbian, and Bisexual Youths: Stipulation and Exploration of a Model*, 29 AM. J. COMMUNITY PSYCHOL. 133, 153 (2001).

¹¹⁵ Lock & Steiner, *supra* note 108, at 299.

¹¹⁶ *Id.* at 302. Students’ mental health was measured through their reporting of issues such as depression, suicide, stress, anxiety, family problems, self-harm, temper problems, life and social dissatisfaction, and loneliness; general health was measured through reporting on factors such as growth, headaches, and chronic diseases. See *id.* at 299.

¹¹⁷ *Id.* at 300–02.

¹¹⁸ See, e.g., SAVIN-WILLIAMS, *supra* note 107, at 128 (finding a relationship between coming out and self-esteem among gay and lesbian youth); Stephanie K. Swann & Christina A. Spivey, *The Relationship Between Self-Esteem and Lesbian Identity During Adolescence*, 21 CHILD & ADOLESCENT SOC. WORK J. 629, 632 (2004) (summarizing existing research showing that disclosure of sexual identity, *inter alia*, is “specifically relevant to lesbian adolescents’ self-esteem”). Although these studies do not conclusively show that disclosure causes higher self-esteem, they warrant attention. If disclosure does not produce self-esteem, but self-esteem produces disclosure, one can hypothesize that disclosure is an important part of maintaining self-esteem. Disclosure is a sign of identity achievement because congruence between one’s inner sense of self and one’s outward representation of that self is necessary for identity achievement.

denial and make it more difficult for gay and lesbian youth to achieve stable identities.

These findings are not unique to the context of sexual orientation. Research on ethnicity consistently shows that adolescents who strongly identify with an ethnic group have greater psychological well-being than their peers.¹¹⁹ These findings suggest that, to avoid jeopardizing the health of minority youth, the law should be conducive to the identity achievement of minority adolescents; disfavoring assimilationist laws would contribute to this end.

II. THE PLURALISM PRINCIPLE

How should the law protect children from harmful assimilation demands? Most existing legal scholarship on assimilation proposes reforming statutory employment law.¹²⁰ Because most children are not employed, those legal proposals are insufficient.

Rather than focus on employers, I focus on the government as a source of assimilation demands. Both in the United States and abroad, assimilation demands on children often come directly from the state, especially from public schools. For example, when the French government banned girls from wearing headscarves to school, it demanded that Muslim girls assimilate by muting their religious identity.¹²¹ Similarly, when the grooming codes at American schools have the effect of banning Native American hairstyles, they require Native American youth to downplay their ethnic identity.¹²²

Pluralism is the antidote to assimilation demands. Thus, as stated at the beginning of this Article, I propose a two-pronged pluralism principle for children's rights jurisprudence. According to the first prong, socialization of children is generally acceptable, but the government must avoid socialization policies that undermine children's ability to develop and ex-

¹¹⁹ See Eunai K. Shrake & Siyon Rhee, *Ethnic Identity as a Predictor of Problem Behaviors Among Korean American Adolescents*, 39 ADOLESCENCE 601, 602–03 (2004) (concluding that achievement of an ethnic identity corresponds with “self-esteem and psychological well-being as measured in self-worth, sense of mastery, purpose in life, and social competence,” while “feelings of role confusion and alienation resulting from ethnic identity conflicts can lead to psychological as well as behavioral problems for ethnic minority adolescents”); see also Joseph D. Hovey & Cheryl A. King, *Acculturative Stress, Depression, and Suicidal Ideation among Immigrant and Second-Generation Latino Adolescents*, 35 J. AM. ACAD. CHILD & ADOLESCENT PSYCH. 1183, 1188–90 (1990) (presenting evidence that first- and second-generation Latino adolescents in the United States are more likely to experience depression and suicidal ideation than adolescents generally, and that this likelihood correlates with the amount of acculturation stress reported by the adolescents).

¹²⁰ See, e.g., Bartlett, *supra* note 4; Caldwell, *supra* note 37; Carbado & Gulati, *Working Identity*, *supra* note 4; Perea, *supra* note 51; Rich, *supra* note 29.

¹²¹ See *supra* note 12.

¹²² See *New Rider v. Bd. of Educ.*, 480 F.2d 693 (10th Cir. 1973) (rejecting a First Amendment challenge to a school grooming code with a hair-length requirement that prohibited Pawnee students from wearing traditional Native American hairstyles).

press their identities. This requirement creates a presumption against state-sanctioned assimilation demands. According to the second prong, the government can rebut the presumption by showing that protecting a child's exercise of identity interests would generate cognizable harms to the child herself or to others. I offer a narrow definition of cognizable harms below.

In the remainder of this Part, I first clarify the pluralism principle by comparing and contrasting it with some other commentators' proposals regarding children's rights. I then define in more detail each of the principle's prongs.

A. *The Principle's Liberatory Function*

Before proceeding, I should clarify that the pluralism principle is not synonymous with a positive right to identity development. Instead, the principle is a normative proposition that guides determinations regarding whether to afford negative liberties to children.¹²³

Indeed, the impetus for the pluralism principle is to protect children from the state's assimilation demands. Accordingly, the principle suggests that children should have the right to demand that the government refrain from policies that undermine their identity interests, such as bans on headscarves and Native American hairstyles. However, the principle does not obligate the government to take positive actions to facilitate identity development, such as institutionalizing events on Islamic awareness or Native American pride.

The pluralism principle is a starting point. I acknowledge that the principle's negative liberties are necessary but probably insufficient to protect children's identity development fully. Perhaps children ought to have a positive right to particular types of education that foster identity development.¹²⁴ Perhaps children ought to have a positive right to government intervention when parents' assimilation demands become unbearable.¹²⁵ I bracket these issues regarding potential positive rights for a future article; they warrant additional consideration because defining and enforcing positive rights pose unique challenges.¹²⁶ In the meantime, this Article focuses on children's freedom from governmental assimilation demands.

¹²³ Negative rights entail freedom from government interference, whereas positive rights entail government assistance in actualizing the decisions that one freely makes. On the difference between negative and positive rights, see generally ISAIAH BERLIN, *TWO CONCEPTS OF LIBERTY* (1958).

¹²⁴ For an argument in favor of children's positive rights, see Tamar Ezer, *A Positive Right to Protection for Children*, 7 *YALE HUM. RTS. & DEV. L.J.* 1 (2004).

¹²⁵ See *supra* note 58.

¹²⁶ On the difficulty of defining and enforcing positive rights, see Frank B. Cross, *The Error of Positive Rights*, 48 *UCLA L. REV.* 857 (2001). For counterarguments, see Stephen Holmes & Cass R. Sunstein, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* (1999); Susan Bandes, *The Negative Constitution: A Critique*, 88 *MICH. L. REV.* 2271 (1990). State governments already afford some positive rights to children, such as rights to education and shelter. See Teitelbaum, *supra* note 20, at 804–06.

Existing theories of children's rights are often either liberationist or protectionist.¹²⁷ In contrast, the pluralism principle is a hybrid; while it is liberatory in practice, its normative underpinnings are protectionist in nature. Drawing from psychological literature, the principle embodies the idea that liberation can be a form of protection. By allowing children to explore and express identity-forming values freely, the principle protects children from the harms of incomplete identity development. By giving children the liberty required for identity moratorium and identity achievement, the principle protects children from psychological harm.

The pluralism principle diverges from traditional liberal theory. Early liberal theorists such as John Stuart Mill explicitly denied negative liberties to children. Mill argued that children lacked the competency required for autonomous decisionmaking and, therefore, that granting children freedom would harm them.¹²⁸ Child liberationists often challenge the assumption that children lack competency. Some advocates have argued that children should be presumed competent unless proven otherwise.¹²⁹ Other commentators have since criticized those proposals for being unworkable because it is difficult to define and measure competence and because people develop competency at different rates.¹³⁰

I eschew the traditional liberal emphasis on competency as a requisite for exercises of liberty.¹³¹ Mill and contemporary opponents to chil-

¹²⁷ Child liberationists argue for increasing children's autonomy rights. The original child liberationists from the 1970s compared children to other oppressed classes, such as women and racial minorities. For examples of liberationist literature, see JOHN HOLT, *ESCAPE FROM CHILDHOOD* (1974); John Holt, *Why Not a Bill of Rights for Children?*, in *THE CHILDREN'S RIGHTS MOVEMENT: OVERCOMING THE OPPRESSION OF YOUNG PEOPLE* 319 (1977); Rodham, *supra* note 9. Protectionists argue not for children's autonomy rights but for welfare rights that protect children from harm, such as rights to nutrition and shelter. See Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 *BYU L. REV.* 605, 644–50 (1976) (arguing for child protectionism and against child liberation); Teitelbaum, *supra* note 20, at 804–06 (discussing children's welfare rights).

¹²⁸ In discussing liberty, Mill remarked: "We are not speaking of children . . . Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury." MILL, *supra* note 18, at 14.

¹²⁹ See, e.g., Robert Batey, *The Rights of Adolescents*, 23 *WM. & MARY L. REV.* 363, 373 (1982) (arguing that "in a situation in which the state would defer to the desires of an adult, the state can refuse to defer to the considered desires of an adolescent only upon a showing that the adolescent is not competent to make the decision"); Rodham, *supra* note 9, at 508 (arguing to "abolish the status of minority and to reverse its underlying presumption of children's incompetency").

¹³⁰ See, e.g., Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 *HARV. WOMEN'S L.J.* 1, 5 (1986) (arguing that "there are [no] knowable boundaries between competence and incompetence for any given societal task" and that "[t]here are no uncontroversial principles to pinpoint the kinds of competencies crucial to accord an individual independent decision-making power and to relinquish paternalist control").

¹³¹ See Katherine Hunt Federle, *On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle*, 42 *DEPAUL L. REV.* 983, 985 (1993) ("It is my contention not only that competency is unnecessary to any formulation of rights for children, but also that it is extremely confining to rights theory in ways that make it difficult to

dren's autonomy rights claim that the competency requirement protects children from the potentially harmful consequences of their own decisions.¹³² However, as illustrated in the previous Part, autonomous exploration and expression of identity is not intrinsically harmful; rather, it is a requirement for healthy psychological development. Accordingly, the pluralism principle presumes that children's freedom to exercise identity interests should be protected, unless the state satisfies a showing of harm.¹³³ Unlike many existing liberal arguments for children's rights, the pluralism principle hinges on a harm-based inquiry instead of a competency-based inquiry. Competency is a second-order question that only matters if the state first shows harm.

The principle's harm-based approach to children's rights is inspired by the writings of Emily Buss, who has asserted that, in deciding what autonomy rights to extend to children, the government should consider how extending such rights would foster or harm child development.¹³⁴ The pluralism principle builds on that idea by establishing a legal presumption that fosters identity-related aspects of child development and by narrowly defining the types of harms that would counter that presumption.

B. Protecting Identity Interests

The pluralism principle's first prong protects children's exercise of identity interests: the development and expression of identity. Protecting children's identity development means protecting children's ability to attain moratorium and achievement statuses. In other words, it means protecting children's ability to develop a sense of self by exploring and committing to goals and values associated with different social categories.¹³⁵ Pro-

conceptualize, much less acknowledge, the rights of children and other groups."); Melinda A. Roberts, *Parent and Child in Conflict: Between Liberty and Responsibility*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 485, 514–15 (1996) (arguing that "children [should] have a right of liberty . . . only in those particular circumstances in which the child's choice in fact serves his or her own best interests").

¹³² See MILL, *supra* note 18, at 14; Hafén *supra* note 127, at 650.

¹³³ Note that the pluralism principle protects children *qua* children. In contrast, some commentators have argued that children should have some freedoms because they are potential adults; the idea is that giving children some autonomy prepares children for the decisions that they will face as adults. See Sharon Bishop, *Children, Autonomy and the Right to Self-Determination*, in WHOSE CHILD? 174 (William Aiken & Hugh LaFollette eds., 1980). I reject merely viewing children as potential adults because such a view ignores the fact that, when children are denied certain liberties, they suffer immediate harms as children. See Minow, *Children's Rights*, *supra* note 20, at 296 n.160.

¹³⁴ See Buss, *Allocating Developmental Control*, *supra* note 17, at 35.

¹³⁵ See *supra* notes 87–92 and accompanying text. Because the pluralism principle protects exploration of fluid goals and values, it rejects the notion that people belong in rigid, fixed identity categories. For example, an American of Asian descent can explore and choose to adopt goals and values that she may or may not label as "Asian American." Indeed, the pluralism principle protects, for example, the individual of Asian descent who identifies, in the psychological sense, with goals and values typically associated with people of another racial phenotype. There is no correct way to be Asian American, and an individ-

protecting children's identity expression means protecting children's ability to make outward representations of that internal sense of self.¹³⁶

Often particular conduct constitutes a prima facie exercise of identity interests: for example, wearing a shirt that reads "gay and proud," wearing a yarmulke, or joining the Young Republicans of America. These exercises should be protected. Surely, whether conduct constitutes an exercise of identity interests will not always be clear. However, the difficult cases neither detract from the principle's normative weight nor render the relatively easy cases any less worthy of legal protection.¹³⁷

An opponent of the pluralism principle might worry that protecting identity interests would create a slippery slope. For example, some might argue that shy people constitute an identity group. Under the principle, would a shy student have a claim against a teacher who requires her students to study public speaking? Below I explain why such worry about slippery slopes is unwarranted. Personality traits, such as shyness, can be distinguished from identities, such as racial, religious, and sexual identities.¹³⁸

As explained above, individuals develop identities through a process of exploring and committing to goals and values associated with particular social categories.¹³⁹ For example, even if someone is born to black parents, she only develops a sense of black identity through a process of learning and adopting goals and values associated with the black community.¹⁴⁰ Similarly, there are shared goals and values within the Jewish community, the gay and lesbian community, and other identity groups, that an individual may adopt or reject as a part of her identification process. In contrast, one does not develop a "shy identity" by committing to values and goals associated with shy people. The pluralism principle focuses on the suppression of identities because of the particularly harmful effects of that process.¹⁴¹

This Article does not articulate a comprehensive list of social categories that are worth discussing. Not all social categories are equally relevant to a person's sense of self. In this Article, I focus on the categories of race, ethnicity, religion, political opinion, disability, sexual orientation, and

ual with an Asian phenotype may identify, for example, with black identity. See Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded as" Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 Wis. L. Rev. 1283 (arguing that Title VII should prohibit discrimination against people who are not phenotypically black but identify with, or are regarded by others as, being black).

¹³⁶ See *supra* notes 84–86 and accompanying text.

¹³⁷ Compare the exercise of identity interests to the exercise of religion. Whether particular conduct constitutes an exercise of religion has often vexed courts. However, those difficult cases do not suggest that the Free Exercise Clause should be amended out of the Bill of Rights.

¹³⁸ See *supra* note 95 and accompanying text.

¹³⁹ See *supra* note 137 and accompanying text.

¹⁴⁰ See *supra* note 103 and accompanying text.

¹⁴¹ See *supra* Part I.B (discussing harms).

gender identity, because those categories are particularly relevant to a person's sense of self. These categories are not relevant by nature. They are relevant because, historically, social prejudice based on these statuses has been pervasive, rendering these statuses socially salient. Perhaps one day society truly will be colorblind.¹⁴² Or perhaps one day an individual's choice of intimate partner will be no more socially salient than her choice of a favorite ice cream flavor. Until that day arrives, however, people will continue to be particularly self-aware of their identities based on the aforementioned categories.¹⁴³ Accordingly, attacking someone's identity with regard to these categories is particularly injurious and worthy of censure.

C. *Exceptional Cases: Preventing Cognizable Harms*

Although the first prong of the pluralism principle presumes that all identities deserve protection, the government can rebut that presumption and legitimately impose assimilation demands if it shows that by doing so it prevents harms. For example, the government can prohibit children's exercise of Neo-Nazi identity if it shows that the conduct is sufficiently violent or hateful to constitute a cognizable harm. Below, I clarify the categories of cognizable harm that the government can invoke to rebut the principle's presumption against assimilation demands.

In developing and expressing her identity, a child will sometimes impose harms on herself or on others. Those harms legitimize government infringement of that child's identity interests. However, only a narrow scope of harms should be cognizable under law.

1. *Binding Commitments as Harms to Self*

What constitutes a cognizable harm to a child's self? The state must exercise restraint in construing such harm. Because the pluralism principle is meant to protect difference, the state must not make subjective judgments about whether any particular exercise of identity is culturally or morally desirable. Thus, for example, the government should not limit a young girl's access to genital mutilation practitioners simply because the government views the practice as lacking legitimate cultural purposes. However, the government may limit that access because, by agreeing to genital mutilation, a young girl commits to a decision that is difficult to

¹⁴² Of course, whether colorblindness is desirable in the first place is disputed. See Charles R. Lawrence III, *The Epidemiology of Color-Blindness: Learning To Think and Talk about Race, Again*, 15 B.C. THIRD WORLD L.J. 1 (1995).

¹⁴³ Cf. Charles Stangor et al., *Categorization of Individuals on the Basis of Multiple Social Features*, 62 J. PERSONALITY & SOC. PSYCHOL. 207, 208 (1992) ("[S]ocial categories are well learned [B]ecause they are [perceived to be] highly informative about underlying dispositions, social categories such as race and sex may be used so frequently in social perception that their use becomes habitual and automatic, occurring without conscious thought or effort.").

undo.¹⁴⁴ The state invokes a cognizable harm when it shows that, by exercising her identity, a child is making a binding commitment—either in a physical sense or a legal sense.

Children are less capable of fully assessing relevant factors before making decisions.¹⁴⁵ Accordingly, there is good reason to preserve a child's ability to change her mind on important decisions.¹⁴⁶ This logic has been incorporated, for example, into contract law. Contract law generally protects children from their own commitments by rendering contracts unenforceable when they involve child signatories.¹⁴⁷ By the same rationale, the government may justifiably restrict children's exercises of identity that bind them to consequences that are difficult to undo. For children, such self-binding amounts to a cognizable harm.

Generally speaking, binding commitments fall into two categories: decisions of a legal nature, such as marriage, and conduct with bodily consequences.¹⁴⁸ Conduct with bodily consequences, such as genital mutilation, involves binding commitments because changes to one's body are often difficult to undo. As James Marcia has pointed out, exploring and "committing" to social values and goals is an important part of adolescent identity development.¹⁴⁹ When Marcia spoke of commitment, however, he did not mean commitment in any binding sense. There is directional freedom in moving between competing values associated with social categories—for example, liberal and conservative, masculine and feminine, heteronormative and queer, Christian and Buddhist. Although one may feel committed to certain values, such intangible allegiance is not binding in the same way as legal or bodily consequences, and individuals are free to return to their starting positions.

Thus exercising identity interests usually does not require making binding commitments. For example, wearing a yarmulke does not preclude someone from converting to another religion. Similarly, protesting a war

¹⁴⁴ My argument here is normative rather than descriptive. As a descriptive matter, subjective cultural factors probably play a significant role in the promulgation of laws regulating female genital mutilation.

¹⁴⁵ See Emily Buss, *Constitutional Fidelity Through Children's Rights*, 2004 SUP. CT. REV. 355, 358–59 [hereinafter Buss, *Constitutional Fidelity*].

¹⁴⁶ See Buss, *Allocating Developmental Control*, *supra* note 17, at 41 ("[T]he ongoing process of identity development, which continues through adolescence, compromises the extent to which it is appropriate to bind an individual at Time 2 to the choices made by that individual, as a child, at Time 1.")

¹⁴⁷ See MARTIN R. GARDNER & ANNE PROFFITT DUPRE, *CHILDREN AND THE LAW* 410–17 (2002).

¹⁴⁸ Similarly, age-of-consent laws regulating sexual intimacy are justified even if they assimilate adolescents to majoritarian moral codes. Consent to sex has a legal nature. By consenting to the act of sexual intimacy, one essentially agrees to waive certain rights, such as the right to press charges for rape.

¹⁴⁹ See FRANKLIN E. ZIMRING, *CHANGING LEGAL WORLD OF ADOLESCENCE* 65–72 (1982) (arguing that adolescence should be viewed as something like a driver's permit for adulthood, during which individuals experiment with different values); *supra* notes 87–93 and accompanying text.

does not bind someone to an antiwar position. Holding hands with a same-sex partner also does not bind someone to being gay.

Insofar as the pluralism principle's second prong is concerned, binding commitments are the only cognizable harm to oneself. A respect for difference prohibits the government from making subjective determinations about whether a particular exercise of identity is culturally or morally desirable, but the state can make a more objective determination that an exercise of identity interests has enduring consequences. Thus, the state can require greater maturity from individuals who engage in such behavior.¹⁵⁰

2. Harms to Others

The state also has a legitimate interest in limiting a child's exercise of identity if that exercise harms others. This limitation is a partial incorporation of John Stuart Mill's harm principle into the pluralism principle.¹⁵¹ Because the purpose of the pluralism principle is to protect children from assimilation demands, the state cannot assert that the community is harmed simply because children's exercises of identity interests offend the community's majoritarian sensibilities. Changes in community norms are not intrinsically harmful. As H. L. A. Hart persuasively argued, there is no empirical support for the claim that deviation from community mores—in and of itself—harms the community, unless the term “harm” is conflated with “change.”¹⁵²

Accordingly, I offer a narrow definition of cognizable harms to others. These include (1) incitement of other children to harm themselves¹⁵³

¹⁵⁰ The pluralism principle merely gives the government discretion to infringe upon identity interests when long-term consequences are at stake. The state is not obligated to regulate children's actions whenever those actions lead to long-term consequences. For example, lawmakers may very well determine that some actions—such as ear piercing—have relatively inconsequential long-term effects that do not warrant regulation.

¹⁵¹ See MILL, *supra* note 18, at 165 (“[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”). I discuss, in notes 131–133 and accompanying text, *supra*, why I reject Mill's wholesale exclusion of children. Mill argued that harm to others is the only justification for limiting adults' freedom. See MILL, *supra* note 18, at 165. Because I am writing about children, my claim is much more modest. The pluralism principle's first prong states that the government *may* limit children's freedom for socialization purposes, except when the freedom at stake implicates identity interests. Not all conduct involves identity interests. Since the state may limit a child's exercise of identity when that exercise harms the child herself, the pluralism principle protects significantly fewer freedoms than Mill's broader harm principle.

¹⁵² See H. L. A. HART, LAW, LIBERTY AND MORALITY 49–51 (1963). According to Hart, the notion that changes in morality are inherently harmful is “entitled to no more respect than the Emperor Justinian's statement that homosexuality was the cause of earthquakes.” *Id.* at 50.

¹⁵³ In other words, the state may intervene when children incite other children to make binding commitments of either a legal or bodily nature, as discussed in Part II.B.1, *supra*. Typically, states will exercise this power in school contexts. Thus, for example, even if a student believes strongly in the legalization and consumption of certain drugs—whether for religious, cultural, or political reasons—a school may be permitted to prevent that stu-

and (2) harms to others' protected interests—such as privacy, physical well-being, and property interests.¹⁵⁴

Regarding the question of harm, two particular situations are uniquely complex and warrant further discussion: when a child's exercise of identity interests challenges her parents' desires, and when her exercise of identity interests compromises other children's identity interests.

a. Parents' Childrearing Interests

Can the state's allowance of a child's exercise of identity interests harm her parents by infringing their protected interest in childrearing? For example, consider a child who wants to explore Buddhism by borrowing books on Buddhism from the school library, even though her devout Christian parents object to her interest. Should the school limit the child's identity exploration in order to protect her parent's childrearing interests?

As long as the government protects children's exercise of identity interest through negative liberties, parents' childrearing interests generally are not infringed. The Supreme Court has held that the Constitution protects parents' rights to direct the upbringing of their children, especially with regard to religion,¹⁵⁵ but that protection is limited.¹⁵⁶ The Constitution protects parents' rights to remove their children from public schools

dent from openly preaching drug use to her classmates because drug use entails bodily consequences and a legal decision, i.e., to break the law. However, the school may only intervene if the student's classmates are vulnerable to peer pressure, which will depend on their maturity. As this Article goes to publication, the Supreme Court is poised to release its decision in *Frederick v. Morse*, a case in which a high school principal punished students for displaying a banner stating, "Bong Hits 4 Jesus." 439 F.3d 1114 (9th Cir. 2006), *cert. granted*, 127 S.Ct. 722 (U.S. Dec. 1, 2006). Under the pluralism principle, the principal's actions only would be justified, as a normative matter, if she could show that the banner was likely to incite drug use, and not just parody the school's position against drugs.

¹⁵⁴ See FEINBERG, *supra* note 18, at 38–62, 105–06 (1984) (clarifying Mill's principle by defining harms in terms of setbacks to others' protected interests).

¹⁵⁵ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that Amish parents' free exercise right to direct children's religious upbringing outweighed state interests in mandating schooling for children until the age of sixteen); *Farrington v. Tokushige*, 273 U.S. 284 (1927) (invalidating state regulations of private schools because the regulations violated parents' substantive due process right to direct their children's education); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that the Due Process Clause protects parents' right to send their children to private religious schools in lieu of public schools); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that Fourteenth Amendment Due Process Clause protects parents' right to employ a private school teacher to instruct their children in foreign languages). For a thorough criticism of these cases and the notion of parents' rights, see James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371 (1994); see also Emily Buss, *The Adolescent's Stake in the Allocation of Educational Control Between Parent and State*, 67 U. CHI. L. REV. 1233, 1276–88 (2000) (relying on Eriksonian psychological literature to question the appropriateness of home schooling and private religious schooling for older adolescents).

¹⁵⁶ See, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944) (explaining, in a case involving child labor laws, that parents' interest in directing children's religious upbringing is not absolute); *infra* note 159 and accompanying text.

and educate their children through private institutions or home schooling.¹⁵⁷ However, parents do not have a protected interest in having the state take steps to facilitate their childrearing.¹⁵⁸ Therefore, “preventing harm to parents” does not implicate the pluralism principle’s second prong. Protecting parents’ rights, for example, does not require public schools to alter their curricular requirements, textbooks, or school activities just to further parents’ childrearing goals. Indeed, parents have argued that their childrearing interests were infringed when schools’ sex education and condom distribution policies conflicted with their childrearing goals, and these arguments have generally failed in court.¹⁵⁹

b. Other Children’s Identity Interests

Can the state, by protecting a child’s identity interests, set back other children’s identity interests? Indeed, in cases of hate speech, a child speaker might harm another child’s identity development in the process of expressing her own identity. I argue the state can legitimately impose assimilation demands in public schools when doing so prevents the harms caused by hate speech.¹⁶⁰

The pluralism principle’s second prong only gives a public school the discretion to restrict a child speaker’s negative liberties when it considers her expression to be hate speech.¹⁶¹ The principle does not grant children a free-standing positive right to hate speech intervention. Pinpointing a precise definition of hate speech is difficult, and thus enforcing a positive right to protection from hate speech would be difficult. However, granting schools a degree of discretion is not novel. Current law already grants public schools broad discretion to foresee and preempt other harms, such as stu-

¹⁵⁷ See *supra* note 155.

¹⁵⁸ In cases where a child’s conduct implicates cognizable harms, the state may consider parental interests to determine whether and how to limit the child’s freedom; however, the state must first show a cognizable harm independent of so-called “harm to parents.” See *infra* Part III.B.2 (discussing deference to parents in cases such as abortion cases, which potentially involve cognizable harms because of abortion’s long-term consequences).

¹⁵⁹ See, e.g., *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003) (holding that a father did not have a constitutional right to excuse his son from mandatory sex education classes); *Brown v. Hot, Sexy & Safer Prod., Inc.*, 68 F.3d 525 (1st Cir. 1995) (determining that parents’ right to childrearing did not include the right to limit flow of information in public school); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987) (rejecting parents’ free exercise challenge to textbooks).

¹⁶⁰ I am only making a normative argument at this point. The Supreme Court has yet to decide a case regarding hate speech in the school context. Lower courts have reached conflicting opinions. I evaluate these conflicting opinions in Part IV.B, *infra*.

¹⁶¹ The pluralism principle only justifies the regulation of hate speech in contexts involving child speakers and child audiences; regulating child speakers—but not adult speakers—makes sense as a legal matter because children have always possessed less freedom of expression than adults. See *infra* Part IV.B. Protecting child audiences makes sense because of children’s particular vulnerabilities. See *supra* Part I.B; see also RICHARD DELGADO & JEAN STEFANCIC, UNDERSTANDING WORDS THAT WOUND 93–109 (2004) (discussing hate speech and the special case of children).

dents' infringements upon other students' privacy interests and physical safety.¹⁶² The pluralism principle simply puts identity interests on par with these other protected interests because, as discussed in Part I, infringement of identity interests can seriously undermine children's psychological and physical health.

Although the state has discretion to regulate hate speech among students, there are minimum requirements for expression to be deemed hate speech. A gay teenager might associate Christian fundamentalism with homophobia, and thus be offended by even the slightest expression of Christian fundamentalism, but the state should not suppress all such expression. Expressions of Christian fundamentalist pride do not necessarily harm gays and lesbians. To constitute the type of hate speech that is a cognizable harm, the fundamentalist's speech must directly attack other children, suggesting that they are to be despised and denied respect because of their identity.¹⁶³ Such hateful speech is an assimilation demand that undermines identity development. Hate speech is an assimilation demand because it essentially suggests that members of the targeted group need to abandon or suppress their identity as much as possible, or leave the community because their identity is despised and unworthy of respect.¹⁶⁴

The state may err on the cautious side, opting to intervene rarely. Some forms of expression, however, present easy cases. When a child wears a shirt declaring "Islam: Rotten to the Core"¹⁶⁵ or "God Hates Fags,"¹⁶⁶ the speech seems to say rather clearly that members of certain identity groups should be despised and denied respect.

Most debates on social issues need not devolve into hate speech. For example, classroom debates over whether homosexuality is immutable or whether same-sex marriage should be banned, while controversial, should generally be acceptable under the pluralism principle's second prong because they do not inherently suggest that gays and lesbians should be despised and denied respect. Indeed, the same-sex marriage debate largely

¹⁶² See *infra* note 262 and accompanying text (on privacy); *infra* notes 249–250 accompanying text (on physical safety).

¹⁶³ This definition of hate speech draws from Canadian jurisprudence. See *R. v. Keegstra*, [1990] 3 S.C.R. 697, 777 (Can.) (“[H]atred[,] . . . if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation.”).

¹⁶⁴ Hate speech can be distinguished from assimilation pressures that merely encourage people to change. For example, when a school encourages students to be patriotic by conducting flag salutes, it still respects unpatriotic students who choose not to participate in the salute. See *infra* notes 182–187 and accompanying text. In contrast, hate speech is by definition a denial of respect.

¹⁶⁵ For an online vendor selling T-shirts with this slogan, see Café Press, http://www.cafe.press.com/religion_01 (last visited Mar. 9, 2007).

¹⁶⁶ For a photograph of children wearing T-shirts stating “GOD HATES FAGS.COM,” see Vox Hunt: Sign O’ The Times GOD HATES FAGS!, <http://dancingbear.vox.com/library/post/vox-hunt-sign-o-the-times-god-hates-fags.html> (last visited Mar. 9, 2007).

has been over whether the government has other interests, aside from hate, that legitimize same-sex marriage bans.¹⁶⁷

In contrast, schools should have the discretion to decide that debates over whether particular identity groups should be hated have no place on school grounds (even if the debate creates no physical disturbances) because arguments on one side of the debate will amount to hate speech. Children should not be expected to protect themselves against hate speech because they are particularly vulnerable to the crippling effects of assimilation demands, including hate speech. A child who is attacked in this way is not empowered to respond with defensive speech.

III. UNCOVERING THE PLURALISM PRINCIPLE IN EXISTING LAW

In the remainder of this Article, I focus on how the pluralism principle relates to constitutional law. Although courts have never clearly articulated the pluralism principle, it seems already to influence the Supreme Court's decisions in cases involving children's constitutional rights. Different cases have implicitly embraced different parts of the pluralism principle. My goal is to uncover and piece together the pluralism principle, which has been emerging in the Supreme Court's jurisprudence on children's rights.

The pluralism principle has been manifested as both a shield and a sword. In some cases, children have successfully raised the principle as a shield, preventing the government from limiting their rights in relation to those of adults; I refer to these cases as regarding equal rights to those of adults. In at least one other case, the pluralism principle has been wielded as a sword to justify affording children more negative liberty than adults. I refer to such cases as regarding special rights.¹⁶⁸

In this Part, I first provide background on constitutional principles that are not explicitly stated in the Constitution's text. I then show how the pluralism principle has begun to inform the Court's decisions—first in cases regarding children's equal rights and then in cases regarding children's special rights.

A. *Constitutional Principles Generally*

Legal principles, which fill lacunae within the Constitution's text, have a history of guiding judicial decisionmaking, including that of the Supreme

¹⁶⁷ See, e.g., *Andersen v. King*, 138 P.3d 963, 980–81 (Wash. 2006) (disagreeing with plaintiffs that Washington's same-sex marriage ban was motivated only by antigay animus); *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006) (reaching the same conclusion regarding New York's same-sex marriage ban).

¹⁶⁸ I borrow the term "special rights" from Buss, who has written extensively on how *Bellotti v. Baird*, 443 U.S. 622 (1979), suggests that children have not only equal constitutional rights but special constitutional rights. See Buss, *Allocating Developmental Control*, *supra* note 17, at 47; Buss, *Constitutional Fidelity*, *supra* note 145, at 356.

Court.¹⁶⁹ Some principles guide constitutional decisionmaking generally, as opposed to decisionmaking concerning one particular constitutional provision. For example, the principle of constitutional avoidance guides constitutional decisionmaking generally, dictating that the Court will construe statutes so that they do not infringe the Constitution.¹⁷⁰ Recently, constitutional law scholars have argued that an equality principle guides the Court's decisionmaking not only in equal protection cases, but also in substantive due process and First Amendment cases.¹⁷¹

Just as equality can be articulated as a principle that guides constitutional decisionmaking generally, the pluralism principle for children's rights should also guide decisionmaking in a range of cases—from First Amendment, to due process, to equal protection cases.¹⁷² As discussed below, the pluralism principle and its expansive reach are both grounded in existing Supreme Court jurisprudence.

Nowhere in its text does the Constitution specify how constitutional rights affect children. The Court has been filling in that gap through case law, and the pluralism principle has been emerging from that case law.¹⁷³

B. The Principle and Children's Equal Rights

Children's identity interests are implicated in various constitutional contexts. Freedom of expression and free religious exercise both foster children's abilities to develop and express their religious identities, including religious identity specifically. Minority children's identity interests are implicated when the government invokes majoritarian community standards to restrict liberties that minority children value, such as the liberty to speak a foreign language. Unequal treatment not only deprives some children of a good, but also stigmatizes the disadvantaged group, undermining the iden-

¹⁶⁹ See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 710 (2005) (acknowledging a neutrality principle in Establishment Clause cases); *Ewing v. California*, 538 U.S. 11, 20 (2003) (describing the proportionality principle of the Eighth Amendment).

¹⁷⁰ See, e.g., *United States v. Booker*, 543 U.S. 220, 286 (2005) (Stevens, J., dissenting in part) (invoking the principle of constitutional avoidance in a question of procedural due process); *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944) (applying the principle of constitutional avoidance to a question about the Commerce Clause).

¹⁷¹ See, e.g., Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673 (2002) (discussing equality as a principle in Establishment Clause cases); Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103 (2004) (discussing equality as a principle in substantive due process cases).

¹⁷² Similarly, when Ken Karst wrote his seminal essay on intimate association, he argued that the freedom of intimate association is an organizing principle that should guide decisionmaking in the areas of substantive due process, the First Amendment, and equal protection. See Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

¹⁷³ Constitutional principles often emerge—like the common law does—through a pattern among cases, rather than manifesting in a specific opinion. See Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1899 (2004) (comparing the Court's reasoning in *Lawrence* to deriving a regression line from a scatter diagram of previous substantive due process cases).

tity development of its members. Accordingly, the legal analysis that follows focuses on cases regarding freedom of expression, free religious exercise, substantive due process, and equal protection.¹⁷⁴

In *In re Gault*, the Supreme Court famously declared that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.”¹⁷⁵ However, the Court subsequently asserted, in *Bellotti v. Baird*, that “three reasons justify[] the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.”¹⁷⁶ Although the Court has identified these three factors, it has not clarified how these factors interact. As a result, critics charge that the Supreme Court’s children’s rights jurisprudence lacks coherence.¹⁷⁷ The pluralism principle reveals previously unrecognized coherence in that jurisprudence.

Assessing vulnerability is the first-order task, and that is when the pluralism principle comes into play. When the state argues that children’s rights should be more limited than those of adults, it typically begins by asserting that children are vulnerable to specific harms and that rights reduction is a form of protection. When the Court finds that states have not identified cognizable harms to which children are vulnerable, the Court extends equal rights to the child.¹⁷⁸ Only when the state has identified a cognizable harm does the Court engage in significant analyses regarding the two other *Bellotti* factors: maturity and deference to parents.¹⁷⁹

In the Court’s assessment of vulnerability, it has implicitly raised the pluralism principle to defend children’s freedom to exercise identity interests from governmental socialization policies. In cases where children’s ability to develop and express their identities has been at stake, the Court has repeatedly stated that children are not vulnerable to harm just because

¹⁷⁴ Although there are many free exercise cases that involve children, I only address *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). I do not devote more attention to free exercise cases because the Court generally assumes that children and adults have equal rights to free exercise. See Note, *Children as Believers: Minors’ Free Exercise Rights and the Psychology of Religious Development*, 115 HARV. L. REV. 2205, 2209 (2002).

¹⁷⁵ 387 U.S. 1, 13 (1967).

¹⁷⁶ 443 U.S. 622, 634 (1979) (upholding an abortion law’s parental notification requirement because it included a satisfactory judicial bypass mechanism).

¹⁷⁷ See *supra* note 20 (listing criticisms of children’s rights jurisprudence).

¹⁷⁸ See *infra* Part III.B.1 (discussing cases in which the state failed to identify cognizable harms).

¹⁷⁹ In *Bellotti*, the Court recognized that it only concerns itself with the maturity factor when children are demanding rights to make “choices with potentially serious consequences,” “choices that could be detrimental to them,” or choices that “present[] a danger against which they should be guarded.” 443 U.S. at 635–36. The Court was less clear on when the deference-to-parent factor comes into play, but it did state that “[u]nder the Constitution, the State can ‘properly conclude that parents . . . who have [the] primary responsibility for children’s well-being are entitled to the support of laws designed to aid discharge of that responsibility.’” *Id.* at 639 (quoting *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)). That statement implies that the state may defer to parents when children’s well-being is at risk. When children are not vulnerable to cognizable harms, their well-being is not at risk.

they do not conform to majoritarian community norms.¹⁸⁰ In essence, the Court has stated that the government's desire for children to conform to majoritarian norms is not reason enough to infringe children's identity interests. The Court has repeatedly protected children's ability to explore and express unorthodox values associated with minority identities. This protection comports with the pluralism principle's first prong. The Court has only infringed upon children's identity interests in cases where doing so prevented harms that are cognizable under the pluralism principle's second prong.¹⁸¹

1. Protecting Identity Interests

a. Foundational Cases

The Court planted the seed of the pluralism principle in *West Virginia State Board of Education v. Barnette*.¹⁸² *Barnette* was not formally a children's rights case because parents brought the suit, but Justice Jackson, writing for the plurality, suggested that children's rights were at stake.¹⁸³ The parents challenged a state statute that compelled students to salute the American flag and recite the Pledge of Allegiance.¹⁸⁴ Jackson recognized that students' interests in developing their religious and political identities were at stake in the case.¹⁸⁵

Jackson stated that the compelled salute and pledge violated constitutional protections of free expression and free religious exercise and could not be justified by the state's desire to assimilate children to a unified standard of nationalism.¹⁸⁶ The children were vulnerable to adopting unorthodox values, but Jackson reasoned that the possibility of children adopting "eccentricity and abnormal attitudes" did not justify restricting the students' constitutional rights.¹⁸⁷ This prioritization of identity interests over assimilation is consistent with the pluralism principle's first prong. Jackson also noted that students' deviation from majoritarian standards of nationalism did not threaten national security.¹⁸⁸ If national security were threatened, the school's policy would have been constitutional.¹⁸⁹ That logic

¹⁸⁰ See *infra* Part III.A.1.

¹⁸¹ See *infra* Parts III.A.2–3.

¹⁸² 319 U.S. 624 (1943).

¹⁸³ See *id.* at 630–31 ("The State . . . coerce[s school] attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.").

¹⁸⁴ *Id.* at 625–30.

¹⁸⁵ See *id.* at 634–36 (noting that students' "religious views" as well as "matters of opinion and political attitude" were implicated).

¹⁸⁶ See *id.* at 642.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 640.

¹⁸⁹ *Id.*

comports with the pluralism principle's second prong because a threat to national security would qualify as a cognizable harm.

After *Barnette* planted the pluralism principle's seed, the principle sprouted in the later cases of *Tinker v. Des Moines*,¹⁹⁰ *Island Trees Union Free School District v. Pico*,¹⁹¹ and *Carey v. Population Services International*.¹⁹² In *Tinker*, the Court upheld secondary students' First Amendment right to protest the Vietnam War in school.¹⁹³ The Court stated that, even though the protests exposed vulnerable children to controversy, that did not justify infringing students' rights to express their political identity.¹⁹⁴ The Court stated that public schools may not censor students' speech just because the speech is unpopular or unpleasant to the community.¹⁹⁵ Put differently, the Court again protected children's ability to explore and to commit to values associated with identities that are out of the mainstream. The Court did make two exceptions: public schools may restrict speech if it impinges upon the rights of other students to be free and let alone or if it is substantially disruptive.¹⁹⁶ These exceptions comport with the pluralism principle's second prong because they both prevent cognizable harms.

Island Trees Union Free School District v. Pico, which dealt with the removal of controversial books from public school libraries,¹⁹⁷ reinforced the pluralism principle. The school board argued that removing the books was necessary "to protect the children in our schools from . . . moral danger."¹⁹⁸ Writing for the plurality, Justice Brennan noted that schools do have an interest in inculcating children with values, but that interest alone cannot justify limiting children's First Amendment rights.¹⁹⁹ Justice Brennan's opinion held that "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'"²⁰⁰ By removing controversial books, the school board delegitimized minority values

¹⁹⁰ 393 U.S. 503 (1969).

¹⁹¹ 457 U.S. 853 (1982).

¹⁹² 431 U.S. 678 (1977).

¹⁹³ 393 U.S. at 514. *Tinker* is the first case in the Court's trilogy on student speech. The second case in the trilogy is *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), which specifically governs low-value speech, such as obscene and indecent speech, and is discussed in Part III.B.1.b, *infra*. The third case, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), governs school-sponsored speech, such as school-run newspapers, and is discussed in notes 262–265 and accompanying text, *infra*.

¹⁹⁴ See *Tinker*, 393 U.S. at 510–11.

¹⁹⁵ See *id.* at 509.

¹⁹⁶ See *id.* at 508–09, 514.

¹⁹⁷ The school board claimed that the books were "anti-American" and "offensive to . . . Americans in general." 457 U.S. at 873 (quoting *Pico v. Bd. of Educ., Island Trees Union Free Sch. Dist.*, 474 F. Supp. 387, 390 (E.D.N.Y. 1979)).

¹⁹⁸ *Id.* at 857 (quoting *Pico v. Bd. of Educ., Island Trees Union Free Sch. Dist.*, 474 F. Supp. 387, 390 (E.D.N.Y. 1979)).

¹⁹⁹ See *id.* at 864.

²⁰⁰ *Id.* at 872 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

and goals that conflicted with majoritarian community values. Brennan suggested that the community's desire to protect children from "moral danger" did not justify reducing children's First Amendment rights.²⁰¹ In *Pico*, the Court again protected children's ability to explore minority identities, while reiterating that nonconformity is not in and of itself a "danger."

The privacy case of *Carey v. Population Services International* is also consistent with the pluralism principle. In *Carey*, the Court invalidated a New York statutory provision that banned the sale of contraceptives to minors under the age of sixteen, except when deemed appropriate by the minors' physicians.²⁰² New York contended that its law was "permissible as a regulation of the morality of minors in furtherance of the State's policy against promiscuous sexual intercourse among the young."²⁰³

Although the Court did not say so explicitly, identity interests were at stake in *Carey* because the government was seeking to assimilate children to the sexual mores of majoritarian identity groups. In addition, identity interests were at stake because intimate relationships can inform one's sense of self.²⁰⁴ The plurality recognized that New York had a legitimate reason for limiting promiscuous sex among teenagers: the prevention of physical and psychological harms associated with adolescent intercourse, especially the physical and psychological harms that teenage motherhood imposes on the mother and child.²⁰⁵ The plurality did not believe that merely sending a moral message to youth could credibly curb those physical and psychological harms.²⁰⁶ Critically, however, sending a moral message was not in and of itself a legitimate reason for reducing minors' rights.²⁰⁷ By invoking physical and psychological harms as the only way the state could have justified its law, the plurality adhered to the pluralism principle's second prong. The Court was not making a culturally subjective judgment regarding sexual mores, but was concerned about both the enduring consequences of teenage intercourse and the harms that such intercourse imposes on others, namely children resulting from the intercourse.²⁰⁸

In *Barnette*, *Tinker*, *Pico*, and *Carey*, the Court did not analyze all three of the factors identified in *Bellotti*: vulnerability, maturity, and deference to parents. In these cases, the Court focused on analyzing whether

²⁰¹ See *id.* at 857.

²⁰² *Carey v. Population Servs. Int'l.*, 431 U.S. 678, 681–82 (1977).

²⁰³ *Id.* at 692.

²⁰⁴ See Karst, *supra* note 172, at 628 (discussing the relationship between intimate associations and personal identities).

²⁰⁵ In discussing the risks of sexual activity among youth, the Court noted numerous physical and psychological harms but did not raise any social or moral concerns. See, e.g., *Carey*, 431 U.S. at 696 n.21 ("[T]eenage motherhood involves a host of problems, including adverse physical and psychological effects upon the minor and her baby." (internal quotation marks and brackets omitted)).

²⁰⁶ See *id.* at 696.

²⁰⁷ See *id.* at 697.

²⁰⁸ See *id.* at 696 n.21 (noting pregnancy's "physical and psychological effects upon the minor and her baby").

children were vulnerable to harms. Those analyses were driven, at least implicitly, by the pluralism principle. In each case, the state sought to limit children's ability to explore or express values and goals associated with minority identities to protect children from straying from community norms. In each case, the Court stated that nonconformity is not inherently harmful and then protected children's identity interests by extending the constitutional rights of adults to children. In these cases, the Court raised the pluralism principle to shield children from a rights reduction.

b. Deconstructing Potential Challenges

The Supreme Court case that potentially challenges the pluralism principle is *Bethel School District No. 403 v. Fraser*,²⁰⁹ a subsequent case involving vulgar speech. The Court held that a high school did not violate the First Amendment by punishing a student who delivered a speech laced with gratuitous sexual references.²¹⁰ In the speech, Matthew Fraser nominated a classmate for student office while referring to the candidate in graphic sexual metaphors.²¹¹ Ultimately, as discussed below, *Fraser* does not challenge the pluralism principle because no identity interests were at stake.

Some commentators and lower courts wrongly view *Fraser* as implicitly overruling *Tinker* and granting schools broad discretion to censor the expression of any ideas that they deem offensive.²¹² In such cases, the pluralism principle is violated based on a misinterpretation of *Fraser*. Before reaching my analysis of *Fraser*, I consider one lower court example, *Boroff v. Van Wert City Board of Education*.²¹³

In *Boroff*, the Sixth Circuit upheld a school's prohibition of T-shirts featuring the musical performer Marilyn Manson.²¹⁴ One T-shirt was critical of Christianity and another T-shirt had illustrations of Marilyn Manson "largely unadorned by text."²¹⁵ Citing *Fraser*, the court stated: "[t]he

²⁰⁹ 478 U.S. 675 (1986).

²¹⁰ *Id.* at 686 (plurality opinion).

²¹¹ *Id.* at 677–78.

²¹² *See, e.g.*, *Hosty v. Carter*, 412 F.3d 731, 739 (7th Cir. 2005) (noting that Supreme Court case law on student speech has become "difficult to understand and apply"); *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 474 (6th Cir. 2001) (Gilman, J., dissenting) (stating that the majority interpreted *Fraser* and *Hazelwood School Bd. v. Kuhlmeier*, 484 U.S. 260 (1988), as "essentially overruling *Tinker*"); *Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 737 (7th Cir. 1994) (asserting that *Fraser* "cast some doubt" on *Tinker*); David L. Hudson & John E. Ferguson, *A First Amendment Focus: The Courts' Inconsistent Treatment of Bethel v. Fraser and the Curtailment of Student Rights*, 36 J. MARSHALL L. REV. 181, 183 (2002) (noting that some courts have relied on *Fraser* to prohibit not just vulgar and lewd speech but also ideas that school boards find offensive).

²¹³ 220 F.3d 465 (6th Cir. 2000).

²¹⁴ *Id.* at 465.

²¹⁵ *Id.* at 469, 71. The T-shirt criticizing Christianity featured a "three-headed Jesus," the words "See No Truth. Hear No Truth. Speak No Truth." on the front and the word "BELIEVE" with "LIE" highlighted on the back. *Id.* at 469.

Supreme Court has held that the school board has the authority to determine what manner of speech in the classroom or in school is appropriate."²¹⁶ The court concluded that the rock artist "promotes disruptive and demoralizing values," and the T-shirts "were determined to be vulgar, offensive, and contrary to the education mission of the school."²¹⁷

Identity interests were at stake in *Boroff*. Commentators have noted that Marilyn Manson's music has a value-laden agenda: to challenge the gender binary, to question mainstream American values, to champion individuality, and to have people take responsibility for their actions.²¹⁸ Commentators have also noted that Marilyn Manson's values are consonant with queer identity.²¹⁹ Because of the identity interests involved, the *Boroff* majority violated the pluralism principle. The principle protects children's identity interests: the ability to explore and express values and goals that shape their identities. Invoking community norms without pointing out cognizable harms as the *Boroff* court did is insufficient justification for infringing identity interests.

The school administrators in *Boroff* were particularly troubled by the shirt that conveyed anti-Christian sentiments.²²⁰ The court would have adhered to the pluralism principle had it reasoned that the anti-Christianity T-shirt amounted to hate speech, thereby harming other students.²²¹ Similarly, the court would have adhered to the pluralism principle had it reasoned that Marilyn Manson T-shirts incited students to harm themselves, for example by engaging in drug use.²²² Instead of doing so, the court simply asserted that both T-shirts contravened school morals and thus were subject to regulation.²²³

Contrary to the *Boroff* court's interpretation, however, *Fraser* does not afford schools with broad discretion to assimilate children to community norms as the school did in *Boroff*. Correctly understood, *Fraser* suggested that schools may censor "low-value"²²⁴ language but not offensive ideas.²²⁵ The Court described the language, not the ideas, in *Fraser*'s speech

²¹⁶ *Id.* at 470.

²¹⁷ *Id.* at 471.

²¹⁸ See Jeff Q. Bostic et al., *From Alice Cooper to Marilyn Manson: The Significance of Adolescent Antiheroes*, 27 ACAD. PSYCH. 54 (2003); Judith A. Peraino, *Listening to the Sirens: Music as Queer Ethical Practice*, 9 GLQ: J. LESBIAN & GAY STUD. 433 (2003).

²¹⁹ See Peraino, *supra* note 218.

²²⁰ See *id.* at 469.

²²¹ See *supra* Part II.B.2.

²²² See *id.*

²²³ *Boroff*, 220 F.3d at 471.

²²⁴ Cf. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words.")

²²⁵ See *Fraser*, 478 U.S. at 689 (Brennan, J., concurring) ("There is no suggestion that school officials attempted to regulate [Fraser's] speech because they disagreed with the views he sought to express."); *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1193 (9th Cir. 2006) (Kozinski, J., dissenting) ("'[P]lainly offensive' under *Fraser* is determined

as “obscene,” “vulgar,” “lewd,” and “offensively lewd.”²²⁶ In cases involving adult speakers and child speakers alike, the Court has repeatedly stated that such expression is not just offensive;²²⁷ it is of low value and thus subject to reduced First Amendment protection, if any at all.²²⁸ According to the Court, obscene and indecent expressions are low value because “such utterances are no essential part of any exposition of ideas, and are of . . . slight social value as a step to truth.”²²⁹

Unlike the gratuitous sexual remarks made by the student in *Fraser*, expressions of identity are anything but low value. Expressions of identity are expositions of ideas, although such expositions may be coded and implicit. Recall that identities are commitments to specific values and goals with regard to particular social categories.²³⁰ Thus, expressions of identities are expressions of ideas, endorsements of particular values and goals. The student who wears kente scarves to express her African American identity is endorsing values that she associates with African Americans. The student who wears a Marilyn Manson T-shirt to express her queer identity is also endorsing a particular set of values.

Expression of one’s identity also is not low-value speech because expression of one’s identity is a form of self-realization. Jurists have touted the facilitation of self-realization as being one of the reasons why the Constitution protects free speech.²³¹ Expressions of identity are especially valuable for adolescents because realizing one’s sense of self is the primary psychosocial developmental task of adolescence.²³²

Had *Fraser* argued that his use of sexual language was itself a substantive message (which he did not), his case would have posed a more difficult question. He might have argued that his use of sexual language was a political statement against his school’s rule against sexual language. As an expression of political ideology, the student’s speech would not be of low value. Nonetheless, under the pluralism principle, the school still would have been able to intervene under the second prong, because treating rule breaking itself as protected speech would plant the seeds of anarchy. The

by the language used, not the idea conveyed.”); *East High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 81 F. Supp. 2d 1166, 1193 (D. Utah 1999) (“*Fraser* speaks to the form and manner of student speech, not its substance. It addresses the mode of expression, not its content or viewpoint.”).

²²⁶ See *Fraser*, 478 U.S. at 687 (Brennan, J., concurring) (summarizing the Court’s description of the speech in question).

²²⁷ See *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978).

²²⁸ See *Miller v. California*, 413 U.S. 15, 24 (1973); see also *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 265 (2002); *Reno v. ACLU*, 521 U.S. 844, 865 (1997); *Pacifica Found.*, 438 U.S. at 745–47.

²²⁹ *Fraser*, 478 U.S. at 685 (quoting *Chaplinsky*, 315 U.S. at 572).

²³⁰ See *supra* Part I.B.

²³¹ “‘Self-realization’ theories of the First Amendment stress the relationship between free expression and personal fulfillment . . . [which includes] developing a self-identity.” DANIEL A. FARBER, *THE FIRST AMENDMENT* 3–4 (2d ed. 2003). However, self-realization theories of free speech have never been absolute. *Id.* at 4.

²³² See *supra* Part I.B.

disorder that would ensue is a cognizable harm, as it would compromise other students' interests in security and public education.

Note that the government may regulate many areas of children's expression, not just obscene and indecent speech, without implicating identity interests. The pluralism principle only protects children's exercise of identity interests and not free expression generally. Therefore, a teacher can mandate that students raise their hands rather than randomly shout responses to the teacher's questions; mandate silent reading time; deduct points for students' poor grammar;²³³ and discipline cheaters by having them write "I will not cheat" one hundred times on the whiteboard. In each of these instances, children are unlikely to argue that restrictions on their expression undermine identity interests. Thus, the pluralism principle is not implicated.

2. Preventing Cognizable Harms

a. Binding Commitments as Harms to Self

While the cases just discussed dealt primarily with the pluralism principle's first prong, other cases reinforce the second prong, which dictates that the government can infringe identity interests to prevent the cognizable harms defined in Part II.B. Consider *Bellotti*, in which the Court addressed whether pregnant teenagers should have the same constitutional right as pregnant adults to make reproductive decisions.²³⁴ The State of Massachusetts had a statute that required pregnant teenagers to procure either parental consent or a judicial bypass prior to undergoing an abortion.²³⁵ The Court stated that a pregnant teen is entitled to a judicial bypass if, upon a hearing, a judge finds that the teen is "mature enough and well enough informed to make her abortion decision" or that "the desired abortion would be in her best interests."²³⁶ In so holding, the Court suggested that minors do not have the same reproductive rights as adults because minors who face decisions regarding abortion are vulnerable to cognizable harms.

The law in *Bellotti* implicated identity interests by precluding many teenage women from making reproductive choices based on their own reli-

²³³ One might argue that requiring students to use "standard" English in assignments is an assimilation demand on, for example, Ebonics speakers. Drawing from the writings of Lisa Delpit, I believe that requiring students to learn standard English is not a coercive assimilation demand, as long as teachers do not denigrate Ebonics as inherently "wrong" or "deficient." Teachers can simultaneously affirm the cultural worth of Ebonics and require students to learn standard English because of its practical value. See Lisa Delpit, *What Should Teachers Do About Ebonics?*, in TONGUE TIED: THE LIVES OF MULTILINGUAL CHILDREN IN PUBLIC EDUCATION (Otto Santa Ana ed., 2004).

²³⁴ *Bellotti v. Baird*, 443 U.S. 622, 634 (1979).

²³⁵ *Id.* at 625–26.

²³⁶ *Id.* at 643–44.

gious and moral sensibilities. The *Bellotti* decision required teenage women to assimilate to specific religious and cultural norms. While the Court noted that abortion decisions raise “profound moral and religious concerns,”²³⁷ it emphasized that abortion is ultimately a medical decision with irreversible consequences.²³⁸ Reading *Bellotti* in light of the Court’s larger jurisprudence on children’s rights suggests that the morality and religious concerns were aggravating but not dispositive factors.²³⁹ Rather, the Court seems to have been swayed by the long-term consequences involved in medical decisionmaking. By emphasizing the irreversible nature of abortions, the Court invoked the pluralism principle’s second prong.

Because the Court determined that teenagers facing abortion decisions are vulnerable to cognizable harms, the other two *Bellotti* factors—deference to parents and maturity—came into play. The Court upheld the government’s deference to parents on whether their daughters should receive abortions, but maintained that daughters could trump that deference by proving to judges that they were mature.²⁴⁰

*Veronica School District v. Acton*²⁴¹ also supports the pluralism principle’s second prong. In *Acton*, the Court upheld a school’s policy of randomly testing student athletes for drug use.²⁴² The Court upheld the tests, over a Fourth Amendment challenge, by invoking a compelling government interest in preventing a cognizable harm: the long-term bodily consequences of drug use.²⁴³ The Court invoked the harms of drug use to reduce children’s constitutional rights, emphasizing at length not only the harmful physical and psychological consequences of drugs generally,²⁴⁴ but also the enduring effects they have on children specifically.²⁴⁵ The case did not implicate identity interests. However, by emphasizing that drug use is harmful because it binds children to long-term bodily consequences, the

²³⁷ *Id.* at 640.

²³⁸ *Id.* at 640–42 (noting abortion’s long-term consequences, medical nature, and legal implications).

²³⁹ See *supra* Part III.B.1 (discussing cases in which the Court stated that cultural and moral norms alone are not sufficient reasons to reduce children’s constitutional rights). In particular, recall that in *Carey v. Populations Servs. Int’l*, the Court stated that moral reasons were not enough to justify a New York law that limited the sale of contraceptives to minors. See 431 U.S. 678, 719 (1977).

²⁴⁰ Pregnant teenagers could bypass the statute’s parental consent component through a judicial hearing in which they proved themselves to be mature or proved that an abortion was in their best interest, regardless of their maturity. *Bellotti*, 443 U.S. at 643–44.

For a case similar to *Bellotti*, consider *Parham v. J.R.*, 442 U.S. 584 (1979). In *Parham*, the Court upheld a statute that empowered parents to commit their children to psychiatric institutions against their children’s will. *Id.* The Court reduced children’s autonomy rights by granting power to their parents only after establishing that medical harms were central to the case. *Id.* at 609.

²⁴¹ 515 U.S. 646 (1995).

²⁴² *Id.*

²⁴³ *Id.* at 660–65; see also *New Jersey v. T.L.O.*, 469 U.S. 325, 338 (1985) (noting that schools have a legitimate interest in preventing drug use).

²⁴⁴ See *Acton*, 515 U.S. at 662.

²⁴⁵ See *id.* at 661.

Court lent support to the definition of “cognizable harm” in the pluralism principle’s second prong.

Interestingly, the Court emphasized that the tests only looked for drugs and not diabetes, epilepsy, teen pregnancy, or other stigmatized medical statuses.²⁴⁶ One element of the tests that did give the Court pause was the requirement that students give advance disclosure of prescription drug use, so as to avoid false positives.²⁴⁷ Interestingly, the Court only paused when children’s identity interests had the possibility of being unduly compromised—when the school may have “outed” students as belonging to a potentially stigmatized identity group based on medical status.²⁴⁸ This attention to identity interests thus lends further support to the pluralism principle’s first prong.

b. Harms to Others

The final type of equal rights cases arises when a government’s efforts to protect children’s identity interests are trumped by its efforts to prevent harms to others. *Tinker*, discussed above, made room for government intervention in these cases. *Tinker* held that students have freedom of expression in schools, but that schools may limit that freedom when a student’s expression substantially disrupts class or when a student’s expression impinges upon the rights of others to be free and let alone.²⁴⁹ The first exception specifically prevents students from violating other students’ interests in public education and in an educational environment free of physical disturbance.²⁵⁰ The second exception is a broad provision that protects others’ interests more generally.²⁵¹

Another case on student expression, *Hazelwood School District v. Kuhlmeier*,²⁵² can also be read to support the pluralism principle’s second prong. *Kuhlmeier* leaves room for interpretation that affects its relationship to

²⁴⁶ See *id.* at 658.

²⁴⁷ *Id.* at 659–60. The Court ultimately decided that students could give advance disclosure in a confidential manner, thus mitigating privacy concerns. *Id.* at 660.

²⁴⁸ Disclosing individuals’ membership in stigmatized identity groups against their will can negatively influence those individuals’ identity development. See *infra* Part IV.C (discussing the disclosure of individuals’ sexual orientation); see also James P. Madigan, *Questioning the Coercive Effect of Self-Identifying Speech*, 87 IOWA L. REV. 75 (2001).

²⁴⁹ See *Tinker v. Des Moines*, 393 U.S. 503, 508–09, 514 (1969).

²⁵⁰ Courts generally have stated that schools invoking the substantial disruption exception must show that there is a risk of physical disturbance, but courts have afforded schools varying degrees of discretion to forecast and define physical disturbances. See generally Royal C. Gardner, III, Case Note, *Protecting a School’s Interest in Value Inculcation to the Detriment of Students’ Free Expression Rights*: Bethel School District v. Fraser, 28 B.C. L. REV. 595, 603–05 (1987); Kathleen Hart, Note, *Sticks and Stones and Shotguns at Schools: The Ineffectiveness of Constitutional Antibullying Legislation as a Response to School Violence*, 39 GA. L. REV. 1109, 1138 (2005).

²⁵¹ Cases almost never rest on the rights-of-others exception. See *infra* note 277. But see *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006).

²⁵² 484 U.S. 260 (1988).

the pluralism principle. At best, *Kuhlmeier* lends full support to the pluralism principle; at worst, *Kuhlmeier* stands for the proposition that, when the line between student speech and the school's own speech is blurred, the school may define cognizable harms more capaciously than the pluralism principle does.

In *Kuhlmeier*, students challenged censorship of two articles in a student newspaper.²⁵³ At the outset, the Court distinguished *Kuhlmeier* from *Tinker*. The Court reasoned that children have reduced First Amendment rights when they are speaking through a school-sponsored newspaper because the newspaper bears the school's imprimatur.²⁵⁴ In *Tinker*, the student protest happened to be on school grounds, but the school did not sponsor the protest.²⁵⁵ Because a school-sponsored newspaper bears the school's imprimatur, people may reasonably attribute opinions in the newspaper to the school, blurring the line between the speech of the student and that of the school.²⁵⁶ As a result of this blurring, the Court declared that schools may censor school-sponsored speech "so long as their actions are reasonably related to legitimate pedagogical concerns."²⁵⁷

The holding in *Kuhlmeier* required the determination of what constitutes a legitimate pedagogical concern. The *Kuhlmeier* Court held that the first article, which addressed the impact of divorce on students, was censored for legitimate pedagogical reasons.²⁵⁸ The school refused to publish the article partly because its author's inadequate research did not satisfy journalistic standards.²⁵⁹ Indeed, requiring thorough and unbiased research, proper spelling, correct grammar, and the like seems to be directly related to pedagogy. Here, the difference between pure student speech and school-sponsored speech becomes clear: a school can refuse to publish an article in the school newspaper because of poor grammar or poor research, but it cannot ban an antiwar protest that happens to be on school grounds just because the protesters are speaking with poor grammar and making poorly researched arguments.

In addition, the school was concerned that the article on divorce compromised the privacy of some parents.²⁶⁰ The school was concerned that the second article also threatened privacy interests. The second article, which addressed student pregnancies, did not adequately protect the ano-

²⁵³ *Id.* at 260.

²⁵⁴ *See id.* at 270–71.

²⁵⁵ *See id.*

²⁵⁶ *See id.*

²⁵⁷ *Id.* at 273.

²⁵⁸ *See id.* at 273–75.

²⁵⁹ The author of the article failed to interview a divorcée whom the author sharply criticized. *See id.* at 274–75. A professional newspaper editor and a former college journalism instructor both testified that the author's reporting did not meet journalistic standards. *See id.* at 275 n.8.

²⁶⁰ *See id.* at 263, 275.

nymity of the students interviewed for the piece.²⁶¹ Thus, the school principal feared that the article would jeopardize the privacy interests of the students interviewed, their boyfriends, and their families.²⁶² Protecting those individuals' privacy interests constituted a legitimate pedagogical goal.²⁶³ In fact, most of the Court's analysis was devoted to discussing this pedagogical goal of preventing harm to others' privacy.²⁶⁴

As analyzed thus far, the school's refusal to publish the two articles supports the pluralism principle. The censorship was not based on a desire to limit the underlying ideas. The censorship was motivated in part by the school's desire to prevent cognizable harms to others, in this case, threats to others' privacy. Insofar as poor research justified censorship, the censorship did not delegitimize the author's opinion, which may have been central to her identity. Censoring for poor research does not undermine identity interests.

A small component of the *Kuhlmeier* opinion may, however, conflict with the pluralism principle. In addition to discussing the pedagogical concerns already listed, the Court mentioned that the school was reasonable in its concern that the pregnancy article's discussion of sexual activity and birth control might be "inappropriate" for the school's freshmen and for the "even younger brothers and sisters" of students who may bring the school newspaper home.²⁶⁵ It is unclear whether that concern was purely a moral concern, which would not amount to a cognizable harm under the pluralism principle, or rather was a concern that the article might encourage younger students and siblings, who may not be adequately informed about sex, to explore potentially irresponsible or dangerous sexual activity. The latter concern would amount to a cognizable harm under the pluralism principle.

By emphasizing the article's impact on younger students, the Court seemed to imply that the school was concerned about something more than mere moralism. The Court could have said that instilling a sense of morality was itself a legitimate pedagogical concern. Instead, it said that the article's impact on younger children was a legitimate concern. The age-specific nature of the Court's reasoning suggests that there was concern about more than just a moral harm.

C. *The Principle and Children's Special Rights*

The cases cited above concerning whether children should have the same rights as adults constitute the majority of the Court's children's rights

²⁶¹ *See id.* at 274.

²⁶² *See id.*

²⁶³ *See id.* at 274–75.

²⁶⁴ At least one lower court has interpreted the protection of privacy as the dispositive factor in the Court's decision in *Kuhlmeier*. *See Hansen v. Ann Arbor Pub. Sch.*, 293 F. Supp. 2d 780, 795 (E.D. Mich. 2003).

²⁶⁵ *Kuhlmeier*, 484 U.S. at 274–75.

cases. However, in a small but growing number of cases, the Court has considered whether children should have greater constitutionally protected negative liberties than adults and has answered in the affirmative.

In *Bellotti v. Baird*, the Court noted that children's rights cannot be equated with those of adults.²⁶⁶ When children's rights are not equal to those of adults, however, they need not be less. *Bellotti* reminds us that courts must apply constitutional principles "with sensitivity" to "children's vulnerability and their needs for concern, sympathy, and paternal attention."²⁶⁷ That sensitivity may require courts to grant children greater, not lesser, negative liberties, which have been referred to as children's special rights.²⁶⁸ Specifically, courts should be sensitive to children's vulnerability to the identity-related harms discussed in Part I.

Properly understood, *Brown v. Board of Education*²⁶⁹ was the first case on children's special constitutional rights. In *Brown*, the Court explained that segregated schools inflicted identity-related harms specifically on children,²⁷⁰ even if segregated schools were equal by tangible measures such as physical facilities.²⁷¹ Segregating children because of their race "generates a feeling of inferiority as to their status in the community that may affect [children's] hearts and minds in a way unlikely ever to be undone."²⁷² The implied inferiority resulting from racial segregation hinders racial minorities' identity development.²⁷³ The Court held that segregated schools were unconstitutional, even if the schools were equal by tangible terms.²⁷⁴

In *Brown*, the Court emphasized that segregation was particularly harmful to children.²⁷⁵ Accordingly, its explicit holding only spoke to the

²⁶⁶ 443 U.S. 622, 633 (1979).

²⁶⁷ *Id.* at 633–36.

²⁶⁸ *See supra* note 168.

²⁶⁹ 347 U.S. 483 (1954).

²⁷⁰ I should note that many commentators have criticized *Brown*'s use of social science literature to discuss developmental harms for being crude and problematic. *See, e.g.,* Garrick B. Pursley, *Thinking Diversity, Rethinking Race: Toward a Transformative Concept of Diversity in Higher Education*, 82 TEX. L. REV. 153, 154 n.8 (2003) (noting that this aspect of *Brown* "has generated an entire body of scholarship critical of such an approach"). These criticisms should not lead jurists to ignore insights from social science; rather, they should prompt greater interdisciplinary dialogue in order to improve the way jurists draw from social science. *See* Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 445–54 (2006) (supporting the Court's more recent steps to integrate psychology "into constitutional decisionmaking"); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1005–08 (2006) (providing an example of an appropriate way in which the courts can utilize social science theories within their jurisprudence); Michael Heise, *Brown v. Board of Education, Footnote Eleven, and Multidisciplinarity*, 90 CORNELL L. REV. 279, 307–18 (2005) (showing that *Brown* has fueled greater multidisciplinarity in court decisions and legal scholarship).

²⁷¹ *See Brown*, 347 U.S. at 493–94.

²⁷² *Id.* at 494.

²⁷³ *See supra* notes 47–48 and accompanying text (discussing the relationship between racial stigma and sense of self).

²⁷⁴ *Brown*, 347 U.S. at 493.

²⁷⁵ *Id.* at 494 (noting that criticisms of racial segregation "apply with added force to

context of public schools, that is, the context of children.²⁷⁶ Today, *Brown* is rarely thought of as a case of children's special rights because legislators and the Court have rightly extended *Brown's* holding against racial segregation to adult contexts such as public transportation and other public accommodations.²⁷⁷ When *Brown* was decided, however, it granted special rights to children because its explicit holding was so narrow.²⁷⁸

Surely, *Brown* was not about assimilation demands; it concerned quite the opposite. Nonetheless, the Court implicitly invoked identity interests to justify special rights for children. Reframed with regard to the pluralism principle, the Court determined that the state could not justify its socialization policy of segregated schools, because children's identity development was at risk and the state did not invoke any cognizable harm.

A second case worth mentioning is *Roper v. Simmons*, in which the Court held that children have a categorical right under the Eighth Amendment to be free from the death penalty, even though adults do not.²⁷⁹ The pluralism principle does not apply to *Roper* because identity interests were not at stake; however, I highlight *Roper* because it created special rights for children and the *Roper* majority acknowledged that children's vulnerabilities led to that outcome. Children's "vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment."²⁸⁰

As Emily Buss put it, courts should sometimes extend heightened constitutional protections to children in order to "maintain[] fidelity to the principles animating constitutional rights."²⁸¹ Together, *Brown* and *Roper* show that, after examining children's particular vulnerabilities, the Court has indeed extended special rights to children in order to satisfy constitutional principles.²⁸² Similarly, to the extent that constitutional provisions are meant to protect identity interests, they may necessitate special rights

children in grade and high schools").

²⁷⁶ See Michael Heise, *Litigated Learning and the Limits of Law*, 57 VAND. L. REV. 2417, 2419 (2004) [hereinafter Heise, *Litigated Learning*] (noting that *Brown* did not expressly overrule *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

²⁷⁷ See *Lee v. Washington*, 390 U.S. 333 (1968) (prison); *Johnson v. Virginia*, 373 U.S. 61 (1963) (courtroom); *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958) (city park); *Gayle v. Browder*, 352 U.S. 903 (1956) (city bus); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (municipal golf course); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (public beach and bathhouse); see also Carlton Waterhouse, *Avoiding Another Step in a Series of Unfortunate Legal Events: A Consideration of Black Life Under American Law from 1619 to 1972 and a Challenge to Prevailing Notions of Legally Based Reparations*, 26 B.C. THIRD WORLD L.J. 207, 247-48 (2006) (describing how Congress and federal courts extended desegregation to different contexts post-*Brown*).

²⁷⁸ See Heise, *Litigated Learning*, *supra* note 276.

²⁷⁹ 543 U.S. 551, 560 (2005).

²⁸⁰ *Id.* at 553.

²⁸¹ Buss, *Allocating Developmental Control*, *supra* note 17, at 35.

²⁸² For an argument that staying true to constitutional principles requires granting children special rights, see generally Buss, *Constitutional Fidelity*, *supra* note 145, at 355.

for children because children are particularly vulnerable to threats against their identity development.

IV. APPLYING THE PLURALISM PRINCIPLE: A CASE STUDY ON GAY AND LESBIAN YOUTH

As discussed in Part III, the pluralism principle already seems to drive the Supreme Court's existing children's rights jurisprudence. The Supreme Court and lower courts should explicitly recognize and implement the pluralism principle in future disputes regarding children's constitutional rights. The rights of gay and lesbian youth provide fertile ground for a case study on the pluralism principle's applicability to future disputes.

The rights of gay and lesbian youth have become a highly contested area of law. In the past year, nineteen state legislatures considered bills that proposed either expanding or limiting the rights of gay and lesbian youth in public schools.²⁸³ Similarly, numerous courts across the country are wrestling with how to define the rights of gay and lesbian students.²⁸⁴ Deliberations in legislatures and courthouses have produced inconsistent results.

In this Part, I discuss how courts should decide the constitutionality of state policies affecting the identity development and expression of gay and lesbian youth. The sketches in this Part are drawn in broad strokes because particular cases are highly fact specific. Nonetheless, these sketches illustrate how the pluralism principle should guide judicial analysis.

First, I discuss school policies that restrict students from joining noncurricular student groups that promote gay pride. I then address school policies that protect gay and lesbian youth from hate speech. Finally, I discuss the pending case of *C.N. v. Wolf*,²⁸⁵ in which a high school suspended a lesbian student and outed her to her family because she hugged, kissed, and held hands with her girlfriend on school grounds.

A. Free Expression

Student expression related to sexual orientation has become a contentious issue. Most of the debate has focused on the rights of secondary students to participate in gay-straight alliances ("GSAs"), which are non-curricular student organizations dedicated to combating homophobia and fostering welcoming school environments for gays and lesbians.²⁸⁶ Like

²⁸³ See Wyatt Buchanan, *Bills Nationwide Address Gays in Schools: 19 States Have More or Fewer Rights for Students on Agenda*, S.F. CHRON., Apr. 1, 2006, at B1.

²⁸⁴ See Michael Janofsky, *Gay Rights Battlefields Spread to Public Schools*, N.Y. TIMES, June 9, 2005, at A18.

²⁸⁵ 410 F. Supp. 2d 894 (C.D. Cal. 2005).

²⁸⁶ For background on GSAs, see Gay Straight Alliance Network, <http://www.gsnet>

other membership organizations, GSAs are expressive associations.²⁸⁷ For many gay and lesbian youth, joining a GSA is an expression of gay pride. For many other students, joining a GSA is an expression of support for the gay community.

Most GSA-related litigation has involved the Equal Access Act ("EAA"), a federal nondiscrimination law governing noncurricular student organizations.²⁸⁸ Based on the EAA, courts have held fairly consistently that, if a school allows any noncurricular student group to operate on school grounds, it may not bar students from forming GSAs.²⁸⁹ In light of these developments, some policymakers now seek to limit students' access to GSAs by requiring students to obtain parental consent before participating.²⁹⁰ These policymakers are writing new laws to require parental consent for participation in any noncurricular student group, so that there is no disparate treatment between GSAs and other student groups.²⁹¹

In August 2006, Georgia became the first state to pass a statewide parental consent bill, which the governor signed into law.²⁹² According to Georgia's law, parents do not need to sign a new consent form every time their child joins a noncurricular organization; consent is assumed.²⁹³ However, parents may opt out and withdraw consent in writing for specific clubs.²⁹⁴

As both a normative and legal matter, students in Georgia should be able to raise the pluralism principle as a shield, defending themselves against the rights reduction that the Georgia statute embodies. The principle protects students' ability to develop and express their identities. Identity development requires exploring goals and values associated with different social categories; participating in student organizations is one way to explore such identity-forming goals and values. As discussed above,

work.org/ (last visited Sept. 14, 2006).

²⁸⁷ For background on expressive associations and the First Amendment's protection of expressive association, see FARBER, *supra* note 231, at 233–39.

²⁸⁸ According to the EAA, 20 U.S.C. §§ 4071–4074 (2000), if a public secondary school receiving federal funds allows students to form noncurricular student groups at all, it generally must allow students to form any noncurricular group they want, and it must treat all noncurricular groups equally. The EAA makes exceptions, allowing schools to treat particular groups differently when necessary to (1) maintain order and discipline, (2) protect the well-being of students and faculty, or (3) prevent material and substantial interference with the orderly conduct of educational activity. *Id.* §§ 4071(c)–(f); *see also* Sarah Orman, Note, "Being Gay in Lubbock": *The Equal Access Act in Caudillo*, 17 HASTINGS WOMEN'S L.J. 227, 231 (2006) (explaining exceptional circumstances under the EAA).

²⁸⁹ *See* Orman, *supra* note 288. *But see* Caudillo v. Lubbock Indep. Sch. Dist., 311 F. Supp. 2d 550 (N.D. Tex. 2004) (finding that the sexual content in the group's discussions and online communications threatened students' well-being and the school's order and discipline).

²⁹⁰ *See* Buchanan, *supra* note 283.

²⁹¹ *Id.*

²⁹² For background on the Georgia law, see Merritt Melancon, *Schools: Parents Not Keeping Kids Out of Activities*, ATHENS BANNER-HERALD, Aug. 28, 2006, at 1.

²⁹³ *See id.*

²⁹⁴ *See id.*

joining student organizations is also a form of expression. Parental consent is an unjustified hurdle that blocks students' exercise of identity interests. There is no categorical harm to joining student organizations, and thus a categorical rule burdening children's access to student organizations is unjustified.

Based on the psychological literature discussed above, it is desirable for schools to provide students with a safe space to explore their identities without first having to obtain parental permission. As James Marcia pointed out, adolescents who simply adopt their parents' values and goals without exploring alternatives often fail to develop stable, mature identities.²⁹⁵ That is not to say that parental guidance is not an important part of children's identity development; it is simply not the only part. The pluralism principle balances parents' influences at home with a degree of freedom for adolescents to explore their identities in the public sphere, including in their schools.

As a legal matter, consent requirements like Georgia's do not run afoul of the EAA, but they do violate students' First Amendment rights. Some might argue, problematically, that there is no Supreme Court case law that is directly on point. *Kuhlmeier* does not apply because noncurricular student groups, unlike school-sponsored newspapers, constitute public forums.²⁹⁶ *Fraser* also does not apply because noncurricular student groups do not categorically involve low-value obscene or indecent speech.²⁹⁷ However, *Tinker* does provide some guidance.

Advocates of the Georgia law might argue that *Tinker* can be distinguished because the school in *Tinker* barred speech entirely, rather than requiring parental consent.²⁹⁸ Indeed, advocates of the Georgia statute have noted that deference to parents has traditionally played a part in American law.²⁹⁹ Moreover, *Bellotti* identified deference to parents as one of the factors in its three-factor test.³⁰⁰

With that said, the notion that *Tinker* does not control is flawed and Georgia's parental consent law should be found unconstitutional. Typically, the Court has limited children's rights by deferring to parents only after finding that children were vulnerable to harms, as was the case in *Bellotti*.³⁰¹ In the past, the Court's analysis of whether children are vulnerable to harm has comported with the pluralism principle. That is to say, the Court has rejected suggestions that nonconformity with the mainstream is intrinsically harmful and instead has protected children's ability to ex-

²⁹⁵ See *supra* note 87 and accompanying text.

²⁹⁶ See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988).

²⁹⁷ For a discussion of *Fraser*, see *supra* Part III.B.1.b.

²⁹⁸ Students who join student organizations are "speaking" in the sense that they are expressing themselves through association. See FARBER, *supra* note 231, at 233-39.

²⁹⁹ See Buchanan, *supra* note 283.

³⁰⁰ See *Bellotti v. Baird*, 443 U.S. 622, 634 (1979).

³⁰¹ See *supra* notes 176-177 and accompanying text.

plore and express unpopular and unorthodox identities. The Court has only reduced children's rights upon a finding of the cognizable harms narrowly defined in Part II.C. Accordingly, Georgia's categorical requirement of parental consent is unconstitutional. Certainly, parents may wish to forbid their children from participating in after-school programs. They are free to take it upon themselves to withdraw their children from the programs. However, as discussed above, the state is not allowed to pass any laws to facilitate such parental wishes.³⁰²

B. Hate Speech

Another area of unsettled law involves hate speech in childhood contexts. First Amendment jurisprudence protects adults' right to espouse hate speech.³⁰³ However, the Supreme Court has not yet addressed whether hate speech spoken by children to other children should be protected. As described below, lower courts have reached divergent conclusions. Under the pluralism principle, hate speech among children should not be protected because, even though the speech may further the speaker's sense of identity, it does so at the expense of her target's identity interests. Hate speech creates a cognizable harm by undermining other students' identity development.³⁰⁴ In cases involving hate speech in schools, the state legitimately can require child speakers to put down the shield of the pluralism principle, because doing so prevents harms to others.

It is worth emphasizing at the outset that this Article only legitimizes regulation of children's hate speech in school contexts where children can harm other children. Children's constitutional rights have never been co-extensive with those of adults. Accordingly, adults can have a right to espouse hate speech while children do not have a similar right.³⁰⁵

In *Harper v. Poway Unified School District*, the Ninth Circuit held that Poway High School did not violate a student's First Amendment rights when it stopped the student from publicly condemning homosexuality.³⁰⁶ The school required the student to refrain from wearing T-shirts that amounted to "verbal assaults" against gay and lesbian students.³⁰⁷ One T-shirt bore the slogans, "I WILL NOT ACCEPT WHAT GOD HAS CON-

³⁰² See *supra* Part II.C.2.a.

³⁰³ See FARBER, *supra* note 231, at 107–17.

³⁰⁴ Hate speech in school denigrates other students as being inferior, which compromises those students' identity development. For a more detailed theory of the cognizable harms created by hate speech, see *supra* Part III.B.2.

³⁰⁵ Outside the context of hate speech, the Court already has given the government discretion to shield children from other forms of speech, even when the speaker is an adult. See *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978) (rejecting a First Amendment challenge to the FCC's programming schedule, even though it relegated certain programs to late nights because the FCC deemed the programs' content unsuitable for children).

³⁰⁶ 445 F.3d 1166, 1171 (2006).

³⁰⁷ See *id.* at 1178.

DEMLED” and “HOMOSEXUALITY IS SHAMEFUL.”³⁰⁸ The second T-shirt bore the slogans, “BE ASHAMED, OUR SCHOOL HAS EMBRACED WHAT GOD HAS CONDEMNED” and “HOMOSEXUALITY IS SHAMEFUL.”³⁰⁹ The student wore these shirts in response to his high school’s “Day of Silence,” which was intended to “teach tolerance of others, particularly those of a different sexual orientation.”³¹⁰ The Ninth Circuit held that the student’s freedom of expression could be limited because his expression infringed the rights of other students “to be secure and let alone” and, thus, became unprotected speech under *Tinker*.³¹¹

Courts in other federal circuits have reached opposite conclusions in similar cases. Most directly oppositional is *Nixon v. Northern Local School District Board of Education*,³¹² in which a high school disciplined a student for wearing a T-shirt bearing the slogans, “Homosexuality is a sin!,” “Islam is a lie!,” and “Abortion is murder!”³¹³ The district court held that the school violated the First Amendment because the student’s T-shirt did not collide with the rights of other students to be secure and to be let alone.³¹⁴

In another case, *Hansen v. Ann Arbor Public Schools*, a district court held that a school violated the First Amendment when it barred speakers from condemning homosexuality on a Diversity Week panel discussion.³¹⁵ Because the panel was a school-sponsored event, the court analyzed the case under *Kuhlmeier* instead of under *Tinker*.³¹⁶ In other words, the court held that the school could limit student speech if it was “reasonably related to legitimate pedagogical concerns.”³¹⁷ The court acknowledged that “to provide a safe and supportive environment for gay and lesbian students” was a legitimate pedagogical goal.³¹⁸ However, the court determined that the school’s actions were not reasonably related to that goal.³¹⁹

The Ninth Circuit opinion in *Harper* comports with the pluralism principle, while the latter two cases do not. The Ninth Circuit’s opinion made history; it was the first reported opinion to restrict student speech

³⁰⁸ *Id.* at 1171.

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.* at 1178. The Eleventh Circuit has taken another approach to preventing hate speech. It has held that a school banning hate speech, in the form of the confederate flag, did not violate the First Amendment because *Fraser* permits schools to regulate civility in schools broadly. See *Denno v. Sch. Bd. Volusia County, Fla.*, 218 F.3d 1267, 1275 (11th Cir. 2000). However, combating hate speech through *Fraser* is problematic because it stretches the reasoning in *Fraser* too far. See *supra* notes 213–222 and accompanying text.

³¹² 383 F. Supp. 2d 965 (S.D. Ohio 2005).

³¹³ *Id.* at 967.

³¹⁴ See *id.* at 974. The court also held that the student’s T-shirt did not cause substantial disruption under *Tinker* and was not impermissible under *Fraser*. See *id.* at 971, 973.

³¹⁵ 293 F. Supp. 2d 780, 792–803 (E.D. Mich. 2003).

³¹⁶ *Id.* at 793.

³¹⁷ *Id.* at 796.

³¹⁸ *Id.* at 802.

³¹⁹ See *id.*

by relying on *Tinker's* rights-of-others exception.³²⁰ The fact that the Ninth Circuit was trailblazing does not mean that its decision was wrong.

The Supreme Court has not explicitly elaborated what it means to interfere with the rights of other students "to be secure and to be let alone." To discern a meaning for those rights, jurists must look at children's rights jurisprudence generally, which I have demonstrated is guided by the pluralism principle.³²¹ As discussed above, assimilation demands inflict psychological wounds,³²² and hate speech is an assimilation demand because it sends the message that an individual will be despised and denied respect unless she abandons or changes her identity.³²³ The Ninth Circuit was correct to conclude that students' right "to be free and to be let alone" includes a right to develop their identity free of psychological attacks in the form of assimilation demands.³²⁴ This reasoning was used in *Harper*: "Being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society."³²⁵

Giving schools the authority to protect students from hate speech grants them discretionary power, but that discretion is not atypical. Schools already have discretion when it comes to protecting children from other harms. For example, they have more leeway in determining what types of searches and seizures are "reasonable" in school contexts.³²⁶ Schools are also afforded considerable discretion in determining whether student speech would lead to substantial disruption that justifies limiting student speech.³²⁷ Hate speech regulations simply put identity-related wounds on par with physical wounds. Part I, which discussed the gravity of harm caused by assimilation demands, suggests that this parity makes sense, especially in childhood contexts. Children's psychological wounds can lead to consequences as grave as depression and suicide, wounds that may never heal. In contrast, a physical bruise, which schools already have discretion to prevent, might heal in a matter of weeks.

³²⁰ See *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) (noting that "the precise scope of *Tinker's* 'interference with the rights of others' language is unclear"); *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 974 (S.D. Ohio 2005) ("[T]he [c]ourt is not aware of a single decision that has focused on [the rights-of-others exception] in *Tinker* as the sole basis for upholding a school's regulation of student speech."); Cindy Lavorato & John Saunders, *Public High School Students, T-Shirts, and Free Speech: Untangling the Knots*, 209 EDUC. LAW REP. 1, 9 (2006) (noting that the rights-of-others exception in *Tinker* "has been analyzed very little").

³²¹ See *supra* Part III.B.1.

³²² See *supra* Part I.

³²³ Above, I defined hate speech as statements sending the message that others "are to be despised and denied respect because of their identity." See *supra* notes 163–164 and accompanying text.

³²⁴ See *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1178 (9th Cir. 2006).

³²⁵ *Id.*

³²⁶ See *New Jersey v. T.L.O.*, 469 U.S. 325, 741 (1985).

³²⁷ See *supra* notes 249–250 and accompanying text.

The district courts in *Nixon* and *Hansen* erred because they did not take affronts to identity interests seriously. They both offered perfunctory and conclusory assertions that the psychological harms of hate speech do not affect students' security.³²⁸ Both courts seemed to imply that only physical security matters.³²⁹ However, such a determination would be at odds with both the pluralism principle and emerging patterns in Supreme Court jurisprudence.

C. Equal Protection and Privacy

Another current controversy is the pending case of high school student Charlene Nguon, who has brought an equal protection claim against her high school for suspending her after she and her girlfriend held hands, hugged, and kissed on school grounds.³³⁰ According to Nguon, her school never punished opposite-sex couples for similar displays of affection.³³¹ In addition, Nguon claims that her school violated her constitutionally protected right to privacy by outing her to her parents without her consent.³³²

If children's rights were coextensive with adult's rights, Nguon's claims would be straightforward as a matter of law. In *Romer v. Evans*, the Supreme Court stated that animus towards gays and lesbians cannot be the rational basis for any government policy that treats gays and lesbians differently than straights.³³³ If Nguon's school simply wanted to assimilate her to a heteronormative environment, that would amount to nothing more than mere animus toward gays and lesbians.³³⁴ However, since children's rights and adult's rights are not coextensive, the school may try to argue that it may reduce children's rights to equal protection because it has an interest in instilling majoritarian community values at school.³³⁵ Reading

³²⁸ See *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 974 (S.D. Ohio 2005) (“[T]here is no evidence that [Nixon’s] silent, passive expression of opinion interfered with the work of Sheridan Middle School or collided with the rights of other students to be let alone.”); *Hansen v. Ann Arbor Pub. Sch.*, 293 F. Supp. 2d 780, 802 (E.D. Mich. 2003) (“Defendants fail to show why gays would be threatened or be made less ‘safe’ by allowing the expression of . . . [a] viewpoint [condemning homosexuality].”).

³²⁹ A student in *Harper* similarly argued that only physical assault can infringe other students' right to be secure and let alone. See *Harper*, 445 F.3d at 1177. This narrow reading of the rights-of-others exception is problematic not only because psychological attacks produce deep wounds, but also because it would be redundant with *Tinker*'s other exception; physical assaults would almost always amount to “substantial disruptions” of school procedures.

³³⁰ See *C.N. v. Wolf*, 410 F. Supp. 2d 894 (C.D. Cal. 2005) (granting in part and denying in part defendants' motion to dismiss); see also Mehta, *supra* note 8. As this Article goes to publication, the decision in this case is pending.

³³¹ See *C.N.*, 410 F. Supp. 2d at 896.

³³² See *id.*

³³³ 517 U.S. 620, 632 (1996).

³³⁴ See YOSHINO, *supra* note 5, at 69–79 (discussing similar scenarios in the employment context and concluding that pressure to conform to heterosexual norms derives from animus toward gays and lesbians).

³³⁵ A well-known equal protection case on sexual orientation-based bullying in schools

children's rights jurisprudence in light of the pluralism principle suggests that the school should not prevail with this argument.

The Court has only reduced children's rights in cases where the state showed that children were vulnerable to harm.³³⁶ Comporting with the pluralism principle, the Court has not viewed nonconformity as a cognizable harm.³³⁷ Moreover, the Court has protected children's rights to explore various identities.³³⁸ Thus, Nguon's school would have difficulty justifying its alleged disparate treatment by asserting that it sought to enforce students' conformity to specific social values.³³⁹

A more difficult question is whether Nguon has a valid privacy claim. Her case would be easier if she had been entirely closeted, but she had already disclosed her sexual orientation at school. At least one lower court has held that the right to privacy includes a right not to be outed by state actors.³⁴⁰ However, in that case, there was no evidence that the outed party had ever disclosed his sexual orientation to anyone other than his apparent sexual partner.³⁴¹

An adult who has disclosed her sexual orientation to as many people as Nguon had would likely have no valid privacy claim. The Supreme Court has recognized that individuals' constitutional right to privacy includes "the individual interest in avoiding disclosure of personal matters."³⁴² It has also recognized that "the fact that 'an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of information.'"³⁴³ However, adults' rights to privacy cease to exist once their "expectation of privacy" is no longer "reasonable."³⁴⁴ Some

offers little guidance because the school in that case did not allege that it had a legitimate state interest in discriminating on the basis of sexual orientation; it simply claimed that it did not discriminate in the first place. *See Nabozny v. Podlesny*, 92 F.3d 446, 453 (7th Cir. 1996).

³³⁶ *See supra* Part III.B

³³⁷ *See supra* Part III.B.1.

³³⁸ *See supra* Part III.B.1.

³³⁹ Indeed, the principal in *C.N. v. Wolf* has focused on disputing the facts of the case instead of making this rather weak legal argument. *See Kelley-Anne Suarez, Passions Fill O.C. Court in Trial Over Student Rights*, L.A. TIMES, Dec. 13, 2006, at 1.

³⁴⁰ *See Sterling v. Borough of Minersville*, 232 F.3d 190, 192 (3d Cir. 2000) (holding that police officers violated a seventeen-year-old's right to privacy by threatening to disclose his sexual orientation to his parents—a threat which precipitated the boy's suicide); *see also Bloch v. Ribar*, 156 F.3d 673 (6th Cir. 1998) (noting that public disclosure of information regarding sexuality compromises one's privacy interests); *Eastwood v. Dep't of Corr.*, 846 F.2d 627, 631 (10th Cir. 1988) (noting that the right to privacy "is implicated when an individual is forced to disclose information regarding personal sexual matters").

³⁴¹ *See Sterling*, 232 F.3d at 192–93.

³⁴² *Whalen v. Roe*, 429 U.S. 589, 599 (1997); *see also In re Crawford*, 194 F.3d 954, 958–59 (9th Cir. 1999); *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir. 1983); *Plante v. Gonzalez*, 575 F.2d 1119, 1134 (5th Cir. 1978).

³⁴³ U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 770 (1989) (internal quotation marks omitted) (quoting Justice William Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?*, Nelson Timothy Stephens Lectures at the University of Kansas Law School (Sept. 26–27, 1974)).

³⁴⁴ Although the Supreme Court has never applied the "reasonable expectation of pri-

commentators believe that, as a general rule, once an individual is bold enough to display same-sex affection in public, it is unreasonable for that person to expect people not to disclose her sexual orientation to others.³⁴⁵ But children should not be—and have not been—subject to the same general rules developed for adult contexts.

The privacy rights of children should be distinguished from those of adults since a special right is sometimes necessary for childhood contexts.³⁴⁶ To discern whether children require a different legal test, jurists must ask what principle is animating the right to privacy and whether furthering that principle in childhood contexts requires heightening children's privacy rights.³⁴⁷ The common view among courts and commentators is that the principle of self-determination animates the right to privacy, specifically the right to informational privacy.³⁴⁸ Taking self-determination seriously requires affording individuals the ability to determine when to disclose sensitive facts about themselves, facts that, upon disclosure, may inhibit individuals' ability to develop themselves. As Daniel Solove has pointed out, "disclosure [of sensitive personal information] can prevent people from engaging in activities that further their own self-development Disclosure can inhibit people from associating with others, impinging upon freedom of association, and can also destroy anonymity, which is sometimes critical for the promotion of free expression."³⁴⁹

To maintain fidelity to the notion of privacy rights, then, courts should extend special rights of privacy to children when it is necessary to protect their identity development.³⁵⁰ Youth are particularly vulnerable to the harms of assimilation demands. By disclosing one's sexual orientation, an individual becomes more susceptible to assimilation demands. For example, youth who are outed to their parents may receive added pressure from their parents to cease exploring their sexual identity. Indeed, courts have noted

vacy" test—which originated in Fourth Amendment jurisprudence—to informational privacy cases, numerous circuit courts have done so. *See, e.g.*, *Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990) ("Personal, private information in which an individual has a reasonable expectation of confidentiality is protected by one's constitutional right to privacy."); *Kimberlin v. U.S. Dep't of Justice*, 788 F.2d 434, 438 (7th Cir. 1986) ("Whether or not Kimberlin has a privacy interest in the information . . . depends upon whether he has a reasonable expectation of privacy in the information.").

³⁴⁵ *See* Tamar Lewin, *Openly Gay Student's Lawsuit Over Privacy Will Proceed*, N.Y. TIMES, Dec. 2, 2005, at A21; *cf.* *Katz v. United States*, 389 U.S. 347, 351 (1967) (opining in a Fourth Amendment case that "[w]hat a person knowingly exposes to the public" is no longer subject to constitutionally based privacy protections).

³⁴⁶ *See supra* note 281 and accompanying text.

³⁴⁷ *See supra* note 281 and accompanying text.

³⁴⁸ *See* Neil M. Richards, *The Information Privacy Law Project*, 94 GEO. L.J. 1087, 1095–120 (2006); Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477 (2006).

³⁴⁹ Solove, *supra* note 348, at 532.

³⁵⁰ *Cf.* James J. Tomkovicz, *Beyond Secrecy for Secrecy's Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province*, 36 HASTINGS L.J. 645, 698–704 (1985) (proposing a similar Fourth Amendment test, under which privacy rights are protected on the basis of "needs" instead of "expectations").

that disclosure of information regarding one's sexual identity can greatly alter one's relationship with others, including one's family.³⁵¹

Because children are uniquely vulnerable to the harms of being outed, there should be a categorical rule unique to children: the government should not out gay and lesbian youth unless the government shows that doing so prevents cognizable harms. For example, a public school might legitimately out a lesbian student to her parents if doing so was part of a plan to intervene in the student's imminent suicide attempt. The government should never assume that a child's being out in one social context (school) means that the same child is out in another social context (home); such assumptions do not comport with research showing that youth are often out to friends but not to family.³⁵² A special categorical rule for children would not be novel. In contexts such as capital punishment, the state already has extended special categorical protections to children.³⁵³ Moreover, special privacy rights for children comport with both the purpose of privacy rights and the pluralism principle.

In terms of implementation, the categorical rule for children would be easier to administer than the privacy test for adults. The inquiry for adults' informational privacy involves two difficult questions: is the relevant information sensitive enough to trigger privacy interests and, if so, has the adult relinquished her reasonable expectation of privacy by beginning a process of disclosure? Under the categorical rule for children, the first question is the only important one, except in rare cases where the state has an interest in preventing cognizable harms.

One might contend that the categorical rule is nonetheless difficult to implement because a school may need to disclose a student's sexual orientation to explain a rule infraction to parents. For example, if Charlene and her girlfriend violated a globally enforced rule against kissing (which did not implicate equal protection), how should the school explain the infraction to Charlene's parents? If the rule were generally against kissing, there would be no need to disclose information about Charlene's partner's sex,³⁵⁴ just as there would be no need to disclose the partner's race or religion. Quite simply, there will rarely be a need to disclose sexual orientation. So long as a school rule does not hinge on sexual orientation, sexual

³⁵¹ See *supra* note 340.

³⁵² See SAVIN-WILLIAMS, *supra* note 107; see also Todd Brower, *Of Courts and Closets: A Doctrinal and Empirical Analysis of Lesbian and Gay Identity in Courts*, 38 SAN DIEGO L. REV. 565, 567-68 (2001).

³⁵³ See *Roper v. Simmons*, 543 U.S. 551 (2005).

³⁵⁴ Attorneys for Charlene Nguon made this point during oral arguments. See Suarez, *supra* note 339. Certainly, parents may be curious as to whom their child was kissing. They should be encouraged to discuss those details with their child. Consider this analogy: if a parent knows that her daughter chronicles her romantic life in a key-lock diary that she keeps in her school locker, the parent should not be able to demand that the school confiscate the diary, break the lock, and disclose her daughter's secrets. Schools should not be allowed to serve as an instrument used by parents to learn about their children's secrets, unless the child is at risk of cognizable harm.

orientation does not need to be disclosed; meanwhile, any rule that hinges on sexual orientation would implicate equal protection.

CONCLUSION

Assimilation demands are harmful to everyone, but they are particularly harmful to children. Therefore, the pluralism principle proposed in this Article carries normative weight on its own. The fact that Supreme Court jurisprudence supports the pluralism principle only furthers the principle's persuasiveness.

The pluralism principle has been lurking right beneath the surface of the Court's opinions on children's rights. Going forward, courts should implement the principle in a more self-aware, explicit, and systematic manner.

This Article only applied the pluralism principle to current controversies regarding the rights of gay and lesbian youth. The principle can also guide how courts address issues involving other social categories. For example, ethnic minority youth have unsuccessfully argued that schools' grooming codes violated their First Amendment right to express ethnic identity.³⁵⁵ Others have argued unsuccessfully that students should be protected against hate speech targeting religious minorities.³⁵⁶ This Article aims to prompt policymakers, courts, and other commentators to reconsider the reasoning behind those cases and to approach similar cases in the future with the pluralism principle in mind.

³⁵⁵ See *New Rider v. Bd. of Educ.*, 480 F.2d 693 (10th Cir. 1973) (rejecting a First Amendment challenge to a school grooming code with a hair-length requirement that prohibited Pawnee students from wearing traditional Native American hairstyles).

³⁵⁶ See, e.g., *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 971 (S.D. Ohio 2005) (holding that a school violated a student's First Amendment rights by prohibiting the student from wearing to school a T-shirt that denigrated homosexuality and Islam).

Roe Rage: Democratic Constitutionalism and Backlash

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Progressive confidence in constitutional adjudication peaked during the Warren Court and its immediate aftermath. Courts were celebrated as “fora of principle,”¹ privileged sites for the diffusion of human reason. But progressive attitudes toward constitutional adjudication have recently begun to splinter and diverge.² Some progressives, following the call of “popular constitutionalism,” have argued that the Constitution should be taken away from courts and restored to the people.³ Others have emphasized the urgent need for judicial caution and minimalism.⁴

One of the many reasons for this shift is that progressives have become fearful that an assertive judiciary can spark “a political and cultural backlash that may . . . hurt, more than” help, progressive values.⁵ A generation ago, progressives responded to violent backlash against *Brown v. Board of Education*⁶ by attempting to develop principles of constitutional

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¹ Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981).

² Mark Kende observes: “It used to be easy. Liberals generally liked the U.S. Supreme Court. Conservatives were skeptical.” Mark S. Kende, *Foreword*, 54 DRAKE L. REV. 791, 791 (2006). But now, he writes, quoting Bob Dylan, “The times, they are a-changin’.” *Id.*

³ LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* 281–318 (1994); Owen Fiss, *Between Supremacy and Exclusivity*, in *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* 452–67 (Richard W. Bauman & Tsvi Kahana eds., 2006); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

⁴ CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 54 (1999); Martha M. Ertman, *Contractual Purgatory for Sexual Minorities: Not Heaven, but Not Hell Either*, 73 DENV. U. L. REV. 1107 (1996); Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187 (1997).

⁵ Kende, *supra* note 2, at 792.

⁶ 347 U.S. 483 (1954). For a discussion, see Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004) [hereinafter Siegel, *Equality Talk*] (tracing the influence of movements

theory they hoped would justify controversial decisions.⁷ Today, there are many progressives who have lost confidence in this project. They fear that adjudication may cause backlash of the kind they attribute to *Roe v. Wade*,⁸ which they believe gave birth to the New Right. Stunned by the ferocity of the conservative counterattack, progressives have concluded that the best tactic is to take no action that might provoke populist resentments.

In our view the pendulum has swung too far, from excessive confidence in courts to excessive despair. In this Essay we offer a more realistic account of how courts actually function in our democracy. We propose a model that we call “democratic constitutionalism” to analyze the understandings and practices by which constitutional rights have historically been established in the context of cultural controversy. Democratic constitutionalism views interpretive disagreement as a normal condition for the development of constitutional law.⁹

The premise of democratic constitutionalism is that the authority of the Constitution depends on its democratic legitimacy, upon the Constitution’s ability to inspire Americans to recognize it as *their* Constitution. This belief is sustained by traditions of popular engagement that authorize citizens to make claims about the Constitution’s meaning and to oppose their government—through constitutional lawmaking, electoral politics, and the institutions of civil society—when they believe that it is not respecting the Constitution. Government officials, in turn, both resist and respond to these citizen claims. These complex patterns of exchange have historically shaped the meaning of our Constitution.

Courts play a special role in this process. Courts exercise a distinctive form of authority to declare and enforce rights, which they enjoy by virtue of the Constitution and the norms of professional legal reason that they employ. Citizens look to courts to protect important social values and to constrain government whenever it exceeds constitutional limitations. Yet judicial authority to enforce the Constitution, like the authority of all government officials, ultimately depends on the confidence of citizens. If courts interpret the Constitution in terms that diverge from the deeply held convictions of the American people, Americans will find ways to communicate their objections and resist judicial judgments.

for and against *Brown* on subsequent judicial interpretation of *Brown*’s meaning).

⁷ This work sought to address what Alexander Bickel famously called the “counter-majoritarian difficulty.” ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–23 (2d ed., Yale Univ. Press 1986) (1962). For a wide-ranging survey of the effort to create constitutional theory, see Richard H. Fallon, Jr., *How To Choose a Constitutional Theory*, 87 CAL. L. REV. 535 (1999).

⁸ 410 U.S. 113 (1973).

⁹ See, e.g., Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Anti-discrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 487–502 (2000) (describing how sit-ins shaped understandings of federal civil rights power); Siegel, *Equality Talk*, *supra* note 6 (showing how the meaning of *Brown* emerged from a half century of struggles over the decision’s enforcement).

These historically recurring patterns of resistance reflect a deep logic of the American constitutional order, which is shaped by competing commitments to the rule of law and to self-governance. Democratic constitutionalism analyzes the practices employed by citizens and government officials to reconcile these potentially conflicting commitments. Such practices are everywhere around us. Through multiple channels, some explicit and others implicit, Americans have historically mobilized for and against juridical efforts to enforce the Constitution. Courts exercising professional legal reasoning resist and at times respond to popular claims on the Constitution.

Because traditional scholarship has tended to confuse the Constitution with judicial decisionmaking, it has imagined resistance to courts as a threat to the Constitution itself. This is a mistake. To criticize a judicial decision as betraying the Constitution is to speak from a normative identification *with* the Constitution. Citizens who invoke the Constitution to criticize courts associate the Constitution with understandings they find normatively compelling and believe to be binding on others. When citizens speak about their most passionately held commitments in the language of a shared constitutional tradition, they invigorate that tradition. In this way, even resistance to judicial interpretation can enhance the Constitution's democratic legitimacy.

Democratic constitutionalism thus offers a fresh perspective on the potentially constructive effects of backlash. This is not the common view in the legal academy, where law-abidingness and deference to professionals are generally prized. Backlash challenges the presumption that citizens should acquiesce in judicial decisions that speak in the disinterested voice of law. Backlash twice challenges the authority of this voice. In the name of a democratically responsive Constitution, backlash questions the autonomous authority of constitutional law. And in the name of political self-ownership, backlash defies the presumption that lay citizens should without protest defer to the constitutional judgments of legal professionals.

These two challenges go to the core of judicial review. Judges regularly assert the authority of their constitutional judgments by invoking the distinction between law and politics. They rely on professional legal reason to separate law from politics. If judges appear to yield to political pressure, the public may lose confidence in the authority of courts to declare constitutional law.

This tension between law and politics is pervasive in our constitutional democracy. We can see the same dilemma structuring debate over the confirmation of Supreme Court Justices.¹⁰ Senate hearings must affirm the independence of Justices, so that the Supreme Court can proclaim a

¹⁰ Robert Post & Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, 115 YALE L.J. POCKET PART 38 (2006), http://www.thepocketpart.org/2006/01/post_and_siegel.html.

rule of law uncorrupted by merely partisan interests. Yet Senate hearings must also reassure the American people that new appointees to the Supreme Court will interpret the Constitution in ways that are responsive to the democratic will of the people.¹¹ These contradictory imperatives transform confirmation hearings into scenes of high drama and much confusion. When successful, Senate hearings draw Americans of disparate views into debate about the Constitution, even as they dramatize the Constitution as a foundational source of law that exists prior to political struggles over its meaning.

The political grammar of backlash is similar. Backlash expresses the desire of a free people to influence the content of their Constitution, yet backlash also threatens the independence of law. Backlash is where the integrity of the rule of law clashes with the need of our constitutional order for democratic legitimacy.

We propose the model of democratic constitutionalism as a lens through which to understand the structural implications of this conflict. We theorize the unique traditions of argument by which citizens make claims about the Constitution's meaning and the specialized repertoire of techniques by which officials respond to these claims. Democratic constitutionalism describes how our constitutional order actually negotiates the tension between the rule of law and self-governance. It shows how constitutional meaning bends to the insistence of popular beliefs and yet simultaneously retains integrity as law.¹²

Our Essay proceeds in three Parts. In Part I, we sketch the model of democratic constitutionalism, with particular emphasis on its implications for understanding the phenomenon of backlash. Although the costs of backlash are well recognized, democratic constitutionalism identifies certain underappreciated benefits of backlash. Backlash can promote constitutional solidarity and invigorate the democratic legitimacy of constitutional interpretation. Democratic constitutionalism suggests that it is neither feasible nor desirable for courts to elevate conflict avoidance into a fundamental principle of constitutional adjudication.

Because fear of backlash has become an important theme for contemporary jurisprudence, we focus in Part II on the work of three eminent theorists of backlash: Michael Klarman, William Eskridge, and Cass Sunstein. We argue that each of these theorists tends in his own way to overestimate the costs of backlash and to underestimate its benefits. Con-

¹¹ *Id.*

¹² See *infra* note 24 and accompanying text. We have pursued these themes in much of our recent work. See, e.g., Robert Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 110–11 (2003); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA*, 94 CAL. L. REV. 1323 (2006).

temporary scholarly debate does not sufficiently appreciate the ways that citizen engagement in constitutional conflict may contribute to social cohesion in a normatively heterogeneous polity. Our analysis does not yield a general normative methodology for deciding constitutional cases, and indeed we doubt whether any such methodology actually exists. But democratic constitutionalism does elucidate how competing system values shape the process of constitutional decisionmaking.

For those who counsel courts to avoid controversy, *Roe* illustrates the terrible consequences of judicial decisionmaking that provokes intense opposition. Conventional legal scholarship has it that *Roe* rage was a response to judicial overreaching and that legislative reform might have liberalized access to abortion without backlash if only the Court had stayed its hand.¹³ Part III reviews established research on *Roe*'s reception that questions this conventional account. Although *Roe* was immediately subject to jurisprudential critique, political mobilization against the decision expressed opposition to the liberalization of abortion law that had begun years before *Roe* was decided. Drawing on more recent scholarship, we show that mobilization against the liberalization of abortion law expanded over the decade into what we now recognize as *Roe* rage—a broad-based social movement hostile to legal efforts to secure the equality of women and the separation of church and state. *Roe* rage opposes ideals of individualism and secularism that lie at the foundation of our modern constitutional order.

Understood in this way, *Roe* rage poses hard questions for progressives who suggest that courts should systematically decide cases so as to avoid backlash. Although law professors may care deeply about professional questions of judicial technique, citizens who have mobilized against *Roe* care chiefly about matters of substance. These citizens act from a constitutional vision that is intensely concerned not only about abortion, but also about the role of women, sex, family, and religion in American life. They will use every available political means to press this constitutional vision on courts, even if progressives embrace constitutional theories that advise courts to avoid conflict.

Progressives therefore need more than a theory of constitutional conflict avoidance; they need a theory about how to protect constitutional ideals under conditions of constitutional conflict. What is more, they need substantive constitutional ideals. Just as those who supported *Brown* in the face of fierce resistance needed a vision of America living in fidelity to its constitutional commitments, so now progressives require a theory that will enable them to maintain constitutional faith in the midst of *Roe* rage.

¹³ See, e.g., *infra* notes 180–182 and accompanying text.

I. BACKLASH AND THE PRACTICE OF DEMOCRATIC CONSTITUTIONALISM

There may be constitutional provisions of which it can be said, as Larry Alexander and Frederick Schauer have written, that “an important—perhaps *the* important—function of law is its ability to settle authoritatively what is to be done.”¹⁴ Settlement enables law to elicit “socially beneficial cooperative behavior” and to generate “solutions to Prisoners’ Dilemmas and other problems of coordination.”¹⁵ Settlement might well be essential with respect to constitutional provisions that establish the constitutive rules of the national government, as when the Constitution decrees that representation in the House shall be based upon population or when the Constitution stipulates that a federal law must be enacted with the concurrence of both houses of Congress. Backlash with regard to such rules might merely throw sand in the gears, frustrating the capacity of law to provide the benefits of coordination.

But there are many provisions of the Constitution that do not merely establish constitutive rules of government. Paradigmatically associated with rights contained in the Fourteenth, Eighth, and First Amendments, these provisions tend to be open ended and to invite constitutional decisionmaking that expresses national ideals. Americans have often thought it more important that constitutional law *correctly* determine the substance of these provisions than that constitutional law merely settle their content. Backlash to judicial decisions interpreting these provisions demonstrates that for some constitutional questions, authoritative settlement is neither possible nor desirable.

Legal interpretation of these open-ended provisions typically involves the expression of national values like equality, liberty, dignity, family, or faith, which establish a “realm of meaning”¹⁶ that Robert Cover has memorably called “nomos.”¹⁷ Nomos matters because it expresses a national “identity.”¹⁸ Nomos is controversial because the American people are heterogeneous in their values and visions of a good society. This diversity is plainly visible in debates over affirmative action, abortion, and school

¹⁴ Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1377 (1997). The full passage reads:

Thus, an important—perhaps *the* important—function of law is its ability to settle authoritatively what is to be done. That function is performed by all law; but because the Constitution governs all other law, it is especially important for the matters *it* covers to be settled. To the extent that the law is interpreted differently by different interpreters, an overwhelming probability for many socially important issues, it has failed to perform the settlement function.

Id.

¹⁵ *Id.* at 1371.

¹⁶ Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 28 (1983).

¹⁷ *Id.* at 4 (emphasis omitted).

¹⁸ *Id.* at 28.

prayer. Judicial decisions addressing these issues provoke popular resistance because they are topics about which Americans disagree and care passionately. Popular resistance signifies that Americans desire officials to enforce the Constitution in ways that reflect their understanding of constitutional ideals.¹⁹ This desire cannot be ignored. A large and persistent gap between professional and popular understandings of the Constitution, about questions that matter to the public, can threaten the democratic legitimacy of constitutional law.

In this Essay we propose a model for understanding official efforts to enforce the Constitution under conditions of public controversy. We call this model “democratic constitutionalism.” Democratic constitutionalism affirms the role of representative government and mobilized citizens in enforcing the Constitution at the same time as it affirms the role of courts in using professional legal reason to interpret the Constitution. Unlike popular constitutionalism, democratic constitutionalism does not seek to take the Constitution away from courts. Democratic constitutionalism recognizes the essential role of judicially enforced constitutional rights in the American polity. Unlike a juricentric focus on courts, democratic constitutionalism appreciates the essential role that public engagement plays in guiding and legitimating the institutions and practices of judicial review. Constitutional judgments based on professional legal reason can acquire democratic legitimacy only if professional reason is rooted in popular values and ideals. Democratic constitutionalism observes that adjudication is embedded in a constitutional order that regularly invites exchange between officials and citizens over questions of constitutional meaning.

Our concern in this Essay is what happens when judicially elaborated constitutional law conflicts with constitutional meanings generated elsewhere within our constitutional system. Backlash is one possible result of this conflict. Viewed from the systemic perspective of the overarching American constitutional order, backlash seeks to maintain the democratic responsiveness of constitutional meaning. Viewed from the perspective of courts, backlash is a threat to the maintenance of legal authority and control. Democratic constitutionalism invites us to analyze backlash from these distinct but interdependent perspectives.

We begin from history. Americans have continuously struggled to shape the content of constitutional meaning. They did so with regard to

¹⁹ Which constitutional issues become controversial in this way is a matter of historical contingency and circumstance. Sometimes Court decisions intervene in “culture war[s]” about national ideals that are already fierce and ongoing. *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting). Sometimes Court decisions are used by organized groups to inspire political mobilization. Sometimes Court opinions create opposition by overturning established ways of life or by redistributing the goods of status and privilege. See J. M. Balkin, *The Constitution of Status*, 106 *YALE L.J.* 2313 (1997). And sometimes groups struggling for recognition and legitimacy turn to the Court to demand that they be acknowledged within constitutional doctrine. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

questions of race in the 1960s and questions of gender in the 1970s, and we are now in the midst of such a struggle about questions of abortion, gay rights, and religion. Americans have used a myriad of different methods to shape constitutional understandings—sit-ins, protests, political mobilization, congressional use of section five powers, ordinary federal and state legislation, state court litigation, and so on. These struggles are premised on the belief that the Constitution should express a *nomos* that Americans can recognize as their own.

Through these struggles, Americans have consistently sought to embody their constitutional ideals within the domain of judicially enforceable constitutional law.²⁰ Constitutional ideals enforced by courts express national identity; they radiate gravitas and consequence. When entrenched through the professional logic of legal reason, otherwise contested understandings of the nation's ideals receive official endorsement and application by those who feel obligated to obey the law. They become guides for the juridical organization of society, wielding enormous symbolic power and shaping the social meaning of innumerable nonlegal transactions.

Americans have thus found it important that courts articulate a vision of the Constitution that reflects their own ideals. The legitimacy of the American constitutional system has come to depend on the many practices Americans have developed to ensure the democratic accountability of their constitutional law. No doubt constitutional lawmaking plays an important role in sustaining the democratic legitimacy of the American constitutional order, yet because the difficulty of lawmaking is so great and its successful achievement so infrequent, lawmaking alone cannot sustain the Constitution's democratic legitimacy. Article V amendments are so very rare that they cannot provide an effective avenue for connecting constitutional law to popular commitments.²¹ And if twenty-seven constitutional amendments cannot ensure democratic accountability, neither can three or four discrete "constitutional moments."²²

More persistent and nuanced forms of exchange are required to maintain the authority of those who enforce constitutional law in situations of aggravated dispute. Democratic constitutionalism examines the many practices that facilitate an ongoing and continuous communication between courts and the public.²³ These practices must be robust enough to prevent

²⁰ See ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT 10–11* (2005).

²¹ Because the constitutional amendment process is far easier in the states, there is a developing literature on the distinctive role of amendments in state constitutional culture. See, e.g., Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871 (1999).

²² See generally Bruce Ackerman, *A Generation of Betrayal?*, 65 FORDHAM L. REV. 1519 (1997).

²³

Given the infrequency of constitutional lawmaking, the American constitutional order seems to rely on practices of participatory engagement to deliver forms of

constitutional alienation and to maintain solidarity in a normatively heterogeneous community.

One important avenue for influencing constitutional decisionmaking is the appointment of Supreme Court Justices.²⁴ There can be public pressure to choose Justices who are likely to express popular commitments. Those opposed to the innovations of the Warren Court, for example, were attracted to President Reagan's pledge to halt the slide toward "the radical egalitarianism and expansive civil libertarianism of the Warren Court"²⁵ They threw their support behind Reagan because he pledged to nominate Justices who would adopt a "philosophy of judicial restraint."²⁶ It is well documented that the Reagan Justice Department self-consciously and successfully used judicial appointments to alter existing practices of constitutional interpretation.²⁷

Presidential politics and Supreme Court nominations, however, are blunt and infrequent methods of affecting the content of constitutional law. A more democratically dispersed and continuous pathway is the practice of norm contestation, which seeks to transform the values that underlie judicial interpretations of the Constitution. The Reagan administration, for example, used litigation and presidential rhetoric to challenge and discredit the basic ideals that had generated Warren Court precedents.²⁸

The current controversy over same-sex marriage illustrates many of the dynamics of norm contestation. Much of this controversy has transpired

democratic responsiveness that we often associate with formal practices of constitutional lawmaking Popular engagement in constitutional deliberation sustains the democratic authority of original acts of constitutional lawmaking and supplements constitutional lawmaking as a source of the Constitution's democratic authority.

Siegel, *supra* note 12, at 1342–43.

²⁴ Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001); *see also* Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489 (2006) (arguing that judicial appointments have facilitated an emerging "National Surveillance State").

²⁵ Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 464 (1986).

²⁶ Ronald Reagan, *Statement on Senate Confirmation of Sandra Day O'Connor as an Associate Justice of the Supreme Court of the United States*, 1981 PUB. PAPERS 819 (Sept. 21, 1981), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=44281>. For a discussion, *see* Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545 (2006).

²⁷ *See generally* Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363 (2003); Debra Cassens Moss, *The Policy and the Rhetoric of Ed Meese*, A.B.A. J., Feb. 1, 1987, at 64. For a discussion of the provisions of the 1980 and 1984 Republican Party platforms on judicial nominations and abortion, *see infra* note 221.

²⁸ *See* OFFICE OF LEGAL POL'Y, U.S. DEP'T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION 3 (Feb. 19, 1988), available at <http://islandia.law.yale.edu/acs/conference/meese-memos/guidelines.pdf>; Edwin Meese, III, *A Return to the Founders*, NAT'L L.J., June 28, 2004, at 22; Meese, *supra* note 25, at 465–66.

within the context of state court decisions applying state constitutional law.²⁹ Although these decisions are, as a matter of legal doctrine, irrelevant to the interpretation of the federal Constitution, state court opinions about state law are venues within which national values are continually contested and reshaped.³⁰ Understanding the recent controversy about same-sex marriage thus requires us to appreciate the many subtle ways that constitutional norms circulate among divergent actors in the American constitutional system, traveling along informal pathways that do not always conform to official accounts of constitutional lawmaking and interpretation.

Second-wave feminism offers a rich example of successful norm contestation. As late as 1970, it was thought that distinctions based upon sex were natural and proper, and the Equal Protection Clause was accordingly interpreted to have no particular application to sex discrimination.³¹ But as women organized to contest traditional understandings of gender roles, common sense began to evolve. Discrimination based on sex came to seem unreasonable. Because judges interpret constitutional text to express their implicit understanding of the world, the Court began to read the Fourteenth Amendment to require elevated scrutiny for classifications based on sex.³² The Court altered its understanding of the Equal Protection Clause even though the Equal Rights Amendment (“ERA”), which proposed to use the procedures of Article V to amend the Constitution to prohibit discrimination based on sex, was never ratified.³³

Democratic constitutionalism suggests that backlash can be understood as one of many practices of norm contestation through which the

²⁹ See *In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (Ct. App. 2006); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006); *Baker v. State*, 744 A.2d 864 (Vt. 1999).

³⁰ Cf. Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981) (arguing that jurisdictional overlap or redundancy in the American legal system persists because of its utility for litigants exercising the dispute resolution and norm articulation functions of adjudication); Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993) (analyzing how state court decisions can be conceived as contributing to a common constitutional culture); Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006) (observing that America’s federal structure also serves as a path for the movement of international rights across borders).

National constitutional ideals are also influenced by other actors, like Congress in the enactment of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419, 2419 (1996), the various state referenda that have spoken to this question, and those who have proposed a federal constitutional amendment on the subject.

³¹ See, e.g., *Hoyt v. Florida*, 368 U.S. 57 (1961); *Bradwell v. Illinois*, 83 U.S. 130 (1872).

³² See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 190 (1976).

³³ The story is told in Siegel, *supra* note 12. These changes even affected the views of a single Justice during the course of his career. See Reva B. Siegel, *You’ve Come a Long Way, Baby: Rehnquist’s New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871 (2006).

public seeks to influence the content of constitutional law. It is a commonplace of history and political science that these practices can eventually be successful because, in the long run, our constitutional law is plainly susceptible to political influence.³⁴ Our “[c]onstitutional law is historically conditioned and politically shaped.”³⁵ The democratic legitimacy of our constitutional law in part depends on its responsiveness to popular opinion.³⁶ The ongoing possibility of shaping constitutional meaning helps explain why Americans remain faithful to their Constitution even when their constitutional views do not prevail.³⁷ Democratic constitution-

³⁴ See Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1278 (2004) (“The claim here simply is that the Court’s dependence on the other branches to enforce decrees and to refrain from attacking the institution of judicial review necessarily acts as a moderating force[.]” ensuring that judicial review is never wholly independent of politics; positive analysis questions the extent to which judicial review imposes limits on majority rule and so can function either as democracy’s “hope” or “threat”) [hereinafter Friedman, *The Importance of Being Positive*]; Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596 (2003); Mark A. Graber, *Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship*, 27 LAW & SOC. INQUIRY 309 (2002); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87 (1993). Originalism sometimes proffers a picture of constitutional law as entirely immune to political influence, but this picture is obviously untrue. See Post & Siegel, *supra* note 26.

³⁵ H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS 6 (2002); see RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 12 (2004); GEORGE I. LOVELL, LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY 45 (2003); KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO *BROWN* 214 (2004); KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 5 (2007); Paul Frymer, *Acting When Elected Officials Won’t: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935–85*, 97 AM. POL. SCI. REV. 483 (2003); Howard Gillman, *How Political Parties Can Use the Courts To Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511, 512–13 (2002); Mark A. Graber, *Constructing Judicial Review*, 8 ANN. REV. POL. SCI. 425 (2005); Keith E. Whittington, *“Interpose Your Friendly Hand”: Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 584–86 (2005); see also Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 41–45 (1993).

³⁶ On the relationship between democratic legitimation and the necessity for individuals to retain the capacity to express themselves so as to “experience the state as in some way responsive to their own values and ideas,” see Robert Post, *Democracy and Equality*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 27 (2006); Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1524 (1997).

³⁷ Siegel, *supra* note 12, at 1342–43:

In the United States, popular confidence that the Constitution is the People’s is sustained by understandings and practices that draw citizenry into engagement with questions of constitutional meaning and enable communication between engaged citizens and officials charged with enforcing the Constitution.

...
[T]he amenability of constitutional decisionmakers to influence enables public guidance of government officials, and promotes public attachment to government officials. At the same time, the prospect of influencing officials shapes the manner

alism allows us to comprehend how the Constitution can continue to inspire loyalty and commitment despite persistent disagreement.³⁸

Democratic legitimacy, however, comes at a price, because constitutional law defines its integrity precisely in terms of its *independence* from political influence. From the internal perspective of the law, the law/politics distinction is constitutive of legality. That is why courts proudly and insistently proclaim themselves to be “mere instruments of the law.”³⁹ Their authority is to say “what the law is,”⁴⁰ and the law’s content is to be determined by “essentially lawyers’ work”⁴¹ that transpires within a space of “principle and logic”⁴² from which all political considerations are rigorously excluded.⁴³ A judge’s duty is “to uphold the law and to follow the dictates of the Constitution,” not to “serve a constituency.”⁴⁴ “Judges . . . are not political actors . . . They must strive to do what is legally right, all the more so when the result is not the one ‘the home crowd’ wants.”⁴⁵

The very practices that ensure the democratic accountability of the American constitutional system thus seem also to endanger the integrity of American constitutional law. It is no simple matter for courts to find ways of incorporating popular beliefs into the domain of legality while at the same time maintaining fidelity to the demands of professional legal reason.⁴⁶ One might imagine this process as a series of “conversations

in which citizens relate to government officials and to each other. Because citizens must enlist the voice and accommodate the views of others if they are to persuade officials charged with enforcing the Constitution, the quest to secure constitutional recognition may promote forms of community identification, and not merely exacerbate group division. In these and other ways, popular participation in constitutional deliberation, and the role expectations that sustain it, underwrite the legitimacy of government and the solidarity of a normatively heterogeneous community.

³⁸ See LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* 8–9 (2001) (“[A]n unsettled constitution helps build a community founded on consent by enticing losers into a continuing conversation.”).

³⁹ *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 866 (1824).

⁴⁰ *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

⁴¹ ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 46 (1997).

⁴² *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting).

⁴³ *Cheney v. U.S. Dist. Ct. for D.C.*, 541 U.S. 913, 920 (2004) (Scalia, J., sitting alone) (“To expect judges to take account of political consequences—and to assess the high or low degree of them—is to ask judges to do precisely what they should not do.”).

⁴⁴ *Republican Party of Minn. v. White*, 536 U.S. 765, 799 (2002) (Stevens, J., dissenting).

⁴⁵ *Id.* at 806 (Ginsburg, J., dissenting).

⁴⁶

[T]he fascinating thing about the Supreme Court has been that it blends orthodox judicial functions with policy-making functions in a complex mixture But though the judges do enter this realm of policy-making, they enter with their robes on, and they can never (or at any rate seldom) take them off; they are both

between the Court and the people and their representatives,”⁴⁷ but the process is rarely as civilized and orderly as a conversation. The Court must navigate a complex field of intense disagreement in order to produce an account of constitutional law that is democratically legitimate and faithful to norms of professional craft.

Exactly how the Court accomplishes this remarkable feat is insufficiently studied.⁴⁸ Traditional legal scholarship has sought to identify methods of constitutional interpretation that will justify the Court’s decisions to those who might otherwise be disposed to oppose them. But while this approach may give comfort to academics, we doubt that it has much political effect. Serious constitutional controversies, like all political controversies, are not to be solved by some magical methodological trick. Disagreement will not disappear merely because the Court has chosen to frame its argument in one form or another.

Democratic constitutionalism invites us to pay close attention to how the Court actually responds to conditions of disagreement and contestation. The contemporary constitutional law of sex discrimination, for example, first appeared when the Court was able to perceive points of convergence in the nation’s understanding of women as equal citizens that emerged within debates between those who opposed and those who embraced the ERA.⁴⁹ By consolidating these understandings into doctrine, the Court rapidly developed a Fourteenth Amendment gender discrimination jurisprudence that commanded astonishingly widespread support, despite the ERA’s defeat.⁵⁰

Although the American constitutional system is rife with conflict, there is nonetheless widespread interest in preserving the integrity of constitutional law. This is because citizens who seek to embody their own particular constitutional understandings in law have reason to preserve the authority of the rule of law, even as they endeavor to influence the content of judicial decisionmaking. Those who wish to change the content of constitutional law thus face a dilemma: they must sway courts to their own constitutional values and yet they must also preserve the authority of courts to speak for the Constitution in the name of an independent rule of law.⁵¹

empowered and restricted by their “courtly” attributes.

MCCLOSKEY, *supra* note 20, at 12.

⁴⁷ ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 91 (1970); see also Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993).

⁴⁸ Some of the implications of this discussion for norms of professional craft are discussed in Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CAL. L. REV. (forthcoming 2007).

⁴⁹ Siegel, *supra* note 12.

⁵⁰ *Id.*

⁵¹ For a useful account of departmentalism that explicitly theorizes this question, see Keith E. Whittington, *Presidential Challenges to Judicial Supremacy and the Politics of Con-*

Democratic constitutionalism invites us to explore how this dilemma is actually mediated. In *Stenberg v. Carhart*,⁵² for example, the Court struck down “a Nebraska law banning ‘partial birth abortion’”⁵³ because the statute did not contain a “health exception”⁵⁴ allowing the procedure when necessary to preserve the health of a mother. Antiabortion advocates responded to *Stenberg* in a way that communicated complete disagreement with the Court and yet also conveyed respect for the Court’s institutional authority to pronounce law. They pressed Congress to enact legislation resembling the Nebraska law the Court had invalidated and to support this legislation with congressional findings to the effect that facts indicate “that a partial-birth abortion is never necessary to preserve the health of a woman.”⁵⁵ These dubious findings of fact⁵⁶ enabled congressional critics of *Stenberg* to dissent from the Court’s precedent while at the same time preserving nominal allegiance to the rule of law.⁵⁷ Although Congress directly challenged the Court,⁵⁸ it stopped well short of outright defiance. In an opinion whose five-to-four majority comprised only Justices appointed by Presidents Reagan, Bush, and Bush—each elected on a platform pledged to appoint judges to protect the lives of the unborn and traditional family values⁵⁹—the Court responded by deferring to the congressional legisla-

stitutional Meaning, 33 POLITY 365 (2001).

⁵² 530 U.S. 914 (2000).

⁵³ *Id.* at 921.

⁵⁴ *Id.* at 931.

⁵⁵ Partial-Birth Abortion Ban Act of 2003, 18 U.S.C.S. § 1531 (LexisNexis 2006).

⁵⁶ See, e.g., Nat’l Abortion Fed’n v. Gonzales, 437 F.3d 278, 287 (2d Cir. 2006); Planned Parenthood Fed’n of Am., Inc. v. Gonzales, 435 F.3d 1163, 1175 (9th Cir. 2006), *rev’d sub nom.* Gonzales v. Carhart, 127 S. Ct. 1610 (2007).

⁵⁷ See, e.g., 149 CONG. REC. H4922, H4924 (remarks of Rep. Sensenbrenner):

In June 2000, the United States Supreme Court struck down Nebraska’s partial-birth abortion ban The Court . . . held, on the basis of highly disputed factual findings of the district court, that the law was required to include an exception for partial-birth abortions deemed necessary to preserve the health of a woman.

H.R. 760’s new definition of partial-birth abortion addresses the Court’s . . . objection to the Nebraska law by including extensive congressional findings based upon medical evidence received in a series of legislative hearings, that, contrary to the factual findings of the district court in *Stenberg*, a partial-birth abortion is never medically necessary to preserve a woman’s health, poses serious risk to a woman’s health, and in fact is below the requisite standard of medical care.

H.R. 760’s lack of a health exception is based upon Congress’s factual determination that partial-birth abortion is a dangerous procedure that does not serve the health of any woman. The Supreme Court has a long history, particularly in the area of civil rights, of deferring to Congress’s factual conclusions. In doing so, the Court has recognized that Congress’s institutional structure makes it better suited than the judiciary to assess facts upon which it will make policy determinations.

⁵⁸ “The Act’s sponsors left no doubt that their intention was to nullify our ruling in *Stenberg*.” Gonzales v. Carhart, 127 S. Ct. 1610, 1643 n.4 (Ginsburg, J., dissenting).

⁵⁹ See *infra* note 221 for the Republican Party platforms of 1980 and 1984. See also Republican Party Platform of 2004, available at <http://www.gop.com/media/2004platform>.

tion (although repudiating Congress's dubious factfinding)⁶⁰ and by sounding for the first time notes of a new justification for restricting abortion: the protection of women.⁶¹

The American constitutional system has many such devices to allow those who disagree with the Court to express their disagreement in ways that appear to acknowledge the rule of law.⁶² These devices are particularly important to study in the context of backlash and resistance.

pdf; Republican Party Platform of 2000, *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=25849> (“[T]he unborn child has a fundamental individual right to life which cannot be infringed Our purpose is to have legislative and judicial protection of that right against those who perform abortions We support the appointment of judges who respect traditional family values and the sanctity of innocent human life.”); Republican Party Platform of 1988, *available at* <http://patriotpost.us/histdocs/platforms/republican/rep.988.html> (“We applaud President Reagan’s fine record of judicial appointments, and we reaffirm our support for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.”).

⁶⁰ *Carhart*, 127 S. Ct. at 1637–38.

⁶¹ *Id.* at 1634–35. For a discussion of these new antiabortion themes, see *infra* text accompanying notes 258–260. See also Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 ILL. L. REV. 939; Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Women-Protective Abortion Restrictions*, 2007 ILL. L. REV. 991.

⁶² We have analyzed doctrinal techniques the Court employs to mediate this tension in our prior work. For example, we wrote:

The ambiguity created by the *Katzenbach* approach had allowed the contradictory and often tension-filled relationship between political self-determination and the rule of law to persist without either perspective stifling the other. By eliminating this ambiguity and requiring Congress to speak only in the voice of a court, *Garrett* is attempting to disable an important mechanism by which the nation maintains democratic dialogue with its judicially enforced Constitution.

Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 42 (2003) (discussing the Court’s deliberate deferral of the question whether civil rights statutes enacted under commerce and Section Five powers were proper exercises of Section Five authority).

If nonjudicial actors should comply with law except in the most exceptional of circumstances, it is a matter of some significance how we draw the boundary between constitutional law and the Constitution. The broader the reach of constitutional law, the more nonjudicial actors are bound by the legal vision of courts, and the more diminished is the space for the political creation of the Constitution An important dimension of this boundary is the question of whether constitutional law subsists in the principles and reasons advanced in judicial opinions, or whether it is instead confined to the specific holdings of judicial judgments. There is at present intense controversy on this question.

Robert C. Post & Reva B. Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027, 1040 (2004) (discussing debate about the elements of a judicial decision that are binding as law on nonjudicial actors).

II. BACKLASH AND CONSTITUTIONAL SCHOLARSHIP

The *Oxford English Dictionary* informs us that “backlash” initially referred to “the jarring reaction or striking back of a wheel or set of connected wheels in a piece of mechanism, when the motion is not uniform or when sudden pressure is applied.”⁶³ The word very quickly became associated with undesirable and counterproductive effects, as when cotton would “‘backlash’ or wind and entangle itself round the rollers” of a cotton gin,⁶⁴ or a fishing reel would “backlash and snap off” a fish.⁶⁵ In the twentieth century the “fatal backlash”⁶⁶ of an angler’s reel became such a common usage that advertisements boasted “Anti-back-lash”⁶⁷ reels that would cast with “Never a Backlash.”⁶⁸ By the middle of the century the scope of the word had expanded so that a libel suit could “backlash”⁶⁹ and political figures could worry about “a backlash of opinion”⁷⁰ in the context of controversies involving labor strikes⁷¹ and the Marshall Plan.⁷²

The word “backlash” began to be routinely applied to the political arena during the civil rights movement, when the term developed a “wider usage”⁷³ that referred both to Southern resistance to civil rights—“the backlash of a mortally stricken system of inequality”⁷⁴—and also to “the

⁶³ 1 OXFORD ENGLISH DICTIONARY 867 (2d ed. 1989). For examples of this usage, see *Krajewski v. Pharr*, 105 F. 514, 521 (5th Cir. 1900); *Lindbladh v. C.E. Sheppard Co.*, 7 F. Supp. 446, 453 (E.D.N.Y. 1933), *aff’d*, 72 F.2d 1015 (2d Cir. 1934); *Woodworth Planing Mach. Cases* (E.D. Pa. 1852), reported in *W.L.J. Sept. 1852*, at 550; *Holmes’ Ship Steering Apparatus*, *SCI. AM.*, May 9, 1857, at 273; E. M. ElBeheiry, *Contouring Error Control of Machine Tool Drives with Backlash Compensation*, 220 *PROC. INST. MECHANICAL ENGINEERS PART I, J. SYSTEMS & CONTROL ENGINEERING* 395, 395–410 (2006); *Laws Govern Steering*, *N.Y. TIMES*, Aug. 22, 1915, at X8. An 1846 *Glossary of Mechanical Terms* in the first volume of *Scientific American* defined backlash as “the hobbling movement of a wheel not fixed firm on its axis.” *SCI. AM.*, Apr. 9, 1846, at 1.

⁶⁴ *Miscellaneous Intelligence*, *S. AGRICULTURIST & REGISTRAR RURAL AFF.*, June 1835, at 332.

⁶⁵ *A Chapter on Game Fish*, *N.Y. TIMES*, July 7, 1886, at 5.

⁶⁶ *Sea and River Fishing: Chicago Fly-Casting Club Open Tournament*, *FOREST & STREAM*, Aug. 25, 1900, at 149; see *Anglers’ Club Casting Contest*, *FOREST & STREAM*, Dec. 8, 1906, at 908 (“Charles Stepath’s practice had been so good that he was regarded as dangerous, but a backlash in his seventh cast ruined his chances.”).

⁶⁷ *FOREST & STREAM*, Apr. 1919, at 181.

⁶⁸ *FOREST & STREAM*, June 30, 1930, at 446; see *N.Y. TIMES*, May 12, 1954, at 39 (advertising reel with “[a]nti-backlash patented brake”).

⁶⁹ *Libel Suit Backlashes*, *N.Y. TIMES*, July 24, 1952, at 30. The meaning in this context appears to be approximately “boomerang.” At about this time Englishman James Raisin published a “hard boiled novel” entitled *Backlash*. Marquis W. Childs, *Speed Demon*, *N.Y. TIMES*, Feb. 13, 1949, at BR30. An American movie about revenge set in the West, entitled *Backlash*, was directed by John Sturges. *The Screen*, *N.Y. TIMES*, Apr. 21, 1956, at 11. A play entitled *Backlash*, about “a revengeful man,” was proposed for Broadway. Sam Zolotow, *Kern To Do Score for ‘Annie Oakley,’* *N.Y. TIMES*, Sept. 14, 1945, at 20.

⁷⁰ Joseph A. Loftus, *President Confers on Coal Stalemate with Top Advisers*, *N.Y. TIMES*, May 7, 1946, at 1.

⁷¹ *Id.*

⁷² Arthur Krock, *In the Nation*, *N.Y. TIMES*, Feb. 25, 1949, at 22.

⁷³ Edward A. Stephenson, *Backlash*, 40 *AM. SPEECH* 156, 156–57 (1965).

⁷⁴ Harold C. Fleming, *A Southern View of the South*, *N.Y. TIMES*, Apr. 3, 1960, at SM23.

white ‘backlash’ in the North,” as evidenced particularly in George Wallace’s strong showing in the presidential primaries of 1964.⁷⁵ Backlash came to designate counterforces unleashed by threatening changes in the status quo. Social scientists began to refer to what Seymour Martin Lipset and Earl Raab labeled “backlash politics,” which “may be defined as the reaction by groups which are declining in a felt sense of importance, influence, and power, as a result of secular endemic change in the society.”⁷⁶ The women’s movement, for example, sparked a “backlash” among those who felt threatened by women’s evolving role in the workplace and by their pursuit of an equal rights amendment.⁷⁷

Legal scholars who now discuss the “Backlash Thesis” in connection with *Brown v. Board of Education*,⁷⁸ or who now lament “the disastrous backlash that occurred in the wake of *Roe v. Wade*,”⁷⁹ use the term “backlash” to focus on questions of judicial role and judicial authority. These contemporary accounts of resistance to *Brown* or to *Roe* often implicitly adopt the perspective of courts, worrying that judicial decisions have unleashed “the kind of backlash that undermines both the Court and its holdings.”⁸⁰ Democratic constitutionalism resists this narrow judicial perspective on backlash.

Democratic constitutionalism conceptualizes the phenomenon of backlash not merely from the perspective of courts, but also from the point of view of the American constitutional order as a whole. It situates backlash within the dense network of communicative exchange that sustains the democratic legitimacy of the Constitution. Americans believe that constitutional meaning should be embodied in legally enforceable ways *and* that constitutional meaning should be potentially responsive to their own views. Citizens engaged in backlash press government officials to enforce what those citizens believe to be the correct understanding of the Consti-

⁷⁵ Michael Rogin, *Wallace and the Middle Class: White Backlash in Wisconsin*, 30 PUB. OPINION Q., 98, 98–106 & n.12 (1966); *The Nation: Eyes on Goldwater*, N.Y. TIMES, May 10, 1964, at E2; see also John Herbers, *Critical Test for the Nonviolent Way*, N.Y. TIMES, July 5, 1964, at SM 5 (referring to the “white backlash stirred up by Gov. George Wallace of Alabama in three Northern Presidential primaries”); E. W. Kenworthy, *Civil Rights: Politics*, N.Y. TIMES, Apr. 26, 1964, at E6 (“The white back-lash is more amorphous, less organized, but plainly discernible from . . . the vote amassed by Gov. George C. Wallace of Alabama in the Wisconsin Presidential primary.”); Fletcher Knebel, LOOK, Sept. 22, 1964, at 36 (“Transferred to the world of politics, the white backlash aptly describes the resentment of many white Americans to the speed of the great Negro revolution, which has been gathering momentum since the first rash of sit-ins in early 1960.”).

⁷⁶ SEYMOUR MARTIN LIPSET & EARL RAAB, *THE POLITICS OF UNREASON: RIGHT-WING EXTREMISM IN AMERICA, 1790–1970*, at 29 (1970); see also Kenneth L. Karst, *Justice O’Connor and the Substance of Equal Citizenship*, 55 SUP. CT. REV. 357, 377 (2003).

⁷⁷ SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* 230–31 (1991).

⁷⁸ See, e.g., Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994).

⁷⁹ Neal Devins, *I Love You, Big Brother*, 87 CAL. L. REV. 1283, 1297 (1999).

⁸⁰ Laura Krugman Ray, *Justice Ginsburg and the Middle Way*, 68 BROOK. L. REV. 629, 636 (2003).

tution. They press these demands so that officials will interpret the Constitution in ways that are democratically accountable.

Accounts of backlash now dominant in the legal academy do not analyze constitutional conflict from this perspective. They are instead juricentric, viewing backlash as an impediment to judicial efforts to endow constitutional ideals with legal form. In this part of our Essay, we examine the shortcomings of this approach. We analyze the views of three prominent scholars—Michael Klarman, William Eskridge, and Cass Sunstein—who do not typically write from a juricentric standpoint, yet who view backlash primarily in terms of the threat it poses to judicial authority and social solidarity.

Klarman is a historian whose work has significantly contributed to the recent interest in backlash.⁸¹ Although Klarman does not purport to instruct courts how to decide cases, he suggests that adjudication has unique capacity to precipitate opposition, and he intimates that backlash is a sign that courts have failed properly to execute their judicial role. Eskridge and Sunstein have each developed a normative constitutional theory advising courts to decide cases in a manner that avoids certain forms of constitutional conflict. Eskridge warns against judicial review that raises the stakes of politics in ways that may drive persons out of the political process. Sunstein advances a comprehensive and influential theory—“minimalism”—that advises courts to decide cases so as to avoid contentious value choices.

Democratic constitutionalism suggests that some degree of conflict may be an inevitable consequence of vindicating constitutional rights, whether rights are secured by legislation or by adjudication. Constitutional decisions sometimes provoke resistance, especially if they threaten the status of groups that are accustomed to exercising authority and that believe resistance may avert threatened constitutional change. Where controversy is unavoidable, enforcement of a right may nevertheless be justified if the values at stake are sufficiently important.⁸²

Democratic constitutionalism suggests, moreover, that controversy provoked by judicial decisionmaking might even have positive benefits for the American constitutional order. Citizens who oppose court decisions are politically active. They enact their commitment to the importance of constitutional meaning. They seek to persuade other Americans to embrace their constitutional understandings. These forms of engagement lead citizens to identify with the Constitution and with one another. Popular debate about the Constitution infuses the memories and principles of our constitutional tradition with meanings that command popular allegiance and

⁸¹ See, e.g., Klarman, *supra* note 78; see also Friedman, *The Importance of Being Positive*, *supra* note 34, at 1292; Frederick Schauer, *Foreword: The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4, 39 n.133 (2006). An important early influence was certainly GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

⁸² See, e.g., Post, *supra* note 12, at 110.

that would never develop if a normatively estranged citizenry were passively to submit to judicial judgments.

Constitutional theorists of backlash who reason in a juricentric framework have generally been incurious about how commitment to our constitutional order is produced, and so they have tended to ignore or undervalue the forms of political engagement that create democratically legitimate constitutional meaning. A theorist who assumes that citizens identify with the Constitution and who never examines the understandings and practices that sustain this identification is likely to view backlash simply as a harm to be avoided. For these and other reasons, the model of democratic constitutionalism suggests that Klarman, Eskridge, and Sunstein may systematically overestimate the costs of backlash and underestimate its benefits.

A. Michael Klarman

Klarman has advanced an interpretation of *Brown* that holds that although *Brown* neither dismantled segregation nor inspired the civil rights movement, it nevertheless inspired “a massive backlash against racial change”⁸³ that was so vicious that it “in turn created a Northern backlash that contributed significantly to racial change.”⁸⁴ Klarman believes that this effect is not unique to *Brown*, for “many landmark Court rulings seem to have generated backlashes rather than support.”⁸⁵ “Supreme Court rulings often produce unpredictable backlash effects.”⁸⁶ Klarman also believes, however, that the Court broadly reflects society, so that its chief tendency is “to constitutionalize consensus and suppress outliers.”⁸⁷ The Court “rarely, if

⁸³ Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 115 n.494 (1994).

⁸⁴ Michael J. Klarman, *Civil Rights Law: Who Made It and How Much Did It Matter?*, 83 GEO. L.J. 433, 433 n.4 (1994). Klarman offers “The *Brown* Backlash Thesis”:

Brown was indirectly responsible for the landmark civil rights legislation of the mid-1960s by catalyzing southern resistance to racial change. *Brown* propelled southern politics far to the right, as race was exalted over all other issues. In this political environment, men were elected to all levels of public office who were, both by personal predisposition and political calculation, prepared to use virtually any means of resisting racial change, including blatant defiance of federal authority and brutal suppression of civil rights demonstrations. The predictable consequence was a series of violent confrontations between white supremacist law enforcement officials and generally nonviolent demonstrators, which provoked an outcry from national television audiences, leading Congress and the President to intervene with landmark civil rights legislation.

Klarman, *supra* note 83, at 85.

⁸⁵ MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 464 (2004).

⁸⁶ Michael J. Klarman, *How Great Were the “Great” Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1182 (2001) (emphasis added).

⁸⁷ KLARMAN, *supra* note 85, at 453; see also Michael J. Klarman, *What’s So Great*

ever, plays” the “adventurous role” of supporting “the vanguard of a social reform movement.”⁸⁸ “The justices reflect dominant public opinion too much for them to protect truly oppressed groups.”⁸⁹

Klarman must explain how such unadventurous courts can inspire such furious backlash. Klarman’s explanation is significant:

Court rulings such as *Brown* and *Goodridge* produce political backlashes for three principal reasons: They raise the salience of an issue, they incite anger over “outside interference” or “judicial activism,” and they alter the order in which social change would otherwise have occurred.⁹⁰

Of the three principal reasons he advances for backlash, Klarman identifies as “perhaps most important” that “court decisions produce backlashes by commanding that social reform take place in a different order than might otherwise have occurred.”⁹¹ The claim is comparative. Klarman seems to be suggesting that politically responsive institutions, like legislatures and executives, will ordinarily not choose to make the same backlash-producing decisions as courts.⁹² He assumes that democratic politics

About Constitutionalism?, 93 NW. U.L. REV. 145, 172 (1998).

⁸⁸ Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 445 (2005).

⁸⁹ KLARMAN, *supra* note 85, at 449.

⁹⁰ Klarman, *supra* note 88, at 473.

⁹¹ *Id.* at 477; *see also* KLARMAN, *supra* note 85, at 465 (“Court decisions can disrupt the order in which social change might otherwise have occurred by dictating reform in areas where public opinion is not yet ready to accept it.”). There are serious conceptual difficulties associated with the first two reasons articulated by Klarman. To say that the Court provokes backlash because it represents “outside interference” might be relevant in a case like *Brown*, in which Northern values were imposed upon Southern schools, but the idea cannot be generalized to decisions like *Roe* or *Lawrence*, which do not reflect the same degree of regional salience. To say that backlash is caused by antagonism to “judicial activism” is to imply that judicial decisions are inherently more likely to create backlash than legislative decisions. Klarman makes no serious effort to argue that there would be less backlash if Congress, rather than courts, were to have ended school desegregation or abolished the crime of sodomy, and the common sense of the matter is surely to the contrary. The same might be said about Klarman’s point concerning salience. It seems true enough to assert, as Klarman does, that “Court rulings such as *Lawrence* and *Goodridge* forced people who previously had not paid much attention to gay-rights issues to notice what has been happening and to form an opinion on it.” Klarman, *supra* note 88, at 474. But surely federal legislation recognizing same-sex marriage would also force persons to take notice of the issue, and it is not clear that a judicial opinion would generate more salience than would congressional legislation.

⁹² Thus Klarman explains that in the Jim Crow South “white southerners were more adamant about preserving grade-school segregation” than they were about resisting integration “in public transportation, police-department employment, athletic competitions, and voter registration.” Klarman, *supra* note 88, at 477. “Blacks, conversely, were often more interested in voting, ending police brutality, securing decent jobs, and receiving a fair share of public education funds than in desegregating grade schools.” *Id.* There was therefore “space for political negotiation” that *Brown* made “untenable by forcing to the forefront an issue—racial segregation of public schools—on which most white southerners were unwilling to compromise. *Brown* thus virtually ensured a backlash among southern whites.”

ordinarily transpires in a space of “negotiation”⁹³ that naturally functions to avoid decisions that provoke massive resistance. Thus, it might be hypothesized that democratically responsible institutions, like Congress and state legislatures, would not have desegregated schools until the political costs of doing so were acceptable, which is to say until the possibility of creating backlash had diminished. Courts, by contrast, “often”⁹⁴ produce backlash because they respond to “the agendas set by litigants” rather than to “political negotiation.”⁹⁵

The normative implications for adjudication of Klarman’s backlash thesis are deeply ambiguous. In the context of *Brown*, we might take Klarman’s description of backlash to imply that school desegregation, whether ordered by a court or by a legislature, ought to have been postponed indefinitely, or at least until desegregation could have been accomplished without backlash.⁹⁶ Or we might take his positive description to suggest that because desegregation could have been peaceably accomplished through politics and legislation, the Court should not have acted to muddy the waters and provoke massive resistance.

On the former interpretation, Klarman’s thesis would amount to a general caution against the enforcement of constitutional rights whenever such enforcement would produce serious controversy. Backlash avoidance on this account would entrench the existing distribution of rights. We shall not address this interpretation, except to observe that we find its excessive quietism incompatible with a commitment to enforce constitutional rights. We instead focus on the second possible interpretation of Klarman, who could be read as arguing that courts should only cautiously enforce constitutional rights because their efforts will interfere with the realization of constitutional values that might be achieved without conflict through legislation.

The idea that constitutional values can be more harmoniously realized through legislation than through adjudication is one that underlies much contemporary fear of backlash. It seems to rest on a seriously romanticized view of democratic politics. We know, for example, that “‘backlash’ politics by declining groups” is “a recurrent phenomenon in American politics.”⁹⁷ Legislation that intervenes in entrenched status relations

Id. at 477–78.

⁹³ See *supra* note 92.

⁹⁴ Klarman, *supra* note 86, at 1182.

⁹⁵ KLARMAN, *supra* note 85, at 465.

⁹⁶ We appreciate that Klarman himself would probably not draw this normative implication from his own history, because he believes that *Brown* ultimately produced such violent Southern resistance that it provoked a Northern backlash committing the nation to the path of desegregation. From Klarman’s perspective, therefore, *Brown* ultimately (if indirectly) produced a socially desirable outcome. But of course this result could not be known *ex ante*, so that at the time of *Brown* it could not be foreseen that predictable Southern resistance would produce a contingent Northern backlash. *Ex ante*, therefore, the normative implications of Klarman’s analysis are not obvious.

⁹⁷ See Seymour Martin Lipset, *Beyond the Backlash*, 23 ENCOUNTER, Nov. 1964, at 11.

often generates countermobilization⁹⁸ and hence serious controversy.⁹⁹ The very word “backlash” acquired political salience in the context of antagonism generated by the Civil Rights Act of 1964.¹⁰⁰ State ratifications of the ERA also generated a powerful backlash,¹⁰¹ and legislation liberalizing access to abortion sparked “significant countermobilization” in the period immediately before *Roe* was decided.¹⁰²

Klarman might concede that legislation causes backlash and nevertheless argue that rights should be enforced by the popular branches of government, rather than by courts, because adjudication is ineffectual and precipitates costly constitutional controversy without commensurate benefit.¹⁰³ At moments Klarman seems to imply that adjudication cannot alter social practices and beliefs.¹⁰⁴ The implication echoes the thesis advanced by Gerald Rosenberg in 1991 that “courts can seldom produce significant social reform,” although they can “mobilize opponents.”¹⁰⁵

The premise that adjudication is relatively unable to affect the content of social ideals and behavior is shared by some on the left.¹⁰⁶ But this premise contradicts much recent “sociological” scholarship, which “sees legal discourse, categories, and procedures as a framework through which individuals in society come to apprehend reality.”¹⁰⁷ In Austin Sarat’s influential

⁹⁸ See, e.g., Clarence Y.H. Lo, *Countermovements and Conservative Movements in the Contemporary U.S.*, 8 ANN. REV. SOC. 107 (1982); David S. Meyer & Suzanne Staggenbord, *Movements, Countermovements, and the Structure of Political Opportunity*, 101 AM. J. SOC. 1628 (1996).

⁹⁹ See generally Scott Lemieux, *Constitutional Politics and the Political Impact of Feminist Litigation: Legal Challenges to Abortion Law in Comparative Perspective*, at 227–28 (2004) (unpublished Ph.D. Dissertation, University of Washington).

¹⁰⁰ Stephenson, *supra* note 73, at 156.

¹⁰¹ See FALUDI, *supra* note 77; Siegel, *supra* note 12.

¹⁰² See Lemieux, *supra* note 99 at 227–28; *infra* note 192 and accompanying text.

¹⁰³ We should note that on this interpretation Klarman’s account would repudiate the fundamental premise of much post-New Deal liberal legal scholarship that the fundamental function of constitutional law is to repair defects in the political process. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). It is ordinarily thought that constitutional law should intervene if political outcomes are unfair because of prejudice against “discrete and insular minorities.” On this interpretation of Klarman, by contrast, courts should not seek to correct the dynamics of the political process. The role of courts would instead seem to be that of suppressing outliers and consolidating conclusions reached through the political process.

¹⁰⁴ The legitimacy of the Court, according to Klarman, “flows less from the soundness of its legal reasoning than from its ability to predict future trends in public opinion.” Klarman, *supra* note 88, at 488.

¹⁰⁵ ROSENBERG, *supra* note 81, at 341.

¹⁰⁶ See, e.g., STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 218–19 (Univ. Mich. Press, 2d ed. 2004) (1974); Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 DRAKE L. REV. 795, 813–15 (2006) (“To rely on litigation rather than political mobilization, as difficult as it may be, misunderstands both the limits of courts and the lessons of history. It substitutes symbols for substance and clouds our vision with a naïve and romantic belief in the triumph of rights over politics.”).

¹⁰⁷ Paul Schiff Berman, *The Cultural Life of Capital Punishment: Surveying the Benefits of a Cultural Analysis of Law*, 102 COLUM. L. REV. 1129, 1140 (2002) (essay review).

formulation, “law shapes society from the inside out by providing the principal categories in terms of which social life is made to seem largely natural, normal, cohesive and coherent.”¹⁰⁸ This “constitutive vision of law”¹⁰⁹ suggests that adjudicative constitutional law can generate *both* positive commitment *and* negative antagonism.¹¹⁰

Democratic constitutionalism rests on the commonsense idea that judge-made constitutional law and democratic politics affect each other. There are good reasons why Americans have struggled for generations to embody their view of the Constitution within judicially enforced constitutional law. Democratic constitutionalism affirms that these struggles have not been for nothing. There is no theoretically cogent reason to regard adjudication as a social practice that is uniquely incapable of affecting social values. Constitutional meaning, in court-made constitutional law and in many other forms, influences and is influenced by general social beliefs and commitments.

The practical consequences of legal decisions enforcing constitutional values can be seen in Bill Eskridge’s detailed examination of gay rights. Eskridge concludes that “public attitudes can be influenced by changes in the law.”¹¹¹ Eskridge praises the “relative success”¹¹² of the Vermont Supreme Court’s decision in *Baker v. State*,¹¹³ which both recognized the rights of same-sex couples and required the state to provide same-sex couples civil unions rather than equal access to the institution of marriage. Eskridge recounts how the *Baker* decision enabled “the values of tolerance and mutual respect” to find expression in an otherwise stalemated political process.¹¹⁴

Were adjudication irrelevant to the formation of constitutional ideals, it would make sense for courts systematically to avoid the destructive effects of backlash. But because court decisions do affect constitutional values, backlash may be a necessary consequence of vindicating constitutional rights.

¹⁰⁸ Austin D. Sarat, *Redirecting Legal Scholarship in Law Schools*, 12 YALE J.L. & HUMAN. 129, 134 (2000) (book review).

¹⁰⁹ Berman, *supra* note 107, at 1140.

¹¹⁰ Of course it might be the case that in any particular decision, as for example in *Brown*, adjudication failed to produce these positive effects.

¹¹¹ William N. Eskridge, Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 ALB. L. REV. 853, 877 (2001) [hereinafter Eskridge, *Equality Practice*]. “While a court’s options are limited by social norms, judges also can influence the evolution of those norms.” William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Anti-Gay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1405 (2000) [hereinafter Eskridge, *No Promo Homo*].

¹¹² William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1326 (2005).

¹¹³ 744 A.2d 864 (Vt. 1999).

¹¹⁴ Eskridge, *Equality Practice*, *supra* note 111, at 881. For a detailed empirical study of that process, see WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 55–82 (2002); Eskridge, *No Promo Homo*, *supra* note 111, at 1405.

B. William Eskridge

Reasoning about backlash in his role as scholar and as advocate,¹¹⁵ Eskridge offers a larger “pluralism-facilitating theory” of the role of courts in the American constitutional system.¹¹⁶ He draws on the work of John Hart Ely to develop a normative framework that would authorize courts to act to preserve healthy democratic politics in a heterogeneous nation riven by “the emergence, conflict, and triumph of normative identity-based social movements.”¹¹⁷

Eskridge advises judges to issue judgments on the understanding that “pluralist democracy is dynamic and fragile.”¹¹⁸ A healthy pluralist democracy “depends on the commitment of all politically relevant groups to its processes. Political losers may exit the system unless they think their interests will be accommodated or their losses from exiting will exceed their gains.”¹¹⁹ But a pluralist democracy also “needs emerging groups to commit to its processes just as much as it needs established groups to stick to those processes.”¹²⁰ These two prerequisites imply that courts must

¹¹⁵ Eskridge generally conceptualizes backlash as a possible effect of a judicial decision that must be considered like any other relevant effect. Sometimes judges should avoid backlash, while at other times they may need to issue rulings that provoke backlash. For example, Eskridge argues that “equality practice that moves too swiftly, as same-sex marriage apparently did in Hawaii and Alaska, may yield a counterproductive backlash.” Eskridge, *Equality Practice*, *supra* note 111, at 878. But he also believes that a court decision “that moves too slowly risks entrenching a grating inequality.” *Id.* Judges know that if “they protect [a] minority group too little, they risk their own personal and institutional legitimacy if the minority becomes an accepted part of public culture. The Court did its legitimacy no good in *Dred Scott*, *Bradwell*, and *Hardwick*.” Eskridge, *No Promo Homo*, *supra* note 111, at 1400. Eskridge thus affirms that judges establishing contested constitutional meanings may properly incur backlash. *See, e.g.*, ESKRIDGE, *supra* note 114, at 80; Eskridge, *No Promo Homo*, *supra* note 111, at 1394 n.281 (conceding that *Baker* produced “a popular backlash”).

¹¹⁶ Eskridge, *supra* note 112, at 1301.

¹¹⁷ *Id.* at 1296. Eskridge’s ambition to construct judicial norms for the preservation of democratic politics could not be more antithetical to Klarman’s essential premises. Compare *supra* note 103.

¹¹⁸ Eskridge, *supra* note 112, at 1294.

¹¹⁹ *Id.* Eskridge observes:

Groups will disengage when they believe that participation in the system is pointless due to their permanent defeat on issues important to them or their perception that the process is stacked against them, or when the political process imposes fundamental burdens on them or threatens their group identity or cohesion.

Id. at 1293.

¹²⁰ *Id.* at 1294. Eskridge writes:

[T]here are positive reasons to encourage all groups—new and old—to work within the democratic system. Any government depends on the cooperation of citizens in the ordinary affairs of governance. Pluralist democracy potentially engages most citizens in the affairs of governance, and that engagement encourages cooperation across the board. If a lot of Americans drop out of or never drop into our system, it will lose much of that democracy bonus.

avoid decisions that cause established groups to exit from politics, and they must also avoid decisions upholding oppressive legislation that prevents emerging groups from becoming politically engaged.

Eskridge thus argues that courts should avoid rulings like *Roe v. Wade*¹²¹ and *Bowers v. Hardwick*.¹²² Eskridge condemns *Roe* because it recognized a right that caused traditional Americans who oppose abortion to feel “as though they had been disowned by this country”:¹²³

Roe essentially declared a winner in one of the most difficult and divisive public law debates of American history. Don’t bother going to state legislatures to reverse that decision. Don’t bother trying to persuade your neighbors (unless your neighbor is Justice Powell). *Roe* was a threat to our democracy because it raised the stakes of an issue where primordial loyalties ran deep. Not only did *Roe* energize the pro-life movement and accelerate the infusion of sectarian religion into American politics, but it also radicalized many traditionalists.¹²⁴

Eskridge condemns *Hardwick* because it failed to strike down a Georgia consensual sodomy law that symbolically stood for the proposition that “people who engage in ‘homosexual sodomy’ can be considered an out-law class of citizens.”¹²⁵ *Hardwick* “generated a firestorm of protest” because “it seemed like a declaration of war by the state against ‘homosexuals.’”¹²⁶ It “was a judicial blunder in the same way as *Roe*.”¹²⁷ If *Roe* forced traditionalists to exit from American politics, *Hardwick* prevented gays from entering it.

Eskridge’s “pluralism reinforcing” theory is thus about when courts should and should not provoke backlash. His theory turns on an interpretation of the health of the American constitutional system. Eskridge asserts that decisions that drive groups out of politics, whether by upholding oppressive legislation or by constitutionalizing contentious issues, harm pluralist democracy. To assess this assertion, one would need to know precisely what it means to estrange groups from politics. Eskridge’s analysis of this crucial point seems to be conceptualized almost entirely within a

Relatedly, the engagement of diverse groups enriches democratic discourse. When advocates must articulate and defend their proposals to a variety of perspectives and not just to their core supporters, they are more likely to moderate and universalize those proposals.

Id. at 1294–95.

¹²¹ 410 U.S. 113 (1973).

¹²² 478 U.S. 186 (1986).

¹²³ Eskridge, *supra* note 112, at 1312.

¹²⁴ *Id.*

¹²⁵ *Id.* at 1314.

¹²⁶ *Id.*

¹²⁷ *Id.*

juricentric perspective that he otherwise rejects in his scholarship and advocacy.

It would surely harm democracy to prohibit groups from participating in politics; that is why political speech and association are constitutionally protected. But neither *Roe* nor *Hardwick* prevented political participation. To the contrary, each decision provoked opponents to enter the political arena. *Roe* inspired a political campaign to prohibit abortion that changed the shape of both constitutional politics and constitutional law.¹²⁸ Advocates of gay rights were likewise active and successful in the years after *Hardwick*, as Eskridge well appreciates.¹²⁹ By any ordinary descriptive measure, *Roe* and *Hardwick* seem to have increased political engagement rather than diminished it.

How, then, might Eskridge claim that these decisions forced groups out of politics? Eskridge reasons from a conventional complaint about *Roe*, which condemns the decision as the Court's creation of "a fundamental right at the expense of democratic deliberation."¹³⁰ To rely on this characterization is to mistake a political critique of the decision for a description of its actual impact. The force of the claim that *Roe* shut down politics draws on juricentric conventions that are so powerful that they obscure the obvious fact that abortion has become one of the nation's most explosive political questions. The resulting confusion is visible in Scalia's *Casey* dissent, which scores *Roe* for having "fanned into life an issue that has inflamed our national politics" and yet which simultaneously condemns *Roe* for "foreclosing all democratic outlet for the deep passions this issue arouses."¹³¹

Roe did restrict the ambit of potential legislation, limiting majoritarian decisionmaking in the way courts do whenever they vindicate any

¹²⁸ See *infra* Part III. It is true, as Eskridge has observed, that "[s]ome pro-life Americans . . . abandoned state processes and mounted campaigns of private economic warfare or even violence against abortion providers." Eskridge, *supra* note 112, at 1300. But this can no more be regarded as a general exodus from politics than can the violence that accompanied resistance to *Brown*. Cf. Siegel, *supra* note 12, at 1356 (observing the use of "procedurally nonconforming, socially disruptive, and unlawful conduct that draws attention to [a] movement's claims").

¹²⁹ See, e.g., Eskridge, *No Promo Homo*, *supra* note 111. In the immediate aftermath of *Bowers*, gay advocates remained in politics, adding direct action protest, most notably the march on Washington, to ongoing legislative efforts. See Karlyn Barker, *Rights March Drawing Gays to Washington: Rally on the Mall To Follow Week of Lobbying and Protests*, WASH. POST, Oct. 9, 1987, at C1; Peter Freiberg, *The March on Washington: Hundreds of Thousands Take the Gay Cause to the Nation's Capital*, ADVOC., Nov. 10, 1987, reprinted in WITNESS TO REVOLUTION: THE ADVOCATE REPORTS ON GAY AND LESBIAN POLITICS, 1967-1999, at 205 (Chris Bull ed., 1999); see also Peter Freiberg et al., *The New Gay Activism: Adding Bite to the Movement*, ADVOC., June 7, 1988, reprinted in WITNESS TO REVOLUTION, *supra*, at 226 (cataloguing emergence of high-profile, direct-action protest by gays and lesbians to supplement traditional lobbying efforts).

¹³⁰ Jason A. Adkins, Note, *Meet Me at the (West Coast) Hotel: The Lochner Era and the Demise of Roe v. Wade*, 90 MINN. L. REV. 500, 502 (2005).

¹³¹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 995, 1002 (1992) (Scalia, J., dissenting).

constitutional right. Yet *Roe* surely did not foreclose all democratic outlet for the deep passions aroused by the question of abortion. Scalia's claims about *Roe* make sense only when they are seen as efforts to mobilize critics of the decision.¹³² As Scalia well knows, the practical and expressive power of judicial decisions does not shut down politics; it can instead inspire Americans to struggle passionately to shape the exercise of judicial review.¹³³ Judicial review limits, channels, and amplifies democratic politics.¹³⁴ Democratic politics, in turn, shapes the institution of judicial review.¹³⁵ The plain historical fact of the matter is well described by Barry Friedman: "[A]fter all is said and done, if the fight is fought and pursued with focus, and attracts enough adherents, the law changes. *Roe* becomes *Casey*. *Bowers* becomes *Romer* and then *Lawrence*."¹³⁶

Democratic constitutionalism invites us carefully to analyze how groups actually engage in politics over constitutional questions of this kind. As the example of federal late-term abortion legislation suggests,¹³⁷ there are numerous ways for those who dissent from a decision of the Court to signal respect for the rule of law while nonetheless registering vigorous disagreement with the Court's judgment. Such disagreement is frequently expressed in legislation, which offers countless opportunities for judicial critics to interpose practical obstacles to the realization of constitutional norms advanced by a challenged decision.

Roe has accordingly been tested by innumerable statutes that probe its reach and attack its normative underpinnings.¹³⁸ Only four years after *Roe*, the Court "explicitly acknowledged the State's strong interest in protecting the potential life of the fetus" and ruled that it was not unconstitutional

¹³² Efforts of this nature recur in Justice Scalia's dissents. See Post & Siegel, *supra* note 26, at 566–68.

¹³³ Mobilization in support or criticism of a decision is a key form of democratic engagement, even though these forms of collective deliberation do not assume the form of lawmaking, or even find expression through an institution designed to adduce democratic will:

Collective deliberation constructs many of the practical questions that institutions of preference aggregation address; it infuses those practical questions with the kinds of symbolic significance that cause members of a polity to care about their disposition. It helps to forge the kinds of identity and attachment that would cause a population to participate in majoritarian processes.

Siegel, *supra* note 12, at 1341.

¹³⁴ See Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027, 1035–37 (2004).

¹³⁵ See Jack M. Balkin, *Respect-Worthy: Frank Michelman and the Legitimate Constitution*, 39 TULSA L. REV. 485, 505 (2004).

¹³⁶ Friedman, *The Importance of Being Positive*, *supra* note 34, at 1293.

¹³⁷ See *supra* text accompanying notes 52–57.

¹³⁸ See, e.g., *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 442–49 (1983); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976).

for state medicaid programs to exclude abortions even if the programs fund childbirths.¹³⁹ *Roe* has inspired its opponents to “run the long race of politics, keeping the issue salient for long enough to push it to a place on the agenda where it influences not only the appointments process, but also public thought, so that people take the bench prepared to see change happen.”¹⁴⁰ These struggles have produced *Casey* and now *Carhart*.¹⁴¹

In contrast to *Roe*, *Hardwick* refused to articulate a constitutional right. Those seeking to challenge *Hardwick* could not mobilize against a particular opinion as *Roe*'s critics had done. Supporters of gay rights nonetheless had to alter the common sense of sexual orientation, so that discrimination against gays, paradigmatically displayed in criminal sodomy statutes, would no longer seem reasonable or acceptable. The gay rights community successfully met this challenge.¹⁴² Whereas in 1987, 55% of Americans thought that homosexuality between consenting adults should not be legal and 33% thought that it should be legal, by 2001 these numbers had virtually switched: 54% of Americans thought that homosexual relations should be legal and only 42% thought that they should be illegal.¹⁴³ The common sense of sexual orientation had been importantly changed,¹⁴⁴ a fact

¹³⁹ *Maier v. Roe*, 432 U.S. 464, 478 (1977); see *Rust v. Sullivan*, 500 U.S. 173 (1991); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2144–53 (2002).

¹⁴⁰ Friedman, *supra* note 34, at 1294.

¹⁴¹ See *supra* text accompanying notes 56–61; *infra* note 243. We resist the idea that the Court simply decides cases in ways that reflect “popular opinion” or “popular consensus.” The meaning of cases is often too complex to be captured by opinion polls; courts construct as well as reflect popular opinion; politics can be too contested to be captured by any notion of consensus to which adjudication can correspond.

¹⁴² See Adam Nagourney, *Gay Politics and Anti-Politics: A Movement Divided Between Push and Shove*, N.Y. TIMES, Oct. 25, 1998, at D3; Ben White, *Gay and Lesbian Groups Plan To Step Up Voter Turnout Campaigns*, WASH. POST, Sept. 22, 2000 at A16.

¹⁴³ Public Agenda, *Gay Rights: Bills and Proposals*, http://www.publicagenda.org/issues/major_proposals_detail.cfm?issue_type=gay_rights&list=1 (last visited May 12, 2007).

¹⁴⁴ As Michael Klarman describes this history:

Lawrence, like *Brown*, came in the wake of extraordinary changes in attitudes and practices regarding homosexuality. In 1986, Chief Justice Warren Burger in his concurring opinion in *Bowers* recited Blackstone's condemnation of homosexuality as an offense of “deeper malignity” than rape. In the seventeen years between *Bowers* and *Lawrence*, public opinion went from *opposing* the legalization of homosexual relations by fifty-five percent to thirty-three percent to *supporting* legalization by sixty percent to thirty-five percent. Many states, either through legislative or judicial action, nullified laws criminalizing same-sex sodomy. Several states and scores of cities added protection for sexual orientation to their antidiscrimination laws. Nearly two hundred Fortune 500 companies extended job-related benefits to gay partners, as did several states and scores of municipalities for their public employees. The Hawaii Supreme Court invalidated a ban on same-sex marriage, and the Vermont Supreme Court ruled that same-sex couples must at least be permitted to form “civil unions.” In the 1990s, hundreds of openly gay men and women were elected to public offices, and gays and lesbians entered mainstream culture on television, film, and music; in 1998, an openly gay man won a Pulitzer Prize for the first time. In 2003 the Episcopal Church ordained its first openly gay bishop.

that no doubt underlay the Court's eventual decision in 2003 to overrule *Hardwick*.

The model of democratic constitutionalism allows us to appreciate that the constitutional politics inspired by both *Roe* and *Hardwick* are the bread and butter of the American constitutional system. *Roe* and *Hardwick* can be condemned (or praised) as a matter of substantive constitutional law, but we are not persuaded that there is an independent and neutral criterion of healthy political pluralism on which it is possible to condemn them. Eskridge's normative theory of judicial review would seem to derive instead from a strong substantive vision of the kind of tolerance that ought to sustain what John Hart Ely once called the "pluralist's bazaar."¹⁴⁵ It can be said of Eskridge's theory, as it was convincingly said of Ely, that "[t]he representation-reinforcing enterprise is shot full of value choices," including the "(covert) choices about who is justifiably the object of prejudice and whether legislative goals are sufficiently important to warrant the burdens they impose on some members of society."¹⁴⁶

C. Cass Sunstein

In contrast to both Klarman and Eskridge, Sunstein does not focus a great deal on the phenomenon of backlash. He knows, of course, that court decisions "may produce an intense social backlash, in the process delegitimizing both the Court and the cause it favors."¹⁴⁷ But this possibility is only one of many reasons that Sunstein advances for the jurisprudence that he has so forcefully articulated during the last decade, which he calls "minimalism."¹⁴⁸ The "distinguishing feature" of minimalism is support for "narrow, incremental decisions, not broad rulings that the nation may later have cause to regret."¹⁴⁹ Minimalist decisions are "*narrow rather than wide*," because "[t]hey decide the case at hand; they do not decide other cases too unless they are forced to do so"¹⁵⁰ And they are "*shallow rather than deep*," because they "try to avoid issues of basic principle and in-

Both *Brown* and *Lawrence* reflected, at least as much as they produced, changes in social attitudes and practices.

Klarman, *supra* note 88, at 443–44.

¹⁴⁵ ELY, *supra* note 103, at 152.

¹⁴⁶ Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 140 (1981).

¹⁴⁷ Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 33 (1996).

¹⁴⁸ CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 54 (1999).

¹⁴⁹ CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* xiii (2005).

¹⁵⁰ Sunstein, *supra* note 147, at 15.

stead attempt to reach incompletely theorized agreements.”¹⁵¹ Sunstein regards *Roe* as “a blunder insofar as it resolved so much so quickly.”¹⁵²

Minimalism has for Sunstein evolved into a full-fledged and free-standing account of the appropriate role of a judge in the American constitutional system.¹⁵³ Sunstein’s embrace of minimalism epitomizes progressives’ diminishing commitment to adjudication in American constitutionalism.¹⁵⁴ Although we have in other contexts been criticized for desiring “to take the Constitution away from the courts,”¹⁵⁵ democratic constitutionalism supports a far more robust account of constitutional adjudication than does Sunstein’s minimalism.

Sunstein offers five reasons to support minimalism.¹⁵⁶ Minimalism reduces decision costs for courts trying to decide cases.¹⁵⁷ It reduces the error costs associated with mistaken judgments.¹⁵⁸ It reduces the difficulties associated with “bounded rationality, including lack of knowledge of unanticipated adverse effects.”¹⁵⁹ It “helps a society to deal with reasonable pluralism.”¹⁶⁰ And, “perhaps most important[ly],” minimalism “allows the democratic process a great deal of room in which to adapt to coming de-

¹⁵¹ *Id.* at 20.

¹⁵² *Id.* at 31.

¹⁵³ In his earlier writings, Sunstein had stressed that “it would be foolish to suggest . . . that minimalism is generally a good strategy . . . Everything depends on contextual considerations.” SUNSTEIN, *supra* note 148, at 50; *see* Sunstein, *supra* note 147, at 28, 30 (“Minimalism is appropriate only in certain contexts. It is hardly a sensible approach for all officials, or even all judges, all of the time . . . The choice between minimalism and its alternatives depends on an array of pragmatic considerations and on judgments about the capacities of various institutional actors.”). In his most recent book, however, Sunstein categorizes minimalism as one of “the four approaches that have long dominated constitutional debates.” SUNSTEIN, *supra* note 149, at xi. The other three are fundamentalism, which holds that “the Constitution must be interpreted according to the ‘original understanding;’” perfectionism, which holds that “the Constitution” should be interpreted to make it “the best that it can be;” and majoritarianism, which holds that “courts should defer to the judgments of elected representatives.” *Id.* at xii–xiii. Because Sunstein asserts that there are “but few supporters on the current federal courts” for perfectionism or majoritarianism, he believes that “modern constitutional disputes . . . are best understood in terms of the division between fundamentalism and minimalism.” *Id.* at xi, 30.

¹⁵⁴ Of course this is not true of all progressives. *See, e.g.,* David J. Barron, *What’s Wrong with Conservative Constitutionalism? Two Styles of Progressive Constitutional Critique and the Choice they Present*, 1 HARV. L. & POL’Y REV. (Sept. 18, 2006), http://www.hlpronline.com/2006/07/barron_01.html; William P. Marshall, *The Empty Promise of Compassionate Conservatism: A Reply to Judge Wilkinson*, 90 VA. L. REV. 355 (2004).

¹⁵⁵ Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539, 1564 (2005); *see* Barron, *supra* note 154; Robert Post & Reva Siegel, *Democratic Constitutionalism: A Reply to Professor Barron*, 1 HARV. L. & POL’Y REV. (Sept. 18, 2006), http://www.hlpronline.com/2006/08/post_siegel_01.html.

¹⁵⁶ SUNSTEIN, *supra* note 148, at 53–54.

¹⁵⁷ *Id.* at 47.

¹⁵⁸ *Id.* at 49.

¹⁵⁹ *Id.* at 53. It is under this rubric that Sunstein explicitly places the question of backlash, which is the possibility “that a judicial ruling could face intense political opposition in a way that would be counterproductive to the very moral and political claims that it is being asked to endorse.” *Id.* at 54; *see* SUNSTEIN, *supra* note 149, at 100–01.

¹⁶⁰ SUNSTEIN, *supra* note 148, at 51.

velopments, to produce mutually advantageous compromises, and to add new information and perspectives to legal issues.”¹⁶¹

The first three of these reasons advance pragmatic considerations that are more or less cogent depending on the circumstances of particular cases. They involve trade-offs about which little can be said in the abstract. But the final two reasons articulate more systemic justifications for minimalism. We have already discussed the last of these justifications, democracy, in our consideration of Eskridge. Sunstein believes that minimalism promotes “democratic accountability and democratic deliberation” and in this way “is self-consciously connected with the liberal principle of legitimacy.”¹⁶² But Sunstein, like Eskridge, tends to adopt the juricentric view that judicial decisionmaking is incompatible with democratic engagement. He writes that for a court to protect a constitutional right is to “rule some practices off-limits to politics.”¹⁶³ Sunstein, no less than Eskridge, is in the grip of an image of constitutional law as “*democracy-foreclosing*.”¹⁶⁴

Democratic constitutionalism refuses to accept this image, and it thus provides a more nuanced appreciation of the actual operation of our constitutional system. No court, including the Supreme Court, has the capacity to rule a controversial issue “off-limits to politics.”¹⁶⁵ As Jon Stewart ironically reports in his discussion of *Roe*, “[t]he Court rules that the right to privacy protects a woman’s decision to have an abortion and the fetus is not a person with constitutional rights, thus ending all debate on this once-controversial issue.”¹⁶⁶ Of course constitutionalization of a right alters the nature of democratic politics. It focuses debate on judicial opinions; it eliminates particular legislative outcomes; it injects constitutional principles into debate; it may, to use the language of both Eskridge and Friedman, “raise the stakes of politics.”¹⁶⁷

¹⁶¹ *Id.* at 53.

¹⁶² Sunstein, *supra* note 147, at 7–8.

¹⁶³ SUNSTEIN, *supra* note 148, at 26.

¹⁶⁴ *Id.* at 26. “The advantage of minimalism over perfectionism should now be clear. Minimalists respect democratic prerogatives.” SUNSTEIN, *supra* note 149, at 103; *cf. id.* at 104: “*Roe* . . . has long dominated debates over the future direction of the Supreme Court. In every recent presidential election, the question, *What will be the future of the Supreme Court?* is often taken, by liberals and conservatives alike, to be code for, *What will happen to the right to choose abortion?*”

¹⁶⁵ Waldron, *supra* note 3, at 1369.

¹⁶⁶ JON STEWART ET AL., *AMERICA (THE BOOK): A CITIZEN’S GUIDE TO DEMOCRACY IN ACTION 90* (2004); *cf.* John F. Basiak, Jr., *Dangerous Predictions: Referencing “Emerging” History and Tradition in Substantive Due Process Jurisprudence in an Era of Blue State Federalism*, 15 WIDENER L.J. 135, 155 (2005) (“As a result of *Roe*, the United States Supreme Court removed the issue of abortion from the public debate and placed it into the nearly untouchable sphere of fundamental rights guaranteed by the Fourteenth Amendment.”).

¹⁶⁷ Eskridge, *supra* note 112, at 1310 (“Judicial review can raise the stakes of politics by taking issues away from the political system prematurely; by frustrating a group’s ability to organize, bond, and express the values of its members; or by demonizing an out-group.”); Friedman, *The Importance of Being Positive*, *supra* note 34, at 1294 (constitutional decisionmaking “raises the stakes of the debate, and intensifies it”).

Even so, it is a mistake to imagine the relationship between constitutional adjudication and democracy as a zero-sum game in which the augmentation of one necessarily entails the diminishment of the other. Although constitutionalizing a right takes certain legislative outcomes off the table, it can also invigorate and transform politics.¹⁶⁸ Whether and how a court should constitutionalize a right is a contextual judgment that must be evaluated at the level of discrete rights and individual cases. Certain rights, for example those of freedom of speech and association, may be required by democracy itself.¹⁶⁹ Other rights impose limits on democratic politics in the name of fundamental constitutional ideals; they prohibit torture or repudiate practices that perpetuate unjust status relations.

Judges vindicating constitutional rights should of course consider the effect of their decisions on democratic politics. This is what judges do in the ordinary exercise of their professional legal reason. Courts routinely determine, for example, whether constitutional values are sufficiently important to justify strict judicial scrutiny of their potential infringement, or whether constitutional values are sufficiently attenuated that courts should examine their potential violation using only rational basis review. A theory of the proper relationship between adjudication and democratic politics necessarily lies coiled at the core of every judicially defined and enforced constitutional right. (Sunstein describes how judges of different interpretive philosophies will approach this problem in his excellent contribution to this volume.)¹⁷⁰

The assumption that avoiding conflict is necessary for social solidarity is visible in the fifth justification advanced by Sunstein to support minimalism, which counsels interpreting the Constitution in ways that accommodate a “reasonable pluralism.” In “heterogeneous society,” Sunstein notes, “reasonable people disagree on a large number of topics.”¹⁷¹ Because constitutional law applies to an entire heterogeneous population,¹⁷² Sunstein believes courts should “try to economize on moral disagreement by refusing to challenge other people’s deeply held moral commitments when it is not necessary for them to do so.”¹⁷³ Courts ought to embrace “incompletely theorized agreements” so that they can put “disagreements to one side” and converge “on an outcome and a relatively modest rationale on its behalf.”¹⁷⁴ “By bracketing the largest disputes, a minimalist court

¹⁶⁸ See, e.g., *supra* note 135 and accompanying text. See generally Part III.A *infra*.

¹⁶⁹ Jürgen Habermas, *On the Internal Relation Between the Rule of Law and Democracy*, in CONSTITUTIONALISM AND DEMOCRACY 267–72 (Richard Bellamy ed., 2006).

¹⁷⁰ Cass R. Sunstein, *Backlash’s Travels*, 42 HARV. C.R.-C.L. L. REV. 435 (2007).

¹⁷¹ SUNSTEIN, *supra* note 148, at 50.

¹⁷² *Id.* at 50.

¹⁷³ Sunstein, *supra* note 147, at 8.

¹⁷⁴ *Id.* at 21. At times, Sunstein seems to back off the view that adjudication should understand the Constitution as an incompletely theorized agreement. There are points at which Sunstein candidly acknowledges that “we follow the Constitution because it is good for us to follow the Constitution.” SUNSTEIN, *supra* note 149, at 75. Sunstein writes:

attempts to achieve a great goal of such a society: making agreement possible when agreement is necessary, and making agreement unnecessary when agreement is impossible.”¹⁷⁵ Sunstein argues that this approach is associated with two distinct social purposes: “promoting social stability and . . . achieving a form of mutual respect.”¹⁷⁶

Minimalism approaches conflict with the assumption that it is a threat to social cohesion and legitimacy. Democratic constitutionalism, by contrast, examines the understandings and practices that promote the social cohesion and legitimacy of our constitutional order. It considers the possibility that controversy over constitutional meaning might promote cohesion under conditions of normative heterogeneity. Minimalism’s treatment of the Constitution as an “incompletely theorized agreement” may actually be counterproductive if it inhibits forms of engagement that contribute to the very “social stability” minimalism means to promote.

Democratic constitutionalism recognizes that Americans engaged in dispute over the meaning of a shared tradition are joined by common understandings and practices. When citizens invoke the Constitution as a basis for criticizing judicial decisions, they are expressing their estrangement from government by identifying with the Constitution. To demonstrate that the Constitution vindicates their ideals, they appeal to memories and principles they share with others whom they hope to persuade. These traditions of argument guide disputants to invoke the Constitution as a powerful symbol of common American commitments. In these and other ways, backlash can strengthen social cohesion and constitutional legitimacy in a normatively heterogeneous nation like our own, which draws upon long-standing practices of argument to struggle over the meaning of a shared constitutional tradition.¹⁷⁷

[The Constitution] is legitimate because it provides an excellent framework for democratic self-government and promotes other goals as well, including liberty and also economic prosperity

[S]tability is only one value, and for good societies it is not the most important one Since 1950 our constitutional system has not been entirely stable; the document has been reinterpreted to ban racial segregation, to protect the right to vote, to forbid sex discrimination, and to contain a robust principle of free speech. Should we really have sought more stability?

Id. at 76. Unless we misinterpret Sunstein, this passage assumes that a basic justification for constitutional law is to express fundamental social values. (This is what Sunstein calls perfectionism. *See supra* note 153.) Sunstein invokes these values to distinguish desirable from undesirable judicial decisions. Yet these values cannot be deduced from minimalism. They must instead be determined by reference to the ideals that the Constitution is meant to express. Courts that seek to attain only “incompletely theorized agreements” must systematically obscure the significance and guidance of these ideals. Sunstein, *supra* note 147, at 21.

¹⁷⁵ SUNSTEIN, *supra* note 148, at 50.

¹⁷⁶ *Id.*

¹⁷⁷ *See, e.g.,* Siegel, *supra* note 12, at 1418–19:

Minimalism does not consider this possibility. It views controversy as a simple threat to social cohesion and recommends severing the connection between constitutional adjudication and constitutional meaning in order to avoid conflict. Minimalism would thus undercut the very practices of deliberative engagement that democratic constitutionalism identifies as potential sources of social stability.

If conflict over a shared tradition in fact supplies forms of social cohesion, then the most weighty justification for minimalism must be the second goal articulated by Sunstein, which is the need to decide cases in such a way as to maintain “mutual respect”¹⁷⁸ in a heterogeneous and plural polity. This is the topic to which we turn in the third and last part of this Essay.

III. DEMOCRACY AND DISAGREEMENT: ABORTION AND *ROE* RAGE

Constitutional scholarship that cautions judges to interpret the Constitution so as to avoid controversy reflects a major shift in the tone of legal scholarship, particularly on the left. No doubt this shift reflects a fear of right-wing activism by new conservative appointees to the federal judiciary. But it also expresses anxiety about the causes of contemporary conservative dominance, which many attribute to the “intense” “popular backlash against *Roe*.”¹⁷⁹

Progressives dread *Roe* rage. Consider Sunstein’s account of *Roe*’s “enduring harmful effects on American life”:¹⁸⁰

By 1973 . . . state legislatures were moving firmly to expand legal access to abortion, and it is likely that a broad guarantee of access would have been available even without *Roe* [T]he decision may well have created the Moral Majority, helped de-

Through most, but not all, of American history, constitutional contestation that challenges authoritative pronouncements of constitutional law has worked to vitalize rather than undermine the system. This paradoxical result obtains because vigorous challenges to pronouncements of law are generally conducted by means of a complex code that preserves respect for legal authorities and rule of law values, even as overlapping understandings of authority license dispute about constitutional meaning

. . . . The practice of negotiating conflict about the terms of collective life by reference to a shared constitutional tradition creates community in the struggle over the meaning of that tradition; it forges community under conditions of normative dissensus.

¹⁷⁸ SUNSTEIN, *supra* note 149, at 76.

¹⁷⁹ A. Jean Thomas, *The Hard Edge of Kulturkampf: Cultural Violence, Political Backlashes, and Judicial Resistance to Lawrence and Brown*, 23 QUINNIPIAC L. REV. 707, 734–35 (2004).

¹⁸⁰ Cass R. Sunstein, *From Theory to Practice*, 29 ARIZ. ST. L.J. 389, 394–95 (1997).

feat the equal rights amendment, and undermined the women's movement by spurring opposition and demobilizing potential adherents. At the same time, *Roe* may have taken national policy too abruptly to a point toward which it was groping more slowly, and in the process may have prevented state legislatures from working out longlasting solutions based upon broad public consensus.¹⁸¹

Sunstein comes very close to holding *Roe* responsible for the sweeping right-wing backlash that in recent years has devastated liberal principles across wide swaths of public policy. He is not alone in this assessment.¹⁸² Progressives interested in appeasing *Roe* rage seem less concerned about *Roe*'s reversal than about the prospect that backlash against *Roe* might swell to engulf the entire liberal agenda.¹⁸³

Minimalism's emphasis on the need for judicial review to maintain a "mutual respect" between groups who disagree in America's diverse pol-

¹⁸¹ Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 766 (1991).

¹⁸² See, e.g., Ken I. Kersch, *Justice Breyer's Mandarin Liberty*, 73 U. CHI. L. REV. 759, 797-98 (2006) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005)) ("Politically, the Court's decision to declare abortion to be a national right served as a catalyst for the Right to Life movement. That movement, in turn, played a major role in realigning the party loyalties of millions of Americans . . ."); David Brooks, *Roe's Birth, and Death*, N.Y. TIMES, Apr. 21, 2005, at A23 (explaining that as a result of *Roe*, "[r]eligious conservatives became alienated from their own government, feeling that their democratic rights had been usurped by robed elitists"); Cynthia Gorney, *Imagine a Nation Without Roe v. Wade*, N.Y. TIMES, Feb. 27, 2005, § 4, at 5 ("Indeed, *Roe* created the national right-to-life movement, forging a powerful instant alliance among what had been scores of scattered local opposition groups. What would happen to that movement, should the galvanizing target of its loathing suddenly disappear?"); Jeffrey Rosen, *The Day After Roe*, ATLANTIC MONTHLY, June 2006, at 56, 57 ("Critics of *Roe v. Wade* often compare it to the Dred Scott decision on slavery before the Civil War. In both cases, the Supreme Court overturned political compromises that national majorities supported, provoking dramatic political backlashes."); Benjamin Wittes, *Letting Go of Roe*, ATLANTIC MONTHLY, Jan. 2005, at 48, 51 ("[T]he Court has not backed down on abortion. Thus the pro-life sense of disenfranchisement has been irremediable—making it all the more potent. One effect of *Roe* was to mobilize a permanent constituency for criminalizing abortion—a constituency that has driven much of the southern realignment toward conservatism.")

¹⁸³ The views of Sanford Levinson seem representative:

[M]y concerns about *Roe*, and whether the Democratic Party should continue to expend a great deal of political capital on keeping it on the books, have less to do with specifically legal concerns—i.e., what constitutes the best interpretation of the Constitution?—and far more to do with the politics of the abortion issue in 2005 and beyond. I am increasingly persuaded that the principal beneficiary of the current struggle to maintain *Roe* is the Republican Party. Indeed, I have often referred to *Roe* as "the gift that keeps on giving" inasmuch as it has served to send many good, decent, committed largely (though certainly not exclusively) working-class voters into the arms of a party that works systematically against their material interests but is willing to pander to their serious value commitment to a "right to life."

ity suggests that *Roe* rage might have been avoided if only courts had preserved a proper neutrality as between divergent perspectives. If courts had only been suitably modest, so the argument might run, the rise of the New Right might have been avoided. Although many find this argument compelling, its force has been substantially undermined by new historical scholarship on antiabortion mobilization in the 1970s.¹⁸⁴

Scholarship on antiabortion movements in the 1970s has come in two waves. The first wave rejected the view that abortion backlash was best understood as a response to judicial overreaching. It demonstrated that political mobilization against *Roe* was part of a larger movement that opposed liberalizing access to abortion, whether authorized by legislation or by adjudication. An even more recent body of scholarship has begun to explore the normative commitments that animated opposition to abortion. It shows that over the course of the decade mobilization against *Roe* expanded into a vehicle for challenging constitutional protections for gender equality and the secular state. This second body of scholarship makes clear that the constitutional vision voiced by Americans who mobilized against *Roe* at the end of the decade is deeply incompatible with progressive constitutional commitments.¹⁸⁵

We argue that in such circumstances the aspiration for “mutual respect” cannot offer much guidance in negotiating the controversies actually produced by *Roe* rage. At root, resistance to *Roe* poses a normative challenge

¹⁸⁴ Justice Ginsburg’s influential critique of *Roe* was published before the appearance of much of the scholarship discussed in this Part. See, e.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185 (1992).

¹⁸⁵ *Roe*’s progressive critics often discuss the values animating the antiabortion movement in highly selective terms, as though the movement were merely about protecting a disembodied fetus. See, e.g., Levinson, *supra* note 183:

I do think that abortion is special, in much the same way that capital punishment is distinguished from ordinary punishment because, as it is often said, “death is special.” Speaking personally, I have a great deal of trouble genuinely respecting those who oppose same-sex marriage or other acknowledgment of full equality for gays, lesbians, bisexuals, and transsexuals. I don’t have the same trouble understanding those, like our friend Mike Paulsen, who oppose abortion. I am confident that I am not alone in this feeling. There are some issues where I’m more than willing to say, in effect, “Shut up. You’re a bigot and that’s all there is to it. You shouldn’t expect to be able to articulate your views, and even potentially win, in the ordinary political marketplace, because they have been taken off the political table by the Constitution.” But I find it difficult to say this to people I regard as on “the other side” of the abortion issue. To constitutionalize the issue is, in a profound sense, to treat them with disrespect, to say that the issue has indeed been pretermitted by lawyers interpreting a notoriously open-ended document.

Progressives who reason about the antiabortion movement in this way fail to appreciate that the movement has become politically (and therefore jurisprudentially) influential in large part because of its views about traditional family values and of the importance of religion in public life. For a discussion of the importance of this distinction, see the text accompanying note 192, *infra*; for evidence about the complex of views that today energize the political forces of *Roe* rage, see note 232, *infra*.

for constitutional interpreters, just as resistance to *Brown* posed a normative challenge for constitutional theorists of an earlier era. *Roe* rage requires us to decide which of our constitutional ideals are worth defending.

A. *The Roots of the Antiabortion Movement*

Progressives who worry about backlash against *Roe* often describe the decision as if judicial overreaching alone inspired the rise of the New Right.¹⁸⁶ Their view seems to be that an incautious judicial misjudgment in the exercise of professional authority produced an extraordinary political reaction. Sometimes it is also suggested that this extraordinary political reaction might have been averted if access to abortion had been liberalized by legislatures instead of by the Court, which disastrously short-circuited the political process.¹⁸⁷ We argue in this Part of our Essay that these views oversimplify the causes and character of *Roe* rage. Mobilization against *Roe* was no simple reaction to a judicial decision, nor was it even simply about abortion.

It is true that from the moment *Roe* was decided it was criticized for judicial overreaching. *Roe*'s dissenters criticized the Court's decision as a "raw exercise of judicial power,"¹⁸⁸ and this criticism was extensively elabo-

¹⁸⁶ See *supra* text accompanying notes 124 & 181 and *supra* note 182.

¹⁸⁷ See, e.g., Michael Kinsley, *The Right's Kind of Activism*, WASH. POST., Nov. 14, 2004, at B7 ("Roe v. Wade is a muddle of bad reasoning and an authentic example of judicial overreaching. I also believe it was a political disaster for liberals. Roe is what first politicized religious conservatives while cutting off a political process that was legalizing abortion state by state anyway."). Cass Sunstein makes something like this claim, but not quite as robustly. See *supra* note 181 and accompanying text. For a critic of *Roe* who is more cautious than Sunstein in speculating that the law of abortion would have been extensively liberalized even if *Roe* had not been decided, see JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* 95 (2006).

¹⁸⁸ *Roe v. Wade*, 410 U.S. 179, 222 (1973) (White, J., dissenting):

As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court. The Court apparently values the convenience of the pregnant woman more than the continued existence and development of the life or potential life that she carries. Whether or not I might agree with that marshaling of values, I can in no event join the Court's judgment because I find no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States.

Justice White apparently viewed the majority as having exerted "raw judicial power" without constitutional warrant in part because the majority protected abortions of "convenience" that could not be justified as therapeutic under the medical criteria that had emerged during the century of abortion's criminalization. Compare *id.*, with *id.* at 222–23:

It is my view, therefore, that the Texas statute is not constitutionally infirm because it denies abortions to those who seek to serve only their convenience rather than to protect their life or health. Nor is this plaintiff, who claims no threat to her mental or physical health, entitled to assert the possible rights of those women whose pregnancy assertedly implicates their health. This, together with *United*

rated in the legal academy and in the press.¹⁸⁹ But jurisprudential objection by itself is rarely sufficient to inspire a political movement capable of altering the complexion of constitutional politics. It is important to distinguish between claims that function as jurisprudential objections within professional debate and claims that function as political arguments within popular debate. The function of the former is to advance professional reason, whereas the function of the latter is to mobilize citizens to exert political pressure to alter constitutional meaning.¹⁹⁰ Because it is difficult for legal scholars to keep hold of this distinction,¹⁹¹ they tend to confuse professional critique with the causes and goals of popular resistance.

Progressive accounts of *Roe* rage conflate professional and popular critique in just this way. Although it is commonly asserted that *Roe* rage was a response to judicial overreaching, a number of historians have demonstrated that political mobilization against the liberalization of abortion began well before *Roe* and challenged all efforts, both legislative and adjudicative, to reform criminal abortion laws.¹⁹² Americans who entered politics

States v. Vuitch, . . . dictates reversal of the judgment of the District Court.

¹⁸⁹ See, e.g., ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 27 (1975) (“But if the Court’s model statute [on abortion] is generally intelligent, what is the justification for its imposition? If this statute, why not one on proper grounds of divorce, or on adoption of children?”); Erwin Chemerinsky, *Rationalizing the Abortion Debate: Legal Rhetoric and the Abortion Controversy*, 31 *BUFF. L. REV.* 107 (1982) (reviewing major criticisms of the decision advanced in law reviews during the 1970s); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920, 943 (1973) (“The problem with *Roe* is not so much that it bungles the question it sets itself, but rather that it sets itself a question the Constitution has not made the Court’s business.”). For similar critiques in the popular press, see, e.g., David Robinson, Jr., Letter to the Editor, *Abortion and Law*, *WASH. POST*, Feb. 20, 1973, at A19:

The action of the Court is one more nail in its coffin for the grand American experiment in representative democracy What has happened is that a handful of power-accustomed judges has seized control of much of the machinery for adjusting the most sensitive interactions among the 210 million citizens of the land. The Court appears to increasingly regard its freedom from public accountability for its actions as an opportunity to rule on the basis of personal preferences of a majority of its members.

¹⁹⁰ See Post & Siegel, *supra* note 26.

¹⁹¹ See, e.g., *supra* note 185.

¹⁹² See Lemieux, *supra* note 99, at 227–28 (demonstrating that “there was significant countermobilization at the state level” in the time immediately before *Roe*, so that the “pro-life movement . . . was clearly not ‘brought into being’ by *Roe*”); see also GENE BURNS, *THE MORAL VETO: FRAMING CONTRACEPTION, ABORTION, AND CULTURAL PLURALISM IN THE UNITED STATES* 227 (2005) (“*Roe* did not *initiate* a period of divided moral sentiment over abortion; it did not serve as a sharp break from the point where state discussions had left off.”); *id.* at 227–28 (“The state-level reform process had exhausted itself Given how often claims about the need for ‘judicial restraint’ have *Roe* in mind, it is striking how incorrect are the empirical assertions that often form the basis of such a critique of *Roe*.”); LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 50–51 (1990) (questioning whether liberalization of abortion law through politics was feasible once countermobilization began; observing that between 1971 and 1973 no states voted to repeal criminal abortion statutes; and observing that a referendum liberalizing access was defeated in Michigan

to oppose *Roe* were concerned primarily about the substantive law of abortion, not about questions of judicial technique or even about the proper role of courts in a democracy.¹⁹³

by antiabortion activists despite broad public support); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 520 (2001) (“The pro-life countermovement was already well under way by the time *Roe* was handed down[.]”). David Garrow is quite explicit on this point:

We could fill a very long shelf with writings that claim that it was *only* the Supreme Court’s action in *Roe v. Wade* that created an intensely energized right to life movement, and that if the Court had not gone as “far” as it did in *Roe*, then anti-abortion forces would not have mobilized in the ways that they did during the 1970s and 1980s Thus, in this fictionalized but nonetheless widely-accepted version of history, the Supreme Court, and particularly Justice Blackmun, are faulted for committing an act of “heavy-handed judicial intervention” that spurred the right to life movement and engendered much of the political strife America has witnessed over the past twenty-five years.

This view is simply and utterly wrong. Not only did the New York legalization energize right to life forces, but it so energized them that they almost succeeded in legislatively repealing the New York legalization statute; only a 1972 gubernatorial veto by Nelson Rockefeller prevented such an anti-abortion triumph and kept legal abortion available in New York in the months immediately preceding the decision in *Roe*. But that New York upsurge helped stimulate a very politically influential right to life upsurge all across the country, in state after state after state, throughout 1971 and 1972. During 1971 and 1972, pro-choice forces won *no* political victories, and New York activists were worried as to whether they could continue to protect their statute from legislative repeal after Nelson Rockefeller left the governorship. In the two states that held 1972 popular vote referenda on abortion, pro-choice measures went down to heavy defeats, and in many others, legislators took the position that they could let the courts resolve the problem, that they did not need to go out on any political limbs by confronting the issue themselves. Thus, by November 1972, when Richard Nixon was overwhelmingly re-elected to the presidency after mounting a very explicitly anti-abortion general election campaign, prospects for making any sort of non-judicial headway with abortion law liberalization looked very bleak indeed. Pro-choice activists feared that more setbacks might be ahead.

David J. Garrow, *Abortion Before and After Roe v. Wade: An Historical Perspective*, 62 ALB. L. REV. 833, 840–41 (1999). Only some in law discuss this history, and it remains underacknowledged in the legal scholarship on backlash. Cf. Michael J. Klarman, *Fidelity, Indeterminacy, and the Problem of Constitutional Evil*, 65 FORDHAM L. REV. 1739, 1751–52 (1997); Michael J. Klarman, *Rethinking the History of American Freedom*, 42 WM. & MARY L. REV. 265, 286 (2000) (reviewing ERIC FONER, *THE STORY OF AMERICAN FREEDOM* (1998)) (“*Roe v. Wade* not only announced a constitutional right to abortion but also mobilized a right-to-life opposition that continues to play a prominent role in American politics to the present day.”).

¹⁹³ It is no small irony that the “strict constructionists” Richard Nixon put on the Court generally voted in the *Roe* majority. See George Will, “*Strict Construction*”: *An Interpretation*, WASH. POST, Mar. 2, 1973, at A18:

Strict constructionists, [President Nixon] has suggested, do not impose values other than those clearly and explicitly affirmed by the Constitution; they base their decisions on the actual words and discernible intentions of the framers; thus they would not legislate their preferences, but respect the express preferences of elected legislatures. As between Mr. Nixon’s assumptions and those of the skeptics, the recent Supreme Court Ruling on a Texas abortion statute certainly seems to support the skeptics’ view.

More recently, historians have begun to analyze how a growing political coalition against abortion was forged during the 1970s. This new coalition was concerned with much more than just abortion, and its concerns evolved as the coalition expanded over the course of the decade. By reconstructing how different groups came to join the coalition against *Roe*, and by tracing the differing substantive concerns they expressed as they did so, this new body of historiography sheds light on how the normative content of antiabortion advocacy developed.

Recent scholarship shows that the Court's decision in *Roe* did not immediately prompt organization of the broad-based conservative coalition against abortion that would mobilize by the end of the 1970s. Resistance to legislative liberalization of access to abortion in the years before *Roe* was predominantly Catholic,¹⁹⁴ and Catholics led the way in criticizing *Roe*—something that did not escape attention at the time of the decision.¹⁹⁵

When mobilization against *Roe* finally did receive official recognition in Ronald Reagan's presidency, its expression was overtly substantive. Cf. Editorial, *The Reagan Court*, N.Y. TIMES, Oct. 1, 1980, at A26 (objecting that "Ronald Reagan's pledge to appoint Federal judges who share his views on abortion and family relations is ominous"). At the time of *Roe*, the political slogan of "strict constructionism" was primarily coded in terms of questions of race and crime. It did not encompass the issues of gender, family, and religion that were to become salient by the decade's end.

¹⁹⁴ The official position of the Catholic Church prior to *Roe* was to preserve laws criminalizing abortion. See TIMOTHY A. BYRNES, CATHOLIC BISHOPS IN AMERICAN POLITICS 54 (1991) ("At a series of meetings in 1967, the bishops decided to denounce the [ALI Model Penal] code and actively oppose legal abortion."); see also *id.* at 57 (suggesting that *Roe* helped mobilize Catholic bishops because it moved abortion politics from state legislatures onto a national political agenda). In 1968, Pope Paul VI issued *Humanae Vitae*, an encyclical reaffirming the Church's ban on artificial means of contraception. Of course, in the Catholic community, as in any other community of belief, there was considerable disagreement about both the morality of contraception and abortion and the question of the Church's stance toward law reform in these areas. See Benedict M. Ashley, O.P., *The Loss of Theological Unity: Pluralism, Thomism, and Catholic Morality*, in BEING RIGHT: CONSERVATIVE CATHOLICS IN AMERICA 63, 64 (Mary Jo Weaver & R. Scott Appleby eds., 1995) (discussing "the controversy over *Humanae Vitae* [that] opened the floodgates for a tidal wave of public dissent from official Catholic teaching—on abortion, homosexuality, the exclusion of women from ordination, and a host of other issues").

¹⁹⁵ See *Catholics Warned To Avoid Abortions*, N.Y. TIMES, Feb. 15, 1973, at 20 ("Roman Catholics have been warned by church leaders that they face excommunication if they undergo or perform an abortion."); Marjorie Hyer, *Catholic Bishops Urge Defiance of Any Law Requiring Abortion*, WASH. POST, Feb. 14, 1973, at A17 ("America's Roman Catholic bishops yesterday issued a pastoral message containing unprecedented advice for disobedience of 'any civil law that may require abortion' and pronouncing excommunication on any Catholics who 'undergo or perform an abortion.'"); Lawrence Van Gelder, *Cardinals Shocked—Reaction Mixed*, N.Y. TIMES, Jan. 23, 1973, at 1 ("Reactions to the Supreme Court decision on abortion fragmented yesterday along predictable lines, as leaders of the Roman Catholic Church assailed the ruling while birth control and women's rights activists praised it."); *Vatican's Radio Criticizes Abortion Ruling by Court*, N.Y. TIMES, Jan. 24, 1973, at 14 ("The Vatican radio harshly criticized today the United States Supreme Court's decision that sharply limited anti-abortion laws yesterday."); Warren Weaver, Jr., *Landmark Ruling on Abortion*, N.Y. TIMES, Jan. 28, 1973, at E3 ("Response from the anti-abortion forces, traditionally led by the Roman Catholic Church, was bitter, angry and outspoken. One right-wing Catholic laymen's group, The Society for the Christian Commonwealth, even called for the excommunication of Justice William J. Brennan for his support of the majority."); cf. Lynn

Catholics who opposed *Roe* opposed all liberalization of abortion, whether through legislation or adjudication.¹⁹⁶ Although few now recall it, Protestants were in fact slow to join the antiabortion movement, even after *Roe*. In the early 1970s, most Protestants did not share the Catholic Church's view of abortion.¹⁹⁷ Mainline Protestant groups generally approved of liberalizing access to abortion; some even supported *Roe*.¹⁹⁸ Evangelical groups took a

Taylor, *Churches Not United on Question of Abortions*, CHI. TRIB., Feb. 12, 1973, at 1A5 ("The opposition of the Catholic Church to legalization of abortion and to the recent Supreme Court ruling is well known. Not so well publicized are the views held by other church groups, which span the spectrum from leadership in Right to Life groups to establishing low-cost abortion clinics.").

¹⁹⁶ In his 1974 testimony before Congress, a spokesperson for the United States Catholic Council declared: "It is repugnant to one's sense of justice to simply allow as an option whether the states within their various jurisdictions may or may not grant to a class of human beings their rights, particularly the most basic right, the right to life." *Pro-Life Amendment for Unborn*, CHI. DEFENDER, Mar. 16, 1974, at 25. The National Conference of Catholic Bishops stated:

Abortion is a specific issue that highlights the relationship between morality and law. As a human mechanism, law may not be able fully to articulate the moral imperative, but neither can legal philosophy ignore the moral order. The abortion decisions of the United States Supreme Court (January 22, 1973) violate the moral order, and have disrupted the legal process which previously attempted to safeguard the rights of unborn children. A comprehensive pro-life legislative program must therefore include the following elements:

- (a) Passage of a constitutional amendment providing protection for the unborn child to the maximum degree possible.
- (b) Passage of federal and state laws and adoption of administrative policies that will restrict the practice of abortion as much as possible.
- (c) Continual research into and refinement and precise interpretation of *Roe* and *Doe* and subsequent court decisions.
- (d) Support for legislation that provides alternatives to abortion.

NAT'L CONFERENCE OF CATHOLIC BISHOPS, PASTORAL PLAN FOR PRO-LIFE ACTIVITIES (Nov. 1975), available at <http://www.priestsforlife.org/magisterium/bishops/75-11-20pastoralplanforprolifeactivitiesnccb.htm>. It is important to distinguish between opposition to *Roe* and opposition to abortion itself. Thus a proposed constitutional amendment "to give states the unqualified right to make their own abortion laws" in 1973 went nowhere, while a proposed "human life amendment" that would have completely banned abortion made its way into the platform of the Republican Party in 1980. *Nullification of Abortion Ruling Sought*, WASH. POST, Mar. 27, 1973, at 14; see Joseph Sobran, *Amendment Fever*, WASH. POST, Aug. 14, 1979, at A1. For a history of the different versions of the human life amendment proposed between 1973 and 1983, see http://en.wikipedia.org/wiki/Human_Life_Amendment#Major_versions_of_the_Human_Life_Amendment (last visited May 12, 2007).

¹⁹⁷ Protestants were divided in their views on the morality of abortion, the use of criminal law to regulate abortion, the ways law should reflect religious views, and the appropriateness of political mobilization on these sorts of questions. Elliot Wright, *Protestants Split on Abortion Edict*, WASH. POST, Jan. 26, 1973, at B7 (discussing division of opinion about *Roe* in a group of four Protestant leaders, some who "wholeheartedly welcomed the decision" and others who were "strongly critical" of it, and noting that the two theologians who criticized *Roe* "stand in disagreement with the official statements of their denomination").

¹⁹⁸ See *id.* For example, the Presbyterian Church (USA) has supported abortion rights since 1970, when the General Assembly stated that "the artificial or induced termination of a pregnancy is a matter of careful ethical decision of the patient . . . and therefore should not be restricted by law." Presbyterian 101: Abortion Issues, <http://www.pcusa.org/101/101->

more cautious approach,¹⁹⁹ but even these more socially conservative groups did not at the time of *Roe* view abortion as a categorical wrong. In

abortion.htm (last visited May 12, 2007). In 1972, the General Conference of the United Methodist Church called for “removal of abortion from the criminal code, placing it instead under the laws relating to other procedures of standard medical practice.” Joretta Purdue, *United Methodists Agreed More on Abortion Issue 25 Years Ago*, UNITED METHODIST NEWS SERVICE, Jan. 21, 1998, <http://www.wfn.org/1998/01/msg00077.html>. Beginning in 1971, some synods of the United Church of Christ spoke out in favor of repealing legal restrictions on abortion and in support of *Roe*. *UCC General Synod Statements and Resolutions Regarding Freedom of Choice*, <http://www.ucc.org/justice/choice/resolutions.htm> (last visited May 12, 2007) (quoting resolutions). However, the historically black African Methodist Episcopal Church gave “limited guidance” to parishioners on abortion. Lawrence N. Jones, *The Black Churches: A New Agenda*, CHRISTIAN CENTURY, Apr. 18, 1979, at 434, available at <http://www.religion-online.org/showarticle.asp?title=1219>.

¹⁹⁹ Evangelical Protestant groups generally discriminated between so-called “personal convenience” abortions, which they condemned, *see supra* note 188, and therapeutically or medically indicated abortions, which they implicitly or explicitly sanctioned. *See* National Association of Evangelicals, *Abortion 1973*, <http://www.nae.net/index.cfm?FUSEACTION=editor.page&pageID=154&IDCategory=9> (last visited May 12, 2007). Divisions among evangelical Protestants over abortion are visible in a series of resolutions that the largest of these groups, the Southern Baptist Convention (“SBC”), issued in the 1970s. These resolutions acknowledge continuing disagreement and stake out a position on the reform of criminal abortion laws between repeal and prohibition. In June, 1971, the SBC declared:

WHEREAS, Christians in the American society today are faced with difficult decisions about abortion; and WHEREAS, Some advocate that there be no abortion legislation, thus making the decision a purely private matter between a woman and her doctor; and WHEREAS, Others advocate no legal abortion, or would permit abortion only if the life of the mother is threatened; Therefore, be it RESOLVED, that this Convention express the belief that society has a responsibility to affirm through the laws of the state a high view of the sanctity of human life, including fetal life, in order to protect those who cannot protect themselves; and Be it further RESOLVED, That we call upon Southern Baptists to work for legislation that will allow the possibility of abortion under such conditions as rape, incest, clear evidence of severe fetal deformity, and carefully ascertained evidence of the likelihood of damage to the emotional, mental, and physical health of the mother.

Southern Baptist Convention, *SBC Resolution: Resolution on Abortion* (June 1971), available at <http://www.sbc.net/resolutions/amResolution.asp?ID=13> (last visited May 12, 2007).

In June 1974, the SBC voted to reaffirm the 1971 statement, adding:

WHEREAS, That resolution reflected a middle ground between the extreme of abortion on demand and the opposite extreme of all abortion as murder, and WHEREAS, That resolution dealt responsibly from a Christian perspective with complexities of abortion problems in contemporary society . . . Be it further RESOLVED, that we continue to seek God’s guidance through prayer and study in order to bring about solutions to continuing abortion problems in our society.

Southern Baptist Convention, *SBC Resolution: Resolution on Abortion and the Sanctity of Human Life* (June 1974), available at <http://www.sbc.net/resolutions/amResolution.asp?ID=14>. As late as 1976, the SBC condemned only the “practice of abortion for selfish non-therapeutic reasons,” and added that “we also affirm our conviction about the limited role of government in dealing with matters relating to abortion, and support the right of expectant mothers to the full range of medical services and personal counseling for the preservation of life and health.” Southern Baptist Convention, *SBC Resolution: Resolution on Abortion* (June 1976), available at <http://www.sbc.net/resolutions/amResolution.asp?ID=15>. Not until 1980, when fundamentalists took over the SBC in an internecine battle connected to

1968, for example, the official publication of a symposium sponsored by the evangelical magazine *Christianity Today* declared that “the Christian physician will advise induced abortion only to safeguard greater values sanctioned by Scripture. These values should include individual health, family welfare, and social responsibility.”²⁰⁰

Roe did not change this understanding; nor were those evangelical Protestants who initially criticized *Roe* moved to political action.²⁰¹ As Harold O. J. Brown, editor of *Christianity Today*, observed: “At that point, a lot of Protestants reacted almost automatically—‘If the Catholics are for it, we should be against it.’ . . . The fact that Catholics were out in front caused many Protestants to keep a very low profile.”²⁰²

By the end of the decade, however, the views of Protestant evangelicals were to change markedly. Increasing numbers of evangelical Protestants joined a pan-Christian coalition opposing abortion as an expression of “secular humanism.” This transformation is most often attributed to the efforts of Swiss theologian Francis Schaeffer²⁰³ and others who popularized the critique of secular humanism.²⁰⁴ That critique was widely disseminated

the rise of the New Right, did the SBC revise its position.

²⁰⁰ WILLIAM MARTIN, *WITH GOD ON OUR SIDE: THE RISE OF THE RELIGIOUS RIGHT IN AMERICA 190* (1996) (citing WALTER O. SPITZER & CARLYLE L. SAYLOR, *BIRTH CONTROL AND THE CHRISTIAN* xxxvi (1969)).

²⁰¹ See *Two Rulings Criticized by Baptist*, WASH. POST, June 15, 1973, at B18 (“Southern Baptist Convention President Owen Cooper Wednesday criticized Supreme Court rulings that liberalized abortions and banned capital punishment, but he said that the denomination would support abortions ‘where it clearly serves the best interests of society.’”); *supra* note 199. In 1973, Harold O.J. Brown convened a meeting on abortion with C. Everett Koop, who had already begun to condemn abortion publicly, as well as Billy Graham and other evangelical leaders; the group he convened opposed both abortion and political action against it. Brown and Koop then organized the Christian Action Council to lobby Congress for abortion restrictions or a ban. Brown recalls: “We thought, ‘Once people realize what’s going on, there will be a spontaneous upheaval.’ That didn’t happen.” See MARTIN, *supra* note 200, at 193–94. According to Brown, at the time of *Roe* Protestants viewed abortion as “one [sin] among many,” not as “a crucial issue [that] affects what you think human beings are.” *Id.* at 194.

²⁰² MARTIN, *supra* note 200, at 193.

²⁰³ MARTIN, *supra* note 200, at 196. In 1977, Schaeffer made the film *Whatever Happened to the Human Race?* and showed it in churches around the United States, accompanied by lectures that sometimes featured C. Everett Koop. *Id.* at 194. The movie’s argument was that “abortion is both a cause and a result of the loss of appreciation for the sanctity of human life,” and that it would lead to infanticide and euthanasia. *Id.* The film is credited with changing the views of many Protestants about abortion. Harold O.J. Brown observed that “nothing has had an impact across-the-board that compares to the Schaeffer-Koop series.” *Id.*; see also SUSAN FRIEND HARDING, *THE BOOK OF JERRY FALWELL: FUNDAMENTALIST LANGUAGE AND POLITICS 191–94* (2000).

²⁰⁴ See FRANCIS A. SCHAEFFER, *A CHRISTIAN MANIFESTO 17–18* (1981). Schaeffer’s text opens with:

The basic problem of Christians in this country in the last eighty years or so, in regard to society and in regard to government, is that they have seen things in bits and pieces instead of totals.

They have very gradually become disturbed over permissiveness, pornography, the public schools, the breakdown of the family, and finally abortion. But they

in the late 1970s through a series of “Family Seminars” led by Tim LaHaye, who in 1979 would co-found the Moral Majority, and his wife, Beverly, who in 1979 would found Concerned Women for America (“CWA”), the evangelical Protestant counterpart to Phyllis Schlafly’s STOP-ERA organization.²⁰⁵ By 1980, the *Christian Harvest Times* was denouncing abortion in its “Special Report on Secular Humanism vs. Christianity”: “To understand humanism is to understand women’s liberation, the ERA, gay rights, children’s rights, abortion, sex education, the ‘new’ morality, evolution, values clarification, situational ethics, the loss of patriotism, and many of the other problems that are tearing America apart today.”²⁰⁶

have not seen this as a totality—each thing being a part, a symptom, of a much larger problem. They have failed to see that all of this has come about due to a shift in world view—that is, through a fundamental change in the overall way people think and view the world and life as a whole. The shift has been *away from* a world view that was at least vaguely Christian in people’s memory (even if they were not individually Christian) *toward* something completely different—toward a world view based upon the idea that the final reality is impersonal matter or energy shaped into its present form by impersonal chance These two world views stand as totals in complete antithesis to each other in content and also in their natural results—including sociological and government results, and specifically including law.

Id.

The foremost popularizer of this critique of secular humanism was Tim LaHaye, who dedicated *The Battle for the Mind* to Schaeffer. TIMOTHY LAHAYE, *THE BATTLE FOR THE MIND* (1980). LaHaye describes the five tenets of humanism as “atheism,” *id.* at 59, “evolution,” *id.* at 60, “amorality,” *id.* at 64, “autonomous man,” *id.* at 68, and a “socialist one-world view,” *id.* at 72. Sex and gender issues fall under “amorality.” LaHaye writes:

Many do not realize that most of the leaders of the feminist movement, which presents itself as the preserver of sexual rights of women and children, are humanists They are really after the young, who will be the key to humanist control of the next generation. That is why—in the name of “health care,” “child’s rights,” “child abuse,” and “the Year of the Child”—they are pressuring political leaders to pass legislation taking the control of children away from their parents and giving it to the state. By the state, of course, they mean bureaucrats and social-change agents who have been carefully trained in amoral, humanistic philosophy and who will use the government’s power to teach sexual activity, contraceptives, birth elimination, and permissiveness to children, whether parents want it or not. Of course, government-financed abortions will be provided for those who refuse to follow instructions.

Id. at 67.

²⁰⁵ For a discussion of the LaHayes’ ideas about the family in the late 1970s, see Patrick H. McNamara, *The New Christian Right’s View of the Family and Its Social Science Critics: A Study in Differing Presuppositions*, 47 J. MARRIAGE & FAMILY 449 (1985) (discussing the endorsement of traditional family structure including male-headed households and the principle of feminine submission in *Spirit-Controlled Family Living* and *The Battle for the Family*); see also David Harrington Watt, *The Private Hopes of American Fundamentalists and Evangelicals, 1925–1975*, 1 RELIGION & AM. CULT. 155, 169 (1991) (“Evangelicals such as Tim and Beverly LaHaye lamented that the forces that were producing a general breakdown of the family were making serious inroads into the born-again community.”); see also *infra* note 218 and accompanying text (discussing Beverly LaHaye’s anti-ERA advocacy).

²⁰⁶ *A Special Report*, CHRISTIAN HARVEST TIMES, June 1980, at 1, quoted in MARTIN,

Although Catholics had initially been uneasy about invoking religious objections to abortion in the public sphere—justifying opposition to abortion instead in the language of science and civil rights²⁰⁷—evangelical Protestants felt no such qualms. They explained their newly mounting opposition to abortion in explicitly religious terms; it was precisely the declining public authority of Christianity that motivated their attack on secular humanism. Opposition to secular humanism was fueled by concern that the state was no longer recognizably Christian,²⁰⁸ a concern that for many had begun with the Court's school prayer decisions and had been inflamed by the ruling in the Bob Jones case.²⁰⁹ Those who came to condemn *Roe* as a reflection of secular humanism voiced displeasure at an estrangement be-

supra note 200, at 196.

²⁰⁷ See Michael W. Cuneo, *Life Battles: The Rise of Catholic Militancy Within the American Pro-Life Movement*, in *BEING RIGHT: CONSERVATIVE CATHOLICS IN AMERICA* 270, 275–76 (Mary Jo Weaver & R. Scott Appleby eds., 1995); see also *Pro-Life Amendment for Unborn*, CHI. DEFENDER, Mar. 16, 1974, at 25 (four American cardinals presented testimony at the United States Catholic Conference in favor of a human life amendment, asserting that “the right to life is a basic human right, proclaimed as such by the Declaration of Independence, the Constitution of the United States, and by the United Nation [sic] Declaration of Human Rights,” “reject[ing] the argument that opposition to abortion is simply a Catholic concern,” and “emphasiz[ing] there is no intention to impose Catholic moral teaching regarding abortion on the country”).

²⁰⁸ There was a belief that:

[T]he enemies of the faith had succeeded in harnessing the power of the state to their own ends . . . evangelicals were left with a distinct impression that the American government was not checking America's drift away from its Christian moorings or its move away from the family, but rather was legitimating those changes in thousands of subtle but terribly significant ways.

DAVID HARRINGTON WATT, *A TRANSFORMING FAITH: EXPLORATIONS OF TWENTIETH-CENTURY AMERICAN EVANGELICALISM* 69 (1991). Sociologist Nancy Ammerman describes the dynamics of conservative religious “backlash” in another way:

Fundamentalists are interested both in strengthening the American “moral fiber” and in protecting the other institutions they see as potentially “Christian.” God has entrusted churches, homes, and schools to their care, and they are willing to enter politics if necessary to project that social territory . . . Fundamentalists did not become politicized until they perceived that the issues with which they were concerned had become political issues.

NANCY TATOM AMMERMAN, *BIBLE BELIEVERS: FUNDAMENTALISTS IN THE MODERN WORLD* 201–03 (1987).

²⁰⁹ See MARTIN, *supra* note 200, at 169, 171–73. On the school prayer decisions, see Sarah Barringer Gordon, *The Almighty and the Dollar: Protestants, Catholics, and Secularism in 20th Century America* (unpublished manuscript). Historian Sara Diamond also notes the influence of the textbook battles of the 1970s. SARA DIAMOND, *NOT BY POLITICS ALONE: THE ENDURING INFLUENCE OF THE CHRISTIAN RIGHT* 65 (1998). Paul Weyrich has described the battle that raged in 1978 between evangelicals and the IRS over the tax-exempt status of Bob Jones University as the birth of the religious right. “[W]hat galvanized the Christian community was not abortion, school prayer, or the ERA. . . . What changed their mind was Jimmy Carter's intervention against the Christian schools . . . on the basis of so-called de facto segregation.” MARTIN, *supra* note 200, at 173. The Bob Jones case powerfully merged concerns about race, religion, family, and markets.

tween Christianity and the federal government that had begun well before *Roe* and that would later accelerate with developments coincident with *Roe*.

Perhaps the single most provocative such development was the revolution in family and sexual mores associated with the women's movement.²¹⁰ By the 1970s the right to an abortion had increasingly come to symbolize fundamental changes in family roles. As Kristin Luker famously demonstrated through interviews of movement leaders in the 1980s, "this round of the abortion debate is so passionate and hard-fought *because it is a referendum on the place and meaning of motherhood.*"²¹¹ Linda Gordon has thus emphasized that it was the feminist embrace of the abortion right—rather than the Court's decision in *Roe*—that so provoked opponents of abortion. "A better explanation of the spread of intense antiabortion feeling was that abortion had changed its meaning through its re-interpretation by the revived women's movement."²¹² "The major reason for the heightened passion about reproduction issues is precisely that they seemed to express the core aims of the women's liberation movement and thus became the major focus of the backlash against feminism."²¹³

The association of abortion rights with women's liberation was reinforced by debates over the ERA, which Congress had sent to the states in 1972.²¹⁴ Phyllis Schlafly, a Catholic, mobilized opponents of the ERA by arguing that it would constitutionalize abortion and homosexuality, which she condemned as potent symbols of the new family forms that the ERA would entrench.²¹⁵ A year before the Court's decision in *Roe*, Schlafly's "STOP-ERA" newsletter attacked "women's lib" as "a total assault on the role of the American woman as wife and mother," accusing women's liberals of "promoting Federal 'day-care centers' for babies instead of homes

²¹⁰ See MICHELE MCKEEGAN, *ABORTION POLITICS: MUTINY IN THE RANKS OF THE RIGHT 18* (1992) ("Significantly, it was the women's movement that first galvanized born-again Christians to political action in the 1970s. After decades of political somnolence, conservative Protestants organized across the nation to defeat the ERA. Only after the amendment fizzled late in the decade did abortion become the religious right's top priority.")

²¹¹ KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 193 (1984); see also Pamela Johnston Conover, *The Mobilization of the New Right: A Test of Various Explanations*, 36 W. POL. Q. 632, 634–35 (1983):

In effect we argue that the mobilization of New Right groups such as those opposed to abortion and the E.R.A. reflects a desire to protect a threatened way of life. What is threatened? The traditional American family and the values it embodies. Who is threatening it? Feminists, humanists, and liberals in general.

²¹² LINDA GORDON, *THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA* 300 (3d ed. 2002).

²¹³ *Id.* at 295.

²¹⁴ See generally PAMELA JOHNSTON CONOVER & VIRGINIA GRAY, *FEMINISM AND THE NEW RIGHT: CONFLICT OVER THE AMERICAN FAMILY* (1983) (demonstrating connection between beliefs about abortion and the ERA among activists and in the public at large, and tracing both to beliefs about family roles).

²¹⁵ To see how Schlafly systematically focused the ERA debate on questions of abortion and gay rights, see Siegel, *supra* note 12, at 1389–1402.

[and] promoting abortions instead of babies.”²¹⁶ She urged her audience to link abortion to daycare and to see both as feminist threats to the traditional family.

“By associating the ERA and abortion as the twin aims of ‘women’s liberation,’ Schlafly used each to redefine the meaning of the other. Schlafly’s anti-ERA frames and networks helped construct the *Roe* decision that reverberated explosively through ERA debates in the 1970s and 1980s.”²¹⁷ In 1979, Beverly LaHaye consolidated these connections by founding CWA, which organized large numbers of evangelical Protestants against the ERA.²¹⁸ The connection between the ERA and abortion was emphasized in partisan struggles over the International Year of the Woman, the International Year of the Child, and President Carter’s White House Conference on the Family.²¹⁹ At a CWA conference held to protest the White House Conference on the Family, critics objected that “[t]he national leaders of the women’s movement, who were working so hard to ratify ERA, were the same clique promoting homosexual rights, abortion, and government child-rearing.”²²⁰ The objection illustrates the conference organizers’ be-

²¹⁶ Phyllis Schlafly, *What is Wrong with “Equal Rights” for Women*, PHYLLIS SCHLAFLY REP. (Eagle Forum, Alton, Ill.), Feb. 1972, at 3–4.

²¹⁷ Siegel, *supra* note 12, at 1392–93.

²¹⁸ Beverly LaHaye writes that she was mobilized into anti-ERA action upon hearing of the 1977 National Womens’ Convention (“NWC”) conference in Houston. LaHaye was horrified by the NWC’s additional goals, which she summarized as “the ‘right’ of homosexuals and lesbians to teach in public schools and to have custody of children; federally-funded abortion on demand; approval of abortion for teen-agers without parental knowledge or consent; federal government involvement in twenty-four-hour-a-day child care centers and more.” BEVERLY LAHAYE, *WHO BUT A WOMAN?* 25, 27 (1984).

On the ERA, LaHaye stated:

I am not against equal rights for women. I am totally in favor of equal pay for equal work; I support a woman’s right to be free from sexual harassment on the job. What I am against, however, is an amendment to the constitution that is a cleverly disguised tool to invite total government control over our lives. . . . The ERA, if passed, would literally transform every women’s issue into a complex constitutional question to be decided by our liberal court system.

Id. at 53–54. For more on Concerned Women for America, see Janna Hanson, “The Role for Which God Created Them”: Women in the United States’ Religious Right (1997) (unpublished B.A. thesis, Radcliffe College).

²¹⁹ For a remarkably rich account of countermobilization at the decade’s end, see Allen Hunter, *Virtue with a Vengeance: The Pro-Family Politics of the New Right 159–68* (1984) (unpublished Ph.D. dissertation, Brandeis University); see also Leo Ribuffo, *Family Policy Past as Prologue: Jimmy Carter, the White House Conference on Families, and the Mobilization of the New Christian Right*, 23 REV. POL’Y RES. 325 (2006); Marjorie J. Spruill, *Gender and America’s Right Turn: The 1977 IWY Conferences and the Polarization of American Politics*, in *RIGHTWARD BOUND: MAKING AMERICA CONSERVATIVE IN THE 1970S* (Bruce Schulman & Julian Zelizer eds.) (forthcoming).

²²⁰ Hunter, *supra* note 219, at 179, quoting ROSEMARY THOMSON, *THE PRICE OF LIBERTY* 13–15 (1978). On CWA’s role in organizing the event protesting the White House Conference on the Family, see Hanson, *supra* note 218 (“Specific issues of concern were the conference’s attempts to ‘redefine the family’ as well as efforts to pass the ERA and ensure access to abortion”) (quoting LAHAYE, *supra* note 218, at 44–45); see also *supra*

lief that Americans would mobilize against abortion because they were anxious about social changes in child rearing and sexual expression.

By the end of the 1970s, in short, conservatives mobilized against abortion in order to protect traditional family roles. That is why the 1980 Republican Party Platform pledged to “work for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.”²²¹ The construction of abortion as a threat to traditional family values was not produced by *Roe*, whose bland and blank opinion, however inartfully rule-bound,²²² emphasized doctors’ prerogatives more than women’s. *Roe* sought “not to be extreme, not to emphasize absolute rights, and not to favor any particular worldview.”²²³

Critics of secular humanism and changing family values seized on *Roe* to produce a powerful symbol of the deep social forces they regarded as endangering their conservative constitutional vision. This vision became a coherent political movement with the assistance of Republican Party strategists, who realized that *Roe* could be used as leverage to redefine party loyalties. The association of *Roe* with the triumph of secular humanism and with the disintegration of the traditional family was envisioned and funded by the architects of a newly conservative Republican Party.²²⁴

In May 1979, in a moment of ecumenical fervor, Paul Weyrich (a Catholic) and Howard Phillips (a Jew) met with Jerry Falwell and other architects of the New Right to propose that Falwell organize evangelicals into

text accompanying note 206.

²²¹ See Republican Party Platform of 1980, available at <http://www.presidency.ucsb.edu/showplatforms.php?platindex=R1980>. In 1984, the Republican Party reaffirmed its “support for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.” See Republican Party Platform of 1984, available at <http://www.presidency.ucsb.edu/showplatforms.php?platindex=R1984>.

²²² See, e.g., Eskridge, *supra* note 112, at 1313; *infra* note 249 and accompanying text. The internal architecture of the *Roe* opinion strongly suggests that the Justices who joined it had little idea of the inflammatory meanings that would later be attributed to it. As we have noted, *supra* note 193, the Justices whom President Nixon appointed to the Court were oriented to the political conflicts of the 1960s, which involved race and crime, and did not anticipate the controversies over gender and family values that would engulf the second half of the 1970s.

²²³ BURNS, *supra* note 192, at 227.

²²⁴ See MATTHEW MOEN, THE CHRISTIAN RIGHT AND CONGRESS 67–68 (1989):

Initially, the New Right secular conservatives were clearly the leaders. The reason they were was logical enough: they were seasoned politicians giving guidance and direction to fundamentalists just entering politics. As New Right leader Paul Weyrich pointed out in 1984: ‘Five years ago, the leadership was clear, and people were in a definite hierarchy . . . in 1980 the religious right’s leadership was to some extent subservient; they were so new to politics they deferred to people like Howard Phillips or myself.’ . . . The conclusion was all the more natural because the New Right recruiters were not themselves fundamentalists: Viguerie and Weyrich were Catholics and Phillips a Jew. As time passed, however, the view that the New Right conservatives were ‘using’ the fundamentalists pretty much abated.

See also Rosalind Pollack Petchesky, *Antiabortion, Antifeminism, and the Rise of the New Right*, 7 FEMINIST STUD. 206 (1981).

a “Moral Majority.”²²⁵ In his biography of Falwell, Dinesh D’Souza recounts that “Weyrich believed that a strong anti-abortion plank in the platform would attract many Catholic voters who normally voted Democratic.”²²⁶ Falwell was enlisted to lead the Moral Majority’s antiabortion crusade. Commenting on Falwell’s new leadership role in 1982, Paul Brown, who with his wife Judie Brown had left the overwhelmingly Catholic National Right to Life Committee to found the American Life League, scoffed: “Jerry Falwell couldn’t spell abortion five years ago.”²²⁷

²²⁵ See MARTIN, *supra* note 200, at 199–200. In establishing the Heritage Foundation and the Committee for the Survival of a Free Congress, Weyrich was funded by Joseph Coors of the Coors Brewing Company. *Id.* at 171.

²²⁶ MARTIN, *supra* note 200, at 200. There are now several accounts of a meeting in Lynchburg, Virginia, attended by Reverend Jerry Falwell, Richard Viguerie, and Paul Weyrich, at which Weyrich “proposed that if the Republicans could be persuaded to take a firm stance against abortion, that would begin to split the strong Catholic voting bloc within the Democratic Party. The New Right strategists wanted Falwell to pressure the GOP via a new organization of Protestant fundamentalists.” DIAMOND, *supra* note 209, at 66; see also CYNTHIA GORNEY, ARTICLES OF FAITH: A FRONTLINE HISTORY OF THE ABORTION WARS 346 (1998):

So it was apparently by mutual consensus, Weyrich and company advising and Falwell seeing the pragmatic and moral wisdom of the plan, that abortion—the subject likeliest to reel in conservative Catholics and disenchanted Democrats (often, but not always, the same people)—was placed at the head of the Moral Majority’s sweeping agenda.

Focusing on abortion allowed the New Right to subsume seemingly disparate religious groups: “It was Weyrich’s idea to blur the distinctions between secular right-wingers, fundamentalist Protestants, and anti-abortion Catholics by merging abortion into the panoply of new right, ‘pro-family issues.’” MCKEEGAN, *supra* note 210, at 23. “No other social issue had the political potential to galvanize the evangelical Protestants whom Weyrich, Viguerie, and Phillips were determined to bring into the political process.” *Id.* at 21–22.

²²⁷ CONNIE PAIGE, THE RIGHT TO LIFERS 225 (1983), *quoted in* MCKEEGAN, *supra* note 210, at 25; see also MARTIN, *supra* note 200, at 193 (suggesting that Falwell only began preaching against abortion in 1978). In the 1980s, Falwell would write that it was *Roe* that inspired him to political action: “I will never forget the moment of January 23, 1973 . . . [A]s I read the paper that day, I knew something more had to be done, and I felt a growing conviction that I would have to take my stand among the people who were doing it.” JERRY FALWELL, IF I SHOULD DIE BEFORE I WAKE 31–32 (1986) [hereinafter FALWELL, IF I SHOULD DIE]. Evidence from other sources, however, suggests that this account should be read with caution. In the 1980s, Falwell characterized his views about abortion as a spontaneous response to *Roe*, but contemporaneous evidence from the 1970s suggests a different picture.

Susan Friend Harding’s study of Jerry Falwell concludes that she “found no evidence that Falwell had preached on abortion before 1973; what evidence there is suggests that he realized the potential and importance of the abortion issue gradually during the late 1970s and early 1980s.” HARDING, *supra* note 203, at 304 & n.18. Falwell’s CAPTURING A TOWN FOR CHRIST: SATURATION EVANGELISM IN ACTION 53 (1973), ghostwritten by Elmer Towns, contains one reference to abortion as “murdering an unborn child.” *Id.* at 303 & n.5. In Falwell’s “I Love America” crusade of 1976, abortion was “just one among many other sins, not the cause célèbre it was to become.” *Id.* Towns claims to have written Falwell’s first pro-life sermon, reprinted in Falwell’s HOW YOU CAN HELP CLEAN UP AMERICA (1978). *Id.* That sermon carefully asks its audience to oppose laws “legalizing ‘abortion-on-demand,’” FALWELL, HOW YOU CAN HELP CLEAN UP AMERICA, *supra*, at 9, 59, rather than to object to abortion more generally. Strikingly, Falwell’s 1979 book, *America*

In this way a new relationship emerged among Protestant evangelicals, the Catholic right-to-life movement, and the ascendant conservatives of the New Right:

The New Right was embracing Right to Life, with the state-by-state volunteer networks and the dedicated core of prerequisite voters; and Right to Life was in turn embracing the New Right, with the direct-mail expertise, the money-funneling PACs, and the splendid surge of fresh reinforcements the New Right leaders appeared to have summoned from the ranks of the Protestant evangelicals.²²⁸

Michele McKeegan observes:

With the 1980 elections only a year away, the new right geared up its machinery to mobilize conservative Protestants behind the anti-abortion flag. The first step was to capitalize on entrenched fundamentalist opposition to the ERA. Thus, several pamphlets were produced to underline the connection between the ERA and abortion: Phyllis Schlafly's *The Abortion Connection* and Eileen Vogel's *Abortion and the Equal Rights Amendment*, a John Birch Society publication.²²⁹

The social meaning of opposing abortion was decisively shaped by this new political alliance. Earlier in the decade Phyllis Schlafly had sought

Can Be Saved!, "does not mention abortion," HARDING, *supra* note 203, at 303 & n.5, even when Falwell lists the "seven things [that] are corrupting America." JERRY FALWELL, AMERICA CAN BE SAVED! 42 (1979). In *America Can be Saved!*, Falwell instead focuses on "America's Lawlessness: Who's to Blame and How It Can be Stopped!," *id.* at 85, which he understands in explicitly racial terms. *Id.* at 86 ("Blacks . . . are simply the instruments being used at this time by wicked men with wicked motives . . . Without any question, the Communist conspiracy is definitely the agent or cause behind the effects of lawlessness now being seen."). Falwell's "first extended treatment" of abortion in print is in 1980's *Listen, America!*. HARDING, *supra* note 203, at 303 & n.5. In 1986, Falwell asserted that after *Roe* he "compared abortion to Hitler's 'final solution' for the Jews and the Court's decision to setting loose a 'biological holocaust' on our nation." FALWELL, IF I SHOULD DIE, *supra* at 33. A comparison to the German Holocaust does appear in *Listen, America!*, at page 253, but neither *America Can be Saved!* nor *How You Can Help Clean Up America* contains any such reference.

²²⁸ GORNEY, *supra* note 226, at 347. The New Right had good reason to want access to the antiabortion network: "The predominantly Catholic anti-abortion movement offered many of the same advantages as the fundamentalist churches: a large pool of potential GOP converts and a ready-made organizational structure. Additionally, the movement was supported by the healthy financial and organizational resources of the Catholic church." MCKEEGAN, *supra* note 210, at 22.

²²⁹ MCKEEGAN, *supra* note 210, at 21. Similarly, the Liberty Court, which became the coordinating group for the pro-family movement, focused on single-issue groups that opposed abortion and the ERA in an effort to draw them together. PAMELA ABBOTT & CLAIRE WALLACE, THE FAMILY AND THE NEW RIGHT 40 (1992).

to create a grassroots coalition of those opposed to abortion and those opposed to the ERA. But it was not until the construction of abortion as a problem of secular humanism at the decade's end, and not until the infusion of antiabortion advocacy with the goals of the New Right, that opposition to abortion took on the conservative social meaning that we today take for granted. Lost in this transformation was an earlier Catholic association of a "pro-life" position with liberal ideals of social justice.²³⁰

In summary, recent scholarship on the 1970s suggests that resistance to the liberalization of abortion began before *Roe* as a largely Catholic movement; that it was not until some years after *Roe* that significant numbers of Protestant evangelicals joined a pan-Christian movement opposing abortion as a symbol of secular humanism and disintegrating family values; and that this movement assumed political shape with the leadership and resources of conservative Republican strategists like Paul Weyrich. The antiabortion backlash that has so traumatized liberals reflects a constitutional vision that would preserve traditional family roles and resist secularization of the American state.²³¹ Weyrich, Schlafly, and other politically sophisticated actors were able symbolically to associate this vision with opposition to *Roe*. This constitutional vision continues to structure *Roe* rage today.²³²

²³⁰ The political salience of abortion changed appreciably in the years after the *Roe* decision. In 1978 Thea Rossi Brown, the National Right to Life Committee's Washington lobbyist who had been urging the organization to "separate the Equal Rights Amendment from the Human Rights Amendment," was replaced by Judie Brown, a "confidante" to Weyrich. Mark Winiarski, *National Right to Life, Political Right Interlink*, NAT'L CATHOLIC REP., Nov. 10, 1978, at 1, 4; see also Laurie Johnston, *Abortion Foes Gain Support as They Intensify Campaign*, N.Y. TIMES, Oct. 23, 1977, at 1; Joe Margolis, *Should It Be Called 'Life for the Right?'*, CHI. TRIB., May 6, 1979, at A6. Many liberal Catholics were dismayed by these conservative connections and by what they saw as a fundamental disconnect between the antiabortion movement and other pro-life issues such as opposition to poverty and the death penalty. In 1978, *The National Catholic Reporter* quoted from a study entitled *Are Catholics Ready?*, asserting that "Views on an anti-abortion amendment were much more strongly associated with views about sex and marriage than with opinions on 'pro-life issues' such as the death penalty." Mark Winiarski, *Anti-Abortion Does Not Equal Pro-Life—Study*, NAT'L CATHOLIC REP., Nov. 10, 1978, at 5.

²³¹ Consider, for example, President Reagan's press conference of January 31, 1983, where he announced that he was to declare 1983 the Year of the Bible:

It's my firm belief that the enduring values, as I say, presented in [the Bible's] pages have a great meaning for each of us and for our nation [W]hen I hear the first amendment used as a reason to keep the traditional moral values away from policy-making, I'm shocked I happen to believe that one way to promote, indeed, to preserve those traditional values we share is by permitting our children to begin their days the same way the Members of the United States Congress do—with prayer. The public expression of our faith in God, through prayer, is fundamental

President Ronald Reagan, Remarks at the Annual Convention of the National Religious Broadcasters (Jan. 31, 1983), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=40550&st=abortion&st1>.

²³² Conservative groups that oppose abortion generally also campaign against same-sex

marriage. At the Protecting Life and Marriage Rally in support of referendum provisions banning abortion and same-sex marriage on the South Dakota ballot in November 2006, keynote speaker Alan Keyes called abortion and same-sex marriage “one and the same issue.” “Abortion does at the physical level what homosexual marriage does at the institutional level,” he said, explaining that “both go against what God intended.” Ryan Woodward, *Speakers Rally Against Abortion, Gay Marriage*, RAPID CITY J., Oct. 17, 2006, available at <http://www.rapidcityjournal.com/articles/2006/10/17/news/local/news01a.txt>. For a sample of multi-issue conservative groups opposing abortion that also oppose same-sex marriage, see the websites of Focus on the Family, <http://www.family.org/socialissues/A000000464.cfm>, Eagle Forum, <http://www.eagleforum.org/topics/marriage/>, Concerned Women for America, <http://www.cwfa.org/coreissues.asp>, the Heritage Foundation, <http://www.heritage.org/Research/features/issues/issuearea/SSMarriage.cfm>, and the Free Congress Foundation, <http://www.freecongress.org/commentaries/2007/070122.aspx>.

The antiabortion movement’s views about sex are perhaps most visibly expressed in the movement’s vocal support of abstinence-only curricula, which urge sexual abstinence outside marriage while withholding from students both sex education and education in contraception. Cristina Page suggests that “there is not one pro-life group in the United States that supports the use of birth control.” CRISTINA PAGE, *HOW THE PRO-CHOICE MOVEMENT SAVED AMERICA* 9, 20 (2006) (“From the seemingly mainstream to the scariest and extreme pro-life groups, the anti-birth control message is seamlessly blended with their so-called mission against abortion.”). Page shows that the pro-life movement systematically opposes sex education curricula in schools in favor of abstinence only programs: “The abstinence movement is often the pro-life movement acting as federally sanctioned ‘educators.’” *Id.* at 73. See the websites of the Heritage Foundation, <http://www.heritage.org/research/abstinence/>, Focus on the Family, <http://www.citizenlink.org/FOSI/abstinence/>, Eagle Forum, <http://www.eagleforum.org/alert/2005/03-08-05.html>, Free Congress, <http://www.freecongress.org/commentaries/2005/050929.aspx>, <http://www.freecongress.org/commentaries/2005/050216.aspx>, and the Howard Center for Family, Religion, and Society, http://www.profam.org/docs/acc/thc_acc_sellout.htm?search=contraception&opt=EXACT 1.

The Howard Center has authored a natural family manifesto that embeds opposition to abortion in convictions concerning proper sexual and parenting roles. ALLAN C. CARLSON & PAUL T. MERO, HOWARD CTR. FOR FAMILY, RELIGION, & SOC’Y, & SUTHERLAND INST., *THE NATURAL FAMILY: A MANIFESTO* (2005), available at <http://familymanifesto.net> (registration necessary, copy on file with authors). For example, the *Manifesto* asserts that “each newly conceived person holds rights to life, to grow, to be born, and to share a home with its natural parents bound by marriage.” *Id.* at 16. The *Manifesto* has been endorsed by a large number of conservative advocacy groups. See Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 1002–06.

On the connection between *Roe* rage and resistance to secularization, Focus on the Family writes:

The federal courts have created a number of “privacy rights” that in turn are used to mandate new social policies, such as the right to abortion, the right to homosexual sex, the right to publish obscenity, as well as trampling on First Amendment religious freedoms. This type of activism (indeed, judicial legislation) by unelected and unaccountable judges was never contemplated by our Founding Fathers and poses grave threats to sanctity of life, the sanctity of marriage, states’ rights, separation of powers, and religious freedoms. The only way to reverse this unconstitutional and ungodly trend is to appoint judges whose judicial philosophy is the same as that intended by the Founding Fathers; judges who will apply existing law and not scribble in the margins of the Constitution when it suits their ideological agenda.

Focus on the Family, *Federal Judicial Appointments: Article Overview*, <http://www.family.org/socialissues/A000000468.cfm> (last visited May 12, 2007).

The Eagle Forum wrote:

B. Minimalism and Abortion

The history we have considered suggests that much more than judicial overreaching is responsible for *Roe* rage. The backlash to *Roe* draws on a far-reaching constitutional vision that transcends the technique or impact of any single judicial decision. This vision exposes an ambiguity in the meaning of minimalism: Does minimalism advise courts to avoid constitutional decisions that might cause controversy, or does minimalism advise that courts refrain from constitutional decisions that are inconsistent with “mutual respect”?²³³

On the first interpretation of minimalism, *Roe* was incorrectly decided because the abortion right was controversial, even if the abortion right might otherwise be constitutionally justified. Although this account of minimalism is consistent with Sunstein’s desire to avoid social conflict, it is not credible. It would mean, for example, that *Brown*, which was surely as controversial as *Roe*, was incorrectly decided.

We are led, therefore, to the second interpretation of minimalism, which would mean that *Roe* was incorrectly decided because it was inconsistent with the “respect” that the Court ought to have shown toward Catholics and others who in 1973 vigorously supported the right to life. The concept of “respect” must thus do important work, for minimalism does not argue that the abortion right is otherwise unworthy of constitutional protection. Everything depends on the exact meaning of “respect.” Strikingly, Sunstein himself does not explain what minimalism means by “respect.”²³⁴

One possible meaning of “respect” is that courts should remain neutral as between competing and antagonistic constitutional visions. But our

The basic meaning of the Constitution’s provisions can be altered only by the people, who are the ultimate HUMAN source of the Constitution. There are, however, limits to the people’s power. We must follow the formal amendment process specified in Article V. of the Constitution, and we can alter the document only within the limits allowed by the Judeo-Christian value system. Federal judges must recognize fully that civil law/government is only one societal institution among several (the other primary institutions being the family and the church). A balance of power and responsibility, undisturbed by federal judges, must be maintained among these institutions.

Virginia Armstrong, Eagle Forum, The Constitutionalist Manifesto, http://www.eagleforum.org/court_watch/alerts/2003/may03/Manifesto.shtml.

Concerned Women for America stated: “The mission of CWA is to protect and promote Biblical values among all citizens—first through prayer, then education, and finally by influencing our society—thereby reversing the decline in moral values in our nation.” Concerned Women for America: About CWA, <http://www.cwfa.org/about.asp> (last visited May 12, 2007).

²³³ SUNSTEIN, *supra* note 149, at 76.

²³⁴ The meaning of “respect” within the context of cultural diversity is in fact highly obscure. See Robert Post, *Democratic Constitutionalism and Cultural Heterogeneity*, 25 AUSTL. J. LEGAL PHIL. 185 (2000).

analysis of *Roe* rage suggests that there may be circumstances in which no such position of neutrality exists. Progressives regard questions of family roles and religious faith as individual decisions that should not be imposed by the state in a pluralistic community. Conservatives leading the backlash against *Roe* regard the protection of individualism as disrespectful of *their* view of traditional family values and traditional faith. A court must choose between these incompatible constitutional ideals. Progressives would not find the Court to be “neutral” were it now to seek to placate anxieties about religion and the family by reversing core constitutional decisions forbidding bible instruction in public schools or protecting principles of gender equality.

An alternative interpretation of “respect” is that courts ought not to decide cases in ways that antagonistic groups might find objectionable. But this interpretation of respect means that courts should articulate only those constitutional rights that express uncontroversial values. For reasons we have discussed, this interpretation of “respect” is not plausible. It implies that the Court should not have decided *Brown* because desegregation was inconsistent with the “respect” that the Court should have shown toward the Southern way of life. Just as ordinary legal reason considers the proper relationship between adjudication and democratic politics before judicially enforcing a constitutional right,²³⁵ so ordinary legal reason also considers the proper relationship between cultural disagreement and adjudication before judicially enforcing a constitutional right.²³⁶ It is not clear what the idea of “mutual respect” is supposed to add to this consideration.

Minimalism’s appeal to “respect,” therefore, seems chiefly to serve as a covert judgment about the strength of the relevant constitutional values. For a court to refuse to enforce a constitutional right because of the “respect” due to those who might be offended seems to be an indirect way of saying that the relevant constitutional value is insufficiently important to merit judicial protection.²³⁷ If this is what the idea of “respect” means in the context of minimalism, it appears to be an invitation to do substantive constitutional work without engaging in substantive constitutional analysis.²³⁸

We do not deny, of course, that avoiding conflict—especially unnecessary conflict—may be prudent. It may be proper for judges to anticipate popular responses to controversial rulings in order more effectively to fulfill discrete constitutional values.²³⁹ But democratic constitutionalism

²³⁵ See *supra* text accompanying note 168.

²³⁶ See, e.g., *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Poe v. Ullman*, 367 U.S. 497, 539 (1961) (Harlan, J., dissenting); *Trop v. Dulles*, 356 U.S. 86, 100–101 (1958) (plurality opinion); Robert Post, *Law and Cultural Conflict*, 78 CHI.-KENT L. REV. 485 (2003).

²³⁷ A good example may be found in the observations of Levinson in note 183, *supra*.

²³⁸ A good example may be found in the observations of Sunstein in note 174, *supra*.

²³⁹ See, e.g., Sunstein, *supra* note 170.

suggests that conflict avoidance should not become a master constraint on adjudication, trumping a judge's best professional understanding of a constitutional right. Professional legal craft requires a judge to assess the strength of relevant constitutional values, which ordinarily demands exquisite sensitivity to context. Minimalism, by contrast, purports to be a transcontextual methodology that seeks to avoid backlash regardless of the specific right at issue or the circumstances of its application.

Minimalism would thus weaken essential attributes of professional practice lest the ordinary exercise of craft unleash social conflict. We are not cavalier about the costs of bitter constitutional conflict. Yet we also recognize the constructive social functions of disagreement. So long as groups continue to argue about the meaning of our common Constitution, so long do they remain committed to a common constitutional enterprise. It has been rightly observed that our constitutional system consists of "an historically extended tradition of argument" whose "integrity and coherence . . . are to be found in, not apart from, controversy."²⁴⁰ Except in extraordinary and extreme conditions, like those that led to our Civil War, common practices of argument within our constitutional order channel disputes in ways that can generate conviction and commitment.²⁴¹ Given the extraordinary diversity of the American constitutional order, the only practical alternative to constitutional disagreement is constitutional anomie.

Professional legal reason in fact possesses significant resources for domesticating controversy within the forms of constitutional law. Whatever *Roe* might reveal about the Court's implicit hope of settling the abortion debate in 1973, this possibility was plainly beyond the Court's power when it decided *Planned Parenthood v. Casey*²⁴² nineteen years later.²⁴³ By 1992

²⁴⁰ POWELL, *supra* note 35, at 6; see Balkin, *supra* note 135, at 508 ("What gives the system of judicial review its legitimacy, in other words, is its responsiveness—over the long run—to society's competing views about what the Constitution means.").

²⁴¹ Siegel, *supra* note 12, at 19–21 (discussing "steering" and "attaching" as democratic goods produced by constitutional dispute).

[Constitutional dispute] allows citizens to experience law, with which they disagree, as emanating from a demos of which they are a part . . . it may strengthen law precisely as it unsettles it, enabling—and, on occasion, moving—those who pronounce law to do so in deeper dialogue with the concerns and commitments of those for whom they speak.

Id. at 97.

²⁴² *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). For an appreciation of *Casey*, see William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 37–39 (1994).

²⁴³ As President Reagan appointed Justices during the 1980s and the Court moved ever closer to reversing *Roe*, the changing structure of the conflict prompted countermobilization by *Roe*'s defenders. See Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 665–66 (documenting the rise of pro-choice activism during the 1980s and following the Court's decision in *Webster*) ("In *Webster*, Justice Scalia commented specifically on the political activity designed to influence the Court."). The resulting voter turnout affected state and federal elections. See Alan I. Abramowitz, *It's Abortion, Stupid: Policy*

it was clear that the Court would have to deploy its judicial authority to channel dispute rather than to seek to end it. *Casey*'s goal was to draw those engaged in the abortion controversy into a common discussion about the meaning of the Constitution.

Strikingly, *Casey* sought to accomplish this task by advancing what is in many ways the opposite of a minimalist decision. *Casey* does not offer a shallow, incompletely theorized agreement that brackets "the largest disputes."²⁴⁴ It instead articulates with great eloquence the ideals of both proponents and opponents of abortion. *Casey* proclaims that a woman's "suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture."²⁴⁵ Yet *Casey* also affirms:

[T]he State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and in-

Voting in the 1992 Election, 57 J. POL. 176 (1995) (showing that attitudes toward abortion had a significant effect on the 1992 presidential election and that many pro-choice Republicans defected from their party to vote for a pro-choice liberal candidate); Elizabeth Adell Cook, Ted G. Jelen & Clyde Wilcox, *Issue Voting in Gubernatorial Elections: Abortion and Post-Webster Politics*, 56 J. POL. 187, 187 (1994) (analyzing statistics from the 1989 and 1990 gubernatorial elections' exit polls to show that abortion had a significant impact on voting patterns and "was a stronger predictor than even partisanship in Pennsylvania"). Scholars have speculated that the pro-choice mobilization that helped ensure the election of Bill Clinton may also have had an impact on the Court. Barry Friedman writes:

Although one might quibble with the plurality's understanding of stare decisis in constitutional cases—the dissent certainly did—it seems hard to gainsay that the plurality [in *Casey v. Planned Parenthood*] understood that the eyes of the public were on them, and that they acted accordingly. Extrajudicially, Justice O'Connor has been quite explicit in pointing out that in the long run it is public opinion that accounts for change in politics, and in judicial doctrine.

Friedman, *The Importance of Being Positive*, *supra* note 34, at 1302. Neal Devins observes:

[N]o longer willing to pay the price for its absolutist ruling in *Roe*, the Court sought to win popular approval by steering a middle ground on abortion rights. Remarkably, the Court came close to conceding this point. Acknowledging that its power lies "in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary," the Court seemed to believe that "the public belief in the Court's institutional legitimacy enhances public acceptance of controversial Court decisions." This emphasis on public acceptance of the judiciary seems proof positive that Supreme Court Justices, while not necessarily following the election returns, cannot escape those social and political forces that engulf them.

Neal Devins, *Reflections on Coercing Privacy*, 40 WM. & MARY L. REV. 795, 801 (1999).

²⁴⁴ SUNSTEIN, *supra* note 148, at 50.

²⁴⁵ *Casey*, 505 U.S. at 852.

stitutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself.²⁴⁶

In passages like these, *Casey* accords great respect to both sides of the abortion controversy.

If minimalism seeks to suppress disagreement by avoidance, *Casey* aspires to channel disagreement by acknowledgment. It is precisely on the basis of its forthright articulation of competing constitutional ideals that *Casey* stakes its claim to call upon “the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.”²⁴⁷ By coupling this invitation to a broad and accommodating “undue burden” standard, *Casey* authorizes the Court to respond to both sides of the abortion dispute by fashioning a constitutional law in which each side can find recognition. *Casey* famously concludes both that “the essential holding of *Roe v. Wade* should be retained and once again reaffirmed”²⁴⁸ and that “the rigid trimester framework of *Roe*”²⁴⁹ should be overturned, thus authorizing for the first time fetal protective regulations throughout pregnancy.²⁵⁰

This Janus-faced holding represents the exact point of contradiction between the need of the American constitutional system for a constitutional law that is democratically responsive and the need of our constitutional system for a constitutional law that can maintain professional autonomy from political control. *Casey* understands its authority to rest “on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.”²⁵¹ Yet *Casey* also frankly acknowledges that the “divisiveness” of *Roe* “is no less today than in 1973, and pressure to overrule the decision, like pressure to retain it, has grown only more intense.”²⁵²

²⁴⁶ *Id.* at 872.

²⁴⁷ *Id.* at 867.

²⁴⁸ *Id.* at 846.

²⁴⁹ *Id.* at 878.

²⁵⁰ *Id.* at 874, 876.

²⁵¹ The Court explained:

The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court’s legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.

Id. at 865–66.

²⁵² *Id.* at 869. The *Casey* Court worried that “to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court’s legitimacy beyond any serious question” because it would suggest “a surrender to political

Casey insists on the independence of law even as it subjects law to democratic pressure by dismantling the trimester system of *Roe*. *Casey* illustrates how a constitutional decision can be politically responsive at the same time as it affirms a commitment to the law/politics distinction. The decision demonstrates how our constitutional system negotiates the tension between judicial independence and democratic legitimacy. The maintenance of this tension is compatible with a full-throated commitment to the judicial function, as expressed in *Casey*'s willingness to "accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents."²⁵³

We do not endorse *Casey*'s application of the undue burden standard or even the undue burden standard itself. Yet we do believe that the Court's decision in *Casey* powerfully suggests that backlash may at times be more effectively addressed by directly facing moral controversy than by avoiding it. *Casey* displays juridical resources for social integration that neither minimalism nor fear of backlash fully appreciate. It shows how judges can use flexible constitutional standards to channel and mediate conflict, guiding public dialogue about hotly controverted social practices and endeavoring to shape the social meaning of competing claims.²⁵⁴

Casey demonstrates that judicial review and disagreement are not incompatible. It illustrates how the substance of constitutional law emerges from the furnace of political controversy. If progressives shun controversy, either in adjudication or politics, they abandon the hope of shaping the content of constitutional law. Democratic constitutionalism suggests that in the end our constitutional law will be made by those willing to run "the long race of politics."²⁵⁵ Minimalism, like all undue fear of backlash, removes progressives from the race.

pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance." *Id.* at 867.

²⁵³ *Id.* at 901.

²⁵⁴ See Alec Stone Sweet, *Judicialization and the Construction of Governance*, in *ON LAW, POLITICS, & JUDICIALIZATION* (Martin Shapiro & Alec Stone Sweet eds., 2002); see also Siegel, *supra* note 6, at 1546 (analyzing decades of debate over the meaning of the anticlassification principle: "[A] norm that can elicit the fealty of a divided nation forges community in dissensus, enabling the debates through which the meaning of a nation's constitutional commitments evolves in history"); Reva B. Siegel, *Siegel, J., concurring*, in *WHAT ROE SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION* 63, 82 (Jack M. Balkin ed., 2005) (rewriting *Roe* to hold that "government may not deny women effective access to abortion, and all regulation of the practice must be consistent with principles of equal citizenship"); Reva B. Siegel, Comment, in *Comments from the Contributors*, in *WHAT ROE SHOULD HAVE SAID*, *supra*, at 244, 248 (observing that the alternative opinion is based on a "dialogic understanding of judicial review" and is "drafted on the assumption that the right it enunciates will have to be taken up, defended, and elaborated in judicial and popular fora and that this process is an integral part of the practice of declaring rights—a collaborative process through which the nation's understanding of its constitution evolves").

²⁵⁵ Friedman, *The Importance of Being Positive*, *supra* note 34, at 1294.

IV. CONCLUSION

As this Essay was going to press, the Court decided *Gonzales v. Carhart*,²⁵⁶ in which five Justices upheld a federal statute banning a late-term procedure polemically labeled “partial-birth abortion.” *Carhart*’s rhetoric is striking. In stark contrast to *Casey*, which took great pains to signal to both sides of the controversy that the Court can be trusted to craft a form of constitutional law that acknowledges their values, *Carhart* conspicuously affirms the concerns of antiabortion advocates without signaling similar respect for the concerns of abortion rights advocates. As recently as the previous Term a unanimous Court had affirmed that the Constitution protects a woman’s right to abortion procedures necessary for her health,²⁵⁷ but *Carhart* holds that legislatures should have “discretion” to regulate this right. The decision intimates that courts should only review such regulations through “as applied” challenges generally thought too cumbersome to respond to the need for emergency medical procedures.

Carhart offers a new woman-protective justification for these restrictions, premised in part on a claim about women’s capacity and in part on a claim about women’s roles. Emphasizing “the bond of love the mother has for her child,” the decision justifies restricting abortion to protect a woman against a mistaken decision to end a pregnancy that she might later regret.²⁵⁸ In a passionate opinion penned by the only remaining woman on

²⁵⁶ 127 S. Ct. 1610 (2007).

²⁵⁷ *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006) (“New Hampshire does not dispute, and our precedents hold, that a State may not restrict access to abortions that are “necessary, in appropriate medical judgment, for preservation of the life or health of the mother.””) (internal citations omitted).

²⁵⁸ *Carhart*, 127 S. Ct. at 1634 (internal citations omitted):

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. . . . While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. See Brief for Sandra Cano et al. as *Amici Curiae* in No. 05-380, pp. 22–24. Severe depression and loss of esteem can follow.

Citing an antiabortion amicus brief and common sense as authority that women make mistaken decisions about abortion, *Carhart* concludes that law banning a late-term abortion procedure vindicates the state’s interest in informing a woman’s choice:

The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast developing brain of her unborn child, a child assuming the human form.

. . . The State’s interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a

the Court, four Justices in dissent object to this gender-paternalist justification. They accuse their brethren of invoking a stereotypical view of women that is incompatible with a long line of cases recognizing women as equal members of the polity.²⁵⁹ The Court refuses to acknowledge the dissent's objection as to the facts or norms of women's capacity, asserting instead that its view of women is grounded in "unexceptionable" common sense, a proposition for which it cites an ardent amicus brief submitted by an antiabortion advocacy group.²⁶⁰

We expect that *Carhart* will inflame political controversy rather than diminish it. This will be true even though the opinion *upheld*, rather than struck down, legislation. *Carhart*'s ratification of a federal ban on a late-term procedure will inspire antiabortion advocates to push for ever more far-reaching restrictions on abortion, and it will provoke abortion rights advocates to renewed mobilization, especially now that the debate over women's agency and women's roles has been expressly joined. Escalating conflict will spill into all arenas of politics, in legislation, litigation, campaign debate, and judicial appointments, as Americans struggle over whether government may promote hotly contested views about the role of women, faith, and family in American life.²⁶¹ In a constitutional democracy, such disputes cannot be resolved by fiat, judicial or otherwise. By grounding their objections in guarantees of equality as well as liberty, the dissenting Justices make clear their view that constitutional controversy will persist even if *Roe* is reversed.²⁶²

late-term abortion.

Id.

²⁵⁹ Justice Ginsburg's dissent appeals directly to the Court's sex discrimination cases, objecting, "This way of thinking reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited." *Id.* at 1649 (Ginsburg, J., dissenting); see also Siegel, *supra* note 61, at 1029–50 (analyzing the stereotypes about women's agency and women's roles that make woman-protective antiabortion argument persuasive); Reva B. Siegel & Sarah Blustein, *Mommy Dearest*, AM. PROSPECT, Oct. 2006, at 22 (showing how the stereotypes in woman-protective antiabortion argument make restrictions on abortion seem reasonable, while diverting attention from remedies that are responsive to the concerns that lead women to abort pregnancies).

²⁶⁰ *Carhart*, 127 S. Ct. at 1634; see Linda Greenhouse, *Adjudging a Moral Harm to Women from Abortions*, N.Y. TIMES, Apr. 20, 2007, at 18 (discussing a passage of the *Carhart* opinion citing a brief that contains "post-abortion" affidavits of a kind employed to justify an abortion ban in South Dakota); see also Siegel, *supra* note 61 (tracing the rise and spread of woman-protective justifications for abortion restrictions and analyzing their gender-based reasoning); *id.* at 1025–26 (discussing amicus briefs advancing woman-protective arguments like those expressed in the *Carhart* decision). For a discussion of the relationship between woman-protective arguments for regulating abortion and religious beliefs, see Post, *supra* note 61, at 953–68.

²⁶¹ See *supra* note 232 (discussing advocacy of antiabortion groups today in matters concerning same-sex marriage, abstinence-only education, contraception, family roles, and the separation of church and state).

²⁶² The sex equality claim for the abortion right has a long lineage, reaching back to the ERA dispute and beyond. See Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. (forth-

The controversies about religion, family, and gender that animate *Roe* rage are now joined in politics and in judicial decisionmaking. They cannot be escaped by strategies of conflict avoidance. Respect for individual choice is viewed in the context of abortion as a *partisan* position dubbed “secular humanism”²⁶³ by those committed to appointing “judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.”²⁶⁴ If the dissenting Justices in *Carhart* were to turn minimalist, they would simply cede ground to the fervently held constitutional vision of those who, like the *Carhart* majority, are attuned to the voice of antiabortion advocates. The question is *which* constitutional vision will influence the Court; it is not *whether* the Court will express a constitutional vision.

This Essay offers a jurisprudential model, democratic constitutionalism, that explores the deep and inevitable interdependence of constitutional law and politics. Democratic constitutionalism suggests what *Carhart* so vividly illustrates: Constitutional law embodies a *nomos*, and fidelity to that *nomos* demands engagement that is both legal and political.

coming 2007) (discussing legal expression of the sex equality argument for reproductive rights in the 1960s and 1970s). Justice Ginsburg began publishing articles urging that the abortion right be understood as a sex equality right in the 1980s, immediately after the period for the ERA's ratification expired. *Id.* It was in this era that “equality reasoning began to emerge as the dominant rationale for the abortion right in the legal academy.” *Id.*

²⁶³ See *supra* notes 203–206 and accompanying text; text accompanying note 206 (quoting a “Special Report on Secular Humanism vs. Christianity” in the *Christian Harvest Times* denouncing abortion: “To understand humanism is to understand women’s liberation, the ERA, gay rights, children’s rights, abortion, sex education, the ‘new’ morality, evolution, values clarification, situational ethics, the loss of patriotism, and many of the other problems that are tearing America apart today.”).

²⁶⁴ See *supra* text accompanying note 221 (quoting 1980 Republican Party Platform); *supra* note 221 (quoting 1984 Republican Party Platform); see also *supra* note 59 (quoting 1988, 2000, and 2004 Republican Party Platforms).

Backlash's Travels

Cass R. Sunstein*

ABSTRACT

Sometimes the public greatly opposes the decisions of the Supreme Court; sometimes the Court seems to anticipate public backlash and even to respond to it when it occurs. Should a social planner want the Court to anticipate or to respond to backlash? No abstract answer is possible; the appropriate conclusion depends on assumptions about the capacities of courts and the capacities of those who engage in backlash. This point is demonstrated through an exploration of four imaginable worlds: Olympus, the Land of the Ancients, Lochnerland, and Athens. The four worlds are based on radically different assumptions about judicial and public capacities to think well about constitutional problems. The proper analysis of backlash depends, in large part, on the prevailing theory of constitutional interpretation and on whether judges have privileged access to constitutional meaning. If judges lack such access, backlash is a healthy part of dialogue between judges and the public, and the judiciary should sometimes yield. If our world is Olympus, the argument for attention to backlash is severely weakened.

Let us define “public backlash,” in the context of constitutional law, in the following way: Intense and sustained public disapproval of a judicial ruling, accompanied by aggressive steps to resist that ruling and to remove its legal force.

It is easy to imagine cases in which a controversial judicial ruling is likely to produce public backlash. Perhaps the ruling involves property rights, presidential power in connection with the war on terror, the use of the words “under God” in the Pledge of Allegiance, the placement of the Ten Commandments on public property, or same-sex marriage.

Let us simply stipulate that if the Court rules in a certain way in such cases, public outrage could significantly affect national politics and undermine the very cause that the advocates of the ruling are attempting to promote. Perhaps the ruling would prove futile or counterproductive, or produce overall social harm. Perhaps the ruling would set in motion forces

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that would ultimately lead to its own demise. How should a social planner want courts to respond to the risk of backlash?

My principal claim in this Essay is that no sensible answer to this question can be given in the abstract. Any judgment inevitably must depend on certain assumptions about institutional capacities and characteristics.¹ Under easily imaginable assumptions, courts should ignore the risk of backlash and rule as they see fit. Under assumptions that are different, but also easily imaginable, the restraining effect of backlash is highly desirable, and it is very good when courts are affected by it. The risk of backlash has sometimes proved a deterrent to desirable rulings from the Court; it has also helped to deter rulings that are not at all desirable. If these conclusions are right, they raise serious questions about a tempting view within the legal culture—that courts should decide as they see fit and let the chips fall as they may. That view might ultimately be right, but it depends on contentious judgments about the fact-finding and theory-building abilities of both courts and the public.

As we shall see, those who believe in “popular constitutionalism”² on normative grounds might well be led to the conclusion that judges should pay careful attention to the risk of backlash. For example, Larry Kramer writes that under the original understanding, “[f]inal interpretive authority rested with ‘the people themselves,’ and courts no less than elected representatives were subordinate to their judgments.”³ On this view, backlash deserves careful attention when it occurs. If judges anticipate backlash, they would do well to limit themselves accordingly, perhaps by invoking justiciability doctrines to avoid the merits, perhaps by ruling narrowly, perhaps by deferring to the elected branches.

If the argument here is correct, the claim that judges should attend to the prospect of backlash stands or falls on particular judgments about constitutional method and institutional capacities. If we believe that the meaning of the Constitution is settled by the original understanding, then “the people themselves” may be ill equipped to uncover that meaning, and judges should pay little or no attention to the public’s desires. But if we believe that the meaning of the Constitution is legitimately settled by reference to

¹ Robert Post and Reva Siegel, this issue, argue on behalf of a model of democratic constitutionalism in which courts retain a prominent role. Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. ____ (2007). Celebrating *Planned Parenthood v. Casey*, 550 U.S. 833 (1992), they seek to defend the judicial role against some of its critics who emphasize the value of popular constitutionalism. As we shall see, their illuminating discussion cannot be evaluated in the abstract; a great deal depends on judgments about institutional capacities. I believe that Post and Siegel have something in common with Bickel: they believe that, to some extent, we live in Olympus. My principal goal here is not to question that conclusion but to clarify the need for and nature of the underlying institutional judgments.

² See LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (contending that the public should create and contest constitutional meaning).

³ *Id.* at 8.

moral and political judgments, and if courts are not especially good at making those judgments, then popular constitutionalism and attention to backlash have far more appeal. My purpose, however, is not to indicate a final view on appropriate response to the risk and occurrence of backlash.⁴ I aim instead to explore the grounds on which such a view must be defended.

I attempt that exploration through an admittedly unusual route. I specify a diverse array of nations, or lands, in which the analysis of backlash must take a distinctive form. Unlike Gulliver, backlash is not a person; but we can learn a great deal, I am hoping, by investigating backlash's travels.

I. OLYMPUS

Let us imagine a nation—call it Olympus—in which judicial judgments are reliably right, from the relevant point of view, and in which public opposition to those judgments, when it exists, is reliably wrong. To make the example simple and intuitive, let us begin by stipulating for present purposes that judicial decisions about constitutional meaning require moral judgments of one or another sort.⁵ On this assumption, the constitutionality of racial segregation, restrictions on the right to choose abortion, or bans on same-sex marriage turns, in significant part, on moral judgments. Perhaps the relevant practices are valid if and only if they can be supported by reference to justifications that are at once legitimate and weighty. If we suppose that judges can assess that question reliably, and that any public backlash is based on grounds that are either illegitimate or weightless, the argument for taking account of backlash seems very weak. At first glance, the duty of judges is to rule on the Constitution's meaning by reference to the relevant sources; if backlash occurs, it is by hypothesis irrelevant to the judges' job.

The first glance is essentially right. For those who believe that our world is Olympus, it is usually inappropriate for judges to attend to backlash. But things are not quite so clear, even in Olympus. To see why, consider the debate between Alexander Bickel and Gerald Gunther about judicial exercise of the "passive virtues," captured in the Supreme Court's refusal to decide certain controversial questions.⁶ Bickel seemed to think that

⁴ See Cass R. Sunstein, *If the Public Would Be Outraged by Their Rulings, Should Judges Care?*, STAN. L. REV. (forthcoming 2007).

⁵ See, e.g., RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996) [hereinafter DWORKIN, *FREEDOM'S LAW*] (arguing that decisions should be based on a "moral reading" rather than specific original understandings or majoritarian sentiment); RONALD DWORKIN, *JUSTICE IN ROBES* (2006) [hereinafter DWORKIN, *JUSTICE IN ROBES*] (challenging models of adjudication that deny the role of moral arguments); JAMES FLEMING, *SECURING CONSTITUTIONAL DEMOCRACY: THE CASE FOR AUTONOMY* (2006) (arguing that judges should perfect the Constitution to assure "deliberative autonomy" and "deliberative democracy").

⁶ See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed., Yale Univ. Press 1986) (1962); Gerald Gunther, *The Subtle Vices of the "Passive Virtues"*—A Comment on Principle and Expediency in Judicial Re-

the United States is, in an important sense, Olympus. He insisted that the Court's role was to announce certain enduring values—to discern principles that would properly organize constitutional life. Bickel believed that courts were in a unique position to carry out that role. In his view, “courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess.”⁷ Indeed, “[j]udges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar . . .” in thinking about those enduring values.⁸

To this extent, Bickel showed great faith in the capacities of judges to think about what political morality requires. “Their insulation and the marvelous mystery of time give courts the capacity to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry.”⁹ Thus, “[n]o other branch of government is nearly so well equipped to conduct” a kind of “vital national seminar,” through which the most basic principles are discovered and announced.¹⁰ Pressed by expediency and by short-term pressures, other institutions are poorly equipped to understand what principles are required, at least by comparison with the judiciary.

Nor was Bickel especially enthusiastic about “the people themselves.” On the contrary, he wrote that “the people themselves, by direct action at the ballot box, are surely incapable of sustaining a working system of general values specifically applied.”¹¹ In his view, “matters of principle” require “intensive deliberation” and should not be submitted to a direct referendum.¹² It should be clear that this is an emphatically Olympian conception of the role of the Supreme Court. What is perhaps most remarkable about that conception is how many people have shared it in the decades since Bickel first wrote.¹³

At the same time, Bickel believed that a heterogeneous society could not possibly be principle ridden. Too much of the time, such a society would resist the imposition of principles, even if they were entirely sound. In this respect Bickel invoked the example of Abraham Lincoln, who seemed to him a model for the Supreme Court itself.¹⁴ Bickel read Lincoln to be unambivalent in his condemnation of the institution of slavery, but also to believe that immediate abolition was impractical, simply because it would meet with such widespread opposition. In Lincoln's view, the feeling of

view, 64 COLUM. L. REV. 1 (1964) (criticizing use of justiciability doctrines to avoid principled decisionmaking).

⁷ BICKEL, *supra* note 6, at 25.

⁸ *Id.*

⁹ *Id.* at 26.

¹⁰ *Id.*

¹¹ *Id.* at 27.

¹² *Id.*

¹³ See, e.g., DWORKIN, JUSTICE IN ROBES, *supra* note 5.

¹⁴ BICKEL, *supra* note 6, at 66–70.

“the great mass of white people” would not permit abolition.¹⁵ In his most striking formulation, Lincoln declared: “Whether this feeling accords with justice and sound judgment, is not the sole question, if indeed, it is any part of it. A universal feeling, whether well- or ill-founded, can not be safely disregarded.”¹⁶

Bickel argued that the Supreme Court maintained a kind of Lincolnian tension, and that it did so through the use of the passive virtues, by which it stayed its own hand in deference to anticipated public resistance. In his view, a court that invalidates legislative policy “must act rigorously on principle, else it undermines the justification for its power.”¹⁷ The same is true when the Court validates a legislative action.¹⁸ But the Court might also refuse to decide. It might give the political processes relatively free play, because it has neither upheld nor invalidated their decisions. In his view, “No good society can be unprincipled; and no viable society can be principle-ridden.”¹⁹ The task of judicial review is to maintain both “guiding principle and expedient compromise”²⁰— and to do so by staying its hand in the face of strong popular opposition, however indefensible the opposition might be.

In response, Gunther was mostly aghast.²¹ In his famous phrase, Gunther wrote that Bickel seemed to believe that the Supreme Court should maintain “the 100% insistence on principle, 20% of the time.”²² By contrast, Gunther thought that the Court should be one hundred percent insistent on principle, one hundred percent of the time. Accepting Bickel’s basic conception of the Court’s role as the elaborator of sound principles, he insisted that the passive virtues should not be invoked as a basis for judicial refusals to invalidate unconstitutional action.

We should be able to see that both Bickel and Gunther write as if our world is Olympus—as if the Supreme Court has special access to constitutional meaning, understanding that concept in terms that acknowledge the Court’s creative role in discerning the governing principles. Both believed, moreover, that public backlash is not well founded—that it is essentially unprincipled, a refusal to act in accordance with constitutional commands. Undoubtedly they were influenced in this regard by their distinctive time, when the Warren Court was engaged in a series of projects that seemed (to many) required from the moral point of view. Recall here that Bickel’s model frames the conflict as between Lincoln’s moral commitments and the intransigence of those who defended slavery. Recall too

¹⁵ *Id.* at 66 (quoting Abraham Lincoln, Speech at Peoria, Illinois (Oct. 16, 1854), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 256 (Roy P. Basler ed., 1953)).

¹⁶ *Id.*

¹⁷ *Id.* at 69.

¹⁸ *Id.* at 70.

¹⁹ *Id.* at 64.

²⁰ *Id.*

²¹ Gunther, *supra* note 6.

²² *Id.* at 3.

that the ban on racial intermarriage is the problem in which Bickel praised, and Gunther condemned, the Court for exercising the passive virtues.²³

The simple conclusion is that to the extent that our world is Olympus, it is not easy to defend the proposition that courts should care about backlash. The most that can be said is that even in Olympus, courts might plausibly use the passive virtues so as to preserve the Lincolnian tension between principle and expediency. This is an important point, but it is merely a qualification of the basic point, which is that because judges are right and an outraged public is wrong, backlash deserves consideration only rarely and only for prudential reasons.

II. THE LAND OF THE ANCIENTS

Now let us adopt different assumptions. Let us imagine that we have arrived at the Land of the Ancients, in which constitutional meaning is best understood in originalist terms. In this land, the meaning of the document is captured by the intentions of the ratifiers,²⁴ or perhaps by its original public meaning.²⁵ (We need not pause over the distinction between the two approaches, even though it might be important in some cases.) In the Land of the Ancients, all judges are self-conscious and unambivalent originalists.

Let us assume as well that the Supreme Court is especially good at discerning constitutional meaning, thus understood, and that the public is very bad at that task. Perhaps the public is essentially uninterested in the outcomes dictated by originalism; perhaps the public is incompetent in thinking about what originalism requires. When backlash occurs in the Land of the Ancients, it is because the public's (legally irrelevant) judgments of policy and principle have been rejected by the Court's (legally sound) judgments about the original understanding. In this particular land, some members of the public are skeptical of originalism as such; some people reject the outcomes that originalism produces; many people reject originalism *because* it produces the relevant outcomes.

In the Land of the Ancients, judges are entirely comfortable with democratic corrections to the outcomes required by originalism—at least if those corrections take the form of using constitutionally specified channels to invalidate actions that the original understanding permits. Suppose, for example, that if we refer to that understanding, the Constitution is best taken not to create a right to choose abortion, or not to include protection against discrimination on the basis of sex. If political majorities seek to use political processes to protect the right to choose abortion, or to ban sex

²³ See BICKEL, *supra* note 6, at 71, 126, 174 (discussing *Naim v. Naim*, 350 U.S. 985 (1956)); Gunther, *supra* note 6, at 11–13 (same).

²⁴ See Saikrishna Prakash, *Radicals in Tweed Jackets*, 106 COLUM. L. REV. 2207 (2006) (book review).

²⁵ See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

discrimination, judges in the Land of the Ancients will have no complaint. Of course such judges will not permit democratic majorities to defy the original understanding—by, for example, denying African Americans the right to vote or allowing legislation to have the force of law when it has not been presented to the President. But originalists agree that these majorities can engage in constitutional change through the lawful use of the ordinary channels for amendment.

If judges are right to commit themselves to originalism, the social planner should not, at first glance, want the Court to take account of backlash. By hypothesis, the Court is correct on the relevant question and the public is wrong. Indeed, the situation here is exceedingly close to the situation in Olympus. Even or perhaps especially if the favored interpretive method is originalist, the public's views about the meaning of the Constitution are irrelevant. The Court should rule as it sees fit, whatever the public's response.²⁶ With respect to backlash, we could easily imagine a working alliance between Olympians, who read the Constitution in moral terms,²⁷ and originalists, whose lodestar is history. The alliance is joined by people with diverse interpretive methods who nonetheless agree that the Court ought not to attend to the risk and reality of backlash.

But there is a counterargument, or at least a contrary consideration. Perhaps a Bickelian approach is appropriate in the Land of the Ancients. Perhaps a Bickelian could be convinced that originalism is the correct approach and that the original understanding exhausts constitutional meaning—while also acknowledging that *no society can be one hundred percent originalist one hundred percent of the time*. One reason might be the existence of longstanding departures from the original understanding, some of which were permitted, and others engineered, by the Supreme Court itself. Perhaps a theory of stare decisis, or of respect for settled social practices, is necessary or appropriate in the Land of the Ancients.²⁸ If the nation has long allowed independent regulatory agencies, or if the Court has long banned sex discrimination, judges in the Land of the Ancients might not try to change the status quo, even if originalism condemns independent regulatory agencies and permits sex discrimination. Perhaps such judges are attuned not merely to reliance interests, but to a large set of considerations of which public backlash is a part.

A variation on this view is Lincolnian. Perhaps there are quasi-Bickelians even in the Land of the Ancients, who believe that adherence to the original meaning is what principle requires, while also insisting that prudence—understood as caution in implementing understandings rejected by the public—has an important place. Even if in principle nothing can be

²⁶ Consider the comments of Justice Scalia in Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

²⁷ See DWORKIN, *FREEDOM'S LAW*, *supra* note 5.

²⁸ See Justice Scalia's admission of possibly proving to be a "faint-hearted originalist" in Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

said to support the public's resistance to judicial adherence to the original understanding, the social consequences of judicial insistence on that understanding might well be unacceptable. Those consequences are especially likely to be unacceptable if the public is genuinely outraged. It follows that originalist judges might stay their hand, at least if they can do so without greatly compromising the rule of law.

Notwithstanding the large differences in interpretive methods, it emerges that the Land of the Ancients is relevantly close to Olympus. There is a strong presumption that backlash is immaterial. But there might well be a prudential argument, in extreme cases, for anticipating backlash, and for refusing to cause it, at least if the consequences would be very bad. An Olympian judge might hesitate before declaring that the Constitution requires states to recognize same-sex marriages. A judge in the Land of the Ancients might hesitate before ruling that the Endangered Species Act is beyond congressional power under the Commerce Clause, or that racial segregation, if required by the national government, offends no provision of the Constitution—even if such a judge believes that the original Constitution does not allow the Endangered Species Act and fails to forbid racial segregation at the national level.

It is true that in the Land of the Ancients, the views of the public have no interpretive authority; they tell us nothing about what the Constitution means. But a judge who works there might be willing to use doctrines of justiciability in order to avoid especially bad consequences. Crucially, such a judge will want to see that the use of such doctrines can itself be justified by reference to the original understanding. Perhaps the relevant doctrines can be so justified, and perhaps they will allow courts some room to maneuver. At the very least, an originalist judge might dare to hope so.

III. LOCHNERLAND

Now let us alter our assumptions in a more significant way. In the land that I now propose to investigate, things are closer to Olympus than to the Land of the Ancients in the following respect: Constitutional meaning is properly, or even inevitably, a product of the political or moral judgments of the interpreter. Let us assume further that interpreters, to qualify as such, cannot be freestanding moral or political arbiters; they owe a duty of fidelity to the relevant legal materials. Nonetheless, these materials contain significant ambiguities or gaps, so that ultimate judgments often depend on contestable views about policy and principle. Let us assume finally—and this is the key step, the departure from Olympus—that judicial views about policy and principle are systematically unreliable and that public backlash, when it occurs, is founded on good grounds, in the sense that the public's judgments are simply better than that of the Supreme Court.

In short, we are now speaking of Lochnerland, in which judicial errors are inevitable. How, if at all, should the analysis of backlash be affected?

A. *Judicial Error*

It should be clear that under the stated assumptions, the social planner would very much want the Court to take account of the risk of backlash. By hypothesis, consideration of backlash will move the Court in better directions. At a minimum, the social planner might insist that the judges of Lochnerland pay attention to public judgments as they are reflected in backlash—perhaps by staying their hand, or by invoking justiciability doctrines, if the risk of significant backlash is high. But the social planner might well go much further. Indeed, the supposition that we are in Lochnerland would help to explain the influential views of James Bradley Thayer on the appropriate posture of the Supreme Court.²⁹ Thayer believed that the Court should strike down legislation only if the violation of the Constitution was “so manifest as to leave no room for reasonable doubt.”³⁰ We can think of Thayerianism as a generalization of the idea that courts should anticipate backlash and be cautious if it is likely to occur.

But Thayer was far more ambitious than that. Thayer suggested, much more broadly, that the Court should generally defer to the public's judgments, and to their judgments about constitutional commands, unless those judgments are palpably wrong.³¹ To say that courts should hesitate in the face of backlash is simply to offer a modest specification of Thayer's general view. It is a specification because Thayer's general plea for judicial deference surely entails hesitation in the face of intensely held public convictions; it is modest because those who ask courts to attend to backlash need not embrace Thayer's general position.

To be sure, Thayer's approach leaves a large gap, one that Thayer himself did not fill: By what theory can we tell whether there is a constitutional violation? Thayerianism cannot possibly be a *complete* account of the judicial role, because the question whether there is a clear violation depends on the method by which the Constitution is read. We could imagine originalist Thayerians, who believe that legislation must be upheld unless the violation of the original understanding is palpable. On this view, the legislature would receive the benefit of all reasonable doubts in the face of originalist challenges. We could also imagine Olympian Thayerians, who

²⁹ See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

³⁰ *Id.* at 140 (quoting *Commonwealth v. Smith*, 4 Binn. 117 (Pa. 1811)).

³¹ *Id.* For a modern version, see Adrian Vermeule, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006). I am identifying here “the public” with the public's elected representatives, who were Thayer's focus.

believe that legislation must be upheld unless the violation of relevant moral principles is plain.

But the core point is that Thayerian approaches emphasize the likelihood of judicial error. In *Lochnerland*, attention to the risk of backlash seems obligatory, simply because it produces better results by stipulation. In *Lochnerland*, it is highly desirable for judges to anticipate public backlash and to attempt to avoid it. The reason is that judges will do better, in principle, if they defer to an excited citizenry.

It is sad but true that the judges of *Lochnerland* might not willingly adopt Thayerianism or even attend to the risk of backlash. By hypothesis, these are the judges of *Lochnerland*, and their judgments are systematically unreliable. Such judges are likely to err while also being confident that they are unerring. Perhaps the judges of *Lochnerland* think they live in Olympus; it would not be the first time. But perhaps a norm or practice of judicial self-discipline might be developed, so that fallible judges, made alert to their own fallibility, adopt measures to limit their own mistakes. Such measures might involve doctrines of justiciability, designed to reduce judicial intervention into American life; or minimalism, designed to ensure a degree of narrowness and shallowness;³² or generalized deference, designed to impose a heavy burden of proof and persuasion on those who challenge legislatures.

B. Popular Constitutionalism, Jefferson's Revenge, and Condorcet

Let us revisit the idea of “popular constitutionalism”³³ through the lens of *Lochnerland*. Those who embrace popular constitutionalism might be taken to suggest that constitutional meaning requires judgments of basic principle and to believe those judgments are more reliably made by the public than by the judiciary.³⁴ A plea for attention to the risk of backlash, and for judicial deference to backlash when it occurs, seems natural in light of the more general view. And in this light, we can see the close links among popular constitutionalism, judicial responses to backlash, and Thomas Jefferson's plea for frequent constitutional amendment by an engaged citizenry.³⁵ If constitutional meaning turns on judgments of morality and fact, and if those judgments change over time, a “living constitution” might turn out to have a powerful Jeffersonian element—at least if the public, and not the judges, breathes life into the document.

More ambitiously, we can even see a kind of “Jefferson's Revenge” in American processes of constitutional change, to the extent that the rele-

³² See CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

³³ See KRAMER, *supra* note 2, and accompanying text.

³⁴ In my view, this is part of the account in *id.*

³⁵ See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006).

vant changes are produced through processes of interpretation that are highly sensitive to popular judgments over time.³⁶ It is certainly plausible to think that most alterations in constitutional meaning have stemmed not from constitutional amendments, and not from freestanding judicial elaboration of principles, but from social practices and constitutional doctrines that show a degree of attentiveness to changing public perceptions and commitments.³⁷ Jefferson's Revenge, if it has occurred, can be found in new understandings of the Constitution that, in the end, are a product of the beliefs and values of successive generations.

In Lochnerland, the argument for judicial attention to popular judgments in general, and to backlash in particular, might be fortified by reference to the Condorcet Jury Theorem ("CJT").³⁸ The CJT says that if members of a group are more than fifty percent likely to be right, the likelihood that a majority of the group will be right expands to one hundred percent as the size of the group increases. We can easily imagine a situation in Lochnerland in which (a) large populations have a constitutionally relevant judgment and (b) most individuals are more than fifty percent likely to be right. If so, the majority is overwhelmingly likely to be right. If the population assents to a proposition that is constitutionally relevant, judges would do well to pay attention to them, perhaps especially if their convictions are firm.

These claims raise many questions and serious doubts, not least from the Olympian point of view.³⁹ The simplest point is that in Lochnerland, the argument for attention to popular backlash is very strong. When judges make constitutional judgments on their own, there is a serious risk of error. Anticipation of backlash and humility in its face reduce that risk. And we can identify a sharp difference, in this light, between Lochnerland on the one hand and Olympus and the Land of the Ancients on the other. In the latter jurisdictions, there is no reason to think that most members of the public are more likely than not to be right on a constitutionally relevant proposition. Hence, judges lack an epistemological reason to care about what the public thinks. In Lochnerland, things are altogether different.

³⁶ See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA*, 94 CAL. L. REV. 1323 (2006).

³⁷ Cf. EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING 3–8 (1949) (emphasizing that with analogical reasoning, changing judicial judgments develop in a way that is attuned to social commitments).

³⁸ See CASS R. SUNSTEIN, INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE (2006).

³⁹ See Sunstein, *supra* note 4. An obvious problem is that if most people suffer from a systematic bias, and hence are more likely to be wrong than right, the likelihood that the majority will be wrong approaches one hundred percent as the size of the group expands. Judges in Lochnerland are not likely to be impressed with the wisdom of crowds; believing that people are probably wrong, they might well enlist the CJT to suggest that the view of the crowd is entitled to no weight. See *id.*

IV. ATHENS

Now suppose that there is no particular reason to believe that judges are especially good, or especially bad, at giving meaning to ambiguous constitutional phrases. Let us imagine that we are agnostic on that question, at least over long periods of time. We do not know whether we are in Olympus or Lochnerland. For every *Brown v. Board of Education*,⁴⁰ there is a *Lochner v. New York*.⁴¹ For every *Dred Scott v. Sandford*,⁴² there is a *Brandenburg v. Ohio*.⁴³ No global assessment is possible. But let us suppose that the Supreme Court operates in an essentially well-functioning democracy, in which relevant judgments are made through a system that combines reflection and reason-giving with accountability. Let us give this imaginary democracy a familiar name: Athens.

In Athens the social planner might well insist that judges should pay careful attention to the risk or existence of backlash.⁴⁴ The reason is that backlash reflects the public's judgments about basic social questions—the best conception of equality and liberty, the proper understanding of religious freedom, the role of property rights, the power of the President. For democratic reasons, such judgments deserve respect whether or not they are likely to be right. A self-governing people deserves to be ruled by its own judgments, at least if those judgments cannot be shown to be wrong in the sense of plainly inconsistent with the founding document.

It is here, in fact, that we might find another reason for Thayerianism—a reason founded not on the risk of judicial error, but on the commitment to democratic self-government. In Athens, that commitment might well be taken to justify a high degree of judicial modesty. But even in Athens, a serious flaw in the use of this commitment to justify Thayerianism is that it grounds its defense on a contentious view of what self-government requires.⁴⁵ Perhaps self-government requires insistence on its preconditions, including freedom of speech and the right to vote; perhaps judicial review, indifferent to public commitments, can do well in ensuring those preconditions.⁴⁶ Perhaps self-government, properly understood, requires respect for a wide range of individual rights.⁴⁷ Perhaps judicial protection of those rights is indispensable.

These are powerful responses to Thayerianism in any form. But if judges do not have the capacity to make superior judgments on the rele-

⁴⁰ 347 U.S. 483 (1954).

⁴¹ 198 U.S. 45 (1905).

⁴² 60 U.S. 393 (1857).

⁴³ 395 U.S. 444 (1969).

⁴⁴ Compare the instructive treatment in Post & Siegel, *supra* note 1, emphasizing the relationship between legitimacy and heeding backlash.

⁴⁵ See DWORKIN, JUSTICE IN ROBES, *supra* note 5.

⁴⁶ See generally JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

⁴⁷ See DWORKIN, JUSTICE IN ROBES, *supra* note 5; FLEMING, *supra* note 5.

vant points, Thayerianism looks much more appealing. At the very least, we might be able to say that on democratic grounds, the Supreme Court should, in Athens, be reluctant to rule in a way that produces significant backlash—and it should attend closely to the existence of backlash when it does occur.

It should be clear that popular constitutionalism is alive and well in Athens. The commitment to popular constitutionalism is not founded on the view, held in Lochnerland, that the underlying questions are likely to be resolved correctly by the public and erroneously by courts. Instead the commitment rests on a judgment in favor of (one account of) self-government as such.

V. OUR WORLD AND WELCOME TO IT

We have now seen how backlash might be analyzed as it travels through a set of imaginable worlds. For us, however, no simple conclusion has emerged. It is both tempting and far too simple to contend that judges should simply ignore the risk of backlash and refuse to attend to it when it occurs. This was essentially Gunther's view, and it depends on the controversial assumption that we live in Olympus (or perhaps the Land of the Ancients). Undoubtedly Gunther was influenced by the context in which he wrote, involving judicial efforts to vindicate palpably sound principles of racial justice in the face of indefensible public opposition. But it should be unnecessary to say that that context is hardly the inevitable one in American political life. We should also be able to see that Bickel neglected the risk of judicial error in the announcement and elaboration of moral principles, and hence assumed, wrongly, that the only reason for "prudence" was to maintain a Lincolnian tension. The assumption was wrong because judges might stay their hand not only for the sake of expediency, but also out of an awareness of their own limitations and their capacity for error.

Which world is our own? That question cannot be answered without making contestable normative and empirical judgments. One person's Olympus will be another's Lochnerland. In any case our world does not fit any of the ideal types, and for that reason it is not possible to reach any unambivalent conclusion about the relevance of backlash.⁴⁸ But one point is clear, and it involves the importance of distinguishing between validations and invalidations. Much of public backlash operates against validations of statutory enactments. By 1953, *Plessy v. Ferguson*⁴⁹ was widely viewed as outrageous; the same was true of *Bowers v. Hardwick*⁵⁰ by 2002. The most visible public backlash in recent years operated against the *Kelo v.*

⁴⁸ Sunstein, *supra* note 4, explores this issue in some detail.

⁴⁹ 163 U.S. 537 (1896).

⁵⁰ 478 U.S. 186 (1986).

City of New London decision,⁵¹ in which the Court offered a broad reading to the “public use” requirement of the takings clause. In cases of validation, there is an evident remedy: The democratic process can usually eliminate the practice against which backlash has occurred.

The point is hardly speculative. In the aftermath of *Bowers v. Hardwick*, a number of states took steps to decriminalize sodomy, whether homosexual or heterosexual. In the aftermath of *Kelo*, many steps were proposed, and some taken, to give greater protection to property rights. Perhaps most visibly, President Bush signed an executive order that would disallow national “takings” under circumstances permitted by the Supreme Court.⁵² To be sure, any particular democratic corrective may be inadequate. Perhaps the practice that the Court has allowed is accepted in one state but rejected in the rest; if so, the practice of the particular state might turn out to be intractable. Perhaps interest-group power operates to entrench practices that the public largely rejects. Nonetheless, it remains true that unjustified validations do far less damage than they might seem to do, simply because a mobilized public is usually in a good position to respond.

Invalidations are of course quite different. If the Court wrongly strikes down a law, and if the invalidation produces bad consequences, it is difficult for the public to supply a corrective. Perhaps new appointments will eventually change the situation. Perhaps the Court can be persuaded of the error of its ways.⁵³ Perhaps a constitutional amendment will be enacted. But to the extent that Olympus does not describe social reality, and to the extent that ours is not the Land of the Ancients, the Court may well have an epistemic ground, rooted in a sense of humility, for hesitating before invalidating legislation if there is a strong risk of public backlash, at least in the most extreme cases.

In light of the risk that the Supreme Court might err, we can now identify some of the relevant questions. If judges anticipate backlash, and tailor their rulings accordingly, what would be the consequences? Would anticipation of backlash produce undue timidity, in the form of hesitation in vindicating constitutional requirements? Or would anticipation of backlash produce a salutary political check on misdirected judgments on the part of the judiciary? Do judges have the capacity to predict public outrage and its effects, or are they more or less at sea? Would consideration of public

⁵¹ 545 U.S. 469 (2005). For a valuable treatment of the controversy, see JANICE NADLER & SHARI SIEDMAN DIAMOND, GOVERNMENT TAKINGS OF PRIVATE PROPERTY: KELO AND THE PERFECT STORM (Northwestern Public Law Research Paper No. 07-05, 2007), available at <http://ssrn.com/abstract=962170>.

⁵² The order says that the federal government must use eminent domain “for the purpose of benefiting the general public and not merely for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken.” Press Release, Office of the Press Sec’y, Executive Order: Protecting the Property Rights of the American People (June 23, 2006), available at <http://www.whitehouse.gov/news/releases/2006/06/20060623-10.html>.

⁵³ See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

backlash produce both undue timidity and erroneous forecasts? Are the public's judgments on morally charged questions more likely to be right or wrong?

My goal here has not, however, been to reach a final judgment on the normative questions.⁵⁴ It has been to suggest the kinds of assumptions on which any such judgment must be based. An understanding of backlash's travels might well provide a place to start.

⁵⁴ See Sunstein, *supra* note 4.

Trademark Law and Free Speech: Protection for Scandalous and Disparaging Marks

*Regan Smith**

I. INTRODUCTION

American society is marked by its liberal use of language, its vibrant debate, and its coarsening culture. Yet America also is a country that, during the civil rights era, kindled a desire to balance tolerance with equality. This tension arises when, no matter how much sex and violence is broadcast on television, some words still are banned from polite conversation. Which words these are depends on who is speaking and who is listening. As a test, consider the following words: *dyke*, *redskin*, *queer*, *nappy-head*, and *slut machine*. It is possible that you find each word highly scandalous or disparaging (in addition to vulgar or offensive). Yet the federal government apparently finds none of these words scandalous or disparaging enough to deny them a place in the federal trademark register.¹

Federal trademark law evolved from the Lanham Act, a statute that establishes the Patent and Trademark Office (“PTO”). The PTO, an agency of the Department of Commerce, is responsible for denying trademarks it deems scandalous or disparaging under Section 2(a) of the Lanham Act.² While the Supreme Court upheld the Federal Communications Commission’s regulation of the airwaves to prevent indecent broadcasting of, as comic George Carlin put it, seven “words you couldn’t say on the public, ah, airwaves, um, the ones you definitely wouldn’t say, ever,”³ the PTO has its own discretion unrelated to FCC standards when registering trademarks;

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¹ See United States Patent and Trademark Office, Trademarks, <http://www.uspto.gov/main/trademarks.htm> (last visited Apr. 13, 2007). Pertinent records include the record of trademark pending for the San Francisco lesbian motorcycle group “Dykes on Bikes,” the trademark record for the football team “Washington Redskins,” the trademark record for the television series “Queer Eye for the Straight Guy,” the trademark record for “Nappyhead” handtools and the trademark record for “The Slut Machine,” registered to Wynn Resorts Holdings.

² See 15 U.S.C.S. §§ 1051–1052 (LexisNexis 2007).

³ FCC v. Pacifica Found., 438 U.S. 726, 729 (1978).

indeed, since the Court's decision in *Pacifica*, the PTO has registered numerous marks using various forms of each of the seven words.⁴ If the determination whether some words are too scandalous to be trademarked is not dependent on precedent or indecency, how does the PTO determine which marks are acceptable? The analysis is complicated by the scant legislative record of Section 2(a) of the Lanham Act.

This Note will argue that the current prohibition on registering scandalous trademarks largely serves no purpose and represents a challenge to First Amendment considerations. Nevertheless, the zero-sum nature of granting trademark registration may provide a rationale for preserving the ability to deny registration to disparaging trademarks. For example, while self-identification with a supposed slur cannot be dispositive of the word's impact, a self-disparaging trademark is more likely to generate reclamation than a disparaging trademark targeted at another.⁵ Indeed, the recent proliferation of "reclaimed" words by identity groups complicates the analysis of trademarks. It would be ironic if, in attempting to reclaim words heretofore used disparagingly, minority groups accidentally eroded their protections against denigration by hate groups.

This Note uses semiotic theory to argue that existing tests can justify why certain words are acceptable when used for particular trademarks but not for others. In a culture in which words have multiple meanings, semiotic theory can be used to ground the search for meaning in linguistics rather than in blunt discrimination based on political viewpoints. By incorporating semiotic theory into the trademark analysis, identity groups will be able to reclaim offensive words, thereby increasing visibility and promoting equality, without wholly eroding the protections against disparagement that Section 2(a) attempts to ensure.

Further, the Lanham Act's prohibition on scandalous and disparaging marks is a troubling exception to our First Amendment civil liberties. Commercial speech may receive less protection than other kinds of speech, but such speech generally is not prohibited entirely. Yet eliminating all reference to trademark content jeopardizes America's relatively recent awareness of hate speech. Fueled by new scholarship recognizing that

⁴ According to the appendix of the *Pacifica* decision, which contains a verbatim transcript of Carlin's act, the seven words are: *shit*, *piss*, *fuck*, *cunt*, *cocksucker*, *motherfucker*, and *tits*. *Id.* at 751. As of April 11, 2007, basic searches of the PTO online database yielded 61 hits for the word *shit*, 17 hits for *piss*, 39 hits for *fuck*, 3 hits for *cocksucker*, and 39 hits for *tits*, and one hit each for *motherfucker* and *cunt*. See United States Patent and Trademark Office, <http://www.uspto.gov/main/trademarks.htm> (last visited Apr. 14, 2007) (follow "Search" hyperlink; then follow "New User Form Search (Basic)" hyperlink). As discussed in Part II.C, *infra*, a symbol's context is evaluated in determining whether to grant a trademark; this list is meant to demonstrate the sheer breadth of registrations allowed by the PTO and does not imply that all marks are somehow indecent along the lines of *Pacifica*.

⁵ Another commentator has suggested that groups be allowed to self-disparage in some circumstances. See Todd Anten, Note, *Self-Disparaging Trademarks and Social Change: Factoring the Reappropriation of Slurs into Section 2(a) of the Lanham Act*, 106 COLUM. L. REV. 388, 433 (2006).

words have an injurious impact on peoples and cultures, the “disparaging mark” prong of Section 2(a) can be revitalized to address current civil rights concerns. In the context of hate speech, there is disagreement as to how to balance the need to encourage expression with the need to prevent oppression. Preservation of the prohibition on disparaging marks through the semiotic system proposed here is one way to protect against the entrance of hate speech into the marketplace while simultaneously loosening the reins of governmental prohibition.

This Note argues that the current prohibition on the registration of scandalous marks should be retired in the face of the evolution of cultural mores and the undue restriction it puts on speech in the marketplace. However, the prohibition on disparaging marks should be treated differently. Despite similar concerns about potentially restricting speech, the overall justification for the prohibition on disparaging speech is strong enough to warrant its retention in some form. Registered trademarks have a singular property value; the government should play a role in properly distributing trademarks that can be either disparaging or reclamatory. Accordingly, an understanding of contemporary identity politics and semiotic theory can help explain why it is proper for some trademark registration applications to be granted and for others to be denied.

II. THE TRADEMARK REGISTRATION PROCESS AND PROHIBITION OF SCANDALOUS AND DISPARAGING TRADEMARKS

The process for registering a trademark initially appears relatively simple. A group or individual can apply for a federally registered trademark under the Lanham Act.⁶ The mark is examined and may be refused registration if: it contains the flag or insignia of any state, municipality, or nation; it contains the name or signature of a living person without their consent or that of a deceased President whose widow is alive; or it is misleading, merely descriptive, or functional.⁷ Additionally, Section 2(a) provides that no trademark may be refused registration unless it “consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.”⁸

Courts have interpreted Section 2(a) to comprise two grounds for denial: a trademark can be either “scandalous” or “disparaging.”⁹ If so, al-

⁶ 15 U.S.C.S. § 1051.

⁷ *Id.* § 1052.

⁸ *Id.*

⁹ The relevant text reads:

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account

though a mark otherwise meets the Act's requirements, it may not be registered.¹⁰ Although there is little legislative history suggesting the rationale for the "scandalous" and "disparaging" exceptions, some have proposed that the government should not expend funds to register trademarks that are scandalous or disparaging to the public.¹¹ Yet, as a dissent from a registration denial noted, "more 'public funds' are being expended in the prosecution of this appeal than would ever result from the registration of the mark."¹²

Although "there is no legislative history or precedent that specifically addresses this distinction between the two statutory provisions," two different tests have emerged to determine whether a trademark is scandalous or disparaging.¹³ Before analyzing these tests, it will be useful to discuss how the procedural requirements for challenging such marks have shaped the development of Section 2(a) doctrine.

A. Procedural Requirements for Challenging a Trademark Under Section 2(a)

The procedural requirements to deny or revoke a trademark deemed scandalous or disparaging contribute to the vagueness and paucity of legal precedent regarding Section 2(a). Section 2(a) provides a basis for the Trademark Trial and Advisory Board ("TTAB") to deny a potential registrant a trademark as well as to permit the initiation of proceedings to cancel a trademark. Because very few courts review invocations of Section 2(a) and there are few published TTAB decisions, there is little legal doctrine to explain why so many trademarks are denied registration under Section 2(a).

1. A Registrant May Be Denied a Trademark by the Board

Probably the most common way Section 2(a) is invoked is by the TTAB itself. Each trademark must be approved by a PTO examiner, who may reject or approve it pursuant to Section 2(a).¹⁴ Upon approval by the ex-

of its nature unless it—(a) Consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute; or a geographical indication which, when used on or in connection with wines or spirits, identifies a place other than the origin of the goods.

Id.

¹⁰ *Id.* § 1052(f) (excluding Section 1052(a) from the distinctiveness exception).

¹¹ See 1 JEROME GILSON, TRADEMARK PROTECTION AND PRACTICE § 3.04(4) (6th ed. 1980).

¹² *In re McGinley*, 660 F.2d 481, 487 (C.C.P.A. 1981).

¹³ *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d (BNA) 1705 (T.T.A.B. 1999).

¹⁴ 15 U.S.C. § 1070 (2000).

aminer, the mark is published in the Official Gazette, and the public has thirty days to register any opposition.¹⁵ If there is no opposition, the PTO issues a certificate of registration.

If the mark is rejected, the applicant may reapply or appeal the denial of registration in an ex parte proceeding to the TTAB.¹⁶ If the denial is upheld, the applicant can appeal to the U.S. Court of Appeals for the Federal Circuit or to the U.S. District Court.¹⁷

The process for appealing a denial can involve the submission of materials to demonstrate that the trademark is neither scandalous nor disparaging. Such evidence anticipates the legal tests the courts will apply to the terms. For example, the San Francisco lesbian motorcycle group Dykes on Bikes requested reconsideration after a denial of registration, and submitted more than forty declarations pertaining to the word *dyke* from linguists, psychologists, and other scholars over a course of reapplications that spanned two years.¹⁸ The examiner denied reconsideration, citing a website translating vulgar words from Spanish to English that included translations for *dyke* and *lesbian*, and a web definition of *dyke* as a “deprecatory” synonym for *lesbian*.¹⁹ Upon an additional resubmission by Dykes on Bikes, the examiner allowed the mark to proceed to the thirty-day waiting period.²⁰

2. A Third Party May Move for Denial or Revocation of a Trademark

If the examiner approves the mark, a third party may bring a challenge against the registration of the trademark under Section 2(a) during a thirty-day waiting period. After the waiting period has expired, the registration is effective but still subject to the provisions of Section 2(a). Challenges on any grounds that the examiner could have used initially to refuse registration can be brought within the first five years of the mark’s registration; after five years, the grounds for challenges are narrower but still include, inter alia, that a mark is scandalous or disparaging.²¹ The ability to bring suit under Section 2(a) is a primary enforcement mechanism for the Act. When evaluating appeals for denials of registrations for allegedly scandalous or disparaging marks, the TTAB has concluded:

¹⁵ 37 C.F.R. § 2.80 (2006).

¹⁶ 15 U.S.C. § 1070.

¹⁷ *Id.* § 1071(a)–(b).

¹⁸ See Joe Garofoli, *Attorneys Find Dykes on Bikes Patently Offensive, Reject Name*, S.F. CHRON., July 14, 2005, at A1.

¹⁹ Letter from PTO to S.F. Women’s Motorcycle Contingent, et al. (May 12, 2005), available at <http://www.ncrights.org/pdf/dykesonbikesUSPTOrefusal.pdf>.

²⁰ See Julian Guthrie, *Trademark Office OKs ‘Dykes on Bikes,’ Motorcycle Group’s Name on Its Way to Becoming Registered*, S.F. CHRON., Dec. 9, 2005, at A2.

²¹ 15 U.S.C. § 1064.

Because the guidelines are somewhat vague and because the determination is so highly subjective, we are inclined to resolve doubts on the issue of whether a mark is scandalous or disparaging in favor of applicant and pass the mark for publication with the knowledge that if a group does find the mark to be scandalous or disparaging, an opposition proceeding can be brought and a more complete record can be established.²²

For these reasons, the requirements for standing to bring suit under Section 2(a) seem relatively unburdensome.

3. *The Test for Standing Is Relatively Generous to Third Parties*

Third parties can bring suit under the Lanham Act to protest a trademark perceived as scandalous or disparaging. Sections 13 and 14 of the Act provide for statutory standing. Under Section 13, “any person who believes that he would be damaged by the registration of a mark upon the principal register . . . may . . . file an opposition in the Patent and Trademark Office.”²³ Under Section 14, a petition to cancel a mark may be made by “[a]ny person who believes that he is or will be damaged” by the registration of the mark.²⁴ Standing generally refers to whether “a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.”²⁵ The Lanham Act effectively allows small special interest groups to curtail others’ speech, raising the risk that trademarks are governed by political correctness rather than free speech values. For example, a conservative Christian group may have standing against a pro-gay rights trademark.

Because this standing language is broad and vague, courts have created a two-part test to determine whether a party may bring suit under Section 2(a). A party bringing suit in opposition to a pending registration or moving for cancellation of a registration “must have a real interest in the proceedings and must have a reasonable basis for his belief of damage.”²⁶ Unlike standing requirements in other contexts, it is not necessary

²² *In re In Over Our Heads, Inc.*, 16 U.S.P.Q.2d (BNA) 1653, 1654 (T.T.A.B. 1990) (concluding a mark containing the word *moonies* with the two “o”s portrayed as buttocks did not disparage the Unification Church founded by the Reverend Sun Myung Moon); see also *In re Mavety Media Group Ltd.*, 33 F.3d 1367, 1374 (Fed. Cir. 1994) (quoting *In Over Our Heads* in allowing men’s erotic magazine to trademark “Black Tail”); cf. *In re Gourmet Bakers, Inc.*, 173 U.S.P.Q. (BNA) 565, 565 (T.T.A.B. 1972) (rejecting the ability to bring opposition as rationale for granting registration in ex parte proceeding).

²³ 15 U.S.C. § 1063.

²⁴ *Id.* § 1064.

²⁵ *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972).

²⁶ *Ritchie v. Simpson*, 170 F.3d 1092, 1095 (Fed. Cir. 1999) (ruling that a New Hampshire intellectual property attorney had standing to challenge registration of “O.J.,” “O.J. Simpson,” and “The Juice” by O.J. Simpson for proposed merchandise) (internal quotation marks omitted).

that the party “have a specific commercial interest, not shared by the general public” to challenge a trademark as scandalous or disparaging.²⁷ The social policy behind restricting trademarks based on their scandalous or disparaging nature does not dictate that a potential consumer have such a specific commercial interest.

Thus, Sections 13 and 14 have been construed relatively broadly. For example, standing was granted to seven members of Native American tribes protesting the Washington Redskins trademarks, two African American women protesting the registration of “Black Tail” by a pornographic magazine, two women who protested a chicken restaurant’s registration of “A BREAST IN THE MOUTH IS BETTER THAN A LEG IN THE HAND,” and an attorney protesting O.J. Simpson’s trademarks as disparaging to the attorney’s role as a family man and Christian.²⁸ The TTAB, when considering large groups such as “women” who may be disparaged by a trademark, does not require something akin to a class action. In granting standing to two women, the TTAB noted that standing relates to individuals, and not groups, as their “practice does not permit class actions but requires each opposer to be identified and to pay a fee” under Section 13.²⁹

On the other hand, the second prong of the standing test, which requires that an opposer have a reasonable basis for belief of damages, can be used to restrict standing. Although this prong easily was satisfied by the groups of women and Native Americans discussed above, aligning with courts’ statements that “one method of establishing the reasonableness of belief of damage for purposes of standing is for the opposer to allege he possesses a trait or characteristic that is clearly and directly implicated in the proposed mark,”³⁰ in *Ritchie v. Simpson*, “family man” and “Christian” were deemed not to be “immutable traits.”³¹ Consequently, the attorney proffered signed petitions from “people from all over the United States” who agreed with his position in order to demonstrate the reasonableness of his belief.³² Responding to Ritchie’s allegation that the O. J. Simpson marks stood for domestic violence and uxoricide, the court found that they could constitute “disparagement of his alleged belief in a loving and nurturing relationship between husband and wife.”³³ O. J. Simpson abandoned his attempts at trademark registration; as such, it is unclear whether Ritchie’s allegations

²⁷ *Id.* at 1096.

²⁸ See *Ritchie*, 170 F.3d at 1099; *Pro-Football, Inc., v. Harjo*, 284 F. Supp. 2d 96 (D.D.C. 2003) (reversing the TTAB’s finding that the Washington Redskins trademark should be revoked); *Boswell v. Mavety Media Group Ltd.*, 52 U.S.P.Q.2d (BNA) 1600, 1604 (T.T.A.B. 1999) (finding that status as an African American woman “clearly demonstrate[s]” standing); *Bromberg v. Carmel Self Serv., Inc.*, 198 U.S.P.Q. (BNA) 176 (T.T.A.B. 1978) (granting two women standing).

²⁹ *Bromberg*, 198 U.S.P.Q. (BNA) at 179.

³⁰ *Ritchie*, 170 F.3d at 1098 (discussing *Pro-Football* and *Bromberg*).

³¹ *Id.*

³² *Id.*

³³ *Id.* at 1097.

would have prevailed.³⁴ Nevertheless, *Ritchie* hints that conservative Americans may challenge leftist trademarks and vice versa. Presumably, any person who feels “family” or “singlehood” or Christianity (or any other religion) is being disparaged may have standing in a trademark cancellation motion.

Historically, standing decisions have considered whether the opposing party can demonstrate that the proposed trademark is disparaging to said party, and not solely that it is scandalous.³⁵ While many cases allege both scandalousness and disparagement, the test for each type of injury is different. The opinion of the general public is influential in determining whether a trademark is scandalous. It is unclear upon what grounds an opposing party can be denied standing when seeking to challenge registration solely because the proposed mark is scandalous. Precedent implies that standing may be granted to anyone, as “members of a group who may believe the mark to be scandalous have the requisite standing to be heard.”³⁶ Perhaps also the grant of standing to *Ritchie* to challenge O. J. Simpson’s marks, while specifically finding potential disparagement to *Ritchie*’s beliefs, was premised partially on the opinion of the general public that Simpson was attempting to profit from his infamous tragedy.

4. *A Registrant May Plead Laches To Avoid Trademark Revocation*

Trademark holders facing suits by third parties can invoke the affirmative defense of laches. A motion to cancel a trademark under Section 2(a) must demonstrate that the trademark was scandalous or offensive at the time of its registration regardless of whether changing cultural attitudes have made the trademark more or less acceptable.³⁷ One of the leading cases discussing the nuances of Section 2(a) is *Pro-Football, Inc. v. Harjo*,³⁸ which reversed the TTAB’s finding that the Washington Redskins’s trademark should be revoked, holding that “Redskins” was not disparaging, or, in the alternative, that laches prevented the Native American challengers from bringing suit.³⁹ In so ruling, the *Pro-Football* court adapted the defense of laches from the trademark infringement context. That defense has “three affirmative requirements: (1) a substantial delay by a plaintiff prior to filing suit; (2) a plaintiff’s awareness that the disputed trademark was being infringed; and (3) a reliance interest resulting from the defen-

³⁴ *Id.*

³⁵ *See, e.g.*, *Bromberg v. Carmel Self Serv., Inc.*, 198 U.S.P.Q. (BNA) 176 (T.T.A.B. 1978)

³⁶ *Id.* at 179.

³⁷ 15 U.S.C. § 1064(3) (2000) (stating that petition may be filed at any time if the registered mark becomes generic or if “its registration was obtained . . . contrary to the provisions of Section 1052”).

³⁸ 284 F. Supp. 2d 96 (D.D.C. 2003).

³⁹ *Id.* at 136.

dant's continued development of good-will during this period of delay."⁴⁰ Using a modified version of this test, the court found substantial delay by the Native American group, awareness of using "Redskins" in a disparaging manner, and reliance by the Washington Redskins on its trademarks from the 1967 registration and the initial 1992 suit.⁴¹ The court rejected the argument that a motion was exempt from the laches defense merely because it was in "the public interest," which some commentators had suggested was implied from prior decisions that found claims estopped when they were based on personal disparagement rather than public policy.⁴² Whether laches should be available as a defense given the aims of Section 2(a) will be discussed further in Part IV.

B. The "Scandalous" Test

The Lanham Act is unhelpful in determining the meaning of the word *scandalous*. Decisions from the TTAB and courts use different standards for "scandalous" when evaluating marks. For example, one early decision relied upon dictionaries published near the time of the Lanham Act's passage in holding that a scandalous mark is one whose "use . . . would be shocking to the sense of . . . propriety, would give offense to the conscience or moral feelings, or would call out condemnation."⁴³ By contrast, a later opinion conflated the concept of scandalousness with an undeveloped idea of "vulgarity."⁴⁴ In evaluating the term *jack-ass*, the court found that the dictionary definition as a vulgar phrase was enough to conclude the mark was scandalous; however, "vulgar" was left undefined.⁴⁵ The above cases demonstrate how the courts define *scandalous*. This Note argues that the meaning of words is better interpreted under a semiotic analysis, and that existing explanations of the word *scandalous* are too vague.

The test for whether a trademark is scandalous involves a two-part examination to determine the likely meaning of the mark and whether it is scandalous.⁴⁶ The likely meaning of the mark is determined in the context "of the marketplace as applied to only the goods described in [the] application for registration."⁴⁷ The court should not consider the morality

⁴⁰ *Id.* (quoting NAACP v. NAACP Legal Def. & Educ. Fund, Inc., 753 F.2d 131, 137 (D.C. Cir. 1985)) (internal quotation marks omitted).

⁴¹ *See id.* at 136–44.

⁴² *See id.* at 137–38; *see also* GILSON, *supra* note 11, § 11.08(3)(i)(ii)(D)(I) (suggesting that broader public policy interests might bar the defenses).

⁴³ *In re McGinley*, 660 F.2d 481, 485 (C.C.P.A. 1981) (internal quotation marks omitted).

⁴⁴ *In re Boulevard Entm't, Inc.*, 334 F.3d 1336, 1340–41 (Fed. Cir. 2003).

⁴⁵ *Id.*

⁴⁶ *Pro-Football*, 284 F. Supp. 2d at 125.

⁴⁷ *In re Mavety Media Group*, 33 F.3d 1367, 1371 (Fed. Cir. 1994) (evaluating "Black Tail" as the name of a pornographic magazine).

of the goods or services to which the mark will attach.⁴⁸ The likely meaning can be inferred from dictionary definitions, and the existence of alternate definitions can imply that the trademark is non-scandalous.⁴⁹ For example, in *In re Mavety Media Group*, the alternate definitions for *tail* as a derriere and *black tail* as a type of formal dress were used to refute the implication that the proposed registration of “Black Tail” necessarily referred to a sexual act; the court allowed that the magazine may have aimed to emulate the branding of a classy pornographic experience à la *Penthouse* magazine.⁵⁰ Similarly, while the term *Acapulco Gold* is (or was) generally understood to refer to marijuana, registration of the phrase as a trademark for a brand of suntan lotion was allowed on the basis that “to the average purchaser . . . in the normal marketing milieu for such goods, the term ‘ACAPULCO GOLD’ would suggest the resort city of Acapulco noted for its sunshine and other climatic attributes rather than marijuana.”⁵¹

In other cases, meaning has been construed as essentially black and white. When “the evidence shows that the mark has only one pertinent meaning, dictionary evidence alone can be sufficient to satisfy the PTO’s burden.”⁵² Very few words have been found to be scandalous per se. One exception to this rule was the mark “Bullshit” as applied to a line of designer handbags.⁵³ Allegedly, the line was inspired by an article discussing a Los Angeles restaurant’s practice of seating patrons according to handbag price. The TTAB rejected the argument that the context of the marketplace should not be the general public, but instead should be limited to wealthy consumers of luxury goods who were not easily shocked and would understand “bullshit” to correspond to “nonsense” in this context.⁵⁴ There seems to be no clear way to identify the bounds of the context of the meaning of a trademark. Caselaw suggests that the factual inquiry underlying the legal standard and appropriate markers (dictionary definitions, context of the marketplace) gives courts ample room to determine a trademark’s meaning.

Indeed, the TTAB has found that the existence of a possible acronym can overcome a potentially scandalous meaning, allowing the trademark registrations of “BADASS,” a line of musical equipment, or “FCUK,” the

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 1369, 1373–74; see also *In re Madsen*, 180 U.S.P.Q. (BNA) 334, 335 (T.T.A.B. 1973) (finding “Weekend Sex” not scandalous in the context of a weekend magazine and noting that the genre of the goods was not to be judged).

⁵¹ *In re Hepperle*, 175 U.S.P.Q. (BNA) 512, 512 (T.T.A.B. 1972).

⁵² *In re Boulevard Entm’t*, 334 F.3d 1336, 1340–41 (Fed. Cir. 2003) (holding that “jack-off” had no nonvulgar alternate definitions, and at any rate no alternate meaning was being used in the mark “1-800-JACK-OFF” for an erotic phone services company.)

⁵³ *In re Tinseltown*, 212 U.S.P.Q. (BNA) 863, 866 (T.T.A.B. 1981).

⁵⁴ *Id.*; see also *Ex parte Parfum L’Orle, Inc.*, 93 U.S.P.Q. (BNA) 481, 482 (T.T.A.B. 1952) (noting that a perfume called “Libido” would be unlikely to scandalize “the class of persons who would be apt to use such a word” in an opinion that assumed the psychoanalytic term had not reached mass consciousness).

edgy brand of the clothing designer French Connection United Kingdom.⁵⁵ These acronym exceptions suggest that it is relatively easy to create an alternate meaning that can overcome even per se scandalous marks.

Once the likely meaning of the trademark is determined, the next step is to determine whether or not it is scandalous. The court in *In re McGinley* outlined the seminal test for whether a trademark is scandalous: “Whether or not the mark, including innuendo, is scandalous is to be ascertained from the standpoint of not necessarily a majority, but a substantial composite of the general public.”⁵⁶ However, the court did not explain how exactly a “substantial composite of the general public” is to be determined by the factfinder. The dissenting judge in *McGinley* commented, “I am at a loss to know what it means or how one can have a ‘composite’ of a class such as the general public.”⁵⁷

Courts seem to consider three types of evidence when determining the general public’s attitude toward a mark: dictionaries, opinion surveys, and marketing strategies predicated upon shock value. First, while some opinions have expressed doubt as to whether dictionaries are sufficient to test the second prong, courts note that “dictionary definitions represent an effort to distill the collective understanding of the community with respect to language and thus clearly constitute more than a reflection of the individual views of either the examining attorney or the dictionary editors.”⁵⁸ When “multiple dictionaries . . . uniformly indicate that a word is vulgar” a trademark may be found scandalous as long as the dictionaries are recent enough to reflect current culture.⁵⁹ Hence “Jack-off” was deemed scandalous despite proffered evidence of limited media references from non-mainstream publications that used the phrase without implying masturbation.⁶⁰

It is less common for courts to use opinion surveys to determine scandalousness. “The results of properly conducted public opinion surveys” are admissible as evidence, but “should not be required” since surveys can entail extensive costs.⁶¹ Opinion surveys were widely used when evaluating the Washington Redskins’s trademark.⁶² One survey reported that 46.2%

⁵⁵ See *In re Leo Quan Inc.*, 200 U.S.P.Q. (BNA) 370 (T.T.A.B. 1978); United States Patent and Trademark Office, Trademarks, <http://www.uspto.gov/main/trademarks.htm> (last visited Apr. 11, 2007).

⁵⁶ *Parfum L’Orle*, 93 U.S.P.Q. (BNA) at 482 (citing *In re Riverbank Canning Co.*, 95 F.2d 327, 329 (C.C.P.A. 1938)).

⁵⁷ *Id.* at 487 (Rich, J., dissenting).

⁵⁸ *In re Boulevard Entm’t, Inc.*, 334 F.3d 1336, 1340 (Fed. Cir. 2003).

⁵⁹ *Id.* at 1341; see also *In re Runsdorf*, 171 U.S.P.Q. (BNA) 443, 443–44 (T.T.A.B. 1971) (finding “Bubby Trap” as a term for brassieres vulgar based solely on Webster’s Third New International Dictionary).

⁶⁰ *Boulevard*, 334 F.3d at 1342.

⁶¹ *Boswell v. Mavety Media Group Ltd.*, 52 U.S.P.Q.2d (BNA) 1600, 1606–07 (T.T.A.B. 1999) (drawing an analogy to trademark infringement cases).

⁶² See *Harjo v. Pro-Football Inc.*, 50 U.S.P.Q.2d (BNA) 1705, 1717, 1732–34 (T.T.A.B. 1999).

of the general public found the term *Redskins* offensive, a description intended to encompass both scandalous and disparaging.⁶³ In an interim decision, the TTAB did find *Redskins* to be disparaging, but found that the survey did not prove a substantial composite found the term scandalous.⁶⁴ While survey opinions may theoretically prove scandalousness, most discussions concerning opinion surveys address the disparaging test.

Third, the packaging of a product can also affect whether the trademark is considered scandalous. In an early case, although the name Madonna was not itself scandalous, the court found the public would be scandalized by a wine named “Madonna.”⁶⁵ Similarly, another early case found that “Queen Mary” was especially scandalous when connected to women’s underwear.⁶⁶ The “notorious” and “suggestive nature” of perfume ads also was considered when evaluating a manufacturer’s trademark for “Libido.”⁶⁷

The marketing and branding of a product can also help demonstrate that it is not scandalous. For example, a Massachusetts Institute of Technology student’s art-project-turned-commercial-venture involving condoms packaged in American flags to raise awareness of HIV was found not scandalous because “the seriousness of purpose . . . is a factor to be taken into account in assessing whether the mark is offensive or shocking.”⁶⁸ The board further noted that the early cases held “little precedential value” since only “contemporary attitudes” were relevant and “what was considered scandalous as a trademark or service mark twenty, thirty or fifty years ago may no longer be considered so, given the changes in societal attitudes.”⁶⁹

Therefore, even if the court is able to determine the likely meaning of a trademark (from dubious analysis), there is little guidance as to what constitutes sufficient evidence that the likely meaning will scandalize the public. As demonstrated, the TTAB has license to appeal to a variety of extrinsic evidence without articulating clear standards. While there is established caselaw on courts’ consideration of marketing efforts or opinion surveys when evaluating other Lanham Act claims, such as false advertising or likelihood of confusion, nothing suggests that the TTAB looks to these cases for guidance.

⁶³ *Id.*

⁶⁴ *Id.* at 1733, 1743, 1748 (holding that the T.T.A.B. lacked sufficient evidence to find disparagement). While later versions of *Harjo* concerned solely whether “Redskins” was disparaging, the initial motions also alleged scandalousness. *Id.* at 1708.

⁶⁵ *In re Riverbank Canning Co.*, 37 U.S.P.Q. (BNA) 268, 269–70 (C.C.P.A. 1938).

⁶⁶ *Ex parte Martha Maid Mfg. Co.*, 37 U.S.P.Q. (BNA) 156, 156 (Comm’r Pat. 1938).

⁶⁷ *Ex parte Parfum L’Orle, Inc.*, 93 U.S.P.Q. (BNA) 481, 481–82 (T.T.A.B. 1952).

⁶⁸ *In re Old Glory Condom Corp.*, 26 U.S.P.Q.2d (BNA) 1216, 1221 (T.T.A.B. 1993).

⁶⁹ *Id.* at 1219.

C. The “Disparaging” Test

Although the “scandalous” and “disparaging” provisions appear in the same clause of Section 2 of the Lanham Act, and are occasionally conflated in court decisions, the two appeal to very different standards. Whether a trademark is scandalous depends on the reaction from the general public; whether a trademark is disparaging depends on its effect upon the specific group allegedly being disparaged. The history and evolution of trademarks for products such as Aunt Jemima syrup demonstrate the difference.⁷⁰ The brand was depicted by an African American woman who originally appeared as a house servant, but whose look now has been updated to appear less racist. A trademark was granted in 1937.⁷¹ Aunt Jemima was not initially considered disparaging when introduced in 1893, but many African Americans later found it disparaging, prodding owner Quaker Oats to institute a makeover.

It is doubtful that anyone would have standing under the Lanham Act to protest the Aunt Jemima character today. Even if standing were demonstrated, laches might apply.⁷² This may explain why an appeal was made to Quaker Oats directly. Although cultural changes can repair denials of “scandalous” trademarks by allowing subsequent registration of the mark, it is difficult to revoke the registration of trademarks later determined to be disparaging.

Before investigating how symbols and words can evolve to be more or less disparaging, as well as the interplay between the scandalous and disparaging standards, the current test for whether a trademark results in disparagement must be outlined. The disparagement test is structurally identical to the scandalous test. First, the meaning of the term must be determined; the inquiry then becomes whether the likely meaning is disparaging.⁷³ In many cases, the analysis is similar to the method to determine whether a trademark is scandalizing to a substantial composite of the public; dictionaries are consulted to determine meaning and then it is determined whether a substantial composite would find the term disparaging.⁷⁴ However, the analysis can diverge from interpretations of scandalousness due to the statutory language in Section 2(a) and the fact that while scandalousness is normally targeted at majority populations, disparagement is more often concerned with minority subgroups.

⁷⁰ See Aunt Jemima’s Historical Timeline, http://www.auntjemima.com/aj_history/ (last visited Apr. 11, 2007).

⁷¹ *Id.*; see Laura Hancock, *UVSC Hosts Racism Exhibit*, DESERET MORNING NEWS, Jan. 13, 2007, at A1.

⁷² See *supra* Part II.A.4.

⁷³ See *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96, 125 (D.D.C. 2003).

⁷⁴ See *supra* Part II.B.

First, while a trademark must be scandalous to be denied, registration can be denied if a trademark may be disparaging.⁷⁵ This makes dictionary evidence both more and less persuasive, as alternate definitions that are less likely to be used can carry more weight to determine if a term “may” be disparaging. Further, dictionary evidence alone is not sufficient to show that the mark is used in a disparaging manner.⁷⁶ Courts more readily allow “slang dictionaries,” evidence of “locker room talk,” and “testimony of linguistic experts” to determine the likely meaning of the trademark in context with the product offered.⁷⁷ A more searching inquiry into the potential meaning of a trademark may rely on social, cultural, and linguistic experts to go beyond a dictionary to interpret the mark’s meaning in a given situation. Further, the requirement that a trademark be evaluated in context still applies. For example, the attempt to trademark “Memphis Mafia” as applied to the coterie of musicians around Elvis Presley was found not reasonably to imply disparagement to Italian Americans.⁷⁸

Second, the test asks whether the trademark is disparaging to a “substantial composite” of “the referenced group.”⁷⁹ The meaning of “substantial composite” is vague, and the size of the group can be determined on “the basis of the facts in each case.”⁸⁰ The *Harjo* court provided an illuminating analysis of whether the term *Redskins* disparaged the group in question. The court found *Redskins* to refer both to the football team and to Native Americans.⁸¹ Because the likely meaning at the time of registration, rather than time of the suit, was important, the court considered that from the 1950s on, “Redskin” became less popular as a term referring to Native Americans, and the football meaning was likely stronger at the time of registration in the 1960s.⁸² While the petitioners for cancellation had submitted evidence polling Native Americans about their impressions of the word in 1996, the court rejected the survey as not applicable to the word’s meaning in the 1960s.⁸³

The Washington Redskins case also implies that a substantial composite is a very high percentage of the potentially disparaged. An additional study comparing the general public’s impression of the word with Native Americans’ impressions revealed that while 42% of all Americans found the term *Redskins* offensive, only 36% of Native Americans had

⁷⁵ 15 U.S.C. § 1052(a) (2000).

⁷⁶ See *Boswell v. Mavety Media Group Ltd.*, 52 U.S.P.Q.2d (BNA) 1600, 1608 (T.T.A.B. 1999).

⁷⁷ *Id.* at 1606–08.

⁷⁸ *Order of Sons of Italy in America v. Memphis Mafia, Inc.*, 52 U.S.P.Q.2d (BNA) 1364 (T.T.A.B. 1999).

⁷⁹ *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96, 124 (D.D.C. 2003).

⁸⁰ *Id.* at 124 n.25.

⁸¹ *Id.* at 131.

⁸² *Id.* Multiple trademarks for the Washington Redskins have been registered over time; hence, the court considered the attitude of the decade rather than one specific date in an effort to evaluate all claims.

⁸³ *Id.*

the same reaction to the term.⁸⁴ The court found that 36% did not comprise a substantial composite. The court did not state what percentage would qualify as “substantial,” implying that “substantial” requires a large degree of unanimity among a potentially diverse group that may be disparaged. In *Pro-Football*, seeing divergence between the general public and Native American groups, the court did not allow extrapolation from other studies of the general population as evidence of the views of Native Americans at the time of registration.⁸⁵ Noting the vast array of Native American tribes and viewpoints, the court also rejected the idea that the viewpoints of the seven individual petitioners could represent the referenced group.⁸⁶ Ultimately, the court concluded the petitioners had not demonstrated that *Redskins* was a disparaging term.

Part of the problem in determining a “substantial composite” is the difficulty of determining what constitutes a group for purposes of the disparaging test. If the group is diffuse, as Native Americans are, there is a greater burden on those attempting to cancel a trademark to demonstrate disparagement, especially in light of the existence of an alternate meaning. Although not concerned with trademarks, the recent controversy over the NCAA’s ruling that nineteen colleges must change their mascots illuminates the potential divergence within the Native American community. While most Native American groups supported the NCAA’s decision to require changes to mascots such as Chiefs and Indians, one of the arguably more offensive mascots had an unlikely defender. Some members of the Seminole Indian tribe helped Florida State University protest changing its trademark, arguing that the visibility of the Seminoles would suffer but for the mascot, who rides onto football fields in full “warpaint” as Chief Osceola and throws down a flaming spear at the beginning of each game.⁸⁷ These members have stronger voices within the more limited subset of members of the Seminole tribe than the group potentially disparaged by the term *Redskins*. This demonstrates that whether a term is seen to derogate a “substantial composite” of a group can vary depending on the metric measured.

Further, while the context of the trademark is crucial to determining its likely meaning under the disparaging test, the *Pro-Football* court also drew a bright line between the actual trademark and its use. As in the scandalous test, packaging and marketing can be used to show that a trademark is more or less likely to be disparaging.⁸⁸ This limitation as to what con-

⁸⁴ *Id.* at 128.

⁸⁵ *Id.* at 135.

⁸⁶ *Id.*

⁸⁷ See Florida State Seminoles Official Athletic Site, Traditions, <http://seminoles.cstv.com/trads/fsu-trads-osceola.html> (last visited Apr. 11, 2007). Other Seminoles have publicly expressed their disapproval of this tradition. See Darryl Fears, *Indian Mascots: Matter of Pride or Prejudice? Even Tribes Are Divided As NCAA Issues Edict*, WASH. POST, Aug. 14, 2005, at A03.

⁸⁸ *Harjo*, 284 F. Supp. 2d at 96; see also *In re Reemtsma Cigarettenfabriken, GmbH*,

stitutes “context” for purposes of the disparaging test was arguably very influential in the court’s interpretation. When a tobacco manufacturer named its goods after a nonsmoking Muslim sect, context was used to demonstrate disparagement.⁸⁹ Yet in *Pro-Football* the court denied that the “Redskins” trademark should be considered in light of the sometimes boorish behavior of football fans. The court noted:

At best, this evidence demonstrates that Pro-Football’s fans and the media continue to equate the Washington Redskins with Native Americans and not always in a respectful manner. However, the evidence does not automatically lead the Court to conclude that the word “redskin(s)” as used in Pro-Football’s marks is derogatory in character. Under the broad sweep of the TTAB’s logic, no professional sports team that uses Native American imagery would be permitted to keep their trademarks if the team’s fans or the media took any action or made any remark that could be construed as insulting to Native Americans. The Court cannot accept such an expansive doctrine.⁹⁰

To be sure, a line must be drawn that prevents nonparties from unduly shifting the meaning of a trademark and making a registration subject to cancellation. However, both tests under Section 2(a) assume that the public will evaluate a trademark in the context of its use in the marketplace. For example, when a football team creates a red-skinned Indian as its mascot and subsequently distributes Native American paraphernalia to its fans, the mascot must be judged by its use in the marketplace, including the act of fans “chopping” to mimic scalping the visiting team. The Washington Redskins were allowed the benefit of the football milieu when determining the meaning of “Redskin,” but escaped the burden of defending the fan environment the team created through its branding. Whether this is the appropriate line to draw when considering the policy behind Section 2(a), free speech concerns, and potential conflicts between the “scandalous” and “disparaging” prongs is discussed in Part IV.

III. FREE SPEECH CONCERNS AND RESTRICTIONS ON SCANDALOUS OR DISPARAGING TRADEMARKS

Interestingly, no court has yet found that Section 2(a) constitutes an impermissible restriction on free speech. This Part briefly explores established regulation of speech, with a particular emphasis on commercial speech and trademarks, and analyzes whether or not Section 2(a) points toward viewpoint discrimination or other unreasonable restrictions on

122 U.S.P.Q. (BNA) 339 (T.T.A.B. 1959).

⁸⁹ *Reemtsma Cigarettenfabriken*, 122 U.S.P.Q. (BNA) at 339.

⁹⁰ *Pro-Football*, 284 F. Supp. 2d at 134.

speech. After reviewing the limited caselaw that considers this question, this Part argues that Section 2(a) is an unreasonable restriction on so-called scandalous trademarks, and discusses the ways in which conflicts between the scandalous and disparaging standards complicate Section 2(a) doctrine.

A. Section 2(a) Has Not Been Found To Violate Free Speech Protections

The first inquiry is whether trademark registration itself should be seen as a type of speech, and, if so, what level of protection it would deserve. This Note argues trademark protection should be seen as commercial speech, subject to the Supreme Court's test outlined in *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*.⁹¹ The *Central Hudson* test requires a "substantial governmental interest" to be found in regulation but stops short of applying the strict scrutiny given to regulations affecting speech by private citizens.⁹² Yet courts do not always treat the presence of a speech component as sufficient to justify applying any First Amendment test at all. Frederick Schauer has written extensively about the realms of speech outside the First Amendment, arguing that the First Amendment has invisible boundaries beyond which activities that are clearly dependent upon speech receive no First Amendment consideration.⁹³ According to Schauer, these areas include antitrust law, securities regulation, the law of criminal solicitation, the law of evidence, copyright, telemarketing, hostile-environment sexual harassment, and trademark law.⁹⁴ Schauer studies these contours for structural explanations of why some issues have constitutional salience and receive treatment as free speech issues while others do not.

While this reasoning may explain why trademark law has not been seriously examined for its First Amendment implications, the issue nevertheless can be examined. For example, it can be assumed that simple contracts (to take another of Schauer's examples) are treated as binding legal documents without concern for free speech exercise because the substantial governmental interest in commerce and consumer protection outweighs any right to express oneself without consequences in a contract. That is, there is a presumption that a government interest hovers around areas where government regulation is allowed.

In the case of scandalous (and possibly disparaging) trademarks, it is not apparent that there is any governmental interest at all in regulation. Past decisions are not much help clarifying the constitutionality of Section 2(a). Many have suggested that Section 2(a) represents an unjustified

⁹¹ 447 U.S. 557 (1980).

⁹² *Id.*

⁹³ See generally Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2003).

⁹⁴ *Id.*

restriction on First Amendment freedoms.⁹⁵ Although it is common for those denied registration to protest on grounds of free speech, there are relatively few opinions by the TTAB or district courts that address the constitutionality of Section 2(a).⁹⁶ More frequently, the TTAB and district courts decide on alternate grounds. They often state, in one form or another, that Section 2(a) does not violate free speech because “although the mark holder who is denied federal registration will not receive the benefits conferred on a federal trademark registrant, the mark holder may and can continue to use the mark.”⁹⁷ Whether the continued ability to use the mark absent federal registration complies with established First Amendment doctrine, however, is unclear; thus, it is possible that a well-crafted challenge could be successful.

B. Section 2(a) Unreasonably Restricts Commercial Speech

Even if an individual or group continues to use an unregistered mark, there still may be abridgement of free speech rights. The inquiry is not necessarily whether the speech can continue, but whether the regulation is a valid exercise of governmental power in the face of the First Amendment. For example, it is understood that a speaker cannot be prevented from speaking in a public park just because she can go home and say the same speech privately.⁹⁸ To be sure, a speaker in a public park and the potential loss of market penetration suffered by an unregistered trademark are two very different situations. Nevertheless, the comparison does illustrate that courts do not normally accept the argument that the speech can be made in an alternate inferior forum as an end to the First Amendment inquiry. First Amendment law is instead nuanced and complex because it

⁹⁵ See, e.g., Kimberly A. Pace, *The Washington Redskins Case and the Doctrine of Disparagement: How Politically Correct Must a Trademark Be?*, 22 PEPP. L. REV. 7 (1994); Jeffrey Lefstin, Note, *Does the First Amendment Bar Cancellation of REDSKINS*, 52 STAN. L. REV. 665 (2000).

⁹⁶

Crafting a constitutional challenge to the “scandalous” and “disparaging” provisions involves a number of complicated doctrines, none of which squarely fits the statutory bars to registering offensive trademarks. Moreover, the interaction between these ill-fitting doctrines is less than clear from the case law, especially in the trademark context where these doctrines are largely untested.

GILSON, *supra* note 11, § 3.04(6)(a)(i)(F).

⁹⁷ *Ritchie v. Simpson*, 170 F.3d 1092, 1095 (Fed. Cir. 1999) (noting that the “constitutional issue” had been neither fully argued in the court, nor raised in the lower court); see also *In re Boulevard Entm’t, Inc.*, 334 F.3d 1336, 1343 (Fed. Cir. 2003) (“Previous decisions of this court and our predecessor court . . . have rejected First Amendment challenges to refusals to register marks . . . We adhere to the reasoning.”); *In re Mavety Media Group Ltd.*, 33 F.3d 1367 (Fed. Cir. 1994); *In re McGinley*, 660 F.2d 481 (C.C.P.A. 1981).

⁹⁸ See, e.g., *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939).

seeks to balance restrictions on speech with government interest in given situations.

The trademark registrations restricted by the Lanham Act fall under the category of commercial speech.⁹⁹ While commercial speech generally receives less protection than other types of speech, the ways in which it can be regulated remain limited. The Supreme Court outlined a test for restrictions on commercial speech in *Central Hudson*. The Court wrote:

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.¹⁰⁰

While commercial speech cases usually concern a complete ban on the speech in question, the argument that the unregistered trademark can still be used may not be enough to demonstrate that Section 2(a) passes muster under *Central Hudson*.

Trademark registration allows the registrant exclusive use of the mark. The government confers the right to exclude others from using this speech as a way to enable the trademark holder to exploit the mark for commerce. The government has an interest in regulating the ways in which it confers property rights such as trademarks. Like patent or copyright, trademark is exclusive: multiple individuals or organizations cannot receive duplicate trademark registrations. In most cases, there is no overriding governmental interest surrounding the denial of trademark registrations. However, in exceptional circumstances (which, this Note will later argue, may be found in the case of potentially disparaging trademarks) the government interest would be enough to justify denial of a trademark.

A comparison of trademark registration to other cases concerning the withholding of governmental benefits based on the content of speech shows that the registrant's free speech concerns likely outweigh any proffered governmental interest in morality or tolerance. The Supreme Court ruled that the Postmaster General could not revoke the second-class mail rate for *Esquire*, Inc. on the grounds that *Esquire* magazine was indecent and morally improper.¹⁰¹ The Court recognized that the ability to mail at second-

⁹⁹ *Friedman v. Rogers*, 440 U.S. 1, 10 (1979).

¹⁰⁰ *Central Hudson Gas & Elec. V. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

¹⁰¹ *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 158 (1946).

class rates was a governmental subsidy, but one that was to be made available to all periodicals with a nonadvertising, public character, and stated that the “validity of the obscenity laws is recognition that the mails may not be used to satisfy all tastes, no matter how perverted. But Congress has left the Postmaster General with no power to prescribe standards for the literature or the art which a mailable periodical disseminates.”¹⁰² The revocation of second-class privilege, like the revocation of trademark registration, would not have prohibited *Esquire* from being mailed, but would have made it more difficult for *Esquire* to compete in the marketplace, as it would lose profits by paying higher postage.

Similarly, the Sixth Circuit struck down attempts by the city of Ann Arbor, Michigan, to deny a sign permit to a restaurant named “Sambo’s” because the name “conveys to some citizens a pernicious racial stereotype of blacks as inferior.”¹⁰³ While “Sambo’s” clearly was commercial speech and “[p]lainly, racial harmony and equality is a substantial state interest,” the city did not demonstrate that regulation would sufficiently advance its interest to justify the comparable restriction on speech.¹⁰⁴ The court noted that “even though exposure to the ‘Sambo’s’ signs may offend some citizens, the ability of the City ‘to shut off discourse solely to protect others from hearing it is dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.’”¹⁰⁵

These cases suggest that, if actually forced to decide a case on commercial speech grounds as applied to trademark regulation, the Supreme Court and circuit courts might agree with the dissenting opinion in *Ritchie*, which noted:

[A]bridgement may result from a law that merely burdens an exercise of speech . . . “even though a person has no ‘right’ to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, . . . [the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.”¹⁰⁶

Although the *Ritchie* decision concerned standing, Judge Newman’s dissent demonstrated a strong concern that Section 2(a) denials could violate commercial speech doctrines regardless of whether the trademarks could still be used unregistered.

¹⁰² *Id.*

¹⁰³ *Sambo’s Rests. Inc. v. City of Ann Arbor*, 663 F.2d 686, 694 (6th Cir. 1981).

¹⁰⁴ *Id.* at 695.

¹⁰⁵ *Id.* (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)).

¹⁰⁶ *Ritchie v. Simpson*, 170 F.3d 1092, 1103 (Fed. Cir. 1999) (Newman, J., dissenting) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

While Section 2(a) may represent an unreasonable restriction on commercial speech depending upon the trademark in question and the government interest advanced, no court has analyzed a Section 2(a) motion under the *Central Hudson* test. Precisely what substantial government interest is involved remains murky. One theory, referenced in *Ritchie*, is that public monies should not be expended upon such trademarks. Yet the economic argument alone is not persuasive, for the price of registration is minimal and would not make a difference in advancing the government's interest in cost efficiency. Additional theories mentioned by commentators include interests in racial equality, promoting morals, and protecting children, but neither the TTAB nor federal courts have analyzed what purpose may lurk behind the relatively stark language of the Lanham Act.¹⁰⁷

IV. DOES SECTION 2(A) PROSCRIBE VIEWPOINT DISCRIMINATION, OR A REASONABLE ALLOCATION OF TRADEMARK LICENSES?

An additional argument may be that, while it is not unconstitutional to regulate in some manner the registration of trademarks, by picking and choosing based on content which trademarks are worthy of registration the federal government is engaging in impermissible viewpoint discrimination. The Supreme Court is more likely to scrutinize regulations that are not content neutral, and denial of a trademark that is “scandalous” or “disparaging” is clearly based on the imputed linguistic content. So far, no challenge has argued viewpoint discrimination. This may be because it is hard to demonstrate standing. The standing requirements discussed in Part II illustrate that only those objecting to the trademark in question have standing to challenge an existing trademark. However, leaving procedural logistics aside, it is worth inquiring whether the PTO is discriminating based on viewpoint. If it is, two questions arise. First, does the fact that registration can be deemed a benefit to the registrant instead of a burden on speech make such discrimination acceptable? Second, if the nature of trademarks is such that some or all types of discrimination are unacceptable, what does this mean for future applications of Section 2(a)?

A. *Established Doctrine on Viewpoint Discrimination and Relevance to Trademark Registration Evaluation*

The Supreme Court has made it clear that, even when regulation of a speech act is otherwise acceptable, such regulation cannot occur if it is targeted at specific viewpoints of the populace, however innocuous those viewpoints may be. In *R.A.V. v. City of St. Paul*, the Court wrote that “[t]he First Amendment does not permit [the government] to impose special prohi-

¹⁰⁷ See generally GILSON, *supra* note 11.

bitions on those speakers who express views on disfavored subjects.”¹⁰⁸ St. Paul had enacted an ordinance penalizing angry words that sought to create violence “on the basis of race, color, creed, religion, or gender.”¹⁰⁹ Based on a presumption of invalidity of content-based speech regulation, the Court found that the regulation went beyond a permissible, facially neutral regulation of fighting words.¹¹⁰

No specific decisions consider viewpoint discrimination in the context of trademarks, but it is useful to examine rulings on registrant intent as a proxy for registrant viewpoint. Denial of registration based on the intention behind a trademark is akin to selective denial based on the party’s viewpoint. If the party’s assertions, rather than the numerous potential interpretations of a trademark, determine success in registration, the party’s viewpoint is being selectively evaluated. The doctrine is vague as to how the intent of the party seeking registration is valuable. *In re Old Glory Condom Corp.* demonstrates that courts will look to the intent of the creator to determine the meaning of a trademark, but in that case the condoms originated out of a larger art exhibition and the designer’s intent was easily determined.¹¹¹ However, as the TTAB noted in *Harjo*:

While the decisional law may suggest that intent, or lack thereof, to shock or to ensure that the scandalous connotation of a mark is perceived by a substantial composite of the general public is one factor to consider in determining whether a mark is scandalous, there is no support in the case law for concluding that such intent, or a lack thereof, is dispositive of the issue of scandalousness.¹¹²

In addressing whether intent to disparage Native Americans was necessary to evaluate the “Redskins” mark, the court emphatically stated that intent was not necessary:

While Section 2(a) precludes registration of matter that *is* scandalous, it does not preclude registration of matter that *is* disparaging. It precludes registration of matter that *may be* disparaging Respondent’s linguistics experts herein have testified that, as they understand the meaning of the word “disparage,” disparagement of someone or something usually requires some degree of intent by the speaker to cause offense, although, as petitioners’ expert notes, this may be inferred from the circumstances and from evidence regarding the acceptability of the language or

¹⁰⁸ 505 U.S. 377, 391 (1992).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 382–83.

¹¹¹ See *In re Old Glory Condom Corp.*, 26 U.S.P.Q.2d (BNA) 1216 (T.T.A.B. 1993).

¹¹² *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d (BNA) 1705, 1716 (T.T.A.B. 1999).

imagery used. Thus, we believe the use of the term “may” is necessary in connection with “disparage” in Section 2(a) to avoid an interpretation of this statutory provision that would require a showing of intent to disparage.¹¹³

Nevertheless, even if a showing of intent is not required, it may be even more persuasive than the circumstances of use and other linguistic evidence. For example, evidence of intent was persuasive to the examiner who eventually agreed to register “Dykes on Bikes” after the group provided extensive documentation and testimony by gay and lesbian groups.¹¹⁴ Similarly, another case allowed the registration of “JAP” as a trademark for denim almost solely on the grounds that the purveyor was a Japanese American businessman. In its brief opinion, the TTAB noted:

The Examiner points out that the Japanese American Citizens League considers the word “JAP” to be derogatory and injurious to those of Japanese ancestry. She also states that the use of the word has been labeled derogatory by various statesmen and that newspapers have been highly critical of the employment of it. Applicant, on the other hand, points out that a Mr. Takada, a couturier of Japanese origin, controls the applicant corporation and argues that it would be inconceivable that someone of Japanese origin would choose a mark that would disparage his own heritage.¹¹⁵

While the context, use, and linguistic evidence of the trademark may indicate that “Jap Jeans” is not disparaging, the TTAB predominantly based its analysis on Mr. Takada’s national origin. Allowing ancestry to demonstrate meaning of a trademark seems to surpass what is already prohibited by constitutional doctrine against viewpoint discrimination outlined in *R.A.V.* Not only would the Japanese origin of an entrepreneur serve as notice of intent that would override the protests of a Japanese American citizen group, but the range of possible statements made via trademarking could potentially be broader or narrower depending upon the registrant’s immutable identity characteristics. Accordingly, the *Condas* decision not only grants registration on the grounds that the use of “JAP” in this context (or from Mr. Takada’s viewpoint) is not disparaging, but posits that it is impossible that a person of Japanese origin could hold views disparaging to the Japanese even if a substantial group of Japanese Americans disagrees.

¹¹³ *Id.* at 1821–22.

¹¹⁴ See Anten, *supra* note 5, at 389 n.7.

¹¹⁵ *In re Condas*, 188 U.S.P.Q. (BNA) 544, 544 (T.T.A.B. 1975). The TTAB also noted that a “persuasive but not controlling” opinion of a New York state court had found “Jap” not derogatory. *Id.*

Nevertheless, examining a party's intent may be necessary to evaluate a trademark's meaning. The alternate position, that the identity, intent, or viewpoint of the registrant is irrelevant, is equally unsatisfying. Certainly, the words *jap* and *dyke* sometimes can be used in a disparaging context and sometimes in an ironic, reaffirming, reclaiming, or simply affectionate manner. Rendering explicit the relevance of the registrant's viewpoint in determining whether a mark is scandalous or disparaging exposes the inherent danger that Section 2(a) privileges some viewpoints over others. If the government must consider viewpoint to determine the likely meaning of a trademark, it necessarily runs the risk of improper viewpoint discrimination. This analysis may be necessary to explain what relevance, if any, Section 2(a) has in a culture that is increasingly preoccupied with the power of words and identity politics. It may be that viewpoint discrimination justifies eliminating the "scandalous" test but preserving the "disparaging" test.

B. Can the Government Decide To Distribute Trademark Registration Benefits Based on Viewpoint?

Even if the TTAB allows trademark registration based upon the viewpoints of the potential registrants, the nature of trademarks may make this acceptable. The distribution of a benefit has sometimes been treated differently than the imposition of a burden by the government. The granting of trademark registration, although a negligible monetary cost to the government, is still conceivably a significant benefit to the registrant. The applicant seeks the positive grant of a registration license in order to gain intellectual property. In this sense, trademark registration is better conceived as a benefit to the applicant than viewing the denial of registration as a burden. Burdens on citizens, as opposed to positive benefits conferred by the government, generally carry a promise of equal treatment.

There is no governmental obligation to provide funds in order to exercise a protected right.¹¹⁶ The benefit analysis has been applied to validate the Hyde Amendment, which prohibited federally funded abortions for Medicaid recipients. Although there is a protected right to seek an abortion, the Court found that due process did not confer an entitlement to federal funds to exercise that right.¹¹⁷ The government must show a rational interest in denying funding, or in imposing a requirement that abortion is medically necessary before it will fund abortion services, but that interest need not be compelling.¹¹⁸ This line of cases implies that while one is entitled to speak a trademark in the marketplace, the government is not required to help an applicant exercise that entitlement.

¹¹⁶ See *Maier v. Roe*, 423 U.S. 464, 473–76 (1977).

¹¹⁷ *Harris v. McRae*, 448 U.S. 297, 311 (1980).

¹¹⁸ *Maier*, 423 U.S. at 499 (finding medical necessity an acceptable requirement for abortion coverage under Connecticut state health benefits).

However, the Hyde Amendment cases are usually applied to instances involving government monies, whereas trademark registration does not cost the government anything, implying that the government should have to balance its interest against the speech interests of the registrant. Indeed, there is an older line of cases concerning interstate travel that denounces treating all positive governmental action as a benefit subject only to rational review. For example, *Shapiro v. Thompson* established that Connecticut could not impose a one-year residency requirement before providing welfare benefits to otherwise eligible new citizens.¹¹⁹ The court found that the state was able to curtail welfare fraud through less drastic measures, and that the one-year waiting period unfairly penalized persons for exercising their freedom of movement.¹²⁰ Arguably, denial of a scandalous trademark could be interpreted as penalizing unpopular speech just as the *Shapiro* regulations restricted freedom of movement.

Perhaps the most direct analogy involves permissible governmental restrictions on speech-related grants. When conferring subsidies through the National Endowment for the Arts (“NEA”), a benefit that enables speech through art, the government may consider “general standards of decency” and “respect for the diverse beliefs and values of the American public.”¹²¹ The Court upheld denial of grant monies to artists in part due to these considerations, demonstrating that denial of benefits based on speech content can be justified. The Court stressed that decency could not be the only standard considered in awarding a grant. However, the rationale of the opinion does not necessarily extend to all denials of trademark registration. The Court noted that “[t]he NEA has limited resources and it must deny the majority of the grant applications that it receives, including many that propose ‘artistically excellent’ projects.”¹²²

The limited resources argument may not necessarily be applicable to the denial of trademark registration under the scandalous test—for example, denying trademark registration to all applicants for the term *bullshit*—because the “scandalous” terms are unavailable to all. However, the argument may have more potency under the disparaging test, because a poten-

¹¹⁹ 394 U.S. 618, 633 (1969).

¹²⁰ *Id.*

¹²¹ *NEA v. Finley*, 524 U.S. 569, 572 (1998). Although this was a facial overbreadth challenge, the named challenger to the NEA was a performance artist who reportedly smeared her genitals with yams and chocolate to aid discussion of sexual abuse, which may qualify the performance as scandalous speech.

¹²² *Id.* at 585. The Court further noted:

Congress may “selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.” In doing so, “the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.”

Id. at 588 (quoting *Rust v. Sullivan*, 500 U.S. 173, 193 (1991)).

tially disparaging term can be nondisparaging when used in another context, and only one party can trademark the term.

This limited resources argument seems to carry the most weight when considering the exclusive nature of trademarks. Two people cannot separately possess the same federally registered trademark. While the government funds involved in the trademark registration process may be negligible and potentially covered by registration fees, the actual trademark license is used up when given to an applicant. This limited resources theory would not justify viewpoint restriction on scandalous trademarks, where presumably all applicants are denied registration of a scandalous mark, but may explain why the government can reserve a potentially disparaging trademark for a more tolerant use.

V. CAN SECTION 2(A)'S RESTRICTIONS BE JUSTIFIED IN LIGHT OF FIRST AMENDMENT CONCERNS?

The tests used to evaluate both the likely meaning of the trademark, and whether or not it is scandalous or disparaging based on the context of use, may implicitly refer to the viewpoint of a product, brand, or registering party. Following *NEA*, courts may tolerate “preserving” a potentially disparaging trademark for a future trademark that is less disparaging since the trademark is a limited resource. Yet the government would not have sufficient interest in taking potential trademarks off the table for all applicants due to scandalousness, since the trademark as resource would otherwise be unspent. If the Lanham Act is interpreted as giving the TTAB free rein to determine which viewpoints are allowable, then it would be unconstitutional under *R.A.V.* to deny scandalous trademarks. Still, if the “disparaging” test is to be preserved, the TTAB’s application of the test would need to evaluate the registrant’s viewpoint and linguistic meaning of the mark more rigorously than it did in *Condas* to avoid seeming arbitrary. Applying semiotic theory may aid in distinguishing between engaging in viewpoint discrimination and considering the registrant’s intent when allowing a trademark.

A. *Semiotic Theory Explains Policy Differences Underlying the Disparagement and Scandalous Tests*

An application of semiotic theory may help explain why the registrant’s intent can influence the meaning of a given trademark, but may not be dispositive in establishing a mark’s meaning. In this sense, a denial under Section 2(a) would still be based on the meaning of a trademark and not on the speech efforts of the registrant, but the TTAB might not have to hide the fact that it is considering the intent and identity of a registrant. For example, semiotic theory could help explain why the TTAB could justify allowing African American entertainer Damon Wayans to register the

trademark “NIGGA,” but disallowed racist groups like the Ku Klux Klan from registering similar trademarks.¹²³

Briefly, semiotic theory, as famously named by French linguist Ferdinand de Saussure, is the study of signs and their functioning.¹²⁴ A sign is anything that contains meaning to someone, including words and graphics. A sign is composed of a signifier, that which points to the concept evoked by a word (known as the signified). “Semiotics is structural. Meaning is created through the relationships or oppositions among elements.”¹²⁵ While a “sign is arbitrary,” since, for example, “[t]he idea of ‘sister’ is not linked by any inner relationship to the succession of sounds s-ö-r which serves as its signifier in French,” a symbol is not.¹²⁶

One characteristic of the symbol is that it is never wholly arbitrary; it is not empty, for there is a rudiment of a natural bond between the signifier and the signified. The symbol of justice, a pair of scales, could not be replaced by just any other symbol, such as a chariot.¹²⁷

Professor Llewellyn Gibbons has also explained how the meaning of trademarks could be explained via semiotic theory:

A semiotic theory of trademark law recognizes that language, words, phonemes, symbols all exist prior the creation of a mark. The mark is created with secondary meaning is attached; the point when the symbols now adds one additional meaning so that in functions as a source, origin, or sponsorship indicator. Regardless of the expenditure by the person desiring to claim a symbol from the commons to create a mark, ultimately communities and not individuals create a language of marks (*langue*) that has its own rules and conventions.¹²⁸

The structural theory of semiotics can be applied to explain more precisely how a trademark is evaluated in context. The situation of “Black Tail”

¹²³ See United States Patent and Trademark Office, *supra* note 1 (holding record of Wayans’s recently abandoned application).

¹²⁴ See FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* (1966), *reprinted in FROM MODERNISM TO POST-MODERNISM: AN ANTHOLOGY* 179 (Lawrence E. Cahoon ed., Blackwell Publishers 1996).

¹²⁵ Llewellyn Joseph Gibbons, *Semiotics of the Scandalous and the Immoral and the Disparaging: Section 2(a) Trademark Law After Lawrence v. Texas*, 9 MARQ. INTELL. PROP. L. REV. 187, 197 (2005) (discussing the application of semiotic theory to trademark law and its use in justifying the registration of “queer” symbols despite Section 2(a)). Gibbons is less concerned than this Note with what happens after such symbols become commonplace, or with the justification for denying registration to anti-queer or similar groups.

¹²⁶ SAUSSURE, *supra* note 124, at 179.

¹²⁷ *Id.* at 180.

¹²⁸ Gibbons, *supra* note 125, at 198.

as the title of a pornographic magazine, for example, would be interpreted using the dictionary definitions of *tail*, cultural and subcultural impressions of the objectification of African American women, and the practice of descandalizing “naughty” magazines by references to “classy” signs such as formal tuxedo dress and posh penthouses. The *Mavety* court may have been considering these interplays when it concluded “a standard dictionary definition and an accompanying editorial designation of vulgarity alone sufficiently demonstrates that a substantial composite of the general public” would find “Black Tail” scandalous.¹²⁹ While the creator or registrant of a symbol cannot own its meaning, the fact that she “spoke” it may influence the actual meaning of the sign, which of course is a combination of the trademark submitted to the PTO and the signifieds which exist in our culture. Presumably, the Ku Klux Klan would intend a very different meaning if it were allowed to register the same trademark as Damon Wayans; similarly, the public most likely would have a different gut reaction to that registration. This reaction would not be evidence of hypocrisy or political correctness, but recognition that the registrations carry two different meanings. While the signifiers may be identical, the signifieds are not, hence the two trademarks can be properly interpreted as two separate signs.

The recent debate over the “Dykes on Bikes” trademark is highly instructive of how a word, depending upon its use, may be affirming to a subculture in one instance yet disparaging in another. One declarant filing in the “Dykes on Bikes” trademark application noted, “[N]owadays I would only take it as an insult if I knew or thought the person was trying to be offensive in the first place.”¹³⁰ While numerous legal efforts, entertainment media, and academic writings may be devoted to the project of reclaiming terms, it is not apparent that members of groups reclaiming antigay or racist terms have stopped feeling disparaged by these words in other contexts. The same group that protests a denial of a trademark to its members may still want to protest the mark’s registration by others. Law can require these groups to choose which way to have it, but should not be blind to the fact that the process of reclaiming words creates terms that are both affirming and disparaging.

Accordingly, semiotic theory can explain why and under what circumstances the same word has a different meaning. Of course, as signs are structurally created, semiotics also introduces uncertainty to the meaning of any trademark until it enters the marketplace and is interpreted by consumers, compared to competitors, and judged against potential knock-offs. Since the meaning of a symbol is created in relation to other symbols, a mark’s meaning would not be fixed. This may help explain why the laches defense is complicated in application to Section 2(a).

¹²⁹ *In re Mavety Media Group*, 33 F.3d 1367, 1374 (Fed. Cir. 1994).

¹³⁰ E-mail from Amanda Goad, former student, Harvard Law School, to Regan Smith, student, Harvard Law School (Jan. 23, 2006) (on file with author).

While a semiotic theory approach explains how a member of an identity group can cultivate a trademark to be non-disparaging, it still may not fully explain why denial of a trademark is not viewpoint discrimination. Such a disallowed trademark would carry a different meaning, its markers of meaning influenced by the strong political viewpoints of the racist group. If the “government subsidy” argument is unpersuasive in explaining why Section 2(a) is not within the purview of *R.A.V.*, the “limited resource” argument would still carry weight. The government can choose whom to award a potentially disparaging trademark, and, as with an NEA grant, choose the applicant with the most potential public good; for example, one with antiracist connotations.

Yet there remains the question of whether some trademarks are wholly disparaging, without any hope of redemption. In that case, disparaging trademarks would function akin to scandalous trademarks, in that the government could not justify registration denial as a reservation function. If, hypothetically, a registrant wanted to trademark something inconceivable of rehabilitation, there would no longer be justification for denying the registration on limited resources grounds because there would be no alternative or future nondisparaging use of the mark. Semiotic theory may go a step further toward arguing that introducing symbols into the marketplace constitutes action beyond mere speech. Individuals’ interactions with these symbols of commerce serve as indicators toward their purchases. A disparaging trademark would carry with it an implicit refusal to do business with the group disparaged by the mark. This type of thinking could draw from fighting words doctrine, although trademarks would ultimately fall short of qualifying as fighting words since the registration process of a trademark is far removed from an environment that is conducive to violence.

If this argument is rejected, then both scandalous and disparaging trademarks without possibility of transformation would lack a serious governmental interest to prevent registration (unless the government interest in preventing disparagement could escape the First Amendment issues discussed above). Perhaps some variant of Section 2(a) could allow challengers to argue for cancellation of a trademark if the challenger can show it is currently disparaging *and* a new use would be nondisparaging, although such a revision of Section 2(a) would undoubtedly pose its own challenges.

B. Semiotic Theory Applied to Trademarks Suggests Two Changes to the Current Regulation

Either semiotic theory or an analogy to defamation law helps explain why Section 2(a) may serve a purpose despite concerns of unreasonable restrictions on speech or targeted political viewpoints. However, Section 2(a)’s current application includes some untenable restrictions on registration.

1. *What Is Scandalous May Be More Acceptable than What Is Disparaging*

If Section 2(a)'s restrictions are acceptable in part because they protect groups from disparaging speech in venues where defamation law is unavailable, then the corresponding protection against scandalous marks would echo antiobscenity laws. As the Supreme Court has stated, obscenity is measured by the reaction of the surrounding community.¹³¹ Federal trademarks necessarily involve the nation as a community, but also may evoke a particular community, as in the case of adult products like condoms or pornography. The TTAB is right, therefore, to consider the goods being trademarked.¹³² Given the wide divergence of cultural attitudes towards indecency, the hurdle for what is scandalous to a "substantial composite of the general public" must be exceedingly high if the public is defined as the American people. This may mean in practice that the "scandalous" test will be met less often than the "disparaging" test, if it is met at all. Additionally, whereas the denial of a scandalous trademark removes the mark from use by everybody, the denial of a disparaging trademark can be seen as preserving that trademark for a different registrant. Shifting cultural mores and projects to reclaim disparaging language are evidence that such different registrants do exist and would eventually come forward to claim the trademark.

2. *Laches May Be an Inappropriate Defense*

From a law-and-economics vantage point, laches as a defense to Section 2(a) challenges makes perfect sense.¹³³ Once a trademark is registered, its owner relies upon the registration when it creates value in the marketplace and establishes a continuous brand identity. Today a successful challenge to the marks "Coca-Cola" or "Mickey Mouse" would have substantial adverse economic effects on the parent company of the mark. Cutting the period in which challenges may be brought encourages companies and, in turn, consumers, to rely upon trademarks.

Nevertheless, the laches defense belies any understanding of how language and symbols operate in use. Just as the *Mavety* court noted that what was formerly scandalous ("[b]ubby [t]rap[s]" for brassieres, "Madonna" as a type of wine)¹³⁴ is no longer shocking, the National Center for Lesbian Rights was able to demonstrate that *dyke* is now a word of comfort and community for certain queer groups.¹³⁵ Language functions the other way as well; words that were formerly commonplace to describe minor-

¹³¹ *Miller v. California*, 413 U.S. 15 (1973).

¹³² *See In re Old Glory Condom Corp.*, 26 U.S.P.Q.2d (BNA) 1216 (T.T.A.B. 1993).

¹³³ *See Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96, 136 (D.D.C. 2003).

¹³⁴ *In re Mavety Media Group*, 33 F.3d at 1372.

¹³⁵ *See Guthrie*, *supra* note 20.

ity groups in America's not-so-honored past (*colored*, *yellow*, and perhaps *Redskins*) are now unacceptable in mainstream society. If a trademark was registered in a time of more virulent racism, it is conceivable that either internalized racism or lack of hope for success prevented members of a disparaged group from bringing a challenge within the five-year period. It is illogical that there is a five-year cutoff on the harm of disparaging trademarks, when words acceptable decades ago can have clearly disparaging meanings now.

While denial of laches may decrease economic efficiency, it also is unlikely to completely erase the value of a property identified by that trademark. The historical evolution of the Aunt Jemima character into a more powerful and respectful trademark appears to have helped Quaker Oats's business, perhaps by broadening its potential consumer base.¹³⁶ Similarly, although not a trademark issue, no evidence suggests the NCAA's mascot requirements have hurt the sustainability of collegiate sports. Any slight harm in the adjustment of a mark would be worthwhile in order to apply more consistently the principle that disparaging or scandalous trademarks are not allowed in the marketplace and to avoid the appearance of arbitrariness based on historical linguistic use.

V. CONCLUSION

The Lanham Act's prohibition on scandalous and disparaging trademarks is still largely untested against free speech concerns. While almost all other speech acts fall into a large body of First Amendment law, here a small group of people are given tremendous power to determine whether or not a term is acceptable. Since there is little indication of legislative intent behind the law, linguistic scholarship can help determine how these prohibitions should be applied. In the past few decades, certain words referring to minority groups have undergone substantial linguistic changes, resulting in words that are sometimes disparaging and sometimes not. Current interpretations struggle with these dual-use terms and raise the specter of viewpoint discrimination. The tests created by the TTAB seek to divine what a substantial composite of a group believes is the meaning of a mark. However, appeals to dictionary definitions and expensive, inexact surveys seem overly blunt ways to measure the meaning of words in the marketplace and sometimes belie actual linguistic use. Rather than vaguely appealing to the context of a trademark—which allows the TTAB to decide whether targeted consumers, use, competitors, and so forth are relevant—the TTAB can use semiotics to evaluate the meaning of the trademark.

Conceiving of Section 2(a) as a way to allocate the limited resource of exclusive trademarks among users with diverse interests explains how

¹³⁶ See Aunt Jemima's Historical Timeline, *supra* note 70.

dual-use words are appropriate as trademarks in some instances but not others. Moreover, it can assuage fears that the Lanham Act allows viewpoint discrimination against otherwise protected speech. The prohibition against scandalous trademarks seems to have outlived its purpose and runs the risk of being more restrictive than obscenity laws. Without a uniform analysis of trademarks under Section 2(a), the application of this section is relatively arbitrary and the Lanham Act has authorized the TTAB to do what even the Supreme Court cannot.

Next-Generation Sex Offender Statutes: Constitutional Challenges to Residency, Work, and Loitering Restrictions

*Chiraag Bains**

On April 26, 2006, Georgia Governor Sonny Perdue signed the most restrictive sex offender law in the country.¹ Commonly called HB 1059, the measure prohibits all current and future registered state sex offenders from residing or loitering within 1000 feet of any child care facility, school, church, or “area where minors congregate,” including parks, playgrounds, swimming pools, skating rinks, neighborhood centers, gymnasiums, and school bus stops. The law also bars such individuals from being employed by any entity within 1000 feet of a child care facility, school, or church.² The law will force thousands of sex offender registrants to leave their homes and search for new residences that meet these restrictions. While the Supreme Court has never ruled on the constitutionality of residency or work restrictions on sex offenders, it has upheld an Alaska registration law against an *ex post facto* challenge³ and a Connecticut registration law against a procedural due process challenge.⁴ Including Georgia, twenty-two states have now gone far beyond registration requirements⁵ and several others are poised to join them.⁶

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¹ GA. CODE ANN. § 42-1-15 (2006).

² *Id.* Furthermore, a knowing violation of the residency, work, or loitering restrictions constitutes a felony punishable by a minimum of ten and a maximum of thirty years in prison. *Id.* § 42-1-15(d). The new statute also extends the registration requirement, retroactively, from ten years to life. *Id.* § 42-1-12(f)(7). These restrictions go well beyond those imposed by GA. CODE ANN. § 42-1-13 (2006), which prohibits registrants from living within 1000 feet of schools, child care facilities, and places where minors congregate.

³ *Smith v. Doe*, 538 U.S. 84 (2003).

⁴ *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1 (2003).

⁵ ALA. CODE ANN. § 15-20-26 (2006) (prohibiting sex offenders from residing or working within 2000 feet of a school or child care facility and prohibiting them from loitering or working within 500 feet of a school, playground, park, or athletic facility); ARK. CODE ANN. § 5-14-128 (2003) (prohibiting Level 3 and Level 4 sex offenders from residing within 2000 feet of schools or daycare facilities but exempting those who resided on property they owned before the law was enacted); CAL. PENAL CODE § 3003(g) (West 2007) (prohibiting certain sex offenders on parole from residing within a quarter mile of a primary school); DEL. CODE ANN. tit. 11, § 1112 (2006) (prohibiting sex offenders from residing or loitering within 500 feet of school property); FLA. STAT. ANN. § 947.1405(7)(a)(2)

As the Southern Center for Human Rights and the ACLU of Georgia pursue a class action suit against HB 1059,⁷ it seems likely that the Supreme Court will have to settle the constitutional issues surrounding these controversial new residence and employment restrictions. There are various constitutional arguments against such statutes, but the doctrinal barriers to injunctive relief are robust. Drawing on recently litigated claims in the circuit and state courts as well as on Supreme Court precedent, this Article assesses the arguments on both sides of the most probable and most viable constitutional challenges.⁸ These include suits based on the Ex Post

(West 2007) (prohibiting sex offenders from living within 1000 feet of a school, daycare center, park, playground, designated school bus stop, or other place where children regularly congregate); GA. CODE ANN. § 42-1-15 (2006); IDAHO CODE ANN. § 18-8329 (2006) (prohibiting sex offenders from “be[ing]” or loitering on school property, “be[ing] in any conveyance” owned or used by the school to transport students, or residing within 500 feet of school property, though also making exceptions for pre-enactment residence and allowing parents to drop off or pick up their children from school); 720 ILL. COMP. STAT. 5/11-9.4(b-5) (West 2006) (prohibiting child sex offenders from residing within 500 feet of a playground, child care center, or facility with programming targeted exclusively at minors); IND. CODE ANN. § 35-42-4-11 (West 2006) (prohibiting certain classes of sex offenders from residing within 1000 feet of school property, a youth program center, or a public park, or within one mile of their victims’ residences); IOWA CODE ANN. § 692A.2A (West 2003) (prohibiting sex offenders from residing within 2000 feet of a school or child care facility); KY. REV. STAT. ANN. § 17.545 (West 2006) (prohibiting sex offenders from residing within 1000 feet of a school, public playground, or daycare facility); LA. REV. STAT. ANN. § 14:91.1 (West 2004) (prohibiting sex offenders from residing within 1000 feet of any school, daycare facility, playground, youth center, public swimming pool, or video arcade); MICH. COMP. LAWS ANN. §§ 28.733–28.735 (West 2006) (prohibiting sex offenders from working or loitering within 1000 feet of school property but exempting those already working in such areas before enactment); MISS. CODE ANN. § 45-33-25(4) (West 2006) (prohibiting sex offenders from residing within 1500 feet of the real property of a school or child care facility, with certain exceptions); MO. ANN. STAT. § 566.147 (West 2006) (prohibiting certain sex offenders from residing within 1000 feet of any public school, private school for students in twelfth grade or below, or child care facility existing before residency is established); N.C. GEN. STAT. ANN. § 14-208.16 (West 2006) (prohibiting sex offenders from residing within 1000 feet of school or child care center property); OHIO REV. CODE ANN. § 2950.031 (West 2006) (prohibiting sex offenders from residing within 1000 feet of a school); OKLA. STAT. ANN. tit. 57 § 590 (West 2006) (prohibiting sex offenders from residing within 2000 feet of any school, other educational institution, playground, park, or child care facility); OR. REV. STAT. §§ 144.642, 144.643 (West 2006) (generally prohibiting sex offenders from residing near places where children are the primary occupants); S.D. CODIFIED LAWS §§ 22-24B-22, 22-24B-23 (2006) (prohibiting sex offenders from residing within 500 feet of any school, public park, public playground, or public pool); TENN. CODE ANN. § 40-39-211 (2007) (prohibiting sex offenders from residing or working within 1000 feet of any school, child care facility, public park, playground, recreation center, or public athletic field); TEX. CODE CRIM. PROC. ANN. art. 42.12(13B) (Vernon 2005) (prohibiting sex offenders from residing within 1000 feet of a place where children commonly gather).

⁶ See Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. (forthcoming 2007) (manuscript at 3 & n.15) (providing citations to legislation pending in twelve states), available at <http://ssrn.com/abstract=959847>.

⁷ Whitaker v. Perdue, No. 06-140 (N.D. Ga. 2006).

⁸ Several other articles have explored one or more of the claims discussed here, usually with reference to a recently passed law or recently decided case. See, e.g., Yung, *supra* note 6 (discussing residency restrictions as tantamount to banishment); Michael J. Duster, Note,

Facto Clause, procedural and substantive due process, equal protection, takings, the privilege against self-incrimination, and the prohibition against cruel and unusual punishment.

I. EX POST FACTO

The single most litigated claim with respect to residency restrictions on sex offenders is the argument that they violate the constitutional decree that “[n]o state shall . . . pass any . . . ex post facto Law.”⁹ This claim is at the forefront of *Whitaker*. The Ex Post Facto Clause prohibits states from passing “laws that change[] the punishment, [or] inflict a greater punishment, than the law annexed to the crime.”¹⁰ Thus, any statute that imposes retroactive punishment on people for conduct that was legal when committed, or that increases the penalty attached to the crime when it was committed, is unconstitutional.¹¹

According to *Smith v. Doe*, in which the Supreme Court upheld Alaska’s sex offender registration and notification law, courts pursue a two-step inquiry. The first step is to determine whether the state legislature intended the law to be punitive or civil.¹² If the legislature meant to establish criminal punishment, the statute is an ex post facto law. If the court deems the law civil and nonpunitive in intent, it proceeds to the second step of asking whether the law is nonetheless “‘so punitive either in purpose or effect as to negate [the State’s] intention’ to deem it ‘civil.’”¹³ A court will apply the factors from *Kennedy v. Mendoza-Martinez*¹⁴ to determine if a regulatory regime is punitive in effect: the court will examine whether the regulation “has been regarded in our history and traditions as

Out of Sight, Out of Mind: State Attempts To Banish Sex Offenders, 53 DRAKE L. REV. 711 (2005) (describing the Eighth Circuit’s resolution in *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005), of claims based on the Ex Post Facto Clause, double jeopardy, substantive due process, procedural due process, and the privilege against self-incrimination); Steven J. Wernick, Note, *In Accordance with a Public Outcry: Zoning Out Sex Offenders Through Residence Restrictions in Florida*, 58 FLA. L. REV. 1147 (2006) (describing the outcome of challenges based on procedural due process, substantive due process, the privilege against self-incrimination, and the Ex Post Facto Clause in *Miller*); Note, *Making Outcasts Out of Outlaws: The Unconstitutionality of Sex Offender Registration and Criminal Alien Detention*, 117 HARV. L. REV. 2731 (2004) (suggesting substantive due process, equal protection, and bill of attainder as grounds to challenge registration laws); Recent Legislation, *Alabama Strengthens Restrictions on Sex Offenders*, 119 HARV. L. REV. 939 (2006); *The Supreme Court, 2002 Term—Leading Cases*, 117 HARV. L. REV. 327 (2003) (criticizing the Supreme Court for construing the statute in *Connecticut Department of Public Safety* as nonpunitive and suggesting two kinds of overbreadth challenges).

⁹ U.S. CONST. art. I, § 10, cl. 1.

¹⁰ *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (opinion of Chase, J.).

¹¹ *See id.*; *see also* *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810).

¹² *Smith v. Doe*, 538 U.S. 84, 92 (2003) (citing *Hudson v. United States*, 522 U.S. 93, 100 (1997)).

¹³ *Id.* (alteration in original) (quoting *United States v. Ward*, 448 U.S. 242, 248–49 (1980)).

¹⁴ 372 U.S. 144 (1963).

a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose.”¹⁵ Furthermore, “only the clearest proof” will establish that a statute intended to be civil is punitive in effect.¹⁶

The Court in *Smith* and all courts issuing final rulings in residency restriction cases have deemed these laws to be nonpunitive both in intent and effect.¹⁷ However, courts may find an intent-based ex post facto violation in the case of a particularly stringent statute like Georgia’s based on the statements of the bill’s chief sponsors, the unusually harsh penalty for violation, and the absence of exemptions for people living in areas that were not prohibited before the statute was enacted. In an interview before the bill was introduced, Georgia House Majority Leader Jerry Keen commented, “This legislation will probably make Georgia one of the toughest in the nation on sex offenders. No sex offender is ever going to want to live here. I’d be mighty happy to see that happen.”¹⁸ Moreover, according to the Supreme Court, “Other formal attributes of a legislative enactment, such as the manner of its codification or the enforcement procedures it establishes, are probative of the legislature’s intent,”¹⁹ and in this case, “enforcement” means ten to thirty years’ incarceration.²⁰ This stiff sanction stands in contrast with similar statutes that treat violation as a misdemeanor or lesser felony.²¹ Both the penalty for violation and comments like Keen’s suggest that “the intention of the legislature was to impose punishment.”²²

The caselaw, however, suggests that courts will be reluctant to find even a statute as harsh as Georgia’s to be punitive in intent. Courts will look first to the plain language of the statute. If “[n]othing on the face of the statute suggests that the legislature sought to create anything other than a civil . . . scheme designed to protect the public from harm,” the court is likely to view it as nonpunitive.²³ Courts give great credence to language

¹⁵ *Smith*, 538 U.S. at 97.

¹⁶ *Id.* at 92 (internal quotation marks omitted).

¹⁷ *Id.* at 96, 105; *Weems v. Little Rock Police Dep’t*, 453 F.3d 1010, 1017 (8th Cir. 2006); *Doe v. Miller*, 405 F.3d 700, 718, 723 (8th Cir. 2005); *Doe v. Baker*, No. Civ-A. 1:05-CV-2265, 2006 WL 905368 (N.D. Ga. Apr. 5, 2006) (rejecting ex post facto challenge to GA. CODE ANN. § 42-1-13, the less punitive predecessor to HB 1059); *Thompson v. State*, 603 S.E.2d 233, 236 (Ga. 2004); *People v. Leroy*, 828 N.E.2d 769, 779, 782 (Ill. App. Ct. 2005); see also *Coston v. Petro*, 398 F. Supp. 2d 878, 884–86 (S.D. Ohio 2005) (dismissing claim against residency restrictions for lack of standing, but noting that the law is neither punitive in intent nor excessively punitive in effect).

¹⁸ Jerry Keen, *People Are Sick and Tired of Being Taxed to Death Through Local Property Taxes . . .*, GEORGIA DAILY DIGEST.COM, Sept. 6, 2005, http://www.georgiadailydigest.com/article_12588.shtml.

¹⁹ *Smith*, 538 U.S. at 94.

²⁰ GA. CODE ANN. § 42-1-15(d) (2006).

²¹ See ARK. CODE ANN. § 5-14-128 (2003) (class D felony); IOWA CODE ANN. § 692A.2A (West 2003) (aggravated misdemeanor).

²² *Smith*, 538 U.S. at 92 (noting that such a finding “ends the inquiry”).

²³ *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997).

indicating a public-safety-oriented basis for the legislation. In *People v. Leroy*, a state-level challenge to an Illinois residency restriction law, the court noted, “Where a legislative restriction is an incident of the state’s power to protect the health and safety of its citizens, the restriction will be considered to evidence an intent to exercise that regulatory power, and not a purpose to add to a punishment.”²⁴ Notably, in the same interview in which Keen indicated his intent to drive sex offenders out of Georgia, he stated that the new law would ensure that “they cannot get near schools or other places where children congregate.”²⁵ The U.S. District Court for the Northern District of Georgia, the same court before which *Whitaker* is pending, has already declared the predecessor to HB 1059 a “civil regulatory scheme,” one “designed to safeguard against encounters between minors and a convicted sex offender.”²⁶ It is possible that the heavy prison term attached to the bill could convince a court of the legislature’s punitive intent, but such a finding would depart from recent judicial intuitions.

A set of restrictions like those in HB 1059 is more likely to be adjudged punitive in effect than in intent, through the *Mendoza-Martinez* analysis.²⁷ Several statutes have survived this second-step analysis, but those have involved residency restrictions alone.²⁸ HB 1059, by contrast, puts severe restrictions on where a registrant can live, loiter, and work.²⁹ This difference augurs well for a punitive-in-effect claim, especially given the greater number of places from which sex offenders are excluded. Perhaps the most powerful argument plaintiffs can make is that the statute effectively banishes them from the state. Due in particular to the prevalence of school bus stops and churches, almost all of the roughly 12,000 people on the sex offender registry would be required to move if the law goes into effect as intended.³⁰ The banishment claim is especially important to one of the *Mendoza-Martinez* factors: whether the regulation has been regarded in our history as punishment. Those courts that have rejected *ex post facto* claims have done so not because banishment is insufficiently punitive in effect, but rather because the regulation does not amount to banishment.³¹ Meanwhile, the Northern District has presaged the

²⁴ 828 N.E.2d 769, 779 (Ill. App. Ct. 2005).

²⁵ See Keen, *supra* note 18.

²⁶ *Doe v. Baker*, No. Civ-A. 1:05-CV-2265, 2006 WL 905368, at *3 (N.D. Ga. Apr. 5, 2006) (internal quotation marks omitted) (quoting *Mann v. State*, 603 S.E.2d 283 (Ga. 2004)).

²⁷ For an example of how to apply the five-factor analysis to a statute imposing residency restrictions, see Duster, *supra* note 8, at 730–37.

²⁸ See statutes cited *supra* note 5 and cases cited *supra* note 17.

²⁹ GA. CODE ANN. § 42-1-15 (2006).

³⁰ See Sarah Geraghty, *Challenging the Banishment of Registered Sex Offenders from the State of Georgia: A Practitioner’s Perspective*, 42 HARV. C.R.-C.L. L. REV. 520 & n.36 (2007) (describing sheriffs’ estimates that 222 out of 230 offenders in Bibb County, 490 out of 490 in DeKalb County, and 277 out of 278 in Gwinett County would have to move to comply with HB 1059).

³¹ See, e.g., *Doe v. Miller*, 405 F.3d 700, 719 (8th Cir. 2005) (“While banishment of course involves an extreme form of residency restriction, we ultimately do not accept the

current level of punitiveness and foreshadowed constitutional protection: it remarked that “[a] more restrictive act that would in effect make it impossible for a registered sex offender to live in the community would in all likelihood constitute banishment which would result in an ex post facto problem if applied retroactively to those convicted prior to its passage.”³²

At least three other problems face litigants mounting ex post facto challenges to restrictions like those imposed by HB 1059. First, the Supreme Court and the courts of appeals have been increasingly willing to find arguably punitive restrictions to be regulatory in nature.³³ In *Kansas v. Hendricks*, the Court upheld a state law allowing the postsentence commitment to psychiatric hospitals of offenders deemed sexually violent predators.³⁴ If such profound deprivation of liberty does not constitute punishment in effect, surely residency restrictions do not either. Importantly, however, the *Hendricks* Court emphasized that civil commitment is constitutional only provided that it occurs “pursuant to proper procedures and evidentiary standards.”³⁵ The Kansas statute required proof of dangerousness and mental abnormality or personality disorder.³⁶ By contrast, procedural protections are almost completely lacking in the Georgia statute, which sweeps in all registrants regardless of individual characteristics. This class of sex offender laws may be distinguishable on that basis.

Second, a state government or a court may interpret a statutory obligation such that it does not look retroactive. In *Thompson v. State*, the Georgia Supreme Court ended the ex post facto inquiry without approaching the question of punitiveness: “Thompson is not being punished again because he is a convicted sex offender. He is being punished again because he is currently violating OCGA § 42-1-13, and he refuses to move. Simply put, it is Thompson’s new crime which sparked Thompson’s probation revocation.”³⁷ Litigants may be able to combat this logic by clarifying that such a law still contravenes the ex post facto prohibition by criminalizing conduct that was legal before the enactment of the statute.

Finally, even if successful, an ex post facto challenge protects only those who are convicted or who establish residency before the statute is implemented. If HB 1059 goes into effect, thousands of people will be sub-

analogy Unlike banishment, § 692A.2A restricts only where offenders may reside.”).

³² *Doe v. Baker*, No. Civ-A. 1:05-CV-2265, 2006 WL 905368, at *3 (N.D. Ga. Apr. 5, 2006).

³³ *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346 (1997) (holding that civil commitment, postsentence incapacitation of sexual predators deemed to be abnormal, is not punitive); *United States v. Salerno*, 481 U.S. 739 (1987) (holding that pretrial incarceration based on future dangerousness does not constitute punishment); *Miller*, 405 F.3d 700 (holding prohibition against residing within 2000 feet of a school or child care facility to be civil and nonpunitive).

³⁴ 521 U.S. at 371.

³⁵ *Id.* at 357.

³⁶ *Id.* at 358.

³⁷ 603 S.E.2d 233, 236 (Ga. 2004); *see also* *Denson v. State*, 600 S.E.2d 645, 647 (Ga. Ct. App. 2004).

ject to its strictures in the future. To shield that class of individuals, civil rights litigators will have to turn to other constitutional strategies.

II. PROCEDURAL DUE PROCESS

One such strategy is to bring procedural due process claims based on the right to notice and the opportunity to be heard.³⁸ The Fourteenth Amendment provides that states may not “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.”³⁹ A person raises a due process concern when the government deprives her of life, liberty, or property through inadequate or unfair procedures.⁴⁰ A court’s first step, then, is to determine whether a deprivation has occurred.⁴¹ The second step is to apply the balancing test articulated by the Supreme Court in *Mathews v. Eldridge*⁴² to determine what procedures are due: the court balances the government’s interest against the private interest of the plaintiffs, the risk of erroneous deprivation, and the value added by an oral hearing.⁴³

For many statutes imposing restrictions on sex offenders, however, the *Mathews* inquiry never becomes relevant. The Supreme Court ruled in *Connecticut Department of Public Safety v. Doe* that because the state based its registration requirement not on future dangerousness but simply on the fact of having been convicted of a sexual offense, the registrants were not entitled to a hearing: “[D]ue process does not require the opportunity to prove a fact that is not material to the State’s statutory scheme.”⁴⁴ That is, procedural due process applies only when “potential factual issues exist concerning a particular individual or group.”⁴⁵ Under the Connecticut statute, proving that one is not dangerous would not have saved an ex-offender from having to register.

HB 1059 makes no distinction between Wendy Whitaker, who had oral sex with a fifteen-year-old boy when she was seventeen, and the state’s thirty sexual predators. All are subject to the residency, loitering, and work restrictions.⁴⁶ Based on *Connecticut Department of Public Safety*, plaintiffs in these circumstances will be unable to mount a procedural due process claim to win a hearing and will have to rely on substantive due proc-

³⁸ See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

³⁹ U.S. CONST. amend. XIV, § 1.

⁴⁰ See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 580 (2006).

⁴¹ See *State v. Seering*, 701 N.W.2d 655, 665 (Iowa 2005).

⁴² 424 U.S. 319 (1976).

⁴³ See *id.* at 335.

⁴⁴ *Connecticut Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003); accord *Doe v. Miller*, 405 F.3d 700, 708–09 (8th Cir. 2005) (“[T]he absence of an individualized hearing in connection with a statute that offers no exemptions does not offend principles of procedural due process.”); *People v. Leroy*, 828 N.E.2d 769, 778 (Ill. App. Ct. 2005).

⁴⁵ CHEMERINSKY, *supra* note 40, at 580.

⁴⁶ See Geraghty, *supra* note 30, at 518–19 & nn.26–28.

ess instead. In states like Arkansas and California that do draw distinctions among classes of sex offenders, registrants may win the opportunity to establish their membership in the group exempted from the statutory restrictions.⁴⁷ Interestingly, even in states with statutes as broad and all-encompassing as Georgia's, plaintiffs might claim entitlement to notice of where they may live. The Eighth Circuit left open the door to notice claims of this type when it upheld an Iowa statute against a due process challenge. The court held that the notice problems did not render the statute unconstitutional on its face, but the court did not consider whether the plaintiffs were entitled to injunctive relief until their city governments could tell them what areas were and were not off limits. Such notice would not solve the larger problems that confront registrants as a result of the statute, but it could delay government action and provide registrants additional time to cope with a very sudden upheaval.

III. SUBSTANTIVE DUE PROCESS

Under the doctrine of substantive due process, the Constitution "provides heightened protection against government interference with certain fundamental rights and liberty interests."⁴⁸ For a substantive due process claim, the court requires first, "'a careful description' of the asserted fundamental liberty interest,"⁴⁹ and second, that the fundamental interest be "objectively, 'deeply rooted in this Nation's history and tradition'"⁵⁰ and "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"⁵¹ Infringement of a fundamental right requires strict scrutiny review, meaning that a law is unconstitutional "unless the infringement is narrowly tailored to serve a compelling state interest."⁵²

The Supreme Court has identified a series of fundamental rights protected by substantive due process, including "the right to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion."⁵³ Substantive due process challenges to residency restrictions on registrants have centered around the family right to privacy or the right to "cohabita-

⁴⁷ In *Weems v. Little Rock Police Department*, the Eighth Circuit held a process involving review of official records, psychological testing, and a personal interview sufficient to satisfy due process under the *Mathews* test. 453 F.3d 1010, 1019 (8th Cir. 2006).

⁴⁸ *Washington v. Glucksberg*, 521 U.S. 720, 720 (1997).

⁴⁹ *Id.* at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

⁵⁰ *Id.* at 720–21 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

⁵¹ *Id.* at 721 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937)); see also *Paul v. Davis*, 424 U.S. 693, 713 (1976).

⁵² *Flores*, 507 U.S. at 302.

⁵³ *Glucksberg*, 521 U.S. at 720.

tion with one's relatives."⁵⁴ In *Doe v. Miller* and *State v. Seering*, those challenging the Iowa statute relied on the right to live with one's family members;⁵⁵ so too did the plaintiffs in *Doe v. Baker* and *People v. Leroy*.⁵⁶ These family privacy claims usually depend on *Moore v. City of East Cleveland*, the landmark case in which the Supreme Court invalidated a municipal housing ordinance that prohibited two cousins from living with their grandmother.⁵⁷ People asserting this type of claim generally must distinguish *Village of Belle Terre v. Boraas*, a case in which the Court upheld a zoning ordinance preventing more than two unrelated persons from living together.⁵⁸

The other two fundamental rights most commonly asserted under substantive due process in sex offender litigation are the rights to inter- and intrastate travel. The Supreme Court declared in *United States v. Guest* that the "constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized."⁵⁹ Similarly, the Court has stated in dicta that the right to intrastate travel is a fundamental right.⁶⁰ Both might present powerful arguments against residency and loitering restrictions, especially if plaintiffs can compile empirical data about the proximity of school bus stops, churches, schools, and other off-limits locations to "hotels, motels, homeless shelters, and missions throughout" the state.⁶¹

A litigation strategy that emphasizes substantive due process faces at least three problems. First, much of the struggle lies in defining the right. The Supreme Court has cautioned that "[s]ubstantive due process' must begin with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we

⁵⁴ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619–20 (1984) (explaining that "[f]amily relationships, by their nature, involve deep attachments and commitments" and "only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty").

⁵⁵ See *Doe v. Miller*, 405 F.3d 700, 709–10 (8th Cir. 2005); *State v. Seering*, 701 N.W.2d 655, 662–63 (Iowa 2005); see also *Graham v. Henry*, No. 06-CV-381-TCK-FHM, 2006 WL 2645130, at *10 (N.D. Okla. Sept. 14, 2006) (right to live with wife).

⁵⁶ See *Doe v. Baker*, No. Civ-A. 1:05-CV-2265, 2006 WL 905368 (N.D. Ga. Apr. 5, 2006) (right of extended family to live together); *People v. Leroy*, 828 N.E.2d 769 (Ill. App. Ct. 2005) (right to live with mother).

⁵⁷ 431 U.S. 494, 541 (1977) (plurality opinion).

⁵⁸ 416 U.S. 1, 9–10 (1974).

⁵⁹ 383 U.S. 745, 757 (1966).

⁶⁰ *United States v. Wheeler*, 254 U.S. 281, 293 (1920) (noting that under the Articles of Confederation, state citizens "possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom"); *Williams v. Fears*, 179 U.S. 270, 274 (1900) ("[T]he right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty . . . secured by the 14th Amendment.").

⁶¹ *Doe v. Miller*, 405 F.3d 700, 712 n.3 (8th Cir. 2005).

are asked to break new ground in this field.”⁶² In *Miller*, the government narrowed and redefined the right for the court: “The question is not whether any Plaintiff has a fundamental right to live with his family. The question is whether there is a fundamental right to live within 2000 feet of a school or registered child care center.”⁶³ The court in *Leroy* similarly held that the “essence of the defendant’s argument is that he has a fundamental right to live with his mother and enjoy her support within 500 feet of a school.”⁶⁴ Second, the government often will argue that the statute in question does not directly infringe on the rights asserted by the plaintiff, and that any disability in enjoying those rights results from exogenous factors. The right to family cohabitation, then, can be dismissed because the statute “does not impose on such a right, as it does not dictate *with whom* Plaintiff may live, but only *where* Plaintiff may live.”⁶⁵ Similarly, a plaintiff’s inability to live with his family is “largely the result of circumstances outside of those created by the residency restriction”⁶⁶—namely his financial situation—and those restrictions on sex offenders do not act directly upon the asserted rights.⁶⁷ Third, the court may not recognize the purported right as fundamental.⁶⁸ In *Doe v. City of Lafayetteville, Indiana*, a sex offender brought a claim against the city for banning him from entering its parks, arguing that the order violated his right to loiter.⁶⁹ The court called the “historical and precedential support for a fundamental right to enter parks for enjoyment . . . , to put it mildly, oblique” and rejected the claim.⁷⁰

If the court does recognize a fundamental right infringed by the statute, it will apply strict scrutiny review.⁷¹ While the protection of children from sexual abuse is certainly a compelling state interest, plaintiffs in suits like *Whitaker* have a strong argument that the law is not narrowly tailored to serve that interest. It is overinclusive in that it captures people like Wendy Whitaker, who pose no threat to children at all. If the court did not recognize a fundamental right, it would apply rational basis review and uphold the statute if “there is any reasonably conceivable state of facts that

⁶² *Reno v. Flores*, 507 U.S. 292, 302 (1993) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (second alteration in original)).

⁶³ Appellant’s Brief and Argument at *15, *Miller*, 405 F.3d 700 (No. 04-1568). The court agreed that the plaintiff’s formulation was overly general. See *Miller*, 405 F.3d at 711.

⁶⁴ *People v. Leroy*, 828 N.E.2d 769, 776 (Ill. App. Ct. 2005).

⁶⁵ *Graham v. Henry*, No. 06-CV-381-TCK-FHM, 2006 WL 2645130, at *7 (N.D. Okla. Sept. 14, 2006) (second emphasis added).

⁶⁶ *State v. Seering*, 701 N.W.2d 655, 664 (Iowa 2005).

⁶⁷ See, e.g., *Miller*, 405 F.3d at 710 (“[T]he Iowa statute does not operate directly on the family relationship [N]othing in the statute limits who may live with the Does in their residences.”); *id.* at 712 (“The Iowa statute . . . does not erect an ‘actual barrier to interstate movement.’”) (citation omitted).

⁶⁸ See, e.g., *Seering*, 701 N.W.2d at 666 (holding that “freedom of choice in residence” is “an important interest” but “not a fundamental one”).

⁶⁹ 377 F.3d 757, 769–70 (7th Cir. 2004).

⁷⁰ *Id.* at 771–73.

⁷¹ *Reno v. Flores*, 507 U.S. 292, 302 (1993).

could provide a rational basis for” it.⁷² Statutes imposing residency restrictions that have been challenged on substantive due process grounds have generally been upheld on rational basis review.⁷³ However, the Georgia plaintiffs might make a convincing case that the virtual banishment and ten-to-thirty-year sentence for violation are so disproportionate as to render the statute irrational.

IV. EQUAL PROTECTION

The Fourteenth Amendment commands that no state “shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁷⁴ The Court has described this protection as “a direction that all persons similarly situated should be treated alike.”⁷⁵ Any law that classifies people into groups and treats them differently based on that classification may be subjected to constitutional scrutiny. The standard test is rational basis review, under which the law will be upheld “if any state of facts reasonably can be conceived that would sustain it.”⁷⁶ If a law infringes on a fundamental interest or implicates a suspect classification—such as race, alienage, or national origin—it will be subjected to strict scrutiny.⁷⁷ Justice Souter indicated in *Connecticut Department of Public Safety* that when a state legislature imposes restrictions upon a certain set of sex offenders, that statute is open to challenge on equal protection grounds.⁷⁸

Equal protection claims, however, are unlikely to succeed against most sex offender laws. Courts have held that sex offenders are not a suspect class,⁷⁹ and courts have been unwilling to find that fundamental rights are implicated by any of these statutes.⁸⁰ Thus strict scrutiny does not apply, and under the rational basis test, offenders’ above-average recidivism rates are sufficient to justify the restrictions on them.⁸¹ Nonetheless, as in the substantive due process context, plaintiffs would have a strong chance of prevailing if they could identify a fundamental right that has been infringed. And a law as sweeping and restrictive as HB 1059 is more likely to implicate such rights than the statutes that courts have examined thus far.

⁷² FCC v. Beach Commc’ns, Inc., 508 U.S. 307, 313 (1993).

⁷³ See, e.g., Graham v. Henry, No. 06-CV-381-TCK-FHM, 2006 WL 2645130, at *7 (N.D. Okla. Sept. 14, 2006).

⁷⁴ U.S. CONST. amend. XIV, § 1.

⁷⁵ City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).

⁷⁶ Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

⁷⁷ City of Cleburne, 473 U.S. at 440.

⁷⁸ 538 U.S. 1, 10 (2003) (Souter, J., concurring).

⁷⁹ United States v. LeMay, 260 F.3d 1018, 1030 (9th Cir. 2001); see also Doe v. Moore, 410 F.3d 1337, 1346 (11th Cir. 2005) (citing *LeMay*).

⁸⁰ See, e.g., Weems v. Little Rock Police Dep’t, 453 F.3d 1010, 1016 (8th Cir. 2006).

⁸¹ See *Moore*, 410 F.3d at 1347.

V. TAKINGS

The Fifth Amendment, made applicable to the states through the Fourteenth Amendment,⁸² provides that “private property [shall not] be taken for public use, without just compensation.”⁸³ The Supreme Court has recognized that government regulations constitute compensable takings when the “regulation goes too far.”⁸⁴ In order to establish a regulatory taking, a claimant must first establish that she possessed a property interest.⁸⁵ Then, if the plaintiff argues that the regulation constitutes a partial taking, the court must conduct an “ad hoc, factual inquir[y]” to determine whether a taking has occurred.⁸⁶ The three main factors a court considers in that inquiry are “the economic impact of the regulation on the claimant,” “the extent to which the regulation has interfered with distinct investment-backed expectations,” and “the character of the government action.”⁸⁷

According to the Southern Center, HB 1059 will cause thousands of registrants to leave their homes, break their mortgages, and sell their property in fire sales.⁸⁸ This is physical property to which the owners and occupants have both a financial and emotional connection. They likely invested in the property by maintaining and improving it, and their expectations that they could continue living in their homes were reasonable. The government has an interest in preventing child abuse, but given that the restrictions may not have an appreciable effect on recidivism rates,⁸⁹ this interest may be outweighed by those captured by the first two prongs of the three-pronged inquiry. While a successful takings challenge would not result in the invalidation of a statute, it would require the government to provide just compensation to those sex offenders who suffer property losses—a requirement that might prevent officials from enforcing the law or passing others like it.

The U.S. District Court for the Northern District of Georgia rejected a takings challenge to the state’s 2003 enactment of residency restrictions.⁹⁰ In *Doe v. Baker*, the court held that the statute requiring the plaintiff to

⁸² See *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

⁸³ U.S. CONST. amend. V.

⁸⁴ *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

⁸⁵ See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000–01 (1984).

⁸⁶ *Penn. Cent. Transp. Co. v. N.Y. City*, 438 U.S. 104, 124 (1978).

⁸⁷ *Id.*

⁸⁸ See Plaintiffs’ Response to Defendants’ Motion to Dismiss at 35–36, *Whitaker v. Perdue*, No. 06-140 (N.D. Ga. Aug. 17, 2006).

⁸⁹ Richard Tewksbury, *Exile at Home: The Unintended Collateral Consequences of Sex Offender Residency Restrictions*, 42 HARV. C.R.-C.L. L. REV. 531, 539 (2007) (“[R]e-search provides little if any support for the effectiveness of residential restriction laws in deterring or preventing sexual offenses.”).

⁹⁰ *Doe v. Baker*, No. Civ-A. 1:05-cv-2265, 2006 WL 905368, at *9 (N.D. Ga. Apr. 5, 2006); see also *Mann v. State*, 603 S.E.2d 283, 285–86 (Ga. 2004) (rejecting the takings claim of a sex offender who lived with his parents and could not show he had “any economic stake in the property”).

move did not constitute a compensable taking because the economic impact on him was minimal, no interference with investment-backed expectations had been demonstrated, and the state had a strong interest in preventing the sexual abuse of children.⁹¹ The court also emphasized the Supreme Court's principle that the Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."⁹² The court emphasized that "[i]t was the Plaintiff's own actions that created his current problem, and it should not be the public's responsibility to compensate him for any monetary hardship he suffers in order to comply with this legitimate government regulation."⁹³

While the *Baker* ruling presents obstacles to future claimants, a plaintiff appearing before another court could argue that the *Baker* court simply came to the wrong conclusion on the three factors. Moreover, HB 1059 appears closer to a taking than its predecessor statute. In *Baker*, the court found that the plaintiff was "not forced to sell his home" but rather required "not [to] use it as a residence for a period of time"⁹⁴—presumably because the statute required registration for only ten years.⁹⁵ HB 1059 requires lifetime registration,⁹⁶ meaning that registrants will never be able to live in their homes again. This difference, combined with the effective banishment of sex offenders from the state, suggests that a takings claim would be much more robust under these circumstances than in *Baker*.

VI. PRIVILEGE AGAINST SELF-INCRIMINATION

A sex offender might also object to the registration portion of the new law on the grounds that reporting her place of residence or employment, when that place falls within a prohibited geographic area, would violate the Fifth Amendment protection that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."⁹⁷ Many statutes require citizens to produce information to the government that ultimately might prove incriminating, and they of course are not all unconstitutional. Such laws, called compulsion statutes, implicate the Fifth Amendment when they aim to secure private information that might be incriminating⁹⁸

⁹¹ *Baker*, 2006 WL 906368 at *8.

⁹² *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

⁹³ *Baker*, 2006 WL 906368 at *9; cf. *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 592 (1897) ("Uncompensated obedience to a regulation enacted for the public safety under the police power of the state is not a taking" (quoting *Chicago & N.W. Ry. Co. v. City of Chicago*, 140 Ill. 309, 323 (1892))).

⁹⁴ *Baker*, 2006 WL 906368 at *8.

⁹⁵ GA. CODE ANN. § 42-1-12(g) (2006).

⁹⁶ *Id.* § 42-1-12(f)(7).

⁹⁷ U.S. CONST. amend. V. The Supreme Court extended application of this right to the states in *Malloy v. Hogan*, 378 U.S. 1 (1964).

⁹⁸ See CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE 372 (2000) (citing *Garner v. United States*, 424 U.S. 648 (1976)).

and when they require “revelation of obviously incriminating information from ‘a highly selective group inherently suspect of criminal activities.’”⁹⁹ However, the regulatory purpose doctrine of Fifth Amendment jurisprudence holds that if a statutory reporting requirement “is essential to a public, regulatory scheme” and is noncriminal in nature, the privilege may not apply.¹⁰⁰

The first question for a court, then, is whether a compulsion statute is criminal or regulatory in nature.¹⁰¹ If it is criminal, the privilege against self-incrimination attaches.¹⁰² If it is regulatory, the court should follow *California v. Byers*, a case upholding a reporting requirement under a hit-and-run statute for motorists who get into accidents.¹⁰³ That case held that a court should balance “the public need on the one hand, and the individual claim to constitutional protections on the other” to determine whether the individual can assert the privilege.¹⁰⁴ In doing this balancing, Justice Harlan’s influential concurrence advised, the court should consider “the assertedly non-criminal governmental purpose in securing the information, the necessity for self-reporting as a means of securing the information, and the nature of the disclosures required.”¹⁰⁵

A successful claimant, then, might convince the court that the compulsion statute at issue constituted a criminal law. An Illinois state court addressed this issue directly in *People v. Leroy* and found that the state’s residency restriction law was regulatory and noncriminal.¹⁰⁶ A claimant might still win the ability to invoke her Fifth Amendment privilege under the *Byers* balancing. In *Leroy*, however, the court held that the weight of the public’s interest in procuring residency information about registrants trumped the interests of those registrants.¹⁰⁷ There might yet be room for sex offenders to assert the privilege under the doctrine of groups inherently suspect of criminal activity. The *Byers* plurality found that doctrine to be no bar to conviction because “like income taxes,” the hit-and-run statute’s reporting requirement was “directed at all persons.”¹⁰⁸ Sex offender registrants who are alone subject to the criminal sanctions of statutes like

⁹⁹ See *id.* (quoting *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 79 (1965)).

¹⁰⁰ See *id.*

¹⁰¹ See *California v. Byers*, 402 U.S. 424, 436 (1971) (Harlan, J., concurring).

¹⁰² See *Leary v. United States*, 395 U.S. 6 (1969); *Marchetti v. United States*, 390 U.S. 39 (1968); *Albertson*, 382 U.S. 70.

¹⁰³ 402 U.S. at 434 (plurality opinion).

¹⁰⁴ *Id.* at 427.

¹⁰⁵ *Id.* at 454 (Harlan, J., concurring). The Supreme Court has generally adopted Justice Harlan’s approach over that of the plurality opinion. *WHITEBREAD & SLOBOGIN*, *supra* note 98, at 374.

¹⁰⁶ See *People v. Leroy*, 828 N.E.2d 769, 782–83 (Ill. App. Ct. 2005).

¹⁰⁷ See *id.* at 783. This court applied the inquiry as described by Chief Justice Rehnquist in his plurality opinion in *Byers*, “balancing the public need for protection against the individual claim to constitutional protection.” *Id.*

¹⁰⁸ *Byers*, 402 U.S. at 430 (plurality opinion).

HB 1059 might have a better claim to being inherently suspect of criminal activity.¹⁰⁹

The federal and state cases on the Iowa statute—the former involving plaintiffs’ affirmative challenge to the statute and the latter involving a constitutional challenge as a defense to prosecution¹¹⁰—demonstrate that courts may find procedural grounds to dismiss a self-incrimination claim. In both cases, the court faulted the sex offenders for challenging only the residency provision and not the registration provision.¹¹¹ The federal court also noted that even if the plaintiffs had challenged the proper provision, their Fifth Amendment claim was premature because their rights could not be infringed until they were prosecuted.¹¹² Moreover, the state court claimed that the proper remedy in a criminal case would be suppression of evidence and not invalidation of the statute as unconstitutional.¹¹³ If the court was right about the remedy, sex offenders could break the residency law and report to the police to immunize themselves against prosecution.¹¹⁴ This prospect makes it especially unlikely that courts will find violations of the privilege against self-incrimination in statutes like HB 1059.

VII. CRUEL AND UNUSUAL PUNISHMENT

The Eighth Amendment, made applicable to the states in *Robinson v. California*,¹¹⁵ prohibits the infliction of “cruel and unusual punishments.”¹¹⁶ According to the Supreme Court, the amendment “prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed,” including felony prison sentences.¹¹⁷ The proportionality inquiry is guided by three factors: “(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the

¹⁰⁹ The *Leroy* court found that the Illinois statute did “not implicate inherently illegal activity,” 828 N.E.2d at 783, but other courts have yet to rule on this matter.

¹¹⁰ *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005); *State v. Seering*, 701 N.W.2d 655 (Iowa 2005).

¹¹¹ *See Miller*, 405 F.3d at 716; *Seering*, 701 N.W.2d at 670.

¹¹² *See Miller*, 405 F.3d at 717–18.

¹¹³ *See Seering*, 701 N.W.2d at 670.

¹¹⁴ *See Duster*, *supra* note 8, at 770–71 (“The only way [suppression as remedy] would be effective in a trial context would be for any derivative evidence to be excluded as well, including evidence of a defendant’s actual residential address.”).

¹¹⁵ 370 U.S. 660 (1962).

¹¹⁶ U.S. CONST. amend. VIII.

¹¹⁷ *Solem v. Helm*, 463 U.S. 277, 284, 288 (1983); *see also Weems v. United States*, 217 U.S. 349, 371 (1910) (holding that the Eighth Amendment prohibits “all punishments which, by their excessive length or severity, are greatly disproportioned to the offenses charged”). In 1991, the Supreme Court appeared to reverse course, saying “we think it most unlikely that the English Cruel and Unusuall Punishments Clause was meant to forbid ‘disproportionate’ punishments.” *Harmelin v. Michigan*, 501 U.S. 957, 974 (1991). This language, however, appeared in a part of Justice Scalia’s majority opinion joined only by Chief Justice Rehnquist.

same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.”¹¹⁸

There are two ways in which HB 1059 and similar laws might be held to inflict cruel and unusual punishment. First, the imposition of residency, work, and loitering restrictions could constitute the punishment for the crime of being listed on the sex offender registry. Second, the statutorily prescribed sentence of ten to thirty years of incarceration could constitute the punishment for the crime of failing to abide by the residency, work, and loitering restrictions. The former faces an obstacle in establishing that the restrictions amount to punishment rather than civil regulation.¹¹⁹ The latter appears to be a more promising claim. In *State v. Seering*, the Iowa Supreme Court ruled that the two-year sentence prescribed for violation of the residency statute did not appear disproportionate on a threshold inquiry of comparing the harshness of the penalty to the gravity of the offense.¹²⁰ Given that HB 1059 mandates that sex offenders stay on the registry for life and also makes it nearly impossible for them to live in the state without violating the residency restrictions, the plaintiff class likely has a strong claim that a sentencing provision requiring ten years’ imprisonment and allowing up to thirty is “grossly disproportionate.”¹²¹

VIII. CONCLUSION

This Article has aimed to sketch out the most viable constitutional challenges to the new generation of sex offender statutes—to describe the doctrinal bases for those challenges as well as the doctrinal barriers facing them. There are a number of claims beyond those presented above that may prove effective depending on the nature of the specific statute under scrutiny. These include actions based on the protection against double jeopardy,¹²² the prohibition on the impairment of contract,¹²³ the separation of

¹¹⁸ *Helm*, 463 U.S. at 292.

¹¹⁹ See *People v. Leroy*, 828 N.E.2d 769, 543–44 (Ill. App. Ct. 2005) (rejecting the contention that the statute inflicted cruel and unusual punishment because it did not constitute the punishment of virtual banishment).

¹²⁰ 701 N.W.2d 655, 670 (Iowa 2005).

¹²¹ *Helm*, 463 U.S. at 291 n.7.

¹²² The Fifth Amendment requires that no person “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. CONST. amend. V. The success of a double jeopardy claim will depend on whether the statute can be understood as imposing criminal punishment. See *Graham v. Henry*, No. 06-CV-381-TCK-FHM, 2006 WL 2645130, at *4, *6 (N.D. Okla. Sept. 14, 2006) (noting the statute’s remedial intent and finding it “unlikely that Plaintiff will succeed in demonstrating that Section 590 is so punitive in effect as to negate the Oklahoma Legislature’s intent to create a civil scheme”); see also *Hudson v. United States*, 522 U.S. 92, 98–99 (1997).

¹²³ “No state shall . . . pass any . . . Law impairing the Obligation of Contracts . . .” U.S. CONST. art. I, § 10, cl. 1. Thus far, at least one state’s residency restrictions have been challenged on this basis. See *Coston v. Pedro*, 398 F. Supp. 2d 878, 880, 882 (S.D. Ohio 2005) (dismissing plaintiffs’ claim of violation of the right against impairment of contracts for lack of standing).

powers principle,¹²⁴ and overbreadth and vagueness doctrine.¹²⁵ As state statutes like HB 1059 proliferate, so too will state and federal lawsuits, and the Supreme Court may eventually hear some of these issues. Those suits that have been adjudicated to date suggest that plaintiffs will face three main difficulties that cut across the doctrines: courts' reluctance to deem any of these restrictions punitive; courts' dubious attitude toward the implication of fundamental rights; and courts' tendency to weight the plain text of the statute more heavily than the lived consequences that follow from that text. Nonetheless, this territory is highly contested, at least in the context of the government's increasing circumscription of people's daily lives, and there is room for creative litigation.

¹²⁴ *See Doe v. Moore*, 410 F.3d 1337, 1349 (11th Cir. 2005) (rejecting claim that registration statute violated separation of powers by, *inter alia*, undermining the judiciary's sentencing role); *Mann v. State*, 603 S.E.2d 283, 287 (Ga. 2004) (denying claim that residency restriction statute violated separation of powers by granting judicial authority to probation officers).

¹²⁵ *See Mann*, 603 S.E.2d at 286–87 (denying claim that statute was unconstitutionally overbroad because “less restrictive remedies are available to promote the State’s interest” and unconstitutionally vague in its definition of the terms “areas where minors congregate” and “child care facilities”).

My Life Before and After HB 1059

*Lori Sue Collins**

My name is Lori Sue Collins, and I would like to share with you how my life has been affected by the new sex offender law in Georgia, HB 1059. In 2001, I pled guilty to statutory rape and received a split sentence of “ten do four.” This meant that I would serve four years in prison and the remainder of my sentence on probation. I received an immediate release after serving three and a half years. Currently I am on probation and also on the sex offender registry in Georgia.

I am neither a predator nor a pedophile. I am forty-five years old, a mother and grandmother. I made some terrible choices, and I have paid a dear price for those choices. I will not place any blame except where it is due, and I accept full responsibility for my actions. I began to use prescription drugs during my teens. I used pills and alcohol to try to stop the very real pain from a muscle disease. I still have pain, but I now know how to live with it. Before long, I was taking way too many pills, and my life spun totally out of control. I was not only overusing prescription drugs; I also began to drink alcohol to enhance the effect. I would take anywhere from ten to thirty different pills a day just to get through. When I ran out of my pills, alcohol would take their place. There were some times when I would forget how many I had taken or how much I had had to drink.

Mixing the alcohol with the pills caused me to have many days and nights I do not remember. Blackouts were frequent. I was a functioning legal drug addict: one doctor, one pharmacy, and one messed up life. There were times when I did not want to be alone, so I ended up with a reputation as “easy.” Many men were my friends. I am ashamed to admit that I would sometimes wake up with someone I did not remember going to bed with. This is not easy to admit, but it is the truth. Because I was not in control of my own ability to think clearly and make good decisions, I put myself into a situation with someone underage, a friend of my daughter. This is not a situation I would have been in had I been sober.

That person is not who I am today. I must always live with the fact that it is a part of my past. I have given up alcohol completely because of that incident, and I have been totally delivered from my prescription pill abuse. During my time in prison I stopped taking all medications, and currently I use vitamins and natural therapy instead of medications when I

* The author is a forty-five-year-old mother and grandmother living in Georgia. She was formerly incarcerated at Pulaski State Prison, where she was a graduate of the Faith and Character Based Dormitory and an honors graduate of the Graphic Arts and Communication Design Program in 2005. She is now an ordained minister and is active in prison ministry in the state.

can. There is nothing I can think of that would cause me to go back to taking chemicals to get through life. The risks are too high. I live life now with a clear mind and I am able to think, make sound decisions, and remember.

While I was incarcerated, I utilized my time as well as I possibly could. I attended Middle Georgia Technical School, which was on the grounds of the prison, and received a diploma with honors in graphic arts and communication design. I was also one of the very first female inmates to be accepted into the Faith and Character Dormitory at Pulaski State Prison. It was a real honor to be accepted into this program, which is designed to reduce recidivism by supporting offenders' "successful transition from custody to community."¹

In the words of Commissioner James Donald, "Partnering with the dedicated volunteers of the faith community provides a great opportunity to assist inmates in redeeming themselves back into society. I believe this initiative will produce a safer Georgia as fewer inmates return to a life of crime as a result of this partnership."²

I was really excited to be a part of this new pilot program, which would not only assist me in following the call on my life, but also hopefully give me the resources to help others who have been where I have been. I firmly believe that there is nothing we have been through in life that is for us alone; our trials are for us to use to help others. Others learn from our mistakes, and hopefully we can help prevent future mistakes by learning from each other. While in the Faith and Character Dormitory, I furthered my education through correspondence Bible studies and the graphic arts. I was able to get on-the-job training hours and became certified as a teacher's aide in graphic arts. Additionally, I became the founding editor of the *New Horizons Newsletter*. The newsletter began as a community service project for the Faith and Character Dormitory's first group of women. It is still in print and continues to be a blessing for contributors and recipients alike. The vision and mission statement for this endeavor is:

To see the community of women here at Pulaski State Prison pull together, learn and grow in our beliefs, faith & character. To become a positive influence on those around us. To see a future filled with potential, that we CAN fulfill, to set goals that we CAN reach. To focus on that NEW HORIZON, and not on the path we left behind³

¹ Georgia Department of Corrections, Faith and Character-Based Initiative, <http://www.dcor.state.ga.us/NewsRoom/PublicInformation/FCBI.html>.

² CHAPLAINCY SERVS., GA. DEP'T OF CORR., FAITH AND CHARACTER-BASED INITIATIVE, available at <http://www.dcor.state.ga.us/pdf/faith-basedpamplet.pdf>.

³ *Mission Statement*, NEW HORIZONS (Faith & Character-Based Initiative, Pulaski State Prison, Ga.), Sept. 1, 2004, at 1 (on file with author).

This was and still is my vision, and I hope to see it fulfilled in the future.

While at Pulaski, I assisted the chaplain with various duties and helped the counselor set up criteria for the Big Sister–Little Sister program, which was a part of the Faith and Character Program. I helped to screen new applicants for the program. I have been involved with Kairos, an international prison ministry, both while inside prison and since my release. I recently became a Certified Volunteer with the Chaplaincy Department for the State of Georgia and am a member of the Burning Bush prison ministry team. I have been able to go back into both women’s and men’s facilities to share my story with the inmates. I have hopes of being able to go into other facilities in the future. This is all a part of fulfilling my vision for my future.

When I was released from Pulaski, I moved into the Door of Hope, a parole-approved Christian transitional home for women coming out of prison. After I had been in the program for six months in Felton, the program was moved to Conyers, Georgia. There I became the in-house residential program director and assistant to Miss Lonnie Turner, the program’s director and founder. Miss Lonnie and I set up policies and procedures for the home based on the state’s guidelines.

My duties as “house mom” and assistant included clerical duties and driving women to and from appointments, interviews, and jobs. I was also on call at all times to help in any way that came up. Of course, we went to church three times each week, Bible study twice weekly, and extracurricular events.

During this time I also became a volunteer prayer partner with the Trinity Broadcasting Network. This opportunity was a big blessing to me, and I was extremely excited to be able to do it. I went to the station each Thursday morning, and my job was to answer the phones as people called in for prayer. They would frequently post job openings on the board in the prayer room, and I was really thrilled when I noticed that they would hire from within. I thought that maybe I would one day be able to get hired and have a really good job. I dreamed of becoming a paid employee and hopefully living on my own. Of course, I would continue to volunteer at the Door of Hope. That was my goal and my plan. I felt that the time would come when I would be able to put my graphic arts training to good use, and I had felt a call into media ministry when I was in class at Pulaski. I thought that it was all coming together for me. Life was good—for a little while.

Then the bottom fell out: I found out that House Bill 1059 had been passed into law and was to take effect in July 2006. At first, I did not fully grasp the devastating effects of this law. I was only concerned with the provisions relating to churches,⁴ which would keep me from ever working with or near a church, volunteering at or near a church, or attending the prayer vigils that sometimes linger for hours, due to the law’s “loitering”

⁴ 2006 Ga. Laws 571, §§ 24–25.

language.⁵ I had no idea that the bus stop issue⁶ would cause me to lose my home and my job as in-house Program Director. I nearly became homeless, which is another violation of the law with penalties exceeding my original sentence. Any violation of this new law could cause me to go back into prison for no less than ten years, and it could happen all because I could not find any place that was safe for me to live.

My whole entire life seemed to become out of control in a split second. When I visited my probation officer in Rockdale County, she told me that of the fifty-one registered offenders in that county, all but one had to move. She went on to say that there was absolutely no place in the county that was a “safe” zone for registered offenders, due to the high population and large number of school bus stops. This is when I began to worry. I had come this far and was doing the very best I knew how to live life right, give back to society, try to better myself, and make a difference for good—and it was all falling apart.

I looked in the newspaper, on the Internet, and to friends and family to try to help me to find someplace—anyplace—to move that was 1000 feet away from any of the places covered by HB 1059. No one could find anything. There were many that seemed to be right, and I would take down the address, go back home, and look them up on the county websites displaying school bus stop locations. Sure enough, each and every time, a bus stop would be within 1000 feet of the address—and often right there at the driveway. I didn’t realize at the time that these bus stops were most likely from the previous residents, who may have had school-age children. It was like trying to find a needle in a haystack.

I am on a fixed income, living on a small monthly check that I stretch to make ends meet. I had managed before because my work at Door of Hope was rewarded with a waiver of the \$75 per week rent, which also covered utilities. I had to search diligently for something that was “safe” and affordable for me. A friend of mine actually found a place that initially seemed to be perfect. It was a small home that was smack dab in the middle of an industrial, commercial area. The house itself was zoned residential and/or commercial, so that meant that I might be safe there, and the rent was okay too. After checking the address on the county website, a school bus stop showed up right there at the driveway. I called the probation officer in that county and asked if they would please check this out and see if this was an old bus stop that was not in use anymore. They did and found out that, though the particular stop at the driveway was indeed an old one, there was a housing development with a bus stop in use about

⁵ *Id.* § 24.

⁶ See generally Sarah Geraghty, *Challenging the Banishment of Registered Sex Offenders from the State of Georgia: A Practitioner’s Perspective*, 42 HARV. C.R.-C.L. L. REV. 513 (2007); Chiraag Bains, *Next-Generation Sex Offender Statutes: Constitutional Challenges to Residency, Work, and Loitering Restrictions*, 42 HARV. C.R.-C.L. L. REV. 483 (2007).

300 feet behind the home: behind a row of trees, the rental storage units, and the garage. You could not see it from the home or even from the road, but it was there. So it was back to square one for me, and time was running out.

I looked into moving in with my grandparents, who are well into their nineties and live way out in the county near Augusta. My aunt, who lives within a few miles of them, checked it out for me. She called back and said that a school bus stop was at the end of the dirt road that touched their property. She said that another person on the registry lived behind my grandparents' home and that he was going to have to move. He had been helping my granddad for several years with yard work and other chores and had never given anyone any trouble, so they were quite upset that he was going to have to move.

My sister lives in South Carolina, as do some very dear friends of mine. I phoned and told them about this dilemma, and my friend offered to find out about the laws in South Carolina. Both my sister and my friend said that it would be fine for me to come and live with them if I needed to. I then called my probation officer back and asked her what would have to be done to allow me to move to another state. She said that I would need an interstate compact, which might take up to six months to be approved. Furthermore, approval from the other state was not guaranteed. She also said it would help if I already had a job in the other state. This was in June, a few weeks before the law was to go into effect. There was no time to even begin the paperwork.

I filled up the gas tank in my car and took to the roads, driving, looking, and searching, seeking a safe place to live. I drove through the countryside, looking mostly in rural areas for something off by itself: a mobile home, small cottage, or little house for rent. I could find nothing. Everything I looked at or called about was either way too expensive for me or was near a bus stop, a rural church, a park, or something else I could not be close to. I began to look into extended-stay hotels. I knew of an affordable one close to the Door of Hope, which would let me still help out with the women there. I thought I could do this, but when I approached my probation officer with this idea, she said that periodically there would be families living there, and the school bus would stop whenever there were children in need of transportation. I realized then that, even if I were to find a place that was in compliance and affordable, there was no guarantee that I would remain in compliance, since bus stops would change as families moved in and out of the area.

By then, I was ready to give up. I didn't think I would be able to find anything that would satisfy the new law. Through speaking with others who had to put their homes up for sale due to their proximity to bus stops, I got in touch with a realtor who was helping them to relocate. She began by checking for places where school buses could not go, such as culs-de-sac and long, narrow roads. This wonderful woman spent many hours search-

ing for potential places. She tried to help me, but I was not in the position to purchase a home. She was unable to find anything within my price range for rent or for lease. I would need a roommate in order to afford the places she found. Most of the people with whom I would be comfortable sharing a place were the women from the Door of Hope, but like me they were just getting back on their feet after prison. Again, I was back to square one.

Still, there was one last option. During all of this time, the owner of the Door of Hope had a home on a piece of property about two hours away, in rural Polk County. This had been the original transitional home for women. I had lived there before, when I was first released from prison. I knew the probation officer and was comfortable there. Unfortunately, they had it up for sale. They had been planning to sell the home and the property and relocate the entire ministry to Conyers. At the time, the building was being used for fundraisers, gatherings for worship, a food pantry, and other activities. We had talked about the possibility of my moving back there, but it seemed as if there was a serious buyer.

With only a couple weeks left for me to find a safe haven, I began to seek God for guidance and direction. I gave all of this to Him. I couldn't do it anymore. The stress, the worry, the not knowing what the future held, was really wearing me down. I had also been in contact with the Southern Center for Human Rights and had signed on as a plaintiff in its lawsuit. Still, the law was going to go into effect, and I could not wait and see and risk being found in violation after the fact. I had to do something. I fasted and I prayed, and I asked others to pray with and for me. Within a few days, the owners of the Conyers house came to me and said they were led by the Lord to take down the "For Sale" sign in the yard, and that it would be a safe place for me.

I was so relieved, but I still had to find out from the Polk County probation officers if it was, in fact, safe. I called my old probation officer, Tony Mitchell. He said that his office was swamped with requests for the same thing because it was a rural area; many people on the registry were trying to relocate there. He put me on a list and told me that he would try to get to me within a week or ten days. It was getting close to the deadline for me. Someone told me that 1000 feet was equal to two tenths of a mile, so I rode out there myself and measured the distance from the nearest group of houses to the property. If my calculations were correct, it was exactly 1000 feet from the property to the nearest school bus stop, with not a bit of room to spare. Others measured with their vehicles, too, and we all came up with the same thing: exactly right on the mark. I started to relax and to breathe easier, began packing my things, and waited. Finally, I called Mr. Mitchell back. He had just measured and said that it would be fine for me to move into the house. He could see no problem. I called my current probation officer, and she began the paperwork. I had a safe haven, a place to go to. I would be okay. This was a good feeling, knowing that there was a place for me.

The week before the law went into effect I moved to Polk County, where I now live. My new home is in a ministry outreach building. Some problems have arisen because people have mistaken it for a church, and living in a church is against the law for someone like me. Still, I love my home. There is a huge room, a sanctuary room, which is my living room and my office. I feel that the Lord has given me sanctuary, safety, and security.

I do not understand the reason behind the church provisions. Where can people go to when they are in desperate need but the church? This law has caused me to live in fear. When I go on a prison ministry trip, I meet up with the team at a designated place. They have been doing this for years, and it works well for all team members. However, for me there is a problem: the meeting place is almost always a church, which is a safe place to leave your car unattended while on the trip. Yet I can be in violation if I get there early and wait in the parking lot. Last time I got there a full twenty minutes before our meeting time, and I panicked and nearly went back home. I did not want to be in violation of the loitering law, even though I was only waiting for my ride. I drove back and forth along the highway for twenty minutes, just to be safe. The whole time, I worried about whether I had enough gas to keep driving and make it back home later after the service.

Before this law went into effect, I had been granted an interstate travel pass to attend a conference in Nashville, Tennessee. Last week I was asked to go on another ministry conference trip with the Door of Hope team members, and I asked my probation officer if this would be a problem. After making sure that it was an adult conference, she asked me if there was a church there. She said that she needed to research whether or not I am allowed to go to a conference site where there is a church. My heart breaks over this. For years while in Pulaski, I had read about this particular campground and vowed to go one day. Because it is in another state, I knew I needed a special travel permit, but I did not realize that the laws in Georgia might affect this other state, too. I do not understand why this law attacks my freedom to participate in worship and spiritual enrichment. There is not a church building on the campgrounds, but we, the church, will be assembling there for worship. The church is open to all who have sinned, and that includes me.

In August, my mother became sick. She had been in serious condition for a long time due to lung problems. She battled polio as a child and had been fighting post-polio syndrome for many years. This time it was really serious. The doctors told us it was just a matter of time. I got special permission to be with her in intensive care. My probation officer and the sheriff's office granted me thirty days at a time to be there, since the doctors could not tell us how long she would linger. We took her home from the hospital with hospice care, and my dad and I took turns being by her side. She went home to be with Jesus on her first morning home. The family

gathered for the next few days, and then I went home. The entire time I was gone, I called the probation office each morning to update them on my mom's status and let them know that I was still with her.

Since I came home early and my car was back in the driveway, a deputy came to the door and wanted to know where the owners were and who I was. When I told him, he demanded to know what I was doing back in the county, and he informed me that I was living in a church. He said that he drove by and saw that we had services every Wednesday and Sunday. I was totally unprepared for this encounter, and all I could do was fall apart before his eyes. I was not only tired from the long drive back home the night before, but I was still in shock from my mother's death. I was with her, holding her hand when she passed from this life into the next. I am a believer in Jesus, and I know my mother is in heaven. Still, it is not an easy thing to go through. I tried really hard to hold it all together, but I began to sob, and that didn't make matters any better.

I told the officer that I had been granted permission to live here, and he said that the Sheriff has the right to designate what constitutes a church. He also said that I could face ten to thirty years in prison if found to be in violation. I had to get one of the board members on the phone to speak to him, and I also sent an e-mail to the Southern Center for Human Rights. I did not know what to do. I did make a phone call the day before to my probation officer, letting her know I would be arriving, but it seemed as if they were angry with me for coming home early. Eventually all of this was straightened out, and I have been told by Major Sullivan of the Polk County Sheriff Department that I can live at this address and that I am not breaking any laws or any rules by living here. He said we can even have a women's prayer group in my home each Wednesday morning. There also is a monthly Saturday night gathering of ministry people, who meet in the sanctuary—living room for fellowship and worship. The Door of Hope is a prison ministry team; others in the area come here, and we just hang out and have fun sharing what the Lord is doing. The way the law reads, a church is any public place of praise and worship.⁷ Major Sullivan has reassured me that as long as this is not "public," I am not in violation. It is a private time of prison ministry fellowship.

By definition, the law has it wrong. The church is not a building, it is the people. I am a part of the church. Therefore, when I am in my car stuck in traffic with my praise and worship music on the radio, I am in worship to the Lord Jesus Christ. By their definition, I am breaking the law. I cannot be separated 1000 feet from myself, so I suppose I would have to say, "I am the church. Arrest me." Truthfully, I do not see how anyone can regulate church services or meetings in homes. The early church met in homes. And Jesus came and died for all, not for some. He died so people like me can be transformed, changed, and live a godly life: a life free from addic-

⁷ 2006 Ga. Laws 571, § 24.

tions, bondages to sin, habits, and lusts. He came to the sinners, not the righteous. He came so that people who have been in sin can be set free.

I sometimes truly identify with the woman caught in the act of adultery.⁸ It was a sex-sin, and it was brought out in the open. Those lawmakers of that day, the ones who were demanding that she be stoned to death, were told by Jesus, “Let the one among you who is without sin be first to throw a stone.”⁹ And they dropped their rocks and left. He then turned to the woman and told her to go and sin no more. That tells me it truly is possible to be forgiven, set free, and able to live a life that is right. You don’t have to stay in your mess; you can change. I have. But this law keeps me in a perpetual state of fear.

HB 1059 just doesn’t make any sense to me. The Door of Hope—a Christian, parole-approved, transitional center for women from prison—is now off limits to me. When I was first released from Pulaski, this center is where I went and began my new life. I felt like I had found my niche and had come to consider it my home. I can now visit the Door of Hope, but I cannot live there. I am grateful to have been able to move here, to the outreach ministry building, where I rent a room.

Recently, I went to a prison ministry conference, and a question was posed about aftercare for sex offenders. There is a tremendous need for aftercare, especially with this new law. It has become next to impossible to find places that are in compliance with this new law, so some changes are necessary. I do not understand how they can allow a person to go through a program and then deny the re-entry aspect of that program. I worked hard while in prison to turn my life around and help others like me. Yet it is nearly impossible to help those who need it the most. The men and women who are signing up for programs like the Faith and Character Dorm are the very ones who want to change. They desire the help that is offered, most importantly with regard to transitioning back into society. When we signed up for these programs, we agreed to follow the rules, with the goal of continuing to follow them once released from prison. The state offers these programs and says that they work. However, the new law makes it impossible for people on the registry to follow through with the aftercare part of the programs, since many of the transitional homes, including the Door of Hope, are located near bus stops and/or in churches.

I am truly praying that those who are in power to create laws will see that we need rules, but we also need them to work. This law is such that it is impossible to keep it together. There is a scripture in the Bible that states, “Hope deferred makes the heart sick,”¹⁰ and that is what HB 1059 does. People need hope in order to go on with life. If we have no hope in ever seeing that we can do right, then most people will just give

⁸ *John* 8:7.

⁹ *Id.*

¹⁰ *Proverbs* 13:12.

up. If you cannot possibly find work or a place to live, then what do you have? Hopelessness and despair. If you cannot turn to the church for help for fear of being in violation, where do you go? If shelters cannot help you and it is against the law to be homeless, where do you turn?

This law fosters fear and paranoia, on the part of both the general public and those who must be on the registry. The public fear because they believe that everyone on the registry is a serious pedophile and dangerous to their children. The people on the registry fear because we are all being lumped together into one basket. There needs to be some differentiation. For other offenses, there are classes and levels of seriousness, and the penalties reflect these variations. It should not be a one-size-fits-all punishment. There should also be input from probation and parole officers as to the people they see on a regular basis. The law now makes life registration mandatory, meaning that no one will ever come off the registry. There should be a way for those who have proven themselves over time to be law-abiding citizens and not dangerous to society to be removed from the registry.

I have heard horror stories about registered people who have had their faces plastered throughout their neighborhoods. People have gone online, printed out what is on the registry, and taken it upon themselves to do everybody a favor and expose people on the registry. I am a single woman living alone in a rural area, and the thought of such a thing happening really frightens me. As I have told the deputy who stops by every month, I am glad that he patrols the highway in front of my home; I feel safe knowing he is out there. I need protection, too. I am trying to live a quiet life: I go to church services two or three times a week, have a prayer group in my home, and am beginning a women's group that will meet monthly. I work on the computer a few hours a day, and I study daily. I go on prison ministry trips as often as I can. A dear woman friend and I are beginning another newsletter, called *Beyond The Horizon*. We hope to send it to the prisons here in Georgia. It is a way of giving back and helping others by letting those who are behind the walls know that there is life beyond prison. There is hope for the future.

I am in a constant state of readiness, fearing I may have to move again. I have many things still in boxes in my room and in my car because I never know when I may find out that I cannot stay here. It is a fear that I feel will never be gone until the law is changed. I fear for those who have no support but have been trying to live life the best they can; now they are in a state of limbo, without family or friends to lean on. It is hard to reach out to charities, churches, and missions because this law makes it seem as though we are off limits to them. I do not know what I will do if the time comes for me to have to move on. All I have is a limited monthly income that pays my rent, phone, insurance, and other bills. A little is left over for food and gasoline, and that is it. I have nothing left over to put aside for a deposit on another place. What would I do? I do not know. I am

not doing anything illegal or criminal, but I would have to turn myself in as a probation violator if I could not find a place to go.

I realize that we need protective laws because there are many dangerous people out there. However, not everyone who is on this registry should be feared. I have a friend whose son is about to be released from prison for statutory rape. It says in his paperwork that if he has any children, he will not be allowed to be around them. He was twenty-one, and the girl he was involved with was fifteen. He will be on this registry for the rest of his life. That is crazy.

I have made serious mistakes in my past. I have hurt others and myself, but I am not the same person I was years ago. I have changed. I am not dangerous, and I am not a pedophile. I am trying to live my life in the best way I can while abiding by the law. Please understand that I am not the only one. There are many like me. For example, I met women in prison who were victims of abuse from their husbands. These women were afraid to tell authorities what they thought their husbands were doing to their children. These women are now sex offenders. They received the same charges as the abusers did and will have to register for the rest of their lives. I also know of men who were in custody battles and faced false sex abuse charges. All it takes is one accusation and someone trying to defend himself because he knows he did not do anything, and you have another sex offender.

We need to have some way of structuring HB 1059 so that those who are truly rehabilitated and following the law can get on with life knowing they have a fair chance to find work and keep a roof over their heads.

Challenging the Banishment of Registered Sex Offenders from the State of Georgia: A Practitioner's Perspective

*Sarah Geraghty**

Last year, the State of Georgia decided to rid itself of its 12,000 registered sex offenders. The General Assembly passed House Bill 1059, a law that made it illegal—and punishable by ten to thirty years in prison—for any registered sex offender to live or work virtually anywhere in Georgia. From May to July 2006, preparations were made for a forced mass eviction. Thousands of people on the registry—from serious offenders to teens whose only crime was consensual sex with other teens—came within forty-eight hours of being driven from their homes. After following HB 1059's progress in the legislature and receiving hundreds of calls and letters from people on the verge of banishment from the state, the Southern Center for Human Rights—the law office at which I work—and the American Civil Liberties Union of Georgia filed suit to stop implementation of HB 1059. This Article discusses that class action litigation. Part I describes the definition of the term “sex offender” under Georgia law and the adoption of HB 1059. Part II lays out the state's preparations for a mass eviction of sex offenders and the plaintiffs' preparations to challenge the eviction. Part III discusses the state of the law with respect to sex offender residence restrictions nationally and a shift in public opinion in Georgia. Part IV provides some thoughts about the future of Georgia's sex offender law.

I.

All across America, people are talking about sex offenders. One can hardly open a newspaper without reading about a sex crime, sex offender commitment statutes, child molestation in the church, or the latest public figure caught in inappropriate conduct with a teenager. Millions tune in each week to watch *Dateline NBC's* “To Catch a Predator,” a television exposé in which men who engage in sexually explicit internet chat with a decoy teen are interrogated, humiliated, and arrested in dramatic fashion.

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With the click of a mouse, we can now download the name, photograph, and address of every sex offender in our communities.

No one doubts that heightened awareness of the prevalence of sex crimes has beneficial effects, most notably a greater recognition that many victims of sex crimes suffer terribly. But there have been costs as well, including the proliferation of sex offender laws of questionable efficacy and constitutionality. Indianapolis, for example, recently prohibited sex offenders from being present in many areas of the city.¹ Suffolk County, New York, requires homeless sex offenders to live in trailers and regularly moves them around the county.² Hillsborough County, Florida, passed an ordinance prohibiting sex offenders from using hurricane shelters.³ In Missouri, legislators are considering a law to prevent sex offenders from keeping lottery winnings.⁴ Sex offenders are arguably the most despised members of our society, and states and municipalities are in a race to the bottom to see who can most thoroughly ostracize and condemn them.

The latest trend is sex offender residence restrictions: laws that typically prohibit offenders from living within a certain distance, ranging from 500 to 2000 feet, of schools and daycare centers. There is no evidence to suggest that residence restrictions prevent child molestation.⁵ In fact the contrary is true: sex offenders with stable housing and employment are less likely to commit new sex offenses than those who lack stability.⁶ Yet laws restricting the locations where sex offenders can live are increasingly

¹ *Sex Offenders Sue Over Ordinance*, N.Y. TIMES, June 1, 2006, at A20.

² Corey Kilgannon, *Suffolk County To Keep Sex Offenders on the Move*, N.Y. TIMES, Feb. 17, 2007, at B3.

³ Robert F. Worth, *Exiling Sex Offenders from Town: Questions About Legality and Effectiveness*, N.Y. TIMES, Oct. 3, 2005, at B1.

⁴ *Bill Would Refuse Lottery Wins for Sex Offenders*, SPRINGFIELD NEWS-LEADER, Feb. 9, 2007, at 2B.

⁵ See Jill S. Levenson & Leo P. Cotter, *The Impact of Sex Offender Residence Restrictions: 1,000 Feet from Danger or One Step from Absurd?*, 49 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 168 (2005) (suggesting that residence restrictions disrupt stability and lead to an increase in dynamic risk factors associated with sex offense recidivism); see also COLO. DEP'T OF PUB. SAFETY, REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE COMMUNITY 4 (2004) ("Placing restrictions on the location of . . . supervised sex offender residences may not deter the sex offender from re-offending and should not be considered as a method to control sexual offending recidivism."); MINN. DEP'T OF CORR., LEVEL THREE SEX OFFENDERS RESIDENTIAL PLACEMENT ISSUES: 2003 REPORT TO THE LEGISLATURE 9 (2003) ("Enhanced safety due to proximity restrictions may be a comfort factor for the general public, but it does not have any basis in fact."); Richard Tewksbury, *Experiences and Attitudes of Registered Female Sex Offenders*, 68 FED. PROBATION 30 (2004).

⁶ See, e.g., Brief for Ass'n for the Treatment of Sexual Abusers as Amicus Curiae Supporting Petition for Writ of Certiorari at 6, *Doe v. Miller*, 126 S. Ct. 757 (2005) (mem.) (No. 05-428), 2005 WL 2988235, at *6; Wendy Koch, *Sex-Offender Residency Laws Get Second Look: States Consider Easing Restrictions that Critics Say Provide a False Sense of Security and Often Make Felons Tougher To Monitor*, USA TODAY, Feb. 26, 2007, at 1A (describing a "backlash" against sex offender residence restriction laws).

popular. At least twenty-seven states and numerous municipalities now have them.⁷

A. Georgia Seeks To Banish All Sex Offenders from the State

Georgia adopted its original sex offender residence law in 2003. Under that law, no sex offender could live within 1000 feet of a school, child care facility, park, recreation facility, skating rink, neighborhood center, gymnasium, or any similar facility.⁸ The 2003 law, repeatedly upheld by Georgia courts,⁹ made it difficult but not impossible to find a place to live.

The impetus for the 2006 crackdown on Georgia's sex offenders was a horrific child abduction case. In February 2005, Jessica Lunsford, a nine-year-old from Homosassa, Florida, was kidnapped from her home, raped, and murdered.¹⁰ John Couey, a registered sex offender who lived near the Lunsford home, was later charged with the murder. Couey, whose capture in Augusta, Georgia, was repeatedly played on television, epitomized everyone's image of the worst kind of criminal: forty-six years old, a drifter, and a repeat child molester.

Unfortunately for the 12,000 people on Georgia's sex offender registry, the Lunsford murder coincided with an election year. Citing the tragic murder, the leadership in Georgia's General Assembly drafted HB 1059, a bill they vowed would make Georgia's sex offender law "the toughest in the country."¹¹ HB 1059 increased minimum prison sentences for sexual

⁷ See, e.g., ALA. CODE § 15-20-26(a) (1995 & Supp. 2005); ARK. CODE ANN. § 5-14-128(a) (2006); FLA. STAT. § 794.065 (2004); GA. CODE ANN. § 42-1-15 (Supp. 2006); IDAHO CODE ANN. § 18-8329 (2004 & Supp. 2006); 720 ILL. COMP. STAT. § 5/11-9.3(b-5) (2004); IND. CODE ANN. § 35-42-4-11(c) (West Supp. 2006); IOWA CODE § 692A.2A(2) (2005); KY. REV. STAT. ANN. § 17.545 (West Supp. 2006); LA. REV. STAT. ANN. §§ 14.91.1 (A)(2), 14.91.2(A)(2) (2004 & Supp. 2006); MICH. COMP. LAWS §§ 28.735(1) (2004 & Supp. 2006); MISS. CODE ANN. § 45-33-25(4) (2000 & Supp. 2006); MO. REV. STAT. § 566.147 (2000 & Supp. 2005); N.C. GEN. STAT. § 14-208.16 (Supp. 2006); OHIO REV. CODE ANN. § 2950.031(A) (LexisNexis Supp. 2005); OKLA. STAT. TIT. 57, § 590 (2001 & Supp. 2006); S.D. CODIFIED LAWS § 22-24B-23 (2004 & Supp. 2006); TENN. CODE ANN. § 40-39-211(a) (2003 & Supp. 2005).

⁸ See GA. CODE ANN. § 42-1-13 (2005) (repealed 2006).

⁹ See *Thompson v. State*, 603 S.E.2d 233 (Ga. 2004). In *Thompson*, the State sought to revoke a convicted sex offender's probation because he lived within 1000 feet of a school. Thompson argued that the 2003 sex offender law violated the Ex Post Facto Clause, but the Georgia Supreme Court disagreed. Citing *Kansas v. Hendricks*, 521 U.S. 346 (1997), the court found that the 2003 law was not retrospective because it did not alter the consequences for crimes committed prior to its enactment. Rather, the law created a new crime based on an offender's status as a sex offender. Because the law was not retrospective, there was no need to determine whether the law was punitive in intent or effect. See also *Mann v. State*, 603 S.E.2d 283 (Ga. 2004) (noting a sex offender can be punished under the 2003 law only if she prospectively chooses to violate the law by continuing to reside at her home); *Denson v. State*, 600 S.E.2d 645 (Ga. Ct. App. 2004) (same).

¹⁰ *The Body of a Missing Florida Girl Is Found*, N.Y. TIMES, Mar. 20, 2005, at 29.

¹¹ Press Release, Ga. House of Representatives, Majority Leader Urges House to Consider Tougher Laws for Sexual Predators (Sept. 28, 2005) (quoting Rep. Keen), available at http://www.legis.ga.gov/legis/2005_06/house/communications/Press/tougherLawsSexual.htm.

offenses from ten to twenty-five years. It forbade sex offenders from “loitering” in many areas, upon penalty of ten to thirty years in prison. It prohibited them from working within 1000 feet of schools, churches, and day-care centers. Most significantly, HB 1059 prohibited people on the registry from living within 1000 feet of a church, swimming pool, or school bus stop.¹²

The intent of HB 1059, as repeatedly declared by the bill’s sponsors, was to banish sex offenders from Georgia. Representative Jerry Keen, Speaker of the Georgia House, was particularly vocal during the legislative vetting process:

- “There is no place in our society for those who prey on innocent children.”¹³
- “We don’t want these types of people staying in our state.”¹⁴
- “We want those people running away from Georgia. Given the toughest laws here, we think a lot of people could move to another state.”¹⁵
- “If someone did something now to my grandchildren, I think you and I would have the same reaction to that. Those are the people we’re targeting. Those are the people we’re trying to get off the streets of this state, and those are the people that we are going to send a message to that if you have a propensity to that crime perhaps you need to move to another state.”¹⁶
- “If it becomes too onerous and too inconvenient, they just may want to live somewhere else And I don’t care where, as long as it’s not in Georgia.”¹⁷
- “Candidly, Senators, they will in many cases have to move to another state.”¹⁸

HB 1059 sailed through the General Assembly. Attempts to remove low-level offenders from the law’s residence requirements were rejected. The General Assembly ignored sex offender treatment providers who testi-

¹² GA. CODE ANN. § 42-1-15(a) (Supp. 2006).

¹³ Press Release, *supra* note 11.

¹⁴ Greg Bluestein, *House Leaders Lobby for Tougher Sex Offender Penalties*, MACON TELEGRAPH, Jan. 13, 2006 (quoting Rep. Keen).

¹⁵ Emily Kopp, *Sensational Topics Set for Election-Year Session*, GA. PUB. RADIO, Jan. 6, 2006.

¹⁶ Statement by Rep. Keen to Rep. Roger Bruce during House debate on HB 1059, Feb. 2, 2006, available at http://www.georgia.gov/00/article/0,2086,4802_6107103_47120020,00.html.

¹⁷ Nancy Badertscher, *Law to Track Sex Offenders Studied*, ATLANTA J.-CONST., Aug. 16, 2005, at B1 (quoting Rep. Keen).

¹⁸ Editorial, *Sex Offenders Won’t Vanish for Good*, ATLANTA J.-CONST., Mar. 23, 2006, at 14A (“House Majority Leader Jerry Keen . . . told his Senate colleagues that he intends to drive sex offenders out of Georgia.”).

fied that HB 1059 would banish offenders to rural areas away from treatment programs. Unlike other states considering residence restrictions, Georgia did not study the fiscal impact or efficacy of the law.¹⁹

Even law enforcement opposition to HB 1059 was disregarded. The Georgia Sheriffs' Association testified in opposition to HB 1059's school bus stop restriction.²⁰ They cited the result of Iowa's residence restriction prohibiting sex offenders from living within 2000 feet of a school or child care facility: a nearly three hundred percent increase in the number of absconders from the registry since the law took effect.²¹ Faced with the prospect of living in their cars or in motels in industrial areas, many Iowa sex offenders simply went underground.²² The law was such a disaster that Iowa's association of state prosecutors called for its immediate repeal.²³

In Georgia, nevertheless, HB 1059 passed by an overwhelming majority: 144 to 27 in the House and 53 to 1 in the Senate.²⁴

B. *What Is a Sex Offender in Georgia?*

Before describing the implementation of HB 1059, it is important to define what is meant by the term "sex offender" in Georgia. In the last year, my colleagues and I have come into contact with hundreds of people on Georgia's sex offender registry and studied many of their criminal case files. A "sex offender" is synonymous with a pedophile or rapist to most lay audiences. In Georgia, this is not necessarily the case. Let me give a few examples of people I met in the course of our litigation who are lumped in the same category and subject to the same restrictions as the most serious sex offenders. I met William Cassidy in a south Georgia nursing home.²⁵ He has Parkinson's disease and is in a wheelchair. Mr. Cassidy became an alcoholic after his wife and child were killed in a car accident. In the late 1980s, in a drunken stupor, Cassidy touched an eight-year-old neighbor on the chest and made lewd comments to her teenage babysitter. He is a registered sex offender for life and must comply with all of HB 1059's residency restrictions.

¹⁹ See COLO. DEP'T OF CORR., *supra* note 5; MINN. DEP'T OF CORR., *supra* note 5.

²⁰ Sonji Jacobs, *Sex Offender Bill Gets Feedback*, ATLANTA J.-CONST., Mar. 18, 2006, at 1E.

²¹ Monica Davey, *Iowa's Residency Rules Drive Sex Offenders Underground*, N.Y. TIMES, Mar. 15, 2006, at A1.

²² See *id.*

²³ See IOWA COUNTY ATTORNEYS ASS'N, STATEMENT ON SEX OFFENDER RESIDENCY RESTRICTIONS IN IOWA (Feb. 14, 2006) (on file with author); IOWA COUNTY ATTORNEYS ASS'N, STATEMENT ON SEX OFFENDER RESIDENCY RESTRICTIONS IN IOWA (Dec. 11, 2006), available at <http://www.iowa-icaa.com/ICAA%20STATEMENTS/Sex%20Offender%20Residency%20Statement%20Dec%2011%2006.pdf>.

²⁴ See Georgia General Assembly—HB 1059, http://www.legis.ga.gov/legis/2005_06/sum/hb1059.htm.

²⁵ William Cassidy, Morris Chapman, and Jerome Chadwick are pseudonyms.

Morris Chapman was nineteen when he had sex on one occasion with his underage girlfriend. Morris was a senior in high school at the time; his girlfriend was a freshman. The girl's parents found out, and Morris was convicted of statutory rape. He is a registered sex offender for life.

I cannot count the number of people I have met with mental retardation who are on the sex offender registry. These are often people from poor families whose public defenders "met 'em and pled 'em" guilty without any investigation into their mental capacity or the circumstances of the alleged crime. Jerome Chadwick, for example, has an IQ of sixty-five. He cannot read or write, tell time, perform simple arithmetic, or name the months of the year. Despite a tumultuous upbringing in the foster care system, Chadwick stayed out of trouble for most of his life. When he was twenty-four, however, he touched two teenage neighbor girls (hand to genital contact) while they were watching television on the couch. Chadwick pled guilty to child molestation and is now a registered sex offender for life.

All of these people committed crimes, to be sure. They were judged and punished, and rightfully so. They are not, however, pedophiles or rapists or "predators" who lie in wait for children at bus stops.

There are still others on Georgia's sex offender registry who are not predators by any stretch of the imagination. Wendy Whitaker is a good example. Wendy, twenty-six years old, is a student at Augusta Technical College with hopes of going to law school. A decade ago, at seventeen, Whitaker had consensual oral sex with a fifteen-year-old. Both were sophomores in high school. Wendy was convicted of sodomy and must register as a sex offender for the rest of her life. Jeffery York is a gay man from rural north Georgia. When he was seventeen, he had consensual oral sex with a fifteen-year-old. Convicted of sodomy, he is also a sex offender for life. There are many others on the registry for similar "crimes."

Perhaps the chief criticism leveled at HB 1059 during legislative hearings was that it treated everyone like the worst offender. The same residence and employment restrictions apply both to pedophiles and to people like Whitaker and York. Representative Keen, recently asked about this problem on PBS's *Religion and Ethics Newsweekly*, provided the following explanation:

Rep. KEEN: We've got anywhere from a thousand to 1,500 predators—people who we know are capable and will commit these crimes again given the opportunity—living in the general population of the state. And the truth is we don't know who they are.

[Reporter]: But taking your statistics, that would mean that 90 percent of them are not sexual predators?

Rep. KEEN: Exactly my point, but do you want to gamble on those 1,500?²⁶

This might be compelling if it were accurate. However, at the time HB 1059 passed, there were exactly fourteen “sexual predators”²⁷ in the state, not 1500.²⁸

Moreover, we do know something about which offenders are likely to re-offend. We know that adult male molesters of prepubescent boys have the highest risk for re-offense.²⁹ We know people who commit sibling incest have a low rate of re-offense after treatment.³⁰ We know people convicted of rape tend not to re-offend after the age of fifty-five. We also know with a high degree of certainty that some people will not re-offend. Daniel Anderson, age eighty-one, from Perry, Georgia, is a good example. Convicted of statutory rape over a decade ago, Anderson has end-stage Alzheimer’s disease, is losing the power of speech, and requires twenty-four-hour care. He is a risk to no one but himself. Last year, however, deputies arrived at his home with an eviction notice; there is a church three blocks away.

II.

A. *Georgia Sheriffs Prepare for Mass Evictions*

Evicting 10,000 people from their homes is a big job, and HB 1059 gave Georgia’s sheriffs just sixty-six days to do it.³¹ In May and June 2006, sheriffs’ deputies drove squad cars after school buses to determine their routes; tape measured the distance between offenders’ homes and the nearest bus stop; spent tens of thousands of dollars inserting school bus stops onto global positioning maps; diverted officers from other duties, in-

²⁶ *Religion and Ethics Newsweekly: Georgia Sex Offender Law* (PBS television broadcast Jan. 26, 2007) (featuring Tim O’Brien), available at <http://www.pbs.org/wnet/religionandethics/week1022/cover.html>.

²⁷ “Sexual predators” are a special class of sex offenders designated by Georgia’s Sex Offender Review Board as being at higher risk for re-offending. See GA. CODE ANN. § 42-1-14 (2006). Predators are subject to additional restrictions, including the requirement that they wear ankle monitors for the rest of their lives. See *id.*

²⁸ See Georgia Bureau of Investigation Sex Offender Registry Search Page, <http://services.georgia.gov/gbi/gbisor/disclaim.html> (permitting viewer to see a list of all “predators” in Georgia). As of this writing, the number of sexual predators in Georgia has gone up to thirty, eleven of whom are incarcerated. See *id.*

²⁹ See R. KARL HANSON & KELLY MORTON-BOURGON, PREDICTORS OF SEXUAL RECIDIVISM: AN UPDATED META-ANALYSIS 15–18 (2004).

³⁰ See *id.*

³¹ Governor Perdue signed HB 1059 into law on April 26, 2006, with an effective date of July 1, 2006. GA. HOUSE OF REPRESENTATIVES, 2006 SESSION REPORT 2 (2006), available at http://www.legis.state.ga.us/legis/2005_06/house/communications/daily/2006/2006session.pdf. In April 2006, there were about 12,000 people on the registry, about 2000 of whom were incarcerated.

cluding 911 duties; and notified all or nearly all registered sex offenders in their counties that they would have to move.

It was the prohibition against living near school bus stops—the first such law in the country—that affected most people on the registry. School bus stops are everywhere children are, which is everywhere. As the law’s effective date (July 1, 2006) approached, it became clear that nearly all of the thousands of sex offenders in Atlanta and the surrounding counties would be evicted. In DeKalb County (Atlanta), every one of the 490 sex offenders would have to move.³² In suburban Cobb County, 196 out of 200 would have to move; in suburban Gwinnett County, 277 out of 278 would have to move.³³ All sixty of suburban Forsyth County’s sex offenders would have to move.³⁴ Virtually all residential areas in rural Georgia were also off-limits.³⁵ While HB 1059 required thousands of people to move and made it nearly impossible to relocate, it also expressly prohibited sex offenders from being homeless, upon penalty of ten to thirty years in prison.³⁶

It is difficult to describe the confusion and panic among people on the registry as we moved closer to July 1. In April 2006, our office began to receive calls from registered sex offenders. There were calls from sobbing mothers and wives; people on the registry who were blind, disabled, and in wheelchairs; and people who were undergoing chemotherapy for cancer. There were more calls than I can count from people who told us they were considering suicide. By May, the calls had increased in number, and the callers had become more desperate. As the clock ticked closer to July 1, sheriffs’ deputies began delivering eviction notices, sometimes in the middle of the night, giving residents just days to vacate. By mid-June, we were receiving hundreds of calls each day from people in a state of total panic and sometimes hysteria. I recall leaving my desk for an afternoon and returning to find eighty-one voicemail messages. We had to install new phone lines and, despite the presence of ten exceptional summer law interns, had to hire people to field calls.³⁷ Also calling in droves were law

³² See Transcript of Hearing on Plaintiffs’ Motion for Preliminary Injunction at 62, *Whitaker v. Perdue*, No. 06-140 (N.D. Ga. 2006).

³³ See *id.* at 37–38, 85.

³⁴ See *id.* at 23.

³⁵ See, e.g., PETER WAGNER, MAP OF HB 1059’S EFFECT ON RURAL MCDUFFIE COUNTY (July 12, 2006) (on file with author).

³⁶ HB 1059 requires people on the registry to provide law enforcement with certain “required registration information,” including their address. GA. CODE ANN. § 42-1-12(a)(16)(B) (2006). The law defines the term “address” as “the street or route address of the sexual offender’s residence.” *Id.* § 42-1-12(a)(1). HB 1059 specifically states that “homeless does not constitute an address.” *Id.* The penalty for being a homeless sex offender is ten to thirty years in prison. See GA. CODE ANN. § 42-1-12(n)(1)–(3).

³⁷ These ten law interns worked tirelessly throughout the summer, drafting pleadings, researching the law late into the night, and driving hours on a moment’s notice to serve subpoenas or collect affidavits. They were Chiraag Bains (Harvard Law School, ’08), Chrissie Demaso (Columbia Law School, ’07), Adissu Demissie (Yale Law School, ’08), Robin Dull (University of Iowa School of Law, ’08), Devadatta Gandhi (University of Michigan

enforcement officials who complained bitterly about HB 1059's detrimental effect on public safety.

Wendy Whitaker was just one person on the verge of eviction. A grocery store clerk from Flowery Branch, Georgia, she is on the registry for consensual sex with a fifteen-year-old when she was twenty-two. Whitaker was the sole caregiver for her terminally ill father. A school bus stopped near their trailer. Whitaker was given three weeks notice to leave her home, and by July 1 she had spent every day looking for a place to live without success.

Daryl Kingsland also received an eviction notice.³⁸ He, his wife, and their ten-day-old baby had three weeks to sell their home. They put over 2500 miles on their car looking for an appropriate residence, to no avail.

Lori Sue Collins, who would become a plaintiff in our case, was one of the fifty-one (out of fifty-two) sex offenders facing eviction from suburban Rockdale County.³⁹ When Lori was thirty-nine she had sex with a fifteen-year-old, resulting in a statutory rape conviction. In June 2006, Lori received an eviction notice. For three weeks she spent nearly every waking moment in the car, searching for a new home, without success. She could not find a place to live in Rockdale County, yet could not live outside the county without approval of the state probation office—a process that often takes months.

As Lori's experience illustrates, legislators whose goal it was to force sex offenders to leave the state were not fully informed. Thousands of people on the registry are on probation and cannot simply leave Georgia without permission. Under HB 1059, they were evicted from their homes, barred from living anywhere else in the county, and prohibited from leaving the county. They were also prohibited from being homeless.⁴⁰

B. Plaintiffs Prepare for Litigation

Members of the HB 1059 legal team got very little sleep in the spring of 2006. We had the complaint to draft and briefs to write. We needed lists of school bus stops from all of Georgia's 159 counties and maps to show the extent of HB 1059's evictions. We needed law enforcement witnesses and experts in the treatment of sex offenders. Most of all, we needed named plaintiffs. In preparation for litigation, my colleagues and I spent the month of May driving around the state, interviewing registered sex

Law School, '08), Katie Lovett (Harvard College, '07), Emily Richardson (University of Alabama School of Law, '07), Olivia Smith (Loyola University School of Law, '07), Joshua Sellers (University of Chicago Law School, '08), and Charles Willoughby (Howard University School of Law '07).

³⁸ Daryl Kingsland is a pseudonym.

³⁹ Lori Sue Collins describes her experience in her article *My Life Before and After HB 1059*, 42 HARV. C.R.-C.L. L. REV. 501 (2007).

⁴⁰ See *supra* note 36.

offenders and gathering their criminal case files. We knew we had to choose plaintiffs carefully. We decided early on that we would have no “John Doe” plaintiffs because a John Doe sex offender would be likely to take on the characteristics of the worst of the worst—a child abductor and rapist—in the minds of the press and the public. We needed plaintiffs who would engender sympathy, make good witnesses, and be willing to talk to the media.

Early media coverage of our impending lawsuit highlighted the importance of choosing plaintiffs well. Newspapers referred to “sexual predators” and called HB 1059 “strict,” “tough,” and a “crackdown.”⁴¹ Our goal was to reframe the issue. Instead of sexual predators, we referred to “mothers, sons, and daughters.” Instead of “toughest in the country,” we would portray the law as the “dumbest in the country.”

Wendy Whitaker was our first pick of plaintiffs. When we met Wendy at her lawyer’s office in rural Thomson, Georgia, she sobbed, recounting the humiliation of having her photograph on the state sex offender website with her conviction listed (without explanation) as “sodomy.” Her neighbors, she explained, would shoo their children inside when they saw her. By the time we met Wendy in 2006, she had already been forced from one home; it was within 1000 feet of a daycare center. She and her husband were now facing eviction from a relative’s trailer because it was near a school bus stop.⁴²

Wendy was not alone in her predicament. At sixteen, Joseph Lina-weaver had consensual oral sex on one occasion with his fourteen-year-old girlfriend. They were caught. Joseph pled guilty to sodomy and received five years of probation. Now twenty-two, he must register as a sex offender for life. Last year Joseph received an eviction notice because of his proximity to a school bus stop. He too became a plaintiff in our lawsuit.

Plaintiff Janet Allison is another example of the dilution of the registry with people who are not sexual predators. Allison is married with five children. In 2002, she was convicted of being a “party to a crime of child molestation” because she permitted her fifteen-year-old daughter’s boyfriend to move in with the family after her daughter became pregnant. The young couple later married. For this crime, Allison must register as a sex offender for the rest of her life. She lost her home and her job at a fast food restaurant because both were too close to churches. She now lives in

⁴¹ See Vicky Eckenrode, *Law Makes State One of Strictest on Sexual Predators*, ATHENS BANNER-HERALD, Apr. 27, 2006 (quoting Governor Perdue stating: “This legislation goes as far as any in the country. . . .”); *Perdue Signs Legislation Cracking Down on Sex Offenders*, COLUMBUS LEDGER-ENQUIRER, Apr. 27, 2006 (“Gov. Sonny Perdue on Wednesday signed into law tough new legislation cracking down on sexual predators in Georgia, a move supporters hope will prompt the worst offenders to leave the state.”).

⁴² In 2006, the General Assembly amended the law so that people like Wendy, if convicted today, would not have to register as sex offenders. See GA. CODE ANN. § 16-6-2(d) (2006). The General Assembly did not, however, make the amendment retroactive. See *id.*

a trailer in a rural area, a quarter mile down a dirt road, and she is unemployed.

Even with these plaintiffs at the helm, turning the tide of public opinion was not easy. The state struck back with its press strategy, pitting the safety of children against our purported concern for the “inconvenience to sex offenders.” Governor Purdue’s characterization of our lawsuit was typical:

While the ACLU is concerned with the inconvenience to sex offenders of having to move away from schools and playgrounds, the rest of the state of Georgia is more concerned about protecting kids from sexual predators. Georgia will vigorously defend our efforts to keep dangerous criminals away from Georgia’s children.⁴³

A low point came with an editorial titled “No Tears For Predators,” in the *Savannah Morning News*:

“These residency restrictions are causing a forced displacement of thousands of Georgians,” said Sara Totonchi, the [Southern] center’s public policy director.

Boo hoo hoo.

Don’t let the door on the moving van hit these creeps on their way to a new neighborhood.

.....

If registered sex offenders don’t like being displaced too often, too bad. There’s always Antarctica.⁴⁴

Worse yet, a news station in Augusta began showing local sex offenders on television and publishing directions to their homes. Wendy Whitaker was one of the “sexual predators” featured on the program.

III.

A. *We Sue the State*

Ten days before HB 1059’s effective date, the Southern Center for Human Rights and the ACLU brought suit on behalf of plaintiffs, alleging violations of the Ex Post Facto Clause, the Due Process Clause, the Free Exercise Clause, the Takings Clause, the Eighth Amendment, and the

⁴³ Jill Young Miller, *Tougher Law for Sex Offenders Under Fire*, ATLANTA J.-CONST., June 20, 2006, at B1.

⁴⁴ Editorial, *No Tears For Predators*, SAVANNAH MORNING NEWS, June 10, 2006.

Religious Land Use and Institutionalized Persons Act.⁴⁵ We sought a temporary restraining order to halt the banishment of all sex offenders from the state.

At the time we filed *Whitaker v. Perdue*,⁴⁶ sex offender residence restrictions had passed constitutional muster in all of the courts in which they were challenged.⁴⁷ Lawsuits alleging violation of the right to due process, the Takings Clause, and the right to travel had all failed. Even *ex post facto* challenges alleging that residency restrictions were the equivalent of banishment (regarded historically as punishment) had failed. Those defending the residence laws argued that as long as there was somewhere in the state, county, or city to live, the law in question did not “banish” sex offenders. A number of courts agreed.⁴⁸

The Eighth Circuit Court of Appeals was, and still is, the only federal appellate court to have considered the constitutionality of sex offender residence restrictions.⁴⁹ At issue in *Doe v. Miller* was Iowa’s law prohibiting sex offenders from living within 2000 feet of a school or child care facility. The law relegated sex offenders to industrial areas, expensive developments, or the outskirts of town in urban areas.⁵⁰ Many smaller towns were simply off limits. The Eighth Circuit found, however, that Iowa’s law did not “‘expel’ the offenders from their communities” since they could still work, shop, and otherwise be within 2000 feet of schools and day care centers.⁵¹ The Court upheld the law.

Georgia’s Attorney General cited *Miller* in support of the State’s motion to dismiss our case. However, in stark contrast to Georgia’s law, Iowa’s law did not expel a single person from her home. The Iowa legislature included a provision that exempted persons with already established resi-

⁴⁵ For a comprehensive analysis of the legal challenges raised in this lawsuit, see Chiraag Bains, *Next-Generation Sex Offender Statutes: Constitutional Challenges to Residency, Work, and Loitering Restrictions*, 42 HARV. C.R.-C.L. L. REV. _____ (2007).

⁴⁶ See *Whitaker v. Perdue*, No. 06-140 (N.D. Ga. filed June 20, 2006). For an online collection of many of the important case documents, see the Southern Center for Human Rights’ website, http://www.schr.org/aboutthecenter/pressreleases/HB1059_litigation/HB1059_litigation_legaldocuments.html.

⁴⁷ See, e.g., *Weems v. Little Rock Police Dep’t*, 453 F.3d 1010 (8th Cir. 2006) (upholding a law barring level III and IV sex offenders from living within 2000 feet of schools and daycare centers); *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005) (upholding 2000-foot restriction from schools and daycare centers); *Graham v. Henry*, No. 06-CV-381-TCK-FHM, 2006 WL 2645130 (N.D. Okla. 2006) (denying injunctive relief to plaintiff barred from living within 1000 feet of school); *Coston v. Petro*, 398 F. Supp. 2d 878 (S.D. Ohio 2005); *People v. Leroy*, 828 N.E.2d 769 (Ill. App. Ct. 2005).

⁴⁸ See, e.g., *Doe v. Baker*, No. Civ-A. 1:05-CV-2265, 2006 WL 905368, at *4 (N.D. Ga. Apr. 5, 2006) (“The Court takes judicial notice that Cobb County is primarily a suburban county where it would be relatively easy to find an affordable residence that is more than 1,000 feet from a school or daycare center.”); *Leroy*, 828 N.E.2d at 780 (finding 500-foot restriction not “banishment” because the offender, although required to leave his mother’s home, found a new residence nearby).

⁴⁹ *Weems*, 453 F.3d 1010; *Miller*, 405 F.3d 700.

⁵⁰ See *Miller*, 405 F.3d at 706, 724.

⁵¹ See *id.* at 719.

dences.⁵² Most other states' residence restrictions also have such a grandfather clause.⁵³ No other state in the country had passed a law like Georgia's with no exceptions, no grandfather clause, and no viable housing options.

As the clock ticked closer to July 1, we and thousands of our clients waited anxiously for a ruling from the court. Less than two days before the law went into effect, my colleagues and I were in the midst of a television interview when the cameraman got news on his Blackberry that the court had temporarily blocked the law. The office erupted in cheers. The court ruled that we had demonstrated a likelihood of succeeding on the merits of our ex post facto claim.⁵⁴ The court further stated that enjoining the bus stop provision would not disserve the public because the provision "might result in greater difficulty in monitoring registered sex offenders."⁵⁵

B. A Shift in Public Opinion

Around this time, we started to see a shift in the tone of the media coverage. Many Georgia newspapers ran editorials critical of the law. The *Augusta Chronicle* called the law "too extreme," writing:

Lawmakers didn't think these issues through when they passed the new get-tough-on-sex-offenders law. They were so eager to burnish their anti-sex-offender credentials in this election year that they went overboard, throwing the baby out with the bath water. They'll need to do a little fine-tuning next year.⁵⁶

The *Athens Banner-Herald* cautioned legislators to "take care in writing laws":

[C]rafting worthwhile legislation requires more careful thought than legislators put into House Bill 1059. With that in mind, leg-

⁵² See *id.* at 720 ("With respect to many offenders, the statute does not even require a change of residence: the Iowa General Assembly included a grandfather provision that permits sex offenders to maintain a residence that was established prior to [the law's effective date] even if that residence is within 2,000 feet of a school or child care facility.")

⁵³ See *Coston v. Petro*, 398 F.Supp.2d 878, 882–85, 887–88 (S.D. Ohio 2005) (finding that plaintiffs lacked standing because not a single one was required to leave her residence and finding no ex post facto violation because Ohio's law contained two protective grandfather clause provisions, including a provision that the statute would not apply to people who entered into rental agreements before its effective date).

⁵⁴ *Whitaker v. Perdue*, No. 06-140, 3 (N.D. Ga. June 27, 2006) (granting temporary restraining order). The court extended the application of the order to the entire plaintiff class two days later. See *Whitaker v. Perdue*, No. 06-140 (N.D. Ga. June 29, 2006).

⁵⁵ *Whitaker v. Perdue*, No. 06-140, 6 (N.D. Ga. June 27, 2006) (granting temporary restraining order).

⁵⁶ Editorial, *Sex Offender Law Too Extreme*, *AUGUSTA CHRON.*, July 11, 2006, at A04.

islators should resolve to approach next year's General Assembly session with a renewed appreciation for the seriousness of their endeavors. Making laws should involve a more deliberate process than simply transferring campaign rhetoric into the state code.⁵⁷

Law enforcement officials spoke out too. J. Tom Morgan, former District Attorney of DeKalb County, called HB 1059 "irreparably flawed":

Ninety percent of children are sexually abused by a family member or someone they know and trust. I never prosecuted a case where a child was molested at a school bus stop. I did prosecute many, many cases where children were molested in the privacy of their own bedrooms.

Without valid justification, [HB 1059] deprives individuals of the freedom to work and live in a broad range of locations. This is legally and ethically wrong. There are laws we can pass to protect children. Unfortunately, this is not one of them.⁵⁸

The new sex offender law looked even more foolish when we presented the court with the results of our investigation of the location of school bus stops in Georgia. Many of the 159 school boards we surveyed confirmed that bus stops in Georgia change monthly, weekly, or even daily.⁵⁹ In Stephens County, school bus stops change because of road construction.⁶⁰ In Taylor County, the bus route is amended if a child "spend[s] the night with [her] grandmother."⁶¹ In Wayne County, school bus stops change on rainy days.⁶² It was clear that the bus stop provision would be impossible to enforce.

C. The State Backs Away from the Law

On July 17, the Attorney General appealed the district court's temporary restraining order to the Eleventh Circuit Court of Appeals, accusing

⁵⁷ Editorial, *State Legislators Must Take Care in Writing Laws*, ATHENS BANNER-HERALD, July 27, 2006.

⁵⁸ J. Tom Morgan, Editorial, *Law Weakens Rights, Adds Little Security*, ATLANTA J.-CONST., Aug. 22, 2006, at A11.

⁵⁹ See Plaintiffs' Brief in Response to Court's July 12 Order Regarding the Definition of "School Bus Stop," *Whitaker v. Perdue*, No. 06-140 (N.D. Ga. July 17, 2006).

⁶⁰ Response to Request for Information Regarding School Bus Stops, from Beth McDonald, Stephens County Bd. of Educ., to S. Ctr. for Human Rights (June 28, 2006) (on file with author).

⁶¹ Response to Request for Information Regarding School Bus Stops, from Wayne Smith, Taylor County Bd. Of Educ., to S. Ctr. for Human Rights (June 29, 2006) (on file with author).

⁶² Response to Request for Information Regarding School Bus Stops, from Glenda Campbell, Wayne County Bd. of Educ., to S. Ctr. for Human Rights (June 29, 2006) (on file with author).

the court of “endangering children” by blocking the bus stop provision.⁶³ Then a strange thing happened. Just six days later, the State changed its story. The Attorney General’s office began to argue that according to the statutory definition,⁶⁴ only school bus stops designated by the actual members of school boards were “school bus stops” for purposes of the sex offender law.⁶⁵ Under that definition, there was not a single school bus stop in the State of Georgia.

Jerry Keen fired back, insisting that the intent of HB 1059 was to prohibit sex offenders from living near any school bus stop:

“Designated means the appointed areas that a school bus driver is given that they are to go and pick children up,” [Keen] said. “They are given some type of route. That is what we meant.” “Every school system has a published route and public stops, and that’s what you have to work with,” Keen said.

. . . .

Keen said legislators weren’t concerned with whether the law would turn sex offenders into nomads or force them out of Georgia. Asked if that would be the effect, he said if sex offenders live within 1,000 feet of a designated bus stop, “they are going to have to move.”⁶⁶

But the court disagreed. After a hearing, the judge denied the plaintiffs’ preliminary injunction motion because there were no “school bus stops” in Georgia, and thus there was no banishment.⁶⁷ To date, only three of Georgia’s 159 county school boards officially have designated bus stops. Sheriffs in all three counties agreed not to enforce the provision until the federal court rules on its constitutionality. The bus stop provision has yet to be enforced anywhere in the state.⁶⁸

⁶³ See Defendants’ Petition for Interlocutory Appeal at 7, *Whitaker v. Perdue*, No. 06-140 (N.D. Ga. June 30, 2006) (“By expanding the TRO to include all persons convicted of a sex offense, the Court has put the State’s children at risk of assault at a place where there is generally little to no supervision i.e. the school bus stop.”)

⁶⁴ GA. CODE ANN. § 42-1-12(a)(19) (2006) (“a school bus stop as designated by local school boards of education or by a private school”).

⁶⁵ See Defendants’ Supp’l Brief Pursuant to Court Order of July 12, 2006, *Whitaker v. Perdue*, No. 06-140 (N.D. Ga. July 17, 2006).

⁶⁶ R. Robin McDonald, *Court Weighs if Law Will Banish Sex Offenders: State Attorneys at Odds with Legislature, Sheriffs over Bus Stops*, FULTON COUNTY DAILY REP., July 14, 2006, at 5.

⁶⁷ *Whitaker v. Perdue*, No. 06-140, 5 (N.D. Ga. July 25, 2006) (order denying preliminary injunction).

⁶⁸ To date, only three local school boards (Bulloch, Columbia, and Chatham) have designated their bus stops. We sought TROs blocking the application of the school bus stop provision in these counties. All three have been enjoined from enforcing the bus stop provision while the court considers its constitutionality.

IV.

A. The Future of Georgia's Sex Offender Law

Although the bus stop provision has not been enforced, this was only a partial victory. HB 1059's other provisions are in effect. About 1000 people have had to leave their homes this year because of the church provision. Thousands more have lost jobs.

In October 2006, I received a telephone call from the director of a nursing home in south Georgia. He was calling about three patients. One was in hospice care, with fewer than six months to live. The second had a brain disorder that left him unable to walk or talk. The third had Parkinson's disease, emphysema, seizure disorder, had suffered two strokes, and was in a wheelchair. All three were registered sex offenders. Sheriffs' deputies notified the nursing home that the men had to be evicted immediately. The reason? A Baptist church was four blocks up the road. It did not matter that none of the men was able to walk across the room—let alone one-fifth of a mile to a church to molest a child. Georgia's sex offender law permits no exceptions.

In October, we sought another temporary restraining order to prevent the eviction of these men and six other severely disabled people. When it came to the eviction of hospice care residents, neither the State nor county officials put up much of a fight. County attorneys quietly agreed to a consent decree keeping the elderly people in their homes during the pendency of the lawsuit.

Jerry Keen, however, issued a statement in defense of HB 1059, claiming the nursing home residents could simply apply for release from the registry. In reality, they couldn't. Under HB 1059, few offenders are eligible for release from the registry, and even those who are cannot be released until ten years after their probation is terminated. None of the disabled men were eligible for release.

When HB 1059 began to evict nursing home residents, the tide of public opinion moved further in our favor. The *Columbus Ledger-Enquirer* published an editorial calling HB 1059 "about as wisely crafted as a concrete canoe."⁶⁹ The *Rome News Tribune* published an editorial titled "I'm With Stupid":

The supposed crackdown on sex offenders living anywhere near where children might be found (which is pretty much everywhere) has reached the point where it is turning the state into a laughing-stock.

....

⁶⁹ Editorial, *Be Tough and Smart*, COLUMBUS LEDGER-ENQUIRER, Oct. 19, 2006, at A8.

While the complainants in the Southern Center for Human Rights' lawsuit were doubtless hand-picked for maximum effect, even those most adamantly in support of this concept must now be blushing and hiding their faces in shame. The nine anonymous elderly and disabled offenders who would be evicted, without exception, include an 81-year-old Alzheimer's patient who can't even recognize his relatives any longer.⁷⁰

B. Conclusion

The outcome of the lawsuit over HB 1059 is uncertain. On March 30, 2007, the court refused the State's request to dismiss the case, allowing the *ex post facto*, due process, and other claims to proceed to trial.⁷¹ In the meantime, plaintiff Jeffery York has been forced from another home. He now lives in a camper van in the woods without water or electricity. Many people are being arrested and prosecuted under the provision of HB 1059 that makes it illegal to be homeless. Efforts to remove Wendy Whitaker from the registry have failed. She is currently being prosecuted for allegedly residing in a home within 1000 feet of a daycare center. If convicted, she faces a minimum term of ten years imprisonment.

In January 2007, Georgia's General Assembly went back into session for the first time since passing HB 1059. At the request of the Sheriffs' Association, a bill was drafted to repeal the school bus stop provision and to permit sex offenders who are incapacitated by age or illness to apply for an exemption from the 1000-foot requirements. The bill failed. In February 2007, the Republican leadership in the General Assembly indicated that it would not revisit the matter of sex offender residence restrictions. Relief, if it comes at all, will have to come from the courts.

⁷⁰ Editorial, *I'm With Stupid*, ROME NEWS TRIB., Oct. 26, 2006.

⁷¹ See *Whitaker v. Perdue*, No. 06-140 (N.D. Ga. Mar. 30, 2007) (order on motion to dismiss). The court did, however, dismiss the claims raised under the Takings Clause, the Eighth Amendment, and the Religious Land Use and Institutionalized Persons Act. *Id.*

Exile at Home: The Unintended Collateral Consequences of Sex Offender Residency Restrictions

*Richard Tewksbury**

The past several years have seen a number of increasingly severe restrictions imposed on criminal offenders, including initiatives and efforts to increase supervision of offenders and inhibit their opportunities to victimize others. The primary focus of these efforts has been on sex offenders, especially those who victimize children. A Georgia statute, HB 1059, is among the most extreme of these restrictions. Enacted in 2006, the new law makes it a felony punishable by ten to thirty years in prison for a registered sex offender to reside, be employed, or loiter within 1000 feet of a school; child care facility; church; public or private park, recreation facility or playground; skating rink; neighborhood center; gymnasium; community swimming pool; or school bus stop.¹

Legislation like this makes it increasingly important to identify and assess the effects that such laws have on offenders, potential victims, and communities. This Article provides an overview of the impact residential restriction laws have on offenders and communities. It also provides readers with an understanding of how and why unintended consequences of legislation may be seriously detrimental both to public safety and to successful re-entry and reintegration of offenders into communities. This Article discusses the unintended collateral consequences² of sex offender registration, with special attention to the issue of housing difficulties faced by registered sex offenders (“RSOs”). This discussion then turns to the issue of where RSOs tend to reside, with a focus on social science evidence showing a concentration of sex offenders in socially disorganized and economically disadvantaged communities. Next, the effects of residential restriction laws are examined, and the ability of such laws to prevent sexual offenses is discussed. Finally, the data from this emerging body of literature is applied to HB 1059, with a prediction of what may result from this statute.

The full impact of statutes such as HB 1059 is frequently overlooked; laws like this affect not only sex offenders themselves, but also their families and communities. As discussed below, research regarding these new laws clearly illustrates that RSOs experience difficulties finding housing,

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¹ GA. CODE ANN. § 42-1-15 (Supp. 2006).

² Collateral consequences are those effects, both intended and unintended, arising from the restrictions.

frequently move, and suffer numerous additional collateral consequences as a result of registration and legal restrictions on where they may reside.

Collateral consequences arising from legal sanctions are not unique to sex offenders. Scholars have documented a number of collateral consequences associated with many types of felony convictions. These include restrictions and experiences that arise from both legal requirements and social interactions. Examples of legal collateral consequences include employment restrictions and the loss of constitutionally guaranteed rights, such as the right to possess a firearm or to participate in political elections.³ On the other hand, social collateral consequences typically vary in intensity, frequency, and certainty; these include relationship and parenting problems, employment difficulties, harassment, ostracism, and feelings of shame and diminished self-worth.⁴

Collateral Consequences of Sex Offender Registration

Social science research has documented that, as a result of their registered status, RSOs experience a range of unintended negative consequences that typically have stronger impacts upon sex offenders than other felons.⁵ Although these collateral consequences are not universal and may vary in intensity and the degree to which they affect the short- and long-term experiences of offenders, they nonetheless do have serious implications for individual offenders, their families, communities, and society in general.

Several recent studies used surveys to document the experiences of RSOs in general⁶ and female RSOs specifically.⁷ More than one-half (54.7%) of a general sample of RSOs in Kentucky reported losing a friend who found out about their registration, 47% were harassed in person, 45.3% lost or were denied a place to live, and 42% lost a job as a result of regis-

³ See Velmer S. Burton, Jr., Francis T. Cullen & Kathleen M. Olivares, *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROBATION 10, 11–14 (1996); Velmer S. Burton, Jr., Francis T. Cullen & Lawrence F. Travis III, *The Collateral Consequences of a Felony Conviction: A National Study of State Statutes*, 51 FED. PROBATION 52, 54–58 (1987).

⁴ See Erving Goffman, *STIGMA: NOTES ON THE MANAGEMENT OF A SPOILED IDENTITY* (1963); Mary Dodge, Paul Katsampes & Mark Pogrebin, *The Collateral Costs of Short-Term Jail Incarceration: The Long-Term Social and Economic Disruptions*, 5 CORRECTIONS MGMT. Q. 64, 65–66 (2001); Mary Dodge & Mark R. Pogrebin, *Collateral Costs of Imprisonment for Women: Complications of Reintegration*, 81 PRISON J. 42, 42–43 (2001).

⁵ See generally Richard Tewksbury, *Collateral Consequences of Sex Offender Registration*, 21 J. CONTEMP. CRIM. JUST. 67, 67–79 (2005) (canvassing negative consequences particular to RSOs); Richard Tewksbury & Matthew Lees, *Perceptions of Sex Offender Registration: Collateral Consequences and Community Experiences*, 26 SOC. SPECTRUM 309, 330–33 (2006).

⁶ See Jill S. Levenson & Leo P. Cotter, *The Effects of Megan's Law on Sex Offender Reintegration*, J. CONTEMP. CRIM. JUST. 49, 54 (2005); Tewksbury, *supra* note 5, at 72.

⁷ Richard Tewksbury, *Experiences and Attitudes of Registered Female Sex Offenders*, 68 FED. PROBATION 30, 31 (2004).

tration.⁸ Rural RSOs generally experienced more negative consequences than those living in metropolitan areas.⁹ Focusing on the experiences of forty female RSOs in Kentucky and Indiana, another study found that “a number of negative experiences stem from sex offender registration.” The most significant collateral consequences identified by women in the sample were loss of a job (42.1%), loss of a friend who found out about registration (39.5%), in-person harassment (34.2%), loss or denial of a place to live (31.6%), and rude treatment in public (31.6%).¹⁰

Levenson and Cotter examined the collateral consequences of 183 RSOs in Florida.¹¹ They reported that the majority of the respondents in their study experienced negative psychological feelings that were directly related to sex offender registration.¹² Using a methodology similar to that of earlier studies,¹³ the authors reported that 35% of their sample was “forced” to move because of their registration on the Florida sex offender registry.¹⁴ Additionally, 27% said that they had lost their jobs because of their status as RSOs,¹⁵ and 19% reported harassment of some form.¹⁶

A similar study conducted in Kentucky provides an in-depth analysis of the experiences and perceptions of RSOs through the use of qualitative, in-person interviews.¹⁷ Lees and I interviewed twenty-two RSOs listed on the Kentucky sex offender registry and reported several primary types of collateral consequences,¹⁸ including employment difficulties, relationship problems, harassment, stigmatization, and persistent feelings of vulnerability.¹⁹ As one respondent in the study explained, “I know [the registry] is there to remind and punish, but it will always be like a roadblock in the way for those of us who wish to truly rehabilitate and change their lives.”²⁰ Our research found that these issues were experienced more intensely by RSOs than has been found among other felons.²¹ The study concluded that re-integration into society may be more difficult for RSOs as a result of

⁸ Tewksbury, *supra* note 5, at 75.

⁹ *Id.*

¹⁰ Tewksbury, *supra* note 7, at 32. Less commonly, women experienced threatening or harassing phone calls and mail, assault, and requests to leave a business. *Id.*

¹¹ Levenson & Cotter, *supra* note 6, at 54.

¹² *Id.* at 62.

¹³ *See, e.g.*, Tewksbury, *supra* note 5, at 72–74; Tewksbury, *supra* note 7, at 31.

¹⁴ Levenson & Cotter, *supra* note 6, at 58.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *See* Tewksbury & Lees, *supra* note 5, at 316.

¹⁸ *Id.*

¹⁹ *Id.* at 319; *see also* Richard G. Zevitz & Mary A. Farkas, *Sex Offender Community Notification: Assessing the Impact in Wisconsin*, RES. BRIEF (Nat’l Inst. Of Justice), Dec. 2000, at 9–10 (interview of 30 RSOs in Wisconsin found that 83% reported difficulties finding or maintaining a residence; 77% reported harassment or threats; 77% were ostracized by neighbors or acquaintances; 67% reported emotional harm to family members as a result of their registration; and 57% reported loss of employment).

²⁰ Tewksbury & Lees, *supra* note 5, at 329.

²¹ *Id.* at 330–33.

sex offender registration and found little evidence supporting the effectiveness of current registration practices.²²

Similarly, Burchfield and Mingus reported on interviews with twenty-three RSOs in Illinois.²³ They found that RSOs have less access to local social capital because of their status as RSOs.²⁴ More than one-third of their sample reported voluntary withdrawal from the community and a decrease in social interaction.²⁵ RSOs were also found to be generally fearful of community members learning of their registration and experienced feelings of stigmatization due to their registry listing.²⁶ Most respondents (78%) reported that policy requirements for sex offender parolees “impeded their ability to reintegrate into community life.”²⁷

Difficulties with Housing

One of the most serious and far-reaching collateral consequences associated with sex offender registration is the difficulty RSOs experience in locating and maintaining safe, affordable, and legal housing. Even before the advent of state and local laws restricting where sex offenders may live, self-reports from RSOs indicated that this was among the most problematic collateral consequences.²⁸ My study of 121 RSOs in Kentucky revealed that 45.3% lost or were denied a place to live.²⁹ For female RSOs, the rate of offenders reporting such problems was lower but still significant (31.6%).³⁰

Once again, qualitative interviews with RSOs support the results of the survey-based studies. Zevitz and Farkas’s interviews in Wisconsin showed a substantially higher rate of housing difficulties: 83% of RSOs reported difficulties in finding or maintaining a residence.³¹ More recent interview-based studies highlight the difficulties RSOs experience with housing in communities with and without residential restriction laws. In Kentucky, where there were no restrictions at the time of data collection, Lees and I reported that housing difficulties were among the problems most

²² *Id.*; see also Richard Zevitz & Mary A. Farkas, *Sex Offender Community Notification: Managing High Risk Criminals or Exacting Further Vengeance?*, 18 BEHAV. SCI. & L. 371, 375–91 (2000) (data collected from citizens at community notification meetings in Wisconsin showing strong community resistance to the presence of RSOs).

²³ See Keri B. Burchfield & William Mingus, *Not In My Neighborhood: Assessing Registered Sex Offenders’ Experiences with Local Social Capital and Social Control* (Nov. 1, 2006) (unpublished manuscript, presented at annual meeting of the American Society of Criminology, on file with the Harvard Civil Rights-Civil Liberties Law Review).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ See Tewksbury, *supra* note 5, at 68–69; Zevitz & Farkas, *supra* note 19, at 9–10.

²⁹ Tewksbury, *supra* note 5, at 75.

³⁰ Tewksbury, *supra* note 7, at 32.

³¹ Zevitz & Farkas, *supra* note 19, at 9–10.

frequently experienced by RSOs.³² Challenges with housing were directly tied to difficulties with employment and maintaining familial and social networks.³³ Illinois's residential restriction statute requires that RSOs live more than 1000 feet away from designated places.³⁴ In that state, Burchfield and Mingus found that RSOs typically identified finding housing to be a major stress and a distraction from full engagement in law-abiding lifestyles.³⁵

Where Registered Sex Offenders Reside

An emerging body of literature has focused on the characteristics of neighborhoods where RSOs reside, with special attention to the characteristics of communities with high concentrations of sex offenders. Generally, although RSOs are found in all varieties of neighborhoods, they are particularly likely to reside in areas characterized by economic disadvantage, lack of physical resources, relatively little social capital, and high levels of social disorganization. Mustaine, Stengel, and I examined data on the residential locations of 1504 RSOs in four urban counties in Kentucky and Florida.³⁶ When RSO-dense census tracts³⁷ were compared with both those counties studied and the nation as a whole, we found significant problems in the RSO-dense census tracts: unemployment rates were higher, fewer residents had high school or college educations, greater proportions of families lived below the poverty line, fewer residents owned their homes, and household incomes and home values were lower.³⁸ Further analysis of this data suggests that RSOs are more likely to be relegated to such areas rather than to live there by choice.³⁹

Building on this research, Mustaine and I extended this analysis to assess whether and how race related to the types of communities where RSOs reside.⁴⁰ Drawing on data from 2290 RSOs in five urban U.S. counties, we found that RSOs were more likely to live in areas with high levels of social disorganization, and black RSOs were especially likely to live in such "undesirable" communities.⁴¹ White RSOs, on the other hand, were

³² Tewksbury & Lees, *supra* note 5, at 313–14.

³³ *Id.* at 322–25.

³⁴ 720 ILL. COMP. STAT. § 5/11-9.3(b-5) (2004).

³⁵ Burchfield & Mingus, *supra* note 23.

³⁶ Elizabeth E. Mustaine, Richard Tewksbury & Kenneth M. Stengel, *Social Disorganization and Residential Locations of Registered Sex Offenders: Is this a Collateral Consequence?*, 27 *DEVIAN'T BEHAV.* 329, 336 (2006).

³⁷ RSO-dense census tracts have ten or more RSOs.

³⁸ Mustaine, Tewksbury & Stengel, *supra* note 44, at 342.

³⁹ *Id.* at 344.

⁴⁰ Elizabeth E. Mustaine & Richard Tewksbury, *Registered Sex Offenders, Residence, and the Influence of Race*, 5 *J. ETHNICITY CRIM. JUST.* (forthcoming 2007) (on file with authors).

⁴¹ *Id.* (manuscript at 17).

more likely than black RSOs to live in census tracts with high concentrations of RSOs.⁴²

In further research, we compared the neighborhood characteristics of child-abusing RSOs with other RSOs.⁴³ Surprisingly, our findings showed that RSOs with child victims did not experience greater residential disadvantage than those convicted of victimizing adults.⁴⁴ It appears that the status of “sex offender” determines the collateral consequences experienced, without regard to the age of the victim. Victimization of a child does not appear to be related to relegation to less desirable residential locations.

Residential Mobility of Registered Sex Offenders

Two studies have shown a high rate of residential mobility for registered sex offenders. One study showed that two-thirds (64%) of RSOs reported a different address at the time of registration than at the time they were arrested for their sex offenses.⁴⁵ Drawing on social disorganization variables commonly used in assessing the characteristics of where sex offenders reside, Mustaine and colleagues demonstrated that mobility is common, and one-half of those who changed residences moved to less desirable (i.e., more socially disorganized) neighborhoods than those in which they lived at the time of their offenses.⁴⁶ Interestingly, white RSOs were the most likely to move to less socially disorganized (“better”) neighborhoods.⁴⁷ Those RSOs who did not change addresses were most often in neighborhoods with the highest degree of social disorganization to begin with.⁴⁸

In a second study, Turley and Hutzal reviewed residential locations of all 1458 RSOs registered in West Virginia as of May 2001.⁴⁹ They found that 59.7% of the population had been at their current address for less than two years, and that RSOs had reported an average of 1.7 addresses to state police since being on the registry.⁵⁰ Additionally, they showed movement by RSOs between rural and suburban communities.⁵¹ Laws restricting where RSOs can live have had a significant impact on RSOs’ resi-

⁴² *Id.*

⁴³ Richard Tewksbury & Elizabeth E. Mustaine, *Collateral Consequences and Community Re-entry for Registered Sex Offenders with Child Victims: Are the Challenges Even Greater?* (Mar. 2007) (unpublished manuscript, presented at the annual meeting of the Academy of Criminal Justice Sciences, on file with author).

⁴⁴ *Id.* (manuscript at 19–20).

⁴⁵ Elizabeth E. Mustaine, Richard Tewksbury & Kenneth M. Stengel, *Residential Location and Mobility of Registered Sex Offenders*, 30 AM. J. CRIM. JUST. 177, 185–92 (2006).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Erica Turley & Laura Hutzal, W. VA. DIV. CRIMINAL JUSTICE SERVS., WEST VIRGINIA SEX OFFENDER STUDY 7 (2001), available at <http://www.wvdcjs.com/publications>.

⁵⁰ *Id.* at 20.

⁵¹ *Id.* at 21.

dential mobility. Although there is no data showing how many RSOs have been forced to relocate, Levenson and Cotter's work showed that 35% of RSOs in Florida changed residences;⁵² the most cited reason for moving, reported by one in four respondents, was Florida's residency restriction requirements.⁵³ Not only must sex offenders move, but when they are forced to do so they often lose significant sources of social support. Levenson and Cotter reported that 44% of the RSOs in their study were forced to move away from family members, and 60% experienced emotional distress as a result of the residency limitations imposed on them.⁵⁴

The Particular Impact of Residential Restriction Laws Related to Child Gathering Places

Across the country, states and local governments are enacting residential restriction laws that prevent RSOs from living near various "child gathering places." As this and the following section show, these statutory restrictions impose serious limitations on the ability of offenders to reintegrate into communities as law-abiding residents. These laws also negatively impact offenders and their communities. Additionally, research has failed to demonstrate that such laws are likely to reduce sex offending; as a result, the corrections community opposes such laws.

Twenty-seven states and perhaps hundreds of local communities now have laws that restrict where RSOs may live.⁵⁵ Typically these laws use vague language to restrict RSOs from living near "places where children congregate," including schools, parks, playgrounds, daycare centers, school bus stops, and recreational facilities. The restricted zones around such sites generally range from 500 to 2000 feet.⁵⁶ Only one study from one Arkansas county suggests that RSOs are likely to live near places such as daycares, parks, and schools.⁵⁷ Another study showed that only approximately one in five RSOs live in close proximity to these places.⁵⁸

Residential restrictions have taken a significant toll on RSOs who are attempting to be law-abiding citizens. With housing restrictions that some-

⁵² Levenson & Cotter, *supra* note 6, at 58; Jill S. Levenson & Leo P. Cotter, *Impact of Sex Offender Residence Restrictions: One Thousand Feet from Danger or One Step from Absurd?*, 49 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 168, 173 (2005) [hereinafter Levenson & Cotter, *Impact of Residence Restrictions*].

⁵³ Levenson & Cotter, *Impact of Residence Restrictions*, *supra* note 52, at 172.

⁵⁴ *Id.* at 173.

⁵⁵ See Sarah Geraghty, *Challenging the Banishment of Registered Sex Offenders from the State of Georgia: A Practitioner's Perspective*, 42 HARV. C.R.-C.L. L. REV. 513, 515, n.7 (2007).

⁵⁶ *Id.* at 514.

⁵⁷ Jeffrey T. Walker, James W. Golden & Amy C. VanHouten, *The Geographic Link Between Sex Offenders and Potential Victims: A Routine Activities Approach*, 3 JUST. RES. & POL'Y 15, 30-32 (2001).

⁵⁸ Richard Tewksbury & Elizabeth E. Mustaine, *Where To Find Sex Offenders: An Examination of Residential Locations and Neighborhood Conditions*, 19 CRIM. JUST. STUD. 61, 70-75 (2006).

times bar RSOs from living within 2000 feet of locations as common as schools and even bus stops, offenders are all but forced out of entire neighborhoods and cities. A recent study used Geographic Information System analysis to examine the consequences of the Florida state buffer zone law in Orange County.⁵⁹ The resulting data showed that only 64% of available property is not within 1000 feet of a school or daycare facility.⁶⁰ If school bus stops were included in the restrictions, the situation would become even more dire: a mere 4% of all properties would be available as legal residence options for RSOs.⁶¹ This same study showed that if the restricted zone were expanded to 2500 feet around schools and daycare facilities, RSOs would only have 29% of Orange County land available for residence.⁶² Finally, if the restrictions were to create a 2500-foot zone around school bus stops, RSOs would be able to live in less than 1% of Orange County.⁶³

Residential Restrictions and Prevention of Sexual Offenses

The stated purposes of residential restriction laws are maximizing public safety and deterring sexual offenses. Although these are admirable goals, the research to date does not show that these laws help to achieve that goal. As an initial matter, the proportion of known sexual offenders in a neighborhood is not related in a statistically significant way to the number of sexual offenses that occur in that neighborhood.⁶⁴ Furthermore, a 2004 study by the Colorado Department of Public Safety showed that, if and when registered sex offenders recidivated, they were highly unlikely to commit a sex offense near their places of residence.⁶⁵

More recently, Duwe, Donnay, and I examined data on 224 re-offending RSOs in Minnesota in order to evaluate the potential deterrent effects of a residency restriction law (the legislature has not yet enacted a statewide law).⁶⁶ We concluded that very few, if any, offenses would be prevented by a residential restriction law.⁶⁷ Not a single case involved an

⁵⁹ Paul A. Zandbergen & Timothy C. Hart, *Reducing Housing Options for Convicted Sex Offenders: Investigating the Impact of Residency Restriction Laws Using GIS*, 8 JUST. RES. & POL'Y 1, 1–24 (2006).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Kenneth M. Stengel, Richard Tewksbury & Elizabeth E. Mustaine, *Examining Rates of Sexual Offenses from a Routine Activities Perspective*, VICTIMS & OFFENDERS (forthcoming 2007) (manuscript at 12–15, on file with authors).

⁶⁵ DIV. OF CRIMINAL JUSTICE, COLO. DEP'T OF PUB. SAFETY, REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE COMMUNITY 38–39 (2004).

⁶⁶ GRANT DUWE, WILLIAM DONNAY & RICHARD TEWKSBURY, MINN. DEP'T OF CORR., DOES RESIDENTIAL PROXIMITY MATTER? A SPATIAL ANALYSIS OF SEX OFFENSE RECIDIVISM (2006) (on file with author).

⁶⁷ *Id.*

offender making contact with a victim at a park, school, or other location typically included in such laws. Sixty-three percent of the re-offenses took place within the offender's home, usually against another person residing there,⁶⁸ and in only nine percent of the cases did offenders make contact with victims at a location within one mile of the offender's home.⁶⁹ In sum, research provides little if any support for the effectiveness of residential restriction laws in deterring or preventing sexual offenses.

Noting the inefficacy of residential restriction statutes, the American Correctional Association ("ACA")—the world's largest professional organization of corrections practitioners—has recently taken a stance against these laws. At its 2007 winter conference, the ACA passed a resolution that states in part:

WHEREAS, there is no evidence to support the efficacy of broadly-applied residential restrictions on sex offenders; and WHEREAS, statutory prohibitions on where predatory sex offenders may live and go may cause them to become lost to the supervision and surveillance of responsible authorities; and WHEREAS, it is contrary to good public safety policy to create disincentives for predatory sex offenders to cooperate with the responsible community corrections agencies, THEREFORE BE IT RESOLVED that the American Correctional Association calls upon all legislative bodies to take into consideration the unintended consequences of statutes intended to exclude these offenders from neighborhoods or locations.⁷⁰

The professionals charged with enforcing these laws—those who have the most sophisticated experience supervising and interacting with convicted sex offenders—recognize significant problems with residential restrictions and their likely collateral consequences. In conjunction with the lack of evidence of the effectiveness of residential restrictions, the ACA's position forms a strong basis for reconsidering these laws.

What To Expect from the Georgia Statute

The new Georgia statute HB 1059 is the nation's broadest and most restrictive law regarding sex offender registration and residential restrictions for RSOs.⁷¹ With these restrictions in place, there is very little suitable land and housing in most Georgia cities and towns that is not within the prohibited areas.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Am. Corr. Ass'n, Resolution on Neighborhood Exclusion of Predatory Sex Offenders (Jan. 24, 2007).

⁷¹ See Geraghty, *supra* note 55.

What should be expected as a consequence of a law such as the new Georgia statute? It seems likely that RSOs will continue to experience persistent stress from difficulties in meeting one of their most basic needs: decent, safe, and affordable housing. As a result, RSOs may feel they have little choice but to abscond from supervision and fail to register. Even worse, they may seek ways to relieve their increasing levels of stress and frustration, which are among the most powerful factors contributing to sex offense recidivism. Furthermore, laws such as HB 1059 will undoubtedly contribute to increased alcohol and drug use and abuse, which would also increase the likelihood of sexual re-offense. The Georgia law induces stress, distances offenders from their law-abiding and pro-social support systems, likely introduces additional economic and labor stresses, and labels RSOs as the scourge of society. Why would a sex offender *not* violate supervision and disappear? After all, considering all of the restrictions and collateral consequences already experienced, what do they have to lose?

Judicial Recognition of the Harms of Slavery: Consumer Fraud as an Alternative to Reparations Litigation

*Tara Kolar Ramchandani**

INTRODUCTION

Beginning as early as 1915, African Americans have attempted to gain redress for the evils of slavery through the judicial system and consistently have met defeat.¹ These cases have been dismissed for a variety of procedural and jurisdictional reasons, including statutes of limitations, the political question doctrine, sovereign immunity, and lack of standing—hurdles preventing such cases from being decided on their merits.² For example, in *Cato v. United States*, two groups of plaintiffs, all descendants of slaves, sued the United States for damages caused by the enslavement of African Americans and discrimination arising in society as a result of slavery. The plaintiffs asked for an acknowledgement of the discrimination and for an apology for slavery and its effects.³ The U.S. District Court for the Northern District of California did not reach the merits of the case; the court dismissed based on sovereign immunity because the plaintiffs were suing the United States. Additionally, the court noted that a claim that attempts to adjudicate the “judgment calls of legislators in their

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¹ See *Johnson v. McAdoo*, 40 App. D.C. 440, 441 (1916) (holding that a claim for the proceeds of cotton obtained through illegal servitude was barred because “the United States cannot be made party to this suit without its consent”); see also Charles J. Ogletree, *From Brown to Tulsa: Defining Our Own Future*, 47 How. L.J. 499, 560 (2004).

² See, e.g., *Cato v. United States*, 70 F.3d 1103 (9th Cir. 1995) (dismissing case because of sovereign immunity, because the complaint did not raise statutory or constitutional violations, and because the plaintiffs did not provide a basis for subject matter jurisdiction); *Berry v. United States*, No. C-94-0796-DLJ, 1994 WL 374537 (N.D. Cal. 1994) (dismissing suit seeking to quiet title to forty acres of land under the Freedmen’s Bureau Act of 1865 for lack of subject matter jurisdiction, failure to state a claim, and statute of limitations); see also *Obadele v. United States*, 52 Fed. Cl. 432 (2002) (denying plaintiffs’ claim for restitution under the Civil Liberties Act of 1988 on the ground that reparations to interned Japanese Americans were not arbitrary or capricious or not in accordance with the law).

³ *Cato*, 70 F.3d 1103.

legislative capacity” cannot be brought.⁴ Due to the fact that the original harms of the “peculiar institution” were inflicted against men and women who lived generations ago, it is difficult to surmount threshold procedural issues, and access to the courts is barred for both private and public rights of action.

On December 13, 2006, the door to the courthouse reopened with the possibility of claims based on current violations of consumer fraud and protection acts. The right of action under these acts provides a new hope for recognition of the great harms inflicted through slavery by the judicial system. In *In re African American Slave Descendants Litigation*, the Seventh Circuit reviewed the district court’s dismissal of a class action reparations suit brought by African American descendants of slaves.⁵ This Recent Development argues that although claims under consumer fraud and protection statutes may not garner large sums of money, they should be vigorously pursued for four reasons: (1) such claims may present the only avenue for judicial recognition and vindication of the evils of slavery; (2) publicity and media campaigns following lawsuits may spur a larger movement toward non-judicially enforced reparations; (3) as has happened with previous reparations suits, the filing of suits may lead to out-of-court settlements; and (4) recognition of the injuries inflicted upon plaintiffs will provide a dignitary value previously unrecognized by the American justice system. Part I provides an overview and analysis of the opinions issued in the case, and Part II addresses the arguments discussed above.

I. WHAT THE COURTS SAID

A. *District Court Opinion*

Writing for the Northern District of Illinois, Judge Norgle granted the defendant’s motion to dismiss with prejudice, holding that: (1) the plaintiffs failed to establish standing under Article III of the Constitution and failed to satisfy prudential standing requirements (particularly third-party standing requirements); (2) the action was not justiciable due to the political question doctrine; (3) plaintiffs failed to state a claim upon which relief could be granted; and (4) the action was barred by the applicable statute of limitations.⁶

The parties included nine named plaintiffs, all of whom initially filed individual lawsuits but joined together in a consolidated complaint after the Judicial Panel on Multidistrict Litigation transferred the cases to the district court for coordinated or consolidated pretrial proceedings.⁷ In addition to the nine named plaintiffs, seven unnamed plaintiffs joined the con-

⁴ *Id.* at 1110.

⁵ *In re African American Slave Descendants Litig.*, 471 F.3d 754 (7th Cir. 2006).

⁶ *In re African American Slave Descendants Litig.*, 304 F. Supp. 2d 1027 (N.D. Ill. 2004).

⁷ *Id.* at 1038.

solidated complaint. The plaintiffs brought suit against eighteen companies whose predecessors were alleged to have been unjustly enriched and to have facilitated crimes against humanity through the transatlantic slave trade and slavery in the United States.⁸ Of the fifteen defendants, the plaintiffs alleged that nine “withheld information or made misleading statements regarding their participation in and profiting from slavery.”⁹

1. *Claims*

The consolidated complaint contains fourteen counts, which fall into three broad categories.¹⁰ Many of the counts, including those upon which this Recent Development is based, address questionable business practices (conspiracy, demand for accounting, piracy, unjust enrichment, and consumer fraud). The second set of counts uses an international legal framework to support the complaint (crimes against humanity and violation of the Alien Tort Claims Act), placing the issue in a much broader context and suggesting a comparison with World War II reparations cases. Finally, the third category charges the defendants with specific, physical harms (intentional infliction of emotional distress). While emotional distress is the count most closely tied to the injustices of slavery, it is also the hardest count for the plaintiffs to prove because there is not a direct connection between the defendants and the particular ancestors of the plaintiffs.¹¹

⁸ *Id.* at 1039. The eighteen defendants are FleetBoston Financial Corporation, CSX Corporation, Aetna Inc., Brown Brothers Harriman, New York Life Insurance Company, Norfolk Southern Corporation, Lehman Brothers, Lloyd’s of London, Union Pacific Railroad, J.P. Morgan Chase Manhattan Bank, Westpoint Stevens Inc., RJ Reynolds Tobacco Company, Brown and Williamson, Liggett Group Inc., Loews Corporation, Canadian National Railway, Southern Mutual Insurance Company, and American International Group (“AIG”).
Id.

⁹ *Id.* at 1040–41. These nine defendants are FleetBoston, CSX, Aetna, Brown Brothers Harriman, New York Life, Lloyd’s of London, Union Pacific, J.P. Morgan Chase, and Canadian National Railway.

¹⁰ The counts are as follows: (I) Conspiracy; (II) Demand for an Accounting; (III) Crimes Against Humanity; (IV) Piracy; (V) Intentional Infliction of Emotional Distress: Rape, Breeding, Torture, Abuse and the Spread of Racist Beliefs; (VI) Conversion; (VII) Unjust Enrichment; (VIII) violation of 42 U.S.C. § 1982, which gives equal property rights to all citizens; (IX) violation of the Alien Tort Claims Act (pled in the alternative); (X) violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILL. COMP. STAT. 505/1 et seq. (2003); (XI) violation of the Louisiana Unfair Trade Practices and Consumer Protection law, LA. REV. STAT. ANN. § 51:1401 et seq. (2003); (XII) violation of the New Jersey Unfair Trade Practices law, N.J. STAT. ANN. § 56:8-1 (2003); (XIII) violation of the New York Consumer Protection from Deceptive Acts and Practices Law, N.Y. GEN. BUS. LAW §§ 349–350 (2003); and (XIV) violation of the Texas Deceptive Trade Practices and Consumer Protection Act, TEX. BUS. & COM. CODE ANN. § 17.41 (2002). *In re African American Slave Descendants Litig.*, 304 F. Supp. 2d at 1042–43.

¹¹ *Id.* at 1048 (“Plaintiffs fail to allege any facts in their Complaint that link the specifically named Defendants to the alleged injuries suffered by the Plaintiffs; nor does the Plaintiffs’ Complaint allege a connection between any of the named Defendants and any of the Plaintiffs’ ancestors.”).

2. *Standing*

The district court did not reach the merits of any of these claims because it dismissed the entire suit. Although the court could have dismissed the case based solely upon questions of standing, the court also found the claims barred by the political question doctrine, statutes of limitations, and failure to state a claim upon which relief can be granted. The plaintiffs had identified three concrete injuries: (1) African American slaves suffered injury to their property and tort rights, and their descendants suffer derivative harms because of these injuries; (2) African Americans still endure the vestiges of slavery in racial profiling, racial slurs, and stereotypes; and (3) plaintiffs suffer a present harm because they have been fraudulently deceived by defendant companies.¹² Regarding the first injury, the district court found that the derivative harm was insufficient for standing because there was no injury in fact, the injury was conjectural or hypothetical regarding what the descendants would have inherited from their ancestors, and the injury was not fairly traceable to conduct of the defendants.¹³ In addressing the second injury alleged by plaintiffs, the court, relying upon the Ninth Circuit's decision in *Cato v. United States*,¹⁴ found that the continuing injuries were too generalized to establish concrete and particularized injury in fact.¹⁵ Finally, regarding the third injury, the court held that because the consumer fraud claims were state claims, the plaintiffs could not use a different federal claim to establish jurisdiction over state claims. The court also found that the plaintiffs had not established an injury in fact, but were instead relying upon "unsupported conclusions wrapped in legally significant terms."¹⁶

Not only was the case dismissed based on Article III standing, but also the court elaborated upon the prudential limitations of the standing doctrine. The court first found that the plaintiffs "impermissibly attempted to assert the legal rights of absent third parties," noting that the plaintiffs did not allege a legally sufficient relation to their ancestors or that their ancestors were hindered from bringing their own claims.¹⁷ Additionally, the court wrote that the plaintiffs attempted to litigate a generalized grievance that should be left to other branches of government.¹⁸

¹² *Id.* at 1047.

¹³ *Id.* at 1048.

¹⁴ 70 F.3d 1103 (9th Cir. 1995).

¹⁵ *In re African American Slave Descendants Litig.*, 304 F. Supp. 2d at 1049.

¹⁶ *Id.* at 1051.

¹⁷ *Id.* at 1052–53.

¹⁸ *Id.* at 1053.

3. *The Political Question Doctrine*

In evaluating the question of whether the plaintiffs' claims were non-justiciable due to the political question doctrine, the court used the test developed in *Baker v. Carr*.¹⁹ Before turning to the *Baker* factors, Judge Norgle explained that the political question doctrine applies to private as well as political claims, such as these claims based in tort and property law.²⁰ Finally, the court conducted an analysis of the *Baker* factors and found each factor to be applicable in the current case.²¹ The thorough analysis of the political question doctrine ensured that if the plaintiffs had survived the procedural bars of standing and statute of limitations, they still would have been unable to obtain vindication in a court of law. To support his analysis, Judge Norgle relied upon World War II reparations cases that had been found nonjusticiable under the political question doctrine.²² These cases also provided an easy transition to Judge Norgle's argument that because the end of slavery was inextricably linked to the Civil War, and because war powers are reserved to Congress and the President, the issue of reparations is also reserved to those branches.²³

However, this argument fails to account for a key difference between slavery and labor camps during World War II: labor camps during World War II were created for and because of the war, whereas slavery existed for centuries before the Civil War. To claim that slavery is an issue for the non-judicial branches because of its relation to the Civil War is to oversimplify the issue. Continuing his explanation of the nonjusticiability of the plaintiffs' claims, Judge Norgle wrote that "the Representative Branches considered the issue of reparations to former slaves, and the chosen vessels of reparations came in the form of constitutional and legislative enactments guaranteeing equality under the law and freedom from discrimination."²⁴ While this may be the case regarding reparations for government involvement with the peculiar institution, the argument is much weaker when applied to private institutions, particularly because the legislative and executive branches cannot hold private institutions responsible. Therefore only the judiciary can act effectively, which suggests that perhaps political ques-

¹⁹ 369 U.S. 186, 210 (1962). The *Baker* test includes six factors: (1) a constitutional commitment of the issue to a different branch; (2) lack of judicially manageable standards for resolving the issue; (3) the need for a policy decision to resolve the issue; (4) whether a judicially independent resolution would express a lack of respect toward other branches; (5) the need to adhere to a political decision already made about the issue; and (6) potential for different resolutions from various branches. *Id.* at 217.

²⁰ *In re African American Slave Descendants Litig.*, 304 F. Supp. 2d at 1055–56.

²¹ *Id.* at 1056–63.

²² *Id.* at 1055 (citing *Kelberine v. Societe Internationale*, 363 F.2d 989, 995 (D.C. Cir. 1966); *In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d 370, 382 (D.N.J. 2001); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 489 (D.N.J. 1999); *Burfer-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 283–85 (D.N.J. 1999)).

²³ *Id.* at 1057.

²⁴ *Id.* at 1060.

tion doctrine should not apply. Not all elements of the district court's analysis lacked merit; certainly a case like this is difficult to manage and remedy.²⁵ Nonetheless, the complete dismissal under the *Baker* test for a reparations claim against private actors was unwarranted and excessive.

4. *Failure To State a Claim upon Which Relief Can Be Granted*

The court found that the plaintiffs' allegations failed to state a claim upon which relief can be granted because they were too broad to give the defendants fair notice.²⁶ Judge Norgle wrote: "Plaintiffs' Complaint is a pastiche of the generally acknowledged horrors of slavery, totally devoid of allegations of injury to the Plaintiffs or corresponding conduct committed by Defendants."²⁷ After first discussing the liberal notice pleading standard that is applied by courts to be sure that no relief could be granted under a particular set of facts, the court stated that the plaintiffs did not provide enough information to identify the acts underlying their claims.²⁸ In particular, the district court focused on the fact that the plaintiffs did not tie specific actions or conduct of the defendants to the alleged injuries of the plaintiffs, thus leaving the defendants without proper notice of the charges filed against them.²⁹ While the district court is accurate in its assertion that the plaintiffs' complaint³⁰ fails to identify particular actions of the named defendants (especially in regard to defendants' actions against specific ancestors of the slave descendants), this is a problem that could be solved in subsequent consumer fraud actions. To do so, plaintiffs would need to identify specific instances of deceit or fraud committed by the defendants against an individual plaintiff or class of plaintiffs.

5. *Statutes of Limitations*

The final prong of the district court's analysis focused on statutes of limitations. The court went through the various statutes of limitations for the common law claims, the state statutory claims, and the federal statutory claims.³¹ After also looking to federal statutes of limitations, the court found that the "longest limitations period for any of Plaintiffs' claims is ten years, which would have run well over a century prior to the filing of

²⁵ *Id.* at 1061–62.

²⁶ *Id.* at 1064.

²⁷ *Id.* at 1065.

²⁸ *Id.* at 1064.

²⁹ *Id.* at 1064–65.

³⁰ First Consolidated and Amended Complaint and Jury Demand at 25, *In re African American Slave Descendants Litig.*, 304 F. Supp. 2d 1027 (No. 02-7764), 2003 WL 24256588 (N.D. Ill. 2004).

³¹ *In re African American Slave Descendants Litig.*, 304 F. Supp. 2d at 1068–69. Because it will be of importance in subsequent sections of this Recent Development, the relevant statutes of limitations for the consumer fraud and protection statutes range from one to six years. *Id.* at 1068.

the instant Complaint.”³² Concluding the analysis, the court determined that none of the doctrines extending statute of limitations periods applied to the plaintiffs’ claims. These doctrines include the discovery rule (postpones beginning of violations period until plaintiff discovers injury or should have discovered the injury), the continuing violation doctrine (allows plaintiff to file action when there is a continuous series of injuries arising from the same harm), equitable estoppel (allows plaintiff to bring a cause of action after the statute of limitations has run if defendant actively prevented plaintiff from suing on time), and equitable tolling (when plaintiff is unable to obtain enough information to bring a claim).³³

B. Court of Appeals Opinion

The Seventh Circuit affirmed as modified in part and reversed and remanded in part. Writing for the panel, Judge Posner upheld the motion to dismiss regarding claims I through IX, although he noted that diversity generates federal jurisdiction over all of the claims³⁴ and that while the lower court properly granted the motion to dismiss, the motion should have been dismissed without prejudice because it was not a decision on the merits.³⁵ This section examines the Seventh Circuit’s opinion, highlighting the areas in which the appellate court differed from the lower court.

1. The Political Question Doctrine

The court noted that although there may be political question issues for many reparations cases, the plaintiffs in this case had framed their claims in terms of state law and one federal statute and the complaint had the form of a conventional lawsuit. Therefore, if the plaintiffs were able to establish standing, establish that the law was intended to provide a remedy to slaves or descendants, identify ancestors, quantify damages, and toll the statute of limitations, political question doctrine would not stand in the way.³⁶

2. Standing

In addressing the issue of standing, the Seventh Circuit generally agreed with the district court, noting that “the wrong to the ancestor is not a

³² *Id.* at 1070.

³³ *Id.* at 1070–74.

³⁴ *In re African American Slave Descendants Litig.*, 471 F.3d 754, 757–58 (7th Cir. 2006). The only plaintiff without federal diversity jurisdiction is Richard E. Barber, Sr., who is suing Brown Brothers. Because both parties are from New Jersey, the court held that Barber’s case must be dismissed. *Id.*

³⁵ *Id.* at 758.

³⁶ *Id.* at 758–59.

wrong to the descendants.”³⁷ The court also echoed the district court’s concerns of speculation and hypothesizing about damages, noting, “There is no way to determine that a given black American today is worse off by a specific, calculatable sum of money . . . as a result of the conduct of one or more of the defendants.”³⁸

However, the court noted that some of the descendants were suing not as descendants, but as representatives of their ancestors’ estates, and that in this case, if the plaintiff could show injury to the ancestors, there would be standing.³⁹

3. *Consumer Fraud*

Last, the court noted that the alleged state fraud and consumer protection law violations are not rooted in ancient violations and that the injury (loss incurred by purchasing something one would not have otherwise purchased if the truth had been known) is a present-day injury.⁴⁰ While recognizing that there is no general duty to disclose every fact that might deflect a buyer, the judges wrote that a “seller who learns that some class of buyers would not buy his product if they knew it contained some component that he would normally have no duty to disclose, but fearing to lose those buyers falsely represents that the product does not contain the component, is guilty of fraud.”⁴¹ The court did not rule on the merits of this claim but remanded for further proceedings, holding that the claims were not barred at the threshold. The rest of this Recent Development focuses on that remand.

II. MOVING FORWARD ON CONSUMER FRAUD AND PROTECTION CASES

A. *Consumer Fraud and Protection Claims May Present the Only Avenue for Judicial Recognition and Vindication of the Evils of Slavery*

The lengthy explanation of the district court’s opinion in Part I illustrates the numerous procedural bars that prevent plaintiffs from winning reparations cases. To date, no reparations case (filed either by former slaves or by descendants of slaves) has resulted in a successful outcome for the plaintiffs.⁴² In fact, every public action for reparations has been dismissed

³⁷ *Id.* at 759.

³⁸ *Id.* at 760.

³⁹ *Id.* at 762. After acknowledging that these plaintiffs might have standing, the court was quick to note that these claims still would be barred by statutes of limitations, ensuring that the claims would move no further. *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 763. The court then gave the example of a manufacturer who says that her products are made in the United States with laborers employed by unions, whereas in reality the products are manufactured using sweatshop labor. *Id.*

⁴² Roy L. Brooks, *Toward a Perpetrator-Focused Model of Slave Redress*, 6 AFR.-AM.

without a determination on the merits.⁴³ Thus, because of sovereign immunity for the U.S. government and procedural bars of standing and statutes of limitations, it is highly unlikely that there will be a successful reparations case based on the injuries inflicted by slavery itself. The present case is the first private action reparations case to result in a judicial opinion.⁴⁴

1. *Goals of Reparations*

The goals of reparations extend beyond monetary compensation or an apology by the government. Reparations seek “both an accounting of and for past behavior, and some kind of reckoning for that behavior.”⁴⁵ This reckoning would be brought about through redistribution of resources in American society.⁴⁶ While common perceptions of redistribution focus on economic redistribution, Professor Charles Ogletree writes that reparations are “yet another expression of the demand for political, social, and economic equality that, since the failure of the Civil Rights movement in the 1970s, has been stifled and suppressed in this country.”⁴⁷ Certainly one can envision many ways to achieve political, social, and economic equality, but it does not stretch the imagination to think that African American citizens winning lawsuits against large corporations are taking a step in the right direction.

2. *A Brief History of Reparations*

The history of reparations in the United States is certainly not one that played out in the courts. In 1988, Congress enacted the Civil Liberties Act, issuing reparations to Japanese Americans who had been held in internment camps, held in custody elsewhere, relocated, or otherwise deprived of liberty during World War II due to Executive Order 9066.⁴⁸ The Civil Liberties Act came out of lobbying efforts in Congress by Japanese Americans to create a commission to “determine whether a wrong was committed against those American citizens and permanent residents relocated or interned as a result of Executive Order 9066.”⁴⁹ Congress created the Commission on Wartime Relocation and Internment of Civilians, and the commission found that grave injustices had been inflicted upon Japa-

L. & POL'Y REP. 49, 51 (2004).

⁴³ *Id.*

⁴⁴ *Id.* at 56.

⁴⁵ Erin J. Miller, *Reconceiving Reparations: Multiple Strategies in the Reparations Debate*, 24 B.C. THIRD WORLD L.J. 45, 58 (2004).

⁴⁶ *Id.*

⁴⁷ Charles J. Ogletree, Jr., *Tulsa Reparations: The Survivors' Story*, 24 B.C. THIRD WORLD L.J. 13, 14 (2004).

⁴⁸ Pub. L. 100-383, 102 Stat. 904, 50 U.S.C. app. § 1989(b)(7); see also *Seno v. United States*, 43 Fed. Cl. 621, 628 (Fed. Cl. 1999).

⁴⁹ SUCHENG CHAN, *ASIAN AMERICANS: AN INTERPRETIVE HISTORY* 173–74 (1991).

nese American citizens by the U.S. Government.⁵⁰ The bill called for the nation to issue an official apology and to provide \$20,000 to living internees.⁵¹ Unfortunately, similar efforts for reparations for slavery have been unsuccessful. As early as 1989, Congressman John Conyers introduced a reparations bill in Congress; although re-introduced every year, the bill has yet to be passed into law.⁵²

3. *A New Opportunity*

Given this history, the open door of the state consumer fraud and protection claims appears to be a rare opportunity to achieve judicial recognition of the harms inflicted by slavery. These claims avoid the pitfalls that other reparations litigation has encountered. First, there is a clear injury in fact to the plaintiff bringing the claim (it was the plaintiff who was defrauded, not the plaintiff's ancestor), thereby resolving the standing issue. Next, the injury occurs in the present day to current consumers, avoiding problems with statutes of limitations. Additionally, these actions present a legal claim that does not fall within the jurisdiction of the representative branches, avoiding the possibility of dismissal under political question doctrine. Finally, the claims are private claims that will not run into sovereign immunity concerns. Though the consumer fraud claim avoids these procedural problems, however, the claim is certainly not without challenges. As the district court made amply clear in its opinion, the plaintiffs will need to provide specific factual allegations of fraud to succeed on these claims.⁵³ Many statutes require the party bringing the fraud claim to prove that there was intent behind the deception or fraud, a burden that could be difficult for the plaintiffs to meet.⁵⁴

In their second complaint, plaintiffs provide specific allegations of consumer fraud.⁵⁵ For example, they claim that one of the companies purposely concealed its involvement with the "peculiar institution" when speaking with the media: "'CSX, based in Richmond, Virginia says the allegations that its railroad lines were built with slave labor lack merit,' referring to a September 2002 article in the *Dallas Morning News* [sic]."⁵⁶ Second, plaintiff Farmer-Paellmann asserts that she was a customer of an Amtrak train service that uses CSX-owned rail lines, which she would

⁵⁰ *Id.* at 174.

⁵¹ *Id.*

⁵² Commission to Study Reparations for African Americans Act, H.R. 40, 108th Cong. (2003), available at http://www.house.gov/conyers/news_reparations.htm.

⁵³ *In re African American Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1048 (N.D. Ill. 2004).

⁵⁴ See *infra* notes 67–68.

⁵⁵ Motion for Reconsideration of Dismissal Order at 6–7, *In re African American Slave Descendants Litig.*, 304 F. Supp. 2d 1027 (No. 02-7764), 2005 WL 3746745 (N.D. Ill. 2004).

⁵⁶ *Id.* at 4 n.9.

not have selected had she had known about CSX's misrepresentation.⁵⁷ Finally, a plaintiff claims that she was a customer of FleetBoston's student loan services and would have obtained similar services for less money had she known the truth about FleetBoston's involvement with slavery.⁵⁸ In their appellate reply brief, plaintiffs also claim that Marcelle Porter and Ina McGee would not have been customers of J.P. Morgan Chase and Aetna Insurance, respectively, had they known about the defendants' historical involvement with the slave trade.⁵⁹ It is possible that with these specific allegations of fraud the plaintiffs in *In re African American Slave Descendants Litigation* will succeed. However, success appears unlikely if the plaintiffs are unable to amend the complaint to offer specific instances (similar to that alleged against CSX regarding its misrepresentation in the media) of fraudulent behavior by each of the defendants that caused concrete damage to the plaintiffs. The challenge facing lawyers, then, is that in order to prevail in these cases, they must present sufficient evidence of fraud.

4. *How a Consumer Fraud Claim Might Be Litigated*

To understand better how a fraud claim may be brought under one of these statutes, this section uses the Illinois Consumer Fraud and Deceptive Business Practices Act to take a closer look at the mechanics of such a claim. To avoid dismissal for failure to state a claim, the first step is to identify the underlying facts and legal violations.⁶⁰ To use an example from the plaintiffs' complaints, defendant CSX is a railroad line company based in Richmond, Virginia, which conducts continuous and systematic business in Illinois through its railway lines. The defendant is alleged to have "withheld information or made a misleading statement to the Press regarding their participation in and profiting from slavery."⁶¹ The plaintiffs' second complaint specifically identifies the misleading statement; the plaintiffs allege that in a September 2002 article, CSX told the *Dallas Morning News* that allegations that its railroad lines were built with slave labor were false.⁶²

The applicable statute in Illinois reads:

Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception fraud, false pretense, false promise, misrepresen-

⁵⁷ *Id.* at 6.

⁵⁸ *Id.* at 7 n.20.

⁵⁹ Reply Brief of Plaintiffs-Appellants at 12, *In re African American Slave Descendants Litig.*, 471 F.3d 754 (No. 05-3265), 2005 WL 4678902 (7th Cir. 2006).

⁶⁰ FED. R. CIV. P. 12(b)(6).

⁶¹ First Consolidated and Amended Complaint and Jury Demand, *supra* note 30, at 65-66.

⁶² Motion for Reconsideration of Dismissal Order, *supra* note 55, at 4 n.9.

tation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact . . . in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby.⁶³

The first issue is whether the plaintiffs would satisfy the threshold procedural requirements. From the Seventh Circuit opinion, it is clear that the claim is barred neither by standing, because the plaintiffs are the injured parties, nor by the three-year statute of limitations, because the statement to the press occurred in 2002 and the claim was filed in 2003. In terms of surviving a motion to dismiss for failure to state a claim, the Northern District of Illinois has stated that to have a claim under the act, a plaintiff “must show that: (1) the defendant engaged in a deceptive act or practice, (2) the defendant intended that the plaintiff rely on that deception, (3) the deception occurred in the course of conduct involving trade or commerce, and (4) the act proximately caused damage to the plaintiff.”⁶⁴ At this stage, however, the only burden on the plaintiff is to prove that the fraud proximately caused the consumer’s injury, not that the consumer actually relied upon the deceptive act or practice.⁶⁵

Regarding the first element, there is a specific description of the defendant engaging in a deceptive act: lying to the public via the media. The second element is more difficult, as it is unclear from the facts why CSX may have lied to the press. This element is satisfied, however, because the law commands that all material disputes be resolved in favor of the non-moving party.⁶⁶ It is thus unlikely that CSX would have made statements to the media without intending that the public, their consumers, would rely upon this information. Element three is satisfied as well. Because CSX was speaking to the press in its official capacity as a company, the deception occurred in the course of conduct involving trade or commerce. Finally, the plaintiff alleged the act proximately caused her damages because she would not have purchased train tickets that required her to ride on lines owned by CSX. By satisfying the four elements, the plaintiff at hand would survive a motion to dismiss and be able to have her grievances heard in a court of law.

One counterargument to bringing such a claim is that the suit is not necessarily specific to African Americans. Because all plaintiffs in the current suit are black, any monetary gains from the suit would go to black Americans. However, the elements of the claim do not require a black plaintiff; therefore, should a nonblack plaintiff succeed in winning such a claim,

⁶³ 815 ILL. COMP. STAT. 505/2 (2006).

⁶⁴ *Murry v. America’s Mortgage Banc, Inc.*, 2004 U.S. Dist. LEXIS 12045, at *19 (N.D. Ill. June 25, 2004).

⁶⁵ *Id.*

⁶⁶ *Id.* at *4.

the monetary award would not redistribute resources to African Americans in this country. It is therefore a valid criticism that pursuing consumer fraud cases will not achieve the goals of reparations unless such claims are brought by African American slave descendants.

While the consumer fraud laws in different states contain many similarities, there are certainly advantages and disadvantages to bringing such claims in particular jurisdictions. For example, in Louisiana, New York, and Texas, additional damages are provided if the fraud is found to be knowing or intentional; in all three states plaintiffs can receive up to three times the amount of damages suffered.⁶⁷ The inclusion of such a provision implies that knowledge/intent is not necessary to find fraud, reducing the burden significantly for a consumer bringing such a claim. In Illinois and New Jersey, intent is required to have a right of action; however, it is not necessary to show that the plaintiff actually suffered or relied upon the deceptive acts.⁶⁸ Such a law also reduces the burden on consumers bringing a claim.

5. *Monetary Awards*

One of the disappointments of a victory through a consumer fraud claim is that the monetary award may be small. The statutes allow for compensation of damages, and often a tripling of those damages in cases where intent can be shown; in New York the maximum in punitive damages is one thousand dollars.⁶⁹ The economic and emotional harms caused by the institution of slavery dwarf these damages. As noted in the plaintiffs' first complaint:

The economic deprivation resulting from slavery can be gleaned from discrepancies in earnings between whites and blacks. Black families earn only \$580 for every \$1,000 earned by white families. Only 3.4% of all Black men earned \$50,000 or more compared to 12.1% of white men. Additionally, 44.8% of black children live below the poverty line, compared to 15.9% of white children.⁷⁰

Compensation through consumer fraud statutes will likely be nothing more than a drop in the bucket when compared to statistics such as these. It is difficult to assess accurately the damages that plaintiffs could recover from claims brought under these statutes because the claims have yet to

⁶⁷ LA. REV. STAT. ANN. § 51:1409(a) (2006); N.Y. GEN. BUS. LAW § 349(h) (2007); TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (2006).

⁶⁸ 815 ILL. COMP. STAT. 505/2 (2006); N.J. REV. STAT. § 56:8-2 (2007). To receive damages rather than injunctive relief in both of these states it is necessary to show actual harm.

⁶⁹ N.Y. GEN. BUS. LAW § 349(h) (2007).

⁷⁰ First Consolidated and Amended Complaint and Jury Demand, *supra* note 30, at 51.

be fully developed. The amount could vary significantly. For example, the claim brought by plaintiff Farmer-Paellmann against the railway lines may only result in monetary damages worth the value of a few railway tickets, whereas the claims brought against FleetBoston for fraud related to student loans could be in the tens of thousands of dollars. Regardless, it is difficult to foresee a sum that approaches the necessary amount for true wealth redistribution arising from these individual claims. Perhaps a class action by investors would come closer; however, that claim has yet to be filed.

6. *Dignitary Victory*

As a strategy to combat economic disparities between blacks and whites in the United States, consumer fraud litigation will not suffice. However, there is a significant dignitary value to be gained from judicial victories. The United States reveres its legal institutions; courts are seen as the arbiters of justice, and the Supreme Court promises to all Americans equal justice under law.⁷¹ Yet it is that legal institution that has refused to hear claims related to one of the gravest injustices in the history of the United States—and in the history of humanity. To hear the courts repeatedly reject claims by descendants of slaves, who still live centuries later with the inequality that slavery created, because of mere procedural issues is to inflict dignitary harm upon those who have already suffered harm at the hands of the government. To win cases under the consumer fraud and protection acts is to recognize a dignitary victory, one that holds institutions legally responsible for the injury inflicted by the “peculiar institution.”

B. Publicity and Media Campaigns Following Lawsuits May Spur a Larger Movement Toward Non-Judicially Enforced Reparations

As discussed in Part II.A, winning suits under consumer fraud statutes will not lead to large sums of money or judicial decisions that will, by themselves, correct the destruction and vast inequality wrought by slavery. Yet, in winning a lawsuit against a large corporation, the plaintiffs would arm themselves with powerful ammunition to launch a media and publicity campaign about the judicial victory and the practices of the corporate defendant. Public relations and publicity have a great effect on the psyche of the American people.⁷² Such a public relations campaign may spur activism throughout the nation, perhaps persuading Congress to pass the bill that has been before it eighteen times, and may increase corporate

⁷¹ See Joseph H. Sommer, Note, *Transformative Torts*, 97 YALE L.J. 645, 654 (1988) (citing the need of Vietnam War veterans for recognition from courts and society for the wrongs committed against them).

⁷² See generally STUART EWEN, PR! A SOCIAL HISTORY OF SPIN (1996) (describing the influence of public relations by corporate entities throughout the history of the United States).

accountability regarding previous involvement with the slave trade and slavery. Judicial decisions can create larger movements and public awareness.⁷³ Should a plaintiff or class of plaintiffs be successful in winning a consumer fraud case because of fraud based on concealment of involvement with the institution of slavery, many opportunities could open up for activism, social change, and justice outside the jurisdiction of the courts.

C. *The Filing of Suits May Lead to Numerous Out-of-Court Settlements*

One possibility for increasing the amount of monetary gain from consumer fraud claims is that companies will be fearful of a large number of claims against them and the resulting bad publicity.⁷⁴ Settlement in reparations cases is not without precedent. In *In re Holocaust Victim Assets Litigation*, two Swiss banks agreed to a class action settlement with Holocaust victims while the case was pending.⁷⁵ Additionally, MetLife Inc., after waiving a statute of limitations defense, settled a class action lawsuit brought by black shareholders for a quarter of a billion dollars because the insurance company had sold life insurance policies to blacks that were more expensive and provided fewer benefits than those sold to whites.⁷⁶ Settlement would not provide the dignitary advantages and sense of victory of a judicial decree,⁷⁷ but it might provide larger sums of money for individual plaintiffs and perhaps class action settlements from companies that are large enough to provide substantial settlements. A push toward settlement needs to be balanced against the positive effects judicial victory might have, in terms of both the psychological benefits that come from winning in court and the publicity that is generated from such a win. A dignitary benefit may also accrue from the shift in power when large, seemingly untouchable corporations decide to bargain with individual consumers and admit some responsibility by agreeing to settle. While there is no clear answer, settlement is a possibility that may emerge from consumer fraud litigation for slavery, resulting in positive effects.

D. *Dignitary Values*

This Part has argued that winning a lawsuit under the consumer fraud claim will provide a dignitary benefit to the plaintiffs and the reparations movements in addition to whatever monetary benefits may accrue. As discussed earlier, no litigation effort for slave reparations has yet been suc-

⁷³ See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Brown v. Board of Educ. of Topeka*, 349 U.S. 294 (1955); *Schindler v. Schiavo*, 780 So. 2d 176 (Fla. Dist. Ct. App. 2001).

⁷⁴ See Kenneth L. Schneyer, *Hooting: Public and Popular Discourse about Sex Discrimination*, 31 U. MICH. J.L. REFORM 551, 574 (1998).

⁷⁵ *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000).

⁷⁶ Charles J. Ogletree, *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279, 303-04 (2003).

⁷⁷ See Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

cessful in the courts of the United States. While the consumer fraud claims discussed herein are not typical reparations claims—companies are not being held accountable for their involvement with the institution of slavery, but rather for denying that involvement—a victory would provide judicial and institutional recognition to the plaintiffs’ injuries. Professor Frank Michelman has written about the values of litigation, asserting that there are four principal gains.⁷⁸ It is the first value, dignitary value, which provides a context for the discussion of dignitary advantages conferred by litigating consumer fraud claims. Michelman claims that litigation has a dignitary value because individuals who are denied the opportunity to litigate and have their concerns heard in a court of law may suffer from humiliation and a loss of self-respect.⁷⁹ Applying this idea to the matter at hand, if reparations claims are consistently and systematically thrown out by courts, a message is sent—whether intentional or not—that such claims are simply not valid enough to be heard by a court and that the plaintiffs are wrong in thinking that their injuries deserve redress. By proceeding with the consumer fraud claims, courts and the American justice system can send a message that these plaintiffs have, in fact, been injured and that the harms of slavery deserve judicial recognition.

CONCLUSION

In re African American Slave Descendants Litigation presents an opportunity to hold powerful parties responsible for the grave injustices of slavery. It does so in a manner that has been previously unexplored, but in comparing the potential for successful litigation it appears more promising than any other reparations litigation previously brought before United States courts. Consumer fraud is a useful doctrinal tool because of the procedural pitfalls that it avoids, but also because it provides consumers with a right of action that belongs to them. It allows plaintiffs who live with the day-to-day effects of slavery to bring their own claims rather than to fight for the claims of those who suffered generations before them. It acknowledges that the effects of slavery are prevalent throughout our society and that slavery is not just a black mark on our past, but continues in society today. Finally, it opens up the possibility of legal recognition of the “abject cruelty, both physical and psychological,”⁸⁰ that countless institutions, including the Supreme Court, Congress, presidents, railroad companies, tobacco manufacturers, banks, and insurance agencies, supported with all their might.

⁷⁸ Frank L. Michelman, *The Supreme Court and Litigation Access Fees: The Right To Protect One's Rights*, 1973 DUKE L.J. 1153, 1172–77 (describing the four values of litigation: dignitary values, participation values, deterrence values, and effectuation values).

⁷⁹ *Id.*

⁸⁰ *In re African American Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1035 (N.D. Ill. 2004).

Doe v. Kamehameha: Section 1981 and the Future of Racial Preferences in Private Schools

*Christopher W. Schmidt**

On December 5, 2006, one day after the United States Supreme Court heard oral arguments on the constitutionality of race-based pupil assignment in public schools,¹ the Ninth Circuit handed down its decision in *Doe v. Kamehameha*,² a case that raised analogous issues in the context of private education. The Ninth Circuit rejected a challenge brought under 42 U.S.C. § 1981 to the admissions policy of the Kamehameha Schools, a group of private schools in Hawaii that effectively admit only Native Hawaiians. Kamehameha is a unique educational institution; the schools' avowed educational mission is to remedy the severely disadvantaged position of Native Hawaiians and to protect Native Hawaiian culture. But while the facts of *Kamehameha* are singular, the underlying legal issues and policy implications are not. The basic question *Kamehameha* presents is one sure to arise with increasing frequency as the nation reconsiders the role of race in grade school education: how far will courts extend the reach of antidiscrimination norms to challenge racial preferences in private educational institutions?

This Recent Development argues that there are strong reasons to allow private schools more freedom than public schools to use race in admissions policies. Unless a sufficient societal consensus develops around the color-blind principle, intrusion into the decisionmaking of private school administrators unjustifiably limits their ability to offer potentially beneficial alternative approaches to education. Furthermore, judicial doctrine on this question, though still inchoate, allows for such a result. The *Kamehameha* majority's standard for evaluating challenges to private school racial preferences under Section 1981 recognizes the wisdom of judicial deference here by allowing private schools latitude to apply race-based preferences that might not be available to public schools.

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¹ *Meredith v. Jefferson County Bd. of Educ.*, No. 05-915; *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, No. 05-908.

² 470 F.3d 827 (9th Cir. 2006) (en banc).

I. BACKGROUND

The Kamehameha Schools were founded in 1887 under a trust established by Princess Bernice Pauahi Bishop, the last direct descendant of the Hawaiian King Kamehameha I.³ In accord with Pauahi Bishop's vision of an institution serving the particular needs of Native Hawaiians,⁴ the schools have traditionally limited their enrollment to Native Hawaiians, a group that suffered severely from United States imperialist policy and that today lags far behind other Hawaiians in most social welfare and educational achievement measures.⁵ The princess's trust left the schools what has been estimated to be the second largest endowment of any educational institution in the nation.⁶ The schools receive no federal funding and charge a sharply reduced tuition fee, which is often waived for students whose families cannot afford it.⁷

Formally, Kamehameha's admissions policy is one of preference, not exclusion. In theory, the schools will admit non-Native Hawaiians⁸ after they admit all Native Hawaiian applicants who pass the admissions test. But, in practice, this works as a policy of exclusion based on ancestry because there are always enough qualified Native Hawaiian applicants to fill the number of spots available.⁹

Because the trust is not a state actor, the policy cannot be challenged under the Fourteenth Amendment. John Doe, a qualified applicant who lacked the requisite Native Hawaiian ancestry, was denied admission and instead challenged the exclusionary policy under 42 U.S.C. § 1981. Section 1981 protects against racial discrimination by private actors in forming contracts;¹⁰ the Supreme Court has held that it applies to private school

³ *Id.* at 831.

⁴ *Id.* at 831–32.

⁵ *Id.* at 833–34.

⁶ John Tehranian, *A New Segregation? Race, Rice v. Cayetano, and the Constitutionality of Hawaiian-Only Education and the Kamehameha Schools*, 23 U. HAW. L. REV. 109, 109 (2000) (citing a 1999 estimate that the school's endowment was approximately \$10 billion).

⁷ *Kamehameha*, 470 F.3d at 832.

⁸ For purposes of admission to Kamehameha, being classified as "Native Hawaiian" requires that one had an ancestor in Hawaii in 1778, when Westerners first arrived. *Id.*

⁹ *Id.* Between 1962 and 2002, only one non-Native Hawaiian was admitted to Kamehameha. *Id.* at 870 (Bybee, J., dissenting). The proper characterization of the admissions policy—whether or not it is an "absolute bar" to non-Native Hawaiians—was a point of dispute between the majority and the primary dissent. *Compare id.* at 832 (majority opinion), *with id.* at 869–71 (Bybee, J., dissenting).

¹⁰

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens

admissions.¹¹

The federal district court in Hawaii dismissed Doe's claim on a motion for summary judgment.¹² Doe appealed to the Ninth Circuit, which, in a 2-1 decision in August 2005, reversed the district court's ruling.¹³ The Ninth Circuit then reheard the case en banc and, in an 8-7 decision, reversed the panel and upheld Kamehameha's admissions policy.

II. LEGAL ISSUES PRESENTED

The most significant issue faced by the Ninth Circuit in *Doe v. Kamehameha* was determining the appropriate standard for evaluating a Section 1981 challenge to a racial preference policy in a private school. However, there was also a significant threshold issue: whether the categorization of applicants in question should even be considered race based.¹⁴ The issue was whether the class of Native Hawaiians should be considered more like a Native American tribal group, in which case it was a predominantly political category and thereby largely exempt from challenge as racially exclusionary,¹⁵ or whether instead the class of Native Hawaiians should be considered more as a traditional racial category. This question has been the subject of much dispute,¹⁶ but in 2000 the Supreme Court gave strong support for treatment of Native Hawaiians as a traditional racial category in *Rice v. Cateyano*.¹⁷ In striking down a Hawaiian law that permitted only Native Hawaiians to vote in elections for the Office of Hawaiian Affairs, the Court ruled that Native Hawaiians should be treated as a racial group for the purposes of the Fifteenth Amendment.¹⁸ For most of the judges on the Ninth Circuit in *Doe*, this was conclusive. The majority opinion dismissed the question in a footnote;¹⁹ the main dissent offered a lengthier re-

1866, which was passed under the authority of Section 2 of the Thirteenth Amendment, it is not subject to the state action limitation of statutes passed under authority of the Fourteenth Amendment. See *infra* Part III.A.

¹¹ *Runyon v. McCrary*, 427 U.S. 160 (1976).

¹² *Doe v. Kamehameha Sch.*, 295 F. Supp. 2d 1141 (D. Haw. 2003).

¹³ *Doe v. Kamehameha Sch.*, 416 F.3d 1025 (9th Cir. 2005).

¹⁴ Another threshold question was whether Section 1981 applied to a contract made with a nonprofit entity. The majority dismissed this in a footnote. *Kamehameha*, 470 F.3d at 836 n.9. A possible variation on this issue, raised by Judge Rymer in her dissent, is whether the heavily subsidized education offered by Kamehameha actually creates a contractual relationship. *Id.* at 885 n.2 (Rymer, J., dissenting). Judge Kozinski's dissent took this issue a step further, suggesting that if the school stopped charging tuition there would no longer be a legally binding contractual relationship and hence Section 1981 would no longer apply. *Id.* at 888-89 (Kozinski, J., dissenting).

¹⁵ See *Morton v. Mancari*, 417 U.S. 535 (1974) (holding special programs for Native Americans largely immune from equal protection challenges).

¹⁶ Compare Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537 (1996), with Jon M. Van Dyke, *The Political Status of Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95 (1998).

¹⁷ 528 U.S. 495 (2000).

¹⁸ *Id.* at 514.

¹⁹ *Kamehameha*, 470 F.3d at 837 n.9 ("[F]or the purposes of our decision, we accept

jection.²⁰ But Judge William Fletcher, in a concurrence joined by four other judges, concluded that *Rice* did not resolve the issue. The holding in *Rice*, he argued, should be read to apply only to voting rights and the heightened scrutiny required by the Fifteenth Amendment: “voting rights are sui generis.”²¹ In light of this narrow reading of *Rice*, and the history of congressional action conferring special benefits on Native Hawaiians,²² Judge Fletcher concluded that “Native Hawaiian” “is not merely a racial classification. It is also a political classification.”²³

Judge Fletcher’s efforts notwithstanding, ten of the fifteen Ninth Circuit judges sitting en banc held that *Rice* resolved the issue in favor of the plaintiff’s contention that Native Hawaiians constitute a racial category. And, if the Supreme Court reviews this case, it is hard to imagine that the Court would uphold the schools’ policy by distinguishing *Rice*.²⁴ The critical issue is therefore the level of review to accord Kamehameha’s admission policy.

In determining the correct standard for reviewing a Section 1981 claim as applied to a private educational institution, all but three of the dissenters²⁵ rejected the plaintiff’s contention that strict scrutiny should apply.²⁶ The majority opinion and the primary dissent agreed that while affirmative action plans by state actors should be subject to strict scrutiny under the Equal Protection Clause,²⁷ the less rigorous standard of review used in Title VII cases should be applied in Section 1981 challenges to private, voluntary racial preferences.²⁸ The majority and the principal dissent also agreed that the Title VII burden-shifting approach established in *McDonnell Douglas Corp. v. Green*²⁹ was the appropriate framework for evaluating the Section 1981 claim.³⁰ Under this approach, the plaintiff must first establish a prima facie case of racial discrimination. The burden then shifts to the defendant to articulate a nondiscriminatory reason for the policy, such as

that ‘Native Hawaiian’—like ‘Negro’—is a racial classification.”).

²⁰ *Id.* at 879–85.

²¹ *Id.* at 852.

²² *Id.* at 853–57.

²³ *Id.* at 850.

²⁴ In *Rice*, only Justice Stevens and Justice Ginsburg rejected the idea that Native Hawaiian should be treated as a racial classification under the Fifteenth Amendment. 528 U.S. at 527–47 (Stevens, J., dissenting); *id.* at 547–48 (Ginsburg, J., dissenting).

²⁵ *Kamehameha*, 470 F.3d at 887 (Kleinfeld, J., dissenting) (joined by Kozinski & O’Scannlain, JJ.).

²⁶ Appellant’s Reply Brief at 3–8, *Kamehameha*, 470 F.3d 827 (No. 04-15044).

²⁷ See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

²⁸ *Kamehameha*, 470 F.3d at 835–39; *id.* at 857–58 (Bybee, J., dissenting); *id.* at 886 (Rymer, J., dissenting). The Ninth Circuit judges based this conclusion on *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (superseded by statute), in which the Supreme Court applied Title VII analysis to a Section 1981 claim against a private employer.

²⁹ 411 U.S. 792 (1973).

³⁰ *Kamehameha*, 470 F.3d at 837–39; *id.* at 858–59 (Bybee, J., dissenting); *id.* at 886 (Rymer, J., dissenting).

an affirmative action plan. Once such a reason is offered, the plaintiff will prevail only if she can show that the institution's justification is pretextual.³¹

Beyond these points of agreement, the majority and the principal dissent parted ways. The difficulty the court faced was that the most relevant precedents for evaluating a Title VII challenge to a voluntary affirmative action program have evolved in the field of employment law, and these employment cases make for awkward analogies to the educational context. The standard for evaluating affirmative action plans in employment, derived largely from *United Steelworkers of America v. Weber*³² and *Johnson v. Transportation Agency*,³³ entails a three-part test. To withstand a Title VII challenge, the plan must: (1) respond to a manifest racial imbalance; (2) "not 'unnecessarily' trammel the rights" of the nonpreferred groups or "create an absolute bar to their advancement;" (3) do no more than necessary to remedy the imbalance.³⁴

Crucially, the majority and the principal dissent diverged over the proper way to apply the *Weber/Johnson* test to an education case. Judge Graber's opinion for the majority argued that the three-part test required modification before it could be applied to a school admissions policy, particularly one with such a distinctive background and context as Kamehameha's.³⁵ In making this adaptation, the court must always keep in mind that the "broad[] mission" of schools is "the development of all children to become citizens, leaders, and workers."³⁶ So while the relevant community to determine whether there is a manifest racial imbalance in employment discrimination cases was the ranks of the "employer's work force,"³⁷ the relevant community in this case, considering the role of schools in society, should be *external* to the institution³⁸—in this case, the state of Hawaii.³⁹ The dramatic disparities in educational achievement and social welfare between Native Hawaiians and non-Native Hawaiians satisfied the requirement of manifest racial imbalance.⁴⁰ Moving to the second part of the test, determining whether the admissions policy unnecessarily trammels the rights of the nonpreferred groups or creates an absolute bar to their advancement, Judge Graber argued that the relevant "advancement" was not admission to the schools, but the development of young citizens generally. She noted that students denied admission to Kamehameha "have

³¹ See *Patterson*, 491 U.S. at 186–87; *Johnson v. Transportation Agency*, 480 U.S. 616, 626 (1987).

³² 443 U.S. 193 (1979).

³³ 480 U.S. 616 (1987).

³⁴ *Kamehameha*, 470 F.3d at 840–41 (quoting *Rudebusch v. Hughes*, 313 F.3d 506, 520–21 (9th Cir. 2002)).

³⁵ *Kamehameha*, 470 F.3d at 839.

³⁶ *Id.* at 842.

³⁷ *Johnson*, 480 U.S. at 631–32.

³⁸ *Kamehameha*, 470 F.3d at 842.

³⁹ *Id.* at 843.

⁴⁰ *Id.* at 843–44.

ample and adequate alternative educational options.”⁴¹ Finally, to ensure that the plan does no more than necessary, it must be temporary.⁴² Judge Graber found this factor was satisfied since the admissions policy is open to the admission of qualified candidates and grants preferences “only for so long as is necessary to remedy the current educational effects of past, private and government-sponsored discrimination and of social and economic deprivation.”⁴³

Writing in dissent, Judge Bybee, in contrast, said the *Weber/Johnson* test should be applied with as little translation as possible. There is no reason, he argued, to create separate standards for employment and education. The text of Section 1981 does not distinguish between contracts with schools and contracts with employers, and no precedent compels such a distinction.⁴⁴ Therefore there was no need to create a “special standard” for education cases. “If anything . . . *Runyon* compels the conclusion that a primary and secondary educational contract—like any other contract—that discriminates solely on the basis of race violates § 1981.”⁴⁵ Judge Bybee concluded that Kamehameha’s policy failed the majority’s modified test, but that the majority should have applied the *Weber/Johnson* standard.⁴⁶

III. SECTION 1981, ANTIDISCRIMINATION NORMS, AND AFFIRMATIVE ACTION

Kamehameha is exceptional, both in the way its preference policy works as an exclusionary measure and in its clear, narrowly defined mission, which is directly tied to remedying social inequalities created by the history of oppression of Native Hawaiians. At a time when racial preferences in education are justified almost exclusively on diversity grounds,⁴⁷ Kamehameha’s justification rests largely on the need to remedy past societal discrimination. Because of the uniqueness of its circumstances, the Supreme Court may choose not to hear the case.⁴⁸ Even if the Supreme Court did review, later courts would have ample opportunity to distinguish its ruling, whichever side was victorious.⁴⁹

⁴¹ *Id.* at 844.

⁴² *Id.* at 845.

⁴³ *Id.* at 846.

⁴⁴ *Id.* at 860 (Bybee, J., dissenting).

⁴⁵ *Id.* at 861.

⁴⁶ *Id.* at 867–72.

⁴⁷ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁴⁸ Kathleen Sullivan, attorney for Kamehameha and Stanford law professor, said after the decision, “[I]t is hard to see why the Supreme Court would be interested in a case that turns on such unique circumstances. There is no other case just like this one.” Henry Weinstein, *Private School is Allowed To Favor Native Hawaiians in its Admissions*, L.A. TIMES, Dec. 6, 2003, at A10. *But cf. Kamehameha*, 470 F.3d at 889 (Kozinski, J., dissenting) (“[T]he question is close and ours may not be the last word.”).

⁴⁹ See Adam Liptak, *Hawaii Schools’ Racial Enrollment Upheld*, N.Y. TIMES, Dec. 6, 2006 at A25 (quoting Kathleen Sullivan’s prediction that the Ninth Circuit decision will

Regardless of the particular fate of this case, if the Roberts Court does move to limit further the use of racial preferences in public education, then surely the admissions practices of private schools will face increasingly frequent and powerful legal challenges under Section 1981. The courts will then have to confront squarely the question that underlies *Kamehameha*: How far should we impose the norm of colorblindness on the decisionmaking of private actors? The answer to this question turns on whether the courts are willing to extend, through Section 1981, the color-blind standard as an essential component of civil society.

A. *The Reach of Section 1981*

The challenge of deciding where to draw the line between private spheres of conduct and antidiscrimination norms arises with particular urgency in Section 1981 cases. Section 1981 is different than most antidiscrimination laws because it is virtually limitless in the scope of its application. Unlike the Civil Rights Acts of 1964 and 1968, Section 1981 does not exclude small-scale dealings from its antidiscrimination mandate. It reaches any contractual relationship, no matter how insignificant, no matter how detached from government action.

Two events, separated by over a century, form the basis of Section 1981's nearly unbounded reach. The first is the Civil Rights Act of 1866,⁵⁰ which was designed to implement the newly ratified Thirteenth Amendment and which included the first version of Section 1981. There was, however, much uncertainty about whether the Thirteenth Amendment conferred the power to pass such sweeping antidiscrimination legislation. Congress proposed the Fourteenth Amendment, in part, to respond to these concerns. Soon after ratification of the Fourteenth Amendment in 1868, Congress reenacted the 1866 Act as part of the Enforcement Act of 1870.⁵¹ But as congressional support for Reconstruction declined, and as the Supreme Court began its assault on congressional authority to pass antidiscrimination legislation, the courts read a state action limitation into the statutory descendants of the 1866 Act, effectively making Section 1981 coterminous with the Equal Protection Clause.⁵²

The second major event, *Jones v. Alfred H. Mayer Co.*,⁵³ changed all this. In this 1968 decision, the Court held that 42 U.S.C. § 1982, a companion provision to Section 1981 that dealt with property transactions and

have "no precedential impact on any other school in the nation").

⁵⁰ 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981).

⁵¹ See HAROLD HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835–1875, at 464–71 (1982); George Rutherglen, *The Improbable History of Section 1981: Clio Still Bemused and Confused*, 2004 SUP. CT. REV. 303, 307–22.

⁵² See Rutherglen, *supra* note 51, at 322–30.

⁵³ 392 U.S. 409 (1968).

was similarly derived from the Civil Rights Act of 1866, “prohibit[s] all racial discrimination, private and public, in the sale and rental of property.”⁵⁴ The Court further held that Congress possessed the power under the enforcement clause of the Thirteenth Amendment to create such a sweeping prohibition on private discrimination in the buying and selling of property.⁵⁵ The *Jones* Court concluded that the fact that the 1866 Act was re-enacted in the wake of the Fourteenth Amendment in no way limited its application to state action.⁵⁶ This decision opened the possibility of Section 1981 emerging from the shadow of the Equal Protection Clause and its state action doctrine and becoming a weapon to attack racial discrimination in private conduct whenever a contractual relationship was involved.

In *Johnson v. Railway Express Agency, Inc.*,⁵⁷ the Court made explicit what it had implied in *Jones*:⁵⁸ that Section 1981, like Section 1982, provided antidiscrimination protection that went beyond not only the Fourteenth Amendment, but also modern civil rights legislation.⁵⁹ Then, in *Runyon v. McCrary*,⁶⁰ the Court held that Section 1981 prohibits racial discrimination in “private, commercially operated, nonsectarian schools.”⁶¹ Since enrollment in the school required a contract, and Section 1981 prohibits racial discrimination in contracting, refusal to admit a black student was “a classic violation of § 1981.”⁶² The Court recognized possible countervailing arguments—the right to association, the right to privacy—but dismissed them as insufficient in the face of the overwhelming national mandate for desegregation. On the same day that *Runyon* was decided, the Court also decided in *McDonald v. Santa Fe Trail*⁶³ that Section 1981 applied to discrimination against whites.⁶⁴

B. *Runyon II*?

The central claim of Judge Bybee’s dissent is that the admissions policy at issue in *Kamehameha* is no different from the one struck down

⁵⁴ *Id.* at 437.

⁵⁵ *Id.* at 439.

⁵⁶ *Id.* at 436.

⁵⁷ 421 U.S. 454 (1975).

⁵⁸ 392 U.S. at 441–43 n.78 (discussing prior cases and the scope of congressional action against discrimination authorized by the Thirteenth Amendment); *see also* *Runyon v. McCrary*, 427 U.S. 160, 170 (1976) (noting that *Jones* “necessarily implied” that Section 1981 “likewise reaches purely private acts of racial discrimination”).

⁵⁹ *Jones*, 421 U.S. at 459–60. Whereas *Jones v. Mayer* recognized that Section 1982 went beyond the Civil Rights Act of 1968 to offer protection in property transactions that had been exempted from the 1968 act, *Johnson* recognized that Section 1981 went beyond Title VII of the Civil Rights Act of 1964.

⁶⁰ 427 U.S. 160 (1976).

⁶¹ *Id.* at 168.

⁶² *Id.* at 172.

⁶³ 427 U.S. 273 (1976).

⁶⁴ *Id.* at 295; *see also* *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 609–13 (1987) (interpreting Section 1981 to prohibit discrimination on the basis of national origin).

in *Runyon*. “*Runyon* makes clear,” Judge Bybee explained, that “discriminating against a private school applicant solely on the basis of that applicant’s race ‘amounts to a classic violation of § 1981.’”⁶⁵ According to Judge Bybee, the majority “stands *Runyon* on its head,” and its ruling marks a “dramatic departure” from this well-established precedent.⁶⁶

The comparison between *Runyon* and *Kamehameha* is instructive. When the Supreme Court decided *Runyon* in 1976, the civil rights movement had largely run its course. For all its failures to remove the scars of slavery and Jim Crow from American life, by the late 1970s it was clear that one of the movement’s unquestionable accomplishments was thoroughly to discredit animus-based racial discrimination toward African Americans as practiced through explicit policies of exclusion. Such racist policies were an embarrassment to the nation, and most Americans supported using the law to its fullest extent to remove such practices.⁶⁷ By 1976 the antidiscrimination principle had passed beyond the realm of political debate. A decent civil society, no less than a just public policy, required that exclusion of blacks in the furtherance of an agenda of white supremacy be rejected in American life. Justice Stevens recognized this point in *Runyon*: “The policy of the Nation as formulated by the Congress in recent years has moved constantly in the direction of eliminating racial segregation in all sectors of society.”⁶⁸ Seven years later, in *Bob Jones University v. United States*,⁶⁹ when upholding the decision of the Internal Revenue Service to revoke the tax-exempt status of a racially discriminatory private university, the Court made this point even more explicit. “[T]here can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice,” wrote Chief Justice Burger. “Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education.”⁷⁰

But has America in 2007 reached a consensus about affirmative action in the same way it had in 1976 regarding segregated education? There are certainly signs of hostility to affirmative action, as revealed most promi-

⁶⁵ *Doe v. Kamehameha*, 470 F.3d 827, 857 (9th Cir. 2006) (Bybee, J., dissenting) (quoting *Runyon*, 427 U.S. at 172).

⁶⁶ *Id.* Judge Kleinfeld’s brief dissent makes basically the same point. *Id.* at 888 (Kleinfeld, J., dissenting) (“The law we have to follow was laid down by the Supreme Court in *Runyon v. McCrary*.”).

⁶⁷ See, e.g., HOWARD SCHUMAN ET AL., *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* 105, 241 (rev. ed. 1997) (citing 1976 survey that found 85% of whites and 98% of blacks felt that black and white children should attend the same schools).

⁶⁸ *Runyon*, 427 U.S. at 191 (Stevens, J., concurring); see also *THE SUPREME COURT IN CONFERENCE, 1940–1985*, at 736 (Del Dickson ed., 2001) (quoting Justice Stevens in the private conference of the Justices noting that despite his reservations about the doctrinal basis for the ruling, “in the modern social context” the Court should apply Section 1981 to segregated private schools).

⁶⁹ 461 U.S. 574 (1983).

⁷⁰ *Id.* at 592–93.

nently in referenda in California⁷¹ and Michigan.⁷² However, there is much evidence of broad national support for some forms of affirmative action.⁷³ This was the message, for example, that the majority in *Grutter v. Bollinger* took from the array of amicus briefs supporting racial preferences in public universities submitted during the Court's consideration of the University of Michigan cases.⁷⁴ The place of racial preferences in American society is a matter of open debate, with legitimate positions on both sides. In *Runyon* and *Bob Jones*, the Court correctly recognized that a fundamental, national commitment to nondiscrimination against minorities justified intervention.⁷⁵ But it is much less clear that a comparable commitment against affirmative action in education has been reached today.

After *Runyon*, Section 1981's potential was clear.⁷⁶ In essence, Section 1981 has become a tool that allows society to take a national antidiscrimination principle and turn it into a legally enforceable norm for social behavior.⁷⁷ The responsibility for those charged with interpreting its scope is to determine whether the policy norm being imposed upon private behavior is of sufficient importance to justify the intrusion. This is why the disagreement between Judge Graber and Judge Bybee over the proper way to apply doctrine developed in employment cases to education cases is so important. The choice of paths here, for which precedent offers little guidance, effectively determines the reach of Section 1981 when applied to racial preferences in school admissions. Judge Bybee's unmodified *Weber/Johnson* standard would threaten the legality of many private school affirmative action programs. By choosing to apply a standard

⁷¹ CAL. CONST. art. 1, § 31.

⁷² Proposed Constitutional Amendment, Proposal 06-2, at 5 (Nov. 7, 2006), available at http://www.michigan.gov/documents/sos/ED-138_State_Prop_11-06_174276_7.pdf.

⁷³ See, e.g., JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA 75 (2006) (“[T]he political pressures to achieve racial diversity proved so overwhelming that when state universities [in Texas and California] were forbidden to take race into account in the admissions process, they simply refused to accept the decline in black and Hispanic enrollment that inevitably followed.”).

⁷⁴ *Grutter v. Bollinger*, 539 U.S. 306, 330–32 (2003).

⁷⁵ Cf. PETER H. SCHUCK, DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE 195–96 (2003) (emphasizing the benefits of a “private ordering principle,” under which “society must respect a private entity’s decision about how to conduct its own affairs, absent some overriding public justification for regulating that decision”); Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 67 n.195 (1983) (When the state uses the law to invade the world of an “insular community” that violates national norms of nondiscrimination, its decision “ought to be based on more than the passing will of the state. It ought to be grounded on an interpretive commitment that is as fundamental as that of the insular community.”).

⁷⁶ This is even truer after the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (codified in sections of 2 U.S.C., 29 U.S.C., and 42 U.S.C. (2000)). If read literally, Congress essentially repealed the state action requirement of the Equal Protection Clause through its explicit application of the “full and equal benefit” clause of Section 1981 to nongovernmental action. See Rutherglen, *supra* note 51, at 303–07, 344–51.

⁷⁷ See Theodore Eisenberg & Stewart Schwab, Comment, *The Importance of Section 1981*, 73 CORNELL L. REV. 596, 604 (1988) (“Section 1981 has become an important symbol supporting the generalization that racial discrimination in this country is unlawful.”).

that stacks the deck against racial preferences in educational institutions, Judge Bybee, in effect, would move toward a strict scrutiny test for school admissions policy under Section 1981. The question, then, is whether society is at the point where we can confidently say that racial preferences whose purpose is to benefit groups that have been the tragic victims of racial oppression are so offensive to national norms of behavior that they should be purged from the land.

IV. CONCLUSION

If the Supreme Court strikes down race-based school assignments in public schools, the question of Section 1981 challenges to private school affirmative action policies will take on increased urgency. Although the standard of review under Section 1981 would, if the Ninth Circuit's approach is followed, be more deferential than the strict scrutiny required for constitutional equal protection claims, such a ruling would create pressure on the courts to follow the path pioneered in *Runyon* and use Section 1981 to bring the antidiscrimination requirements for private schools in line with those for public schools.

Yet, as this Recent Development has argued, we should not be too quick to extend the rules that apply to government policy to all private entities. As *Kamehameha* illustrates, the value of having distinct standards for public and private entities is that it allows for experimentation. Having distinct standards recognizes the fragility of human certainty on the hardest questions about law and social relations. Such questions call for a measure of judicial deference to those who directly confront the dilemmas of education in a racially fragmented society.⁷⁸ Deference, of course, does not require approval. As a matter of policy, *Kamehameha's* admissions policy raises serious concerns: if the schools' mission is truly to create a new generation of leaders for Hawaii, leaders who will be more aware of the importance of Native Hawaiian culture and the history of the Hawaiian people, then this mission would be better served by a policy that allowed for non-Native Hawaiians to be included in its classrooms; its mission would be more effectively realized by a policy of racial preference, not one of racial exclusion. But what is the proper forum in which to press for these changes? The legal command of a color-blind standard, enforced through the sweeping mandate of Section 1981, is simply too blunt a tool for this job.

In light of the hard questions raised in *Kamehameha*, those who have long advocated an aggressive extension of antidiscrimination policy into

⁷⁸ See *Doe v. Kamehameha*, 470 F.3d 827, 841 (noting "the importance of deferring to the judgment and expertise of the relevant decisionmakers" when considering affirmative action plans); see also *Grutter*, 539 U.S. at 328 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer.").

all corners of American society—through the abandonment or limitation of the state action doctrine and through broad interpretation of civil rights statutes—might now be forced to reconsider some of these assumptions. If, as a judicial matter, the battle against facile equations of racial discrimination and affirmative action is being lost, then potentially sweeping antidiscrimination laws such as Section 1981 may prove a double-edged sword for those who continue to see a real need for race-based policies designed to remedy past harms and to promote a more racially just society.

The Role of Community-Based Clinical Legal Education in Supporting Public Interest Lawyering

*Robert Greenwald**

At a time when law schools increasingly promote high-profile, “cutting edge” clinical programs to attract potential law students, it may seem odd to celebrate the place of community-based legal service programs in clinical legal education. However, it is my belief that such programs serve an important role in legal education and support ongoing participation in public interest-oriented legal service. Community-based clinical programs provide law students with an opportunity to build practical lawyering skills while exposing students to the significant opportunities that exist to use their newly acquired legal skills to promote social justice.

In addition to imparting experiential learning through working with clients, law clinics anchored around community-based legal services provide the next generation of attorneys with the opportunity to better understand and help bridge the access-to-justice gap of poor and low-income clients in their own communities. They offer law students firsthand exposure to the dramatic consequences of increasingly insufficient funding of traditional legal service programs and demonstrate that public interest lawyering plays a significant role in advancing social justice by addressing the day-to-day legal service needs of individuals who otherwise would largely go unrepresented. The sponsorship and endorsement of community-oriented legal services by law schools helps to seed in law students a professional commitment to public service. It is this commitment, which I have seen nurtured in law students and fully realized in law school graduates, that leads me to conclude confidently that with the ongoing support of community-based clinical programs, the next generation will continue the tradition of lawyers serving at the forefront of the social justice movement.

Of course, I am biased in my conclusion. In 1985, as a law student, I was introduced to both clinical legal education and community-based public interest lawyering by working in a Harvard Law School clinical program. Over the past twenty years, I have left and returned to Harvard’s Legal Services Center (“the Center”) several times. Today I am a lecturer on law at the Law School and manage the Center’s Health, AIDS, Disability, Estate Planning, Family, Domestic Violence, and Lesbian, Gay, Bisexual, and Transgender Law Clinics. Though the Center has undergone much change through my twenty-year tenure, to its credit the goals of the institution—

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providing clinical legal education to law students and supporting community-based public interest legal services in the greater Boston area—remain largely unchanged. As in my student days, law students continue to fill the Center’s available clinical placements. Staff and students remain dedicated to addressing core social justice issues, while often demanding new and innovative approaches to maximize domestic human rights objectives.

In 1985, when I was a student in the Center’s Housing Law Clinic, staff and students were working to help create and enforce an “eviction-free zone,” by representing all tenants facing eviction in the zone. The goal was to stop gentrification of the Center’s Jamaica Plain community and to preserve affordable housing. Given the current cost of housing in Jamaica Plain, the neighborhood in which I now live and work, some consider the battle to have been lost. But every day at the Center, I see a committed group of students, in both the Center’s Housing Law Clinic and the relatively newly created Community Enterprise Project, fighting evictions while at the same time partnering with neighborhood housing organizations to ensure that large-scale affordable housing developments continue to be built in this “gentrified” neighborhood.

That, over twenty years later, the Center’s Housing Law Clinic remains a vibrant part of the Center is just one example of the staying power, or ongoing commitment, clinicians and law students have to addressing the meat-and-potatoes social justice issues facing poor and low-income populations in our community. That there is now a Community Enterprise Project that supports the development of affordable home ownership is just one example of the Center’s commitment to innovation and creativity in meeting ongoing social justice objectives.

Over the past twenty years, I have seen students educate judges and legislators as to the importance of affordable housing, promote fair housing laws, defend tenancies, and preserve and create affordable housing. At the same time, hundreds of law students have been exposed to housing within their own community as a social justice issue. As a result, while most of our graduates work in large corporate law firms, many remain engaged in this important work today. Each year, usually after a two- to three-year initial “firm life” adjustment period, former students let us know that their clinical experience, working to help people in their own community, inspired them to re-engage in public interest lawyering. And I know that our experience is not unique, as clinical educators across the country describe similar stories of their former students’ enthusiasm both for their clinical law training and for the resulting long-term commitment to social justice lawyering.

While community-based legal service centers do provide law students with access to traditional roads for addressing injustice in low-income communities, their institutional longevity also empowers students to create innovative remedies to both ongoing and newly identified injustices. The Center, for example, has expanded from three original programs—address-

ing housing, family, and public benefits issues—to fifteen today; many of these new programs were created as a result of student initiative and activism.

Beginning in 1987, for example, the Center created the first law school-based AIDS law clinics in the nation. At a time when large numbers of people in the greater Boston area were dying of AIDS and both fear and discrimination were rampant, Harvard Law School students started representing individuals and families living with HIV and AIDS. Today the Clinic remains one of the largest legal service providers in the state for people living with HIV and AIDS. Students continue to challenge insurance companies that deny coverage of new treatment options, appeal denials of public income and health care benefits, and draft and defend against challenges to clients' estate plans. Partnering with health and social service agencies, students continue to staff the Living Legacy Project, providing coordinated health, social, and legal advocacy to secure the smooth transition of children whose parents or legal guardians have died of AIDS to safe and secure friends and family. When I look around the country today, it is no coincidence that I see our graduates creating, working in, and volunteering in similar programs from New York to California.

Most recently, Harvard Law students are now working to replicate the successes of the AIDS Law Clinic's health law collaboration model to address a broad range of social justice issues. In 2005, Center staff and students created a Domestic Violence Clinic, including the Passageway Health Law Collaborative, an advocacy project linking Boston area health and legal professionals serving low-income victims/survivors of domestic violence. The collaboration, run by the Center and Boston's Brigham and Women's Hospital ("BWH"), provides coordinated legal, health, and social services to our clients and those of BWH's sixteen affiliated community health centers who are survivors of domestic violence. This innovative methodology seeks to maximize the effective role of lawyers in broad-based social justice advocacy.

Finally, the Center's strong institutional presence in the community and reputation for innovation keeps staff and students at the Center working at the forefront of domestic human rights issues. The Center's Gay, Lesbian, Bisexual, and Transgender ("GLBT") Law Clinic is its newest clinic, a collaborative effort of the student-run organization Lambda and Center staff and students. The Clinic, again in collaboration with community-based health and social service advocates, provides a broad range of direct legal services to the Boston area GLBT community, with a particular emphasis on family-law related legal issues. Clinic staff and students recognize the importance of building strong institutional support for the GLBT community, with Center students working to create sound legal precedents that protect the rights gained under Massachusetts's granting of marriage equality to the gay and lesbian communities.

Despite the typical challenges facing all clinical legal education programs, including increased competition for student enrollment and limited resources, the willingness and ability to respond to domestic human rights issues is what I believe keeps this Center growing. At the Center, law students have the opportunity to help people living with HIV access Medicaid-based early intervention care and treatment, rather than having to wait until they are disabled by AIDS, because an earlier group of students worked to secure this right in Massachusetts. Others work with survivors of domestic violence to have the court appoint standby guardians and prevent abusers from ever gaining custody of children, for the same reason—law students helped enact the law. Harvard Law students work to secure custody, visitation, and adoption rights in the LGBT community, because law students helped to secure such rights across the commonwealth.

The Center's staff and students do not just champion rights, they work to create them, protect them, and celebrate them. This sense of accomplishment can last a lifetime. It can help to create in law students the next generation of public interest lawyers.

Indigent Defendants and Enemy Combatants: Developing Prototypes for National Security Cases

*James Klein**

I unflinchingly accepted this invitation to reflect on the direction in which my branch of public interest law is heading, but then realized my predicament. I have been a public defender since leaving law school in 1978 but have never identified myself as a “public interest lawyer.” When I graduated, “public interest law” narrowly referred to class action lawsuits or test cases with “attractive” plaintiffs to protect some worthy cause or group. Whatever its precise contours, “public interest law” meant targeted, nonprofit legal work to achieve progressive social change.

Public defenders defiantly rebuffed this label. In our classically client-focused practice, we relish appointments to represent ever-unpopular clients. We cause victims to cry while testifying, acquitting jurors to wring their hands, and appellate judges to bemoan being “constrained to reverse”—hardly anyone’s romantic picture of public interest lawyers at work. Defenders are contrarians by nature, emotionally charged by resisting government power, but dismissive of garnering praise as nice guy “public interest lawyers.”

We never doubted, however, whether we advanced the public interest. We took on faith the existence of a fundamental link between, on the one hand, zealously representing the indigent accused and, on the other hand, diluting the risk of executive power generating a climate of fear or swamping our own liberty. Having faith implies incapacity to prove the reality of that connection. Perhaps those of us from privileged backgrounds imagined that our own liberty stood on more solid footing than the liberty of our marginalized clients. But until recently, we were not reeling from national security letters forbidding recipients from revealing their issuance, government lawyers insisting in some cases that federal judges make appointments with them to review secret court filings, and government arguments against allowing apparent torture victims to present even truthful testimony about their treatment in custody.

This flexing of executive power with its ominous implications for all individuals demands fresh analysis of the relationship between how the government deprives indigent criminal defendants of liberty and how the government threatens liberty in cases of obvious national importance, such

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as cases involving military detentions of “enemy combatants.” That inquiry reveals the government honing its litigation tactics in so-called run-of-the-mill criminal cases involving the poorest of defendants, before exploiting the refined prototypes of those methods in national security cases that galvanize public attention. In Washington, D.C., where the United States Attorney prosecutes local crime, three features of the government’s methods recur with stunning frequency.

First, the cases my public defender office handles reveal the government’s institutional determination to hide information about the unreliability of the evidence it advances to deprive defendants of liberty, particularly the inducements the government extends to mold that evidence, which are critically important to a fact finder’s evaluation of a witness’s credibility. Second, the government invents new forms of secret proceedings designed to shield the compromised pedigree of its evidence, conceal the heavy costs of the government’s own wrongdoings, or gain tactical advantage over defense counsel. As a notable corollary, the judiciary learns to accept these secret devices as an inevitable feature of everyday criminal litigation. Third, the government deploys litigation tactics, such as dismissing cases at the eleventh hour to moot cases or withholding material information from judges, that curb the power of courts, including appellate courts, to hold the government meaningfully accountable for improper actions.

Only tenacious litigation, sometimes extending over years in collateral and appellate proceedings, pries free the repeating fact that the government secretly offered leniency to a critical witness, whether by refraining from arresting or prosecuting, dangling a generous plea deal, or hinting at a reduced sentence in exchange for favorable testimony, even though the witness swore in court that the government never showed interest in helping him, and the prosecutor, obliged by the Due Process Clause to correct testimony he knows to be misleading or false, remained silent. We discover, but usually long after trial, that the prosecutor convinced a judge to seal transcripts of proceedings in other cases involving evidence directly contrary to the representations of government attorneys or their witnesses in our cases. We must bring a suit in federal court to unseal a Justice Department report chronicling tens of thousands of dollars a prosecutor paid to government witnesses, disguising the payments as legitimate witness attendance fees. Even more frightening, we have found the government secretly petitioning a judge to appoint “shadow counsel,” who can persuade a defendant to cooperate with the government, behind the back of appointed counsel. And, if we are on the cusp of convincing an appellate court that a trial prosecutor cheated, the government moots the case, vacating homicide convictions whose legality it defended with determination through layers of postconviction litigation.

The public, even the courts, rarely examine a case like *Padilla* through the lens of the federal government’s everyday criminal prosecution tac-

tics. Writing for four members of the Court, Justice Stevens dissented from the majority's conclusion that Padilla's federal habeas petition, filed in New York, must be refiled in South Carolina, where his "immediate custodian," the commander of the naval brig, was located. Troubled in part by the government's tactic of filing *ex parte* to obtain dismissal of the material witness warrant on which Padilla was detained in New York and then shipping Padilla in military custody as an alleged "enemy combatant" to South Carolina, all pointedly before his lawyers in New York could file a habeas petition, Justice Stevens criticized the majority's refusal to deviate from its customary interpretation of the rules for determining habeas venue:

It is . . . disingenuous at best to classify respondent's petition with run-of-the-mill collateral attacks on federal criminal convictions. On the contrary, this case is singular not only because it calls into question decisions made by the Secretary [of Defense] himself, but also because those decisions have created a unique and unprecedented threat to the freedom of every American citizen.¹

It is mistaken to exaggerate the distance between the government's conduct in run-of-the-mill cases and this case. Not by coincidence, when Padilla's case erupted in New York, public defenders in Washington, D.C., had recently skirmished with the federal government over the same question of habeas venue, and they had advanced the same arguments challenging the functional nature of habeas venue that inform Justice Stevens' dissent. The government had shipped their clients to federal prisons around the country, far from their attorneys, much as the government later shipped Padilla far from his New York counsel and defended its actions on the basis of arguments only recently refined.

After confining Padilla in the brig "for three and a half years, steadfastly maintaining that it was imperative in the interest of national security that he be so held[,]"² and without demonstrating the reliability of the information underlying that detention to a single judge, the government announced its intention to prosecute him in ordinary civilian court on charges "considerably different from, and less serious than, those acts for which the government had militarily detained Padilla."³ The government's motion to transfer Padilla to civilian custody spurred Judge Luttig, whose opinion only weeks earlier had upheld the President's authority to detain Padilla, to rebuke the government for attempting to moot the case on the eve of possible Supreme Court review, creating the impres-

¹ *Rumsfeld v. Padilla*, 542 U.S. 426, 460–61 (2004) (Stevens, J., dissenting).

² *Padilla v. Hanft*, 432 F.3d 582, 584 (4th Cir. 2005).

³ *Id.*

sion that the government had held Padilla mistakenly and jeopardizing “the government’s credibility before the courts[.]”⁴ From a public defender’s vantage point, the government’s behavior looked eerily familiar, suggesting that even if the government had long believed that the information on which it detained Padilla was untrue or unreliable, it would have continued to insist on the necessity of his extraordinary military detention, used secret devices (like isolated military prisons) to thwart public knowledge, and prevented any reckoning in court by abandoning the case.

Only a more in-depth analysis can demonstrate adequately how the government’s experimental tactics in everyday criminal prosecutions foreshadow its perfected methods in cases of great national import. If the thesis is correct, however, resisting those government actions that endanger the freedom of every American citizen cannot await a case like *Padilla*, but must begin in every public defender’s seemingly run-of-the-mill defense of every indigent defendant.

⁴ *Id.* at 587.

In Defense of Children

*Patricia Puritz**

Our society is ambivalent about the legal status of its children. We have had difficulty answering the question, “What kind of person is a child in the eyes of the law?” The early progressive reformers sought to distinguish children from adults and protect them from the vagaries of the adult criminal justice system; thus the first juvenile court was created in the late 1890s. While the focus was placed on rehabilitation rather than adult style punishments, over time the juvenile justice system has continued to have difficulty finding the right balance between punishment and treatment. Despite the due process protections established for children in the 1960s by the United States Supreme Court, we still anguish over the right ways to ensure children’s rights, intervene in their lives appropriately, and keep communities safe.

In the landmark 1963 case *Gideon v. Wainwright*, the United States Supreme Court held that the constitutional right to counsel requires the appointment of an attorney to represent an indigent person charged with a felony offense. Three years later, in a series of cases beginning in 1966, the Supreme Court acknowledged that these bedrock elements of due process were also essential to youth in delinquency proceedings. Arguably the most important of these cases, *In re Gault*, stated that juveniles facing delinquency proceedings have the right to counsel under the Fourteenth Amendment Due Process Clause of the United States Constitution. In *Gault*, the Court found that juveniles need access to counsel when facing “the awesome prospect of incarceration.” *Gault* also provided youth with other critical due process protections, including the right to adequate and timely notice of the charges; the right to confront and cross-examine witnesses; and the privilege against self-incrimination.

Forty years later, the promise of *In re Gault* remains largely unfulfilled and, indeed, the juvenile defense bar is in crisis. Vigorous representation on behalf of young clients is not widespread or even common, and in some juvenile courts it is discouraged. While effective counsel has always been necessary to ensure fundamental fairness and just proceedings, access to appropriate and necessary services, and safe and humane conditions of confinement for those children who need to be incarcerated, over the years the stakes have significantly increased. Children are subject to more punitive sanctions than before, longer sentences, harsher institutional conditions,

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zero tolerance mandates, DNA testing, placement on lifelong sex offender registries, erosion of confidentiality protections, and decreased procedural protections related to transfer to adult court, to name a few. These laws have negatively impacted racial and ethnic minority youth, and have drawn large numbers of indigent children deeper into the justice system. As a result, far too many indigent children appear in our nation's juvenile courts, defenseless and powerless against the state, and subject to consequences that carry lifelong implications of which they are unaware.

The introduction of legal advocates into the juvenile court system was, in fact, intended to alter the tenor of delinquency cases. Noting that the "absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment[.]" the Supreme Court determined that a child's interests in delinquency proceedings are not adequately protected without adherence to due process principles. Through *Gault* and other juvenile due process cases, youth accused of delinquent acts were to become participants rather than spectators in court proceedings. The only person who can ensure that the child has a meaningful opportunity to be heard in court is the juvenile defense attorney.

A new paradigm for juvenile indigent defense representation is necessary if we are to begin to guarantee the fair administration of justice for children. Juvenile defense must be recognized as highly specialized and critically complex, and must be based on the unique developmental needs of children. Exemplary juvenile defense practice would necessitate a pervasive cultural shift in most juvenile courts. Courts would have to embrace zealous defense advocacy and avoid marginalizing the important role of the juvenile defense attorney.

The paradigm for specialized juvenile defense practice envisions a court system in which defense attorneys have the time, training, and resources necessary to advocate zealously for young clients, many of whom have special mental health and educational needs, within a system that suffers from extensive race and class biases. The prevailing level of defense practice in delinquency courts today, however, bears little resemblance to the model of representation advocated here. Because of myriad institutional and systemic barriers to quality representation, including a paternalistic culture of juvenile courts that views zealous advocacy with ridicule or hostility, many children are denied a meaningful voice in the delinquency court process. Until reforms are implemented that allow for defense attorneys to serve their clients effectively within a paradigm of specialized juvenile defense practice, neither the fair administration of justice nor the goal of rehabilitation will be achieved.

There is growing national recognition that traditional notions of criminal defense are insufficient to protect the interests of children charged with crimes and delinquent acts. Public defender offices and juvenile law offices across the country have taken the unique needs of juveniles into

consideration by fashioning specialized, juvenile-focused defender offices. These offices are clear about their ethical mandate to their child clients and provide contextual representation, relying upon holistic and developmental strategies to inform their case preparation.

While these initiatives have developed in different ways, they share several common features. These features are central in ensuring that the indigent defense delivery system improves and the quality of representation is enhanced for children. High quality juvenile defender programs share essential elements and values, including:

- representation that is individualized, developmentally and age appropriate, and free of racial, ethnic, gender, social, and economic bias;
- limited/controlled caseloads;
- support for entering the case early; adequate time for proper investigation, client interviewing, and case preparation; the flexibility to represent or refer the client for representation in related collateral matters (such as special education or mental health);
- comprehensive initial and ongoing training and available resource materials;
- adequate nonlawyer support and resources;
- hands-on supervision of attorneys and office leadership;
- a work environment and clear sense of mission that values and develops a positive culture of juvenile defense and demands excellence in the defense of children; and,
- a juvenile defense bar that promotes accountability and reform.

In 2007, we mark the fortieth anniversary of the *Gault* decision. This anniversary presents us with an opportunity to reflect upon the failures of the past and build a better future. Children deserve lawyers and judges in delinquency court who operate with the highest degree of skill and professionalism. Voice and meaning must be brought to a child's right to counsel and excellence must become the standard in the defense of children.

